



DECISIONS AND
INTERPRETATIONS
OF THE
FEDERAL
LABOR RELATIONS
COUNCIL

Volume 1



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

Posted
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ERRATA

Title: Decisions and Interpretations of the Federal Labor Relations Council, Volume 1 (FLRC-75-3) GPO Stock Number 052-003-00097-1

- ✓ Page 7 Add reference to page number 198a to FLRC Number listing for 72A-2.
- ✓ Page 12 Add reference to page number 615a to FLRC Number listing for 72A-47.
- ✓ Page 16 Insert attached page 16a.
- ✓ Page 25 Add reference to page number 615a to Agency listing for "National Guard -- New York National Guard."
- ✓ Page 27 Add reference to page number 198a to ✓ Agency listing for "New Jersey Department of Defense."

Add reference to page number 615a to ✓ Agency listing for "New York National Guard."
- ✓ Page 34 Add reference to page number 615a to Labor Organization listing for "Association of Civilian Technicians, Inc."
- ✓ Page 36 Add reference to page number 198a to Labor Organization listing for "International Union of Electrical, Radio and Machine Workers, AFL-CIO -- National Army and Air Force Technicians Association."
- ✓ Page 48 Insert attached page 48a.
- ✓ Page 53 Change "(February 2, 1971)" to "(January 7, 1971)" in first line of second paragraph of digest.

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RELATIONS COUNCIL

S.R. Horn

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Errata (Continued)

- ✓ Page 54 Delete; insert new page 54, attached.
- ✓ Page 59 Change "(March 5, 1971)" to "(February 12, 1971)" in first line of second paragraph of digest.
- ✓ Page 60 Delete; insert new page 60, attached.
- ✓ Page 89 Insert attached page 89a.
- ✓ Page 108 Insert attached page 108a.
- ✓ Page 121 Change "(September 10, 1971)" to "(July 9, 1971)" in first line of second paragraph of digest.
- ✓ Pages ~~122,~~
~~123~~ Delete; insert new page 122, attached.
- ✓ Page 135 Change "(December 15, 1971)" to "(August 27, 1971)" in first line of second paragraph of digest.
- ✓ Pages ~~136,~~
~~137~~ Delete; insert new pages 136 and 137, attached.
- ✓ Page 165 Insert attached pages 165a and 165b.
- ✓ Page 198 Insert attached pages 198a - 198c.
- ✓ Page 506 Delete words "(described below)" from sixth line of second paragraph of digest.
- ✓ Page 525 Add text on attached page 525a to text on page 525.
- ✓ Page 615 Insert attached pages 615a - 615g.
- ✓ Page 651 Insert attached pages 651a - 651c.
- ✓ Page 662 Insert attached pages 662a - 662c.

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December 31, 1973

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71A-3	Returned as Incomplete	March 26, 1971
71A-8	Withdrawn	February 16, 1971
71A-29	Returned as Incomplete	October 29, 1971
71A-39	Withdrawn	October 22, 1971
71A-54	Withdrawn	October 26, 1971
72A-8	Withdrawn	July 7, 1972
72A-34	Withdrawn	December 13, 1972
72A-48	Withdrawn	February 15, 1973
73A-3	Withdrawn	March 29, 1973
73A-15	Withdrawn	April 9, 1973
73A-19	Withdrawn	April 25, 1973
73A-26	Withdrawn	September 28, 1973
73A-38	Withdrawn	November 8, 1973
73A-41	Withdrawn	October 19, 1973
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PART II.

TEXTS OF DECISIONS AND INTERPRETATIONS



January 1, 1970 through December 31, 1973

APPEALS DECISIONS

January 1, 1970 through December 31, 1973

Department of the Army, U. S. Military Academy, West Point, N. Y., Assistant Secretary Case No. 30-2547. In a representation case filed by NAGE with the Assistant Secretary, AFGE intervened and moved to dismiss the petition on various grounds, including the charge of laches by NAGE in pursuing its request for recognition. The Assistant Secretary denied the motion to dismiss, and AFGE submitted an interlocutory appeal to the Council, for review and reversal of that decision, relying principally on the doctrine of laches.

Council Action (September 11, 1970). The Council denied review of the appeal filed by AFGE, without prejudice to the union's renewal of its contentions in a petition duly filed with the Council after 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

SEP 11 1970

Mr. Bruce I. Waxman, Assistant
to the Staff Counsel
American Federation of Government
Employees (AFL-CIO)
400 First Street, NW.
Washington, D.C. 20001

Re: Department of the Army, U.S. Military
Academy, West Point, New York; Assistant
Secretary of Labor for Labor-Management
Relations Case No. 30-2547

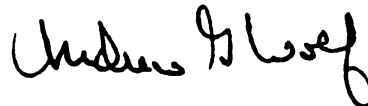
Dear Mr. Waxman:

Reference is made to your petition and further statement in the above-captioned case, requesting that the Council review the decision of the Assistant Secretary of Labor for Labor-Management Relations sustaining the Regional Administrator's denial of your motion to dismiss; and that the Council reverse such decision, principally on the grounds of laches by the petitioner, National Association of Government Employees.

The Council has fully considered the documents which you submitted and the opposition to your petition filed by National Association of Government Employees, and has directed that review of your petition be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,



Andrew G. Wolf
Acting Executive Director

Copies to:
James L. Neustadt
Kenneth T. Lyons
Major General William A. Knowlton
Honorable W. J. Usery

Norfolk Naval Shipyard, Assistant Secretary Case No. 46-1617 (RO). Following a representation election conducted at the Norfolk Naval Shipyard, in which MTC and NAGE participated, the Assistant Secretary issued a decision and direction of a hearing on certain objections to the election filed by MTC. MTC appealed to the Council for review of this action by the Assistant Secretary, seeking a hearing also on objections overruled by the Assistant Secretary in his decision. NAGE filed a cross-appeal with the Council, on jurisdictional grounds and seeking the overruling of all the objections filed by MTC.

Council Action (September 24, 1970). The Council denied review of these interlocutory appeals, without prejudice to the renewal by the unions of their respective contentions in petitions duly filed with the Council after 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

September 24, 1970

Patrick C. O'Donoghue, Esq.
Douglas L. Leslie, Esq.
Attorneys for Fifth Naval District
Metal Trades Council, AFL-CIO
1912 Sunderland Place, N.W.
Washington, D.C. 20036

Re: Norfolk Naval Shipyard, Assistant
Secretary of Labor for Labor-Management
Relations Case No. 46-1617 (RO)

Gentlemen:

Reference is made to your petition in the above-captioned case, requesting review of a decision and direction of hearing issued by the Assistant Secretary on July 16, 1970.

The Council has fully considered the documents which you submitted and the opposition to your petition filed by National Association of Government Employees, and has directed that review of your petition be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew G. Wolf".

Andrew G. Wolf
Acting Executive Director

Copies to: Gordon P. Ramsey, Esq.
Honorable W. J. Usery, Jr.
Mr. W. J. Richmond Overath
Honorable John H. Chaffee
Admiral James A. Brown, USN
Mr. Alan Whitney
National Association of Government
Employees Council of Shipyard Locals
Mr. Glenn R. Graves, Esq.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 24, 1970

Gordon P. Ramsey, Esq.
Gadsby & Hannah
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Norfolk Naval Shipyard, Assistant
Secretary of Labor for Labor-Management
Relations Case No. 46-1617 (RO)

Dear Mr. Ramsey:

Reference is made to your cross-appeal in the above-captioned matter, challenging retroactive assertion of jurisdiction by the Assistant Secretary over this case and, in the alternative, requesting reversal of the decision dated July 16, 1970, of the Assistant Secretary, directing a hearing on certain objections filed by the Metal Trades Council, AFL-CIO (MTC).

The Council has fully considered the documents which you submitted and the opposition to your cross-appeal filed by MTC, and has directed that review of your cross-appeal be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary. The Council has further directed that your request for oral argument be denied.

For the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew G. Wolf".

Andrew G. Wolf
Acting Executive Director

Copies to: Honorable W. J. Usery, Jr.
Mr. W. J. Richmond Overath
Honorable John W. Chaffee
Admiral James A. Brown, USN
Mr. Patrick C. O'Donoghue, Esq.
Mr. Douglas L. Leslie, Esq.



U. S. Army Electronics Command, Fort Monmouth, New Jersey, Atmospheric Sciences Laboratory, Assistant Secretary Case No. 32-1506. The union (NFFE Local 476) filed an unfair labor practice complaint against the Atmospheric Sciences Laboratory, based on alleged improper conduct by the activity before January 1, 1970. The Assistant Secretary dismissed the complaint, because the alleged unlawful action occurred prior to the effective date of Executive Order 11491. The union appealed to the Council for review of the Assistant Secretary's decision.

Council Action (November 12, 1970). The Council denied review on the grounds that the union's appeal failed to meet the requirements for review under section 2411.12(c) of its rules.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 12, 1970

Mr. Herbert Cahn
President, Local 476
National Federation of Federal
Employees
P.O. Box 204
Little Silver, New Jersey 07739

Re: U.S. Army Electronics Command,
Fort Monmouth, New Jersey,
Atmospheric Sciences Laboratory,
Assistant Secretary of Labor for
Labor-Management Relations, Case
No. 32-1506

Dear Mr. Cahn:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has fully considered the documents which you submitted and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council rules of procedure. Accordingly, the Council has directed that review of your appeal be denied. The Council has further directed that your request for a hearing also be denied.

For the Council.

Sincerely,

W. V. Gill
Executive Director

cc: NFFE Headquarters
USAECOM, Ft. Monmouth, N.J.
Asst. Secy. of Labor for
Labor-Management Relations

I.B.E.W. Local 910 and Directorate of Engineering, Camp Drum, Watertown, N. Y. The union appealed from a determination by the Department of the Army that a union proposal for 4 hours of minimum call-back overtime was non-negotiable under an Army regulation which limited such minimum overtime to 2 hours. The union claimed that Army erred in its interpretation of its own regulation, and that nothing in the regulation prohibited more than 2 hours if the parties so agreed.

Council Action (January 4, 1971). The Council denied review on the grounds that the union's petition failed to present an issue subject to Council review under the conditions prescribed in section 11(c)(4) of the Order.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 4, 1971

Mr. Kenneth E. Day
Business Manager
Local 910, I.B.E.W.
Black River Road
Watertown, New York 13601

Re: I.B.E.W. Local 910 and Directorate of
Engineering, Camp Drum, Watertown, New York,
FLRC No. 70A-4

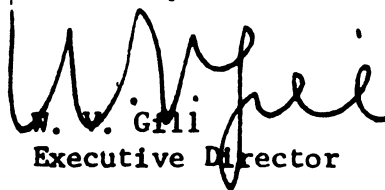
Dear Mr. Day:

Reference is made to your petition for review, filed in the above-entitled matter.

Upon careful consideration of the documents which you submitted and the opposition to your petition which was timely filed by the Department of the Army, the Council has determined that your appeal does not present an issue subject to Council review under the conditions prescribed in section 11(c)(4) of the Order. Therefore, in accordance with section 2411.12(a) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. W. Gili
Executive Director

cc: Acting Civilian Personnel Officer
Hancock Field, Syracuse, New York

Chief, Procedures and Regulations Division
Department of the Army, Washington, D.C.

Director, Government Operations, I.B.E.W.
Washington, D.C.

AFGE Local 1960 and Naval Air Rework Facility, Naval Air Station, Pensacola, Fla. The parties disagreed on the negotiability of the union's proposal that wage grade employees who perform supervisory duties in the temporary absence of supervisors be paid at supervisor rates for all periods served. Upon referral, the Department of the Navy determined that the proposal was non-negotiable under Navy regulations, but indicated that a solution to the problem might be provided through recommended modification of the Coordinated Federal Wage System to permit additional pay assignments for this situation. The union (headquarters) appealed to the Council from Navy's determination of non-negotiability. However, prior to this appeal, the local parties signed a two-year contract, which provided that assignments or details to higher level positions for over 45 days shall be effected by temporary or permanent promotions; and that, upon receipt of CFWS authorization permitting additional pay for employees assigned supervisory duties in the temporary absence of supervisors, the parties would negotiate further on the matter. The contract also barred reopening generally, except upon mutual consent of the parties and after certain fixed periods of time.

Council action (~~February 2,~~ ^{January 7,} 1971). The Council decided that the negotiability issue was rendered moot by the agreement of the parties. Because of the mootness of the negotiability issue, and without passing on Navy's further challenge to the timeliness of the union's appeal, the Council denied the petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 2, 1971

Mr. Clyde M. Webber
Executive Vice President
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: AFGE Local 1960 and Naval Air Rework
Facility, Naval Air Station, Pensacola,
Florida, FLRC No. 70A-6

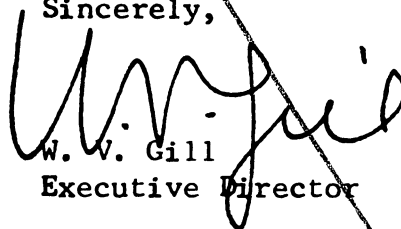
Dear Mr. Webber:

Reference is made to your letter filed January 18, 1971, requesting that the Council reconsider its decision of January 7, 1971, and accept your petition for review, in the above-entitled case.

The Council has carefully considered your request, and the objection thereto filed by the Department of the Navy, and is of the opinion that no persuasive reason has been advanced for reconsidering and reversing the Council's prior decision in this case. Accordingly, the Council has directed that your request be denied.

For the Council.

Sincerely,



W. W. Gill
Executive Director

cc: Dir., Labor & Emp. Rel. Div.,
Dept. of Navy

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 7, 1971

Mr. Clyde M. Webber
Executive Vice President
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: AFGE Local 1960 and Naval Air Rework
Facility, Naval Air Station, Pensacola,
Florida, FLRC No. 70A-6

Dear Mr. Webber:

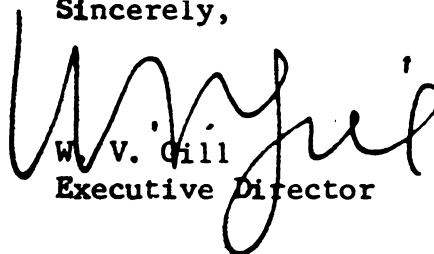
Reference is made to your petition for review in the above-entitled matter.

The Council has carefully considered your petition filed on November 9, 1970, supplemented, as you requested, by your letter of December 8, 1970. The Council has further considered the opposition to your petition, filed by the Department of the Navy on November 27, 1970, and the contract between Local 1960 and the Naval Air Rework Facility, approved on September 25, 1970, and submitted to the Council by the Navy on December 16, 1970.

In the opinion of the Council, the negotiability issue which was the subject of your appeal was rendered moot by the agreement of the parties relating to this issue and by the restrictions on reopening during the term of that agreement. Because of the mootness of the negotiability issue, and without passing on the timeliness of your appeal, the Council has directed that review of your petition be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: Dir., Labor & Emp. Rel. Div.,
Dept. of Navy

IAM-AW and Department of the Navy. The union petitioned for review of a policy dispute over a Navy directive on the subject of negotiated grievance and arbitration procedures, claiming that the non-negotiability of certain procedures under this directive violated the Order and FPM requirements. However, the union did not identify any specific contract negotiations or contract proposal relating to the matter, nor did the union advert to any request for, or rendering of, an agency head decision on such a proposal.

Council action (February 12, 1971). The Council denied review since the petition failed to establish any basis for review under the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 12, 1971

Mr. Floyd E. Smith
International President
International Association of
Machinists and Aerospace Workers
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: IAM-AW and Department of the Navy,
FLRC No. 71A-6


Dear Mr. Smith:

Reference is made to your petition for review of a policy dispute, filed with the Council in the above-entitled matter.

The Council has carefully considered your appeal and the opposition thereto filed by the Department of the Navy, and has determined that your petition fails to establish any basis for review under the Council's rules of procedure. Accordingly, the Council has directed that your petition for review be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: A. Di Pasquale
Dept. of Navy

Department of the Army, Fort Leavenworth, Kansas, Advisory Arbitrator Case No. 284-Army 5th-1, Fort Leavenworth, Kansas. On July 30, 1970, an arbitrator issued an advisory decision on a unit dispute between NFFE and AFGE, in a proceeding which had been initiated under E.O. 10988. On January 20, 1971, NFFE appealed to the Council from the arbitrator's determination, asserting that, while the decision was made by a private arbitrator under E.O. 10988, the decision supposedly followed E.O. 11491 rules as if rendered by the Assistant Secretary and, therefore, the appeal should be treated as a petition for review of an Assistant Secretary decision under section 2411.12(c) of the Council's rules. However, no appeal was taken from any actual decision rendered by the Assistant Secretary on the unit dispute in any proceeding conducted under E.O. 11491.

Council action (February 25, 1971). Without passing on the timeliness of the petition, the Council denied review because no basis for acceptance of the appeal is provided in the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 25, 1971

Mr. Irving I. Geller, Director
Legal & Employee Relations
National Federation of Federal
Employees
1737 H Street, N.W.
Washington, D.C. 20006

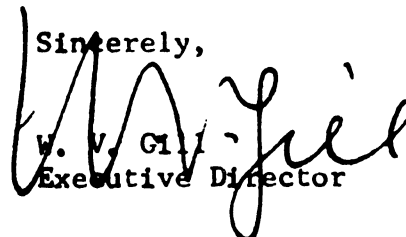
Re: Department of the Army, Fort Leavenworth,
Kansas, Advisory Arbitrator Case No. 284-
Army 5th -1, Fort Leavenworth, Kansas,
FLRC No. 71A-5

Dear Mr. Geller:

Reference is made to your petition for review of the advisory arbitrator's decision in the above-entitled matter, filed under section 2411.12(c) of the Council's rules of procedure.

The Council has carefully considered your appeal and the opposition thereto filed by the American Federation of Government Employees, and has determined that no basis for acceptance of your appeal is provided in the Council's rules. Accordingly, without passing on the timeliness of your appeal, the Council has directed that your petition for review be denied.

For the Council.

Sincerely,

W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

William J. Schrader
Dept. of the Army

James L. Neustadt
AFGE

AFGE Local 1923 and Social Security Administration, Headquarters Division and Payment Center, Baltimore, Md. The decision of the agency head on the negotiability issue involved in this case was rendered on April 10, 1970, and the union did not file its petition for review with the Council until December 30, 1970. Section 2411.14(a) of the Council's rules, published and effective on September 29, 1970, provides that an appeal must be filed within 20 days from the date of service of an agency head's decision and, under section 2411.14(g), such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit. (While section 2411.14(d) of the rules provides for an extension of time limits under certain conditions, no request for such an extension was submitted here.) Measuring the 20-day time limit from the publication and effective date of the Council's rules, the union's petition in this case was filed more than 70 days after the last day established for such action in the rules.

Council action (^{February 12,} ~~March 5,~~ 1971). As the union's appeal was untimely filed, the Council denied the petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 5, 1971

Mr. John F. Griner
National President
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: AFGE Local 1923 and Social Security Admin-
istration, Headquarters Division and Payment
Center, Baltimore, Md., FLRC No. 70A-12

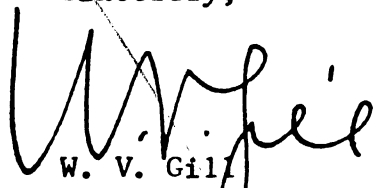
Dear Mr. Griner:

Reference is made to your letter filed on February 23, 1971, requesting that the Council reconsider its decision of February 12, 1971, and accept your petition for review in the above-entitled case.

The Council has carefully considered your request and is of the opinion that no persuasive reason has been advanced for reconsidering and reversing the Council's prior decision in this case. Accordingly, the Council has directed that your request be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: R. B. Hacker
HEW

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 12, 1971

Mr. John F. Griner,
National President
American Federation of
Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Re: AFGE Local 1923 and Social Security Administration,
Headquarters Division and Payment Center,
Baltimore, Md., FLRC No. 70A-12

Dear Mr. Griner:

Reference is made to your petition for review of an agency head's decision on a negotiability issue, filed with the Council in the above-entitled case.

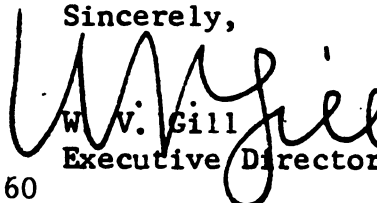
Upon careful consideration, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Section 2411.14(a) of the rules, published and effective on September 29, 1970, provides that an appeal must be filed within 20 days from the date of service of an agency head's decision, and, under section 2411.14(g) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit. (While section 2411.14(d) of the rules provides for the extension of time limits under certain conditions, no request for an extension was submitted in this case.) Here, the decision of the agency head was rendered on April 10, 1970, and your appeal was not filed until December 30, 1970, more than eight months after the agency head's decision and three months after the publication and effective date of the Council's rules. Therefore, measuring the 20-day time limit from the publication and effective date of the rules, your petition was filed more than 70 days after the last day established by the Council for such action.

Accordingly, as your appeal was untimely filed, the Council has directed that your petition for review be denied.

For the Council.

Sincerely,


W. W. Gill
Executive Director

cc: R. B. Hacker, HEW

IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Md.

The negotiability dispute concerned the legality of union proposal defining the terms "appropriate authorities" and "agency," as used in section 12(a) of E.O. 11491, in a manner which would subject the agreement to the policies and regulations of Department of Defense headquarters but not those of its components and subordinate commands. (Section 12(a) provides that, in the administration of an agreement, "officials and employees are governed by existing or future laws and the regulations of appropriate authorities . . .; 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.")

Council action (March 9, 1971). The Council held that the term "appropriate authorities" in section 12(a) was intended to mean those authorities outside the agency concerned which are empowered to issue regulations and policies binding on such agency; and that the term "agency" as used in section 12(a) was intended to include both DOD itself and its cognizant subordinate echelons. Accordingly, the Council ruled that the union's proposal was violative of section 12(a) of the Order and was non-negotiable.

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

IAM Local Lodge 2424

and

FLRC No. 70A-9

Aberdeen Proving Ground
Aberdeen, Maryland

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During negotiations between the parties, a dispute arose over the union's proposal as to the meaning of the terms "appropriate authorities" and "agency" as used in section 12(a) of E.O. 11491. That section provides as follows:

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.

Section 12 concludes that the "requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental . . . agreements between the agency and the organization."

The union proposed that in its agreement with Aberdeen Proving Ground the terms "appropriate authorities" and "agency" be so defined as to render the administration of the agreement subject to the policies and regulations of the Department of Defense, but not those of its cognizant subordinate echelons (in this case, Department of the Army, Army Materiel Command, and the Army Test and Evaluation Command). The Proving Ground contested the negotiability of this proposal. Upon referral, DoD decided that the union's proposal was contrary to the meaning of the Order and DoD regulations, and interpreted section 12(a) and its regulations as subjecting the agreement to the policies and regulations both of DoD headquarters and its cognizant management echelons. The union appealed to the Council from this determination and the Council accepted the petition for review under section 11(c)(4) of the Order.

Contentions of the Parties

The union argues in effect that, since an "agency" is defined in section 2(a) of the Order as an "executive department," and since only DoD, and not its components, is listed as an "Executive department" in 5 U.S.C. 101, the terms "appropriate authorities" and "agency" were intended to bind the agreement only to the regulations and policies of DoD itself.

DoD contends, however, that, as to "appropriate authorities," the term when read in the context of section 12(a) means authorities outside the agency which establish policies or regulations binding on the agency involved. As to "agency," DoD argues that the term must be interpreted as used in section 12(a), i.e. "agency policies and regulations," and that, based on the intent of the Order and the statutory authority of the military departments within DoD, this provision means the policies and regulations of both DoD and its subordinate echelons in the chain of command.

Opinion

The Council, upon careful consideration of the positions of the parties and the entire record in the case, is of the opinion that the union's proposed definitions of the terms "appropriate authorities" and "agency," as used in section 12(a), to include DoD itself but not its subordinate management levels is contrary to the meaning of the Order and is non-negotiable.

Turning first to the term "appropriate authorities," section 12(a) binds officials and employees in the administration of an agreement to the "regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual," and "published agency policies and regulations." If the agency involved were included within the term "appropriate authorities," as claimed by the union, the added references to "agency policies and regulations" would be completely redundant and without purpose. Moreover, the Report accompanying E.O. 11491 specifically indicated that the regulations of an appropriate authority "outside the agency" were contemplated by section 12(a) of the Order (Labor-Management Relations in the Federal Service (1969), pp. 40, 52). Accordingly, we find that the term "appropriate authorities" in section 12(a) was intended to mean those authorities outside the agency concerned, which are empowered to issue regulations and policies binding on such agency.

As to the term "agency," section 2(a) of the Order provides that "'Agency' means an executive department . . .;" and 5 U.S.C. 101 refers to DoD as an "Executive department," while, under 5 U.S.C. 102, DoD components such as Army are classified as "military departments." However, contrary to the union's contention, the separate designation of components as military departments in the code does not mean that they were intended to be divorced as constituent parts of their executive department (DoD) under section 2(a) of the Order. Any such interpretation would virtually eliminate the components and their subordinate commands from the coverage of the entire Order, and section 2(a) obviously did not intend so incongruous a result.

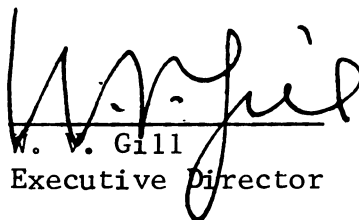
With particular reference to section 12(a), the proposed definition by the union of the term "agency" to include only DoD itself would likewise conflict with the

purposes of that section and with the express statutory authority of DoD components and subordinate echelons in personnel matters. Section 12(a) was plainly intended to establish the legal framework to govern the administration of the agreement, namely, the laws, regulations and policies of outside authorities, and published "agency policies and regulations." No distinction was made in section 12(a) between the levels of an agency which might issue such binding regulations and policies, and, as to DoD, the components and subordinate commands have broad statutory authority in this regard. For example, under 5 U.S.C. 301, the head of a military department is authorized to "prescribe regulations for the government of his department" and for "the conduct of its employees." Further, under 5 U.S.C. 302(b)(1), the head of a military department may delegate to subordinate officials his lawful authority "to take final action on matters pertaining to the employment, direction and general administration of personnel under his agency." Clearly, section 12(a) was not intended to give binding effect to policies and regulations issued by DoD headquarters and yet to disregard those issued under express statutory authority by components and subordinate echelons within the same department.

We conclude, therefore, apart from further considerations, that the term "agency" as used in section 12(a) was intended to include both DoD itself and its cognizant subordinate echelons, and that the contrary proposal of the union is violative of the Order.

For the foregoing reasons, and pursuant to section 2411.18(d) of the Council's rules of procedure, we hold that the determination by DoD as to the non-negotiability of the union's proposal in this case was proper and must be sustained.

By the Council.


W. V. Gill
Executive Director

Issued: March 9, 1971

IAM and Kirk Army Hospital, Aberdeen, Md. The negotiability issue in this case involved a union proposal that any dispute or complaint by the union regarding the "interpretation or application" of the agreement, "or any policy, regulation, or practice now or hereinafter enforced wherein the Employer has discretion," would be subject to a disputes procedure, including arbitration as the terminal step.

Council action (March 9, 1971). The Council held that the arbitration of union disputes over the "interpretation or application" of "any policy, regulation, or practice" within the employer's discretion, as proposed by the union, is violative of sections 13 and 14 of E.O. 11491 and is not negotiable.

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

International Association of
Machinists and Aerospace Workers

and

FLRC No. 70A-11

US Kirk Army Hospital,
Aberdeen, Md.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During the course of bargaining, the union submitted a proposal that the "Union shall have the right and shall discuss with the Employer any dispute or complaint concerning the interpretation or application of this Agreement, or any policy, regulation, or practice now or hereinafter enforced wherein the Employer has discretion," with any such dispute or complaint subject to a two-step appeal procedure and binding arbitration. The Hospital claimed that the proposal was non-negotiable. Upon referral, the Department of the Army concurred in the Hospital's position, determining that the proposal, insofar as it would apply the binding arbitration procedures to a union dispute or complaint over "any policy, regulation, or practice now or hereinafter enforced wherein the Employer has discretion," violated sections 13 and 14 of the Order. The union appealed to the Council, and the Council accepted the petition for review of this issue under section 11(c)(4) of the Order. (Review of a separate negotiability issue was denied by the Council as moot.)

Contentions of the Parties

The union asserts that its proposal is consistent with the Order, essentially because: (1) the proposal, if applied to employee grievances, would be negotiable, and union disputes and employee grievances should be considered alike under the Order; (2) the proposal does not seek arbitration of changes or proposed changes in the agreement or agency policy, which is alone prohibited in section 14; and (3) similar provisions have been included in contracts covering other Department of Defense units.

The agency contends, however, that the Order carefully limits the arbitration of union disputes to controversies involving the interpretation or application of an existing agreement, and that the union's proposal extends beyond these limits and is therefore non-negotiable. Furthermore, according to the agency, the provisions in other agreements relied upon by the union, which "slipped past" the management review process, are not dispositive as to negotiability under the Order.

Opinion

The question for decision is whether, under sections 13 and 14 of the Order, binding arbitration procedures may be applied to a union dispute or complaint over not only the "interpretation or application" of an agreement, but also of "any policy, regulation, or practice" within the discretion of management.

Sections 13 and 14 provide in relevant part as follows:

Sec. 13. Grievance procedures. An agreement with a labor organization which is the exclusive representative of employees in an appropriate unit may provide procedures, applicable only to employees in the unit, for the consideration of employee grievances and of disputes over the interpretation and application of agreements. The procedure for consideration of employee grievances shall meet the requirements for negotiated grievance procedures established by the Civil Service Commission. A negotiated employee grievance procedure which conforms to this section, to applicable laws, and to regulations of the Civil Service Commission and the agency is the exclusive procedure available to employees in the unit when the agreement so provides.

Sec. 14. Arbitration of grievances. (a) Negotiated procedures may provide for the arbitration of employee grievances and of disputes over the interpretation or application of existing agreements. Negotiated procedures may not extend arbitration to changes or proposed changes in agreements or agency policy. Such procedures shall provide for the invoking of arbitration only with the approval of the labor organization that has exclusive recognition and, in the case of an employee grievance, only with the approval of the employee. The costs of the arbitrator shall be shared equally by the parties. . . .

A reading of these provisions clearly establishes that two separate and distinct types of controversies may be subject to binding arbitration procedures, namely (1) "employee grievances," and (2) "disputes over the interpretation or application of existing agreements." Arbitration of the first type of controversy, i.e. employee grievances, may be invoked only with the approval of the union and the employee, while arbitration of the second type of controversy, commonly referred to as "union disputes," needs only the approval of the union itself. Also employee grievances, as distinguished from union disputes, must specifically comply with the requirements for negotiated procedures prescribed by the Civil Service Commission.

Apart from the literal wording of sections 13 and 14, the background of these provisions shows that the arbitration of union disputes was intended to be considered in a manner separate from the arbitration of employee grievances. Under section 8(b) of E.O. 10988, which preceded E.O. 11491, negotiated procedures were sanctioned only for the advisory arbitration of individual employee grievances. In reviewing the need for changes in these provisions, the Report accompanying E.O. 11491 observed that "current proposals would permit the parties to an agreement to include arbitration procedures for the resolution of disputes over the interpretation and application of the agreement as well as for the resolution of employee grievances" (emphasis supplied); and the Report recommended the adoption of such disputes procedure, stating: "Arbitration should be made available for the resolution of disputes over the interpretation

and application of an agreement" (Labor-Management Relations in the Federal Service (1969). pp. 20, 41-42). This recommendation, as so limited, was adopted in the final Order and was explained in the Report as follows (p. 53):

Agreements may contain employee grievance procedures which meet CSC requirements, may make them the only grievance procedures available to employees in the unit, and may provide for arbitration (with union and employee consent and cost-sharing by union and agency). Agreements may also contain procedures for consideration of disputes over interpretation and application of agreement, including arbitration of such disputes with consent of the union (cost-sharing by union and agency)

It is plain from the foregoing, that union disputes were designed and regarded as distinct from employee grievances for arbitration purposes, under sections 13 and 14, and, since the proposal involved in this case concerns the arbitration of a union dispute or complaint, rather than an employee grievance, it must meet the special requirements for the arbitration of such disputes.

As already indicated, the arbitration of union disputes is expressly confined under sections 13 and 14 to disputes over the interpretation or application of an existing agreement. While section 14 also prohibits the extension of arbitration "to changes or proposed changes in agreements or agency policy," these provisions simply establish a further condition to any arbitration which may be negotiated, whether of employee grievances or union disputes. Obviously nothing in that specific prohibition presumes to enlarge the scope of union disputes which may be subject to arbitration, i.e. "disputes over the interpretation or application of existing agreements."

In our opinion, it is clear, therefore, that the arbitration of union disputes over the "interpretation or application" of "any policy, regulation, or practice" within the employer's discretion, as here proposed by the union, is violative of sections 13 and 14 of the Order and is not negotiable. Although other contracts may have included such provisions, as claimed by the union, this circumstance cannot alter the express language and intent of the Order and is without controlling significance in this case.

Accordingly, based upon the foregoing and upon careful consideration of the entire record, we find that the agency's determination as to the non-negotiability of the union's proposal was proper and, pursuant to section 2411.18(d) of the Council's rules of procedure, the determination is sustained.

By the Council.


W. V. Gill
Executive Director

Issued: March 9, 1971

Veterans Administration Hospital, Durham, North Carolina,
Assistant Secretary Case No. 40-1945. North Carolina State
Nurses' Association filed an objection to an election won by
AFGE, based on alleged preferential access to bulletin boards.
The Assistant Secretary upheld dismissal of the objection,
finding no conduct by the agency which warranted setting aside
the election. NCSNA appealed to the Council, disagreeing
with the decision by the Assistant Secretary, but neither
asserting nor establishing that such decision was arbitrary
or capricious, or that it presented any major policy issue.

Council action (March 11, 1971). The Council denied review
on the grounds that the union's appeal failed to meet the
requirements for review under section 2411.12(c) of the
Council's rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 11, 1971

Mr. Patrick E. Zembower
Assistant Director
Economic and General Welfare Department
Federal Representative
American Nurses' Association, Inc.
1030 15th Street, N.W.
Washington, D.C. 20005

Re: Veterans Administration Hospital, Durham
North Carolina, Assistant Secretary Case
No. 40-1945(RO), FLRC No. 71A-1

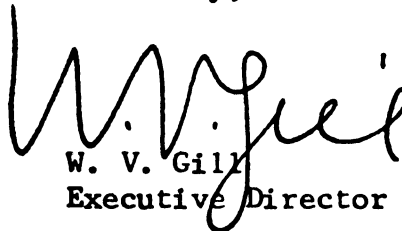
Dear Mr. Zembower:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition, and the opposition thereto filed by the Veterans Administration, and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: J. J. Corcoran
VA

H. A. Barrier
AFGE

C. Perry
AFGE Local 2345

W. J. Usery, Jr.
Dept. of Labor

AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona). The negotiability dispute involved the legality of the union's proposed maintenance of "drag roads" (used by the Border Patrol as a surveillance device), so as to increase the health and safety of the Border Patrol officers.

Council action (April 15, 1971). The Council held that the proposal is negotiable as an appropriate matter "affecting working conditions" under section 11(a) of the Order, and, contrary to the determination of the Department of Justice, is not violative of sections 11(b) or 12(b)(1), (4) or (5) of the Order.

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

AFGE Local 2595

and

FLRC No. 70A-10

Immigration and Naturalization
Service, U.S. Border Patrol,
Yuma Sector (Yuma, Arizona)

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During bargaining on a supplemental agreement, the union submitted the following proposal on the maintenance of "drag roads" by the Border Patrol:

Drag roads will be maintained on a regular basis and in such a manner so that they are reasonably smooth and free of ruts, potholes and washouts and any other roughness or irregularity which may be caused by usage, weather or other contributing cause or element. They will also be maintained in such a manner so that they are free of excessive dust and other particles that may become airborne due to passage of a vehicle. Properly maintained drag roads will reduce the chance of injury to the officer, particularly to the back and kidneys, will reduce the incidence of hemorrhoids, and will alleviate the suffering of those with hay fever, sinus and allergy problems. Regular maintenance of these roads will reduce the chance of damage to the vehicle.

The "drag roads" which are the subject of this proposal are a means of surveillance used to detect the tracks of persons illegally entering the United States in the barren southwest border areas. They consist of paths or strips created and maintained by dragging "roughing" and "smoothing" devices behind a slowly moving vehicle, to render a smooth surface of dust on which to detect footprints left by an illegal entrant. Sometimes three or four such roads may lie parallel to one another and a short distance apart. The roads are dragged as often as necessary, depending on environmental conditions, to keep the surface functional for detection purposes.

The Border Patrol asserted that the maintenance of drag roads as proposed by the union was non-negotiable and, upon referral, the Department of Justice upheld this position, determining that the proposal (1) would require bargaining on the technology of performing the work of the Border Patrol, in conflict with section 11(b) of the Order; and (2) would infringe on the agency's right to direct employees and determine the methods and means by which its operations will be efficiently accomplished, in violation of section 12(b)(1), (4) and (5) of the Order. The union petitioned the Council for review of this determination and the Council accepted the appeal under section 11(c) (4) of the Order.

Contentions of the Parties

The union argues that section 11(a) of the Order sanctions negotiations with respect to "matters affecting working conditions"; that the health and safety aspects of maintaining drag roads fall within such scope of bargaining; and that the proposal does not violate either section 11(b) or 12(b), since the union "is only asking that when the Border Patrol decides to use drag roads to accomplish its mission, they will be maintained in a manner conducive to employee health and safety".

The agency contends, however, that it is not required to bargain on "the technology of performing its work" under section 11(b) of the Order; that drag roads are part of the technology of performing Border Patrol work; and that since the proposal would prescribe the frequency of officer assignment and the standards of accomplishment for this activity, the proposal is not negotiable. The agency further claims that the proposal is non-negotiable because it would require the maintenance of drag roads on a regular basis and to specific standards, and would require the regular assignment of personnel to carry out such functions, in violation of management's right to determine the "methods and means" by which its operations will be efficiently accomplished, and its right to "direct" its personnel, under section 12(b)(1), (4) and (5) of the Order.

Opinion

The question before us is whether the union's proposal as to the maintenance of drag roads is a matter "affecting working conditions" which is bargainable under section 11(a) of the Order, or falls outside the scope of such negotiations under the provisions of sections 11(b) and 12(b)(1), (4) and (5) of the Order.

Section 11(a) of the Order, which relates to the negotiation of agreements between an agency and the exclusive representative of its employees, provides that the parties shall meet and confer in good faith regarding "matters affecting working conditions, so far as may be appropriate under . . . this Order". Section 11(b) excepts from the agency's obligation to meet and confer "matters with respect to . . . the technology of performing its work". Further, section 12(b) establishes rights expressly reserved to management officials under

any bargaining agreement, including the right "(1) to direct employees of the agency; . . . (4) to maintain the efficiency of the Government operations entrusted to them; [and] (5) to determine the methods, means, and personnel by which such operations are to be conducted."

Turning to the proposal submitted by the union in the present case, this proposal, by its terms, was intended solely to "reduce the chance of injury to the officer, particularly to the back and kidneys," and to accomplish other stated health and safety purposes. To achieve these goals, the proposal would require the "regular" maintenance of the drag roads by the agency, so that they are in a "reasonably" level condition and so that they are free of "excessive" dust and other airborne particles.^{1/}

Contrary to the agency's contentions, such provisions do not require bargaining on the "technology" of drag roads which requires a smooth surface of dust in order to detect the footprints of illegal entrants. Rather, the proposal would merely require that this "technology," as adopted by the agency, be implemented in a manner consistent with the health and safety of the Border Patrol officers. Nor does the agency assert that regular maintenance of drag roads, in reasonably level condition and free of excessive dust, would adversely affect the use of such roads as the surveillance device for which they are constructed. Accordingly, the proposal is plainly not excepted from bargaining as a matter of "technology" under section 11(b) of the Order.

Likewise, the 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. Finally, the proposal seeks only to improve the health and safety of the Border Patrol officers, and, contrary to the position of the agency, such objective, if accomplished, would contribute to, and not conflict with, the management right to maintain the efficiency of its operations under section 12(b)(4) of the Order.

For the foregoing reasons, we are of the opinion that the union's proposal is clearly negotiable as an appropriate matter "affecting

^{1/} Analogous provisions were contained in agreements in other agencies negotiated under E.O. 10988, which preceded the present Order, particularly where hazardous occupations were involved. (U.S. Department of Labor, Safety Clauses in Collective Bargaining Agreements in the Federal Service, 1-10, 13 (1970))

working conditions" under section 11(a) of the Order. We do not hold, of course, that such proposal in its present form is either necessary, desirable or even feasible. Nor do we hold that this proposal, or any modification thereof, must be accepted by the agency. We decide simply that the proposal as submitted by the union is properly subject to negotiation by the parties concerned.

Accordingly, pursuant to section 2411.18(d) of the Council's rules of procedure, we find that the determination by the Department of Justice that the union's proposal would violate sections 11(b) and 12(b)(1), (4) and (5) of the Order is improper, and the determination must be set aside.

By the Council.


W. W. Gill
Executive Director

Issued: April 15, 1971

United States Army Corps of Engineers, Mobile District, A/SLMR No. 7. In a representation case filed by AFGE, the Assistant Secretary found appropriate a unit of all powerhouse employees at the Millers Ferry powerhouse, Camden, Ala. NFFE appealed from this decision on grounds relating to contract bar, appropriateness of unit, and right to participate in the election. However, the appeal did not establish that the Assistant Secretary's decision was either arbitrary and capricious, or presented any major policy issue.

Council action (April 23, 1971). The Council denied review because NFFE's appeal failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 23, 1971

Mr. Nathan T. Wolkomir
President, National Federation
of Federal Employees
1737 H Street, N. W.
Washington, D. C. 20006

Re: United States Army Corps of Engineers,
Mobile District, A/SLMR No. 7, FLRC No. 71A-7

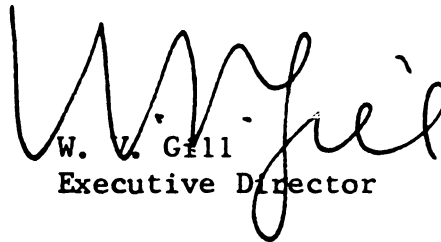
Dear Mr. Wolkomir:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: A. S. Brewer
Department of the Army

James Rice
NFFE, Local 561

AFGE, AFL-CIO Local 2257

W. J. Usery
Department of Labor

AFGE Local 2197 and Rocky Mountain Arsenal, Denver, Colo. The negotiability dispute previously accepted for review by the Council in this case (Report No. 1) concerned the validity of an Army Materiel Command directive which provided for the scheduling of at least 30 hours of actual work for firefighters who serve a normal 72-hour workweek (three 24-hour shifts per week), including standby time, and receive premium compensation at a 20 percent annual rate.

Council action (April 29, 1971). The Council held, in accord with the agency's determination and contrary to the union's contentions, that the AMC directive was not violative of Civil Service Commission regulations or statutory requirements.

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

AFGE Local 2197

and

FLRC No. 70A-5

Rocky Mountain Arsenal,
Denver, Colorado

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During negotiations concerning the hours of work of firefighters, a dispute arose over the scheduling of actual work for firefighters who serve a normal 72-hour workweek (three 24-hour shifts per week), including standby time, and receive premium compensation at a 20 percent annual rate. The union proposed the scheduling of 24 hours of actual work for such employees and claimed that an Army Materiel Command directive providing for the scheduling of at least 30 hours of actual work is invalid under Civil Service Commission and statutory requirements. The pertinent portion of the directive (AMC Directive No. 420-5, par. 4(a)(1), dated August 15, 1962) reads as follows: "A fire prevention and protection workload determination, work guides and annual workload schedule will be prepared In determining the available productive manhours, at least thirty (30) hours of the normal seventy-two (72) hour workweek will be scheduled for each man at Government-operated installations "

The dispute was referred by the union to the Department of the Army, which determined that the subject AMC directive is valid with respect to the work requirements for firefighters at the Rocky Mountain Arsenal. The union appealed to the Council from this determination, and the Council accepted the petition for review under section 11(c) (4) of the Order.

Contentions of the Parties

The union takes the position, in substance, that the AMC directive violates sections 550.141 and 550.144(a)(1) of CSC regulations, which require a minimum of only 24 hours of actual work for the 20 percent annual premium compensation paid to the firefighters. The union also

contends that the directive, by the 30-hour actual work requirement, discriminates against the firefighters in the agency and forces such employees to work at least 6 hours per week without compensation, in violation of the proscribed acceptance of "voluntary service for the United States" in 31 U.S.C. 665(b).

The agency asserts, however, that the AMC directive is consistent with CSC regulations since the regulations authorize a 20 percent annual rate of premium pay when "24 or more hours of actual work is customarily required." It further argues that the scheduling of 30 hours of actual work is deemed necessary to accomplish the agency mission and does not result in the firemen working 6 hours without compensation, because the 24-hour provision in CSC regulations is a minimum and not a maximum, and the premium serves as payment for more than just the 24-hour period.

Opinion

The issue in the present case is whether the AMC directive which provides for the scheduling of 30 hours of actual work for firefighters who serve on a 72-hour tour of duty, including standby time, and receive premium compensation at a 20 percent annual rate, is violative of either CSC regulations or statutory requirements.

As to the CSC regulations, sections 550.141 - 550.144 of those regulations, which implement 5 U.S.C. 5545(c)(1) on the payment of premium compensation on an annual basis to such employees, provide in relevant part as follows:

Sec. 550.141 Authorization of premium pay on an annual basis. An agency may pay premium pay on an annual basis . . . to an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work

Sec. 550.143 Bases for determining positions for which premium pay under section 550.141 is authorized . . .
(d) The words a substantial part of which consists of remaining in a standby status rather than performing work in section 550.141 refer to the entire tour of duty.
This requirement is met: . . . (2) If certain hours of the tour of duty are regularly devoted to actual work and others are spent in a standby status, that part of the tour of duty devoted to standing by is at least 25 percent of the entire tour of duty; . . .

Sec. 550.144 Rates of premium pay payable under section 550.141. (a) An agency may pay the premium pay on an annual

basis referred to in section 550,141, to an employee who meets the requirements of that section, at one of the following percentages of that part of the employee's rate of basic pay which does not exceed the minimum rate of basic pay for GS-10: (1) A position with a tour of duty of the 24 hours on duty, 24 hours off duty type and with a schedule of: . . . 72 hours a week -- 15 percent, unless 24 or more hours of actual work is customarily required, in which event -- 20 percent

As already mentioned, the AMC directive requires the scheduling of at least 30 hours of actual work in the normal 72-hour tour and the union claims such directive violates the 24-hour provision in the CSC regulations. Since the Civil Service Commission has the primary responsibility for the issuance and interpretation of its own regulations, the Council requested the Commission for an interpretation of its regulations as they pertain to the question raised in the present case. The Commission responded as follows:

As we understand the problem, the only question for our consideration is whether the Commission's regulations prohibit scheduling more than 24 hours of actual work in a 72 hour workweek which includes standby duty, for which the employee is paid an annual rate of premium pay under 5 U.S.C. 5545(c)(1). The answer is the regulations do not prohibit such a schedule, as long as that part of the tour of duty devoted to standing by is at least 25 percent of the entire tour of duty (see section 550.143(d)(2) of the Commission's regulations). [underscoring supplied]

In this connection, your attention is directed to the decision of the Court of Claims in Bean v. U. S., 175 F. Supp. 166, (Ct. Cl. 1959). The facts in this case involved Federal firefighters whose tour of duty prior to November 1, 1954, had been 60 hours a week, during which 40 hours of actual work was customarily performed; prior to November 1, 1954, the employees were paid under the so-called "two-thirds" rule. On November 1, 1954, the agency elected to pay these employees premium pay on an annual basis for standby duty under authority of section 208(a) of the Act of September 1, 1954 (68 Stat. 1109), which is now 5 U.S.C. 5545(c)(1); also on November 1, 1954, the agency extended the tour of duty to 72 hours a week. The court ruled that the employees were not entitled to an increase in pay although the tour of duty had been increased, 'It is true that they are on duty more hours per week than they were prior to the passage of the 1954 Act, but the head of the department was given authority under section 208(a) to fix the tour of duty . . .' (175 F. Supp. 169).

The union does not allege, nor does it appear, that less than 25 percent of the entire tour of duty of the firefighters is devoted to standing by. Accordingly, based on the above interpretation by the Civil Service Commission, we find that the subject AMC directive is consistent with the CSC regulations.

We turn next to the union's contention that the AMC directive is invalid under 31 U.S.C. 665(b), which provides: "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property." This contention is clearly without merit. Apart from other considerations, the AMC directive schedules work requirements for the firefighters and makes no provision for the acceptance of any "voluntary services" from such employees. Moreover, it has long been established that this section of the Code has no application to the performance of additional service by a government employee without added compensation, but refers to voluntary services rendered by private persons without authority of law. 30 Op. Atty. Gen. 129, 131 (1913); 30 Op. Atty. Gen. 51 (1913); cf. Lee v. U. S. 45 Ct. Cl. 57, 62 (1910). We find, therefore, that the subject AMC directive is not in violation of 31 U.S.C. 665(b).

For the foregoing reasons, we hold that the determination by the agency as to the validity of the AMC directive here involved was proper and, pursuant to section 2411.18(d) of the Council's rules of procedure, the determination is hereby sustained.

By the Council.


W. V. Gill
Executive Director

Issued: April 29, 1971.

NASA Audit Division (Code DU), Assistant Secretary Case No. 46-1848 (RO). The major policy issue which the Council previously accepted for review (Report No. 1) was whether the Assistant Secretary has authority to review that portion of the NASA Administrator's determination under section 3(b)(4) of the Order, which found that the Audit Division unit requested by AFGE "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."

Council action (April 29, 1971). The Council held that the agency head's findings as to the internal security functions of the organizational group involved are subject to review by the Assistant Secretary to determine whether such findings were arbitrary or capricious. The Assistant Secretary's contrary decision was set aside and the case was remanded for appropriate action consistent with the Council's opinion.

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

Audit Division (Code DU)
National Aeronautics and
Space Agency

and

Assistant Secretary Case
No. 46-1848 (RO)
FLRC No. 70A-7

Local 2842, American
Federation of Government
Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

On June 22, 1970, the union filed a representation petition with the Assistant Secretary, seeking a unit of all non-supervisory GS employees, including professionals, in the Audit Division (Code DU) of NASA. On July 23, the NASA Administrator determined that the unit sought "falls within the meaning of" section 3(b)(4) of E.O. 11491 and "that the Order cannot be applied [to the Audit Division] in a manner consistent with the internal security of the agency." Section 3(b)(4) of the Order provides:

Sec. 3. Application. . . .

(b) This Order (except section 22) does not apply to . . .

(4) any office, bureau or entity within an agency which 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, 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.

Following the NASA head's determination, the regional administrator of the Assistant Secretary dismissed the union's petition, ruling that the agency head's determination rendered further proceedings unwarranted. The union appealed to the Assistant Secretary and, on November 2, 1970, the Assistant Secretary upheld the action of the regional administrator, on the grounds that, under the language of section 3(b)(4), the determination to exclude organizational segments from coverage for internal security reasons rests in the sole judgment of the agency head and "is not subject to review by the Assistant Secretary;" and therefore that "an investigation into the merits of the NASA Administrator's determination . . . does not appear to be appropriate."

The union petitioned the Council for review of the Assistant Secretary's decision. The Council, on January 4, 1971, accepted the appeal, limited to the following major policy issue: Whether the Assistant Secretary has authority to review that portion of the NASA Administrator's determination under section 3(b)(4) which found that the Audit Division "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."

Briefs were timely filed by the union and by NASA. The Department of the Treasury was also permitted to file a brief as amicus curiae.

Contentions

The union argues, with respect to the issue under review, that section 3(b)(4) was intended to exclude only those employees primarily involved in the investigation or audit of their fellow employees to insure their honesty and integrity in discharging their duties; that, if an agency head were permitted to determine such primary functions and thereby to exclude employees from collective bargaining arbitrarily and without review, serious constitutional questions would arise; and that such questions would be averted and the purposes of the Order served by the conduct of an appropriate hearing and review by the Assistant Secretary.

NASA contends, however, that the Assistant Secretary is without authority to review a determination by an agency head under section 3(b)(4) of the Order, because that section expressly provides for the exclusion of certain segments of an agency from coverage when the agency head makes a sole judgment determination, and the basis for such determination cannot be separated from the determination itself. NASA further argues that review of the basis of the agency head's determination would undermine the internal security of the agency and would conflict with the specific purposes of section 3(b)(4) of the Order. Finally, NASA asserts that the determination by its Administrator in this case was grounded on a careful investigation and evaluation of the Audit Division's functions in relation to the internal security of the agency.

Treasury likewise contends that the action of an agency head under section 3(b)(4) is not reviewable, relying principally on the historical development of applicable sections of the Order.

Opinion

The issue in this case raises a question of major significance to effective labor-management relations in the Federal service, namely: Does an agency head have authority under section 3(b)(4) to except any office, bureau or entity within his agency from the operation of the Order, for "internal security" reasons, without any third-party review of the functions actually performed by the organizational group involved. The Assistant Secretary decided that the language of section 3(b)(4) precluded any such third-party review. However, for the reasons indicated below, we disagree with that decision.

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.

Nevertheless, the basic purposes and procedures established in E.O. 11491 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 the internal security functions of the group concerned.

E.O. 11491 was clearly designed to facilitate more effective collective bargaining and to improve the entire system of labor relations in the Federal service (Id, pp. 17-22). To these ends, third-party processes were adopted for the first time to consider and resolve controversies between the parties over matters subject to the Order. With particular reference to representation disputes, as here involved, the Assistant Secretary was delegated the initial responsibility to pass upon such controversies, and the Report accompanying E.O. 11491 explained in this regard (Id, at p. 37):

Accordingly, we recommend that the Assistant Secretary of Labor for Labor-Management Relations be assigned responsibility for the handling of complaints concerning unfair labor practices on the part of either labor organizations or agency representatives and alleged violations of the standards of conduct for labor organizations, and for the supervision of representation elections, in addition to his present responsibility [through the use of advisory arbitration] for unit and representation disputes. The Assistant Secretary should be authorized to issue decisions to agencies and labor organizations in all cases, subject to a limited right of appeal on major policy issues by either party to the Federal Labor Relations Council, and to refer cases involving major policy questions to the Council for decision or general ruling.

The assignment of responsibility for the resolution of administrative disputes in this manner will benefit both agencies and unions and bring impartiality, order, and consistency to the process. As decisions are issued, a body of precedent will be developed on which interested parties can draw for guidance in avoiding attitudes or practices that engender conflict in the labor-management relationship. (emphasis supplied)

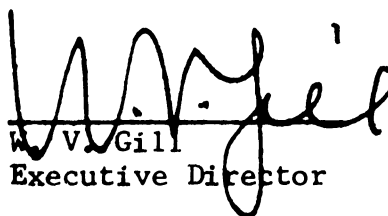
The exclusion of a segment of an agency from the operation of the Order obviously limits effective collective bargaining within the agency, and deprives the employees concerned of the opportunity to participate in the formulation and implementation of personnel policies and practices, sought to be extended by E.O. 11491. Although the need for such an exclusion is recognized under the limited conditions prescribed in section 3(b)(4), that section was plainly not intended to empower an agency head, under the guise of "internal security" findings, to exclude any office, bureau or entity of his agency from the impact of the Order. Any such interpretation would enable an agency head, arbitrarily or capriciously, to defeat the underlying purposes of the Order.

As already mentioned, the Order assigns to the Assistant Secretary the initial responsibility to resolve controversies over representation matters. In our opinion, it is implicit, under section 3(b)(4), that a dispute over the findings by an agency head that a unit sought to be represented by a union has a "primary function" related to internal security is subject to review by the Assistant Secretary, as provided in the Order, to determine whether such findings were arbitrary or capricious. The burden of proof before the Assistant Secretary is, of course, on the union which claims that the action of the agency head was arbitrary or capricious. Furthermore, the decision of the Assistant Secretary is subject to appeal to the Council as provided in the Council's rules of procedure. (35 Fed. Reg. 15065).

Contrary to the contentions of NASA, such third-party review need not endanger the internal security of the agency. For the Assistant Secretary is required, like the courts in numerous cases involving related matters of privilege, to adopt all necessary safeguards in each case to prevent any possible disclosure of sensitive information to unauthorized persons. (See, e.g., 8 Wigmore, Evidence §§2378, 2379, pp. 792-817 (McNaughton rev. 1961); 4 Moore's Federal Practice par. 26.61, pp. 26-313 to 26-332 (2d ed. 1970)).

For the foregoing reasons, and pursuant to section 2411.18(d) of the Council's rules of procedure, we find that the decision of the Assistant Secretary in the present case is inconsistent with the purposes of the Order and must be set aside. The case is accordingly remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


W. V. Gill
Executive Director

Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10. The Assistant Secretary, in his decision and order, found that PATCO had lost its status as a labor organization under section 2(e)(2), and committed unfair labor practices in violation of section 19(b)(4), of E.O. 11491, and ordered PATCO to take detailed remedial actions. National Association of Government Employees, Inc., timely filed a petition for review, on grounds relating to the adequacy of the remedies ordered. Approximately 18 days after the time had expired for taking an appeal to the Council, PATCO filed a motion for leave also to file a petition for review.

Council action (May 13, 1971). The Council denied review of NAGE's appeal because it failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure. The Council further denied PATCO's motion for leave to file a petition for review, because, apart from other considerations, of the untimeliness of the petition sought to be filed.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 13, 1971

Mr. William B. Peer
Bredhoff, Barr, Gottesman,
Cohen & Peer
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Professional Air Traffic Controllers
Organization, Inc., A/SLMR No. 10,
FLRC No. 71A-10


Dear Mr. Peer:

Reference is made to your Motion for Leave to File Petition for Review of the Assistant Secretary's decision, filed with the Council in the above-entitled matter.

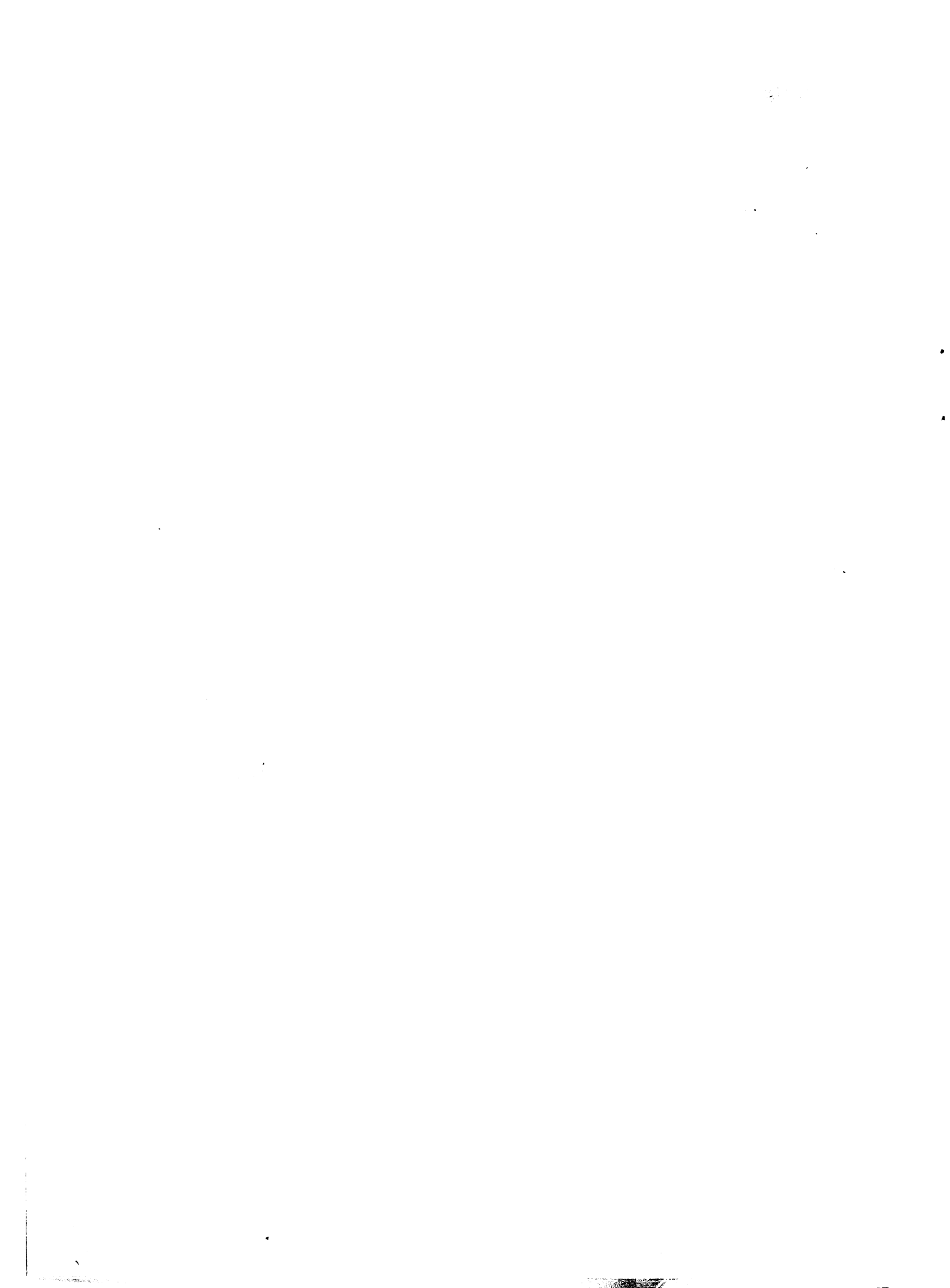
The Council has carefully considered your motion and the opposition thereto filed by the National Association of Government Employees, Inc., and has directed that your motion be denied because, apart from other considerations, of the untimeliness of the petition sought to be filed.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
G. P. Ramsey
C. J. Peters
J. D. Hill
J. L. Neustadt
I. I. Geller
L. P. Poulton



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 13, 1971

Mr. Gordon P. Ramsey
Attorney for the National Association
of Government Employees, Inc.
Gadsby & Hannah
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Professional Air Traffic Controllers
Organization, Inc., A/SLMR No. 10,
FLRC No. 71A-10

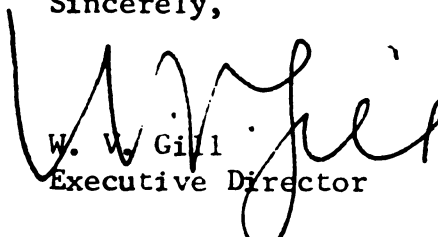
Dear Mr. Ramsey:

Reference is made to your petition for review of the Assistant Secretary's decision, filed with the Council in the above-entitled matter.

The Council has carefully considered your appeal and the opposition thereto filed by the Professional Air Traffic Controllers Organization, Inc., and has determined that your petition fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your petition be denied.

For the Council.

Sincerely,


W. W. Gill
Executive Director

cc: W. J. Usery, Jr.
C. J. Peters
W. B. Peer
J. D. Hill
J. L. Neustadt
I. I. Geller
L. P. Poulton

Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6. Navy appealed from that part of the Assistant Secretary's decision which directed a self-determination election in (and later certified) a craft unit of plumbers, pipefitters, and related classifications, in addition to finding appropriate a residual base-wide blue collar unit. The Assistant Secretary determined, in connection with the craft unit, that the employees involved constituted a functionally distinct craft, with a clear and identifiable community of interest. He further found that insufficient evidence was offered to establish that such unit would not promote effective dealings and efficiency of agency operations, observing in this regard the history of recognition of unions by the Activity in separate units, and the lack of evidence that such relationships had hampered agency operations or precluded effective dealings.

Council action (May 17, 1971). The Council denied review of Navy's appeal because it failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure. The Council noted that evidence as to whether a requested unit "will promote effective dealings and efficiency of agency operations" is within the special knowledge of, and must be submitted by, the agency involved; that Navy's petition failed to indicate that the agency was denied a full opportunity by the Assistant Secretary to introduce any such evidence which it desired in the proceeding; and that Navy's petition failed to reflect any specific evidence sufficient to warrant review of the decision of the Assistant Secretary on the appropriateness of the craft unit.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 17, 1971

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

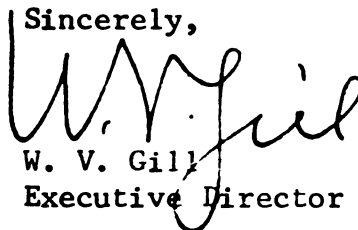
Re: Department of the Navy, Alameda Naval Air
Station, A/SIMR No. 6, FLRC No. 71A-9

Dear Mr. Di Pasquale:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-entitled case.

The Council has carefully considered your petition and the opposition thereto filed by Local 444, United Association of Plumbers and Gas Fitters, AFL-CIO, and has directed that your petition be denied because it fails to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure. The Council noted, in this regard, that evidence as to whether a requested unit "will promote effective dealings and efficiency of agency operations" is within the special knowledge of, and must be submitted by, the agency involved; that your petition fails to indicate that you were denied a full opportunity by the Assistant Secretary to introduce any such evidence which you desired in this proceeding; and that your petition fails to reflect any specific evidence sufficient to warrant review of the decision of the Assistant Secretary on the appropriateness of the craft unit.

For the Council.

Sincerely,

W. V. Gill
Executive Director

cc: F. B. Morgan

J. D. Foote

W. J. Usery, Jr.
Dept. of Labor

U.S. Naval Underwater Weapons and Research Engineering Section, Newport, R.I., Assistant Secretary Case No. 31-3252 E.O. The Assistant Secretary dismissed objections by AFTE to a consent election won by NAGE. AFTE appealed to the Council from this decision, alleging errors by the Assistant Secretary relating mainly to the validity of pre-election procedures and the consent election agreement. However, the appeal neither asserted, nor established, that the Assistant Secretary's decision was arbitrary or capricious, or that it presented any major policy issue.

Council action (June 7, 1971). The Council denied review because AFTE's appeal failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 7, 1971

Mr. Fred R. Martin
International Representative
American Federation of
Technical Engineers
9 Fleetwood Drive
Sandy Hook, Connecticut 06482

Re: U.S. Naval Underwater Weapons and Research
Engineering Section, Newport, R.I.,
Assistant Secretary Case No. 31-3252 E.O.,
FLRC No. 71A-14

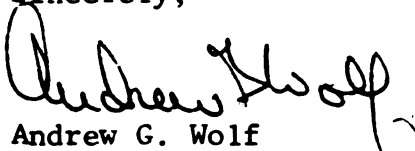
Dear Mr. Martin:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition, and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


Andrew G. Wolf
Acting Executive Director

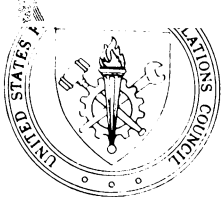
cc: W. J. Usery, Jr.
Dept. of Labor

M. Williamson
NAGE

A. Di Pasquale
Dept. of Navy

Defense Supply Agency, Defense Contract Administration Services Region, Atlanta, Defense Contract Administration Services District, Birmingham, A/SLMR No. 23. The Assistant Secretary dismissed NFFE's petition for a unit limited to employees of the agency located at Mobile, Alabama, on the grounds of inappropriateness of the requested unit. NFFE appealed to the Council from this decision, alleging erroneous findings and conclusions by the Assistant Secretary in his unit determination. However, the appeal neither asserted, nor established, that the Assistant Secretary's decision was arbitrary or capricious, or that it presented any major policy issue.

Council action (June 7, 1971). The Council denied review of NFFE's appeal because it failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 7, 1971

Mr. N. T. Wolkomir, President
National Federation of Federal
Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: Defense Supply Agency, Defense Contract
Administration Services Region, Atlanta,
Defense Contract Administration Services
District, Birmingham, A/SLMR No. 23,
FLRC No. 71A-16

Dear Mr. Wolkomir:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,

Andrew G. Wolf
Acting Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. R. Hart
Def. Supply Agency

R. Malloy
AFGE

Portsmouth Naval Shipyard, Apprentice Training School, A/SLMR No. 2. Navy appealed to the Council from a decision and direction of election issued by the Assistant Secretary, which found appropriate a unit of teachers at the Apprentice Training School of the agency, as requested by NAGE. After the appeal was filed, but before the election was conducted, NAGE requested and was granted permission to withdraw its representation petition, and the matter was closed by the Assistant Secretary. However, Navy wished to maintain its appeal before the Council.

Council action (June 8, 1971). Since the situation involved in the case was moot, and apart from other considerations, the Council denied review of the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 8, 1971

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

Re: Portsmouth Naval Shipyard, Apprentice
Training School, A/SLMR No. 2,
FLRC No. 71A-4

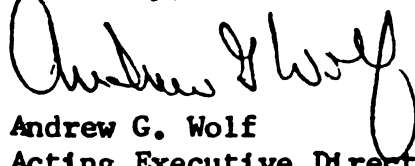
Dear Mr. Di Pasquale:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has been informed that the representation petition here concerned has been withdrawn and the case closed by the Assistant Secretary. Accordingly, since the situation involved in this case is moot, and apart from other considerations, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,



Andrew G. Wolf
Acting Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. F. Carr
NAGE

T. D. Flynn
AFTE

A. Woolf
AFGE

Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21.
The Assistant Secretary, in his decision and order, dismissed the representation petition filed by AFGE Local 2592, because of AFGE's lack of cooperation in the processing of its petition, and because a guard is president of the nonguard local seeking representation of the installation-wide unit in this case. In its appeal to the Council, AFGE did not dispute the authority of the Assistant Secretary to dismiss the representation petition for lack of cooperation, but challenged the guard status of its local president as a proper ground for dismissal.

Council action (June 11, 1971). The Council denied review of AFGE's appeal by reason of AFGE's lack of cooperation in the processing of its petition, and without passing upon the questions raised in the appeal relating to the effect of the guard status of the local president.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 11, 1971

Mr. James L. Neustadt
Staff Counsel
American Federation of Government
Employees (AFL-CIO)
400 First Street, N.W.
Washington, D.C. 20001

Re: Veterans Administration Hospital, Brockton,
Massachusetts, A/SLMR No. 21, FLRC No. 71A-17

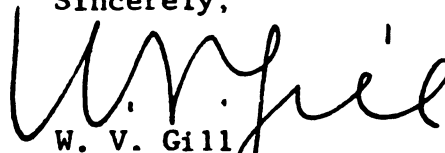
Dear Mr. Neustadt:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-entitled case.

The Council has carefully considered your appeal and has directed that review be denied by reason of AFGE's lack of cooperation in the processing of its petition, and without passing upon the questions raised in your appeal relating to the effect of the guard status of the AFGE local president.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. Winick
VA Hospital, Brockton, Mass.

K. T. Lyons
NAGE

AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Argriculture, Greenport, N.Y. The negotiability dispute accepted for review by the Council (Report No. 7) involved the union's proposal which would require bargaining on changes of tours of duty if so requested by the union, and would proscribe any such changes by the agency unless agreed upon by the union.

Council action (July 9, 1971). The Council held that, under section 11(b) of the Order, the obligation to bargain does not extend to the establishment or changes of tours of duty, and sustained the agency's determination that negotiations were not required on the subject proposal.

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

AFGE Local 1940

and

FLRC No. 71A-11

Plum Island Animal Disease
Laboratory, Dept. of Agriculture,
Greenport, N. Y.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During negotiations on a supplement to the agreement between the union and Plum Island Animal Disease Laboratory (PIADL), a dispute arose over the establishment of tours of duty by the agency. The circumstances surrounding this dispute are briefly as follows:

PIADL is a facility located on an island a short distance off the coast of the United States, and engaged in research on exotic diseases of animals. Its major operations are conducted in two laboratory buildings, a decontamination plant and a power plant. To provide for round-the-clock operation and maintenance of its buildings and equipment, PIADL currently employs four crews of 11 men each (including a foreman), who work on three rotating, weekly shifts, and who supplement the regular 8-hour, 5 days per week, maintenance employees.

Management has now decided that, by reason of improvements in equipment and operating procedures, its work can be more effectively and efficiently accomplished by eliminating the third shift in one laboratory, and establishing two new fixed shifts, working on a regular five day basis. No reductions in force or in grades are anticipated, although premium pay would be reduced. Improved staffing of the first and second shifts would be effected by the agency action.

The union claims that such changes in tours of duty, and particularly the establishment of new tours, are negotiable, and submitted the following proposal on tours of duty, during bargaining on the supplemental agreement:

Both parties recognize that management has the right to fix and to assign the number, type and grades of personnel to any segment in its organization, to any location and to an approved scheduled tour of duty. Changes in personnel from one scheduled shift to another, or from one existing five-day period to another, are assignments or scheduling of personnel and not changes in tours of duty.

Should management in exercising the above-cited rights determine that a change in scheduled tours of duty is necessary to maintain the efficiency of the Government operations entrusted to them, such determination will be presented to the Local representatives with a recommended revised schedule tour of duty for consideration, together with a recommended effective date, not less than two pay periods dating from the date it is presented to the Local.

During the above period, consultations will be undertaken to arrive at a mutually acceptable schedule. If consultation does not result in a mutually acceptable tour of duty and if requested by the Local, negotiations of a formal schedule will be initiated; these negotiations shall be conducted in good faith to assure no undue delay in establishing an effective date for a revised schedule.

Tours of duty now in existence will remain the same unless changed in accordance with the provisions of this article.

PIADL asserted that the union's proposal is non-negotiable and, upon referral, the Department of Agriculture upheld such position, on the ground that the proposal conflicts with management's rights under the Order. The union appealed to the Council from Agriculture's determination, and the Council accepted the petition for review under section 11(c)(4) of the Order.

Opinion

The essential question is whether changes in tours of duty, including the establishment of new tours, must be negotiated under section 11(a) of the Order, or whether such changes are excepted from the obligation to bargain, particularly under section 11(b) of the Order.

Section 11(a) provides that an agency and the exclusive representative of its employees shall negotiate "with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order." Section 11(b), however, excludes from the obligation to bargain "matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an

organizational unit, work project or tour of duty." Section 11(b) further provides: "This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

The intent of the foregoing provisions in section 11(b) is explained in the Report accompanying E.O. 11491 (Labor-Management Relations in the Federal Service (1969)), as follows (pp. 38-39):

We believe there is need to clarify the present language in section 6(b) of [E.O. 10988, which preceded E.O. 11491 and which excluded from the obligation to bargain an agency's "assignment of its personnel"]. The words 'assignment of its personnel' apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work -- the number of employees in the agency and the number, type and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

To remove any possible future misinterpretation of the intent of the phrase 'assignment of its personnel,' we recommend that there be substituted in a new order the phrase '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.' As further clarification, a sentence should be added to this section providing that agencies and labor organizations shall not be precluded from negotiating agreements providing for appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. (Emphasis supplied)

It is plain from the foregoing that the establishment or change of tours of duty was intended to be excluded from the obligation to bargain under section 11(b). As stated in the Report, the agency has the right to determine the "staffing patterns" for its organization and for accomplishing its mission. Clearly, the number of its work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the "staffing patterns" necessary to perform the work of the agency. Further, the specific right of an agency to determine the "numbers, types, and grades of positions or employees" assigned to a shift or tour of duty, as provided in section 11(b), obviously

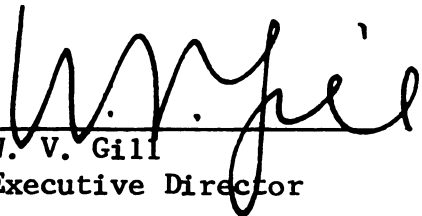
subsumes the agency's right to fix or change the number and duration of those shifts or tours. To hold otherwise, i.e. to interpret section 11(b) as sanctioning the right of the agency to determine the composition of the shift or tour and not the framework upon which that composition depends, would render the provisions of section 11(b) virtually meaningless.

While the obligation to bargain does not therefore extend to the establishment or change of tours of duty under section 11(b), negotiations may be required on the impact of such actions on the employees involved. For example, as indicated in the Report, bargaining may be required on the criteria for the assignment of individual employees to particular shifts; on appropriate arrangements for employees who are adversely affected by the realignment of the work force; and the like. Indeed, the agency stated in the instant case, "There is no disagreement that matters such as procedures for determining how qualified individuals will be assigned to a particular shift or tour and advance notice of such changes before they are made are negotiable and agreement has, in fact, been reached on those matters."

Turning now to the union's proposal in the present case, this proposal would, among other things, require bargaining on changes of tours of duty if so requested by the union, and would proscribe any such changes by the agency unless agreed upon by the union. As already indicated, the obligation of an agency to bargain does not extend to the establishment or changes of tours of duty under section 11(b). PIADL was consequently free from the obligation to bargain on this proposal by the union.

Accordingly, pursuant to section 2411.18(d) of the Council's rules of procedure, we hold that the determination by the Department of Agriculture that negotiations were not required on the union's proposal here involved was proper and must be sustained.

By the Council.


W. V. Gill
Executive Director

Issued: July 9, 1971

Department of Army, Corps of Engineers, St. Paul, Minn., Assistant Secretary Case No. 51-1233. The union (NFFE) filed an unfair labor practice complaint, alleging that the agency transferred an employee for submitting a grievance concerning an altercation with his supervisor and thereby violated section 19(a)(4) of the Order. The Assistant Secretary upheld the Regional Administrator's dismissal of the complaint, because there was no reasonable basis for the complaint under the Order. The Assistant Secretary further refused to consider new allegations of section 19(a)(1) and (2) violations raised for the first time in NFFE's appeal to the Assistant Secretary, since the allegations were not filed as a charge with the agency. NFFE appealed to the Council from the Assistant Secretary's decision.

Council action (July 9, 1971). Since it does not appear from the appeal that the Assistant Secretary's decision was either arbitrary or capricious, or presents any major policy issue, the Council denied review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 9, 1971

Mr. Irving I. Geller, Director
Legal & Employee Relations
National Federation of Federal Employees
1737 H Street, N. W.
Washington, D. C. 20006

Re: Department of Army, Corps of Engineers,
St. Paul, Minn., Assistant Secretary
Case No. 51-1233, FLRC No. 71A-13

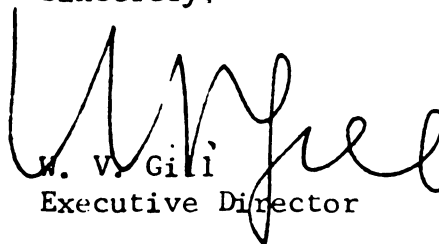
Dear Mr. Geller:

Reference is made to your petition to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and the opposition thereto filed by the Department of the Army, and has determined that your petition fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

G. L. Olmsted
Dept. of Army

Norfolk Naval Shipyard, A/SLMR No. 31. Following a hearing on certain objections filed by MTC to a representation election won by NAGE at the Norfolk Naval Shipyard, the Assistant Secretary issued a decision and direction of second election. NAGE appealed to the Council for review of this decision by the Assistant Secretary. MTC filed a contingent appeal from the Assistant Secretary's decision and direction of second election, and from his earlier decision and direction of hearing on objections. The second election has now been held, but the ballots have been impounded by the Assistant Secretary pending disposition of unfair labor practice charges filed by NAGE against Navy.

Council action (July 9, 1971). The Council denied review of these interlocutory appeals, without prejudice to the renewal by the unions of their respective contentions in petitions duly filed with the Council after final decision on the entire representation case by the Assistant Secretary.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 9, 1971

Mr. Gordon P. Ramsey
Gadsby & Hannah
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Re: Norfolk Naval Shipyard, A/SLMR No. 31,
FLRC No. 71A-19

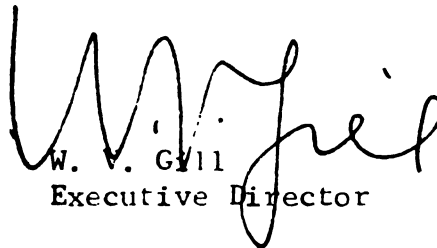
Dear Mr. Ramsey:

Reference is made to your petition for review, and motion to strike, the decision on objections and direction of second election issued by the Assistant Secretary in the above-entitled case.

The Council has carefully considered the documents which you submitted, and the opposition to your petition filed by the Fifth Naval District Metal Trades Council, AFL-CIO, and has directed that your petition and motion be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary. The Council has further directed that your request for oral argument be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

D. L. Leslie
MTC

J. Amann
Navy

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 9, 1971

Mr. Douglas L. Leslie
O'Donoghue & O'Donoghue
1912 Sunderland Place, N. W.
Washington, D. C. 20036

Re: Norfolk Naval Shipyard, A/SLMR No. 31,
FLRC No. 71A-19

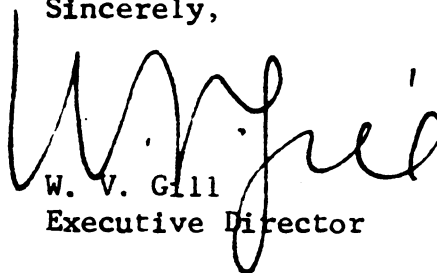
Dear Mr. Leslie:

Reference is made to your petition for review of the decision and direction of hearing, and the decision on objections and direction of second election, issued by the Assistant Secretary in the above-entitled case.

The Council has carefully considered the documents which you submitted, and the opposition to your petition filed by the Department of the Navy, and has directed that review of your petition be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

G. P. Ramsey
NAGE

J. Amann
Navy

Boston Naval Shipyard, Navy Department, Assistant Secretary Case No. 31-3179. The Assistant Secretary dismissed IAM's petition for severance of a craft unit of machinists and related classifications from a more comprehensive unit of Wage Board employees at the Shipyard, on the ground of the inappropriateness of the requested unit. IAM appealed to the Council from this decision, alleging error by the Assistant Secretary in his unit determination. However, the appeal neither specifically asserted, nor established, that the Assistant Secretary's decision appears arbitrary or capricious, or that it presents any major policy issue.

Council action (August 20, 1971). The Council denied review of IAM's appeal because it failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 20, 1971

Mr. Floyd E. Smith, International President
International Association of Machinists and
Aerospace Workers (AFL-CIO)
1300 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: Boston Naval Shipyard, Navy Department
Assistant Secretary Case No. 31-3179,
FLRC No. 71A-18

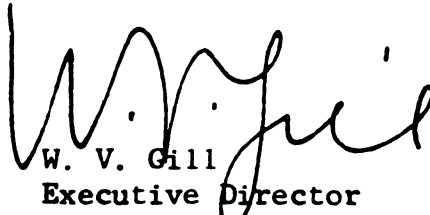
Dear Mr. Smith:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and the opposition thereto filed by the Department of the Navy, and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied. The Council has further directed that your request for oral argument be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

P. M. Frank
Dept. of Navy

W. F. Carr
NAGE

W. J. Donahue
AFGE

Federal Aviation Administration New York Air Route Traffic Control Center, Assistant Secretary Case No. 30-3213 E.O. The Assistant Secretary upheld the Regional Administrator's denial of intervention by PATCO's New York chapter in the representation case filed by NAGE, involving controllers at the New York Air Route Traffic Control Center. The PATCO chapter appealed to the Council for review of the Assistant Secretary's ruling. However, it did not appear that a final decision in the representation matter had been rendered by the Assistant Secretary.

Council action (August 20, 1971). The Council directed that review of the appeal be denied, without prejudice to the renewal by the chapter of its contentions in a petition duly filed with the Council after final decision on the entire representation case by the Assistant Secretary.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 20, 1971

Mr. William B. Peer
Bredhoff, Barr, Gottesman,
Cohen & Peer
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Federal Aviation Administration New
York Air Route Traffic Control Center,
Assistant Secretary Case No. 30-3213 E.O.,
FLRC No. 71A-21

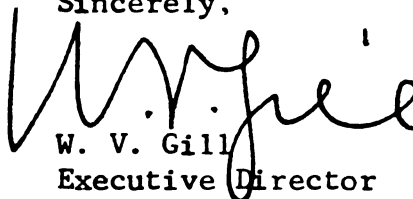
Dear Mr. Peer:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered the documents which you submitted, and has directed that review of your petition be denied at this time, without prejudice to the renewal of your contentions in a petition duly filed with the Council after final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

J. Boyle
FAA

R. Wexler
S. Q. Lyman
NAGE

United States Treasury Department, Internal Revenue Service, Assistant Secretary Case Nos. 22-1916(CU), 22-1917(CU), 22-1918(CU). National Association of Internal Revenue Employees (NAIRE) filed three "CU" petitions with the Assistant Secretary, seeking to "clarify" 69 separate units into three virtually nationwide units of the employees involved. The Assistant Secretary dismissed the "CU" petitions, holding that, under the circumstances in these cases, representation petitions would be a more appropriate means to achieve the results sought by the union. NAIRE appealed to the Council from the Assistant Secretary's decision.

Council action (August 20, 1971). The Council denied review under section 2411.12(c) of its rules of procedure, since the Assistant Secretary's decision neither appears arbitrary and capricious, nor presents a major policy issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 20, 1971

Mr. Robert M. Tobias
NAIRE Staff Counsel
711 14th Street, N.W.
Suite 1100
Washington, D.C. 20005

Re: United States Treasury Department, Internal
Revenue Service, Assistant Secretary Case
Nos. 22-1916(CU), 22-1917(CU), and 22-1918(CU),
FLRC No. 71A-24

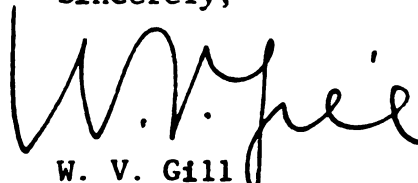
Dear Mr. Tobias:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned cases.

The Council has carefully considered your petition and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

C. R. Thrower
Internal Revenue Service

Treasury Department, United States Mint, Philadelphia, Pennsylvania,
A/SLMR No. 45. In a representation case filed by Fraternal Order of
Police (FOP), the Assistant Secretary carved out a unit of guards
from an existing activity-wide unit represented by AFGE. Treasury
appealed to the Council from this decision on grounds relating to
contract bar, appropriateness of unit, and qualification of FOP to
serve as representative of the unit found appropriate. AFGE also
appealed, arguing that the guard unit is inappropriate.

Council action (August 20, 1971). The Council denied review under
section 2411.12(c) of the Council's rules of procedure, because it
does not appear that the Assistant Secretary's decision was arbitrary
and capricious, nor does the decision present a major policy issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 20, 1971

Mr. James L. Neustadt, Staff Counsel
American Federation of Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Mr. Amos N. Latham, Jr.
Director of Personnel
Department of the Treasury
Washington, D. C. 20220

Re: Treasury Department, United States
Mint, Philadelphia, Pennsylvania,
A/SLMR No. 45, FLRC No. 71A-26

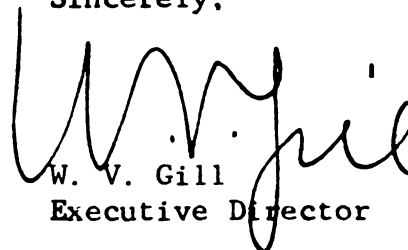
Gentlemen:

Reference is made to your appeals to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your respective petitions and has determined that the appeals fail to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeals be denied. The Council has further directed that your requests for oral argument be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

A. J. Caiazzo
FOP

Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, Assistant Secretary Case No. 31-3278 E.O. AFGE filed a representation petition seeking a unit of certain foremen and supervisory inspectors at the Shipyard. The Assistant Secretary upheld the Regional Administrator's dismissal of the petition, because of the supervisory nature of the requested unit. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious, and requesting a hearing on the eligibility of the employees sought. However, AFGE did not advert to any persuasive evidence which would contradict the Assistant Secretary's findings, based on his investigation, as to the supervisory status of the personnel involved.

Council action (August 20, 1971). The Council denied review of AFGE's appeal under section 2411.12(c) of the Council's rules of procedure, since the decision of the Assistant Secretary does not appear arbitrary and capricious, and does not present a major policy issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 20, 1971

Mr. James L. Neustadt, Staff Counsel
American Federation of Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Re: Department of the Navy, Portsmouth Naval
Shipyard, Portsmouth, New Hampshire,
Assistant Secretary Case No. 31-3278 E.O.,
FLRC No. 71A-27

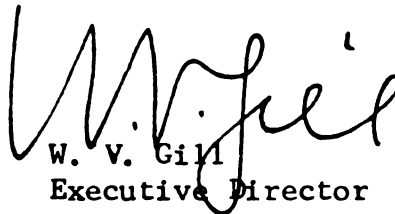
Dear Mr. Neustadt:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and the opposition thereto filed by the Department of the Navy, and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

A. Di Pasquale
Navy

G. D. Spinks
Navy

U.S. Navy Autodin Switching Center, U.S. Marine Corps Supply Center, Albany, Georgia, Assistant Secretary Case No. 40-2608(RO). The Assistant Secretary dismissed AFGE's petition for a unit of cryptograph operators, upon finding that the requirements of section 3(b)(3) of the Order for the exclusion of these employees from coverage were satisfied in the present case. Section 3(b)(3) provides that that Order (except section 22) does not apply to any "agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations." The union appealed to the Council on the sole ground that, contrary to the Assistant Secretary's decision, the "head of the agency" had failed to make the necessary determination to exclude the subject employees.

Council action (August 23, 1971). The Council denied review under section 2411.12(c) of the Council's rules of procedure, because the Assistant Secretary's decision on the issue raised by the union does not appear arbitrary and capricious, and does not present a major policy issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1971

Mr. James L. Neustadt, Staff Counsel
American Federation of Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Re: U.S. Navy Autodin Switching Center, U.S.
Marine Corps Supply Center, Albany,
Georgia, Assistant Secretary Case No.
40-2608(RO), FLRC No. 71A-25

Dear Mr. Neustadt:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The sole question raised in your petition is whether, contrary to the Assistant Secretary's decision, the "head of the agency" failed to make the determination to exclude the subject employees as required by section 3(b)(3) of the Order. The Council has carefully considered your petition in this regard and has determined that your appeal fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

D. F. Black
Dept. of Navy

IAM Local Lodge 830 and Naval Ordnance Station, Louisville, Ky.

During negotiations, the union submitted a proposal that, in the arbitration of disputes over the interpretation or application of the agreement, neither party "will introduce or make use of any interpretation or application of agency or higher level rules, regulations, policies or laws." The union claimed that such language was required by the Council's decision in Kirk Army Hospital (FLRC No. 70A-11, issued March 9, 1971) and must be included in the agreement. Upon referral, DOD disagreed with the union's position, and the union appealed to the Council under section 11(c) of the Order.

Council action (^{July 9}~~September 10~~, 1971). The Council denied review because, in the particular circumstances of this case, the appeal did not meet the requirements for review under section 11(c) of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 10, 1971

Mr. Floyd E. Smith
International President
International Association of
Machinists and Aerospace Workers
1300 Connecticut Avenue
Washington, D.C. 20036

Re: IAM Local Lodge 830 and Naval Ordnance
Station, Louisville, Ky., FLRC No. 71A-20

Dear Mr. Smith:

Reference is made to your letter filed on August 9, 1971, requesting clarification of the Council's denial of review in the above-entitled matter.

The Council, in its decision of July 9, 1971, "determined that, in the particular circumstances of this case, your appeal does not meet the requirements for review under section 11(c) of the Order." The circumstances adverted to by the Council were not in dispute and are as follows:

During negotiations, the union proposed that, in the arbitration of disputes over the interpretation or application of the agreement, neither party "will introduce or make use of any interpretation or application of agency or higher level rules, regulations, policies or laws." The union claimed that inclusion of this language was mandatory and non-negotiable in order to carry out what it believed was the intent of the Council in its Kirk Army Hospital decision, FLRC No. 70A-11. Upon referral, DoD determined that the proposal was negotiable. In your appeal to the Council, you contested the validity of the prior Kirk Army Hospital decision; argued that the subject proposal is mandatory under that decision; and disagreed with the determination by DoD that the proposal was negotiable.

Section 11(c) of the Order, the provisions of which are incorporated by reference in section 2411.12(a) of the Council's rules of procedure, prescribes the types of negotiability disputes which are subject to appeal to the Council:

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 9, 1971

Mr. Floyd E. Smith, International President
International Association of Machinists and
Aerospace Workers
Machinists Building
1300 Connecticut Avenue
Washington, D. C. 20036

Re: IAM Local Lodge 830 and Naval
Ordnance Station, Louisville, Ky.,
FLRC No. 71A-20

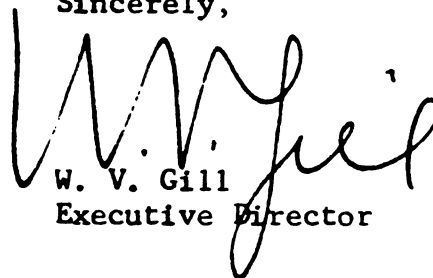
Dear Mr. Smith:

Reference is made to your petition for review of a dispute over the required inclusion of the union's proposal in an agreement, filed with the Council in the above-entitled matter.

Upon careful consideration of the documents which you submitted, the Council has determined that, in the particular circumstances of this case, your appeal does not meet the requirements for review under section 11(c) of the Order. Therefore, in accordance with section 2411.12(a) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

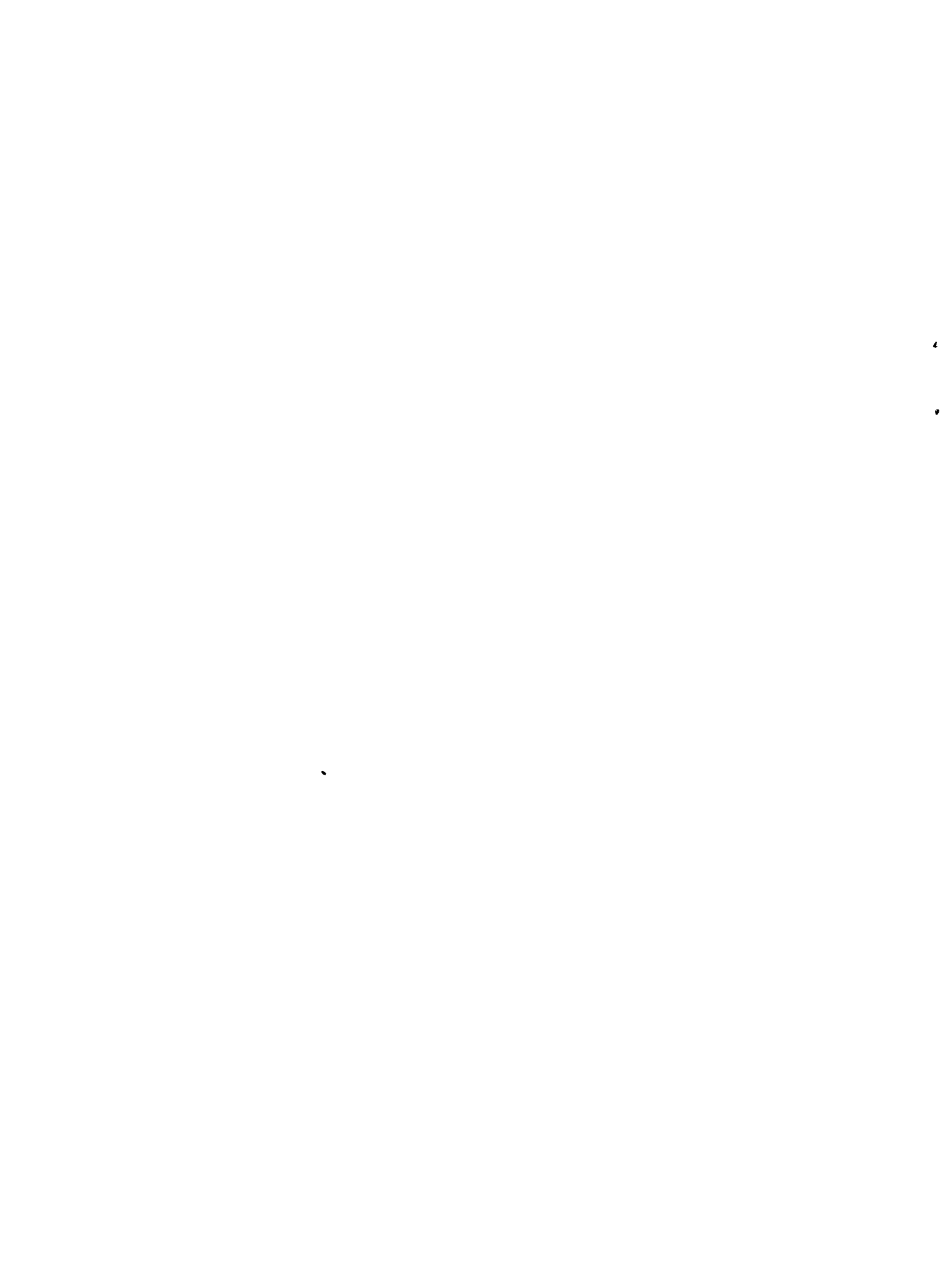
For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. C. Valdes
DoD



(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) 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.

The intended review functions of the Council under section 11(c) are further explained in section E(2) of the Report accompanying E.O. 11491 (Labor-Management Relations in the Federal Service (1969), p. 39):

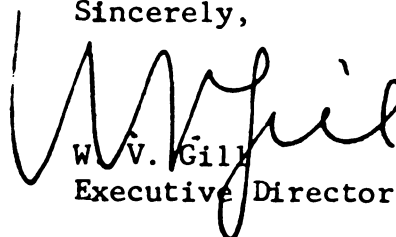
Issues as to whether a proposal advanced during negotiations, either at the local or national level, is not negotiable, because the agency head has determined that it would violate any law, regulation or rule established by appropriate authority outside the agency may be referred to the Federal Labor Relations Council for decision. Similarly, issues as to whether an agency's regulations are contrary to the new order, to interpretations of the order issued by the Council, or to applicable law or regulations of appropriate authorities, should be referred to the Council for decision.

As indicated, your appeal in the present case challenged the Kirk Army Hospital decision; asserted that the union's proposal was required by that decision and was therefore non-negotiable; and disagreed with the agency's determination that the proposal was negotiable. In the Council's opinion, your appeal, under these particular circumstances, failed to meet the requirements for review of a negotiability dispute as prescribed in section 11(c) of the Order. Consequently, your petition for review was denied.

Since the Council's decision of July 9, 1971, plainly reflects its determination in the present case, the Council has directed that your request for clarification be denied.

For the Council.

Sincerely,



W. V. Gillette
Executive Director

cc: W. C. Valdes
DoD

United States Department of Agriculture, Soil Conservation Service, A/SLMR No. 48. The Assistant Secretary dismissed AFGE's petition for a unit of the agency's district conservationists working in the state of Minnesota, because of the supervisory nature of the unit sought. AFGE appealed to the Council from this decision, alleging erroneous findings and conclusions by the Assistant Secretary in his unit determination. However, the appeal did not establish that the Assistant Secretary's decision appeared arbitrary and capricious, or that it presented any major policy issue.

Council action (September 10, 1971). The Council denied review of AFGE's appeal since it failed to meet the requirements for review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 10, 1971

Mr. Gary B. Landsman
Assistant to the Staff Counsel
American Federation of Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Re: United States Department of Agriculture,
Soil Conservation Service, A/SLMR No. 48,
FLRC No. 71A-32

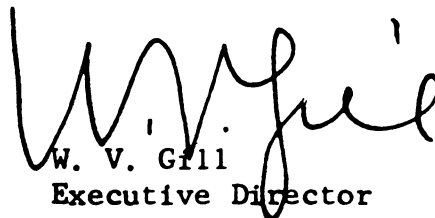
Dear Mr. Landsman:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary in the above-captioned case.

The Council has carefully considered your petition and has determined that your appeal fails to meet the requirements for review, as provided under section 2411.12(c) of the Council's rules of procedure, in that no major policy issue is present nor does the Assistant Secretary's decision appear to be arbitrary and capricious. Accordingly, the Council has directed that review of your appeal be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

C. C. Smith
Dept. of Agriculture

Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24; Air Force Welfare Board, Non-Appropriated Fund Fiscal Control Office, Elmendorf Air Force Base, Alaska, A/SLMR No. 28; Southern California Exchange Region, Army and Air Force Exchange Service, Norton Air Force Base, San Bernardino, Calif., et. al., A/SLMR Nos. 26, 32, 33, 43. On May 28, 1971, the Council granted AFGE's request for an extension of the time for filing appeals in these cases until 15 days after the Assistant Secretary ruled on the union's motions for reconsideration. The Assistant Secretary issued his decision denying the motions for reconsideration on June 25, 1971. Therefore, under section 2411.14(e), (f) and (g) of the Council's rules of procedure, the appeals were due in the office of the Council on or before the close of business on July 12, 1971. However, the union did not file its appeals with the Council until July 22, 23 and 30, respectively, and no further extension of time for filing was either requested by the union or granted by the Council.

Council action (October 6, 1971). Since the union's appeals were untimely filed, and apart from other considerations, the Council denied the petitions for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 6, 1971

Mr. Raymond J. Malloy
Associate Staff Counsel
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: Department of the Navy, Navy Exchange,
Mayport, Florida, A/SLMR No. 24,
FLRC No. 71A-36;
Nonappropriated Fund (NAF), Fiscal
Control Office, ACX-N, Elmendorf Air
Force Base, Alaska, A/SLMR No. 28,
FLRC No. 71A-38;
Southern California Exchange Region, Army
and Air Force Exchange Service, Norton Air
Force Base, San Bernardino, California,
et. al., A/SLMR Nos. 26, 32, 33 and 43,
FLRC No. 71A-40

Dear Mr. Malloy:

Reference is made to your appeals to the Council for review of the Assistant Secretary's decisions in the above-captioned cases.

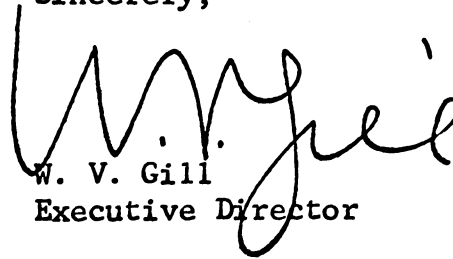
Upon careful consideration, the Council has determined that, for the reasons indicated below, your petitions were untimely filed under the Council's rules of procedure and cannot be accepted for review:

On May 28, 1971, the Council granted your request for an extension of the time for filing appeals in the present cases until 15 days after the Assistant Secretary ruled on the motions for reconsideration described in your request. The Assistant Secretary issued his decision denying your motions for reconsideration on June 25, 1971. Therefore, under section 2411.14(e), (f) and (g) of the Council's rules, your appeals were due in the office of the Council on or before the close of business on July 12, 1971. However, your appeals were not filed in these cases until July 22, 23 and 30, respectively, and no further extension of time for filing was either requested by your union or granted by the Council.

Accordingly, as your appeals were untimely filed, and apart from other considerations, the Council has directed that your petitions for review be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

G. Spinks
Navy

R. Reed
Exchange Service

Lt. Col. Fraser
JAG

L. G. Berman
Air Force

Maj. T. V. Ball
Air Force

L. A. La Ferriere
NFFE

NFFE Local 453 and National Climatic Center, U.S. Department of Commerce, Asheville, N.C. The negotiability dispute concerned the union's proposal that a local union member be appointed to merit promotion, awards, and performance rating committees of the agency. Upon referral, the agency determined that the proposal is non-negotiable under a published agency directive which assigned such matters, among others, to manpower utilization councils composed only of top management officials. The union appealed to the Council, in effect challenging the advisability of the agency's decision, but not contesting the validity of the directive relied upon by the agency in making its determination.

Council action (December 1, 1971). The Council denied review since the union's appeal failed to meet the conditions prescribed for review in section 11(c)(4) of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 1, 1971

Mr. Nathan T. Wolkomir, President
National Federation of Federal
Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: NFFE Local 453 and National Climatic
Center, U.S. Department of Commerce,
Asheville, N.C., FLRC No. 71A-41

Dear Mr. Wolkomir:

Reference is made to your appeal to the Council for review of a negotiability determination by the Department of Commerce, in the above-entitled case.

The Council has carefully considered your appeal, and the opposition thereto filed by the agency, and has decided that review of your petition must be denied for the following reasons:

Section 11(c)(4) of the Order, which is incorporated by reference in section 2411.12(a) of the Council's rules of procedure, provides:

(4) 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.

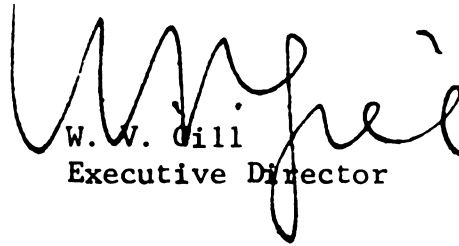
Commerce determined in the present case that the proposal of your organization was not negotiable under the provisions of its published agency directive (NOAA Manual 06-06, dated 3/27/69). In your appeal, you dispute the propriety of that determination based on: similar provisions in a recent agreement between your union and another agency; the proposal's desirability from the standpoints of management, employees and the union; and the acceptance by Commerce of union representation on safety committees.

However, since the agency did not determine that the union's proposal would violate applicable law, outside regulation, or the Order, section 11(c)(4)(i) is clearly inapplicable to your appeal. Likewise, you do not assert that the agency's directive, as interpreted by the agency head, violates any applicable law, outside regulation, or the Order. Therefore, your appeal is not subject to review under the provisions of section 11(c)(4)(ii) of the Order.

Accordingly, since your appeal fails to meet the conditions prescribed for review in section 11(c)(4)(i) or (ii) of the Order, the Council has directed, in accordance with section 2411.12(a) of its rules, that review of your appeal be denied.

For the Council.

Sincerely,



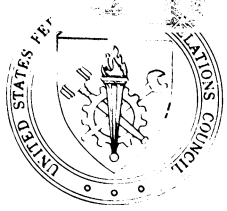
W. W. Gill
Executive Director

cc: G. H. Dorsey
Commerce

FLRC NOS. 71A-33, 71A-44 and 71A-53

Federal Aviation Administration, Assistant Secretary Case Nos. 22-1990, etc.; Federal Aviation Administration, Assistant Secretary Case Nos. 22-2007, etc.; Federal Aviation Administration, Assistant Secretary Case Nos. 22-2651, 2654(CA). The Assistant Secretary dismissed, for lack of jurisdiction under section 19(d) of E.O. 11491, unfair labor practice complaints by a number of air traffic controllers discharged by the FAA because of their alleged participation in a strike. The individual complainants appealed to the Council, alleging that the Assistant Secretary's decisions erroneously interpreted and applied section 19(d) of E.O. 11491. The appeal also sought retroactive application of the amendments under E.O. 11616.

Council action (December 14, 1971). The Council held that, based on the specific language of E.O. 11491 and E.O. 11616, the decisions of the Assistant Secretary do not appear arbitrary and capricious, and do not present any major policy issue. Accordingly, the Council denied review under section 2411.12(c) of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 14, 1971

Mr. William B. Peer
Bredhoff, Barr, Gottesman,
Cohen & Peer
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Federal Aviation Administration,
Assistant Secretary Case Nos.
22-1990, etc., FLRC No. 71A-33;
Federal Aviation Administration,
Assistant Secretary Case Nos.
22-2007, etc., FLRC No. 71A-44;
Federal Aviation Administration,
Assistant Secretary Case Nos.
22-2651, 2654(CA), FLRC No. 71A-53

Dear Mr. Peer:

The Council has considered your petitions for review of the Assistant Secretary's decisions in the above-captioned cases which dismissed, for lack of jurisdiction under section 19(d) of E.O. 11491, unfair labor practice complaints by a number of air traffic controllers discharged by the Federal Aviation Administration because of their alleged participation in a strike.

Your request for review asserts that "substantial policy questions" are raised by the Assistant Secretary's decisions. In substance, you contend that: (1) A/SLMR Report No. 25, cited by the Assistant Secretary, is an insufficient basis upon which to dismiss these complaints since that report provides neither the salient facts upon which it arose nor the rationale underlying the decision; (2) section 19(d) of E.O. 11491 deprived the Assistant Secretary of jurisdiction only when the alleged violations were subject to a negotiated grievance or appeals procedure, which is absent here; (3) the Assistant Secretary's interpretation of section 19(d) is inconsistent with the design of E.O. 11491 since it allowed the agency against whom an individual employee is complaining to pass upon the validity of such complaint; (4) the grievance and appeal procedures of FAA do not accord due process and the Assistant Secretary should not defer to such procedures; and (5) the decisions are contrary to private sector practice.

Additionally, in FLRC No. 71A-53, you contend that the recent amendments of section 19(d) made by E.O. 11616 permit the Assistant Secretary to process complaints such as those involved in the instant cases. And you "request that the Council interpret the new Executive Order expansively to permit processing of [the petitioners'] unfair labor practice complaints", since it "would be an arbitrary and capricious result if, because of the timing of the filing of the unfair labor practice cases, petitioners were precluded from processing their unfair labor practice complaints, while others, no differently situated, who follow them will have the advantage of the new Section 19(d)."

Section 19(d) of E.O. 11491 provided that:

When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

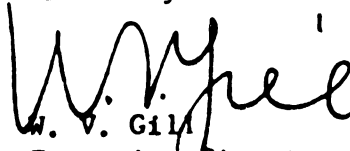
This plain language of section 19(d) excluded from the complaint procedures of the Assistant Secretary issues which were subject to established grievance or appeals procedures. Since it is uncontroverted that the issues in the petitions here involved were subject to established grievance or appeals procedures, his determination as to lack of jurisdiction under section 19(d) of E.O. 11491 presents no major policy issue.

As to the question whether the amendments of section 19(d) made by E.O. 11616 may be applied retroactively to these cases, E.O. 11616, adopted August 26, 1971, specifically provides that "The amendments made by this Order shall become effective ninety days from this date." Therefore, such amendments, which became effective on November 24, 1971, clearly provides no basis for review in the present cases.

Accordingly, since the decisions of the Assistant Secretary do not appear to be arbitrary and capricious, nor are there major policy issues present, the Council has directed, pursuant to section 2411.12(c) of its rules, that review of your appeals be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

C. J. Peters
FAA

First U.S. Army, 83rd Army Reserve Command (ARCOM), U.S. Army Support Facility (Fort Hayes), Columbus, Ohio, A/SLMR No. 35.

On May 10, 1971, the Assistant Secretary dismissed the representation petition filed by NFFE Local 142 in this case. On June 8, 1971, some six days after the last date for filing an appeal under section 2411.14 of the Council's rules of procedure, the local president submitted his petition for review, alleging that he personally did not learn of the subject decision until the week of May 23, and that his local had not received a copy of the decision directly from the Assistant Secretary. However, the local president did not assert, nor did it appear, that service of the decision was not properly made by the Assistant Secretary on the counsel of record or any other person who entered an appearance as representative of the local in the proceeding. Further, while the local president had knowledge of the decision before June 2, and the NFFE vice-president of the local's region had received a copy of the decision, no request was made to the Council for an extension of the time for filing an appeal as provided in section 2411.14(d) of the Council's rules.

Council action (^{August 27}~~December 15~~, 1971). Since 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

December 15, 1971

Mr. Nathan T. Wolkomir, President
National Federation of Federal
Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: First U.S. Army, 83rd Army Reserve
Command (ARCOM), U.S. Army Support
Facility (Fort Hayes), Columbus,
Ohio, A/SLMR No. 35, FLRC No. 71A-23

Dear Mr. Wolkomir:

Reference is made to your letter filed on September 9, 1971, requesting that the Council in effect reconsider its decision of August 27, 1971, and accept the petition for review in the above-entitled case.

In your request for reconsideration, you urge that the time limits be extended since "Mr. Clark and the National Federation of Federal Employees were not sleeping on their rights." In principal support of your request, you enclose a copy of a letter dated September 4, 1971, addressed to you by Mr. Clark, which provides further details concerning the matters discussed in the Council's decision.

It would appear from that letter, and from your entire submission, that service of the Assistant Secretary's decision was properly made on the individuals listed as NFFE representatives at the hearing, and that a problem of communications occurred between such representatives and the local president. It further appears that Mr. Clark, at the time here involved, was not aware of the specific requirements in the Council's published rules of procedure (35 Fed. Reg. 15065 (1970)), as amended, (36 Fed. Reg. 5205 (1971)) and depended on guidance from outside the local, which was not forthcoming.

Such circumstances do not warrant the waiver by the Council of the untimely filing of the instant appeal. Accordingly, since no persuasive reason



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 27, 1971

Mr. Richard L. Clark, President
Local 142, National Federation of
Federal Employees
4633 Hannaford Drive
Toledo, Ohio 43623

Re: First U.S. Army, 83rd Army Reserve Command
(ARCOM), U.S. Army Support Facility (Fort
Hayes), Columbus, Ohio, A/SLMR No. 35,
FLRC No. 71A-23

Dear Mr. Clark:

Reference is made to your appeal to the Council for review of the decision of the Assistant Secretary, issued on May 10, 1971, in the above-captioned case.

Upon careful consideration, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Section 2411.14(a) of the Council's rules provides that an appeal must be filed within 20 days from the date of service of the Assistant Secretary's decision; under section 2411.14(f) three additional days are allowed when service is by mail; and under section 2411.14(g) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit. Your petition, which was due on or before June 2, 1971, was not filed with the Council until June 8, 1971.

While your petition alleges that you personally did not learn of the subject decision until the week of May 23, 1971, and that your local has not received a copy of the decision directly from the Assistant Secretary, you do not assert, nor does it appear, that service was not properly made on your counsel of record or any other person who had entered an appearance as representative of your local in the proceeding. Further, while admittedly you had knowledge of the decision before June 2, and the NFFE vice president of your region had received a copy of the decision, no attempt whatsoever was made to seek an extension of time to file an appeal as provided in section 2411.14(d) of the Council's rules.

Accordingly, as your appeal was untimely filed, and apart from other considerations, the Council has directed that your petition for review be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

- cc: W. J. Usery, Jr.
Dept. of Labor

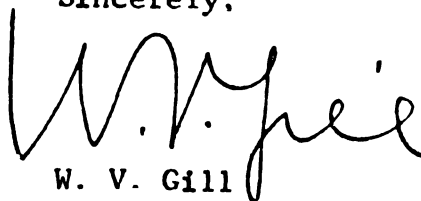
- L. C. Zettler
U.S. Army

- E. M. Ricketson
AFGE

has been advanced for reconsidering and reversing the Council's prior decision in the case, the Council has directed that your request be denied.

By direction of the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

L. C. Zettler
Army

R. L. Clark
NFFE Local 142

E. M. Ricketson
AFGE

Picatinny Arsenal, Department of the Army, Dover, New Jersey,
Assistant Secretary Case No. 32-1818 E.O. The Assistant
Secretary dismissed the section 19(a)(6) complaint by Federal
Employees Council No. 270, because, for the past seven or more
years, the work assignment involved (police vehicle maintenance
by guards when regular employees who performed such work were
off duty) was an established condition of guards' employment;
and the activity was not obligated to bargain during the term
of an agreement about continuing such established practice.
The union appealed, contending a major policy issue was pre-
sented by the activity's determination to interchange work,
without negotiations, during a current agreement.

Council action (December 15, 1971). The Council found that
the appeal was unsupported by the actual circumstances, since it was
uncontroverted that the work assignment was an established
practice and not a determination made during the term of the
current agreement. No major policy issue was therefore pre-
sented and the Council denied review under section 2411.12(c)
of the Council's rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 15, 1971

Mr. John E. Doss, Jr.
President, Federal Employees
Council No. 270
P. O. Box 270
Hackettstown, New Jersey 07840

Re: Picatinny Arsenal, Department of the Army,
Dover, New Jersey, Assistant Secretary Case
No. 32-1818 E.O., FLRC No. 71A-34

Dear Mr. Doss:

The Council has considered your petition for review of the decision of the Assistant Secretary in the above-captioned case.

The Assistant Secretary upheld the Regional Administrator's dismissal of your complaint of a section 19(a)(6) violation, holding that, for the past seven or more years, the work assignment involved (i.e., the assignment to guards of the work of changing tires and putting chains on tires on police vehicles, when employees who normally perform such work are off duty) was an established condition of employment of the guards; and that the activity was under no obligation to bargain during the term of the existing guard agreement about the continuance of such an established practice.

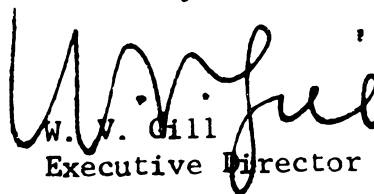
In your appeal, you contend that the Assistant Secretary's decision presents a major policy issue "on the broader connotations, implied or real, concerning [unions] possessing exclusive bargaining rights and prerogatives" under negotiated agreements. In support of this contention, you argue that, where an employer "determines to interchange assignments or parallel assignments on a permanent or continuing basis and not in emergency situations the employer should not use fiat but use negotiating procedures with the unions having current agreements."

However, your appeal does not challenge or even advert to the Assistant Secretary's finding in this case that the practice of assigning the tasks in question to guards when the employees who normally perform such functions are off duty has been an established practice of seven or more years duration. Such assignment was not a "determination" by the activity during the term of any current agreement. Therefore, your appeal appears to be unsupported by the actual circumstances in this case, and no major policy issue is presented by the decision of the Assistant Secretary.

As your petition for review fails to meet the requirements for review as provided under Section 2411.12(c) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

D. A. Dresser
Army

Department of the Navy, Naval Air Rework Facility, Naval Air Station, Alameda, California, A/SLMR No. 61. The Assistant Secretary dismissed the representation petition filed by the Calibration Laboratory Association, because of the inappropriateness of the unit sought. The union appealed to the Council, alleging "significant errors of fact" and a failure to take proper "cognizance" of certain published agency documents.

Council action (December 15, 1971). The Council found that the allegations as to "errors of fact" were without controlling significance; and that the union did not provide the Assistant Secretary with the subject documents, or seek to reopen the record or to obtain reconsideration based on these documents. Therefore, the Council held that the Assistant Secretary's decision did not appear arbitrary and capricious and did not present a major policy issue, and denied review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 15, 1971

Mr. Fred E. Huntley, President
Calibration Laboratory Association
972 Grizzly Peak Boulevard
Berkeley, California 94708

Re: Department of the Navy, Naval Air
Rework Facility, Naval Air Station,
Alameda, California, A/SLMR No. 61,
FLRC No. 71A-35

Dear Mr. Huntley:

The Council has carefully considered your petition for review of the decision of the Assistant Secretary in the above-captioned case, and the opposition to your appeal submitted by the Navy.

You contend in effect that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue, by reason of (1) "significant errors of fact;" and (2) the Assistant Secretary's failure to take "cognizance" of two published instructions by Naval Air Systems Command relating to the calibration program, which resulted in his improperly finding that the proposed unit is a part of an integrated production process.

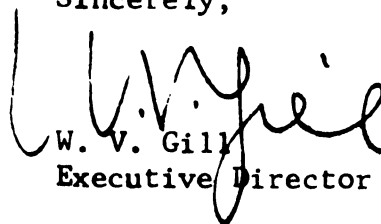
As to (1), the alleged factual errors concern such matters as asserted disparities in figures, inexactness or lack of precision in isolated phrases, and mislaid reliance on evidence, in the decision. However, these alleged errors are minor in nature or clearly lacking in merit. Also, in most instances, they are unsupported by any reference either to evidence actually introduced or sought to be introduced at the hearing. Accordingly, the allegations as to "errors of fact" are without controlling significance in this case.

With respect to (2), although you assert that your union made "some quotes" from NAVAIRINST 4355.4 in its brief to the Assistant Secretary and urged the Assistant Secretary to obtain a copy of that document, the union did not provide the Assistant Secretary at the hearing or in its brief with copies of either of the documents referred to, nor did the union seek to reopen the record, or to obtain reconsideration by the Assistant Secretary, based on these publications. Therefore, no basis for review is established by the Assistant Secretary's alleged failure to take "cognizance" of the subject documents.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your petition fails to meet the requirements for review as provided in section 2411.12(c) of the Council's rules of procedure. Accordingly, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

J. Amann
Navy

Naval Electronic Systems Command Activity, Boston, Mass., Assistant Secretary Case No. 31-3371 EO. The major policy issue which the Council had accepted for review (Report No. 7) was whether the Assistant Secretary has authority to review that portion of the determination made by the Secretary of the Navy, under section 3(b)(3) of the Order, which in effect found that the unit sought by AFTE "has as a primary function intelligence, investigative, or security work."

Council action (January 19, 1972). The Council held that the Assistant Secretary is without authority to review a determination made by an agency head under section 3(b)(3) of the Order. However, the Council also held that, before honoring such a determination, the Assistant Secretary must first obtain a clear and explicit statement that the agency head had assured himself of the facts concerning a primary function related to national security and had personally decided on the 3(b)(3) exclusion. As the record in this case is unclear as to whether the Secretary of the Navy had assured himself of the facts and made the necessary personal determination, the case was remanded to the Assistant Secretary to obtain the required statement and to take further appropriate action.

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

Naval Electronic Systems Command
Activity, Boston, Mass.

and

Local Union No. 15, American
Federation of Technical Engineers,
AFL-CIO

Assistant Secretary Case
No. 31-3371 EO
FLRC No. 71A-12

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

On August 26, 1970, the union (AFTE) filed a representation petition with the Assistant Secretary, seeking a unit of approximately 22 non-supervisory technical employees at the activity. On November 19, 1970, Navy's Office of Civilian Manpower Management advised the area office of the Assistant Secretary, as follows:

This letter certifies that it is the determination of the Secretary of the Navy that all but four of the employees sought by the Petitioner occupy positions involving duties related to cryptographic operations that the Secretary of the Navy has determined should be excluded from coverage under the Executive Order 11491 for reasons of national security pursuant to Section 3b(3) of that Order. . . .

Section 3(b)(3) of the Order, referred to by Navy, provides that the Order (except section 22) does not apply to "any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations."

On November 24, 1970, the regional administrator of the Assistant Secretary decided that further proceedings were not warranted due to this determination by the agency head and, in effect, dismissed the petition. Upon appeal by the union, the Assistant Secretary, on March 18, 1971, affirmed the

regional administrator's action because: Section 3(b)(3) of the Order "clearly states that the head of an agency, in his sole judgment, may exclude certain segments of his organization from the coverage of the Order"; such an agency head determination falls outside the review authority of the Assistant Secretary under section 6 of the Order; and, therefore, an investigation into the merits of the determination by the Secretary of the Navy "does not appear to be appropriate."

AFTE petitioned the Council for review of the Assistant Secretary's decision. On April 29, 1971, the Council accepted the petition for review of the following major policy issue:

Whether the Assistant Secretary has authority to review that portion of the determination by the Secretary of the Navy under section 3(b)(3) of the Order which found that the 'agency, or office, bureau or entity [involved] . . . has as a primary function intelligence, investigative, or security work.'

Briefs were timely filed by both the parties.^{1/}

Opinion

The issue before the Council is whether the Assistant Secretary has authority to review that part of an agency head's determination under section 3(b)(3) of the Order, which finds that an agency element "has as a primary function intelligence, investigative, or security work."

The Council considered a related issue pertaining to internal agency security matters which arose under section 3(b)(4) of the Order in the NASA case,^{2/} and decided that the Assistant Secretary had authority to determine if the agency head's findings of fact as to a "primary function" of the unit were "arbitrary and capricious." The question at the outset, therefore, is whether, as claimed by AFTE, the NASA decision "governs" the present case, or whether, as contended by Navy, such decision is without controlling significance, because of material differences between section 3(b)(3) and section 3(b)(4) of the Order.

Section 3(b) of the Order provides in pertinent part as follows:

Sec. 3. Application

(b) This Order (except section 22) does not apply to --

^{1/} The union filed a letter in the nature of a brief. Navy filed two briefs, one classified as "confidential" and the other unclassified. The unclassified brief alone was served on the union and the Assistant Secretary, and the union opposed the Council's acceptance of the classified brief unless such brief was also "immediately and unconditionally made available" to the union. The Council has deemed it necessary in this case to consider only the unclassified brief and has returned the classified brief to Navy without examination of its content.

^{2/} Audit Division (Code DU) National Aeronautics and Space Agency, Assistant Secretary Case No. 46-1848(RO), FLRC No. 70A-7, dated April 29, 1971.

- (1) the Federal Bureau of Investigation;
- (2) the Central Intelligence Agency;
- (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or
- (4) any office, bureau or entity within an agency which 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, 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. . . .

The dispute in the NASA case involved an audit division unit which the agency head determined to exclude from the Order under section 3(b)(4). The Assistant Secretary decided that the agency head's determination was unreviewable, and the Council accepted the union's appeal on the question whether the NASA administrator's findings as to a "primary function" of the unit were subject to review under 3(b)(4).

In its decision, the Council found that neither the language, nor the history, of 3(b)(4) provided any specific light on this question. With particular reference to the history of that section, the Council stated:

. . . 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 . . . Nor was this permissive exemption adverted to in any prior report or issuance indicative of the intent of that section.

The Council then considered the purposes and procedures of the Order and concluded "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 the internal security functions of the group concerned." The Council also observed that such review need not endanger the agency's internal security, because of procedures available to the Assistant Secretary to prevent disclosure of this type of information to unauthorized persons.

Turning now to the situation in the present case, the language of section 3(b)(3) is analogous to that in 3(b)(4) in a number of respects, including certain parallel phrasing and sentence structure. However, for the

reasons detailed below, major differences prevail in the context of 3(b)(3) and in its history, import, and legal framework, which establish that, upon a clear showing of an agency head's determination made under 3(b)(3), the Assistant Secretary is without further authority to review the exclusion of an organizational element for national security reasons.

1. The language of 3(b)(3), unlike 3(b)(4), directly links the exclusion of an element for national security reasons with the blanket exclusion of the FBI and CIA under 3(b)(1) and (2), respectively, viz., section 3(b) provides that the Order does not apply to "(1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency; [or] (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations" (underscoring supplied).

The above underscored words do not appear in 3(b)(4). Their usage indicates not only a different order of magnitude of 3(b)(3), but also a different scope of review.

2. Unlike the provisions of 3(b)(4) which appear for the first time in E.O. 11491, section 3(b)(3) was based on almost identical provisions in section 16 of E.O. 10988 which preceded E.O. 11491, and the "legislative history" of section 3(b)(3) is specific and compelling on the intent of this section of the Order.

Section 16 of E.O. 10988 stated in relevant part as follows:

This order . . . shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations

Questions arose under section 16 as to whether the determination by an agency head was subject to any type of review under E.O. 10988. Both the Department of Labor and the Civil Service Commission, in their respective advisory capacities, consistently declared that such determinations were not reviewable under that order. For instance, in a case where a union requested the nomination of an arbitrator to review the determination by an agency head that certain employees were not covered for national security reasons, Labor refused the request, saying:

"Section 16 determinations are the responsibility of the head of each agency or department in the performance of his statutory obligations as agency head and not subject to review under this order."^{3/}

Likewise, CSC in a letter of February 6, 1969, to the Department of Justice, regarding the meaning of the phrase "national security requirements and considerations" in section 16, stated:

The determination of exemptions from the coverage of the Order under section 16 is specifically delegated as a determination to be made by the head of the agency concerned. The Secretary of Labor has confirmed this by refusing to consider disputed exemptions under the provisions of section 11. The U.S. District Court for the District of Columbia and the U.S. Court of Appeals [NAIRE v. Dillon, 356 F. 2d 811 (D.C. Cir. 1966)] have refused jurisdiction on grounds that such determinations are administrative matters not subject to the review of the Courts. Thus the program provides for no third party review of these determinations.

Indeed, in a subsequent letter of October 16, 1969, addressed to the Metal Trades Department, CSC specifically refused to investigate or take other action "relating to the amendment of Department of the Navy regulations under Section 16 of Executive Order 10988 which has the effect of removing certain cryptographic personnel from established units of exclusive recognition." CSC said in this regard: "The Executive Order does not qualify or limit the authority of an agency head in the application of this provision. It intended that the decision of the agency head in this area of national security requirements and considerations should be final and unreviewable"

Section 3(b)(3) of E.O. 11491 was drafted with only one principal change in the related language of section 16 of E.O. 10988, namely, the insertion of the phrase "in his sole judgment" after the reference to the agency head determination. While the Report accompanying E.O. 11491 is silent as to the intent of this addition, the phrase manifestly reflects a reinforcement, not a change, of the past interpretation and practice under section 16. This conclusion is supported by the comparative analysis of 10988 and 11491 which issued contemporaneously with the Report accompanying E.O. 11491 and which expressly states that "No appeal" was sanctioned under section 16 of 10988; that section 3(b)(1), (2) and (3) of 11491 is the "Same" as section 16 of 10988; and that the "Changes" in section 16 made by 3(b)(1), (2) and (3) were "None."^{4/}

3. National security matters are obviously of a different nature, and their importance of a different significance, than the internal security

^{3/} CSC Bulletin No. 711-6, dated May 14, 1964, p. 4.

^{4/} Labor-Management Relations in the Federal Service (1969) at p. 48.

of a particular agency. For example, more profound dangers would derive from leaks of classified defense information than of merely privileged information within an agency. Similarly, errors in judgment by a third-party in finding a lack of a primary function related to national security matters would have more serious potential consequences than a like error concerning internal agency security matters. Further, a more complex legal framework surrounds the national security area;^{5/} and a more specialized capability is required to assess the boundaries of "intelligence, investigative, or security work" under 3(b)(3), than deciding whether an element's primary function involves "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," under 3(b)(4).

4. Finally, the classified nature of the matters involved under 3(b)(3), unlike the privileged materials under 3(b)(4), would render it difficult, if not impossible, to conduct review proceedings. Access to classified information is uniformly restricted in legal directives to a "need to know" in the interest of national security.^{6/} Review proceedings under 3(b)(3) would not fall within this category and no intent was reflected in E.O. 11491 to supersede such requirements. Moreover, heavy penalties are sanctioned for unauthorized disclosure and receipt of such classified information.^{7/} And, while the courts may have authority to determine if a security classification was arbitrary and capricious (Epstein v. Resor, 421 F. 2d 930, 933 (9th Cir. 1970), cert. den. 398 U.S. 965 (1970)), such authority is not granted to the Assistant Secretary or the Council, within the executive branch.

For the foregoing reasons, we are of the opinion that the NASA decision relating to 3(b)(4) is not controlling in the instant case, and that the Assistant Secretary is without authority to review a determination made by an agency head under section 3(b)(3) of the Order.

However, our conclusion in the above regard presumes that the determination to exclude the agency element involved was actually made by the head of the agency as required in section 3(b)(3). Because of the significant consequences which derive from such an exclusion, the Order intended, in our opinion, that the agency head assure himself of the facts concerning a primary function related to national security and personally decide on the 3(b)(3) exclusion.^{8/} Therefore, the Assistant Secretary, in any case challenging a 3(b)(3) determination, must first obtain a clear and explicit statement as to the agency head's assurance of the facts and personal decision to exclude the element involved, before honoring any such determination.

^{5/} See, e.g., 5 U.S.C. 552(b)(1); 18 U.S.C. 793(d), 798; 50 U.S.C. 402, et seq; E.O. 10501 as amended.

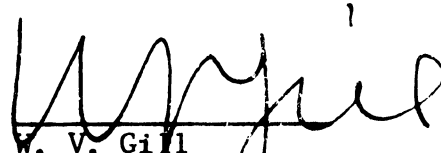
^{6/} See, e.g., section 7 of E.O. 10501, as amended.

^{7/} See footnote 5, supra.

^{8/} For purposes of section 3(b)(3), the authority of the "agency head" in the Department of Defense may properly be delegated to the Secretary of the Military Department, as provided in para. III.B.1 of DoD Directive 1426.1. Cf. IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9, dated March 9, 1971.

The record is unclear in the present case as to whether the Secretary of the Navy had assured himself of the facts and made the necessary personal determination to exclude the employee group here sought by the union. Accordingly, pursuant to section 2411.20 of the Council's rules of procedure, the case is remanded to the Assistant Secretary to obtain a clear and explicit statement from the Secretary of the Navy and then to take further appropriate action consistent with this decision of the Council.

By the Council.



W. V. Gill
Executive Director

Issued: January 19, 1972

IAM-AW Local Lodge 830 and Naval Ordnance Station, Louisville, Ky.

The dispute concerned the negotiability of the union's proposed grievance and arbitration procedures under sections 13 and 14 of E.O. 11491 and related Navy and CSC requirements. Following the Council's acceptance of the appeal, E.O. 11616 was adopted and became effective, revoking section 14 and materially revising section 13 of E.O. 11491; making inapplicable the CSC regulations involved; and in effect requiring amendment of the disputed Navy directive.

Council action (January 21, 1972). The Council denied the union's appeal as moot, without passing on the merits of the questions raised in the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 21, 1972

CERTIFIED MAIL

Mr. Floyd E. Smith, International President
International Association of Machinists and
Aerospace Workers, AFL-CIO
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. William C. Valdes
Staff Director
Office of Personnel Policy
Office of Assistant Secretary
of Defense
The Pentagon
Washington, D.C. 20301

Re: IAM-AW Local Lodge 830 and Naval Ordnance
Station, Louisville, Ky., FLRC No. 71A-28

Gentlemen:

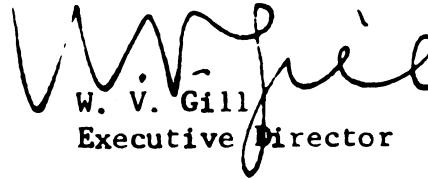
Reference is made to the union's petition for review of a negotiability dispute in the above-entitled case, which appeal was accepted for review by the Council on August 26, 1971.

The conflict between the parties, as appealed to the Council, concerned the negotiability of the union's proposed grievance and arbitration procedures, under sections 13 and 14 of E.O. 11491 and related Navy and CSC requirements. After the Council's acceptance of the petition for review, E.O. 11616 was adopted, effective November 24, 1971, which revoked section 14 and materially revised section 13 of E.O. 11491; made inapplicable the CSC regulations involved; and in effect required amendment of a Navy directive the validity of which was a principal issue in the appeal.

In the Council's opinion, the foregoing changes effected by E.O. 11616 have clearly rendered moot the negotiability dispute presented in the instant case and require dismissal of the union's appeal on that ground. Accordingly, the Council has directed that the union's petition for review be dismissed, without passing on the merits of the questions raised in the appeal.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: Mr. J. F. Griner
AFGE

NFFE Local 476 and Department of the Army. The union petitioned for review of a dispute over the validity of Army regulations concerning the waiting period for quality increases. However, it did not appear from the appeal that the dispute arose "in connection with negotiations" between the union and the agency. Nor did the union identify or advert to any "proposal" sought to be included in any agreement concerning the matter.

Council action (January 21, 1972). The Council denied review since the union's appeal failed to meet the conditions prescribed for review in section 11(c)(4) of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 21, 1972

Mr. Herbert Cahn, President
National Federation of Federal
Employees Local 476
P. O. Box 204
Little Silver, New Jersey 07739

Re: NFFE Local 476 and Department of the
Army, FLRC No. 71A-50

Dear Mr. Cahn:

Reference is made to your appeal to the Council, under section 11(c)(4) of the Order and section 2411.12(a) of the Council's rules of procedure, for review of a dispute over the validity of certain agency regulations, in the above-entitled case.

The Council has carefully considered your appeal, and the opposition thereto filed by Department of the Army, and has decided that review of your appeal must be denied.

Section 11(c)(4) of the Order, which is incorporated by reference in section 2411.12(a) of the Council's rules, provides in context as follows:

Sec. 11. Negotiation of agreements . . .

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

- (1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;
- (2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;
- (3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;
- (4) 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

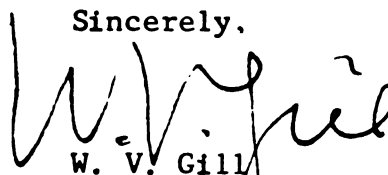
(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.
(underscoring in body supplied)

The dispute in the present case over the validity of Army's regulations does not appear from your appeal to have arisen "in connection with negotiations" between your union and the agency. Moreover, you have not identified nor adverted to any "proposal" sought to be included in any agreement concerning the matter.

Under these circumstances, your appeal fails to meet the conditions prescribed for review in section 11(c)(4) of the Order, and the Council has directed, in accordance with section 2411.12(a) of its rules, that review of your appeal be denied.

For the Council.

Sincerely,



W. V. Gill
Executive Director

cc: G. L. Olmsted
Army

AFGE Local 361 and National Naval Medical Center (Bethesda Naval Hospital), Bethesda, Md. The controversy between the parties related to the negotiability of the union's grievance and arbitration proposal under sections 13 and 14 of E.O. 11491 and pertinent Navy and CSC requirements. After the determination by the agency and the filing of the appeal by the union, E.O. 11616 became effective, revoking section 14 and materially revising section 13 of E.O. 11491; making inapplicable the CSC regulations involved; and in effect requiring amendment of the subject Navy directive.

Council action (January 24, 1972). The Council denied review on the ground of mootness, without passing on the merits of the questions raised in the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 24, 1972

Mr. John F. Griner
National President
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: AFGE Local 361 and National Naval Medical
Center (Bethesda Naval Hospital), Bethesda,
Md., FLRC No. 71A-51

Dear Mr. Griner:

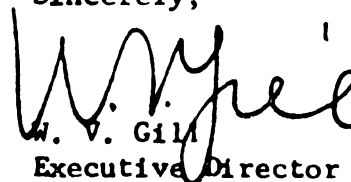
Reference is made to your petition for review of a negotiability determination by the Department of the Navy, in the above-entitled case.

The dispute between your organization and the Navy, as reflected in your appeal, concerns the negotiability of the union's proposed grievance and arbitration procedures, under sections 13 and 14 of E.O. 11491, and related Navy and CSC requirements. After the determination by the Navy and after your appeal to the Council, E.O. 11616 became effective, revoking section 14 and materially revising section 13 of E.O. 11491; making inapplicable the CSC regulations involved; and in effect requiring amendment of the Navy directive, the validity of which is the principal issue in your appeal.

In the Council's opinion, the above changes effected by E.O. 11616 have clearly rendered moot the negotiability dispute presented in this case and require denial of your petition on that ground. Accordingly, the Council has directed that your petition for review be denied, without passing on the merits of the questions raised in your appeal.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: Robert H. Willey
Navy

Department of Labor (Decision and Order of Vice Chairman of U.S. Civil Service Commission). The Vice Chairman dismissed an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 12 and Council of Field Labor Lodges, which alleged that Labor violated section 19(a)(1), (5) and (6) of the Order by unilaterally excluding a group of employees of the Labor Management Services Administration, under section 3(d) of the Order, from units represented by AFGE. The union appealed to the Council, claiming that the Vice Chairman's decision relating to unilateral action by Labor presents a major policy issue; and that his decision with respect to the exclusion of two particular employees was arbitrary and capricious.

Council action* (April 11, 1972). The Council denied review, since the Vice Chairman's decision upholding the unilateral action by Labor did not present a major policy issue in view of the specific language of section 3(d) of the Order and, with respect to exclusion of the two named employees, did not appear arbitrary and capricious.

*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

April 11, 1972

Mr. James L. Neustadt
Staff Counsel
American Federation of
Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: Department of Labor (Decision and Order of
Vice Chairman of U.S. Civil Service Commis-
sion), FLRC No. 71A-43

Dear Mr. Neustadt:

The Council has carefully considered your petition for review of the Vice Chairman's decision in the above-entitled case, which dismissed your complaint alleging violations by the Department of Labor of section 19(a)(1), (5) and (6) of the Order. These alleged violations were based, in substance, on Labor's unilateral action, under section 3(d) of the Order, in excluding LMSA employees from units represented by AFGE, shortly after the effective date of E.O. 11491.

Your request for review asserts that a major policy issue is present, namely, whether exclusions made pursuant to section 3(d) are subject to negotiation and consultation by the parties. Further, your petition contends that the Vice Chairman's decision with respect to the exclusions of two particular employees (Jaworski and Thurber) was arbitrary and capricious because: (1) As to Jaworski, the Vice Chairman assumed, "without the aid of record evidence," that this employee's erroneous exclusion had been corrected; and (2) as to Thurber, the decision on the merits of the exclusion was made "without the benefit of proper and sufficient record evidence."

Section 3(d), relating to "Application" of the Order, provides as follows:

(d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

The unequivocal language of this section, in the light of its context and manifest purpose, clearly required the prompt and unilateral exclusion of

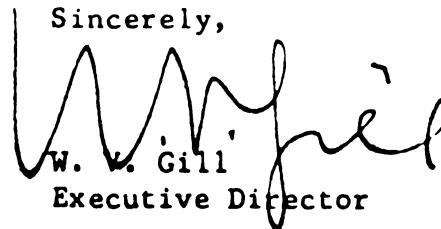
employees engaged in administering the Order, from units represented by a union which also represents other employees under a labor-management relations law or the Order -- subject, of course, to review in third party proceedings to correct any errors in this regard. Therefore, the Vice Chairman's decision upholding such action taken by Labor under 3(d) with regard to LMSA employees engaged in administering the Order presents no major policy issue.

As to employee Jaworski, the Vice Chairman clearly did not predicate his decision on any assumption that this employee's erroneous exclusion had been corrected. With respect to employee Thurber, while you question the adequacy of record evidence to support the Vice Chairman's decision, you neither allege in your appeal, nor offer to prove, any facts which would indicate that the Vice Chairman's decision was arbitrary and capricious.

Since the Vice Chairman's decision does not present a major policy issue or appear to be arbitrary and capricious, your petition fails to meet the requirements for review as provided in section 2411.12(c) of the Council's rules of procedure. The Council has, therefore, directed that review of your appeal be denied.

The Secretary of Labor did not participate in this decision.

By direction of the Council.

Sincerely,

W. W. Gill
Executive Director

cc: J. B. Spain
CSC

G. L. Paley
Labor

United States Treasury Department, Bureau of Customs, Region V, New Orleans, Louisiana, A/SLMR No. 65. The Assistant Secretary dismissed a representation petition filed by the National Customs Service Association because that union currently represented the employees sought, neither the Activity nor a petitioning union challenged NCSA's majority status, and, therefore, no valid question concerning representation was raised by NCSA's petition. Further, the Assistant Secretary, in his decision as clarified, dismissed the intervention in this case by American Federation of Government Employees, AFL-CIO, Local 2891, since AFGE's status as an intervenor did not raise a valid question concerning representation, and since AFGE's interest showing of less than 30 percent was insufficient, under his regulations, to warrant the conduct of an election. AFGE appealed to the Council, contending in effect that its intervenor status required that an election be conducted.

Council action (April 24, 1972). The Council denied review, since the Assistant Secretary's decision as clarified neither appeared arbitrary and capricious nor presented a major policy issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 24, 1972

Mr. Raymond J. Malloy
Associate Staff Counsel
American Federation of Government
Employees, AFL-CIO
400 First Street, N.W.
Washington, D.C. 20001

Re: United States Treasury Department,
Bureau of Customs, Region V, New
Orleans, Louisiana, A/SLMR No. 65,
FLRC No. 71A-37.

Dear Mr. Malloy:

The Council has carefully considered your petition for review of that portion of the Assistant Secretary's decision in the above-captioned case, which dismissed the representation petition filed by National Customs Service Association in this consolidated proceeding.

In his decision, the Assistant Secretary dismissed NCSA's petition because that union currently represented the employees sought, there was no challenge to its majority status by the Activity or a petitioning labor organization, and, therefore, no valid question concerning representation was raised by the petition. Further, in his decision, as clarified by his letter of January 7, 1972 (a copy of which was previously furnished to you and is again here attached), the Assistant Secretary dismissed your intervention in that proceeding since your status as an intervenor did not raise a valid question concerning representation. Moreover, your interest showing of less than 30 percent was insufficient, under his regulations, to warrant the conduct of an election.

You assert in your appeal that the Assistant Secretary's decision is arbitrary and capricious, and presents a major policy issue, substantially because your status as an intervenor required that an election be conducted.

In the Council's opinion, the Assistant Secretary's decision, as clarified, not to proceed to an election based on your intervention neither appears

arbitrary and capricious nor presents a major policy issue. Accordingly,

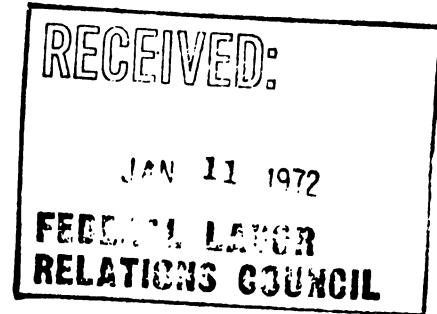
U.S. DEPARTMENT OF LABOR

OFFICE OF THE ASSISTANT SECRETARY

WASHINGTON, D.C. 20210



JAN 7 1972



Mr. W. V. Gill
Executive Director
United States Federal Labor
Relations Council
1900 E Street, NW.
Washington, D. C. 20415

Re: United States Treasury Department,
Bureau of Customs, Region V,
New Orleans, Louisiana
A/SLMR No. 65, FLRC No. 71A-37

Dear Mr. Gill:

This is in response to your letter of December 13, 1971, in which, by direction of the Council, you request certain information in clarification of my decision in the above-entitled case to assist the Council in determining whether to accept the American Federation of Government Employees' (AFGE) petition for review. The AFGE's petition for review raises the question whether it was proper to dismiss the petition filed by the currently recognized exclusive representative, National Customs Service Association (NCSA), for a unit identical to the one it already represents on the basis that no question concerning representation existed in circumstances where another labor organization had intervened timely. Your letter indicates that it is unclear from my decision: (a) whether I considered the AFGE's status as an intervenor in dismissing the NCSA's petition in Case No. 64-1132 E of the consolidated proceeding; and, (b) if AFGE's status was considered, the reasons upon which I relied in support of my action.

In answer to your first inquiry, I can assure you that the status of the AFGE as an intervenor in Case No. 64-1132 E was considered in arriving at my decision in the subject case.

As to your second question concerning the reasons for my disposition of the subject case, under the Regulations a petition for exclusive representation may be filed only by a labor organization which has a showing of interest of not less than thirty (30) percent of the

employees in the unit claimed to be appropriate. This requirement was established to avoid unnecessary public expense in proceeding to elections where the petitioning labor organization was unable to demonstrate that a substantial number of employees in the unit claimed to be appropriate sought to be represented. Thus, a labor organization with less than thirty (30) percent showing of interest has no standing to file a petition for exclusive recognition and, in effect, cannot raise a valid question concerning representation warranting the holding of an election. However, once a petition for exclusive recognition has been filed, accompanied by the prescribed showing of interest, the Regulations provide that a labor organization which has a ten (10) percent showing of interest or has submitted a current or recently expired agreement with the Activity covering any of the employees involved, or is the currently recognized or certified exclusive representative of any of the employees involved, may seek to intervene in the proceedings initiated by the petitioner. In this regard, it is clear that an intervenor's rights are dependent on the ultimate disposition of the petition. Thus, if dismissal of the petition is found to be warranted, any intervention in that proceeding similarly would fall because, in effect, there no longer would exist any valid question concerning representation nor any proceeding in which to intervene.

Applying the foregoing principles to the subject case, the dismissal of the NCSA petition, based on the view that, in the circumstances, it did not raise a valid question concerning representation because there was no challenge to its majority status by the Activity or a petitioning labor organization, required that the AFGE intervention in that matter also be dismissed because, as stated above, a labor organization with intervenor status does not have standing to raise a valid question concerning representation. Moreover, it is clear that the AFGE had less than a thirty (30) percent showing of interest in Case No. 64-1132 E, and that proceeding to an election based solely on its intervention status would be tantamount to holding an election where the labor organization involved had an inadequate showing of interest.

I trust, in connection with the Council's deliberations, that the above information will help clarify my decision in the subject case.

Sincerely,

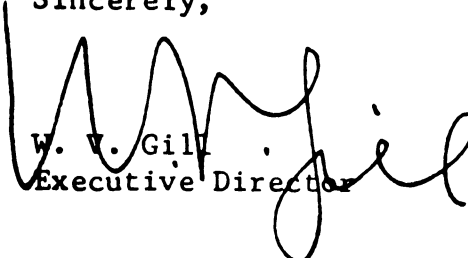


W. J. Usery, Jr.
Assistant Secretary of Labor

arbitrary and capricious nor presents a major policy issue. Accordingly, since your petition fails to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

Attachment

cc: W. J. Usery, Jr.
Dept. of Labor

T. J. Rojeck
Bureau of Customs

T. M. Gittings
NCSA

FLRC No. 72A-21

U.S. Army Electronics Command, Army Aviation Detachment, Fort Monmouth, New Jersey, Assistant Secretary Case No. 32-2468. NFFE Local 476 appealed to the Council from the Assistant Secretary's dismissal of its challenge to the validity of the showing of interest submitted by AFGE Local 1904 (an intervenor in this proceeding).

Council action (May 2, 1972). The Council denied review of NFFE'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 representation case by the Assistant Secretary.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1972

Mr. Herbert Cahn, President
Local 476, National Federation
of Federal Employees
P.O. Box 204
Little Silver, New Jersey 07739

Re: U.S. Army Electronics Command, Army
Aviation Detachment, Fort Monmouth,
New Jersey, Assistant Secretary Case
No. 32-2468, FLRC No. 72A-21

Dear Mr. Cahn:

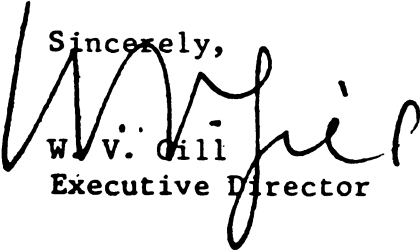
This refers to your petition for review of the February 29, 1972 decision of the Assistant Secretary in the above-captioned case.

Your letters dated April 7 and April 19, 1972 indicate that the subject decision, to which your appeal is addressed, involves the Assistant Secretary's dismissal of your challenge to the validity of the showing of interest submitted by AFGE Local 1904 as an intervenor in this representation proceeding.

Section 2411.13(a) of the Council's rules prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision in a case such as here involved until a final decision has been rendered on the entire proceeding before him. Since a final decision has not been so rendered, the Council has directed that your appeal be 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.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

D. A. Dresser
Army

E. Harvey
AFGE

United States Department of the Treasury, Office of Regional Counsel, Western Region, A/SLMR No. 161. The agency appealed to the Council from the Assistant Secretary's decision and direction of election, and sought a stay of the election pending Council determination of its appeal.

Council action (June 14, 1972). The Council 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. The Council likewise denied the agency's request for stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 14, 1972

Mr. Samuel R. Pierce, Jr.
General Counsel
United States Department of
Treasury
Washington, D.C. 20224

Re: United States Department of the Treasury,
Office of Regional Counsel, Western Region,
A/SLMR No. 161, FLRC No. 72A-26

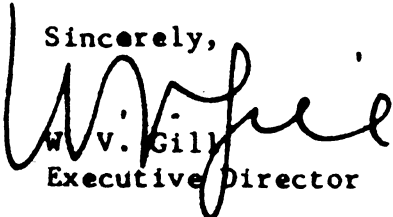
Dear Mr. Pierce:

Reference is made to your petition for review, and your request for stay of election pending decision on your appeal, in the above-entitled case.

Section 2411.13(a) of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision 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, the Council has directed that your appeal be 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 stay pending decision on your appeal is therefore likewise denied.

By direction of the Council.

Sincerely,

W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

R. Tobias
NAIRE

Veterans Administration Center, Togus, Maine, A/SLMR No. 84; Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89. The Assistant Secretary dismissed representation petitions filed by affiliates of the American Nurses Association seeking severance of registered nurses from established larger units (which units also included other professionals) at the respective activities. The unions appealed to the Council alleging that "unusual circumstances" are present in these cases which warrant severance, principally because of the special status accorded professional employees under section 10(b)(4) of the Order.

Council action (June 22, 1972). The Council held that, since 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, the Assistant Secretary's decisions do not appear arbitrary and capricious and do not present any major policy issue. Accordingly, the Council denied review under section 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 22, 1972

Mr. Patrick E. Zembower
Associate Director
American Nurses Association
1030 15th Street, N.W.
Washington, D.C. 20005

Re: Veterans Administration Center, Togus, Maine,
A/SLMR No. 84, FLRC No. 71A-42; and
Veterans Administration Center, Mountain Home,
Tennessee, A/SLMR No. 89, FLRC No. 71A-45

Dear Mr. Zembower:

The Council has considered your petitions for review of the Assistant Secretary's decisions in the above-captioned cases, denying severance of registered professional nurses from established larger units at the respective activities.

Your requests for review assert that the Assistant Secretary's application of his decision in United States Naval Construction Battalion Center, A/SLMR No. 8, as the basis for denying severance in the instant cases is an arbitrary and capricious act and presents a major policy issue. In this connection, you contend that "unusual circumstances" are present in these cases which warrant severance principally because of the special status accorded professional employees by section 10(b)(4) of the Order.

Section 10(b) of the Order provides in pertinent part:

(b) 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. A unit shall not . . . be established if it includes --

(4) both professional and non-professional employees, unless a majority of the professional employees vote for inclusion in the unit.

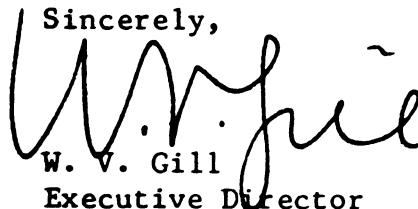
The established unit from which severance of the nurses was sought in Veterans Administration Center, Togus, Maine, comprised all eligible professional employees. In Veterans Administration Center, Mountain Home, Tennessee, the unit comprised all eligible professional employees and non-professional employees. In both cases, the units included professional employees in several occupations other than nursing.

In the Council's opinion, nothing in section 10(b)(4) implies or requires that a segment of professionals be accorded any special right of severance from more comprehensive units of an activity's employees. Therefore, the Assistant Secretary's determination in the instant cases that no "unusual circumstances" are present to warrant severance under his Naval Construction decision neither appears arbitrary and capricious nor presents a major policy issue.

Accordingly, as your appeals fail to meet the requirements for review as provided under section 2411.12(c) of the Council's rules of procedure, the Council has directed that review of your appeals be denied. The Council has further directed that your requests for oral argument also be denied since the petitions, and the oppositions thereto, adequately reflect the issues and positions of the parties.

By direction of the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. V. Gill".

W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

R. E. Coy
VA

Pres., Local 902
NFFE

Pres., Local 2610
AFGE

G. B. Landsman
AFGE

United States Public Health Service Hospital, Department of Health, Education, and Welfare, A/SLMR No. 82. The Assistant Secretary dismissed a representation petition filed by the California Licensed Vocational Nurses Association (CLVNA), finding inappropriate the requested unit of licensed practical or vocational nurses employed at the activity. CLVNA appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious because, based upon the record and upon evidence allegedly excluded in error from the record, the LVN's met the criteria for a separate unit under the Order. Also, the union asserted that major policy issues were presented because (1) the denial of separate representation for LVN's conflicted with other Federal policies; and (2) the Assistant Secretary's decision would require employees to disrupt agency operations in order to secure separate representation.

Council action (June 23, 1972). The Council held that the Assistant Secretary did not appear to have acted willfully or without justification either in his findings or in upholding the rulings of the hearing officer. Further, the Council held that the Assistant Secretary's decision, which properly considered and invoked the criteria for an appropriate unit in the Order, did not appear to conflict with any other Federal policy or program, or to indicate that disruption of operations by the employees involved would warrant separate representation. Accordingly, since the Assistant Secretary's decision did not appear to be arbitrary and capricious or to present a major policy issue, the Council denied review under section 2411.12(c) of its rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 23, 1972

Mr. Joel Goldfarb
Nason & Goldfarb, Inc.
2437 Durant Avenue
Suite 204
Berkeley, California 94704

Re: United States Public Health Service Hospital,
Department of Health, Education, and Welfare,
A/SLMR No. 82, FLRC No. 71A-47

Dear Mr. Goldfarb:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case, which dismissed the California Licensed Vocational Nurses Association's petition for representation of a unit of licensed practical or vocational nurses at the United States Public Health Service Hospital, San Francisco, California.

Your request for review asserts that the Assistant Secretary's decision was arbitrary and capricious because, based upon the record and upon evidence allegedly excluded in error from the record by the hearing officer, the proposed unit met the criteria for a separate unit required under section 10 of E.O. 11491. Further, your petition contends that major policy issues are in effect presented because denial of separate representation for LVN's prevents them from improving their status "contrary to other Federal policies encouraging emergence of LVN's as a distinct subprofessional group," and because the Assistant Secretary's decision would require that employees disrupt agency operations in order to secure separate representation.

With respect to your contentions relating to the matters relied upon by the Assistant Secretary in his determination, it does not appear that the Assistant Secretary acted willfully or without justification either in his findings or in his upholding of the rulings of the hearing officer.

As to your claim that denial of separate representation for LVN's is contrary to other Federal policies, section 10(b) of the Order clearly establishes the criteria which are to be applied in determining a unit appropriate for exclusive recognition, and these were the criteria properly considered and invoked

by the Assistant Secretary in the present case. Moreover, it does not appear that a denial of separate representation for LVN's conflicts in any manner with any other Federal policy or program.

As to your further assertion that the Assistant Secretary's decision would require LVN's to disrupt agency operations in order to secure separate recognition, such contention is obviously without merit. The Assistant Secretary concluded that LVN's lack a separate community of interest, and that separate representation would impede effective dealings and efficiency of agency operations (or, in other words, would not meet the section 10(b) criteria that a unit must "promote effective dealings and efficiency of agency operations"), based upon all his detailed findings, not just the fact that past bargaining on an activity-wide basis reflected no impediment to agency operations. Manifestly, the Assistant Secretary neither stated, nor implied, that if the LVN's had engaged in unlawful or other disruptive conduct, such action would have warranted separate representation for the employees involved. And certainly the Assistant Secretary's decision cannot be construed as suggesting that if the LVN's should take such action in the future, which might subject them or their organization to sanctions under law or the Order, it would compel a different result.

Accordingly, since the Assistant Secretary's decision does not appear to be arbitrary and capricious or present a major policy issue, your petition fails to meet the requirements for review set forth in section 2411.12(c) of the Council's rules of procedure. The Council has, therefore, directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Acting Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

H. F. Ortmeyer
HEW

C. Turner
AFGE

F. Drozak
SIU

W. M. Manning
NMU

W. Bennet
UTIPEU

Department of the Army, U.S. Army Electronics Command, Medical Department Activities, Fort Monmouth, New Jersey, Assistant Secretary Case No. 32-1995 (RO). The Assistant Secretary denied review of objections filed by NFFE Local 476 to an election won by AFGE Local 1904; rejected NFFE's contentions relating to certain challenged ballots; and ordered the certification of AFGE in the unit at the activity. NFFE appealed to the Council, alleging that the decision was arbitrary and capricious and in effect presented a major policy issue principally because the Assistant Secretary (1) failed to consider and respond to all its arguments; (2) erred in finding no adequate evidence supported its objections; and (3) failed to order a hearing and to provide NFFE with access to the entire case file.

Council action (July 6, 1972). The Council held that the Assistant Secretary's decision shows he considered and discussed all relevant grounds presented in NFFE's appeal to him. The Council further held that NFFE, in its appeal to the Council, did not allude to any material evidence submitted or offered to the Assistant Secretary in support of its objections; did not identify any substantial factual issues which required a hearing; and did not show that NFFE had requested or was denied proper access to any case materials. Accordingly, since the Assistant Secretary's decision did not appear arbitrary and capricious or present a major policy issue, the Council denied review under section 2411.12(c) of its rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 6, 1972

Mr. Herbert Cahn, President
Local 476
National Federation of Federal
Employees
P.O. Box 204
Little Silver, New Jersey 07739

Re: Department of the Army, U.S. Army
Electronics Command, Medical Department
Activities, Fort Monmouth, New Jersey,
Assistant Secretary Case No. 32-1995
(RO), FLRC No. 71A-58

Dear Mr. Cahn:

The Council has carefully considered your petition for review of the Assistant Secretary's decision which dismissed your objections to the election and rejected your contentions relating to certain ballots, in the above-entitled case.

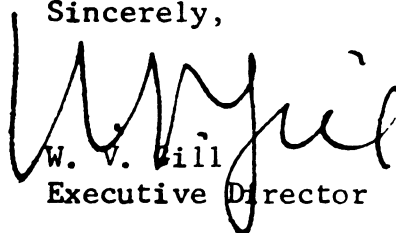
Your petition asserts that the Assistant Secretary's decision is arbitrary and capricious and, in effect, presents a major policy issue, principally because (1) the Assistant Secretary failed to consider and respond to various grounds set forth in your appeal to him from the Regional Administrator's decision; (2) contrary to the Assistant Secretary's findings, ample evidence was allegedly submitted in support of your objections; and (3) the Assistant Secretary improperly failed to order a hearing and to provide your union with access to the complete case file.

As to (1) the Assistant Secretary's decision shows that he considered and discussed the relevant grounds set forth in your appeal to him. With respect to (2), your petition fails to allude to any material evidence which you submitted or offered to submit to the Assistant Secretary in support of your objections. And, as to (3), your appeal does not identify any substantial factual issues which required a hearing by the Assistant Secretary, nor does it show that you requested or were denied proper access to any case materials.

Accordingly, the Assistant Secretary's decision does not appear to be arbitrary and capricious or to present a major policy issue. Therefore, your petition fails to meet the requirements for review as provided in section 2411.12(c) of the Council's rules of procedure, and the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



W. V. Hill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

L. S. Edmiston
Army

Pres., Local 1904
AFGE

Staff Counsel
AFGE

U.S. Army Natick Laboratories and National Association
of Government Employees, Local R1-34 (Myers, Arbitrator),
FLRC No. 72A-6

Appeal returned: March 24, 1972

Subsequent submission dismissed as untimely: July 10, 1972

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 10, 1972

Mr. Gregory L. Chiriaco
Vice President
National Association of Government
Employees, Local R1-34
36 Concord Street
Framingham, Mass. 01701

Re: U.S. Army Natick Laboratories and National
Association of Government Employees, Local
R1-34 (Myers, Arbitrator), FLRC No. 72A-6

Dear Mr. Chiriaco:

Reference is made to your petition for review of an arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

The arbitrator issued his subject award on January 13, 1972. While you submitted a letter of appeal on January 31, 1972, your appeal was deficient under the Council's rules of procedure and you were informed, on February 4, 1972, that further processing of your petition depended upon prompt compliance with the requirements of the Council's rules, particularly sections 2411.13(a) and (c), 2411.15 and 2411.16(a). No additional submittal was then received from your organization. Consequently, on March 24, 1972, you were advised that further processing of your petition was not indicated and your letter of appeal was returned therewith.

On April 3, 1972, you submitted a completed petition for review, with enclosures. However, no request for an extension of time to make such submission was previously filed with or granted by the Council. And no persuasive reason is asserted in your submission for granting such an extension at this time.

Accordingly, as contended by the agency in its opposition, your appeal as submitted on April 3, 1972, is clearly untimely filed under section 2411.14(a)

of the Council's rules of procedure. Because of this untimeliness, and apart from other considerations, the Council has directed that your petition for review be denied.

By direction of the Council.

Sincerely,



W. V. Gill
Executive Director

cc: W. Schrader
Army

NAGE Local R14-83 and Texas National Guard. The agency head issued his determination on the negotiability of the union's proposal, on December 3, 1971. The determination was addressed to the union's national vice-president who had requested the determination, at the Washington, D.C., location of the union listed on the union's letterhead. The appeal, based on the date of the determination, was due no later than December 27, 1971, under section 2411.14 of the Council's rules. However, the appeal was not filed until February 3, 1972. While the union indicated in its appeal that "concerned NAGE officials" were not notified of the determination until on or after January 11, 1972, the union did not deny that, as stated by the agency, the determination was mailed on December 3, 1971. Nor did the union indicate that the determination was not duly received by the union's Washington office in the customary time and manner.

Council action (July 10, 1972). Since 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

July 10, 1972

Mr. Charles E. Hickey, Jr.
National Vice President
National Association of
Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Re: NAGE Local R14-83 and Texas National Guard,
FLRC No. 72A-7

Dear Mr. Hickey:

Reference is made to your petition for review of an agency head's decision on a negotiability issue, and the agency's opposition to your petition, filed with the Council in the above-entitled case.

Upon careful consideration, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

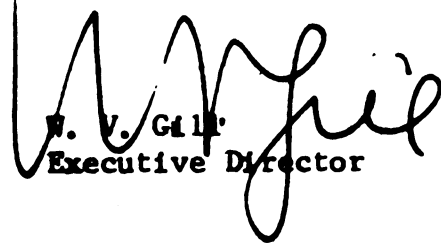
Section 2411.14(a) of the Council's rules provides that an appeal must be filed within 20 days from the date of service of an agency head's decision; under section 2411.14(f) three additional days are allowed when service is by mail; and under section 2411.14(g) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit.

The agency head's determination in this case was dated December 3, 1971, and was addressed to you at the Washington, D.C. address of your organization, listed on your letterhead. While you indicate in a footnote in your appeal that "concerned NAGE officials" were not "officially notified" of this determination until on or after January 11, 1972, you do not deny that, as stated by the agency, the determination was in fact mailed to you on December 3, 1971. Nor do you indicate that such determination was not properly received by your Washington office in the customary time and manner.

Accordingly, since your petition for review was due on or before December 27, 1971, and was not received by the Council until February 3, 1972, the petition was untimely filed under the Council's rules. For this reason, and apart from other considerations, the Council has directed that your petition for review be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: W. C. Valdes
DoD

U.S. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, and Federal Employees Metal Trades Council, AFL-CIO, Vallejo, California (McNaughton, Arbitrator). The arbitrator issued his award in this case on January 12, 1972, and any appeal from this award was due, under section 2411.14 of the Council's rules, no later than February 4, 1972. However, the union made no submittal by way of an appeal until after March 1, 1972, and no persuasive reason was advanced for waiving this untimeliness.

Council action (July 10, 1972). Since 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

July 10, 1972

Mr. Herbert Fuller
Friedman and Fuller
Attorneys At Law
601 Georgia Street, Suite 202
Vallejo, Calif. 94590

Re: U.S. Department of the Navy, Mare Island
Naval Shipyard, Vallejo, California, and
Federal Employees Metal Trades Council,
AFL-CIO, Vallejo, California (McNaughton,
Arbitrator), FLRC No. 72A-14

Dear Mr. Fuller:

Reference is made to your petition for review of an arbitrator's award, filed with the Council in the above-entitled case.

The Council has carefully considered all the documents submitted in this case, including your petition, the request for extension of time limits filed on your behalf by the Metal Trades Department, the motion and memorandum in opposition filed by the Department of the Navy, and your brief in support of the petition. For the reasons indicated below, the Council has determined that your petition cannot be accepted for review.

Section 2411.14(a) of the Council's rules specifically provides that an appeal must be filed within 20 days from the date of service of an arbitrator's award; under section 2411.14(f) three additional days are allowed when service is by mail; and under section 2411.14(g) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit.

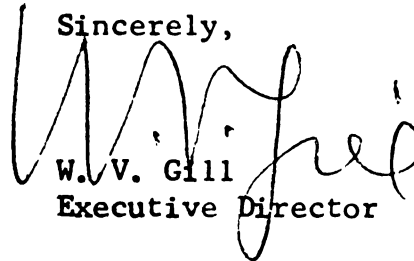
The arbitrator's award was issued in this case on January 12, 1972, and your appeal was therefore due on or before February 4, 1972. However, no submittal to the Council by way of an appeal was made by your union until after March 1, 1972. And neither the request for extension of time, which was filed on your

behalf by the Metal Trades Department on March 30, 1972, nor your brief in support of petition, which was filed on May 15, 1972, advances any persuasive reason why this untimeliness should be waived.

Accordingly, as your appeal was untimely filed, and apart from other considerations, the Council has directed that your petition for review be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. V. Gill', written over the typed name and title.

W. V. Gill
Executive Director

cc: S. M. Foss
Navy

P. J. Burnsky
IAM

NFFE Local 476 and U.S. Army Electronics Command, Fort Monmouth, New Jersey. The union appealed from a negotiability dispute, under section 11(c)(4) of the Order. However, it did not appear from the union's appeal, nor did the union allege, that any agency head determination had been rendered in the dispute.

Council action (July 14, 1972). The Council denied review since the union's appeal failed to meet the conditions prescribed for review in section 11(c)(4) of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 14, 1972

Mr. Herbert Cahn, President
National Federation of Federal
Employees Local 476
P. O. Box 204
Little Silver, New Jersey 07739

Re: NFFE Local 476 and U.S. Army Electronics
Command, Fort Monmouth, New Jersey, FLRC
No. 72A-29

Dear Mr. Cahn:

Receipt is acknowledged of your petition for review of a negotiability dispute, filed on July 11, 1972, in the above-entitled case.

Your appeal adverts to a letter of June 26, 1972, from the Federal Service Impasses Panel, in Case No. 72 FSIP 6, involving the same parties as here involved. That letter reads in pertinent part as follows:

The Panel determines, in accordance with Section 2471.6 of its Rules of Procedure, that the Union's proposal on the competitive area for reduction-in-force purposes, which the Employer alleges to be nonnegotiable, should be handled in accordance with the procedures set forth in section 11(c) of the Order, as amended . . .

Section 11(c)(4) of the Order, which is incorporated by reference in section 2411.12(a) of the Council's rules, provides in context as follows:

Sec. 11. Negotiation of agreements . . .

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when --

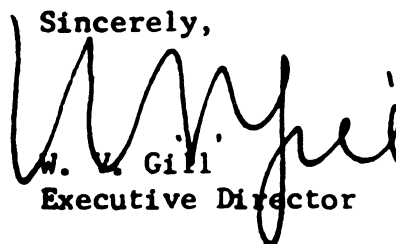
- (i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or
 - (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.
- (underscoring in body supplied)

It does not appear from your appeal, nor do you allege, that any agency head's determination has been rendered in your dispute, as required under the above provisions of section 11(c) of the Order.

Under these circumstances, and apart from other considerations, your appeal fails to meet the conditions prescribed for review in section 11(c)(4) of the Order, and the Council has directed, in accordance with section 2411.12(a) of its rules, that review of your appeal be denied.

By direction of the Council.

Sincerely,



W. V. Gill
Executive Director

cc: D. Dresser
Army

DCA Field Office, Ft. Monmouth, New Jersey, Assistant Secretary Case No. 32-2457 (25) E.O. NFFE Local 476 filed a representation petition seeking certification as exclusive representative of a single employee unit. The Assistant Secretary dismissed the petition, finding that such a unit is inappropriate under the Order. The union appealed, alleging that the Assistant Secretary erred in his determination.

Council action (August 17, 1972). The Council held that, under the specific language of section 10(b) of the Order (which establishes as one of the criteria for an appropriate unit "a clear and identifiable community of interest among the employees concerned"), more than one employee is required to constitute an appropriate unit for the purpose of exclusive recognition. Accordingly, since the Assistant Secretary's decision did not therefore appear arbitrary and capricious or present a major policy issue, the Council denied review under section 2411.12(c) of its rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 17, 1972

Mr. Herbert Cahn
President, Local 476
National Federation of
Federal Employees
P.O. Box 204
Little Silver, New Jersey 07739

Re: DCA Field Office, Ft. Monmouth, New
Jersey, Assistant Secretary Case No.
32-2457 (25) E.O., FLRC No. 72A-5

Dear Mr. Cahn:

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

Your representation petition sought certification as exclusive representative of a single employee unit. The Assistant Secretary dismissed your petition based upon his determination that such a unit is inappropriate under the Order. You allege that the Assistant Secretary erred in his determination, principally on the grounds that the decision does not fulfill the intent of the Order and that it "ignores" the rights of individual employees.

Section 10(b) of the Order provides in pertinent part:

Sec. 10. Exclusive recognition.

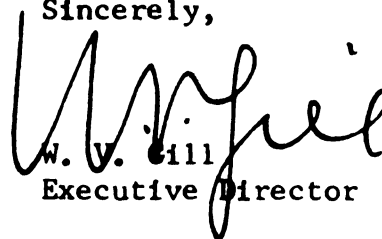
(b) A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. . . .

It is clear from the phrase "community of interest among the employees concerned" in section 10(b), and apart from other considerations, that more than one employee is required to constitute an appropriate unit for the purpose of exclusive recognition of a labor organization representative under the Order.

Accordingly, the Assistant Secretary's dismissal of your representation petition does not appear arbitrary and capricious, or present a major policy issue. As your appeal therefore fails to meet the requirements for review as provided in section 2411.12(c) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



W. V. Hill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

L. S. Edmiston
Army

U.S. Army Training Center, Ft. Jackson Laundry Facility, Ft. Jackson, South Carolina. Assistant Secretary Case No. 40-3491 (CA). The Assistant Secretary dismissed AFGE's unfair labor practice complaint as untimely, because it was filed 31 days after receipt of the final decision of the agency, rather than within 30 days of receipt as required by section 203.2 of his rules. The union appealed to the Council from this decision, alleging that three additional days after service by mail, provided for in section 205.2 of the Assistant Secretary's regulations, was applicable to the 30-day prescribed time limit for filing, and that such additional time should have been granted in accordance with the "liberal construction" provision in section 205.7 of the regulations. However, while the union's appeal contested the correctness of the Assistant Secretary's interpretation and application of his regulations, the appeal did not allege, nor did it appear, that the decision was arbitrary and capricious or that it presented a major policy issue.

Council action (August 17, 1972). The Council denied review since the union's appeal failed to meet the requirements for review under 2411.12(c) of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 17, 1972

Mr. Dolph David Sand
Assistant to the Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Re: U.S. Army Training Center, Ft. Jackson
Laundry Facility, Ft. Jackson, South
Carolina, Assistant Secretary Case No.
40-3491 (CA), FLRC No. 72A-17

Dear Mr. Sand:

The Council has carefully considered your petition for review of the Assistant Secretary's decision which sustained the Regional Administrator's dismissal of your local union's unfair labor practice complaint as untimely filed in the above-entitled case.

The Assistant Secretary based his determination of untimeliness on section 203.2 of his regulations which provides that a complaint shall not be considered timely unless filed within 30 days of receipt by the charging party of the final decision of the other party. The complaint in this case was admittedly filed on the 31st day of receipt of such final decision. The Assistant Secretary considered your contention that an additional three days to file the complaint should have been allowed under section 205.2 of his regulations, which provides for the addition of three days to a prescribed period after service of a notice or paper. However, he determined that section 205.2 was inapplicable inasmuch as the period prescribed by section 203.2 for timely filing of an unfair labor practice complaint is stated as after receipt rather than after service of the final decision.

Your appeal repeats your contention to the Assistant Secretary that the three additional days provided for in section 205.2 would be applicable as an addition to the 30-day prescribed time limit for filing, and asserts further that such additional time could and should have been granted by the Assistant Secretary in accordance with section 205.7(a) of his regulations which provides:

The regulations in this chapter shall be liberally construed to effectuate the purposes and provisions of the order.

While your petition contests the correctness of the Assistant Secretary's interpretation and application of his regulations in this case, you do not allege, nor does it appear, that his decision was arbitrary and capricious or that it presents a major policy issue.

Accordingly, as your appeal fails to meet the requirements for review as provided in section 2411.12(c) of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,


W. V. Gill
Executive Director

cc: D. A. Dresser
Army

Department of the Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. The agency appealed to the Council from the Assistant Secretary's decision and direction of election in a unit sought by NFFE Local 119. However, it did not appear from the appeal that a final decision in the representation matter had been rendered by the Assistant Secretary.

Council action (August 17, 1972). The Council 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

August 17, 1972

Mr. John F. McKune
Director of Personnel
Office of the Secretary
Bureau of Land Management
Department of the Interior
Washington, D.C. 20240

Re: Department of the Interior, Bureau of Land
Management, Riverside District and Land
Office, A/SLMR No. 170, FLRC No. 72A-31

Dear Mr. McKune:

Reference is made to your petition for review in the above-entitled case.

Section 2411.13(a) of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision 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, the Council has directed that your appeal be 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.

By direction of the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. V. Gill".

W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. J. Kozak
NFFE

FLRC Nos. 72A-2 and 72A-4

New Jersey Department of Defense, A/SLMR No. 121; United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120. These two cases involved the same issue, that is, the Assistant Secretary's holding (in cases initiated before him by National Army and Air Technicians Association, and by AFGE, respectively) that an individual must have supervisory authority over more than one employee in order to be a supervisor within the meaning of section 2(c) of the Order. The agencies appealed to the Council, alleging that the Assistant Secretary's decisions were arbitrary and capricious and present major policy issues. Also, NAATA cross-appealed in FLRC No. 72A-2, requesting that the Council review as a major policy issue the propriety of excluding supervisors from units of exclusive recognition and from holding union office.

Council action (September 15, 1972).

With respect to NAATA's cross-appeal, the Council determined that such appeal did not raise matters which may be considered under section 2411.12(c) of the Council's rules and, accordingly, denied review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 15, 1972

Mr. Zachary Wellman
c/o Vladeck, Elias, Vladeck
& Lewis
1501 Broadway
New York, New York 10036

re: New Jersey Department of Defense
A/SLMR No. 121, FLRC No. 72A-2

Dear Mr. Wellman:

The Council has carefully considered your petition for review of the Assistant Secretary's decision and order in the above-entitled matter wherein you contend it "entails a major policy issue which must be addressed by the Council."

In that decision, the Assistant Secretary, in unit clarification proceedings, determined the supervisory status of various individuals under the Order. In your appeal, you urge that the Council undertake a comprehensive review of the provisions of E.O. 11491 which bar supervisors from inclusion in units of exclusive recognition and from holding union office. (You also separately opposed the agency's limited appeal concerning the supervisory status of individuals having only one subordinate. Contrary to your opposition, the Council, as you were advised on September 1, 1972, accepted the agency's petition for review.)

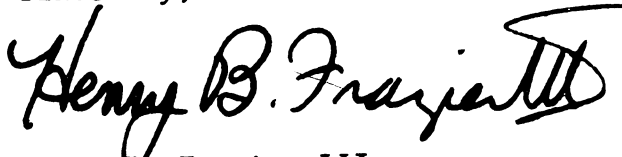
Under § 2411.12(c) of the Council's rules of procedure, review of an Assistant Secretary's decision "will be granted only where there are major policy issues present or where it appears that the decision was arbitrary and capricious."

Your appeal does not raise such contention with respect to the decision of the Assistant Secretary but seeks change in the provisions of the Order respecting supervisors.

Accordingly, it does not appear that your appeal has raised matters which may be considered under § 2411.12(c) of the Council's rules and, therefore, review has been denied. In this connection, the Council plans to hold hearings later this year for the purpose of reviewing experience under the policies of the Order. Timely public notice of such hearings will be issued. The Council will be pleased at that time to consider your views on this and any other matters.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Acting Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. C. Valdes
DOD

Bureau of Retirement and Survivors Insurance (Social Security Administration, DHEW), and National Office of American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) (Trotta, Arbitrator). The union filed its appeal from the arbitrator's award on September 12, 1972. Under section 2411.14 of the Council's rules, the appeal was due no later than September 5, 1972. No extension of time for filing was requested by the union or granted by the Council.

Council action (September 21, 1972). Since 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

September 21, 1972

Mr. Arthur B. Johnson, President
National Council of Social Security
Payment Center Locals
American Federation of Government
Employees
c/o Local 1760
P.O. Box 626
Corona-Elmhurst, New York 11373

Re: Bureau of Retirement and Survivors Insurance
(Social Security Administration, DHEW), and
National Office of American Federation of
Government Employees, AFL-CIO (National
Council of Social Security Payment Center
Locals) (Trotta, Arbitrator), FLRC No. 72A-36

Dear Mr. Johnson:

Reference is made to your petition for review of an arbitrator's award, filed with the Council in the above-entitled case.

Upon careful consideration, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

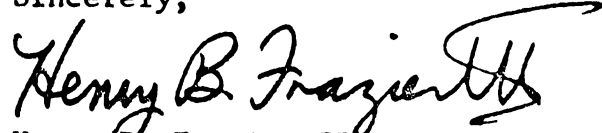
Section 2411.14(a) of the Council's rules provides that an appeal must be filed within 20 days from the date of service of an arbitrator's award; under section 2411.14(f) three additional days are allowed when service is by mail; and under section 2411.14(g) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit. In computing these time limits, as provided in section 2411.14(e) of the Council's rules, if the last day for filing a petition falls on a Saturday, Sunday or Federal legal holiday, the period for filing shall run until the end of the next day which is not a Saturday, Sunday or Federal legal holiday.

The arbitrator's award in this case was dated August 9, 1972, and appears to have been mailed on or about August 10, 1972. Therefore, under the above rules, your appeal was due in the Council's office on or before September 5, 1972. However, your petition for review was not filed until September 12, 1972, and no extension of time was either requested by your organization or granted by the Council under section 2411.14(d) of the Council's rules.

Accordingly, as your appeal was untimely filed, and apart from other considerations, the Council has directed that your petition for review be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Acting Executive Director

U.S. Army Engineer District, Mobile, Alabama, and National Federation of Federal Employees, Local 561, A/SLMR No. 206. NFFE appealed to the Council from the Assistant Secretary's decision and direction of elections in this case. However, it did not appear from the appeal that a final decision in the representation matter had been rendered by the Assistant Secretary.

Council action (November 10, 1972). The Council denied review of the union'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

November 10, 1972

Mr. David J. Markman
Attorney
National Federation of
Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: U.S. Army Engineer District, Mobile,
Alabama, and National Federation of
Federal Employees, Local 561, A/SLMR
No. 206, FLRC No. 72A-43

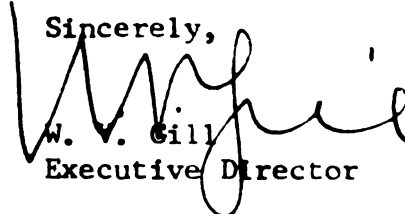
Dear Mr. Markman:

Reference is made to your petition for review in the above-entitled case.

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 an Assistant Secretary's decision 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 certifications of representative or of the results of the elections have 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, the Council has directed that your appeal be 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.

By direction of the Council.

Sincerely,

W. V. Gill
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

W. Schrader
Army

L. Overstreet
NMU

B. I. Waxman
AFGE

Illinois Air National Guard, 182nd Tactical Air Support Group, A/SLMR No. 105. The Assistant Secretary dismissed the unit clarification petition filed by Illinois Air Chapter, Association of Civilian Technicians, Inc. (ACT), and revoked that union's certification of representative, on the grounds that the ACT had entered into "sham stipulations" with respect to voter eligibility in order to obtain its certification. The Council accepted this case for review having determined that major policy issues are present in the Assistant Secretary's decision.

Council action (November 17, 1972). The Council upheld the Assistant Secretary's dismissal of the unit clarification petition. However, the Council viewed as inconsistent with the purposes of the Order the punitive revocation of the certification solely because a party may have taken some action which casts doubt on the validity of the earlier stipulation. Accordingly, the Council set aside the revocation of the certification, insofar as such action was taken because the union took actions inconsistent with its prior stipulation, and remanded the case to the Assistant Secretary for appropriate action.

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

Illinois Air National Guard,
182nd Tactical Air Support Group

A/SLMR No. 105
FLRC No. 71A-59

and

Illinois Air Chapter, Association
of Civilian Technicians, Inc.

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary which dismissed the unit clarification petition filed by the Illinois Air Chapter, Association of Civilian Technicians, Inc. (herein called the union); and which revoked the union's certification of representative in a bargaining unit composed of the activity's air national guard technicians employed at Peoria, Illinois. A brief statement of the necessary facts is set forth below.

On June 25, 1970, a representation election was conducted among the activity's air national guard technicians. The election was conducted pursuant to a consent agreement entered into by the parties and approved by the Assistant Secretary's area administrator. The tally of ballots issued after the counting of the ballots disclosed that the election results were inconclusive since the votes cast for the union (46) did not constitute the required majority of the total of valid votes cast (82) plus challenged ballots (25).

Subsequently, on July 2, 1970, the union and the activity stipulated, in writing, that 16 of the challenged voters were supervisors within the meaning of the Order. The parties' stipulation resolving the status of 15 of the aforementioned challenged voters stated:

It is hereby jointly stipulated by the parties concerned that the following named individuals are certified to be supervisors, as defined by Section 2(c), "General Provisions," Executive Order 11491 and therefore excluded from representation by subject labor organization and

also not eligible to vote in the Instant Certification of Representatives. It is further stipulated as a result of the foregoing, the challenged ballots as cast by the below named individuals should be excluded from the Tally of Ballots . . . 1/

Based upon a revised tally of ballots which reflected these stipulations, the area administrator then determined that the union had received a majority of the valid votes cast and that the remaining unresolved challenged ballots were not determinative. On July 8, 1970, he certified the union as exclusive bargaining representative for the subject bargaining unit.

On September 25, 1970, the activity notified the union, by letter, that it considered 29 named employees to be supervisors within the meaning of the Order and thereby proposed to exclude them from the bargaining unit. This total was comprised of 14 of the 16 persons previously stipulated to be supervisors, 7 of the 9 unresolved challenged voters, and 8 persons whose status previously had not been in issue.

The union thereupon filed the unit clarification petition here involved with the Assistant Secretary, on October 8, 1970, which sought clarification of the status of the 29 persons claimed to be supervisors by the activity. Pursuant to the union's petition, a hearing was conducted by a hearing officer of the Assistant Secretary in which both the activity and the union presented evidence bearing upon the alleged supervisory status of the 29 individuals named in the activity's letter of September 25, 1970.

The Assistant Secretary issued his decision on October 29, 1971, and found that the union had attempted to negate the stipulations by which it had obtained its certification of representative by filing the unit clarification petition. The Assistant Secretary concluded that the union had entered into "sham stipulations" for the sake of expediency and that its conduct constituted flagrant disregard of his established procedure for the resolution of determinative challenged ballots. Upon the foregoing basis, the Assistant Secretary dismissed the unit clarification petition, and, further, ordered that the union's certification of representative be revoked "because of the substantial doubt which has now been cast upon the validity of the prior certification of representative." (The Assistant Secretary made no determination as to the supervisory status of the disputed individuals.)

1/ The parties entered into a separate but similar stipulation with respect to the remaining stipulated supervisor.

The union petitioned the Council for review of the Assistant Secretary's decision. The Council, on June 22, 1972, accepted the petition for review having determined that major policy issues were presented by the Assistant Secretary's decision. A brief was filed timely by the union which has been duly considered. No submission was made by the agency.

Contentions

The union argues that: (1) the filing of its unit clarification petition was proper under the Assistant Secretary's regulations; (2) it did not enter into sham stipulations or attempt to evade prescribed procedures of the Assistant Secretary; (3) the Assistant Secretary failed to note that "the activity was the initiating party in the setting aside of election stipulations"; (4) "The Assistant Secretary made a punitive decision depriving the [union] of exclusive certification . . . without cause, and in doing so deprived the employees of proper coverage of the Order"; and (5) the Assistant Secretary's decision failed to provide a "ruling on the unit appropriateness and therefore did not establish reason for setting aside the results of a secret ballot election as provided for in the Order." The union requests that their certification be returned as of the date of revocation.

Opinion

The issue before the Council is whether, in the circumstances of this case, the purposes and policies of the Order have been effectuated by the Assistant Secretary's dismissal of the union's petition for unit clarification and revocation of its certification of representative. The Assistant Secretary, as detailed above, found that such action was warranted because of the improper conduct and motivation which he imputed to the union.

Although we sustain the Assistant Secretary's dismissal of the unit clarification petition, we disagree, for reasons indicated below, that the revocation of the union's certification of representative was warranted herein upon the grounds cited by the Assistant Secretary.

Section 6 of Executive Order 11491 provides, in pertinent part, that the Assistant Secretary shall - "(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration; and (2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results" The Assistant Secretary must insure that, in the exercise of these responsibilities, the rights guaranteed Federal employees under section 1(a) are preserved.

To assist in the carrying out of his functions under the Order the Assistant Secretary has established by regulation procedures whereby questions as to appropriate unit and related issues can be resolved. This can be done in two ways. Where there is a dispute, the facts are determined through the hearing process with all the safeguards and opportunities for due process that accompany a hearing. The other method is through the use of consensual agreements between the parties. For example, consent election agreements as authorized by those regulations provide a useful and timesaving tool for permitting an election when it does not appear that the parties are in dispute over the appropriate unit and inclusions and exclusions in the unit. Similarly, throughout the processing of a representation petition there are occasions when stipulations are properly used to dispose of undisputed matters.

Regardless of the method used to establish the facts, the Assistant Secretary must insure that the interests of the employees are protected. Certainly since a stipulation replaces full litigation of an issue, the Assistant Secretary must obtain reasonable assurance prior to acceptance that the stipulation accurately represents the facts and does not operate to deny rights guaranteed by the Order.

Further, where doubt concerning the appropriateness of an already accepted stipulation arises, the Assistant Secretary has the authority to vacate his approval of the stipulation so that a new determination can be made on the subject matter.

We view this as no less true even if a certification has already been issued. When the Assistant Secretary has sufficient reason to believe that a stipulation entered into by the parties is contrary to the interest of employees or otherwise inconsistent with the purposes of the Order, he may revoke a certification which was premised on the stipulation.

In the instant case the filing of the clarification petition appears to have raised voter eligibility questions sufficient in number to affect the outcome of the election, notwithstanding the fact that the parties' stipulations purported to resolve the "determinative" challenged ballots. We agree that in such circumstances the Assistant Secretary may, if he should so decide, examine questions of voter eligibility by such means as administrative investigation or formal hearing for the purpose of determining whether the certification should be revoked. However, we view as inconsistent with the purposes of the Order the punitive revocation of the certification solely because a party may have taken some action which casts doubt on the validity of the earlier stipulation.

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary whether he will examine the merits of the challenged ballots and, if so, by what means he will conduct such examination, we overrule the revocation of the certification insofar as such action was taken because the union took actions inconsistent with its prior stipulation.

With respect to the dismissal of the clarification petition, the union does not challenge the authority of the Assistant Secretary to take such action, although it does not agree that it serves the purposes of the Order or of determinative procedure. However, we see nothing arbitrary or capricious or inconsistent with the Order in such an exercise of the Assistant Secretary's discretion.

For the foregoing reasons, and pursuant to § 2411.17 of the Council's rules of procedure, we sustain the Assistant Secretary's dismissal of the unit clarification petition. We further find that the basis for the decision of the Assistant Secretary to revoke the union's certification of representative is inconsistent with the purposes of the Order, and, therefore, it is set aside. The case is accordingly remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


W. V. Gill
Executive Director

Issued: November 17, 1972.

United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy. The negotiability dispute involved the union's proposals concerning (1) reduction in the number of steps from entry to top of grade in the current Faculty Salary Schedule; and (2) change in the percentage factor for adjusting faculty salary compensation by reason of the Academy's extended teaching year.

Council action (November 20, 1972). The Council held that the union's proposals are negotiable under section 11(a) of the Order, and overruled the agency's determination that negotiations on the proposals are precluded by various laws and agency regulations.

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

United Federation of College Teachers
Local 1460

and

FLRC No. 71A-15

U.S. Merchant Marine Academy

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The U.S. Merchant Marine Academy, Kings Point, N.Y. (herein referred to as the Academy), is an installation operated by the Maritime Administration, Department of Commerce, to train civilian officers for the merchant fleet.

In 1961, the Merchant Marine Act was amended to clarify the status of the Academy, its faculty, and other personnel (75 Stat. 212). Among other changes, section 216(e) was added and provides as follows:

To effectuate the purposes of this section, the Secretary of Commerce is authorized to employ professors, lecturers, and instructors and to compensate them without regard to the Classification Act of 1949, as amended.

In 1965, the United Federation of College Teachers (UFCT) was granted recognition as the exclusive bargaining representative of the Academy faculty and an agreement was executed in 1968. That agreement did not include a negotiated article on faculty salary.

During subsequent negotiations, UFCT submitted two proposals relating to faculty compensation: (1) reduction in the number of steps from entry to top of grade in the current Faculty Salary Schedule; and (2) change in the salary ratio from 120 to 133 1/3 percent for adjusting the related U.S. Naval Academy pay schedule to compensate for the 12-month year at the Academy.

The agency determined that these proposals by the union were non-negotiable. UFCT appealed to the Council from this determination, and the Council accepted the petition for review under section 11(c)(4) of the Order.

Opinion

The agency based its determination of non-negotiability principally on the grounds that the union's proposals are: (1) contrary to the Merchant Marine Act; (2) beyond the scope of negotiation by reason of Office of Management and Budget constraints; (3) contrary to published policy as specified in various pay acts; and (4) contrary to agency regulations, as interpreted by the agency head. Each of these grounds is disputed by UFCT.^{1/}

The questions raised will be separately considered below.

1. Do the union's proposals violate the Merchant Marine Act?

The agency asserts in substance, contrary to the union, that: (a) section 216(e) of the Merchant Marine Act grants sole jurisdiction to the Secretary of Commerce to establish faculty salary scales; and (b) the act, according to its legislative history, requires salary scales to be "similar" to those of the U.S. Naval Academy, and the union's proposals are inconsistent with that requirement. We find that the agency's contentions are without merit

As to (a), nothing in either the act or its legislative history expressly or impliedly precludes negotiation on faculty compensation with the exclusive representative of such personnel.^{2/}

As to (b), the legislative history of section 216(e) indicates that Congress intended for Academy faculty salaries to be "comparable" or "similar" to those of the faculty at the U.S. Naval Academy.^{3/} Identity of compensation was not required. Here, the union's proposals would reduce the number of steps within salary grades and would increase by approximately 10 percent the bonus factor already established by the agency for the longer teaching year at the Academy as compared to the Naval institution. Obviously, these proposals fall within the range of "comparability" or "similarity." And without in any manner passing upon the desirability of such proposals, we are of the opinion that they are not violative of section 216(e) of the Merchant Marine Act.

^{1/} The agency also determined that the proposals are not negotiable under the provisions of the current agreement, as interpreted by the agency. UFCT likewise disagrees with this position of the agency. However, such questions of contract interpretation are not properly before the Council in the instant proceeding and, therefore, we do not pass upon these contentions.

^{2/} Cf. Jarett v. U.S., 451 F.2d 623 (Ct. Cl. 1971).

^{3/} H.R. Rep. No. 542, 87th Cong., 1st Sess. 3, 9 (1961); S. Rep. No. 177, 87th Cong., 1st Sess. 3 (1961).

2. Do the union's proposals violate OMB directives to the agency?

A letter from the Chief of the Commerce and Finance Division of the Bureau of the Budget (now Office of Management and Budget), dated April 7, 1965, and addressed to the Assistant Secretary for Administration of Commerce, criticized the Academy's then current practice of basing its faculty pay schedule upon a survey of three academic institutions in the New York area. The letter pointed to the above-mentioned legislative history of section 216(e) of the Merchant Marine Act and advised the agency to re-examine the Academy faculty personnel system to conform it "more closely to congressional intent by patterning it after that of the Naval Academy." To this end, the letter counseled the Department to make certain comparative analyses of the Kings Point and U.S. Naval Academy programs and suggested that it work with the Navy Department and consult with Civil Service Commission and Budget Bureau experts in the study.

Contrary to the agency's determination, the Budget Bureau letter plainly is not regulatory in form or content, but, instead, reflects policy guidance by the Bureau. Moreover, such guidance does not extend beyond the need for the agency to conform more closely to the legislative intent, under the Merchant Marine Act, of "similarity" between the faculty salary structures of the Academy and the Naval institution. As already indicated, nothing in the union's proposals is violative of that legislative intent.

Accordingly, we find that the union's proposals are not inconsistent with OMB directives.

3. Are the union's proposals violative of policies specified in various pay acts?

The agency determined that the union's proposals are contrary to the policies of the Federal Salary Reform Act of 1962 (76 Stat. 841) and the Federal Pay Comparability Act of 1970 (84 Stat. 1946).

However, these statutes apply, with exceptions not here relevant, to employees paid under the Classification Act. As previously indicated, section 216(e) of the Merchant Marine Act specifically excepts faculty compensation at the Academy from the Classification Act. Thus, there is no necessary linkage between Academy faculty salary practices and the policies of the above-cited statutes.

We find, therefore, that the union's proposals are not in violation of the pay acts relied upon by the agency.

4. Do agency regulations, as interpreted by the agency head, render the union's proposals non-negotiable?

The agency determined that the union's proposals are non-negotiable because: (a) they are governed by Maritime Administrator's Order No. 181,

the agency's personnel policy issuance for the Academy faculty;^{4/} and (b) they are outside the delegated bargaining authority of the Superintendent of the Academy by virtue of Department of Commerce Administrative Orders 202-250^{5/} and 202-711.^{6/}

4/ M.A.O. 181 (Amendéd), effective June 24, 1969, is entitled "Policies Applicable to Faculty of the U.S. Merchant Marine Academy, Kings Point, New York." Among the numerous subjects covered, section 7 relates to "Faculty Salary" and provides in part as follows:

7.01 Authority. Under authority of Section 216(e) of the Merchant Marine Act, 1936 (44 U.S.C. 1126) members of the faculty who are subject to this order are compensated according to a faculty salary schedule approved by the Director of Personnel, Department of Commerce, under authority delegated to him by the Department of Commerce Order 134-6. Each faculty member shall receive compensation according to his assigned academic rank and the provisions of this section. Provisions of 5 USC 5504 (formerly the Federal Employees Pay Act of 1945, as amended) govern the computation of bi-weekly salaries of faculty members, except as otherwise specifically provided by law.

7.02 Faculty Salary Schedule. The faculty salary schedule is based on the first 48 steps of the U.S. Naval Academy civilian faculty salary schedule adjusted to 120 percent in recognition of the longer academic year. . . . It is the policy of the Department of Commerce to adjust the faculty salary schedule so as to provide general pay increases comparable to the general pay increases granted by Congress for Federal employees paid under the Classification Act. . . .

5/ D.A.O. 202-250, effective August 31, 1966, concerns "Delegation of Authority for Personnel Management," and provides in section 3.04:

The prior administrative approval of the Director of Personnel or a member of the staff of the Office of Personnel in grade GS-14 or higher must be obtained for . . . (b) Proposed new or revised pay plans and wage schedules for positions not subject to the Classification Act.

6/ D.A.O. 202-711, effective March 23, 1970, relates to "Labor-Management Relations." Section 3.01(a) provides that:

Each operating unit of the Department, through an authorized appointing officer [listing by reference, the Superintendent

The union does not contest the agency's interpretation of its own regulations. However, it contends, in effect, that these regulations, as so interpreted, violate the bargaining obligation imposed by section 11(a) of the Order.^{7/}

The essential question presented is whether the agency head's determination that his regulations bar negotiations on the union's proposals is proper and should be sustained, or whether the determination improperly interprets the bargaining obligation of the Order and should be set aside.

The circumstances in the present case are quite unique. To recapitulate, the proposals for negotiation relate to a salary plan and schedule which applies only to a single, relatively small unit of professional employees (81), in a single activity of the agency and at a single location, who have a recognized union representative. The agency established the salary plan and schedule for these employees by detailed regulation (M.A.O. 181) and reserved authority to alter the plan or schedule to its Director of Personnel at departmental headquarters (or a member of his staff at grade GS-14 or above). Some other personnel policies applicable only to the unit are prescribed by the same agency regulation; other special policies for the group, such as those relating to faculty promotions, teaching loads, sabbatical leave, academic freedom, etc., have been established through negotiated agreement between representatives of the local activity and the recognized union.

6 / (cont'd)

of the Academy], will accord exclusive recognition . . . at the request of a labor organization which meets the requirements for recognition rights . . . under Executive Order 11491 and this order.

Further, section 4.01(a) reads:

Each operating unit 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 . . . published policies and regulations of the Department or any organization unit thereof, . . . and Executive Order 11491. . . .

7 / Section 11(a) provides 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

In these particular circumstances, if the Council were to sustain the agency head's determination of non-negotiability as to the faculty salary plan and schedule, based on M.A.O. 181, it would be holding, in effect, that an agency may unilaterally limit the scope of its bargaining obligation on otherwise negotiable matters peculiar to an individual unit, in a single field activity, merely by issuing regulations from a higher level. We believe the bargaining obligation in section 11(a) of the Order may not be diluted by unilateral action of this kind.

We do not, of course, question the statutory authority of the agency head to issue regulations for the operation of his department and the conduct of his employees.^{8/} Moreover, we are fully aware of, and endorse, the policy of the Order to support such regulatory authority, in order to protect the public interest and maintain efficiency of government operations.^{9/} This policy is incorporated in section 11(a) by express reference to "published agency policies and regulations" as an appropriate limitation on the scope of negotiations.

However, the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity. Any other interpretation of the phrase "published agency policies and regulations," in the context of the Order, which would permit ad hoc limitations on the scope of negotiations in a particular bargaining unit, would make a mockery of the bargaining obligation. For it would mean that a superior official could unilaterally dictate any limit on the scope of negotiations in a particular agency activity merely by publishing instructions to the activity head with respect to personnel policies and working conditions unique to that activity.

In other words, with particular reference to the present case, while higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations in the faculty unit at the Academy, higher level "published policies and regulations" which deal only with terms and conditions of employment

7/ (cont'd)

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 this Order

8/ See, e.g., 5 U.S.C. § 301.

9/ Report accompanying E.O. 11491, part E(2), Labor-Management Relations in the Federal Service (1971).

in that individual unit, such as the faculty salary plan and schedule in M.A.O. 181, do not properly limit the scope of negotiations on this subject matter--since unilateral prescription of these terms and conditions conflicts with the bargaining obligation of section 11(a). This is not to say that the Maritime Administrator's Order 181 is invalid. Rather, its publication does not, within the meaning of section 11(a), limit the agency's obligation to negotiate with the recognized union on the union's proposed changes in matters covered by that directive, subject of course to the Merchant Marine Act and legislative intent.

There remains for consideration the agency's determination that the union's proposals are non-negotiable by virtue of Department of Commerce Administrative Orders 202-250 and 202-711. According to the agency, Commerce's A.O. 202-711 assigns to the Superintendent of the Academy, as the official who accorded recognition to the union, the responsibility for fulfilling the bargaining obligation of the Order in the Academy unit. However, authority to alter the faculty salary plan or schedule is reserved by Commerce's A.O. 202-250 to the Director of Personnel (or appropriate member of his staff). The agency reasons that the effect of these two regulations is to bar negotiations on the salary plan or schedule for Academy faculty since these matters are not within the Superintendent's delegated authority.

We do not agree. The obligation in section 11(a) of the Order reads:

An agency and a labor organization . . .
through appropriate representatives,
shall meet . . . and confer
[Emphasis added.]

Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit. Since we have held that the union's proposals in this case are within the scope of negotiations, then to the extent Commerce's A.O. 202-711 bars such negotiations in the Academy unit, it is inconsistent with the Order and may not stand as a bar. Agency regulations, such as A.O. 202-711, which are issued to implement the Order must be consistent therewith, as required by section 23 of the Order.^{10/} Further, since the authority to take action on the matters covered by the union's proposals is reserved by Commerce's A.O. 202-250 to the Director of Personnel, it is apparent that he becomes the "appropriate" official responsible for fulfilling the agency's section 11(a) obligation on those matters.

^{10/} Section 23 of the Order requires that each agency "issue appropriate policies and regulations consistent with this Order for its implementation."

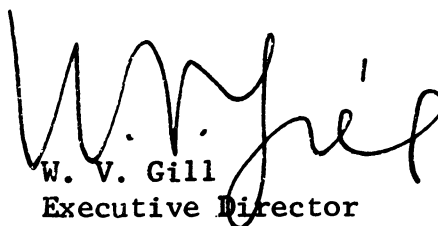
In summary, we find that the agency's regulations, as interpreted by the agency head, do not render the union's proposals non-negotiable.

Conclusion

For the foregoing reasons, we are of the opinion that the union's proposals are negotiable as "personnel policies and practices and matters affecting working conditions" under section 11(a) of the Order. We do not hold that such proposals are desirable or must be accepted by the agency. We decide only that the proposals are matters subject to the obligation to negotiate by the parties involved.

Therefore, pursuant to section 2411.27 of the Council's rules of procedure, we find that the determination by the Department of Commerce that the union's proposals are non-negotiable is improper, and the determination must be set aside.

By the Council.



W. V. Gill
Executive Director

Issued: November 20, 1972

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. The negotiability dispute involved the union's proposals concerning the activity's practice of assigning "swing" operators in such a way as to avoid overtime and holiday pay.

Council action (November 20, 1972). The Council ruled that the union's proposals are negotiable under section 11(a) of the Order, and set aside as insufficiently supported or erroneous the agency's determination that the proposals are non-negotiable under section 12(b)(4) of the Order and various statutory provisions.

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

Local Union No. 2219,
International Brotherhood of
Electrical Workers, AFL-CIO

and

FLRC No. 71A-46

Department of the Army, Corps
of Engineers, Little Rock
District, Little Rock, Ark.

DECISION ON NEGOTIABILITY ISSUE

Background of the Case

The activity (Little Rock District, Corps of Engineers) is headquartered at Little Rock, Arkansas. Among its responsibilities, the activity operates five hydroelectric power plants, located in Arkansas and Missouri, called Bull Shoals, Dardanelle, Greers Ferry, Norfolk and Table Rock.

In October 1966, the union was granted exclusive recognition for a bargaining unit consisting of approximately 90 operating and maintenance personnel employed by the activity. Negotiations for an agreement ensued. All issues were ultimately resolved except one concerning the rotating shift work schedules of power plant operators or, more specifically, the activity's practice of assigning "swing" operators in such a way as to avoid overtime and holiday pay. That issue is the subject of the instant proceeding and the pertinent circumstances surrounding the dispute are as follows:

1. Method of work scheduling at activity. The five power plants operate on a continuous, 24-hour day, 7-day week basis, and each is manned by at least one full-time operator at all times. In order to cover the 21 8-hour shifts per week, and accomodate normal absences for annual leave, sick leave, holidays and usual days off, each plant has a complement of five operators, working on rotating shifts. In any one week four employees occupy the classification of regular operator and one employee that of "swing" operator (the nature of "swing" assignments is described below). All five employees take turns working in each classification and the change is made weekly. Thus, a given employee will be a regular operator on each of the four regular operator shifts for four weeks and swing operator in the fifth week, and then the cycle repeats. In this manner the week's twenty-one shifts are covered.

At the beginning of each calendar year, the activity draws up and posts at each power plant a tentative work schedule which lists each operator's scheduled workdays, off days and, insofar as known at that time, annual leave hours for the coming year. From this annual schedule, 35-day (5-week) final work schedules are posted two weeks prior to their effective dates showing any changes from the tentative schedule for the coming 5-week period. The administrative workweek is Sunday through Saturday.

In practice, when none of the operators at a plant is to be absent during an entire week it is necessary for two operators to work on a single shift, as four employees working forty hours each week cover twenty shifts. In such circumstances, "doubling up" is necessary on four shifts during that week and is scheduled on the first shift (8:00 am to 4:00 pm) on Monday through Thursday. The second man on the doubled-up shifts is the so-called "swing" operator. The swing operator returns as the sole operator on the day shift on Friday and is then scheduled for non-work days on the Saturday and Sunday immediately following. (This is the only time an operator is scheduled for consecutive Saturday and Sunday days off during the 5-week cycle.)

However, in the case of absence of a regular operator during the Monday-Thursday period the swing operator is subject to assignment to the second (4:00 pm to midnight) or third (midnight to 8:00 am) shift.

In addition, where leave is taken by a regular operator on a Saturday or Sunday which has not been accounted for in the posted 5-week schedule, it has been the practice of the activity, in order to avoid paying overtime to one of the other regular operators, to relieve that week's swing operator of work on a scheduled workday and require that he work instead on the uncovered Saturday or Sunday which was scheduled as his off day.

Likewise, it appears that when a holiday occurs on a day on which the regular operator and swing operator are scheduled to work the day shift together, the activity, in order to avoid the payment of holiday pay to both operators, often cancels the scheduled day off of the swing operator (i.e., Saturday or Sunday) and relieves him of his scheduled workday which falls on the holiday.

2. Disputed proposals. The union has not objected to the activity's practice of changing the shifts for which the swing operator is scheduled within his regular workdays, i.e., moving a swing operator from the first to the second or third shifts on his scheduled workdays. It has objected to the changing of the swing operator's off days as specified in the annual schedule, to avoid the payment of overtime and holiday pay, on the ground that this creates a situation where the swing employee can neither make advance personal plans for the use of his off time nor be compensated for his inconvenience by receiving premium pay. To remedy this situation, the union submitted the following proposals during the course of negotiations:

[Article 4, Section D(2)(d)] No operator's nonwork days shall be changed unless he receives overtime pay for said change.

[Article 6, Section D] Schedules will provide for tours which will allow holidays off to all operators to the maximum extent possible; and which will use the swing operator to avoid the unnecessary payment of holiday pay, except that the swing operator will not be scheduled to return to duty with less than sixteen (16) hours off, when the purpose of the return is to avoid payment of unnecessary holiday pay to another operator. The swing operator's non-work day(s) will not be changed for the sole purpose of avoiding the payment of holiday pay.

The activity refused to accept the union's proposals and an impasse resulted. The dispute was thereafter submitted by the union to the Federal Service Impasses Panel; however, in the course of the Panel's proceedings the agency claimed that the proposals were in fact violative of applicable law and regulations, and the negotiability issue was referred to the procedures of section 11(c) of the Order (Case No. 71 FSIP 6).

The union then appealed to the Council, which accepted the union's petition for review. Both the union and the agency have filed briefs in this proceeding.

3. Positions of the parties. The agency in effect determined and asserts before the Council that both of the union's proposals violate management's right under section 12(b)(4) of the Order ". . . to maintain the efficiency of Government operations entrusted to them," and management's responsibilities under 5 U.S.C. sections 301, 302 and 305 to maintain and improve "efficiency and economy in the operation of the agency's activities, functions, or organization units." The agency further contends, as to the overtime proposal (Article 4, Section D(2)(d)), that such proposal is unlawful since it would entitle an employee to overtime pay regardless of whether he has satisfied the requirement of an 8-hour workday or a 40-hour workweek under 5 U.S.C. section 5544(a).

The union argues that its proposals concern matters affecting working conditions upon which an agency has an obligation to bargain under section 11(a) of the Order. Also, the union denies that its proposals are violative of any statutory requirements.

Opinion

The questions presented for Council decision are whether the union's proposals are negotiable under section 11(a) of the Order as matters affecting working

conditions, or non-negotiable, as contended by the agency, because: (1) they interfere with management's right under 5 U.S.C. sections 301, 302 and 305 and under section 12(b)(4) of the Order, to run its operations efficiently and economically; and (2) with particular reference to the union's proposed Article 4, Section D(2)(d), such proposal violates 5 U.S.C. section 5544(a).^{1/}

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. Without more, the union's proposals, which are directed to such management actions, would be negotiable under section 11(a).

1. 5 U.S.C. sections 301, 302 and 305, and section 12(b)(4) of Order. As already mentioned, the agency contends that the union's proposals are nevertheless excepted from the obligation to negotiate, on the grounds that they would violate applicable law (5 U.S.C. sections 301, 302 and 305) and section 12(b)(4) of the Order.

Section 12(b) of the Order establishes rights expressly reserved to management officials under any bargaining agreement, including "the right, in accordance with applicable laws and regulations . . . (4) to maintain the efficiency of the Government operations entrusted to them." Section 305 of Title 5, along with the general agency authority in sections 301 and 302, indirectly requires management to maintain "efficiency and economy in the operation of the agency's activities, functions, or organization units."^{2/} (Although the statute refers to both efficiency and economy, the term "efficiency" in section 12(b)(4) likewise embraces the concept of "economy" and will be so regarded in the discussion which follows.)

^{1/} Unlike in the proceeding before the Panel, the agency does not rely before the Council on any specific agency regulation.

^{2/} Sections 301, 302 and 305 of Title 5 provide as follows:

§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its

(cont'd)

The agency argues principally that "the raison d'etre for the swing shift is the minimizing of overtime and other premium costs to the employer"; and that the proposals would thwart "management's efforts to use the 'swing' operator effectively and [attack] the very purpose for establishing a 'swing' shift, by imposing prohibitions and limitations on the use of the fifth operator to reduce premium pay costs." In essence, therefore, it is the agency's position that, since the union's proposals would constrain the agency in reducing premium pay costs, the proposals of necessity would impair the agency's ability to maintain efficiency and economy in its operations.

In our opinion, the agency position equating reduced premium pay costs with efficient and economical operations improperly ignores the total complex of factors encompassed within the concept of "efficiency and economy." It fails to take into account, for example, the adverse effects of employee dissatisfaction with existing assignment practices, and the

2/ (cont'd)

records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

§ 302. Delegation of authority

(a) For the purpose of this section, "agency" has the meaning given it by section 5721 of this title.

(b) In addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him--

(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency; and

(2) by section 324 of title 44 to authorize the publication of advertisements, notices, or proposals.

§ 305. Systematic agency review of operations

(a) For the purpose of this section, "agency" means an Executive agency

(b) Under regulations prescribed and administered by the Director of the Bureau of the Budget, each agency shall review systematically the operations of each of its activities, functions, or organization units, on a continuing basis.

(c) The purpose of the reviews includes--

(1) determining the degree of efficiency and economy in the operation of the agency's activities, functions, or organization units;

(2) identifying the units that are outstanding in those respects; and

(3) identifying the employees whose personal efforts have caused their units to be outstanding in efficiency and economy of operations.

very real possibility that revised practices along the lines proposed, by reason of their actual impact on the employees, might well increase rather than reduce overall efficiency and economy of operations.

In general, agency determinations as to negotiability made in relation to the concept of efficiency and economy in section 12(b)(4) of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of employees, rather than an arbitrary determination based only on the anticipation of increased costs. Other factors such as the potential for improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety, and the like, are valid considerations.^{3/} We believe that where otherwise negotiable proposals are involved the management right in 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.

Applied to the instant case, the agency has asserted that increased premium pay costs would derive from the union's proposals. However, it has not established in the record before us that such costs would be significant in nature, nor that offsetting factors such as adverted to above would fail to overcome those increased costs. On the other hand, the union has shown that its proposals are limited in scope to certain aspects of swing operator scheduling and assignment, and that its proposals seek to reduce what the employees feel are unusual hardships in the working conditions of the unit.

In these circumstances, we find that the agency's determination of non-negotiability under section 12(b)(4) of the Order and similar language in related statutes is insufficiently supported and must be set aside.

2. 5 U.S.C. section 5544(a). The agency also in effect determined, as previously stated, that the union's overtime proposal (Article 4, Section D(2)(d)) is non-negotiable because it would entitle an employee to premium pay whenever he is called to work on his scheduled day off, regardless of whether he has satisfied the overtime requirements in section 5544(a) of Title 5. That section of the code reads in pertinent part that: "An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week."

The agency's position is without merit. The union's proposal reads: "No operator's nonwork days shall be changed unless he receives overtime pay

3/ Cf. AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), FLRC No. 70A-10 (April 5, 1971) at p. 3.

for said change." Nothing in the language of this proposal would require the payment of overtime before the statutory minimums have been met. Moreover, in its petition the union expressly states that its "proposal inherently contemplates that when the Employer cancels the 'swing operator's nonwork days and requires him to work on those days, it will not relieve the operator from any scheduled work."

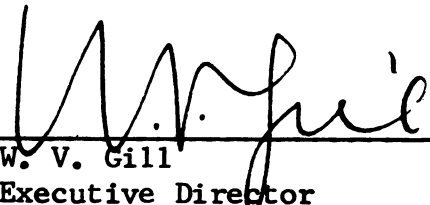
Accordingly, we find that the agency erred in its determination that the union's proposal on overtime is non-negotiable under 5 U.S.C. section 5544(a) and this determination must also be set aside.

Conclusion

For the reasons discussed above, we find that the union's proposals are negotiable under section 11(a) of the Order. We do not, of course, pass upon the wisdom of the proposals, nor indicate in any manner that they should be accepted by the agency. We merely hold that the proposals are subject to negotiation by the parties under the Order.

Therefore, pursuant to section 2411.27 of the Council's rules of procedure, we find that the determination by the agency that the union's proposals are non-negotiable is improper, and the determination is set aside.

By the Council.



W. V. Gill
Executive Director

Issued: November 20, 1972

Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois. The negotiability dispute involved the union's proposal which would require that, upon request of the union, a management official who had not participated in the selection of an employee for promotion would review the promotion decision and render a final decision thereon.

Council action (November 22, 1972). The Council held that the union's proposal is negotiable under section 11(a) of the Order and, contrary to the Veterans Administration determination, ruled that negotiation is not precluded by various agency regulations or section 12(b)(2) of the Order.

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

Veterans Administration Independent
Service Employees Union

and

FLRC No. 71A-31

Veterans Administration Research
Hospital, Chicago, Illinois

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The Veterans Administration Independent Service Employees Union holds exclusive recognition in a unit which consists of all service employees, with the usual exclusions, at the Veterans Administration Research Hospital, Chicago, Illinois. The activity has had in effect, since July 1969, a merit promotion plan covering the employees involved (Memorandum No. P-15 (Revised)). The plan establishes certain procedures for selecting employees for promotion. However, the employees have been concerned that "pre-selection" decisions were being made by supervisors in violation of this plan, and that adequate review of complaints about such practice was not available.

To remedy this concern, the local parties agreed, during negotiations, to a union proposal on promotions which required that, upon request of the union, a management official who had not participated in the selection would review the promotion decision and render a final decision thereon. More specifically, the provision reads as follows:

Positions will normally be filled from within the Hospital structure when there are three highly qualified candidates available. Prior to notifying the Personnel Division of a proposed selection the selecting official shall advise the VAISEU steward of the proposed selection. If the steward desires, the selecting official shall provide him with information concerning the reasons for the proposed selection and the written materials used in making said selection (written materials concerning an employee shall only be provided with his consent). Notification to the Personnel Division shall not be made until the steward has had until the end of the steward's second tour of duty following

receipt of notice of the proposed selection from the selecting officer to request review by the next highest level supervisor who has not participated in the proposed selection under review. The decision by this supervisor will be final and not subject to further review. If the steward has decided not to seek review of the decision he shall immediately notify the selecting officer so that the Personnel Division may receive notice of the decision.

The VA central office directed that the proposal be deleted from the final agreement, apparently because of a question as to its permissibility. The union then appealed to the agency head for a negotiability determination. The agency head determined that the proposal was non-negotiable. The union appealed to the Council from such determination, and the Council accepted the union's petition for review pursuant to section 11(c)(4) of the Order.

Opinion

The agency takes the position, contrary to the union, that the union's proposal is non-negotiable because it would violate certain provisions of (1) Executive Order 11491, (2) Civil Service Commission requirements, and (3) Veterans Administration regulations. We will review each of these grounds below.

1. Executive Order 11491. The agency asserts that the union's proposal conflicts with management's right to "promote" under section 12(b)(2) of the Order. That section provides in context 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--

(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;

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization. [Emphasis in body supplied.]

In support of its position, the agency argues that the union's proposal seeks to permit a union steward to participate in the selection of an

employee for promotion, in violation of 12(b)(2), by establishing the levels of review of a selection decision and enabling the union steward to substitute his judgment for that of the selecting official. However, the union denies that its proposal interferes with management's right to promote, pointing out that only higher level management review of a lower level management action is involved, and that the final decision as to who would be promoted remains exclusively with management.

The union's proposal, as previously set forth, would (a) require that the first-line selecting official notify the union of a promotion selection and, if requested, furnish supporting reasons and materials; and (b) permit the union, upon timely request, to obtain review by the next higher, non-participating supervisor, whose decision would be final. Such provision, in our opinion, is not violative of section 12(b)(2) of the Order.

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. However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

Here, the union's proposal would establish procedures whereby higher level management review of a selection for promotion may be obtained before the promotion is consummated. The proposal does not require management to negotiate a promotion selection or to secure union consent to the decision. Nor does it appear that the procedure proposed would unreasonably delay or impede promotion selections so as to, in effect, deny the right to promote reserved to management by section 12(b)(2).

Under these circumstances, we find that the union's proposal is not rendered non-negotiable by section 12(b)(2) of the Order.

2. Civil Service Commission Regulations. The agency head further determined that the union's proposal is non-negotiable because it violates section 771.302 of CSC regulations and FPM Chapter 335, subchapter 3, par. 7b and c, and subchapter 5, par. 1d. The union disagrees.

Since the Civil Service Commission has the primary responsibility for the issuance and interpretation of its own directives, the Council, in accordance

with usual Council practice,^{1/} requested the Commission for an interpretation of its directives as they pertain to the questions raised in the present case. The Commission replied as follows:

You specifically ask whether a union proposal with respect to promotions violates section 771.302 of the Commission's regulations or sections 3-7b, 3-7c, and 5-1d of FPM chapter 335.

The Veterans Administration maintains that the union proposal violates section 771.302 of the Commission's regulations, which is concerned with agency grievance procedures. However, FPM chapter 771, which contains the Commission's instructions on implementing part 771 of the regulations, provides, in section 3-6d(1), that ". . . grievances . . . may not be initiated by labor organizations." Therefore section 771.302 is not pertinent to the union's proposal since by definition the proposed procedure is not a grievance.

The Commission's regulations clearly make the actual selection of a candidate for promotion non-negotiable. Section 3-7c of FPM chapter 335 provides that the selecting official is entitled to choose any of the candidates on a promotion certificate. Section 5-1d of that chapter identifies the decision on which candidate among the best qualified to select for promotion as a reserved management right and, consequently, not appropriate for negotiation.

On the other hand, none of the regulations cited in your letter or any other regulation of the Commission puts any mandatory requirement on the level at which the selecting authority should rest. We view this as a matter that is subject to management discretion. [Emphasis added.]

Based on the above interpretation by the Civil Service Commission, we find that the union's proposal, which relates to the level at which final selection will be made, is not violative of CSC requirements. Accordingly, the contrary determination by the agency head in the present case is improper.

3. Veterans Administration Regulations. Finally, the agency head determined that the union's proposal is non-negotiable by reason of VA regulations:

^{1/} See, e.g., AFGE Local 2197 and Rocky Mountain Arsenal, Denver, Colorado, FLRC No. 70A-5 (April 29, 1971), at p. 3.

MP-5, Part I, chapter 335, section B, par. 3g(2). This regulation, which is part of an issuance by VA to supplement FPM chapter 335, reads as follows:

(g) Selection . . .

(2) The responsibility of selection must be vested in a selecting official who possesses the experience and knowledge to best determine the attributes necessary in the candidates to be selected. Since the selecting official is responsible for the efficiency of his operations, he is responsible for selecting the type of employee who can best assist him carrying out the functions of his organization. Panels or committees will not make final selections. The official personnel folders and all other pertinent records will be made available to the selecting official during the selection process.

In determining that the union's proposal violates this regulation, the agency head stated:

Your proposal is also in violation of . . . MP-5, Part I, Chapter 335, Section B, paragraph 3g(2). Paragraph 3g(2) states that: "The responsibility of selection must be vested in a selecting official." To require a review and justification of a promotion selection to a union steward or higher level supervisor before the selection is final infringes on the designated selecting official's responsibility under VA regulations.

As provided in section 11(c)(3) of the Order, an agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final. However, the union in effect contends, among other things, that the agency head misinterpreted the union's proposal and therefore that the VA regulation, as interpreted by the agency head, is not a bar to negotiations under section 11(a) of the Order.^{2/} We agree with the union's contention in the circumstances of this case.

In his determination, as quoted above, the agency head referred to the union's proposal as requiring "a review and justification of a promotion selection to a union steward or higher level supervisor before the selection is final." This characterization of the proposal is more fully discussed in the agency's opposition to the union's appeal. There the agency states at the outset:

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, 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 this Order"

In its Petition the Union has attempted to obscure the simple fact that the Administrator determined that the VA Regulation (MP-5, Part I, Chap. 335, Section B, paragraph 3g(2)) means that a promotion decision shall be made solely by a selecting official and concluded that this interpretation did not permit sharing this management prerogative with a union official, which is really what the union is seeking. [Emphasis added.]

Further, the agency explained in summarizing its opposition:

Thus, reduced to simple terms, this proposal seeks to permit a union steward to participate in the selection process. It would permit the steward to substitute his judgment for that of the selecting official.

Therefore, there can be no doubt that the proposal under consideration is non-negotiable under the provisions of Executive Order 11491 and appropriate VA regulations. Otherwise, management has lost its right to promote employees. [Emphasis added.]

It is clear from the foregoing that in making his determination the agency head relied on a characterization of the union's proposal which would require "justification of a promotion selection to a union steward or higher level supervisor," and "sharing this management prerogative with a union official," and would "permit the steward to substitute his judgment for that of the selecting official." However, we find none of these characteristics present in the proposal. On the contrary, the record establishes that the proposal merely would permit the union, upon timely request, to obtain review of a first-line official's promotion selection by a higher level supervisor whose decision would be final.

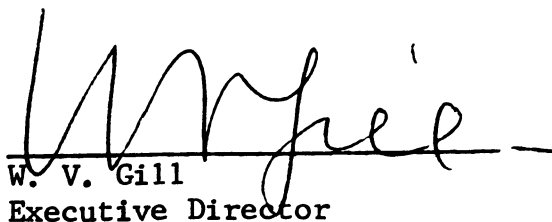
Accordingly, in view of the erroneous characterization of the union's proposal by the agency, and under the particular circumstances of this case, the agency has failed in our opinion to establish that its regulation is applicable so as to preclude negotiation of the proposal under section 11(a) of the Order.

Conclusion

Based on the foregoing reasons, we find the union's proposal is negotiable under section 11(a) of the Order. We do not, of course, decide that the proposal is desirable, or that it must be accepted by the agency. We decide only that the proposal is negotiable.

Therefore, pursuant to section 2411.27 of the Council's rules of procedure, we find that the determination by the Veterans Administration that the union's proposal is non-negotiable is improper, and the determination is set aside.

By the Council.


W. V. Gill
Executive Director

Issued: November 22, 1972

Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina. The negotiability dispute involved a union proposal to affirm Monday through Friday as the basic workweek for unit employees (other than those whose jobs are directly related to continuous operations and certain named functions of the activity).

Council action (November 24, 1972). The Council held that the proposal is negotiable under section 11(a) of the Order, and set aside as insufficiently supported, or improper, the determination of the Department of Defense that the proposal is non-negotiable under section 12(b)(4) or section 11(b) of the Order, respectively.

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

Federal Employees Metal Trades
Council of Charleston

and

FLRC No. 71A-52

U.S. Naval Supply Center,
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUE

Background

The Naval Supply Center provides around-the-clock service to the fleet, seven days per week. The union has represented the activity's wage board employees since 1965, and the parties have entered into agreements since 1967. The last agreement which had been entered into by the parties (in 1969) included a provision that the basic workweek should consist of five (5) eight (8) hour days. During recent negotiations, the union presented a proposal to amend that provision to establish Monday through Friday as the basic workweek for unit employees. The proposal provided, in pertinent part:

ARTICLE VIII
BASIC WORKWEEK AND
HOURS OF WORK

Section 1. . . . The basic workweek shall consist of five (5) eight (8) hour days, Monday through Friday. . . .

Section 2. . . .

B. Additional work shifts may be established for the convenience of the employee when mutually agreed upon by management and the employee.

Section 3. [Not disputed: 'Basic workweeks other than Monday through Friday may be established for employees whose jobs are directly related to the protection of property, security, necessary utilities, and those required to be performed on a continuous basis.']

The activity claimed that the proposal was non-negotiable. Upon referral, the Department of Defense upheld this position, determining that the proposal (1) would infringe on management's right to maintain the efficiency of its operations under section 12(b)(4) of the Order; and (2) would require the agency to bargain on the establishment and change of tours of duty in conflict with section 11(b) of the Order.¹ / The union petitioned the Council for review of this determination and the Council accepted the appeal under section 11(c)(4) of the Order. Both parties filed briefs, and the American Federation of Government Employees, AFL-CIO, filed a brief as amicus curiae.

Opinion

This case involves the extent of the agency's obligation to negotiate with the union concerning the particular days of the week which will constitute the basic workweek of employees whose jobs neither are required to be performed on a continuous basis nor are directly related to the protection of property, security, or necessary utilities at an activity which operates continuously seven days a week. The specific question facing us here is whether the basic workweek of such employees is a matter on which the agency is obligated to negotiate under section 11(a), or is a matter that is excluded from such obligation either by section 12(b)(4) or section 11(b) of the Order?

Section 11(a) of the Order, which relates to the negotiation of agreements between an agency and the exclusive representative of its employees, places a joint obligation on the parties to meet 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 . . . and this Order." Section 11(b), however, excludes from this obligation to negotiate "matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Further, section 12(b) expressly reserves to management, under any negotiated agreement, the right "(4) to maintain the efficiency of the Government operations entrusted to them."

¹ / The agency concluded that the term "tour of duty" as used in section 11(b) of the Order embraces "basic workweek." As support for this conclusion, the agency cited the use of the terms in title 5 of the U.S. Code, and the definition of the terms in the Federal Personnel Manual. This conclusion was not contested by the union.

The union argues that the proposal concerns "matters affecting working conditions" which the agency is obligated to negotiate under section 11(a) of the Order, and that the proposal is not excepted from the obligation to bargain under section 11(b) nor does it violate section 12(b)(4).

The agency contends, however, that the proposal is non-negotiable because it would require the agency to pay otherwise avoidable overtime for Saturday and Sunday work, in violation of its right to maintain the efficiency of its operations under section 12(b)(4) of the Order. Further, the agency claims it is not required to negotiate on the establishment or change of tours of duty, under section 11(b) of the Order, based on the Council's application of that section in the Plum Island case.^{2/}

The grounds upon which the agency based its determination of non-negotiability will be reviewed separately below.^{3/}

1. Section 12(b)(4). The agency asserts that in common industrial parlance "efficiency of operations" is synonymous with "cost or economy of operations"; and, therefore, since the union's proposal would require the payment of avoidable overtime, i.e., would increase costs, it would, by that fact alone, impinge on the 12(b)(4) right reserved to management. The union, on the other hand, contends that adoption of such an interpretation would, in ultimate effect, "almost completely foreclose any effective negotiations."

The general premise which underlies the agency's interpretation is that a proposal which would result in increased costs, ipso facto, would result in decreased efficiency of operations. We recently considered and rejected a similar contention in the Little Rock case.^{4/} As we said in that decision:

In our opinion, the agency's position equating reduced premium pay costs with efficient and economical operations improperly ignores the total complex of factors encompassed within the concept of 'efficiency and

2/ Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971).

3/ The agency, in its brief, contended that the proposal violated certain other provisions of law and regulation. However, in our opinion, these provisions of law and regulation were clearly inapplicable to the union's proposal. Moreover, the agency head did not rely upon them in his determination.

4/ 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., FLRC No. 71A-46 (November 20, 1972), at pp. 5-6.

economy.' It fails to take into account, for example, the adverse effects of employee dissatisfaction with existing assignment practices, and the very real possibility that revised practices along the lines proposed, by reason of their actual impact on the employees, might well increase, rather than reduce, overall efficiency and economy of operations.

In general, agency determinations as to negotiability made in relation to the concept of efficiency and economy in section 12(b)(4) of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of employees, rather than an arbitrary determination based only on the anticipation of increased costs. Other factors such as the potential for improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety, and the like, are valid considerations.^{3/} We believe that where otherwise negotiable proposals are involved the management right in 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. [Footnote omitted.]

In the present case, the agency has pointed out that it is not against the Monday through Friday workweek, per se, and that most unit employees are, in fact, working that schedule. The record does not provide any indication by the agency as to the amount of additional cost the proposal's adoption would involve or any other impact such adoption would have on the efficiency or effectiveness of the agency operations, nor that offsetting factors, such as those described above, would not balance out the additional cost. The union, on the other hand, did, in effect, offer certain claims as to benefits to employees and operations that might result from the proposal's adoption, as well as an estimate of the relative cost impact. Thus, in its request for an agency head's determination of the negotiability dispute, the union, among other matters, alleged that "scheduling of workweeks outside the Monday through Friday period brings about serious problems of employee morale, physical and mental well-being and efficiency"; and that the proposal in question would entail only "minute cost increases in overall operation."

In these circumstances, we find that there is insufficient showing by the agency to sustain its determination that the proposal is not negotiable under section 12(b)(4), and that determination is accordingly set aside.

2. Section 11(b). The agency mistakenly relies on the Council's Plum Island decision as a basis for declaring the proposal non-negotiable

under this section of the Order. In Plum Island, we pointed out that the provision of section 11(b) in question was intended to apply to an agency's right to establish staffing patterns for its organization and the accomplishment of its work, as explained in the report⁵ accompanying Executive Order 11491. In the facts of that case, which dealt with a situation of round-the-clock operations and a work schedule of rotating tours of duty, the number and duration of the tours were integrally related to the numbers and types of workers assigned to those tours. Together they determined the agency's staffing pattern for accomplishing the work. Thus, the union's proposal in that case, which would require bargaining on any changes in existing tours of duty, would also have established an obligation to bargain on any changes in the numbers and types of workers assigned, matters which section 11(b) expressly excluded from such obligation.

In the instant case, the circumstances in the bargaining unit and the union's proposal are materially different from those in Plum Island. There is no indication that the proposal to affirm Monday through Friday as the basic workweek for unit employees (other than those whose jobs are directly related to continuous operations and certain named functions of the activity) would require bargaining on "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." For it does not appear that the basic workweek for employees here proposed is integrally related in any manner to the numbers and types of employees involved. Absent this integral relationship to staffing pattern, the proposal does not conflict with section 11(b), and Plum Island is inapposite.

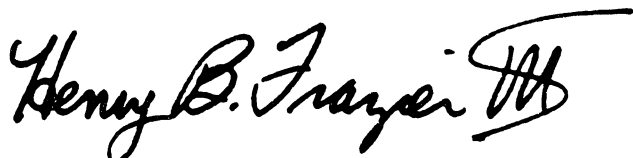
Accordingly, we find that the agency's determination of non-negotiability under section 11(b) of the Order is improper and must be set aside.

Conclusion

On its face, the establishment of a basic workweek, as here proposed, is a negotiable matter "affecting working conditions" under section 11(a) of the Order. We do not hold, nor intend to imply, that the proposal is desirable or even feasible. Neither do we hold that this proposal, or any modification thereof, must be agreed to by the agency. We decide simply that the proposal, as submitted by the union, is properly subject to negotiation by the parties concerned.

Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, we find that the determination by the Department of Defense that the union's proposal would violate sections 11(b) and 12(b)(4) of the Order must be set aside.

By the Council.



Henry B. Frazier III
Acting Executive Director

Issued: November 24, 1972

5 / Labor-Management Relations in the Federal Service, 1969, pp. 38-39.

U.S. Department of the Navy, Naval Supply Center, Assistant Secretary Case No. 22-2949 (CA). Employee James W. Martin, Jr., appealed to the Council from the Assistant Secretary's decision approving the withdrawal of an unfair labor practice complaint. Preliminary examination of the appeal reflected various procedural deficiencies under the Council's rules. Martin was provided time to effect compliance with the rules and was advised that failure to do so would result in dismissal of the appeal. The employee failed to submit the necessary materials within the time limit prescribed.

Council action (November 29, 1972). The Council dismissed the appeal because of the failure to comply with the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 29, 1972

Mr. James W. Martin, Jr.
605 Mango Drive
Virginia Beach, Virginia 23452

Re: U.S. Department of the Navy, Naval
Supply Center, Assistant Secretary
Case No. 22-2949 (CA), FLRC No.
72A-45

Dear Mr. Martin:

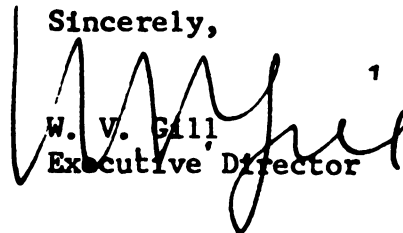
By Council letter of November 8, 1972, receipt of which you acknowledged by letter of November 14, 1972, you were granted until the close of business on November 20, 1972 to submit additional materials to establish compliance with the Council's rules of procedure in the above-entitled case. The Council's letter advised that failure to effect such compliance would result in the dismissal of your appeal.

Since you have not submitted the necessary materials within the time limit prescribed, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For your convenience, the papers which you submitted on October 3, 1972, are returned herewith.

By the Council.

Sincerely,


W. V. Gill
Executive Director

Enclosures

cc: W. J. Usery, Jr.
Dept. of Labor

W. B. Spong, Jr.
U.S. Senate

Pearl Harbor Naval Shipyard, Hawaii, and Honolulu, Hawaii, Metal Trades Council, AFL-CIO (Tinning, Arbitrator). The arbitrator determined that the shipyard, by assigning basic workweeks and workshifts different from those set forth in the collective bargaining agreement, did not violate the collective bargaining agreement. The union filed exceptions to the arbitrator's award on the grounds of various alleged errors of law and other asserted deficiencies. However, the union's exceptions failed to describe facts or circumstances, including identification of the law involved, to support the allegations of legal violations. Moreover, it did not appear from the union's petition that the exceptions presented other grounds similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

Council action (January 24, 1973). The Council determined that the union's petition failed to meet the requirements for review under section 2411.32 of the Council's rules of procedure. Accordingly, the Council directed that review of the union's petition be denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 24, 1973

Mr. Benjamin C. Sigal
Shim & Sigal
Suite 800
333 Queen Street
Honolulu, Hawaii 96813

Re: Pearl Harbor Naval Shipyard, Hawaii,
and Honolulu, Hawaii, Metal Trades
Council, AFL-CIO, (Tinning, Arbitrator),
FLRC No. 72A-22

Dear Mr. Sigal:

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.

The arbitrator decided that the shipyard, by assigning basic workweeks and workshifts different from those set forth in the collective bargaining agreement, did not violate any of the agreement provisions specified in the question submitted to arbitration. Your petition contends that: (1) the arbitrator's award is arbitrary and capricious and is contrary to law; (2) the arbitrator by assertedly failing to include findings of fact and an evaluation of the evidence in his award, failed to discharge his functions; (3) he assertedly relied on the prior award of another arbitrator; and (4) he committed various asserted errors of law in making his award.

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."

While your petition asserts that the award is contrary to law and while it might be read as asserting that the award also violates the Order as previously applied by the Council, it fails to describe facts or circumstances, including identification of the law involved, to support these assertions. Moreover, your petition neither asserts, nor, in the Council's opinion does it present, grounds similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

Therefore, it appears that the contentions in your petition do not assert or, if they do, your petition does not furnish facts and circumstances to present grounds upon which the Council will accept petitions for review of an arbitration award. Accordingly, since your petition fails to meet the requirements for review as provided under section 2411.32 of the Council's rules of procedure, the Council has directed that review of your petition be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Executive Director

cc: J. J. Connerton
Navy

Department of Transportation, Federal Aviation Administration Aeronautical Center, A/SLMR No. 117. Upon a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2282, the Assistant Secretary decided that the agency violated section 19(a)(1) of the Order by its directive which limited the right of instructors at the FAA Academy to engage in certain activities in behalf of labor organizations, particularly soliciting students and wearing union insignia. The Council accepted this case for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 21).

Council action (February 9, 1973). The Council decided, based on the special instructor-student relationship involved, that the purposes of the Order are served and the appropriate balance of rights and obligations under the Order are struck by holding that the agency did not violate the Order by promulgating a rule prohibiting instructors from soliciting students in behalf of a labor organization. That is, the agency may proscribe activities by an instructor which ask a student to indicate, through action or inaction, his preference for or against a particular union or unions generally. The Assistant Secretary's contrary finding in this regard was set aside. However, as to the wearing of union insignia, the Council determined that the same considerations did not prevail and upheld the Assistant Secretary's finding that the agency's prohibiting instructors from wearing union membership buttons violated section 19(a)(1) of the Order. The case was remanded to the Assistant Secretary for purposes of compliance consistent with the Council's decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

WASHINGTON, D.C. 20415

Department of Transportation
Federal Aviation Administration
Aeronautical Center

and

A/SLMR No. 117
FLRC No. 72A-1

American Federation of Government
Employees, AFL-CIO, Local Union 2282

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary who, upon a complaint filed by American Federation of Government Employees, AFL-CIO, Local Union 2282 (herein called the union), found that the Department of Transportation, Federal Aviation Administration Aeronautical Center (herein called the activity), violated Section 19(a)(1) of Executive Order 11491. The violation occurred when the activity promulgated an order prohibiting instructors at the FAA Academy from engaging in certain acts and conduct in behalf of labor organizations. A brief statement of the facts is set forth below.

The FAA Academy

The FAA Academy is part of the Aeronautical Center located in Oklahoma City, Oklahoma. The Academy is a training and retraining center for students who come from the various facilities of the FAA located throughout the U.S. and elsewhere. There are approximately 700 instructors at the Academy. Most of the students are assigned from the regions, with 20-25% being new hires receiving their initial instruction and the balance being career employees assigned to the Academy for refresher or special training courses. The students are hired, and selected for training and discharged by their own field supervisors. Although the students are employees of their normal workplaces, while at the Academy for courses which last from one week to thirty-six weeks, they look to their instructors for solutions of problems other than ones connected to the course, such as absence for illness.

Instructors are recruited from FAA field installations to serve at the Academy for 2 to 4 years and then are expected to return to the field. The instructors are principally GS-12 or GS-13, while the students are GS-5, GS-7 and GS-9.

Student classes at the Academy consist of both academic and laboratory courses. The nature and content of the courses are contained in established guidelines and are highly standardized. While instructors may make suggestions on courses and, as required, assist in writing the content of courses, these tasks are generally performed by staff people at the Academy.

In the classroom, there is a lead instructor and the necessary number of other instructors. Within the established guidelines, instructors are given complete freedom in teaching. Instructors report to a supervisory instructor and regulations require that an instructor must be monitored in the classroom by supervisors at least twice a year. In addition to teaching, instructors assign work and give exams. The written exams given in the classroom are apparently standardized and all are objective; however, in the laboratory courses where performance is rated some subjective evaluation by the instructors is required.

All phases of the students' progress at the Academy are graded and students "pass" or "fail." As noted above, the instructors administer the tests and make a subjective evaluation in the grading of certain performance tests. A student who has failed a portion of the course may be given an opportunity to continue and attempt to raise his grade. In making this judgment, a "board" consisting of a supervisory instructor as chairman, the class lead instructor, an instructor, and a fourth man assigned from another section of the Academy rates the student, but the decision on whether the student stays at the Academy is made by an Academy official who is not on the rating board. The instructors do not attend any staff meetings where management representatives set policies and procedures.

The "Unfair Labor Practice"

The specific FAA policy which was judged by the Assistant Secretary to constitute a violation of Section 19(a)(1) of the Order was set forth in an order issued by the Director of the FAA Center on August 5, 1970. It was entitled "Instructor/Student Relationships as related to the Labor-Management Relations Program under Executive Order 11491." The Order provided in pertinent part:

POLICY. Academy instructors are considered to be part of the agency's management structure. As such their official contacts with students must faithfully reflect FAA organizational and operational doctrines. Failure to maintain the integrity and responsibility of the instructor's role shall be dealt with promptly.

EMPLOYEE PARTICIPATION IN EMPLOYEE ORGANIZATIONS. All employees are free to form and join any lawful employee organization or to refrain from such activities. However, the right of an employee to participate in the activities of an employee organization does not include activities which would be incompatible with the employee's official duties.

THE ROLE OF THE INSTRUCTOR. Training of agency employees at the FAA Academy is a management function; therefore, insofar as the agency is concerned as well as in the eyes of students, instructors are management representatives.

- a. Labor-Management Relations matters involving students properly fall within the jurisdiction of the students' employing regions or offices; however, instructors--because of their unique relationship with students--are susceptible to involvement in situations which may be incompatible with their official duties. Instructors must, therefore, maintain at all times a strictly impartial position with respect to employee organizations and avoid any actions tending to encourage or discourage student membership in any employee organization.
- b. Situations instructors specifically shall avoid are:
 - (1) Recruiting students for membership in an employee organization.
 - (2) Conveying the impression that students might be favored if they were to participate in a particular employee organization.
 - (3) Engaging in controversial discussions with students on the subject of belonging to, or participating in, employee organizations.
 - (4) Wearing emblems or other insignia reflecting to students, support of and/or membership in an employee organization.

REQUESTS FOR ADVICE. Students with questions or problems involving employee organizations who may require advice or counsel while at the Academy should be referred to the Personnel Relations Branch.

The Assistant Secretary's Decision

The Assistant Secretary adopted the findings, conclusions and recommendations of the Hearing Examiner.

The Hearing Examiner concluded that the instructors were not management officials or supervisors, nor were they employees whose participation in the management of a labor organization or acting as a representative of such organization would be barred by Section 1(b) of the Order. Therefore, as the instructors were not employees whose activities in behalf of a labor organization could permissibly be limited on any of these bases, it was held that the activity violated Section 19(a) (1) of the Order by promulgating or maintaining an order which prohibits the instructors: (a) from engaging in solicitation, or any other legitimate activity, on behalf of a labor organization at their work place or elsewhere during their nonwork time providing there is no interference with the work of the agency and; (b) from wearing union membership buttons. As a remedy the activity was ordered to cease and desist from such conduct and to post notices to that effect.

Contentions

Upon appeal, the agency contends as follows:

1. The instructors are management officials and/or supervisors within the meaning of the Order.
2. Section 1(b) of the Order bars the instructors from participating in activities which are otherwise granted to employees.
3. The Assistant Secretary's decision forces agency management to compromise its neutrality and to condone infringement on the right of employees freely and without fear of penalty or reprisal to form, join and assist a labor organization or to refrain from any such activity.

The union contends that all matters raised by the agency's appeal were fully litigated before the Assistant Secretary and urges the adoption of his findings.

Opinion

We are in agreement with the Assistant Secretary's conclusions that the instructors are not management officials or supervisors, or employees barred from union management or representation activity by Section 1(b) of the Order.

The agency makes a general contention about viewing instructors as part of the "management team," but the record fails to disclose any evidence that the instructors perform any duties which might be considered managerial. Their duties appear to require no greater exercise of discretion than any teacher. Accordingly, we see no basis for concluding that the instructors are management officials.

Similarly, the record fails to disclose any evidence that the instructors possess any of the indicia of supervisory status contained in the definition of supervisor set forth in Section 2(c) of the Order.

The agency contends that the special relationship of instructors to students makes them supervisors. While we view this "special relationship" as critical, as discussed below, we do not agree that it makes the instructors supervisors under the Order.

Further, Section 1(b) of the Order has no applicability to the situation here presented. The language of that section precludes, in pertinent part, participation in the management of a labor organization or acting as a representative of such organization "by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee." The scope of the limitation is: participating in the management of a labor organization or acting as a representative; the employee is not thereby precluded from other rights protected by Section 1(a) of the Order. There is nothing in the record of this case to indicate that any of the involved instructors were seeking to participate in union management or to act as representatives as that term is normally used in labor-management relations. Nor is there any indication that the agency's policy statement giving rise to this case was limited to such union status.

The agency further contends that the rules which were promulgated should be permitted because of the special relationship between instructor and student and the problems which can result from permitting instructors to solicit their students in behalf of a labor organization. The Assistant Secretary's decision partially addresses these problems by making clear that the agency is estopped only from prohibiting "legitimate" activity by instructors, i.e.,

Coercion or promise of favor to students certainly would not be legitimate activity, and the Respondent is free to restrict such conduct and could take disciplinary action against any instructor who coerced a student or promised favors to the student if he acceded to the instructor's position.

While this provides the agency with the ability to deal with explicit coercion, it does not in our opinion solve the problems of subtle, but no less real pressures. It is a generally-felt belief that instructors have suasion over their students, even if they do not "supervise" the students. Students inherently feel pressure to "please" instructors and to be deferential to their desires. This is particularly significant in the circumstances of this case where students are often in attendance at the Academy and away from their normal workplaces for extended periods of time. If the student is "solicited" by the instructor -- for example, is asked to sign a union authorization card or membership application or to tender an initiation fee, this places undue pressure upon the student to respond affirmatively, notwithstanding the sophisticated judgment that the instructor is neither a management official nor a supervisor. Further, such action on the part of an instructor places agency management in an equally untenable position. The agency must insure the efficiency of its employees and the administration of a total labor relations program. It is required to insure that undue pressures do not distort true employee choices or the viability of the representation process or impair the efficiency of agency operations.

In the report and recommendations which led to the issuance of Executive Order 11491, the Study Committee noted the need to be mindful "to provide an equitable balance of rights and responsibilities among the parties directly involved -- the employees, labor organizations, and agency management -- and the need, above all, . . . to preserve the public interest. . .".^{1/} In assessing the facts of this case and in reaching his decision, the Assistant Secretary sought to assure the right of the instructors, as employees, to freely engage in activity in behalf of a labor organization. The balance struck by the Assistant Secretary preserved the rights of the instructors. We feel however that the particular relationship between instructors and students at the Academy, the adverse effects which could result from permitting instructors to solicit students in behalf of a labor organization, and the responsibility of the agency to assure that such effects do not occur require that greater weight should be given to the rights and responsibilities of the student employees and agency management, and to the public interest.

In finding that the portion of the agency's order which prohibits instructors from engaging in solicitation of the students violates the Order, the Assistant Secretary relied on his decision in Charleston Naval Shipyard, A/SLMR No. 1. In that case he adopted the rule that "in the absence of special circumstances an agency

^{1/} Labor-Management Relations in the Federal Service (1971), p. 36.

may not ban employee solicitation during nonwork time and in nonwork areas." In promulgating this rule the Assistant Secretary provided the means for balancing rights and responsibilities under the program with the words "in the absence of special circumstances." However, in applying the rule to the facts of the instant case it does not appear that he assessed whether such special circumstances were present in the nature of the instructor-student relationship at the Academy and the potential impact on employees and on the operation of the facility of permitting instructors to solicit students in behalf of a union.

In our view, the facts of the case present the kind of "special circumstances" where the agency may restrict the right to solicit in behalf of a labor organization without violating the Order. Specifically, we conclude that the purposes of the Order are served and the appropriate balance of the rights and obligations of all concerned is struck by holding that the agency did not violate the Order by promulgating a rule which prohibits instructors from soliciting students in behalf of a labor organization.

In reaching our decision in the instant case, we do not mean to imply that the agency may prohibit the entire range of activities by instructors which could be considered "solicitation" in a labor relations context. The agency may certainly prohibit those activities by an instructor which ask a student to indicate, through action or inaction, his preference for or against a particular union or unions generally -- for example, a request to sign an authorization card or membership application or to tender initiation fees or a request to sign a decertification petition. It may prohibit the instructor from asking students to demonstrate, explicitly or implicitly, a commitment one way or the other, i.e., it may prohibit the instructor from calling for a response from students that would destroy the ambiguity of their silence. However, it is not our intention to give our imprimatur to any attempt to prohibit the instructors from otherwise exercising the right to express freely their views or other rights assured by Section 1(a) of the Order.

The second facet of the violation found by the Assistant Secretary was the promulgation of a rule prohibiting instructors from wearing union membership buttons. The agency appeal of this finding is based on the same contentions raised with respect to the appeal of the Assistant Secretary's finding regarding the ban on union solicitations. However, there is a great difference between actively soliciting in behalf of a labor organization and merely wearing a union membership button, particularly in the facts of the instant case where the buttons at issue are described as "unobtrusive membership pins bearing no campaign propoganda." We see no reasonable potential for employee coercion or adverse impact

on the operation of the facility resulting from instructors wearing union membership buttons. While a balancing of competing rights and obligations justifies permitting the agency to restrict the right of instructors to solicit students in behalf of a labor organization, the same kinds of considerations do not exist -- certainly, at least, not to a comparable degree -- when the restriction goes to the very personal act of wearing a union membership button. Accordingly, we find this portion of the decision of the Assistant Secretary to be consistent with the purposes of the Order.

For the foregoing reasons, and pursuant to Section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's finding that the promulgation or maintaining of an order which prohibits instructors of the Academy from engaging in solicitation of students in behalf of a labor organization violates Section 19(a)(1) of the Order; and sustain the Assistant Secretary's finding that the prohibition against wearing union membership buttons violates Section 19(a)(1) of the Order.^{2/}

Our earlier stay of the Assistant Secretary's decision in the instant case is hereby vacated insofar as it affects his Order that the agency cease and desist from promulgating or maintaining an order which prohibits instructors from wearing union membership buttons and take affirmative action with respect thereto.

Pursuant to Section 2411.17(c) of the Council's rules of procedure, we hereby remand this matter to the Assistant Secretary for purposes of compliance consistent with this decision.

By the Council.


Henry B. Frazier III
Executive Director

Issued: February 9, 1973.

^{2/} In support of its petition the agency submitted certain materials which had not been presented in the proceeding before the Assistant Secretary. Pursuant to Section 2411.51 of the Council's rules, that submission was not considered in reaching the decision set forth above.

Savanna Army Depot, Savanna, Illinois, Assistant Secretary Case No. 50-8195. The Government Employees Assistance Council (GEAC) appealed to the Council for review of the Assistant Secretary's dismissal of GEAC's representation petition. The initial appeal filed with the Council reflected various procedural deficiencies under the Council's rules. By letter of January 17, 1973, the Council provided GEAC with time to effect compliance with the rules, and reminded GEAC to provide a statement of service of the additional materials as required by the Council's rules. However, GEAC's later submittal, which included a substantially revised appeal, did not contain a statement of service, and there was no indication that service of the additional materials, upon which the time for the filing of oppositions was contingent, was in fact made on the other parties to the case.

Council action (February 20, 1973). The Council dismissed the appeal because of the failure to comply with the Council's rules of procedure and its letter of January 17, 1973.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 20, 1973

Mr. Thornton E. Lallier
General Counsel
Government Employees
Assistance Council
Box 266, Central Street
Rowley, Massachusetts 01969

Re: Savanna Army Depot, Savanna,
Illinois, Assistant Secretary
Case No. 50-8195, FLRC No.
73A-2

Dear Mr. Lallier:

By Council letter of January 17, 1973, you were advised that preliminary examination of your appeal reflected apparent deficiencies in meeting various requirements of the Council's rules (a copy of which was sent to you for your information), namely: section 2411.14(c) which requires that a copy of the subject decision of the Assistant Secretary be included with the appeal; and section 2411.44, which specifies the number of copies of any document which must be filed with the Council.

You were further advised in the Council's letter that:

Further processing of your appeal is contingent upon your immediate compliance with the above provisions in the Council's rules. Accordingly, you are hereby granted until the close of business on January 29, 1973, to file additional materials (along with a statement of service as provided in section 2411.46(b) of the rules) in compliance with these requirements. Failure to do so will result in the dismissal of your appeal.

Also, pursuant to section 2411.45(d) of the Council's rules, the other parties are granted 18 days from the date of service of your additional submittal to file oppositions under section 2411.13(c) of the rules.

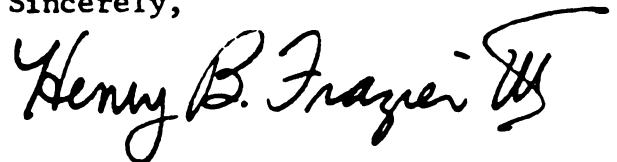
On February 2, 1973, you submitted the requisite number of copies of the Assistant Secretary's decision and at the same time submitted copies of a substantially revised petition for review of that decision. (You also explained the late filing as due to the delay in receiving the Council's letter of January 17, 1973.) However, you failed to submit a statement of service on the other parties of any of the additional materials, as specifically required by section 2411.46(b) of the rules and as you were expressly reminded in the Council's letter of January 17, 1973. Moreover, there is no indication that service of any of these materials, upon which the time for the filing of oppositions was contingent, was in fact made on the other parties.

In view of these circumstances, including your failure to comply with the Council's rules of procedure and the Council's letter of January 17, 1973, your appeal is hereby dismissed.

For your convenience, the papers which you submitted on January 12, 1973, and February 2, 1973, are returned herewith.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

Enclosures

cc: W. J. Usery, Jr.
Dept. of Labor

CO
Savanna Army Depot

R. P. Kaplan
NAGE

U.S. Department of Treasury, Office of Regional Counsel, Western Region, A/SLMR No. 161. The Assistant Secretary issued a decision and direction of election in a unit of professional employees (including attorneys) and nonprofessional employees in the agency's Office of Regional Counsel, Western Region. The agency, following certification, appealed to the Council claiming that the Assistant Secretary's unit finding is arbitrary and capricious, because of alleged lack of separate community of interest of Western Region professionals from professionals in other regions, and because of alleged errors of fact. The agency further asserted that the Assistant Secretary's determination that unit attorneys could be represented by National Association of Internal Revenue Employees (NAIRE) presents a major policy issue and is arbitrary and capricious, due to NAIRE's admitting to membership and representing other nonattorney personnel of the agency.

Council action (February 22, 1973). As to the appropriateness of the unit, the Council held that the Assistant Secretary's decision properly considered and invoked the criteria for an appropriate unit in the Order and does not appear arbitrary and capricious. As to the representation of unit attorneys by NAIRE, the Council held that nothing in the Order prohibits such representation of the attorneys here involved, and that the Assistant Secretary's finding to this effect does not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of the agency's appeal under section 2411.12 of its rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 22, 1973

Mr. Amos N. Latham, Jr.
Director of Personnel
U.S. Department of Treasury
15th & Pennsylvania Avenue, NW.
Washington, D.C. 20220

Re: U.S. Department of Treasury,
Office of Regional Counsel,
Western Region, A/SLMR No. 161,
FLRC No. 72A-32

Dear Mr. Latham:

The Council has carefully considered your petition for review (following certification) of the Assistant Secretary's decision in the above-entitled case, which directed an election in a unit comprised of all professional and nonprofessional employees of the Office of Regional Counsel, Western Region.

Your request for review asserts that the Assistant Secretary's decision finding appropriate a unit which includes the professionals in the Regional unit was arbitrary and capricious because, based upon the record, those professional employees have a community of interest with all professional employees in the Chief Counsel's seven regional offices. Additionally, it is contended that the Assistant Secretary's decision in certain particulars "does not present an accurate portrayal of the record." Your request for review also asserts that the Assistant Secretary's determination that the attorneys at the activity may be represented by National Association of Internal Revenue Employees (NAIRE) and that no conflict of interest is present in such representation is arbitrary and capricious and presents a major policy issue because: (1) American Bar Association (ABA) ethical requirements which are directly applicable to a segment of the agency's attorneys by virtue of U.S. Tax Court rules proscribe such representation of the subject attorneys; and (2) the subject attorneys render personnel advice to agency management concerning other agency employees who are represented by NAIRE.

With respect to your contentions relating to the appropriate unit findings made by the Assistant Secretary, it does not appear that the Assistant Secretary acted arbitrarily or capriciously. Section 10(b)

of the Order clearly establishes the criteria which are to be applied in determining a unit appropriate for exclusive recognition, and these were the criteria properly considered and invoked by the Assistant Secretary in the instant case. Further, the alleged errors of fact in the decision appear without any controlling significance. You neither contend, nor does it appear, that the Assistant Secretary's conclusions are unsupported by evidence in the record.

As to the Assistant Secretary's determination to permit unit attorneys the opportunity to select NAIRE as their bargaining representative, it does not appear that this finding presents a major policy issue or is arbitrary and capricious. In this regard, there is no requirement in the Order that proscriptions of the American Bar Association upon the conduct of its members control unit determinations and qualifications of a labor organization for exclusive recognition in the Federal sector labor-management relations program. With respect to the contention that representation by NAIRE of both attorneys and IRS personnel would create a conflict of interest, the uncontested findings of the Assistant Secretary establish that the attorneys are essentially involved in non-personnel matters related to the mission of the agency and have been required to advise on personnel matters on only three occasions in the past 20 years. Further, there is no indication that any of the attorneys are engaged in Federal personnel work; or that they administer a labor-management relations law or the Order; or that they serve in a confidential capacity assisting or advising those who develop and/or administer management policies in the fields of labor-management relations or personnel management matters; or that they serve as supervisors or management officials. His conclusion that no such conflict of interest would be created was predicated upon uncontradicted findings as to the common work objectives of the two groups and an attendant absence of any substantial source of disharmony between their interests.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

Department of the Army, United States Army Base Command, Okinawa, A/SLMR No. 243. The union (American Federation of Government Employees, AFL-CIO) appealed to the Council from the Assistant Secretary's decision and direction of election, and requested a stay of the election pending Council determination of its appeal.

Council action (March 2, 1973). The Council denied review of the union'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 the union's request for stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 2, 1973

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

Re: Department of the Army, United
States Army Base Command, Okinawa,
A/SLMR No. 243, FLRC No. 73A-11

Dear Mr. Malloy:

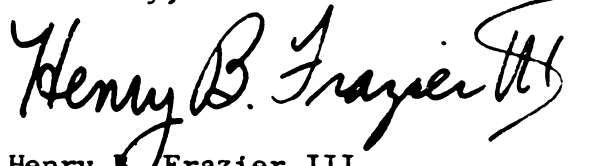
Reference is made to your petition for review, and your request for stay of election pending decision on your appeal, in the above-entitled case.

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 an Assistant Secretary's decision 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 certification or certifications of representative or of the results of the elections have been 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, the Council has directed that your appeal be 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 stay pending decision on your appeal is therefore likewise denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: W. J. Usery, Jr.
Dept. of Labor

S. Sutherland
Army

American Federation of Government Employees (National Border Patrol Council) and United States Immigration and Naturalization Service, Department of Justice (Lennard, Arbitrator). The arbitrator issued an award relating to the pay due for overtime work performed by border patrol agents. The agency appealed to the Council from the award on the ground that the arbitrator lacked jurisdiction over the pay question, and requested a stay of the award pending Council determination of its appeal. Subsequently, the agency requested and obtained a decision from the Comptroller General on essentially the same pay question resolved by the arbitrator. The Comptroller General rendered a decision essentially the same as that of the arbitrator, and the agency implemented the latter decision, thereby complying substantially with the arbitrator's award.

Council action (March 6, 1973). The Council concluded that, since the dispute giving rise to the arbitration no longer existed, the agency's petition for review was moot. Accordingly, the Council directed that review of the petition, and that the agency's request for stay, be denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 6, 1973

Mr. Kenneth J. Stallo
Director of Personnel
and Training
United States Department
of Justice
Washington, D.C. 20530

Re: American Federation of Government Employee
(National Border Patrol Council) and United
States Immigration and Naturalization Service,
Department of Justice, (Lennard, Arbitrator),
FLRC No. 72A-28

Dear Mr. Stallo:

Reference is made to your petition for review of an arbitrator's award in the above-entitled case in which the arbitrator determined that the individual grievant and all other border patrol agents similarly situated were entitled to receive overtime compensation on an hourly basis for the work involved under 5 U.S.C. § 5542(a), rather than premium compensation on an annual basis for uncontrollable overtime under 5 U.S.C. § 5545(c)(2).

Your petition requests that the Council declare invalid and vacate the arbitrator's award solely on the ground that he lacked jurisdiction over the pay question submitted to arbitration. It also requests the Council to stay the arbitrator's award during the period the petition is before the Council. Your petition stated that the agency would also request a decision from the Comptroller General of the United States as to which of the two pay statutes applied to the situation giving rise to the grievance.

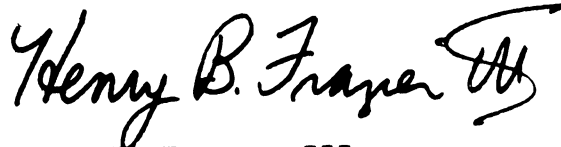
You subsequently furnished a copy of the Comptroller General's decision B-177032, dated December 5, 1972. It appears that the question decided by the Comptroller General is essentially the same question submitted to arbitration, and that the arbitrator's award and the Comptroller General's decision made essentially the same determination. You have also advised the Council that the agency has implemented the decision. It appears therefore that the agency has complied substantially with the arbitrator's award.

Since the dispute which gave rise to the question of arbitrability has been resolved, it is clear that your petition for review of the arbitrator's award has been rendered moot.

Accordingly, the Council has directed that your petition for review be dismissed, without passing on the merits of the questions raised in the petition, and that your request for a stay be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, stylized initial "H" and a flourish at the end.

Henry B. Frazier III
Executive Director

cc: N. H. Fine
AFGE

Volunteers in Service to America (VISTA), A/SLMR No. 95. National VISTA Alliance filed a representation petition, seeking an election in a unit of VISTA volunteers. The Assistant Secretary dismissed the petition, upon finding that VISTA volunteers are not "employees" within the meaning of section 2(b) of the Order. The Council accepted this case for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 26).

Council action (March 7, 1973). The Council, in agreement with the Assistant Secretary, decided that the definition of "employee" in section 2(b) of the Order is controlled by the statutory limitations on the status of volunteers as Federal employees under the Economic Opportunity Act, the statute which established the VISTA volunteer program. These statutory limitations, according to the Council, reflect an intent by Congress to exclude the volunteers from coverage under Executive Order 11491. The Council further ruled that, apart from these statutory limitations, it was not the purpose of the Order to provide coverage for the special type of relationship which exists between the agency and the volunteers. Accordingly, the Council sustained the Assistant Secretary's finding that VISTA volunteers are not "employees" as defined by the Order and upheld his dismissal of the union's representation petition.

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

Volunteers in Service
to America (VISTA)

A/SLMR No. 95
FLRC No. 71A-55

and

National VISTA Alliance

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

The union, National VISTA Alliance, sought an election in a unit composed of approximately 4,000 VISTA volunteers. The activity (formerly Office of Economic Opportunity, now ACTION), moved that the petition be dismissed by the Assistant Secretary, contending that the Economic Opportunity Act (EOA), as amended, which created the VISTA volunteer program, conclusively established that the volunteers are not "employees" covered by the Order. The Alliance, on the other hand, contended that volunteers are "employees" under the Order and that the EOA does not require a contrary conclusion. The Assistant Secretary dismissed the petition.

The essential facts, which are not in dispute, are as follows:

The VISTA volunteer program was established by Congress for the purposes set forth in section 801 of the EOA (42 U.S.C. § 2991), namely:

This subchapter provides for a program of full-time volunteer service, for programs of part-time or short-term community volunteer service, and for special volunteer programs, together with other powers and responsibilities designed to assist in the development and coordination of volunteer programs. Its purpose is to strengthen and supplement efforts to eliminate poverty by encouraging and enabling persons from all walks of life and all age groups, including elderly and retired Americans, to perform meaningful and constructive service as volunteers in part-time or short-term programs in their home or nearby communities,

and as full-time volunteers serving in rural areas and urban communities, on Indian reservations, among migrant workers, in Job Corps centers, and in other agencies, institutions, and situations where the application of human talent and dedication may help the poor to overcome the handicaps of poverty and to secure and exploit opportunities for self-advancement.

As to the status of the volunteers, section 833 of the EOA, as amended (42 U.S.C. § 2994(b) (1970)), provided:

(a) Except as provided in section 8332 of Title 5, [1/] and subsections (b) and (c) of this section and in section 8143(b) of Title 5, [2/] volunteers under this subchapter shall not be deemed Federal employees and shall not be subject to the provisions of laws relating to Federal employment.

(b) Individuals who receive either a living allowance or a stipend under part A of this subchapter shall, with respect to such services or training, (1) be deemed, for the purposes of subchapter III of chapter 73 of Title 5, persons employed in the executive branch of the Federal Government, and (2) be deemed Federal employees to the same extent as enrollees of the Job Corps under section 2727(a) (1) and (3) of this title.

(c) Any period of service of a volunteer under part A of this subchapter shall be credited in connection with subsequent employment in the same manner as a like period of civilian employment by the United States Government --

(1) for the purposes of section 1092(a)(1) of Title 22, and every other Act establishing a retirement system for civilian employees of any United States Government agency; and

1/ Section 8332 provides that time as a volunteer will be creditable service for retirement purposes under the Civil Service Retirement and Disability Fund, but only if the individual subsequently is employed in a position subject to the retirement system.

2/ Section 8143(b) provides that "compensation for injuries" benefits under the Federal Employees' Compensation Act shall be applicable to the volunteers.

(2) except as otherwise determined by the President, for the purposes of determining seniority, reduction in force, and layoff rights, leave entitlement, and other rights and privileges based upon length of service under the laws administered by the Civil Service Commission, the Foreign Service Act of 1946, and every other Act establishing or governing terms and conditions of service of civilian employees of the United States Government: Provided, That service of a volunteer shall not be credited toward completion of any probationary or trial period or completion of any service requirement for career appointment. [Emphasis added.]

The Director of ACTION is the authority who recruits, selects and trains persons to serve in full-time VISTA volunteer programs. Volunteers who enroll are required to make a full-time personal commitment to combat poverty, and, when practicable, to live among and at the economic level of the people served. Further, they must agree to be available for service, without regard to regular working hours, at all times except for authorized periods of leave. Persons selected are enrolled for one-year periods of service, at which time the Director of ACTION assigns the volunteers, upon request, to Federal, State or local agencies, or private, nonprofit organizations. Once the volunteers are assigned, ACTION exercises no direct supervision and control over them, "except for instructions implementing, for example, the prohibition in (EOA) section 833(b) against political activity." In this connection the VISTA Volunteer Handbook defines the roles of the volunteers, the sponsors, and ACTION as follows:

Programs in which volunteers serve are locally developed and supervised...(D)ay-to-day activities are under the direction of the sponsoring agency and its assigned supervisor. The VISTA Regional Office staff periodically visits various project sites to discuss the plans, needs, and problems of your sponsoring agency...

The duties performed by the volunteers are negotiated and agreed to by ACTION and the sponsoring organization, prior to assignment of volunteers, and embodied in a memorandum of agreement. These duties cannot be changed without the approval of ACTION.

Additionally, only ACTION has the authority to "terminate" a volunteer. If a sponsoring organization is not satisfied with a particular volunteer, it requests or directs ACTION to remove him from that assignment. ACTION, however, makes the final determination on whether to transfer him to another assignment or "terminate" him as a volunteer.

With respect to the "living allowance or a stipend" made reference to in paragraph (b) of section 833 of the EOA, the Director of ACTION is authorized to provide volunteers with monthly stipends not to exceed \$50 during the volunteers' first year in service. Thereafter, a stipend of \$75 per month may be paid to individuals who have been designated "volunteer leaders." The stipends, except under extraordinary circumstances, are payable only upon completion of service. The Director may also provide living allowances to volunteers and either furnish government transportation or reimburse volunteers for work-related transportation expenses. Additionally, ACTION Regional Offices have authority to grant supplemental adjustment allowances (moving expenses) if a volunteer's work place changes. The agency provides medical-dental coverage through Blue Cross/Blue Shield for all volunteers. Volunteers accrue vacation leave at the rate of one day for each full month of service (a leave earning system which is somewhat different than that applicable to general Federal employment), and ACTION approves leave and grants vacation leave allowances.

Volunteers are covered by Title II of the Social Security Act (old age assistance), the Hatch Political Activity Act (restriction on political activities), the Federal Employees' Compensation Act (workmen's compensation), and the Federal Tort Claims Act.

The Civil Service Retirement and Disability Fund has limited applicability to the volunteers as their service is creditable service for civil service retirement only if they are subsequently employed subject to the retirement system. Additionally, if a volunteer leaves VISTA and subsequently joins the civil service, his VISTA service is used in determining seniority, reduction in force, and layoff rights, leave entitlement, and other rights and privileges based upon length in service, except as otherwise determined by the President.

The Assistant Secretary's Decision

The Assistant Secretary noted the competing contentions by the parties as to whether the volunteers were excluded from the coverage of the Order by the EOA or covered by the Order's definition of "employee," and stated, "It is, therefore, in this posture that the Assistant Secretary must determine the

employee status of the VISTA volunteers as a matter of law." He stated that he must be guided by the EOA, "which explicitly defines and limits the Federal employee status of the volunteers." The Assistant Secretary then analyzed the above-quoted section 833 of the EOA, noting in particular that it "...clearly states that volunteers will not be subject to the provisions of laws relating to Federal employment except as provided in that section." The Assistant Secretary concluded:

In my view, Section 833 of the Economic Opportunity Act and its legislative history, fully and conclusively define the status of the volunteers. In these circumstances, I find to be without merit the contention of the Alliance that no particular definition of "employee" may determine the applicability of Executive Order 11491 to the Vista volunteers. Nor am I persuaded, as the Alliance contends, that Section 833 of the Economic Opportunity Act is not controlling upon the application of Executive Order 11491 in this case. In making this finding, I note that Section 833, in pertinent part, must be read in the disjunctive. It, therefore, specifically defines the status of the volunteers and then provides that with certain exceptions Vista volunteers will not be subject to laws relating to Federal employment. In any event, I find that the statutory definition of the volunteers' status is controlling in determining the employee status of Vista volunteers under the Executive Order.
[Footnote omitted.]

The Assistant Secretary concluded: ". . . I find that the VISTA volunteers in the petitioned unit are not employees within the meaning of section 2(b) of Executive Order 11491."

Contentions

The Alliance contends:

1. The indicia of volunteers' employment are similar to those of Federal employees.
2. The language from Section 833 of the EOA that the Assistant Secretary relied on was misinterpreted.

3. Section 833 is silent on whether volunteers shall be covered by an Executive order relating to the right to organize and bargain collectively; and, the Assistant Secretary erred in finding that the Executive order is a "law relating to Federal employment."

4. There exists in various statutes a wide variety of different definitions of "Federal employee," none of which is binding on the Council.

The agency, in support of its contention that the volunteers are not employees for purposes of Executive Order 11491, relies on the above-discussed language from section 833 of EOA and the nature of their functions; e.g., they are supervised by their sponsor rather than by ACTION and their motivation is a ". . . devotion to helping overcome poverty and deprivation . . . not working conditions or money. . . ."

Opinion

The questions before the Council are (1) whether the definition of "employee" in section 2(b) of the Order is controlled by section 833 of the EOA; and, if so, (2) whether section 833 reflects a congressional intent to exclude volunteers from coverage under Executive orders such as E.O. 11491. Apart from such considerations, we have considered whether the Order was intended to cover such persons as the VISTA volunteers.

Executive Order 11491 was issued by the President, as stated in the preamble, under the authority vested in him "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." As to the code provisions specifically cited in the preamble, 5 U.S.C. § 3301 authorizes the President to prescribe regulations for admission into the civil service of the Executive branch and to determine the fitness of applicants for such employment. And 5 U.S.C. § 7301 provides that "The President may prescribe regulations for the conduct of employees in the Executive branch."

Section 2(b) of the Order defines "employee" as follows:

'Employee' means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order;

The power of Congress effectively to limit the coverage of the Order by statute is evident. For Congress established the agency involved and is free, within Constitutional restraints, to define the conditions of employment to attach to personnel in that agency.

Therefore, we agree with the Assistant Secretary that the statutory definition of the volunteers' status is controlling in determining the employee status of volunteers under the Executive Order.

Having concluded that the coverage of the volunteers under the Order is controlled by their employee status as limited by section 833 of the EOA, we turn to the question of whether Congress clearly intended to deny volunteers the benefits conferred by the Order.

As previously mentioned, section 833(a) provides that, with exceptions not here applicable, "volunteers . . . shall not be deemed Federal employees and shall not be subject to provisions of laws relating to Federal employment."

The House report on this section, as originally enacted, states:^{3/}

Volunteers will not be deemed to be Federal employees and will not be subject to provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits, except that all volunteers during training, and such volunteers as may be assigned pursuant to paragraph (a)(2) of this section shall be deemed Federal employees to the same extent as are enrollees of the Job Corps. [Job Corps enrollees, under 42 USC §2727, have Federal employee status only in limited respects not here pertinent.]

While there is an absence of explicit evidence, there are substantial implicit indications of congressional intent to exclude the volunteers from the coverage of the Executive Order. The pronouncement "shall not be deemed Federal employees and shall not be subject to the provisions of laws relating to Federal employment" is a clear and unambiguous all-inclusive exclusion. While Congress did make applicable to the volunteers certain laws relating to Federal employment, this very specific and

^{3/} 2 U.S. Code Cong., & Admin. News 2959 (1964).

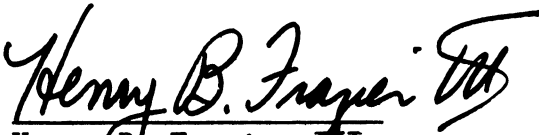
apparently considered judgment was limited to either granting something at the time a volunteer accepted some "subsequent employment," or granting what may be considered requisites of any work situations, i.e., the Internal Revenue Code, Social Security, workmen's compensation and Federal tort claims. The notion of a limited application of Federal laws is further indicated by the fact that Congress stated that the volunteers shall "be deemed Federal employees to the same extent as enrollees of the Job Corps . . .," tying the volunteers to a group whose situation was quite obviously different than that of an employee of an agency. Moreover, there is nothing in section 833 which reflects an intent to establish between ACTION and the volunteers anything approaching a labor-management relations system.

Based on the above, it appears that section 833 reflects a congressional intent to exclude the volunteers from the coverage of Executive Order 11491.

Apart from our conclusion that the definition of "employee" in section 2(b) of the Order is controlled by section 833 of the EOA and that section 833 clearly reflects a congressional intent to exclude the volunteers from coverage under Executive Order 11491, we are of the opinion that it is not the intention of the Order to cover such persons as the VISTA volunteers. It is clear that while the volunteers have some "conditions of employment," e.g., they get some minimal pay and earn leave, they do not become VISTA volunteers for the purpose of earning a livelihood and establishing a career. Instead, the volunteers seek an opportunity to devote a fixed and usually limited portion of their life to the performance of humanitarian endeavors. The relationship between the volunteers and ACTION is not one of the latter supervising the former in the performance of assigned tasks. Rather, the supervision exercised appears to be solely programmatic; i.e., the volunteers are assigned to sponsoring organizations to perform duties embodied in an agreement negotiated by ACTION and the sponsoring organization. Once assigned, the volunteers are engaged in a full-time commitment to combat poverty and, when practicable, to live among and at the economic level of the people served rather than going to and from a job at fixed hours such as marks a traditional employee situation. The marked dissimilarities between the volunteers and any conventional concept of employee is sufficient to convince us that it is not the purpose of the Order to provide a labor relations program for the type of relationship which exists between VISTA and the volunteers.

For the foregoing reasons, and pursuant to section 2411.17(b) of the Council's rules of procedure, we sustain the Assistant Secretary's finding that VISTA volunteers are not "employees" covered by the Order and his dismissal of the petition in the subject case.

By the Council.


Henry B. Frazier II
Executive Director

Issued: ~~Ma~~rch 7, 1973

National Federation of Federal Employees, Local 779 and Department of the Air Force, Sheppard Air Force Base, Texas. The negotiability dispute involved the union's proposal concerning merit promotion.

Council action (April 3, 1973). The Council held that the union's proposal is negotiable to the extent that it does not conflict with an applicable agency regulation on merit promotion. However, to the extent that the proposal is in specific conflict with provisions of that regulation, the agency's determination that negotiations were not required on the proposal was sustained. In the latter connection, the Council found that, contrary to the union's contention, the regulation, as interpreted by the agency head, does not conflict with the Order or the Federal Personnel Manual.

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

National Federation of Federal
Employees, Local 779

FLRC No. 71A-60

and

Department of the Air Force
Sheppard Air Force Base, Texas

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The Department of the Air Force (USAF) regulation on merit promotion (AFR 40-335), issued in July 1969, provides for merit promotion plans to be "established and issued by Headquarters USAF, major commands or installations. . . ." In November 1969, the Air Training Command (ATC), a major command of the USAF, issued a regulation (ATCR 40-3) prescribing a comprehensive merit promotion plan for uniform application at activities throughout the command. This regulation contains a provision prohibiting activities from supplementing it. The petitioner, NFFE Local 779, holds exclusive recognition for a unit of nearly 1,500 General Schedule (GS) employees at Sheppard Air Force Base, an activity within ATC.

During or just prior to negotiations with the activity, the union presented its proposals in a package, including a proposed article on merit promotion.^{1/} Before the merit promotion proposal was reached for discussion, the activity's negotiators advised that such a proposal would be nonnegotiable under ATCR 40-3. The union referred the issue to the agency head for resolution, claiming that under the Order and CSC requirements the merit promotion plan at the activity level is a negotiable item, and that ATCR 40-3 is so overly prescriptive that it unlawfully renders such plan nonnegotiable and should be rescinded. The Department of the Air Force determined "that the issuance of ATCR 40-3 does not violate Civil Service Commission, Air Force, or the Executive Order requirements with respect to negotiability and that, accordingly, there is no call for its rescission."

^{1/} The specific contents of the proposal are not in the record before the Council.

The union petitioned the Council to "review and reverse" the agency's decision, contending principally that the ATC regulation violates the Order and CSC requirements.^{2/}

The Council accepted the union's appeal. The agency filed a brief; the union did not, choosing to rely on its initial petition and the appendices submitted with it.

Opinion

The union contends that ATCR 40-3 violates section 11(a) and (b) of the Order and CSC requirements (FPM Chapter 335, S 5-1) because it "renders a merit promotion plan non-negotiable at the installation level." The agency asserts in its opposition that ATCR 40-3 does "not violate either the Civil Service Commission's regulations or the Executive Order."

The two issues raised by the union will be examined: (I) Does the ATC regulation violate section 11(a) and (b) of the Order? and (II) Does the regulation violate Civil Service Commission requirements?

^{2/} The union also asserted in its appeal that, if the ATC regulation is consonant with the intent of the CSC requirements, the CSC requirements themselves are "in conflict with the intent" of the Order and should be revised. However, it should be noted that this appeal was filed pursuant to section 11(c)(4) of E.O. 11491 which provides that a labor organization may file an appeal or a negotiability issue 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.

This provision of the Order does not contemplate a determination by the Council in negotiability appeals of whether regulations of appropriate authority outside the agency, as opposed to those of the agency itself, are in violation of applicable law or the Order. Therefore, we find that this issue is not properly before us in this instance. Of course, this would not preclude the Council from considering, in an appropriate case filed pursuant to other provisions of the Council's applicable regulations and those of the Order, the propriety or validity of regulations of any appropriate authority outside the agency.

I. Does the ATC regulation violate section 11(a) and (b) of the Order?

Section 11(a) and (b) 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 . . . and this Order. . . .

(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. . . .

The union contends that ATCR 40-3 violates these provisions of the Order because (1) it "cannot by its own dictation be supplemented" at the activity level, and (2) even if it could be supplemented, the regulation is so detailed, specific and overly prescriptive that it "renders the merit promotion program non-negotiable at Sheppard AFB."

1. Supplementation of the ATC Regulation. The negotiating team representing Sheppard Air Force Base initially took the position that the union's proposal was nonnegotiable because Section A4. of ATCR 40-3 provides that "bases are not authorized to supplement this regulation." However, following appeal of the issue to the Council, the Department of the Air Force conceded in its brief that the prohibition of supplementation is not intended to bar negotiation of contract provisions "on matters not explicitly prohibited by the plan's provisions." Since no matters are "explicitly prohibited" by the regulation, we take this to mean that a union proposal dealing with merit promotion is negotiable except to the extent that it specifically conflicts with provisions of ATCR 40-3. Consequently, the dispute regarding the issue of supplementation is moot as to bargaining proposals which do not specifically conflict with the provisions of the ATC regulation. The agency head's original determination that the union's proposal is nonnegotiable has, by implication, been narrowed to only those aspects of the proposal which specifically conflict with the provisions of the regulation.

2. Overly Prescriptive Nature of the ATC Regulation. In connection with its contention that the regulation violates the bargaining obligation imposed by section 11 of the Order, because it is "over-prescriptive," and hence preempts meaningful bargaining at subordinate

activities on features of the merit promotion plan, the union relies on the bargaining obligation imposed on the agency by section 11(a), on the "due regard" provision in section 11(b), and on the following language in the 1969 Study Committee Report and Recommendations:

We firmly believe that agency regulatory authority must be retained, but fruitful negotiations can take place only where management officials have sufficient authority to negotiate matters of concern to employees. Therefore, except where negotiations are conducted at the national level, agencies should increase, where practicable, delegations of authority on personnel policy matters to local managers to permit a wider scope for negotiation.

Agencies should not issue over-prescriptive regulations, and should consider exceptions from agency regulations on specific items where both parties request an exception and the agency considers the exception feasible.^{3/}

Conceding, without passing upon the matter, that the ATC regulation might be judged overly prescriptive, the question is whether the regulation for this reason violates the provision in section 11(a) establishing the bargaining obligation and the provision in section 11(b) requiring an agency to have "due regard" for its bargaining obligation when prescribing regulations concerning personnel policies and practices and working conditions.

The resolution of this question, as here presented, requires an examination of section 11(a) and 11(b) taken together, as the union tacitly recognizes by its reliance upon both sections. Among other reasons, section 11(b) by its very terms incorporates section 11(a). Section 11(b) enjoins agencies when prescribing regulations relating to personnel policies and practices and working conditions to have due regard for the bargaining obligation imposed by section 11(a). Thus, this exhortation may not be considered alone and in isolation but only in conjunction with section 11(a). And section 11(a), which prescribes the bargaining obligation, by its own terms limits the obligation to those matters which may be appropriate under applicable laws and regulations, including, among other things, published agency policies and regulations.

In these circumstances, the fundamental nature of the regulation and circumstances surrounding its issuance should be examined to determine whether the issuance of the ATC regulation improperly limits or dilutes the scope of negotiations on merit promotion at Sheppard Air Force Base and hence conflicts with the bargaining obligation of section 11(a).

In this case, the head of ATC, a major subordinate echelon within the agency, has published a regulation applicable uniformly to all

^{3/} Report accompanying E.O. 11491, section E(2), Labor-Management Relations in the Federal Service (1971).

installations under his command. The regulation was issued to implement the Federal Merit Promotion policy contained in FPM Chapter 335; agencies must publish merit promotion plans consistent with the CSC requirements contained therein.

No union holds exclusive recognition for a commandwide bargaining unit. Hence, this case does not present the issue of whether, and to what extent, ATC might be obligated to negotiate the commandwide merit promotion plan with a union holding such commandwide recognition. A number of unions, including NFFE Local 779, hold recognition at subordinate installations within the command. ATC observed CSC requirements in FPM Chapter 335, S 5-1a(2)4/ by soliciting suggestions from these unions and considering their views prior to the promulgation of the ATC regulation. Moreover, as the agency points out in its brief, "aside from petitioner's request to have ATCR 40-3 rescinded in its entirety for the command as a whole, no attempt has been made to obtain an exception to any of its provisions to permit negotiation on a matter of mutual interest."

4/ Subchapter 5. Relations With Employees and Employee Organizations

5-1. Obtaining the Views of Employees and Employee Organizations

a. Participation of employee organizations and employees in the development and revision of promotion guidelines and plans. Employee organizations and employees participate in the process of developing or making significant revisions in promotion guidelines a. plans.

(1) When the guidelines or plans are developed at the agency headquarters level and are applicable agency-wide, the agency consults or negotiates, as appropriate, with employee organizations having formal or exclusive recognition at the national level as the representatives of employees throughout the agency. When guidelines or plans are developed by a subordinate organizational level (e.g., a command, bureau, regional office, or field installation), the organization consults or negotiates, as appropriate, with employee organizations having formal or exclusive recognition at that level for employees affected by the guidelines or plans. (See chapter 711.)

(Cont'd next page)

The agency explains in its brief its reasons for the issuance of a comprehensive commandwide merit promotion regulation as follows:

Recognizing the commonality of organizational structure, mission objectives, and occupational coverage of its subordinate installations, the Headquarters of the Air Training Command determined that like treatment of employees for promotion consideration within that command could best be accomplished by a standardized system.

We find, therefore, the regulation was issued to achieve some degree of uniformity and equality in the administration of a matter common to all the subordinate activities of the command, i.e., the merit promotion program, to accomplish effective direction and control and maintain efficiency in the administration of the merit promotion program at these subordinate activities, and to insure that the merit promotion plans at these activities met regulatory requirements issued by the agency head and the Civil Service Commission.

4/ (Cont'd)

(2) When no employee organization representing affected employees has formal or exclusive recognition at the organizational level which is developing the guidelines or plans, or the recognized organizations do not represent a substantial and diversified part of the affected employees, additional views are obtained from employee organizations having formal or exclusive recognition in subordinate units of affected employees, supplemented by direct communication with employees outside these units when needed to obtain a representative cross-section of employee views (including those of minority groups and women). Views are obtained directly from employees by such methods as publishing proposed guidelines or plans for general comment, requesting individual employee comments, and interviewing or sending questionnaires to a sample group of employees.

Finally, the ATC issued these regulations under the authority granted by sections 301 and 302 of title 5 of the U.S. Code^{5/} for agencies and their subordinate echelons to prescribe regulations for the government of their departments.

Thus, while the union contends that the issuance of this regulation prevents meaningful negotiations on the merit promotion program at Sheppard Air Force Base and hence demonstrates a lack of "due regard" for the bargaining obligation, we find that the ATC regulation is the type of higher level published policy or regulation, applicable uniformly to more than one activity, that may properly limit the scope of negotiations at such subordinate activities under section 11 of the Order.

5/

Title 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

Chapter 3. Power

§ 301. Departmental regulations.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379)

§ 302. Delegation of authority.

(a) For the purpose of this section, 'agency' has the meaning given it by section 5721 of this title.

(b) In addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him--

(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency; and (2) by section 324 of title 44 to authorize the publication of advertisements, notices, or proposals.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379)

As we stated in our decision in the Merchant Marine Academy case:

We do not, of course, question the statutory authority of the agency head to issue regulations for the operation of his department and the conduct of his employees. Moreover, we are fully aware of, and endorse, the policy of the Order to support such regulatory authority, in order to protect the public interest and maintain efficiency of government operations. This policy is incorporated in section 11(a) by express reference to "published agency policies and regulations" as an appropriate limitation on the scope of negotiations.

However, the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity. . . . [Additional emphasis supplied and footnotes omitted.]

One might question the wisdom or desirability of issuing an explicit, specific and detailed regulation concerning a matter relating to personnel policies and practices and working conditions, such as merit promotion, and thereby reducing the scope of bargaining on merit promotion. However, in this case, the regulation, as already noted, was issued to achieve a desirable degree of uniformity and equality in the administration of matters common to employees at all subordinate activities of the command. Therefore, nothing in the nature of the regulation itself, nor in the circumstances surrounding its issuance, improperly conflicts with the obligations imposed by section 11 of the Order.

II. Does the regulation violate CSC requirements?

The union contends that the regulation is contrary to the "intent of CSC guidance in Subchapter 5 of FPM Chapter 335."

Since this contention involved interpretation of CSC's regulations, the CSC was asked, in accordance with usual Council practice, for an interpretation of chapter 335 of the FPM as it pertains to the question raised in this case. The Commission replied as follows:

* * * * *

You specifically ask whether a merit promotion regulation issued by the Air Training Command (ATC) violates Commission regulations, especially section 5-1 of chapter 335 of the

Federal Personnel Manual (FPM). And you state that particularly in question is that portion of the ATC regulation which provides: 'Bases are not authorized to supplement this regulation.'

FPM chapter 335 requires agencies to develop promotion guidelines (see section 2-3b) and promotion plans (see section 3-1a). And section 3-2 through 3-9 specify a number of requirements agencies must observe in their promotion plans. However, our regulations do not specify the organizational level at which promotion guidelines and plans are to be developed.

Section 5-1 of FPM chapter 335 contains the Commission's instructions to agencies on obtaining the views of employees and unions on promotion matters. With regard to the participation of unions in the process of developing or revising promotion guidelines and plans, section 5-1(a) provides that an agency consults or negotiates, as appropriate, with recognized unions which represent employees affected by the guidelines and plans. Section 5-1(c) gives examples of matters the Commission considers appropriate for consultation or negotiation, and section 5-1(d) lists three categories of matters which we do not consider to be within the scope of consultation or negotiation. (Section 5-1(b) is concerned with agency consideration of, and response to, unsolicited views on promotion matters presented at any time by employees or employee groups and does not appear to be an issue in the case at hand.)

However, section 5-1 is not concerned with either the organizational level at which promotion guidelines and plans are developed or with their specificity.

Thus the fact that the promotion plan established by the ATC regulation is quite specific and was issued at the command level does not violate the Commission's regulations.

In your letter you stated that a particular question had been raised about that portion of the ATC regulation which provides: 'Bases are not authorized to supplement this regulation.' The Commission's regulations do not speak to the question of whether the organizational entity developing promotion guidelines and plans can prohibit lower levels from supplementing the guidelines and plans. Thus this portion of the ATC regulation cannot be said to violate the Commission's regulations.

* * * * *

Based on the above interpretation by the Civil Service Commission, we find that the ATC regulation, as interpreted by the agency head, does not violate CSC regulations.

Conclusion

In these circumstances we accordingly find that, as the agency, in effect, has conceded in its brief the provision in the ATC regulation barring supplementation is inoperative and the union's proposal on merit promotion is negotiable to the extent that it does not conflict with the other specific provisions of the regulation. We further find that the agency's regulation, as interpreted by the agency head, does not improperly limit the scope of negotiations and hence does not conflict with the bargaining obligation imposed by section 11 of the Order, and that it does not violate chapter 335 of the Federal Personnel Manual. Accordingly, to the extent that the union's bargaining proposal is in specific conflict with the provisions of the ATC regulation, we must uphold the agency's determination that the proposal is nonnegotiable.

The foregoing decision shall not be construed as expressing or implying any opinion of the Council as to the merits of those parts of the union's proposal which do not specifically conflict with the ATC regulation. We decide herein only the issues as to the extent, if any, of the mutual obligation of the parties under section 11 of Executive Order 11491 to negotiate on the proposal.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 3, 1973

Philadelphia Metal Trades Council and Philadelphia Naval Shipyard. The negotiability dispute involved union proposals for "official time" bargaining. The essence of each proposal was that it would permit an employee to be on official time for part of the period spent in negotiations which fell outside his regular working hours, or for more than half the time spend in negotiations during his regular working hours.

Council action (April 3, 1973). The Council held that the union's proposals do not meet the terms of the exceptions to the general prohibition of section 20 of the Order against official time bargaining. Accordingly, the Council sustained the agency's determination that the subject proposals are non-negotiable.

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

Philadelphia Metal Trades Council

and

FLRC No. 72A-16

Philadelphia Naval Shipyard

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The activity, a naval shipyard operating on a 24-hour basis, and the union were parties to a "ground rules agreement" which, among other things provided for negotiations on new ground rules, if during negotiations of the agreement, Executive Order 11491 was amended in any manner that could affect the scheduling of agreement negotiations. Soon after the amendment to section 20 was effective,^{1/} the union offered three alternative proposals for modifying the ground rules agreement so as to provide for "official time" bargaining. Each proposal calls for "official time" for one-half the time spent in negotiations and rearranged work shifts for the employees serving as union negotiators so that each employee would be granted official time for one-half the time spent in negotiations regardless of whether the negotiations

^{1/} Section 20 of E.O. 11491, as amended by E.O. 11616, provides:

"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."

occur during or outside his new working hours.^{2/} All three union proposals are designed to insure that the employees who serve as union negotiators will receive a full eight hours of pay each day from the agency, thereby not suffering any economic loss as long as negotiations are in progress. Moreover, the union would not be required to provide any economic support to their negotiators to insure this result.

Under the first union proposal the negotiations would not occur during the rescheduled working hours of the employees serving as union negotiators. Nevertheless, the union proposes that the employees be paid for one-half the time spent in such negotiations. Under the second union proposal two hours of each four-hour negotiating session would occur during the rescheduled working hours of the employees serving as union negotiators and the union proposes, in effect, that the employees be paid for the full two hours. Under the third union proposal one hour of each two-hour negotiating session would occur during the rescheduled working hours of the employees serving as union negotiators and the union proposes, in effect, that the employees be paid for the full hour.

The Defense Department took the position that the three proposals were nonnegotiable "to the extent that they would permit an employee to be on official time for any part of the period spent in negotiations which fell outside his regular working hours, or for more than half of the period spent in negotiations within his regular working hours." The union appealed to the Council from such

2/ The actual proposals were worded, in pertinent part, as follows:

Proposal No. 1. ...negotiations will be conducted during the hours of 0745 to 1115, Tuesday through Thursday. Union negotiators and their chief spokesman will be authorized official time for one half the time spent in negotiations during these regular working hours. Also, they will be on a rearranged work shift from 1145 to 1800....

Proposal No. 2. ...negotiations will be conducted during the hours of 0730 to 1130, Tuesday through Thursday. Union negotiators and their chief spokesman will be authorized official time for one-half the time spent in negotiations during these regular working hours. Also, they will be on a rearranged work shift from 0930 to 1800....

Proposal No. 3. ...negotiations will be conducted between the hours of 0730 to 0930, Monday through Friday. Union negotiators and their chief spokesman will be authorized official time for one half the time spent in negotiations during these regular working hours. Also, they will be on a rearranged work shift from 0830 to 1700....

determination, contending that the proposals are consistent with section 20 in that the phrase "...during regular working hours ,..." in the section refers to all operating hours of the activity and not, as the agency asserts, to the "scheduled working hours of activity employees representing the labor organization in negotiations." The Council accepted the union's petition for review pursuant to section 11(c)(4) of the Order. Both parties filed briefs.

Opinion

A determination as to whether any of the union's proposals are negotiable must be made on the basis of the meaning and intent of the amendments to section 20 of the Order. Prior to the 1971 amendments to Executive Order 11491, there existed a total prohibition on official time for employees serving as union representatives in negotiations with agency management. The Study Committee Report and Recommendations which recommended this prohibition noted that under Executive Order 10988 there were widely divergent practices as to the granting of official time for bargaining and, additionally, such grants had "led in some instances to the protraction of negotiations. . . ." The Report stated:

We believe that an employee who negotiates an agreement on behalf of a labor organization is working for that organization and should not be in a duty status when so engaged.^{3/}

The Council's 1971 Report to the President which recommended some relaxation to the total prohibition of official time stated that --

Section 20 should be modified to eliminate the prohibition of official time for employees when engaged as labor organization representatives in negotiations with agency management. The parties may negotiate on the issue within specified limits.^{4/}

3/ Labor-Management Relations in the Federal Service, 1971, p. 44.

4/ Report and Recommendations on the Amendment of Executive Order 11491, Federal Labor Relations Council, June 1971, p. 30.

The Report went on to state the objectives of the change from the previous policy of prohibition on use of official time.

Upon consideration of all factors, we have concluded that the program will benefit by modifying present policy so as to permit the negotiating parties, when circumstances warrant, to agree to a reasonable amount of official time for employees who represent the union in negotiations during regular working hours. This change will enlarge the scope of negotiations and promote responsible collective bargaining. However, we believe it is essential that the amount of such official time authorized, while adequate to avoid undue hardship or delay in negotiations, should be expressly limited so as to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices.

In order to promote flexibility in the negotiation of agreements for the use of official time, we recommend that the limitations established by the Order on negotiations of such official time be in alternative forms, either: (1) a maximum of 40 hours; or (2) a maximum of one-half the total time spent in negotiations during regular working hours. These limitations refer to the amount of official time during normal working hours of the activity which may be authorized each employee representative in connection with the negotiation of an agreement, from preliminary meetings on ground rules, if any, through all aspects of negotiations, including mediation and impasse resolution processes when needed. Overtime, premium pay, or travel expenditures are not authorized. The number of union representatives on official time during such negotiations normally should not exceed the number of management representatives.^{5/}

The intent which is reflected by the language of section 20 and of the Report was that while the general policy prohibiting official time for union negotiators should be retained, some relaxation of the prohibition would be permitted by providing a limited exception to the general policy. The exception provided was to permit the parties to negotiate, within stated ceilings, some limited provision for official time for union negotiators. The ceilings provided were "up to 40 hours [spent in negotiations]" or "up to one-half the time spent in negotiations."

^{5/} Id., p. 30 (Underscoring added.)

The "up to 40 hour" option was included in the Order, as an alternative to the "up to one-half time spent," to permit employees to continue to receive a full day's pay for a limited time. Thus, under the "up to 40 hour" option during the work and negotiation period covering the first 40 hours of negotiations, the employees would continue to receive a full day's pay for each work/negotiation day but at the end of the 40 hours of negotiations, the agency would pay them nothing for the additional hours spent in negotiations. Under the union's proposals in this case, which were advanced under the "one-half time" option, employees serving as union negotiators would continue to receive a full day's pay for an open-ended period. The net effect of the union's proposal, if approved, would be that negotiations could go on indefinitely with the union negotiators at all times receiving from the agency their normal day's pay. This is clearly inconsistent with both options and with the intent of section 20 "that the amount of such official time authorized . . . be expressly limited so as to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices." [Emphasis added.] Moreover, under the union's proposals in this case there would be no element of "union self-support." No union funds would be used to insure that the employees continued to receive a full day's pay during negotiations. While it is true that under the union's proposal the employee negotiators would be putting in an elongated day, which could be a limited incentive for them to complete negotiations, the proposed arrangement clearly provides something less of an incentive than that reflected in the report.

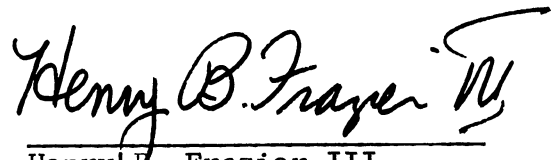
The union claims that the phrase "during regular working hours" which is used in the Order is synonymous with the phrase "during normal working hours of the activity," which appears in another context and at another place in the Report. However both the Order and the Report use the phrase "during regular working hours" to describe the period during which official time for negotiations may be authorized. Rather than being a further explanation of what was meant by "during regular working hours," the words "these limitations refer to the amount of official time during normal working hours of the activity which may be authorized each employee representative in connection with the negotiation of an agreement," were included in the Report for a different purpose. It was recognized that some activities operate on more than one shift (such as the activity in this case). In those cases, it was felt that bargaining representatives might be selected from shifts other than the shift when most management and union representatives normally

would be scheduled to work. Therefore, these words were intended to imply that even though bargaining was taking place during "normal working hours" management could agree to re-arrange the work shifts of those union representatives selected from other shifts while negotiations were taking place so that they would be entitled to "official time."^{6/}

In conclusion, we find that the union's proposals are nonnegotiable to the extent they would permit an employee to be on official time for any part of the period spent in negotiations which fall outside his regular working hours, or for more than half the time spent in negotiations during his regular working hours. Since the authority to authorize a limited amount of official time is stated as an exception to a general prohibition against such official time, any proposal, such as those here involved, which does not meet the terms of the exception is in direct violation of the general prohibition of section 20.

Pursuant to section 2411.27 of the Council's rules of procedure, we hold that the determination by the Department of Defense that the union's proposals here involved were nonnegotiable was proper and must be sustained.^{7/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 3, 1973

^{6/} Thus in its brief in this case the agency concedes that it is "not aware of any policy or regulation which would prohibit activity management from rescheduling the working hours of an employee designated to represent a labor organization in negotiations"

^{7/} The Council further directs that the union's request for oral argument be denied since the submissions of the parties adequately reflect the issues and positions of the parties.

New Jersey Department of Defense, A/SLMR No. 121; United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120. These two cases involved the same issue, that is, the Assistant Secretary's holding (in cases initiated before him by National Army and Air Technicians Association, and by AFGE, respectively) that an individual must have supervisory authority over more than one employee in order to be a supervisor within the meaning of section 2(c) of the Order. The Council accepted the cases for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 27).

Council actions (April 17, 1973). The Council decided that supervisory status, under section 2(c) of the Order, was intended to be determined on the basis of the authority of the individual, not the precise number of his subordinates. That is, the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status, and the Assistant Secretary may not resolve questions of supervisory status solely by reason of the fact that an alleged supervisor has only one subordinate. The Assistant Secretary's contrary findings in this regard were set aside and the cases were remanded to the Assistant Secretary for appropriate action consistent with the decision of the Council.

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

New Jersey Department of Defense

and

A/SLMR No. 121

FLRC No. 72A-2

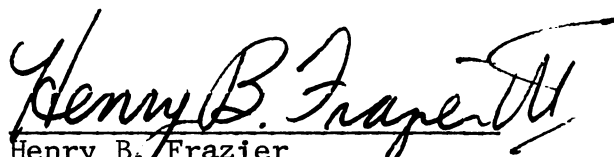
Local 371, NAATA, International
Union of Electrical, Radio &
Machine Workers, AFL-CIO, et al.

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

This appeal, which was accepted for review by the Council, arose from a Decision and Order Clarifying Units in which the Assistant Secretary held, among other things, that certain employees^{1/} were not supervisors within the meaning of the Order in that the authority they exercised was limited, at most, to one employee. In reaching his decision on this issue in the instant case, the Assistant Secretary relied exclusively on his decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120.

On this date the Council has issued its Decision On Appeal From Assistant Secretary Decision in the matter of United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4, in which it found, in pertinent part, that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. For the reasons fully set forth in that Decision, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision with respect to the employees herein involved to be inconsistent with the purposes of the Order, and, therefore, it is set aside. This case accordingly is remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


Henry B. Frazier
Executive Director

Issued: April 17, 1973

^{1/} The classifications at issue are Personnel Equipment and Survival Technician, WG-12; and the Personnel Technician, GS-6. Since the parties have not contested the Assistant Secretary's finding that the Procurement Technician, GS-8, had no subordinate employees, further consideration of that employee's status was deemed unwarranted.

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

United States Department of
Agriculture, Northern Marketing
and Nutrition Research Division,
Peoria, Illinois

and

Local 3247, American Federation
of Government Employees, AFL-CIO

A/SLMR No. 120
FLRC No. 72A-4

and

Local 1696, National Federation
of Federal Employees

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision on Challenged Ballots in which the Assistant Secretary held, among other things, that, for the purpose of unit placement and voting eligibility, an individual was not a supervisor within the meaning of the Order if the authority he exercised was limited to one employee. The propriety of that holding is the major policy issue which the Council determined warranted review. A brief statement of the pertinent facts is set forth below.

An election was conducted involving Local 3247, American Federation of Government Employees, AFL-CIO (AFGE), and Local 1696, National Federation of Federal Employees (NFFE), among all general schedule employees at the activity, including professionals, but excluding supervisors and other usually excluded categories.

The results of the election disclosed that the challenged ballots cast were sufficient in number to affect the results of the election. One of those challenged ballots, which is alone involved in the instant appeal, was cast by Curtis Glass, a GS-12 research chemist. Glass' ballot was challenged by the activity on the ground that he was a supervisor, as defined by the Order.

Following a formal hearing before a hearing examiner the Assistant Secretary issued his decision on those challenged ballots, sustaining certain challenges, but overruling the challenge to the ballot of Curtis Glass. With respect to Glass' status, the Assistant Secretary concluded:

In my view, the language of the Order is clear and free from ambiguity in stating that " 'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment" (Emphasis added). In these circumstances, for the purpose of unit placement and voting eligibility, I find that Glass is not a supervisor within the meaning of the Order inasmuch as the authority he exercises is limited to one employee. Accordingly, I hereby overrule the challenge to his ballot, and direct that, in the event Glass' ballot affects the results of the overall election, his ballot be opened and counted.[1/]

The agency appealed the Assistant Secretary's "one-subordinate" rule, contending that it was inconsistent with the purposes and policies of the Order. The AFGE, which alone filed an opposition to the agency's appeal, argues that the Assistant Secretary's decision is mandated by the use of the plural reference to subordinate employees in the section 2(c) definition of "supervisor."

Opinion

As indicated above, the Assistant Secretary's decision is based on his view as to proper construction of the Order, i.e., "Supervisor" as defined in the Order. Section 2(c) of the Order provides,

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,

1/ The Assistant Secretary made no express determination as to whether Glass' authority, if exercised over more than one subordinate, would have met the criteria for a supervisor as defined in section 2(c) of the Order.

or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is true that the section 2(c) definition of "supervisor" uses the plural forms, so there is literal support for the Assistant Secretary's finding. However, the customary rule of statutory construction is that the singular may include the plural, and the plural, the singular, except where a contrary intent plainly appears.^{2/} In this connection, 1 U.S.C. § 1 (1970) expressly provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise - ... words importing the plural include the singular."

Here the context of section 2(c) of the Order plainly does not indicate any intent that the plural is to exclude the singular. Moreover, it is inconsistent with the purposes of the Order to interpret section 2(c) as requiring the possession of authority over more than one subordinate in order to find that an individual is a supervisor.

In regard to the purposes of the Order, Executive Order 10988, which preceded the present Executive Order 11491, contained no definition of the term "supervisor." Further, it permitted supervisors to hold union office provided no conflict of interest or incompatibility with law or official duties arose; and permitted exclusive representation of supervisors and nonsupervisors in units which did not include subordinates whose performance the supervisors officially evaluated; and provided no separate program for associations of supervisors.

The President's Study Committee, after reviewing experience under Executive Order 10988, stated its view of the labor-management relations role of supervisors to be as follows:^{3/}

. . . 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

^{2/} See e.g., Wiggins Builders Supplies v. Smith, 149 A.2d 360, 362 (1959); 50 Am. Jur., Statutes, § 256 (1964).

^{3/} Labor-Management Relations in the Federal Service, 1971, p. 40.

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. We are also concerned that recognition granted for units of supervisors not compromise in any way the free choice by subordinate employees of their own representatives.

Consistent with this view the Study Committee recommended that the present definition of supervisor be adopted. Moreover, in order to integrate effectively supervisors into agency management Executive Order 11491 provided that supervisors may not be included in bargaining units and may not be covered by a negotiated agreement; supervisors were included within the Order's definition of "agency management," and supervisors' acts toward employees may constitute unfair labor practices imputable to an agency. Also, the Order prohibits supervisors from holding union office, or representing a union, and requires agencies to establish separate systems for communicating and consulting with its supervisors or associations of supervisors.

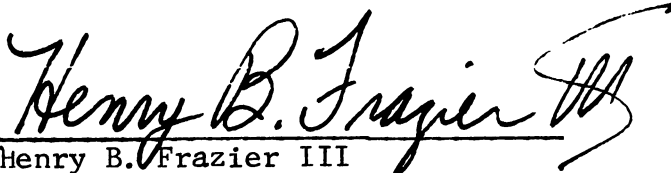
Quite clearly, the Order thus intends that a clear delineation be drawn between supervisory and nonsupervisory employees. A person with such authority stands as a representative of agency management - responsible for participating in and contributing to the formulation of agency policies and procedures, for the negotiation of agreements with employee representatives and for expressing management's viewpoints in daily communication with employees. Additionally, such persons are responsible for administering agency policy and labor-management agreements.

Based on the foregoing purposes of the Order, we find that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. In other words, the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status, notwithstanding the number of persons supervised, and we so find.

There will certainly be factual situations where it is appropriate to determine that an individual who allegedly supervises one subordinate, in fact, exercises authority of a merely routine or clerical nature, and does not exercise independent judgment with respect to that employee. We hold that the Assistant Secretary may not resolve questions of supervisory status solely upon the basis that an alleged supervisor has only one subordinate.

For the foregoing reasons, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision with respect to the challenged ballot of employee Curtis Glass to be inconsistent with the purposes of the Order, and, therefore, it is set aside. The case accordingly is remanded to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 17, 1973

Veterans Administration Hospital, Brecksville, Ohio, Assistant Secretary Case No. 53-4156. The Assistant Secretary dismissed the American Nurses Association's cross-petition for representation on the ground that this union did not have an adequate showing of interest because supervisory participation in the gathering of the union's showing of interest had invalidated a critical portion of the showing. In reaching his decision the Assistant Secretary ruled that a showing of interest is invalid to the extent that it is obtained at or after the point in time when supervisors or management officials participate in the securing of the showing. The Council accepted the case for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 27).

Council action (April 17, 1973). The Council, while agreeing with the Assistant Secretary's desire to eliminate agency management involvement in the collection of a labor organization's showing of interest, concluded that his rule so impairs the section 1(a) rights of employees, or presents the potential for such impairment, that it is inconsistent with the purposes of the Order. The Council further found that a procedure which meets the requirements of the Order is one which reflects a case-by-case determination on the extent to which a showing of interest is invalidated by particular agency management involvement. The Assistant Secretary's dismissal of ANA's petition for representation was therefore set aside and the case was remanded to the Assistant Secretary for appropriate action consistent with the Council's decision.

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

Veterans Administration Hospital,
Brecksville, Ohio

and

American Nurses Association

and

Assistant Secretary
Case No. 53-4156
FLRC No. 72A-9

Local 2113, American Federation
of Government Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary dismissing a cross-petition for representation filed by American Nurses Association (ANA), because of supervisory involvement in the collection of the showing of interest supporting the petition. The Assistant Secretary held, among other things, that, ". . . a showing of interest in support of a petition for an election is invalid to the extent it is obtained at or after the point in time when supervisors or management officials participate in the securing of the showing." The propriety of that holding is the major policy issue which the Council determined warranted review. A brief statement of the pertinent facts is set forth below.

Local 2113, American Federation of Government Employees, AFL-CIO (AFGE) filed a representation petition seeking an election among all professional employees at the Veterans Administration Hospital, Brecksville, Ohio. ANA filed a cross-petition seeking an election in a unit confined to registered nurses at the hospital. ANA's petition was accompanied by a showing of interest -- signatures on "authorization petitions" and proof of union membership (checkoff authorizations) -- which on its face was sufficient to support the petition.^{1/}

^{1/} The Assistant Secretary's regulations require that a petition "be accompanied by a showing of interest of not less than thirty (30%) percent of the employees in the unit claimed to be appropriate."

AFGE thereafter filed a timely challenge to the validity of ANA's showing of interest, claiming that management and supervisory personnel had obtained employee signatures on ANA's authorizations which were submitted as part of the ANA's showing of interest. ANA denied knowledge of any such involvement and, additionally, contended that it had an adequate showing of interest before the date of the alleged supervisory involvement and when it filed its cross-petition.

The Regional Administrator, upon investigation, found that at least one supervisor had participated in gathering signatures. While observing that there was some uncertainty as to the number gathered, the Regional Administrator concluded that "[i]mproper influence of any signature is sufficient to taint the validity of all signatures." The Regional Administrator then dismissed ANA's cross-petition.

Upon ANA's request for review of the Regional Administrator's action, the Assistant Secretary upheld the finding that a supervisor had obtained several of ANA's authorizations. However, the Assistant Secretary modified the Regional Administrator's ruling that any supervisory involvement was sufficient to taint the validity of all signatures by holding that:

. . . a showing of interest in support of a petition for an election is invalid to the extent it is obtained at or after the point in time when supervisors or management officials participate in the securing of the showing.

Applying this rule to the instant case, the Assistant Secretary concluded that the ANA did not have an adequate showing of interest on the date it filed the cross-petition and, accordingly, sustained the dismissal of that petition.

ANA appealed to the Council from the Assistant Secretary's decision. Following acceptance of ANA's petition for review, ANA filed a comprehensive brief. Neither the agency nor AFGE filed a brief.

Opinion

The issue before the Council is whether the Assistant Secretary's rule "that a showing of interest in support of a petition for an election is invalid to the extent it is obtained at or after the point in time when supervisors or management officials participate in the securing of the showing" is consistent with the purposes of the Order.

The union's contention that the rule is inconsistent with the purposes of the Order is based on the impact of the rule on legitimate and "untainted" union activities of employees. Specifically, the union objects to the fact that application of the rule results in the rejection of signatures obtained

after agency management involvement although "obtained without coercion or influence of any kind and without even the knowledge of those thereafter involved that an act of coercion or influence had occurred."

Section 1(a) of the Order seeks to assure employees the right to form, join, and assist a labor organization or to refrain from any such activity. Further, section 7 provides for labor organizations to obtain exclusive recognition. These purposes of the Order are effectuated by policies and practices that do not unduly inhibit employee organizational activities. On the other hand, as the Assistant Secretary quite correctly pointed out, sections 1(b), 10(b)(1) and 19(a)(3) disclose an intent to preclude agency management involvement in the affairs of labor organizations,^{2/} and it is clear that such involvement in the collection of a showing of interest is an "evil" to be eliminated. However, we must determine whether the Assistant Secretary has, by the promulgation of his rule, selected the proper means to assure the elimination of agency management involvement in the collection of a showing of interest.

In promulgating his rule the Assistant Secretary did not provide for any flexibility whatsoever in its application. Thus, it can result in negating the desires of rank-and-file employees whose showings of interest were not affected by such supervisory involvement. Use of the rule would result, for example, in the rejection of all otherwise untainted authorizations collected after a low-level supervisor obtained one signature on the first day of an organizing drive. This would be true regardless of the size of the unit or the length of the organizing effort.

We stated in Illinois National Guard, FLRC No. 71A-59, "The Assistant Secretary must insure that, in the exercise of ... [his] responsibilities, the rights guaranteed Federal employees under section 1(a) are preserved." The rule promulgated by the Assistant Secretary certainly seeks the elimination of agency management's involvement in the affairs of labor organizations and, additionally, it has the advantage of easy and efficient administration. However, in our view the rule so impairs the section 1(a) rights of employees, or presents the potential for such impairment, that it is inconsistent with the purposes of the Order.

We are in total agreement with the Assistant Secretary's desire to eliminate agency management involvement in the collection of a labor organization's showing of interest. However, the purposes of the Order are

^{2/} Section 1(b) of the Order provides that supervisors are not authorized to participate in the management of a labor organization or to act as representatives of such an organization. Section 10(b)(1) specifies that management officials and supervisors shall not be included in units of exclusive recognition. Section 19(a)(3) prohibits agency management from sponsoring, controlling or otherwise assisting a labor organization.

better effectuated by the adoption of a procedure which is not so potentially destructive of the fundamental right of employees to organize and have an election to determine if a majority wish an exclusive representative. We feel that a procedure which meets these requirements is one which involves a case-by-case determination. Using such an approach, if the Assistant Secretary feels that the facts of a situation disclose that the agency management involvement was of such a nature as to pervade any subsequently collected showing of interest, he could so rule. On the other hand, where he believes that the involvement was, for example, isolated, minimal or mitigated, he could selectively invalidate only that portion of the showing directly affected by agency management involvement. Such an approach, which permits the remedying of agency management involvement while alleviating the potential for unreasonably defeating the organizational activities of employees and unions, in our opinion is alone consistent with the purposes of the Order.

For the foregoing reasons, and pursuant to § 2411.17 of the Council's rules of procedure, we set aside the Assistant Secretary's dismissal of ANA's petition for representation and remand the matter to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


Henry B. Frazier II
Executive Director

Issued: April 17, 1973

Mare Island Naval Shipyard, Vallejo, Calif. and Federal Employees Metal Trades Council, AFL-CIO (Childs, Arbitrator). The union took exception to the arbitrator's award on the ground that, as an employee of the Navy, the arbitrator was not truly impartial, and that he did not adequately disclose his employment status until after he issued his award. However, it was uncontroverted that the union selected the arbitrator on the basis of information in the FMCS fact sheet which disclosed among other things that (1) his occupation was Professor of Management, (2) his business address was the U.S. Naval Postgraduate School, Monterey, California, and (3) the majority of his time was devoted to teaching. Moreover, the union admittedly sought no further information on the arbitrator's relationship with the Navy and made no objection whatsoever based on his relationship before the award was issued.

Council action (April 17, 1973). In the opinion of the Council, the union had adequate notice that the arbitrator had a significant relationship to the Navy, and that the union waived its objection by waiting to protest until after he issued his award. The Council determined that the union's petition failed to meet the requirements for review under section 2411.32 of the Council's rule of procedure and directed that review of the agency's petition be denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 17, 1973

Mr. Herbert Fuller
Friedman and Fuller
Suite 202
601 Georgia Street
Vallejo, California 94590

Re: Mare Island Naval Shipyard, Vallejo,
Calif. and Federal Employees Metal
Trades Council, AFL-CIO, (Childs,
Arbitrator), FLRC No. 72A-13

Dear Mr. Fuller:

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

The union takes exception to the award on the ground that the arbitrator was not truly impartial, since he was an employee of the Navy and his status as such an employee subjected him to a conflict of interest which he did not adequately disclose until he issued his award. At that time, he billed the parties for his expenses only and explained that, as a Federal employee, he could not charge his standard fee of \$150 per day for his time because of the Dual Compensation Act (5 U.S.C. § 5533 (1970)).

However, the union's petition shows that the union and the shipyard jointly selected the arbitrator from a roster of arbitrators furnished by the Federal Mediation and Conciliation Service (FMCS), which supplied the parties with a fact sheet stating that (1) his occupation was Professor of Management, (2) his business address was the U. S. Naval Postgraduate School, Monterey, California, and (3) the majority of his time was devoted to teaching. While the petition indicates that, on the basis of the information disclosed in the FMCS fact sheet, the union had concluded that the arbitrator had a relationship with the Navy such as an "independent contractor" or an "independent employee" of the Navy, the union admittedly sought no further information on the relationship and made no objection whatsoever based on the relationship with the Navy before the award was issued.

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 contends in substance that the asserted inadequate disclosure of the arbitrator's status as an employee of the Navy is similar to the grounds upon which challenges to awards are sustained by courts in private sector labor-management relations. 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 FMCS fact sheet was adequate to put the union on notice that the arbitrator had a significant relationship to the Department of the Navy. It is the arbitrator's relationship to the Navy, not his civil service employment or retirement status, that creates the impression of possible bias. As the union itself contends, it is the potential effect of the arbitrator's decision on his employer, the Navy, and on general Naval personnel policy, that is a possible influence on the arbitrator. But it is precisely this relationship that the arbitrator disclosed to the union.

Moreover, when a party is aware of a relationship which could disqualify an arbitrator and fails to object, its silence is considered by courts to constitute a waiver of the objection. In the Council's opinion, the union waived its objection to the relationship in this case by withholding any protest until after the arbitrator issued his award.

Therefore, it appears that your petition asserts, but does not furnish facts and circumstances to present, a ground upon which the Council will accept petitions for review of an arbitration award. Accordingly, the Council has denied review of your petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure.

By direction of the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: S. M. Foss
Navy

Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134. The Assistant Secretary, contrary to AFGE's request in its unit clarification petition, excluded from such unit, as supervisors, individuals who exercised supervisory authority exclusively over military personnel who are not "employees" under section 2(b) of the Order. The Council accepted the case for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 27).

Council action (April 17, 1973). The Council decided, relying upon the general conclusions reached regarding supervisory status in the above-mentioned Department of Agriculture case, FLRC No. 72A-4, that persons who possess supervisory authority as defined in section 2(c) of the Order are supervisors within the meaning of the Order notwithstanding the fact that such authority is exercised exclusively over military personnel. Accordingly, the Assistant Secretary's decision and order clarifying the unit was sustained.

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

Department of the Air Force,
McConnell Air Force Base, Kansas

and

A/SLMR No. 134
FLRC No. 72A-15

Local 1737, American Federation of
Government Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order Clarifying Unit in which the Assistant Secretary held among other things that certain civilian employees of the agency who exercise supervisory authority, as set forth in section 2(c) of the Order, were supervisors within the meaning of the Order, although their supervisory authority extended solely to military personnel. The propriety of that holding is the major policy issue which the Council determined warranted review. A brief statement of the pertinent facts is set forth below.

Since July 1967, Local 1737, American Federation of Government Employees, AFL-CIO (AFGE), has been the exclusive bargaining representative of an activity-wide unit (excluding supervisors and other usually excluded categories) at the McConnell Air Force Base, Kansas. The union filed a unit clarification petition seeking to clarify the status of six employees in the job classifications of Clothing Sales Store Manager, Supervisory Fire Fighter, Pest Controller Foreman and Supervisory Fire Protection Inspector. A formal hearing before a hearing officer of the Assistant Secretary was held. During the hearing the parties stipulated that the duties performed by the incumbents in the four positions were ". . . supervisory in nature within the meaning of section 2(c) of the Order," but disputed the issue of whether the incumbents were supervisors within the meaning of the Order because ". . . all the employees subordinate to these alleged supervisors are in the military service and are engaged in military duties when 'supervised' by the employees in the four classifications involved herein."

The Assistant Secretary decided that the employees in question were supervisors within the meaning of section 2(c) of the Order. With regard to the fact that they supervise exclusively military personnel, the Assistant Secretary stated,

. . . it is immaterial whether the supervisory authority involved is exercised over unit employees, non-unit employees, or persons who, as in the subject case, may not be "employees" as defined by Section 2(b) of the Order. Furthermore, [the President's Study Committee Report and Recommendations, August 1969 indicates that] the exercise of this supervisory authority identifies the interests of individuals in these job classifications with those of management. Thus, in determining supervisory status, I view as determinative the duties performed by the alleged supervisor and not the type of personnel who are working under the alleged supervisor. [Footnotes omitted.]

The AFGE primarily contends in its appeal that, inasmuch as the individuals at issue do not supervise "employees" within the meaning of the Order, they could not be "supervisors" within the meaning of the Order. The agency argues that the Assistant Secretary's decision is consistent with the purposes of the Order.

Opinion

The issue before the Council is whether the purposes and policies of the Order have been effectuated by the Assistant Secretary's holding that individuals who exercise supervisory authority, as defined in section 2(c) of the Order, solely over military personnel in the performance of their military duties are "supervisors" who are excluded from units of exclusive recognition.

Section 2(c) of the Order provides,

"Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

As indicated above, the AFGE argues that the section 2(c) definition describes a supervisor as one who exercises authority over "other employees," and that the individuals at issue could not be supervisors within the meaning of the Order because military personnel are not "employees" as defined by section 2(b) of the Order.^{1/} We certainly agree with the AFGE

^{1/} Section 2(b) provides: " 'Employee' means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of the Order;"

that military personnel in the performance of their military duties are not "employees" within the meaning of the Order.^{2/} Accordingly, there is some literal support for the AFGE's position.

However, it is a well-established rule of statutory construction that where a literal reading of words produces a result plainly at variance with the purposes sought to be accomplished by the statute, such purposes rather than the literal words are controlling.^{3/} This rule is equally applicable in our construction of the Order. We must therefore look beyond the literal meaning of the words to the purposes and policies of the Order to resolve the matter here at issue.

On the instant date, the Council considered in detail the purposes of section 2(c) of the Order in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4. As we stated in that case:

In regard to the purposes of the Order, Executive Order 10988, which preceded the present Executive Order 11491, contained no definition of the term "supervisor." Further, it permitted supervisors to hold union office provided no conflict of interest or incompatibility with law or official duties arose; and permitted exclusive representation of supervisors and nonsupervisors in units which did not include subordinates whose performance the supervisors officially evaluated; and provided no separate program for associations of supervisors.

The President's Study Committee, after reviewing experience under Executive Order 10988, stated its view of the labor-management relations role of supervisors to be as follows:

. . . 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

^{2/} See 5 U.S.C. § 2101 and § 2105.

^{3/} See for example United States v. American Trucking Assoc., Inc., 310 U.S. 534, 543 (1940) and United States v. Rosenblum Truck Lines, 315 U.S. 50 (1942).

of agency management and should be integrated fully into that management. We are also concerned that recognition granted for units of supervisors not compromise in any way the free choice by subordinate employees of their own representatives.

Consistent with this view the Study Committee recommended that the present definition of supervisor be adopted. Moreover, in order to integrate effectively supervisors into agency management Executive Order 11491 provided that supervisors may not be included in bargaining units and may not be covered by a negotiated agreement; supervisors were included within the Order's definition of "agency management," and supervisor's acts toward employees may constitute unfair labor practices imputable to an agency. Also, the Order prohibits supervisors from holding union office, or representing a union, and requires agencies to establish separate systems for communicating and consulting with its supervisors or associations of supervisors.

Quite clearly, the Order thus intends that a clear delineation be drawn between supervisory and nonsupervisory employees. A person with such authority stands as a representative of agency management - responsible for participating in and contributing to the formulation of agency policies and procedures, for the negotiation of agreements with employee representatives and for expressing management's viewpoints in daily communication with employees. Additionally, such persons are responsible for administering agency policy and labor-management agreements.

Based on the foregoing purposes of the Order, we find that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. In other words, the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status, notwithstanding the number of persons supervised, and we so find. [Emphasis added and footnote omitted.]

As stated above, there is no dispute as to whether the persons at issue in the instant case exercise supervisory authority as the parties have stipulated that they do have such authority over the military personnel under their supervision. As we said in Department of Agriculture ". . .

supervisory status was intended to be determined on the basis of the authority of the individual . . ." and ". . . the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status" Accordingly, we find that persons who possess supervisory authority as defined in section 2(c) of the Order are supervisors within the meaning of the Order notwithstanding the fact that such authority is exercised exclusively over military personnel.

For the foregoing reasons, we agree with the Assistant Secretary that the six employees in the job classifications of Clothing Sales Store Manager, Supervisory Fire Fighter, Pest Controller Foreman and Supervisory Fire Protection Inspectors are supervisors within the meaning of the Order. Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, the Assistant Secretary's decision and order clarifying the unit is hereby sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 17, 1973

Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. The Assistant Secretary dismissed a representation petition filed by AFGE Local 3218 upon a finding that the president of the local, who had been the signer of the petition, was a management official whose inclusion in the unit would result in a conflict of interest within the meaning of section 1(b) of the Order. The Council accepted the case for review having determined that major policy issues are present in the Assistant Secretary's decision (Report Number 30).

Council action (April 18, 1973). The Council agreed that the Assistant Secretary's action was proper since a petition is defective and should be dismissed if it was filed by a person determined to be a member of agency management, or an employee whose participation in the management of a labor organization or acting as its representative would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee. However, since subsequent to the Assistant Secretary's decision the Local had filed a new petition and been granted the certification requested in the present case, the Council found that the petition for review of the Assistant Secretary's decision has been rendered moot. Accordingly, the Council directed that the petition for review be dismissed on the latter ground.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 18, 1973

Mr. Gerald I. Sommer
Office of the Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Re: Department of the Air Force, Arnold
Engineering Development Center, Air
Force Systems Command, Arnold Air
Force Station, Tennessee, A/SLMR No.
135, FLRC No. 72A-19

Dear Mr. Sommer:

Reference is made to your petition for review of the Assistant Secretary's decision in the above-entitled case, wherein he dismissed the representation petition filed by Local No. 3218, American Federation of Government Employees, AFL-CIO upon a finding that the president of the local, who had been the signer of the petition, was a management official whose inclusion in the unit would result in a conflict of interest within the meaning of section 1(b) of the Order.

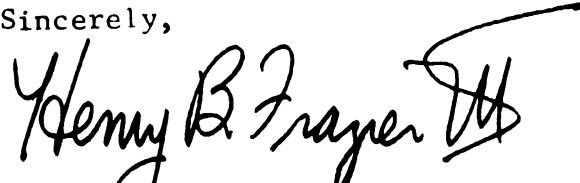
The Council accepted the petition for review because major policy issues were present in the Assistant Secretary's decision. We are of the opinion that the Assistant Secretary's action in the instant case was proper since a petition is defective and should be dismissed if it was filed by a person determined to be a member of agency management, or an employee whose participation in the management of a labor organization or acting as its representative would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

However, the Council has been administratively advised that during the pendency of the instant appeal Local 3218 filed a new representation petition with the Assistant Secretary, not subject to the previously found defect, seeking the same unit which had been sought in the present case and that pursuant to that petition, an election was held and Local No. 3218 has been certified as the exclusive representative. Since Local No. 3218 has already been granted the certification requested in the present case, it is clear that your petition for review of the Assistant Secretary's decision has been rendered moot.

Accordingly, based on the aforementioned reasons, the Council has directed that the union's petition for review be dismissed.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. T. McLean
Air Force

American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator). The arbitrator determined that the agency's establishment of a new function was a "reorganization" as defined in the collective bargaining agreement and that, in violation of the agreement, the agency implemented the reorganization by reassigning certain employees to the new function without prior notice to or consultation with the union. As a remedy, the arbitrator awarded the reassigned employees the right to remain on their reassignments or to withdraw from them and exercise "rights of assignment to a position as such rights existed relative to a reduction-in-force" on the date of the reassignments. The agency filed exceptions to his award on the grounds that (1) the rationale for the award violated Civil Service Commission regulations, (2) the remedy violated the Order, and (3) the arbitrator exceeded his authority by deciding that a reorganization had taken place. However, the agency's exceptions failed to describe facts and circumstances to support any of those allegations.

Council action (April 18, 1973). The Council determined that the agency's petition failed to meet the requirements for review under section 2411.32 of the Council's rule of procedure. Accordingly, the Council directed that review of the agency's petition be denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 18, 1973

Mr. Carl E. Grant
Director of Personnel
Small Business Administration
Washington, D.C. 20416

Re: American Federation of Government
Employees, Local 2532 and Small
Business Administration, (Dorsey,
Arbitrator), FLRC No. 73A-4

Dear Mr. Grant:

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

The arbitrator's award gave an affirmative answer to the following question:

Did Agency violate Article XXIII, paragraph (a), and/or Article XXIX, paragraph (d), of General Agreement of the parties when it reassigned without prior consultation with AFGE, certain employes of its Washington Central Office to a newly established Disaster Cadre Staff in the Central Office by directive dated April 10, 1972?

The arbitrator determined that the agency had decided before March 28, 1972, to establish the Disaster Cadre Staff and this action constituted a "reorganization" as that term is used in Articles XXIII(a) and XXIX(d) of the parties' collective bargaining agreement. He further determined that the subsequent reassignment of the affected employees implemented the agency's decision on reorganization, and that this implementation without at least 48 hours prior notice to the union violated Article XXIX(d) of the agreement.

As a remedy for the agency's violations of the agreement, the arbitrator directed the agency within 30 days to inform all employees who were reassigned to the Disaster Cadre Staff that each of them might elect either to remain on, or to withdraw from, such assignment. Further, his award provided that if an employee elects to withdraw from such assignment, the employee may exercise and the "agency shall honor the employee's vested rights of assignment to a position as such rights existed relative to a reduction-in-force on April 10, 1972."

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."

Your petition takes exception to the arbitrator's award on the following grounds: (1) the rationale for the arbitrator's award assertedly violates regulations of the Civil Service Commission, 5 C.F.R. §§ 210.102(b)(12), 531.202(j) and 351.203(g), which define the terms "reassignment" and "reorganization"; (2) the remedy awarded by the arbitrator assertedly violates mandatory provisions of section 12(a) and (b) of Executive Order 11491, as amended; and (3) 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 agency also requested the Council to stay the arbitrator's award. The request for stay was denied by the Council on February 26, 1973.

As to (1), the award does not appear in any manner to violate Civil Service Commission regulations. With respect to (2), it does not appear that the remedy which merely permits employees to elect to return to the status which existed before the agency's violations of the agreement, violates section 12(a) or (b) of the Order. And, as to (3), 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.

Accordingly, your petition does not furnish facts and circumstances to support grounds for review as provided under section 2411.32 of the Council's rules of procedure. The Council therefore has directed that review of your petition be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a prominent flourish at the end.

Henry B. Frazier III
Executive Director

cc: C. M. Webber
AFGE

International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, N.Y. The negotiability dispute concerned the union's proposals which would proscribe the assignment of certain civil disturbance functions and other alleged "unrelated duties" to firefighters in the bargaining unit.

Council action (April 19, 1973). The Council held that the agency head's determination as to the nonnegotiability of the union's proposals based on agency regulations (including, implicitly, section 11(b) of the Order), was proper; and that, contrary to the union's contentions, these regulations, as interpreted by the agency head, do not violate Civil Service Commission directives or the Order. (However, the Council cautioned that its decision does not mean that conditions deriving from the assignment of unrelated duties -- not here involved -- would be so excepted from the bargaining obligation.) Accordingly, the Council sustained the determination of the agency head in this case.

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

International Association of Fire
Fighters, Local F-111

and

FLRC No. 71A-30

Griffiss Air Force Base,
Rome, N.Y.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (Local F-111, International Association of Fire Fighters) is the exclusive bargaining representative of certain firefighting personnel at Griffiss Air Force Base, Rome, N.Y.

This union, along with other locals of the International Association of Fire Fighters, has been increasingly concerned with the use of firefighters in a manner which it regards as "catch-all employees" performing duties unrelated to those usually associated with such personnel. In an attempt to eliminate the assignment of "some such unrelated duties," the union, during negotiations, submitted the following proposals concerning civil disturbance functions and (other) alleged unrelated duties of firefighters:

(1) Proposed Article, Civil Disturbances, Section 1:
'Unit Employees will not be used to quell Civil Disturbances in order to comply with Mutual Aid Agreement. Unit Employees will be used to perform Rescue, Fire Control and Extinguishment of Fires Only.'
Section 2: 'Unit Employees and Fire Equipment will remain in quarters on Alert Status when demonstrations are anticipated in area of Griffiss Air Force Base, as Professional Firefighters.'

(2) Proposed Article, Unrelated Duties, Section 1:
'Employer agrees not to require Unit Personnel to participate in unrelated duties, e.g., Barrier Detail and after hour I&E calls unless required due to emergency conditions on Base.'

The provisions in proposed article (1) are self-explanatory. As to the alleged unrelated duties in the second proposed article, the parties

stipulated that "Barrier Detail" duties are essentially mechanical in nature and involve work assignments on aircraft arresting barriers which are positioned at both ends of the runway to prevent aircraft from overshooting the runway upon landings or abortive takeoffs. The duties include: inspecting the barriers once daily during weekends and on holidays in accordance with detailed check sheets; logging inspections and discrepancies; and connecting and disconnecting barriers as required for snow removal operations or due to wind changes, during non-duty hours of personnel usually assigned to such work.^{1/}

The activity asserted that the union's proposals were nonnegotiable. Upon referral, the agency head upheld the activity's position on the grounds that both proposed articles violate Air Force Regulation (AFR) 40-702;^{2/} and that the proposed article entitled "Unrelated

1/ The parties also stipulated that the "after hour I&E calls" mentioned in the proposed article on "Unrelated Duties" involved maintenance and repair work which, at the time of the union's proposal, was performed by the base Installation and Engineering organization. The fire department at that time acted as a back-up for all incoming calls for such work while the after hours maintenance-man was out on a repair job. However, these maintenance and repair functions have since been transferred to a Civil Engineering Squadron, and after hour calls are now taken by a controller in Civil Engineering, with the fire department only used as a back-up in rare instances when the service control desk is closed down. The parties agree that this procedure "is no longer a point of dispute." And, although the union still would like to include the provision in the agreement "for future protection," the question as to "after hour I&E calls" is presently moot and will not be further considered in this decision.

2/ AFR 40-702, dated September 24, 1970, concerns "Labor Management Relations" for civilian personnel. It implements E.O. 11491 and provides in part as follows:

4. Matters for Consultation and Negotiation:

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b. While management is not authorized to consult or negotiate with labor organization about matters pertaining to the mission of the activity; its budget; its organization; the total number of employees; the numbers, types, and grades of positions or employees assigned to any organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices, management is obligated to the fullest practical extent, to keep labor organizations informed on such matters. This does not preclude the negotiation of appropriate arrangements for employees adversely affected by the realignment of work forces or technological change.

Duties," insofar as it applies to barrier details, further violates AFR 85-5.^{3/}

The union appealed to the Council from the agency head's determination, alleging in effect that AFR 40-702 and AFR 85-5, as interpreted by the agency head, are violative of the Order; and that AFR 85-5 also violates Civil Service Commission requirements. The Council accepted the union's petition for review, and both parties filed briefs.

Opinion

The principal issues for resolution by the Council are: Whether AFR 40-702 and AFR 85-5, as interpreted by the agency head, are valid as bars to negotiation on the union's proposals under the provisions of the Order; and whether AFR 85-5, considered separately, is contrary to Civil Service Commission requirements and therefore not a bar to negotiations on that ground. For convenience, the impact of Civil Service Commission requirements on AFR 85-5 will be discussed first.

1. Civil Service Commission requirements.

Article (2) of the union's proposal, as previously mentioned, provides that the activity is prohibited from assigning such "unrelated duties" as barrier detail work to the firefighters. The agency determined that this proposal is nonnegotiable by reason of AFR 85-5, which lists work on aircraft arresting barriers among the activity's fire protection duties. The union claims, however, that the agency regulation, as so interpreted by the agency head, is invalid since it violates Civil Service Commission "position classification standards" (Fire Protection and Prevention Series GS-081), and the Commission's published policy in regard to such standards (Bulletin 312-1, which expired July 31, 1969, concerning "Assignment of Inappropriate or Unrelated Duties").

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 the Commission directives as they pertain to the above contentions by the union. The Commission replied in pertinent part as follows (emphasis supplied):

^{3/} AFR 85-5, dated June 22, 1967, relates to "Operation and Maintenance of Real Property." In Attachment 1 to that regulation, which outlines the "Base Civil Engineering Organization Structure and Functions," fire protection duties are listed, including specifically (at p. 12): "Assist(ing) in the inspection and operation of aircraft arresting barriers."

Position classification standards issued by the Civil Service Commission do not prescribe nor prohibit the assignment of any duties or responsibilities to individuals or groups of employees. Thus, Air Force Regulation 85-5, which assigns firefighters to inspect aircraft arresting barriers, does not 'violate' the classification standard for the Fire Protection and Prevention Series, GS-081.

Several Commission documents discuss the use and interpretation of position classification standards. For example, the General Introduction, Background, and Instructions to the Position Classification Standards state:

'Position classification standards are descriptive and explanatory of positions as they exist in the Federal service. They indicate the kinds of positions which are classified to the various classes on the basis of duties and responsibilities; they do not alter the authority which administrative officers usually have, subject to civil service rules and regulations, over the assignment of duties and responsibilities to employees, the creation, alteration, or abolition of positions, or the direction and supervision of work.'

'In relation to the entire standard, [the typical work examples] are only illustrative of the distinctions drawn in the statement of characteristics of the class and of the body of applicable knowledge at the time the standards were prepared. They are not intended to be either complete or exclusive.'

Subchapter 2 of FPM Chapter 271 also provides a discussion of the use of classification standards, including the following:

'It is neither possible nor desirable to prepare [position classification standards] in such detail that all possible conditions or combinations or combinations of conditions are covered. On the other hand, they are sufficiently clear and comprehensive to form a rational framework within which judgment is exercised in their application.'

The principles expressed in these directives have been previously interpreted in correspondence concerning the assignment of duties to firefighting personnel. For example, in a letter to Mr. Alvin E. Davis, International Association of Fire Fighters, dated May 7, 1970, we included the following statement:

'The position classification standards issued by the Civil Service Commission do not prescribe duties and responsibilities or place limits on what may be assigned to individuals or groups of employees. The responsible agency manager decides what work is to be assigned. The standards describe typical duties and responsibilities at the various grade levels as a guide to the classification of individual jobs.'

Similarly, in a letter to Mr. William E. Calkins, Board of Directors, National Association of Government Employees, R1-100, U.S. Submarine Base, Groton, Connecticut, dated June 16, 1970, we stated:

'The Civil Service Commission does not determine the assignment of duties and responsibilities of employees in the Federal service. The determination of particular work assignments is the responsibility of the management officials of the agencies and local activities. The classification standards issued by the Commission, in providing guidelines as to grade levels to be assigned to significant duties and responsibilities, describe tasks which are typical of the various grade levels. These descriptions are by no means all inclusive. They do not prescribe nor prohibit what duties may be assigned to any individual position.'

The International Association of Fire Fighters claims in its brief that CSC Bulletin 312-1 - 'Assignment of Inappropriate or Unrelated Duties' - dated September 3, 1968 (and expired July 31, 1969) supports, by implication, their contention that the assignment of certain duties violated the classification standards. There was no intent, either expressed or implied, to indicate in this bulletin that classification standards have any bearing on what duties may be assigned to employees or positions

Based on the foregoing interpretation by the Civil Service Commission of its own issuances, we find that AFR 85-5 is not violative of Civil Service Commission requirements. Accordingly, we reject the union's contentions in this regard.

2. Executive Order 11491.

The union's proposals, as already set forth, would proscribe the assignment of certain civil disturbance functions and other alleged "unrelated duties," such as barrier detail work, to the firefighters.

The agency head, in addition to determining that the union's proposal relating to barrier details violates AFR 85-5, determined that negotiation on the proposals in their entirety is prohibited by AFR 40-702. The latter regulation was issued by the agency to implement E.O. 11491; and the language of paragraph 4.b. of that regulation, which is principally relied upon by the agency, repeats in substance the wording of section 11(b) of the Order. For purposes of discussion, therefore, the agency position may be regarded as invoking section 11(b) of the Order itself to support the determination of nonnegotiability of the union's proposals in their entirety.^{4/}

The union argues that job content is traditionally recognized as a mandatory subject of bargaining in the private sector; that such matters at least insofar as totally unrelated duties are concerned, are likewise among the mandatory subjects of bargaining under section 11(a) of the Order; that nothing in section 11(b) of the Order precludes negotiation on these matters; and in effect, therefore, that the agency regulations as here interpreted by the agency head are inconsistent with the Order.

Section 11(a) of the Order provides that the parties shall meet 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, a national or other controlling agreement at a higher level in the agency, and this Order" (emphasis supplied).

It is manifest that job content, including the assignment of duties unrelated to the principal functions of the employees involved,

^{4/} Cf. U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 15, 1972), at p. 7.

The agency also argues in its brief that the union's proposals are "contrary to the whole intent" of FPM Chapter 312, subchapter 1, paras. 1-1 and 1-2. However, the Civil Service Commission advised the Council that these paragraphs of the FPM are not "regulatory" issuances by the Commission. Accordingly, apart from other considerations, we find that the union's proposals do not "violate" these paragraphs of the FPM. (While not regulatory in nature, para. 1-1 of FPM Chapter 312, subchapter 1, has interpretative significance with respect to the meaning of section 11(b) of the Order, as more fully discussed hereinafter.)

falls within the ambit of "personnel policies and practices and matters affecting working conditions," under section 11(a) of the Order.^{5/} Without more, the union proposals would be negotiable.

However, section 11(b) of the Order excepts from the obligation to bargain certain specific matters otherwise negotiable under 11(a). The questions which we must resolve are: (a) Is job content in general so excepted from the obligation to bargain under section 11(b); and (b) if so, does such exception extend to the assignment of alleged "unrelated duties" as here involved?

(a) Exception of job content in general from obligation to bargain under 11(b). Section 11(b) of the Order 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.]

The intended meaning of the underscored words, which are of critical significance in the present case,^{6/} is reflected in the "legislative history" of those provisions.

Section 6(b) of E.O. 10988, which preceded E.O. 11491, provided that the obligation to bargain "shall not be construed to extend to such areas of discretion and policy as the . . . [agency's] organization and the assignment of its personnel." Experience under that order revealed some confusion as to the meaning of the phrase "assignment

^{5/} Section 2 of the union's proposal on civil disturbances also relates to the deployment of equipment when demonstrations are anticipated. However, the reference to equipment is only tangential to the underlying purposes of the proposal, i.e., preventing the assignment of allegedly unrelated duties to firefighters, and will not be separately considered.

^{6/} Contrary to the agency's contentions, the union's proposals would not require negotiation on the agency's "mission" or "the technology of performing its work." Rather, the proposals simply concern limits on the designation of particular types of personnel to fulfill certain elements of that mission, and limits on the use of such personnel in performing a number of operating procedures established by the agency.

of its personnel," and the drafters of E.O. 11491 recommended that the present language of 11(b) be adopted. Section E.1. of the Report accompanying E.O. 11491, Labor-Management Relations in the Federal Service (1971), explains in this regard:

1. Areas Excluded from Negotiations.

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We believe there is need to clarify the present language in section 6(b) of the order. The words 'assignment of its personnel' apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work -- the number of employees in the agency and the number, type, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

To remove any possible future misinterpretation of the intent of the phrase 'assignment of its personnel,' we recommend that there be substituted in a new order the phrase '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' [Emphasis in body supplied.]

It is evident from the foregoing that, under both E.O. 10988 and E.O. 11491, the organization of an agency, as well as its patterns of staffing that organization, were excepted from the obligation to bargain by the agency.

The term "organization" of an agency is customarily recognized to mean the administrative and functional structure, or systematic grouping of work, of an agency to accomplish its mission. The lowest building block of that structure or grouping of work is the

individual position, i.e., the duties and responsibilities assigned to individual jobs within the agency. As stated by the Civil Service Commission in FPM Chapter 312 (Position Management), subchapter 1 (General Provisions):

1-1. Authority and Responsibility for Establishing Positions

Federal agencies are created by law and Executive order to accomplish specific missions in the furtherance of national goals. The head of each agency is vested by the nature of his office with the authority and has the responsibility for organizing the agency within this framework and within requirements of pertinent statutes and directives relating to the agency and administration of the Federal Government. He and subordinate officials to whom he delegates authority have the obligation to structure the agency in a manner which will assure that assigned missions are legally and properly accomplished. The structuring process involves the assignment of missions and functions to major organizational elements. Eventual subdivision of missions and functions into systems, processes, and tasks brings the organizational process to the basic unit -- the position. Agencies have the discretion in the interest of the efficiency of the Federal service, to assign, change, or eliminate part or all of the duties and responsibilities that have been grouped together to constitute a position.
[Emphasis supplied.]

Consequently, the exception of the "organization" of an agency from the obligation to bargain under section 11(b) includes by definition and intent the grouping of duties and responsibilities into individual positions. Stated otherwise, the term "organization" extends of necessity to the content of the individual job which constitutes the smallest unit in the agency's administrative and functional structure.

Similarly, the phrase "staffing patterns" of the agency, as used in the Report in explaining the clause in 11(b) "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty," embraces the content of the individual jobs. While the phrase, in context, relates largely to position structures and manpower complements for the various organizational units (e.g., the number and types of positions and employees assigned to the fire department), these organizational allocations of positions and people are integrally related to and dependent on the duties that will be performed by the individual positions involved. In other words, here too the assignment of duties to the individual positions is the critical first step by the agency in determining the staffing patterns for that agency.

Accordingly, it is clear and we find that job content in general is 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.

There remains for consideration the question as to whether, even assuming that job content is generally excluded from the obligation to bargain under 11(b), a different result should obtain where, as here, the union's proposals are directed only to the assignment of duties allegedly unrelated to the type of position involved. We shall next consider that issue.

(b) Application of 11(b) to proposals concerning the assignment of unrelated duties. The union argues in this regard as follows (Brief, at pp. 5, 8):

. . . [Local F-111] is not seeking the right to negotiate with respect to all duties assigned or not assigned to the classes of employees it represents. Rather, it is seeking merely to negotiate with respect to a very limited area of job functions, i.e., with respect to functions totally unrelated to the normal, expected, and widely understood duties of fire fighters.

.

. . . the Executive Order itself does not preclude negotiation concerning job content of specific classifications of employees at least insofar as totally unrelated duties are concerned; on the contrary, such job content matters, going to the heart of the employment relationship, are among the very matters made mandatory subjects of bargaining under Section 11(a) of the Order. Bargaining history under the Order supports this interpretation. [Emphasis by union.]

In assessing this argument, it may be recalled that the union's proposals would proscribe the assignment of such specific duties as assisting in the quelling of civil disturbances (other than rescue, fire control and extinguishment of fires), and barrier detail work. However, each of these types of duties is directly or indirectly concerned with fire prevention and would hardly appear "totally unrelated" to the ordinary duties which might be expected to be performed by firefighters.

In any event, nothing in section 11(b) of the Order, as discussed in detail above, renders the exception from the obligation to bargain on job content dependent in any manner on the degree of relationship of the assigned duties to the principal job function. Indeed, "mixed positions" which combine, into one job, functions and/or knowledge requirements that usually are considered those of completely separate occupations are not uncommon in the Federal service, e.g., firefighter/guard; finance/personnel; carpenter/painter; mathematician/physicist; etc. Such positions are established, when feasible, in organizational situations where the amount of work of each type is insufficient to constitute a full-time position, or where the nature of the work is such as to require the application of combined knowledges or skills for effective performance.

As to the union's further reliance on provisions in other bargaining agreements which allegedly prohibit the assignment of totally unrelated duties, such bargaining history is without controlling significance. For it is within the agency's discretion under section 11(b) as to whether it wishes to bargain on job content, and the agency in the present case has exercised its option not to bargain on this matter. Moreover, as stated by the Council in the Kirk Army case, provisions in other contracts "cannot alter the express language and intent of the Order."^{7/}

Accordingly, we find that the exception from the obligation to bargain on job content, under section 11(b) of the Order, also extends to the assignment of allegedly unrelated duties.

Before concluding, and to avoid any possible misunderstanding, we must strongly emphasize that our decision does not of course mean that conditions deriving from the assignment of unrelated duties would be excepted from the obligation to bargain under section 11(b) of the Order. For instance, if the assigned duties are beyond the capacity or competence of a qualified incumbent and would thereby create health and safety hazards, proposals directed to the amelioration of those conditions would be plainly negotiable.^{8/} However, the union does not assert, nor does it appear from its appeal, that such purpose was sought to be accomplished by the subject proposals in the instant case. Instead, as already indicated, the union seeks in its proposals merely to

^{7/} US Kirk Army Hospital, Aberdeen, Md., FLRC No. 70A-11 (March 9, 1971), at p. 3.

^{8/} Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), FLRC No. 70A-10 (April 15, 1971).

prevent the use of firefighters as "catch-all employees" performing duties which it believes are inconsistent with those usually expected of this type of employee.

Conclusion

For the foregoing reasons, we find that the agency head's determination as to the nonnegotiability of the union's proposals, based on agency regulations, was proper, and that, contrary to the union's contentions, these regulations as interpreted by the agency head are not violative of either Civil Service Commission directives or the Order.

Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 19, 1973

NAGE Local R3-84 and Washington, D.C., Air National Guard. The negotiability dispute involved the union's proposal that National Guard technicians be granted either military leave or administrative leave when ordered to attend reserve drill meetings in an inactive duty status on their normal workdays.

Council action (April 26, 1973). The Council held that the agency head's determination that the union's proposal was nonnegotiable, by reason of statutory proscriptions and related Comptroller General decisions, was proper. Accordingly, the Council sustained the determination of the agency head in the case.

In last line on page 6 of Council decision, issued April 26, 1973, change "5 U.S.C. § 502(a)(1)" to "32 U.S.C. §502(a)(1)."

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

NAGE Local R3-84

and

FLRC No. 72A-23

Washington, D.C., Air
National Guard

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union represents civilian employees of the Washington, D.C., Air National Guard. These employees, commonly referred to as National Guard technicians, must, as a condition of employment, also become members of the National Guard in a military capacity.

During negotiations with the activity, the union proposed that the technicians be granted either military leave or administrative leave when ordered to attend reserve drill meetings in an inactive duty status on their normal workdays. In more detail, the union proposed:

Section 4. When employees in the bargaining unit are required to perform military duties incident to their membership in the District of Columbia National Guard, they will be given military leave in accordance with the Federal Personnel Manual regulations. However, when the Commanding General of the District of Columbia National Guard, under the authority vested in him by Title 39-602, DC Code and Section 502, Title 32 US Code, decides to order employees to reserve assemblies on their normal work days in an 'inactive duty status,' management will take either of the following two actions:

(a) Grant military leave to the employees if it does not violate any Federal Personnel Manual regulation.

(b) Grant administrative leave to the employees if military leave cannot be granted.

In no event will employees be required to take annual leave or leave without pay in order to attend reserve drill meetings.

The activity maintained that the proposal was nonnegotiable. The Department of Defense, upon referral, upheld the activity's position on the grounds (detailed below) that the proposal violated certain statutory provisions as interpreted in Comptroller General decisions. The union appealed to the Council, disagreeing with the agency determination.

Agency Determination

As to the proposal that technicians ordered to attend reserve drill meetings be granted military leave, the agency asserted that the matter is not governed by the Federal Personnel Manual (FPM),^{1/} but by 5 U.S.C. § 6323, which related to military leave for National Guardsmen.^{2/} According to the agency, no provision is made in that

^{1/} In subchapter S9, FPM Supp. 990-2, concerning "Military Leave," the Civil Service Commission states at the outset:

This material on military leave has been prepared solely for the convenience of users of the manual. The Commission has no regulatory responsibility in this area

^{2/} 5 U.S.C. § 6323 provides in relevant part as follows:

§ 6323. Military leave: Reserves and National Guardsmen.

(a) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for each day, not in excess of 15 days in a calendar year, in which he is on active duty or is engaged in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard.

(c) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 261 of title 10, or the National Guard, as described in section 101 of title 32; and

(2) performs, for the purpose of providing military aid to enforce the law--

(cont'd)

statute, or in 5 U.S.C. § 502(a)(1) which sets forth the requirement for drill assemblies,^{3/} for the use of military leave for attendance at such assemblies. Moreover, the Comptroller General specifically ruled in 32 Comp. Gen. 363 (1953) that granting such leave was inappropriate.^{4/} Based thereon, the agency determined that the union's proposed use of military leave is nonnegotiable.

2/ (cont'd)

(A) Federal service under section 331, 332, 333, 3500, or 8500 of title 10, or other provision of law, as applicable, or

(B) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, or a territory of the United States;

is entitled, during and because of such service, to leave, without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the Commanding general.

3/ 32 U.S.C. § 502(a) reads in pertinent part as follows:

§ 502. Required drills and field exercises.

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall--

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year;

4/ In 32 Comp. Gen. 363 (1953), the question was whether a civilian employee of the Department of Commerce on night shift duty was entitled, as a member of the D.C. National Guard, to military leave while attending weekly evening drills. The Comptroller General advised (at p. 364) "that the granting of military leave for the weekly drill periods . . . is not authorized."

As to the proposal that technicians ordered to attend drill meetings be granted administrative leave, the agency found no FPM provision which specifically permits or prohibits an excused absence for this purpose.^{5/} However, the agency believed that such leave would improperly circumvent the above-mentioned Comptroller General decision, which proscribes granting military leave for such purpose, and would conflict with two other decisions (47 Comp. Gen. 761 (1968) and 49 Comp. Gen. 233 (1969)), in which the Comptroller General ruled that administrative leave would be improper for activities specified in 5 U.S.C. § 6323.^{6/} The agency concluded, based on these decisions:

5/ FPM Supp. 990-2, subchapter S11, on "Excused Absence," states generally at S11-5.a.:

With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed

6/ In 47 Comp. Gen. 761 (1968), the question was whether an agency may grant administrative leave to supplement the military leave provided in the statute for "active duty" service under 5 U.S.C. § 6323(a). The Comptroller General ruled that such administrative leave is not authorized, stating (at p. 762):

Heads of agencies may exercise their authority to excuse employees without loss of pay or charge to leave when employees are called for nonfederalized State National Guard duty to which 5 U.S.C. 6323 is not applicable. B-152149, August 2, 1963. Although the absences here in question might be considered as being similar, the Congress has specifically provided for excused absence without charge to leave for certain Reserve and National Guard duty. We do not believe that the discretionary authority which agency heads have to excuse employees when absent without charge to leave may be used to increase the number of days an employee is excused for the purpose of participating in Reserve and National Guard activities which otherwise are covered by 5 U.S.C. 6323.

Similarly in 49 Comp. Gen. 233 (1969), the question was whether administrative leave was authorized to supplement military leave provided for National Guard duty in aid of law enforcement under 5 U.S.C. § 6323(c)(first). Again, the Comptroller General ruled that such leave is not authorized, citing 47 Comp. Gen. 761 and stating (at p. 237): ". . . the rationale of that decision is equally applicable in the case of leave authorized by subsection 6323(c)."

. . . Had Congress intended to include inactive duty training among the kinds of service for which no annual leave need be charged, it presumably would have so provided in this same legislation. Absent such a provision, it must be assumed that Congress did not so intend; and this decision cannot be thwarted by using the device of administrative leave. In the absence of such authority, that portion of the NAGE proposal which would require the granting of administrative leave for this purpose is non-negotiable.

Finally, since it found that neither military leave, nor administrative leave, was authorized for the inactive duty training, the agency determined that the technicians attending drill meetings during regular working hours must do so in an annual leave or leave without pay status, and that the contrary provision in the union's proposal was likewise nonnegotiable.

Union Position

The union in its appeal tacitly agrees with the agency that the technicians called up in an inactive duty status to attend drill meetings would not be entitled to military leave based on 32 Comp. Gen. 363 (1953). The negotiability of this aspect of the proposal will therefore not be further considered.

However, the union claims that administrative leave is authorized in effect because: (1) the two Comptroller General decisions relating to administrative leave are distinguishable, since they concerned types of duties covered by 5 U.S.C. § 6323, whereas drill assemblies here involved are covered by 32 U.S.C. § 502(a); and (2) the agency has admitted that no provision in the FPM on "Excused Absence" prohibits the granting of administrative leave as proposed by the union.

Accordingly, the union concludes:

The NAGE believes that the granting of administrative leave to civilian employees of the Washington, D.C., Air National Guard by the Commanding General would not violate any applicable law, regulation of appropriate authority outside the agency or Executive Order 11491. The decision to grant administrative leave for 'inactive duty' is clearly one within the discretion of the Commanding General of the Washington, D.C., National Guard.

Opinion

The critical issue in this case is whether administrative leave may be granted by the agency for National Guard technicians called up for inactive duty by the National Guard to attend drill assemblies during normal working hours.

As fully discussed above, the agency determined that such leave would violate the intent of Congress under 5 U.S.C. § 6323, in which statute leave with pay was provided only for other types of National Guard duty (e.g., active duty; military aid to enforce the law; parade/ encampment). The agency also relied in this connection on Comptroller General decisions which ruled that military leave was not authorized for attending drill assemblies (32 Comp. Gen. 363 (1953)); and that administrative leave was not authorized to supplement the military leave provided for duties covered by 5 U.S.C. § 6323 (47 Comp. Gen. 761 (1968); 49 Comp. Gen. 233 (1969)).

The union contends, however, that agencies have broad discretion in the granting of administrative leave under Civil Service Commission directives; and that nothing in the Comptroller General's decisions on administrative leave prevents such leave for attendance at drill assemblies, since provision is not made in 5 U.S.C. § 6323 for military leave for these activities.

In our opinion, the agency's determination was completely proper and the union's contentions to the contrary are without merit.

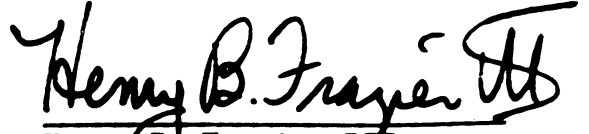
As to the agency's discretion, while agencies have broad discretion in granting administrative leave under Civil Service Commission directives, they obviously cannot exercise that discretion in a manner violative of statute.

As to the statutory proscriptions, Congress expressly provided in 5 U.S.C. § 6323 for military leave for certain types of National Guard functions. These functions, as indicated by the Comptroller General in 32 Comp. Gen. 363, did not include attendance at drill assemblies. It would clearly subvert Congressional intent (and the Comptroller General's ruling) for an agency to accomplish by indirection (authorizing administrative leave) what the Congress has failed to provide directly (authorizing military leave). Likewise, the rationale of the Comptroller General's rulings that administrative leave cannot be used to supplement military leave provided for other National Guard activities under 5 U.S.C. § 6323 applies with equal strength where Congress failed to provide any leave whatsoever for attending military drill assemblies required by 5 U.S.C. § 502(a)(1).

Conclusion

To repeat, we find that the agency head's determination as to the nonnegotiability of the union's proposal was completely proper. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 26, 1973

Picatinny Arsenal, Dept. of the Army, and Local 225, American Federation of Government Employees (Falcone, Arbitrator). The arbitrator determined that the disputed promotions of two bargaining unit employees to positions outside the unit were not proper matters for arbitration. The union appealed to the Council from the award on the grounds that implementation of the award would involve violation of a governing regulation; and that the award is not based on the provisions of the bargaining agreement. However, the union did not furnish facts and circumstances adequately to support such grounds for review.

Council action (May 2, 1973). The Council held that the union's petition failed to meet the requirements for review under section 2411.32 of the Council's rules of procedure. Therefore, the Council directed that review of the union's petition be denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1973

Mr. Robert E. Matisko, President
American Federation of Government
Employees, Local 225
Box 777
Dover, New Jersey 07801

Re: Picatinny Arsenal, Dept. of the
Army, and Local 225, American
Federation of Government Employees
(Falcone, Arbitrator), FLRC No. 72A-44

Dear Mr. Matisko:

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.

Your petition shows that the union sought arbitration under the collective bargaining agreement of a grievance challenging the promotions of two bargaining unit employees to positions outside the bargaining unit. When an arbitrator was designated in accordance with the agreement by the Federal Mediation and Conciliation Service, the agency declined to participate, primarily on the ground that the dispute was not arbitrable. Thereafter, the parties agreed to submit to arbitration only the question of arbitrability.

The specific question submitted to the arbitrator was:

Whether the promotion of Messrs. Stromberg and Oleinky are proper matters for arbitration under the applicable negotiated Collective Bargaining Agreement.

Answering that question in the negative, the arbitrator issued his award that the promotions were not proper matters for arbitration under the agreement.

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."

Your petition requests the Council to review the arbitrator's award on the grounds that (1) the implementation of the award would involve violation of a governing regulation, and (2) the award is not based on the provisions of the agreement.

While your first contention does assert a specific ground for review as provided in section 2411.32 of the Council's rules of procedure, your petition does not state specifically which regulation was violated, or how. Since your petition does state that both exceptions (1) and (2) "are contained in Department of Defense Directive 1426.1, as adopted by the Department of the Army in Civilian Personnel Regulation 700 (Ch 9)," the Council has considered your exception (1) as contending a violation of that DOD Directive, particularly Section VIII-E. That section instructs activity heads as to the grounds and the procedures for their taking exception to an arbitration award. However, the arbitrator's award does not appear in any manner to violate Section VIII-E or any other provision of that regulation.

As to your second contention (that the award is not based on the agreement) it states a ground upon which the Council will accept a petition for review of an arbitration award. However, again, your petition does not furnish any support for this contention; it does not identify which agreement provisions the arbitrator allegedly failed to apply, and does not dispute his use of those provisions which he did apply.

Accordingly, your petition does not furnish facts and circumstances to support grounds for review as provided under section 2411.32 of the Council's rules of procedure. The Council therefore has directed that review of your petition be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: Ben B. Beeson
Army

National Ocean Survey, Pacific Marine Center and Atlantic Marine Center, A/SLMR No. 222. The Assistant Secretary, relying on the provisions of section 24(2) of the Order, dismissed a petition filed by National Maritime Union of North America, AFL-CIO (NMU) for a unit of supervisory chief quartermasters, because NMU did not hold exclusive recognition for any units of such supervisors in the Federal sector on the date of the Order. NMU appealed to the Council, asserting that as a matter of policy section 24(2) should be interpreted to permit representation by NMU of the unit sought, under circumstances where that union traditionally represents such personnel in private industry and such personnel were represented in the Federal sector on the date of the Order by another labor organization.

Council action (May 3, 1973). The Council held that the Assistant Secretary's determination did not present a major policy issue, since NMU admittedly did not hold exclusive recognition for units of supervisors, as here sought, in an agency on the date of the Order, as expressly required by section 24(2) of the Order. Accordingly, the Council denied review of the union's appeal under section 2411.12 of its rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 3, 1973

Mr. Abraham E. Freedman
Attorney for National Maritime
Union of America, AFL-CIO
36 Seventh Avenue
New York, New York 10011

Re: National Ocean Survey, Pacific
Marine Center and Atlantic
Marine Center, A/SLMR No. 222,
FLRC No. 72A-54

Dear Mr. Freedman:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case dismissing the petition filed by the National Maritime Union of North America, AFL-CIO, (NMU).

The Assistant Secretary, relying on the provisions of section 24(2) of the Order, dismissed the NMU petition upon a finding that the union was disqualified from holding exclusive recognition for a unit of supervisory chief quartermasters because it did not hold exclusive recognition for any units of such supervisors on the date of the Order. Your request for review conceded that NMU did not represent a unit of chief quartermasters or similar supervisors in the Federal sector on the date of the Order. However, you argue that as a matter of policy section 24(2) should be interpreted to permit representation by NMU where it has been demonstrated that NMU has traditionally represented such personnel in private industry and such personnel were represented in the Federal sector on the date of the Order by another labor organization.

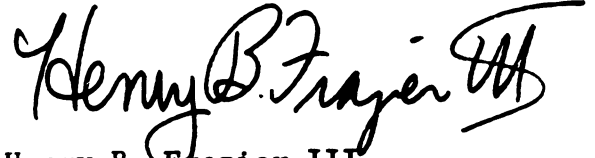
In our view, the Assistant Secretary's determination with respect to the qualification of NMU to represent a supervisory unit of chief quartermasters does not present a major policy issue. As concluded by the Assistant Secretary, section 24(2) expressly provides that for a labor organization to represent a unit of management officials or supervisors, it must historically or traditionally represent the management officials or supervisors in private industry and must hold

exclusive recognition for units of such officials or supervisors in an agency on the date of the Order. Your organization admittedly did not satisfy the latter requirement.

Accordingly, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and the Council has therefore directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a long, horizontal flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor
N.O.A.A.

Seattle Center Controller's Union and Federal Aviation Administration.

The negotiability dispute involved the union's proposals concerning (1) institution of an individualized work scheduling process in lieu of the existing rotational "team concept" prescribed by agency regulation; and (2) expansion of the extent of travel authorized for the activity's controllers under the agency's Air Carrier Flight Familiarization program and, in connection with travel under such program, affirmance that four or more hours of certain activities (e.g. flying time, delays enroute, and the like) would constitute a regular workday.

Council action (May 9, 1973). The Council held, as to both proposals, that the agency's regulations relied upon by the agency head in his determinations of nonnegotiability, are proper as limitations on the scope of negotiations at the activity under section 11(a) of the Order. Accordingly, the Council sustained the agency head's determinations that the union's proposals are not negotiable.

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

Seattle Center Controller's Union

and

FLRC No. 71A-57

Federal Aviation Administration

DECISION ON NEGOTIABILITY ISSUES

Background of Case

During negotiations between the union and the Seattle Air Route Traffic Control Center (Seattle Center) disputes arose regarding the negotiability of two union proposals entitled "Hours of Work" and "Familiarization Flying - SF-160." The circumstances surrounding these disputes are as follows:

"Hours of Work" proposal. In 1970, the FAA issued a regulation (FAA Order 1100.123) prescribing standard organizational structures and titles for certain categories of Air Route Traffic Control Centers (ARTCC), including the class to which the Seattle Center belongs. The Center operates continuously, seven days per week. An integral part of the standard organization plan is a "team" concept^{1/} which requires team members and their leader to rotate together through established shifts and days off so they will work together about 80 percent of the time. The only normal situation when they would not work together is the midnight shift when a full complement of controllers is not needed. Prior to implementation of the standard organization and the "team" concept at the activity, controllers had been allowed to participate extensively in the development of fixed or rotating work schedules to suit their individual preferences.

During negotiations with the Seattle Center, the union presented a proposal entitled "Hours of Work" which seeks, essentially, to reinstitute an individualized work scheduling process in lieu of the

^{1/} The regulation provides:

4c. Team. A team is composed of nine or more ATCS and one supervisor The team supervisor and his team shall work on the same basic schedule.

"team" concept.^{2/} It would permit controllers, through elected "scheduling officers," to select their preferred shifts and days off (fixed or rotating). In coordinating the work schedules of individual controllers, scheduling officers would be required to supply, for each time frame, the numbers, types, and grades of personnel established by management to be needed.

"Familiarization Flying - SF-160" proposal. The agency's Air Carrier Flight Familiarization program was established by the FAA under a broad authorization granted by Civil Aeronautics Board (CAB) regulations. The authorization permits air carriers to "carry without charge . . . any traffic controller or aircraft communicator of the Federal Aviation Administration . . . for the purpose of more fully and adequately acquainting such personnel with the problems affecting

^{2/} The proposal, as submitted to the agency head for negotiability determination, provides:

ARTICLE II

HOURS OF WORK

Section A. The mission of Seattle ARTCC necessitates twenty-four hours a day, seven day a week, coverage of the various job functions entailed in the operation. However, the work load factors change during different time frames and this results in a condition where more employees are needed to accomplish the unit's responsibilities during certain time periods than at others. Management has the right and the responsibility to establish the numbers, types, grades of employees needed to man Seattle ARTCC and will furnish the Union with their requirements for each time frame they establish. This list will establish Management's needs for manning A-1, A-2, B-1, B-2, Flow Control, DSS and Sup-A.

Section B. Each area of specialization, i.e.: A-1, A-2, B-1, B-2, Flow Control, Temporary Training Instructors, DSS, and Sup-A will freely elect one employee from their area of specialization to function as their scheduling officer. Said scheduling officer will then canvass the personnel in his area of specialization as to their individual desires regarding the type of shift they wish to work. He will then develop a schedule for his area of specialization which provides the numbers, types, and grades of employees that Management requires for each time frame.

(cont'd)

in-flight use of air traffic control and communications . . . services provided by the U. S. Government.^{3/}

The CAB's regulations require the agency to promulgate "such rules as may be required to obtain compliance" with CAB regulations by participating personnel. The agency's implementing policy directive (FAA Order 7210.3, Chapter 5) which governs the operation of the program within the FAA provides, among other rules:

522. EXTENT OF TRAVEL

The extent of travel shall be as follows:

- a. ATC specialists at facilities within the conterminous United States may travel to locations within the domestic category; i.e., the 48 states and the District of Columbia; except IFSS and center specialists assigned to oceanic positions of operation.
- b. IFSS and center specialists assigned to oceanic positions of operation may travel to overseas domestic and foreign locations

None of the activity's controllers are within the quoted exception of "IFSS and center specialists assigned to oceanic positions of operation." Hence, under the agency's interpretation of its regulation, their travel is restricted to locations within the "domestic category."

During negotiations, the union presented a proposal consisting of eight sections entitled "Article - Familiarization Flying - SF-160." Only two sections of this proposal are before us for consideration:^{4/}

2/ (cont'd)

Section C. All employees shall have their tours of duty arranged that they receive two consecutive days off: unless they specifically agree otherwise.

3/ CAB Economic Regulations -- Part 224.2.

4/ The agency considers some aspects of the proposal to be negotiable and the parties apparently have tentatively agreed to certain provisions. In the record before us, the parties' arguments focus exclusively on sections 2 and 5 of the proposal. Therefore, our consideration of the proposal is restricted to those sections.

(cont'd)

Section 2, which seeks to authorize travel to "Pacific and Alaska Regions and all Canadian Centers;" and section 5, which seeks to make "four (4) or more hours of either flying time . . . delays enroute, or any combination thereof . . . constitute a regular workday."

Agency Determinations. The Seattle Center maintained that the union's proposals are nonnegotiable because they conflict with agency regulations. The union requested, and the FAA denied exceptions from the agency regulations. Upon the union's referral of the negotiability issue to the agency head for determination, the Department of Transportation upheld the activity's position on the grounds that: (1) The "Hours of Work" proposal conflicts with FAA Order 1100.123 and sections 11(b) and 12(b) of the Order; and (2) the "Familiarization Flying" proposal conflicts with FAA Order 7210.3, Chapter 5, and section 5 of the proposal is "contrary to law."

The union appealed to the Council from these agency head determinations. The Council accepted the petition for review under section 11(c)(4) of the Order and the agency filed a brief.

4/ (cont'd)

As submitted to the agency head for negotiability determination, the sections provide:

ARTICLE - FAMILIARIZATION FLYING - SF-160

.
Section 2. SF-160 Travel and Destinations requirements will be based on the C.A.B.-B.E. Regulations. Specifically, included in Destination Approval shall be the Pacific and Alaska Regions, and all Canadian Centers, providing subsequent C.A.B. Regulations do not restrict such travel.

.
Section 5. When SF-160 Requests are approved, Management will consider the Employee's basic work week so as not to infringe on the Employee's Regular Rest Periods. The Parties agree that four (4) or more hours of either flying time, to and from terminals, delays enroute, or any combination thereof shall constitute a regular work day. Any combination of that aforementioned work day stipulations which exceed eight (8) hours within a twenty-four (24) hour time frame, shall be credited toward another work day.

Opinion

With respect to both union proposals, the dispositive issue in this case is whether the agency's regulations, as interpreted by the agency head, render the proposals nonnegotiable.^{5/} The union contends that the regulations in question, as interpreted to preclude negotiation of its proposals, conflict with the Order. The union urges, therefore, that the agency determinations of nonnegotiability which were based on the regulations should be set aside. The agency argues, however, that the regulations were issued "within the legitimate national regulatory authority of the agency and are not violative of any law, regulation or E.O. 11491." Accordingly, the specific question before us is whether the agency's regulations, as interpreted by the agency head with respect to the proposals, conflict with the Order.

We will examine this question in the separate context of each proposal, below.

Does FAA Order 1100.123, as interpreted by the agency head with respect to the "Hours of Work" proposal, conflict with the Executive Order?

Section 11(a) of the Order, which relates to the negotiation of agreements between an agency and the exclusive representative of its employees, obligates the parties to meet and confer "in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations . . . and this Order."

Section 11(b), which specifically excludes from the agency's obligation to bargain its "organization; . . . technology" and various other matters, concludes by providing: "This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

The union claims that FAA Order 1100.123 violates the Executive Order because: (1) The agency head's determination of nonnegotiability coupled with his refusal to grant an exception from the regulation "disregard the intent" of the Order; and, more particularly, (2) the substance of

^{5/} Since we find our decisions with respect to the proposals vis-a-vis the agency regulations to be dispositive of this case, we do not reach and, therefore, make no ruling as to the other issues raised by the agency: Whether the "Hours of Work" proposal is excluded from the bargaining obligation by sections 11(b) and/or 12(b) of the Order; and whether section 5 of the "Familiarization Flying" proposal is contrary to law.

the "Hours of Work" proposal is expressly included in the agency's obligation to bargain by the concluding sentence of section 11(b) and, therefore, cannot properly be excluded from negotiations by the agency's regulation.

1. The Intent of the Order. To support its claim that the agency disregarded the intent of the Order, the union relies on those portions of the 1969 Study Committee Report and Recommendations^{6/} which stress the desirability of preventing the agency regulatory process from unduly restricting the scope of negotiability at the local level, e.g.:

Agencies should not issue over-prescriptive regulations, and should consider exceptions from agency regulations on specific items . . . ;

and

[E]xcept where negotiations are conducted at the national level, agencies should increase, where practicable, delegations of authority on personnel policy matters to local managers to permit a wider scope for negotiation.

Notwithstanding these and other similar exhortative statements contained therein, we think there should be no doubt that, overall, the report fully supports the authority of the agency head to issue regulations for the operation of his department and the conduct of his employees. As we stated in our decision in the Merchant Marine Academy case:^{7/}

Moreover, we are fully aware of, and endorse, the policy of the Order to support such regulatory authority, in order to protect the public interest and maintain efficiency of government operations. This policy is incorporated in section 11(a) by express reference to 'published agency policies and regulations' as an appropriate limitation on the scope of negotiations.

However, the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity [Additional emphasis supplied and footnotes omitted.]

^{6/} Report accompanying E.O. 11491, section E(2), Labor-Management Relations in the Federal Service (1971).

^{7/} United Federation of College Teachers Local 1460 and U. S. Merchant Academy, FLRC No. 71A-15, issued November 20, 1972, at p.6

More recently, in the Sheppard Air Force Base case^{8/}, we decided a similar issue to the one here under consideration. In Sheppard, the head of a major subordinate echelon within the agency published a merit promotion regulation applicable uniformly to all installations under his command. The union argued that the regulation was over-prescriptive, relying on substantially the same language in the 1969 Study Committee Report and Recommendations as we have indicated is relied upon by the union in the instant case. It urged that, owing to such over-prescriptiveness, the regulation conflicted with the bargaining obligation imposed on the agency by section 11(a) and with the "due regard" provision of section 11(b) of the Order. As we explained in the Sheppard decision:^{9/}

The resolution of this question . . . requires an examination of section 11(a) and 11(b) taken together Among other reasons, section 11(b) by its very terms incorporates section 11(a). Section 11(b) enjoins agencies when prescribing regulations relating to personnel policies and practices and working conditions to have due regard for the bargaining obligation imposed by section 11(a). Thus, this exhortation may not be considered alone and in isolation but only in conjunction with section 11(a). And section 11(a), which prescribes the bargaining obligation, by its own terms limits the obligation to those matters which may be appropriate under applicable laws and regulations, including, among other things, published agency policies and regulations.

In these circumstances, the fundamental nature of the regulation and the circumstances surrounding its issuance should be examined to determine whether the issuance of the . . . regulation improperly limits or dilutes the scope of negotiations . . . and hence conflicts with the bargaining obligation of section 11(a).

Turning to the record in the instant case, the agency indicates that FAA Order 1100.123 was issued in 1970 by the national office of the FAA "to strengthen administrative and technical supervision of air traffic control personnel," and "to increase operational efficiency through better manpower utilization while at the same time to provide a more effective basis for the development of career progression plans for air traffic control specialists" Furthermore, the agency indicates that rotation of the "teams" through the various shifts is

8/ NFFE Local 779 and Department of Air Force, Sheppard Air Force Base, FLRC No. 71A-60, issued April 3, 1973.

9/ Id. at 4.

required by the regulation to give management the ability to "insure that its controllers maintain their proficiency and ability to control different volumes of traffic because traffic varies with the time of day." Fixed shifts, according to the agency, lead to "proficiency loss" and "add an inordinate amount of stress to an already stressful situation."

In these circumstances, we find that FAA Order 1100.123 was issued to achieve a desired degree of uniformity and equality in the administration of matters common to numerous subordinate activities of the agency. Hence, nothing in the nature of the regulation itself, nor in the circumstances surrounding its issuance improperly conflicts with the obligations imposed by section 11 of the Order. Therefore, we conclude that the regulation is of the type of higher-level published agency policy or regulation, applicable uniformly to more than one activity, that may properly limit the scope of negotiations at subordinate activities under the Order. Accordingly, we reject the union's general claim that the agency head's determination of non-negotiability with respect to the "Hours of Work" proposal, should be set aside because it disregards the intent of the Order.

2. The concluding sentence of section 11(b) of the Order. The union maintains that FAA Order 1100.123, as interpreted by the agency head, conflicts with the concluding sentence of section 11(b) which calls for negotiation of "appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." Specifically, the union alleges:

. . . since the controllers were arbitrarily placed on teams and removed from their desired shifts upon implementation of the team concept during the reorganization of the Air Traffic Division of FAA in 1970, the Union feels a realignment of work force occurred [sic]. The Agency should be required to negotiate based on such realignment of work force.

We assume, without ruling on the matter, that a realignment of the work force occurred as the union claims. Hence, the specific question for decision, upon which the union's argument must stand or fall, is whether or not the "Hours of Work" proposal provides "appropriate arrangements for employees adversely affected by the impact of [such] realignment," within the meaning of section 11(b). In our opinion, it does not.

As previously noted, the proposal seeks to establish an individualized work scheduling process in lieu of the "team" concept prescribed by the

agency's regulation. The record shows that the parties agree that the proposal and the "team" concept are incompatible because there is no practical way to set up a team which will work together with a single team leader if the individual team members are assigned to various combinations of fixed and rotating shifts and days off. Thus, in substance, the proposal would require the agency to bargain as to whether the realignment of the work force will remain in effect. That is, the "appropriate arrangement" the union proposes to bargain for "employees adversely affected by the impact of [the] realignment" of the work force amounts to no less than undoing the realignment, itself.

We do not think such a result was intended by the provision of section 11(b) in question. On its face, this provision of the Order does not call for negotiation of the realignment, itself, but only with respect to its "impact." As used in the Study Committee Report and Recommendations which led to the issuance of the Order, this phraseology refers to certain types of "implementation problems" which may be involved in reorganizations:^{10/}

. . . [S]ome labor organizations want to assure the right of exclusive representatives to negotiate protective arrangements for employees adversely affected by personnel policies, changing technology, and partial or entire closure of an installation.

The 1961 task force, in its discussion of this matter, noted that major reorganizations or changes in work methods, while not negotiable themselves, will involve implementation problems that may be negotiable--such as promotion, demotion, and training procedures. Experience has shown that many agencies and labor organizations have negotiated agreements dealing with the impact of such actions on employees.

. . . [A] sentence should be added to this section [11(b)] providing that agencies and labor organizations shall not be precluded from negotiating agreements providing for appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. [Emphasis added.]

The potentially negotiable "implementation problems" illustrated by the examples given by the Study Committee -- "promotion, demotion, and

^{10/} Report accompanying E.O. 11491, section E(1), Labor-Management Relations in the Federal Service (1971).

training procedures" -- clearly do not encompass matters which would have the effect of requiring the agency to bargain on the standing of the realignment itself.

Furthermore, the phrase "realignment of work forces" plainly relates to "reorganizations." Thus, by arguing that the last sentence of section 11(b) requires negotiation of the "Hours of Work" proposal (which would have the effect of undoing the realignment or reorganization accomplished by the agency), the union, in effect, is asking us to interpret that sentence of 11(b) in a manner wholly inconsistent with the express language of the immediately preceding provision of the section which specifically excludes "matters with respect to . . . organization" from the agency's obligation to bargain. Obviously, such a result would be contrary to the overall intent of section 11(b).

For the foregoing reasons we reject, also, the union's argument that the agency determination of nonnegotiability, with respect to the "Hours of Work" proposal, should be set aside because it improperly prevents negotiation of appropriate arrangements for employees adversely affected by the impact of a realignment of work forces under section 11(b).

3. Conclusion. We find the agency head's determination as to the non-negotiability of the union's "Hours of Work" proposal was proper. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, that determination of the agency head is sustained.

Does FAA Order 7210.3, Chapter 5, as interpreted by the agency head with respect to the "Familiarization Flying - SF-160" proposal, conflict with the Executive Order?

The agency maintains that the proposal is nonnegotiable because it conflicts with an agency regulation which establishes a national agency policy beyond the authority of the activity head to modify. The union claims that, in effect, the regulation, so interpreted, violates the bargaining obligation of section 11(a) of the Order.

The record reveals that the union's claim with regard to section 11(a) is based on its misinterpretation of that section, i.e., as the union states in its petition:


According to Executive Order 11491, Section 11(a), the Seattle Center Controller's Union has every right to negotiate published Agency policies and regulations, a National or other controlling agreement at a higher level in the Agency.

We have previously stated that the Order fully supports the regulatory authority of agency heads and that this policy is incorporated in section 11(a) by express reference to "published agency policies and regulations" as an appropriate limitation on the scope of negotiations. Plainly, in the excerpt quoted from its petition, the union has given the limiting language of section 11(a) a meaning which conflicts with the intended meaning of that section. Moreover, the union offered no other substantive allegations to support its claim that the Order has been violated. Therefore, we find the union's argument on this issue completely without merit.

In summary, the record indicates that this regulation was issued at the national level of the FAA to implement a program authorized by the CAB. The regulation applies uniformly to many FAA personnel employed at numerous activities and locations. No factors or circumstances are before us which indicate that the regulation violates any law or regulation of appropriate authority outside the agency. Nor do we find anything in the nature of the regulation, itself, or in the circumstances surrounding its issuance which improperly conflict with the obligations imposed on the agency by section 11 of the Order.

Accordingly, contrary to the union's claim, we find the regulation, as interpreted by the agency head, to be an appropriate limitation on the scope of local negotiations under section 11(a). Therefore, we find, further, that the agency head's determination as to the nonnegotiability of sections 2 and 5 of the "Familiarization Flying - SF-160" proposal was proper and, pursuant to section 2411.27 of the Council's rules of procedure, that determination of the agency head is sustained.^{11/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 9, 1973.

^{11/} The Council further directs that the union's request for oral argument be denied since the parties' submissions adequately define the issues and reflect their positions as to these issues.

American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska; and International Association of Machinists and Aerospace Workers (IAM-AW), Local Lodge 830 and U.S. Naval Ordnance Station, Louisville, Kentucky. The negotiability disputes in these two cases involved the same question, namely, the validity under the amended Order of two provisions of Department of Defense Directive 1426.1. The first of these provisions (VII.B.2.e.(5)) provides:

Any agreement negotiated with a labor organization accorded exclusive recognition will contain, as a minimum: . . . A statement that questions as to interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency shall not be subject to the negotiated grievance procedure regardless of whether such policies, laws or regulations are quoted, cited or otherwise incorporated or referenced in the agreement.

The second provision (VII.B.3.c.) establishes an alternative agency procedure for the resolution of such questions.

Council actions (May 15, 1973). The Council held that the disputed provisions of the DOD directive are violative of section 13 of the Order, as amended, and in discord with the concluding requirement in E.O. 11616 that "Each agency shall issue appropriate policies and regulations consistent with this Order for its implementation." Accordingly, the Council set aside the determinations of the agency head in these cases.

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

American Federation of Government
Employees, Local 1668

and

FLRC No. 72A-10

Elmendorf Air Force Base
(Wildwood Air Force Station),
Alaska

DECISION ON NEGOTIABILITY ISSUE

Background

American Federation of Government Employees Local 1668 represents a unit at Elmendorf Air Force Base (Wildwood Air Force Station), Alaska. An agreement was negotiated between the union and the local Air Force activity which was submitted to the Department of the Air Force for approval. The Department of the Air Force declined to approve the agreement on the basis that the agreement was not in conformity with Department of Defense Directive 1426.1, Labor-Management Relations in the Department of Defense, dated December 9, 1971, which provides, in pertinent part:

Any agreement negotiated with a labor organization accorded exclusive recognition will contain, as a minimum: . . . A statement that questions as to interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency shall not be subject to the negotiated grievance procedure regardless of whether such policies, laws or regulations are quoted, cited or otherwise incorporated or referenced in the agreement.^{1/}

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Questions as to interpretation of published policies or regulations of the DoD component concerned or of the DoD, provisions of law, or regulations of appropriate authorities outside the DoD shall not be subject to grievance procedures or arbitration . . . - such questions shall be referred by either or both

^{1/} DoD Directive 1426.1, VII.B.2.e.(5), December 9, 1971.

parties to the head of the DoD component concerned or his designee. Where the question involves interpretation of DoD or higher authority regulations it will be referred to the ASD (M&RA) [Assistant Secretary of Defense for Manpower and Reserve Affairs] who will either render or, in coordination with the DoD component and the national headquarters of the union involved, obtain an authoritative interpretation. [Emphasis supplied.]^{2/}

Thereupon, a negotiability appeal was filed with the Department of Defense by the union. The AFGE contended, and also asserts before the Council, that the DoD Directive violates section 771.311 of the Civil Service Commission regulations and section 13 of Executive Order 11491. The resultant agency head determination rejected the AFGE's arguments, and stated:

We feel that this is a prudent and reasonable requirement. Since it is fully consistent with the intent of sections 13(a) and (b) [of the Order], it does not represent a restriction on the scope of the negotiated grievance procedure beyond the limitations set forth in the Order itself.

The AFGE has appealed to the Council from that determination under 11(c) (4) of the Order.

Opinion

When an issue develops in connection with negotiations as to whether a particular proposal is contrary to a published agency regulation, under sections 11(c)(3) and 11(c)(4)(ii) of the Order an agency head's interpretation of the agency's regulations with respect to the proposal is final, unless the regulation, as interpreted by the agency head, is found, on appeal to the Council, to violate applicable law, regulation of appropriate authority outside the agency, or the Order. In this case the union has challenged the agency head's interpretation on the grounds that it violates regulations of appropriate authority outside the agency (CSC regulations) and the Order.

The two issues raised by the petitioner, i.e., whether the DoD directive violates: (1) section 771.311 of the Civil Service Commission regulations, or (2) section 13 of the Order, will be considered separately below.

1. Does the DoD requirement violate section 771.311 of the Civil Service Commission regulations?

Since the Civil Service Commission has primary responsibility for the issuance and interpretation of the CSC regulations, that agency was asked,

^{2/} Id. VII.B.3.c.

in accordance with usual Council practice, to provide an interpretation of section 771.311 as it pertained to the AFGE claim that DoD's directive violates that particular section of the regulations. The Commission replied as follows:

. . . since section 771.311 of the CSC regulations provides that CSC regulations do not apply to negotiated grievance procedures, DoD's directive concerning the scope of a negotiated procedure does not violate Commission regulations.

Based on the foregoing interpretation by the Civil Service Commission, we have concluded, contrary to the AFGE's contention, that the agency's directive is not violative of Civil Service Commission requirements.

2. Does the DoD requirement violate section 13 of the Order?

Section 13 of Executive Order 11491, as amended, provides, in pertinent part, as follows:

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 may not cover any other matters, including matters for which statutory appeals procedures exist, and shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances

(b) A negotiated procedure may provide for the arbitration of grievances over the interpretation or application of the agreement, but not over any other matters. 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.

The Department of Defense correctly concedes in its brief that section 13 of the Order does not expressly require, as does DoD Directive 1426.1, the insertion in bargaining agreements of the directive's limitations upon the scope of negotiated grievance procedures. The agency contends, however, that the requirement imposed by its directive reflects a limitation intended by the Council in its 1971 Report and Recommendations leading to the amendment of Order, and by section 13 of the Order, as amended.

In its 1971 Report and Recommendations which led to the section 13 amendments, the Council considered the nature of grievance procedures and arbitration as they then existed in the Federal service and concluded as follows:

. . . [T]he Order presently authorizes the exclusive representative to negotiate procedures, including arbitration, for consideration of "employee grievances" and of "disputes over the interpretation and application of agreements." Under the Order and Civil Service Commission regulations, "employee grievances" may be filed only by an employee or group of employees. Such grievances may relate to matters involving application of law, regulation, or agency policy as well as to the provisions of the labor agreement In contrast, union-initiated "disputes," including arbitration, are limited to the interpretation or application of the labor agreement.

. . . employees are faced with complicated choices in seeking relief, the role of the exclusive union is diminished and distorted by permitting a rival union to represent a grievant with respect to the interpretation and application of the agreement negotiated by the exclusive representative, and the scope of negotiations for agencies and unions is unnecessarily limited.

In order to remedy these faults, we recommend that the Order be amended to provide for negotiated grievance procedures and arbitration involving only the interpretation or application of the negotiated agreement and not involving matters outside the agreement, including matters for which statutory appeals procedures exist. This should be the only procedure for consideration of grievances over the interpretation or application of the provisions of the agreement. The nature and scope of the procedure, including cost-sharing arrangements for arbitration, should be negotiated by the parties. The negotiated grievance procedure and arbitration should not be subject to Commission regulations Any grievance by an employee on a matter other than the interpretation or application of an existing agreement may be presented under any procedure available for the purpose, but not under the negotiated procedure.

By thus delineating the scope of the negotiated grievance procedure, the confusion and anomalies in present arrangements can effectively be eliminated. In addition, an incentive will be created for

unions to negotiate substantive agreements within the full scope of negotiations authorized by the Order. The exclusive representative will be clothed with full authority and responsibility for grievance processing on the bilaterally determined conditions of employment. Artificial distinctions between "employee grievances" and union "disputes" will be eliminated, and only the term "grievance" will be used.^{3/}

Executive Order 11616, issued on August 26, 1971, substituted for the original sections 13 and 14 of E.O. 11491 a new section 13 (quoted above) providing for negotiated grievance procedures which encompass only "grievances over the interpretation or application of the agreement" but "not . . . any other matters." As reflected in the above-quoted passage from the Council's Report and Recommendations, the new section 13 was designed primarily to eliminate the confusion and anomalies in "employee grievance" and union "dispute" arrangements in existence at that time, to strengthen the role of the exclusive representative in processing grievances involving the meaning and application of the negotiated agreement, and to encourage the negotiation of more substantive provisions in agreements.

In furtherance of these purposes, both the amended Order and the Report and Recommendations which led to the amendments intended that the nature and scope of the negotiated grievance procedures were to be left to determination by the parties at the bargaining table, within, of course, the Order's prescription that the scope of the procedures negotiated were to be limited to grievances over the interpretation or application of the agreement. The fact that the negotiated grievance procedure was to be just that -- a negotiated procedure -- was emphasized by: (1) the deletion of the provision in E.O. 11491 which permitted the Civil Service Commission to establish, by regulation, requirements for negotiated grievance procedures; and (2) the statement in the Council's Report that "the nature and scope of the procedure, including cost-sharing arrangements for arbitration, should be negotiated by the parties." [Emphasis added.]

A hallmark of the Order is the establishment of a checks-and-balances system which permits, to an optimum extent, third-party resolution of the various types of disputes that may arise thereunder. The Order not only carefully reserves to the negotiating parties the determination as to the nature and scope of negotiated grievance procedures, but also provides safeguards to ensure the integrity of such procedures. Thus, recognition of the fact that drawing a dividing line in the Order between "grievances over the interpretation or application of the agreement" and

^{3/} Labor-Management Relations in the Federal Service, 1971, pp. 28-29.

grievances over any other matter, would not achieve an absolutely clear and complete separation between the coverage of negotiated grievance procedures and agency grievance procedures, the Order provided a method for the resolution of questions as to "whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement" The Assistant Secretary of Labor is authorized to decide such questions of grievability subject to appellate review by the Council.^{4/} In addition, the Council may review arbitration awards and set aside awards which it finds to be in violation of applicable law, appropriate regulation, or the Order.^{5/}

In summary, as to this agency contention, it was intended by the Council and by the section 13 amendments that the nature and scope of the negotiated grievance procedures were to be negotiated by the parties subject only to the explicit limitations prescribed by the Order itself.

However, 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 element of fairness involved in third-party grievance arbitration procedures under the amended Order, however, would be diluted by the limitations unilaterally imposed by the DoD. The directive in question would permit the agency, an interested party, to determine the interpretation to be applied to any provision of that party's negotiated agreement which includes reference to

^{4/} Section 13 of the Order, as amended, establishes an identical procedure for the resolution of "arbitrability questions" raised in connection with grievances filed under negotiated grievance procedures which provide for arbitration.

^{5/} Section 2411.32 of the Council's rules provides:

§ 2411.32 Considerations governing review.

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 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 Council will not consider exceptions to an advisory arbitration award.

published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency. Such a reservation of power by the agency would permit it to undermine the role of negotiated grievance procedures as they are envisioned under section 13 of the Order.^{6/}

Additionally, the Order's requirement that every bargaining agreement contain a procedure "for the consideration of grievances over the interpretation or application of the agreement," loses much of its purpose and importance if the scope of that procedure may be limited and diminished by means of agency regulations such as the DoD directive in this case.

The DoD, in support of its position, also relied on the statement in the June 1971 Report that reads: "The exclusive representative will be clothed with full authority and responsibility for grievance processing on the bilaterally determined conditions of employment" That statement, however, was intended to explain how the role of the exclusive representative of the employees in a unit would be strengthened by the amendment. It had been pointed out earlier in the Report that the role of a labor organization with exclusive recognition was diminished and distorted by permitting a rival union to represent a grievant with respect to the interpretation and application of an agreement which had been negotiated by the exclusive representative.

Disputes over bilaterally determined conditions of employment which might become the subject matter of a grievance involving an employee in the particular unit are determined on a case-by-case basis, as noted on page 6 above. Contrary to the DoD contention, the reference in the June 1971 Report does not set, and was not intended to set, any limit on the scope of negotiated grievance procedures beyond the limitations in the language of section 13 itself.

Therefore, the 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 and, moreover, in discord with the concluding requirements of E.O. 11616 that "each agency shall issue appropriate policies and regulations consistent with this Order for its implementation." [Emphasis supplied.]

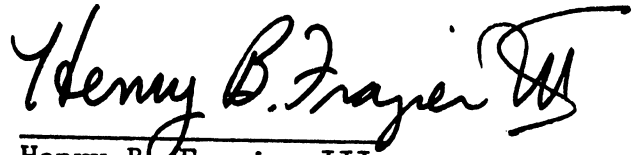
Conclusion

Sections VII.B.2.e.(5) and VII.B.3.c. of DoD Directive 1426.1, dated December 9, 1971, violate section 13 of Executive Order 11491, as amended by Executive Order 11616.

^{6/} The DoD brief points out that its directive preempts only the interpretation and not the application of referenced outside authority in negotiated agreements. However, in our view interpretation of authorities referenced in an agreement cannot be divorced from application of those authorities in a particular case context.

Accordingly, pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the Department of Defense determination in this case must be set aside.

By the Council.

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, stylized initial "H".

Henry B. Frazier III
Executive Director

Issued: May 15, 1973.

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

International Association of Machinists
and Aerospace Workers (IAM-AW),
Local Lodge 830

and

FLRC No. 72A-25

U.S. Naval Ordnance Station,
Louisville, Kentucky

DECISION ON NEGOTIABILITY ISSUE

Background

In the course of negotiations between Local Lodge 830 of the International Association of Machinists and Aerospace Workers (IAM-AW) and the U.S. Naval Ordnance Station at Louisville, Kentucky, the union submitted a grievance procedure proposal which did not expressly exclude from the scope thereof "questions as to the interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency," as required by DOD Directive 1426.1, dated December 9, 1971. The Navy activity asserted that the DOD requirement was a mandatory one and, in effect, that without the required express statement, the union proposal was nonnegotiable. Thereupon, the dispute was referred to DOD pursuant to section 11(c)(2) of Executive Order 11491. The resultant agency head determination supported the Navy position. The union appealed to the Council from that determination under section 11(c)(4) of the Order.

Opinion

The determination presented for review in this case involves the same provisions of DOD Directive 1426.1 as were before the Council in FLRC No. 72A-10, American Federation of Government Employees Local 1668 and Elmendorf Air Force Base (Wildwood AFS), Alaska, i.e., sections VII.B.2.e(5) and VII.B.3.c. The same questions present in that case, i.e., whether the disputed directive provisions violate section 771.311 of the Civil Service Commission regulations or section 13 of the Order, are present in the instant case.

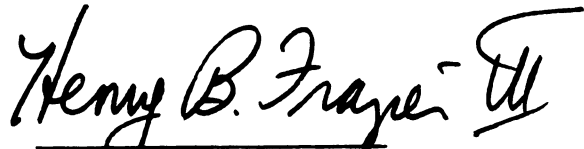
Indeed, in responding to IAM-AW Local Lodge 830's request for an agency head determination under section 11(c) of the Order in connection with the negotiability dispute at Louisville, DOD responded by forwarding to the union and relying on its determination in the AFGE Local 1668 - Elmendorf Air Force Base (Wildwood AFS) dispute. The Department of Defense also submitted a combined brief to the Council, which set forth its position in both this case and FLRC No. 72A-10.

On this date, the Council has issued its decision in the matter of American Federation of Government Employees Local 1668 and Elmendorf Air Force Base (Wildwood AFS), FLRC No. 72A-10, in which we found that the subject sections VII.B.2.e(5) and VII.B.3.c. of DOD Directive 1426.1, dated December 9, 1971, violate section 13 of Executive Order 11491, as amended by Executive Order 11616.

Conclusion

For the reasons fully set forth in FLRC No. 72A-10, AFGE Local 1668 and Elmendorf Air Force Base (Wildwood AFS), and pursuant to section 2411.27 of the Council's Rules and Regulations we find that the Department of Defense determination in this case must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 15, 1973.

FLRC NO. 72A-39

American Federation of Government Employees, Local 2028 and Veterans Administration Hospital, Pittsburgh, Pennsylvania (University Drive).

The negotiability dispute involved the validity under the amended Order of a Veterans Administration regulation which provides: "Each negotiated grievance procedure will contain a statement that where the parties have decided, for purposes of information, understanding, or otherwise, to incorporate by paraphrase, reference or repetition, provisions of law or higher level policies or regulations, such provisions will not be within the scope of the negotiated grievance procedure."

Council action (May 15, 1973). Relying on the reasons set forth in its decision in the above-mentioned Elmendorf Air Force Base case, FLRC No. 72A-10, the Council set aside the determination of the agency head in this case.

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

American Federation of Government
Employees, Local 2028

and

FLRC No. 72A-39

Veterans Administration Hospital,
Pittsburgh, Pennsylvania (University Drive)

DECISION ON NEGOTIABILITY ISSUE

Background

The American Federation of Government Employees Local 2028 represents the professional staff nursing unit at the Veterans Administration Hospital on University Drive in Pittsburgh, Pennsylvania. The Veterans Administration's Regional Medical Director declined to approve an agreement negotiated by the local parties on the basis that the agreement was not in conformity with section Glb(8)(b), Chapter 711, Part I of the Veterans Administration Manual which provides that:

Each negotiated grievance procedure will contain a statement that where the parties have decided, for purposes of information, understanding, or otherwise, to incorporate by paraphrase, reference or repetition, provisions of law or higher level policies or regulations, such provisions will not be within the scope of the negotiated grievance procedure.

Thereupon, the dispute was referred to the Administrator of Veterans Affairs for an agency head determination pursuant to section 11(c)(2) of the Order. The resultant determination supported the Regional Medical Director's position and rejected the union's arguments that the regulation violated Civil Service Commission regulations and Executive Order 11491, as amended. The union appealed to the Council from that determination under section 11(c)(4) of the Order.

Opinion

On this date the Council has issued a Decision on Negotiability Issue in the matter of American Federation of Government Employees Local 1668

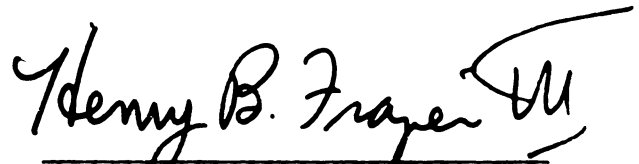
and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10, in which we held, among other things, that certain provisions of an agency regulation which (1) excluded from the scope of negotiated grievance procedures questions involving the interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency which might be quoted, cited or otherwise incorporated or referenced in an agreement, and (2) required that every agreement negotiated with a labor organization contain a statement of such exclusion, were violative of section 13 of Executive Order 11491, as amended.

Conclusion

For the reasons fully set forth in that Decision, section 61b(8)(b), Chapter 711, Part I of the Veterans Administration Manual violates section 13 of Executive Order 11491, as amended by Executive Order 11616.

Accordingly, pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the Veterans Administration's determination in this case must be set aside.

By the Council.



Henry B. Frazier III
Executive Director

Issued: May 15, 1973.

Department of the Navy, Naval Air Station, Corpus Christi, Texas,
A/SLMR No. 150. The Assistant Secretary dismissed a representation petition filed by the International Association of Fire Fighters, AFL-CIO, seeking to sever a unit of all firefighters from the activity-wide unit represented by the National Federation of Federal Employees. The Assistant Secretary's dismissal of the petition was based upon an application of his earlier decision in United States Naval Construction Battalion Center, A/SLMR No. 8, wherein he first established the considerations he would take into account in determining whether to permit a unit of employees to be "severed" from an established represented unit. The Council accepted the petition for review, deciding that a major policy issue was present, namely: The propriety of the Assistant Secretary's criteria for granting a request for severance of a proposed bargaining unit from a more comprehensive unit, established in Naval Construction (Report No. 28).

Council action (May 22, 1973). The Council concluded that the Naval Construction criteria which were applied by the Assistant Secretary in this case are properly based on the language of section 10(b) of the Order and are consistent with the purposes of the Order. Accordingly, the Assistant Secretary's decision and order dismissing the representation petition here involved was sustained.

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

Department of the Navy
Naval Air Station
Corpus Christi, Texas

and

International Association of
Fire Fighters, AFL-CIO

A/SLMR No. 150
FLRC No. 72A-24

and

National Federation of Federal
Employees, Independent, Local 797

DECISION ON APPEAL FROM ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary which dismissed a representation petition filed by International Association of Fire Fighters, AFL-CIO (herein called IAFF). IAFF sought to represent a unit of all fire fighters employed at the Naval Air Station, Corpus Christi, Texas. The fire fighting employees sought by IAFF were part of an exclusive Activity-wide bargaining unit of employees represented by the National Federation of Federal Employees, Independent, Local 797 (herein called NFFE).

The Assistant Secretary dismissed the petition filed by IAFF upon a finding that the unit sought was inappropriate for the purpose of exclusive recognition. The Assistant Secretary's dismissal of the petition was based upon an application of his earlier decision in United States Naval Construction Battalion Center, A/SLMR No. 8, wherein he first established the considerations he would take into account in determining whether to permit a unit of employees to be "severed" from an established represented unit.

The IAFF appealed the Assistant Secretary's decision in the instant case, contending that major policy issues were present. The Council accepted the petition for review, deciding that a major policy issue was present, namely: The propriety of the Assistant Secretary's criteria for granting a request for severance of a proposed bargaining unit from a more comprehensive unit, established in United States Naval Construction Battalion Center, A/SLMR No. 8 (hereinafter Naval Construction).

The IAFF filed a brief wherein it asserted that the standards for severance established in Naval Construction are contrary to the purposes of the Order since those standards constitute a virtual ban on severance. IAFF urges the Council to overrule the Naval Construction doctrine and, in its stead, to adopt one of several proposed standards, all of which, they contend, would make severance easier to achieve, and would be consistent with the purposes of the Order. Both the agency and NFFE assert that the criteria established by the Assistant Secretary for determining whether to grant a severance request are proper and should not be altered or clarified by the Council. The American Nurses Association, which was permitted to file a brief as an amicus curiae, supports the IAFF in urging the Council to overrule the Naval Construction doctrine and to replace it with a suggested list of considerations which they feel would guarantee employees in the Federal service their "freedom of choice."

Opinion

As stated above, in Naval Construction the Assistant Secretary established the considerations he would take into account in determining whether to grant severance of a group of employees from an established, represented unit. The Assistant Secretary, noting that "a determination must be made as to whether the benefits that might reasonably accrue to the employees being sought for severance exceed the benefits to be derived from maintaining an existing relationship," listed "various interests which are affected and must be taken into account." As detailed by the Assistant Secretary:

These include the effect severance would have on the effectiveness of employee representation; the past history of bargaining; the stability of labor relations as related to effective dealings and the efficiency of agency operations; the appropriateness and distinctness of units; and the overall community of interest of the employees involved.

.

Although each case can be expected to have its individual differences, the general theory of a severance case remains the same. Therefore, for future guidance, I conclude it will best effectuate the policies of the Executive Order that where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found to be appropriate except in unusual circumstances.

The IAFF and the ANA contend that the Assistant Secretary has promulgated a standard for judging severance requests which severely limits the opportunity of identifiable employee groupings to separate representation if they are part of an established, more comprehensive, bargaining unit. This characterization of the Naval Construction decision is accurate in that the standards enunciated by the Assistant Secretary clearly favor the retention of existing bargaining relationships. The issue before the Council is whether this policy is consistent with the purposes of the Order.

An examination of the legislative history of Executive Order 11491 provides substantial guidance in determining the propriety of the Assistant Secretary's severance doctrine. In Executive Order 10988, which preceded the current Order, the sole criterion for determining the appropriateness of a unit for exclusive recognition was that the employees concerned have "a clear and identifiable community of interest." The President's Study Committee, after reviewing experience under Executive Order 10988, stated:

The present order's language has been criticized as deficient in that it does not provide adequate criteria for purposes of appropriate unit determination. We are aware of the difficulties encountered in this area of public sector labor relations. We recognize that the element of uniqueness in each situation requires handling appropriate unit determinations on a case-by-case basis, and that such determinations must be tied basically to a clear and identifiable community of interest of the employees involved. However, we recommend that in addition to meeting the "community of interest" criterion, an appropriate unit must be one that promotes effective dealings and efficiency of agency operations. We believe that these additional criteria are essential to insure effective Federal labor-management relations.^{1/}

The Study Committee's recommendations with respect to unit determination were incorporated in section 10(b) of Executive Order 11491:

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. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized. . . . (Emphasis added)

^{1/} Labor-Management Relations in the Federal Service, 1971, p. 39.

In establishing his policy with respect to severance petitions, the Assistant Secretary developed a standard that is based upon and includes the criteria in section 10(b) and is consistent with the purposes of the Order. In our view, the language of the Order and the legislative history clearly mandate that in deciding severance questions the Assistant Secretary not only take into consideration the existence of "established, effective and fair collective bargaining relationships," but that he promote such relationships. It is totally consistent with that mandate that where such a relationship exists, it not be disrupted by severing off portions of the existing unit.

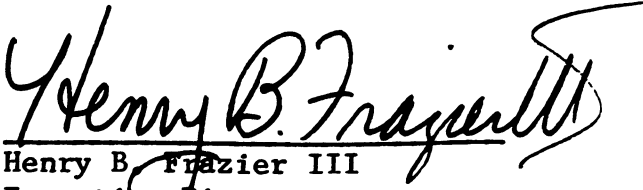
Apart from our agreement with the Assistant Secretary's policy of restricting severance from existing units, there remains the contention of the IAFF that the Assistant Secretary's criteria have created a "virtual ban" on such severance, and that such a ban is inconsistent with the purposes of the Order. In our view, the Assistant Secretary's Naval Construction decision does not create such a ban, but does provide a reasonable opportunity for a petitioning labor organization to obtain severance. The Assistant Secretary has stated that severance may be granted where the established relationship is not effective and fair or where there are unusual circumstances. Additionally, the Assistant Secretary provided rather specific guidance as to criteria he would apply, i.e., the effect severance would have on the effectiveness of employee representation; the past history of bargaining; the stability of labor relations as related to the effective dealings and the efficiency of agency operations; the appropriateness and distinctness of units; and the overall community of interest of the employees involved. Rather than constituting a virtual ban on severance, we view these criteria as being consistent with the purpose of insuring a clear and identifiable community of interest among employees and promoting effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary's policy with respect to severance petitions, as enunciated in Naval Construction, is consistent with the purposes of the Order.

In the instant case, the Assistant Secretary found that the proposed unit of fire fighters was not appropriate for the purpose of exclusive recognition in the absence of evidence that the NFFE has failed to represent such employees fairly and effectively. The Assistant Secretary measured the evidence against his Naval Construction criteria and concluded:

Thus, there is no evidence that the NFFE has refused or neglected to represent any unit employees, and the record reveals that a harmonious bargaining relationship has been maintained for several years by the Activity and the NFFE covering all employees of the Activity including those in the petitioned for unit. Accordingly, I find the unit sought by the IAFF is inappropriate for the purpose of exclusive recognition, and I shall, therefore, dismiss the petition.

As already indicated, the Naval Construction criteria which were applied by the Assistant Secretary in this case are consistent with the purposes of the Order. Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, we hereby sustain the Assistant Secretary's decision and order dismissing the petition.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 22 1973**

Local Lodge 2424, IAM-AW, and Aberdeen Proving Ground Command. The negotiability dispute involved the union's proposal that employees detailed to work at a higher level position for a period (actual or expected) of 30 days or more be granted a temporary promotion during the assignment.

Council action (May 22, 1973). The Council held that the agency head's determination as to the nonnegotiability of the union's proposal based on an Army regulation establishing a minimum 60-day period for such temporary promotions was proper; and that, contrary to the union's contentions, this regulation does not conflict with Civil Service Commission or Department of Defense directives or the Order. Accordingly, the Council sustained the determination of the agency head in the case.

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

Local Lodge 2424, IAM-AW

and

FLRC No. 72A-37

Aberdeen Proving Ground Command

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (Local Lodge 2424, IAM-AW) is the exclusive bargaining representative of wage board employees at the Aberdeen Proving Ground Command in Aberdeen, Maryland,

During negotiations between the parties, a dispute arose over the negotiability of the following proposal by the union concerning temporary promotions:

Section 1. It is agreed that employees assigned above the level of their position for periods in excess of thirty (30) calendar days or where it is expected that the assignments will be for thirty (30) calendar days or more, shall be temporarily promoted to the higher level position, when qualified.

The Department of the Army asserted that the proposal is nonnegotiable under Army regulation CPR 300 (Ch. 27), which in effect establishes a minimum assignment period of 60 days for such temporary promotions.^{1/}

1/ CPR 300 (Ch. 27), 300.8, provides in relevant part:

Subchapter 8. Detail of Employees

8-4. Agency Responsibilities When Using Details

b. Counseling on proper use. The following general principles will be observed within the Department of the Army:

(1) Wherever possible, details will be used to meet temporary needs for services which will not extend beyond 6 months.

(cont'd)

The union referred the dispute to the Department of Defense (DOD), claiming that the subject Army regulation violates Civil Service Commission and DOD directives.

DOD upheld the position of Army as to the nonnegotiability of the union's proposal, finding that CPR 300 (Ch. 27) is not violative of either Civil Service Commission or DOD requirements. The union appealed to the Council from this determination.

Opinion

The union contends in its appeal that the provisions of CPR 300 (Ch. 27), relied upon by the agency in its determination of non-negotiability, conflict with Civil Service Commission regulations, particularly Federal Personnel Manual (FPM) chapter 300, section 8-4e. The union further argues that the subject Army regulation is so overly prescriptive as to violate DOD Directive Number 1426.1 and, in effect, section 11(b) of the Order. We shall consider each of these contentions separately below.

1. Civil Service Commission requirements. The union takes the position that the 60-day minimum period of assignment for temporary promotions in the Army regulation exceeds the "brief period" referred to in FPM chapter 300, section 8-4e, as the time period for details beyond which a temporary promotion should be granted.^{2/}

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:

1/ (cont'd)

(2) Where use of a detail is not the most appropriate method, a temporary promotion may be used to meet a specific need which will last for a limited period of 60 days or more, in accordance with CPR 300, Chapter 335, Subchapter 1-8f and Subchapter 4-4.

2/ FPM chapter 300, subchapter 8, concerning details of employees, provides in pertinent part:

8-4 Agency Responsibilities When Using Details

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

You asked whether the Army regulation setting a 60-day minimum period of assignment for temporary promotions (CPR 300, Chapter 27) conflicts with directives of the Civil Service Commission, particularly chapter 300, section 8-4e of the Federal Personnel Manual.

There is no conflict. Section 8-4e, stating that 'except for brief periods' details should not be made to higher level positions, is intended as general advice to agencies on sound management principles. Similar guidance is contained in section 8-4a, which states that, 'Agencies are responsible for keeping details within the shortest practical time limits.' Neither these nor any other Commission regulations speak to the question of exactly what constitutes a 'brief period' or when a temporary promotion becomes preferable to a detail. We view such determinations as an agency responsibility.

Chapter 300, sections 8-3b and 8-4f, do establish a maximum overall length of any detail to a higher grade position or a position with known promotion potential as 240 days (120 day initial detail plus one extension with prior Commission approval for no more than an additional 120 days). No other limit on the length of such details is contained in the FPM. An agency may set a time limit not over 120 days below which details will be given rather than temporary promotions so long as Commission requirements for documentation of a detail lasting 30 days or more (FPM 300, 8-4c(1)) and competition for a detail to a higher grade position or position with known potential (FPM 335, 4-1e(1)) are observed.

Based on the foregoing interpretation by the Civil Service Commission of its own issuances, we find that CPR 300 (Ch. 27) is not in conflict with Civil Service Commission requirements. Therefore, we reject the position of the union in this regard.

2. Department of Defense directives. The union also claims in substance that the Army regulation is invalid because it circumscribes

the bargaining authority of the activity head, in violation of section VII.B.2.a. of DOD Directive Number 1426.1.^{3/}

However, DOD ruled in this regard:

With respect to your contention that the Army's 60-day policy conflicts with Section VII.B.2.a. of DOD Directive 1426.1, we find no evidence that the Army's current policy does not reflect what it considers to be the broadest practicable delegation in this area at the present time. No conflict with the DOD Directive is therefore apparent.

The Council is of course bound by the agency head's determination as to the interpretation of his own regulations, under section 11(c)(3) of the Order.^{4/} We therefore find no merit in the union's contention that CPR 300 (Ch. 27) conflicts with DOD directives.

3. Executive Order 11491. The union further argues in its appeal that the subject Army regulation is overly prescriptive and thereby, in effect, violates the "due regard" provision in section 11(b) of the Order.^{5/}

There was no showing by the union that the regulation, either by its fundamental nature or in the circumstances surrounding its issuance, improperly limits or dilutes the scope of negotiations and hence

^{3/} DOD Directive Number 1426.1, concerning "Labor-Management Relations in the Department of Defense," provides in section VII.B.2.a. as follows:

DOD components are expected to delegate the broadest practicable authority to heads of activities in the areas of personnel policy and practices and matters affecting working conditions, in order to maximize opportunities for meaningful and productive negotiation

^{4/} Section 11(c)(3) of the Order reads as follows:

An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final.

^{5/} Section 11(b) of the Order provides in pertinent part:

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

conflicts with the bargaining obligation. Instead it is readily apparent that CPR 300 (Ch. 27) applies uniformly and equally to the many subordinate activities within the Department of the Army. Such a regulation, for the reasons fully detailed in the Sheppard Air Force Base decision,^{6/} is completely consistent with the obligations imposed by section 11 of the Order and may properly limit the scope of negotiations at subordinate activities under the Order.

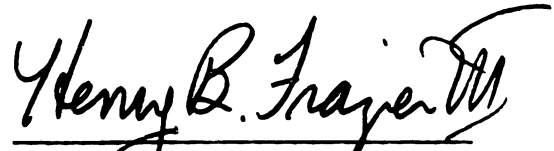
Based on the foregoing (and apart from other considerations), we are of the opinion that CPR 300 (Ch. 27) is not violative of the requirements of the Order.

Conclusion

For the above-mentioned reasons, we find, contrary to the union's contentions, that CPR 300 (Ch. 27) is not in conflict with the requirements of either Civil Service Commission regulations, Department of Defense directives, or the provisions of the Order. Accordingly, the agency head's determination as to the nonnegotiability of the union's proposal, based on the subject Army regulation, was proper.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 22 1973**

6/ National Federation of Federal Employees, Local 779, and Department of the Air Force, Sheppard Air Force Base, Texas, FLRC No. 71A-60, issued April 3, 1973. See also Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57, issued May 9, 1973.

NFFE Local 1633 and U.S. Department of Agriculture, Federal Crop Insurance Corporation. The agency head's determination on a negotiability issue in this case was served on the union on November 22, 1972; and any appeal from this determination was due, under section 2411.23(b) of the Council's rules, no later than December 12, 1972. However, the union did not file its appeal until March 19, 1973, or nearly 100 days late, and no persuasive reason was advanced for waiving this untimeliness.

Council action (May 22, 1973). Since 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 22, 1973

Mr. Nathan T. Wolkomir
President
National Federation of
Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: NFFE Local 1633 and U.S. Department of
Agriculture, Federal Crop Insurance
Corporation, FLRC No. 73A-14

Dear Mr. Wolkomir:

Reference is made to your petition for review of an agency head's decision on a negotiability issue, filed with the Council in the above-entitled case. In that petition you requested that the Council waive the time provisions of its rules and accept the petition as timely filed.

The Council has carefully considered all the documents submitted in this case, including your petition and the opposition thereto filed by the agency. For the reasons indicated below, the Council has determined that your petition cannot be accepted for review.

Section 2411.23(b) of the Council's rules specifically provides that an appeal must be filed within 20 days from the date of the agency head's determination; and under 2411.45(a) such appeal must be received in the Council's office before the close of business of the last day of the prescribed time limit.

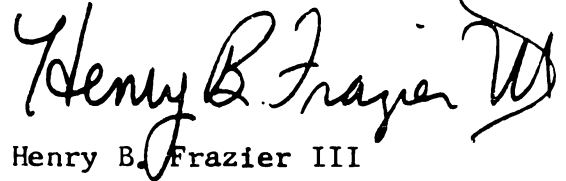
The record indicates that the agency head's determination in this case was served on NFFE Local 1633 on November 22, 1972. Your appeal was therefore due on December 12, 1972. However, your petition for review was not filed with the Council until March 19, 1973, or nearly 100 days late.

Your petition indicates that the national office of the National Federation of Federal Employees did not receive a request from Local 1633 to appeal the agency head's determination until "just recently." However, such delay in communication does not warrant the waiver by the Council of the untimely filing of the instant appeal.

Accordingly, as your appeal was untimely filed, and apart from other considerations, the Council has directed that your petition for review be denied.

For the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Executive Director

cc: R. C. Zeller
FCIC

FLRC NO. 71A-22

AFGE Local 1923 and Social Security Administration Headquarters Bureaus and Offices, Baltimore, Maryland. The negotiability dispute involved the union's proposal relating to the "area of consideration" to be established for filling GS-13 positions at the Bureau of Health Insurance, under the activity's merit promotion plan.

Council action (May 23, 1973). The Council held that the union's proposal is negotiable under section 11(a) of the Order and, contrary to the agency head's determination, decided that negotiation is not proscribed by published agency or Civil Service Commission policies.

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

AFGE Local 1923

and

FLRC No. 71A-22

Social Security Administration
Headquarters Bureaus and Offices
Baltimore, Maryland

DECISION ON NEGOTIABILITY ISSUE

1. General. The activity^{1/} is the headquarters for the Social Security Administration (SSA), an organization within the Department of Health, Education, and Welfare (agency). It is located in Baltimore, Md., and encompasses 11 component bureaus and offices, employing about 17,000 employees.

Among the components of the activity is the Bureau of Health Insurance (BHI), which was established in 1965 and is responsible for the administration of the Medicare program. BHI employs some 910 employees performing staff and operating functions. The negotiability dispute, as detailed below, concerns the merit promotion program relating to these employees.

The union, AFGE Local 1923, has been the exclusive bargaining representative of all non-supervisory employees, including professionals, at the activity since at least 1963. The parties executed a basic agreement in 1963 and various supplemental agreements, including one on merit promotion matters.

All activity employees are covered by the activity's merit promotion plan which, in its stated purpose, supplements SSA directives and is consistent with the applicable supplemental agreement between the parties. The plan provides that vacancies for all positions be announced to all covered employees. The normal "area of consideration" for all vacancies, with the exception of GS-14 and GS-15 positions, is activity-wide. Vacancy

^{1/} The designation of the activity in the caption appears as amended during the instant proceeding.

announcements are posted on bulletin boards throughout the Baltimore complex and all employees are eligible to file.

2. BHI dispute. When BHI was set up in 1965, its typical organizational unit was composed of a GS-14 first-line supervisor, one or two GS-13 project leaders, and a number of GS-9 through GS-12 staff employees. Subsequently, some of the GS-12 staff employees became dissatisfied at not being promoted to GS-13 positions. Following such complaints, the union initially requested that either "career ladders" providing for career promotions be established, or that "sequential positions" requiring the use of above-minimum requirements to fill higher level target positions be designated. At the time, BHI did not have career ladders or sequential positions covering GS-9 through GS-13 staff positions in its various divisions.

Discussions followed, and SSA thereafter informed the union that career ladders would be established at GS-11/12 (not GS-13) levels, and that it would not establish sequential positions at the GS-12/13 levels, as had also been requested, because, among other things, "At these levels, management should have as wide an area as possible to select from subject to normal qualification standards."

The union responded to SSA, stating that "there must be a correlation between the GS-11, 12 and 13 positions" and in effect requested negotiations on "this issue." SSA asserted that the matter was non-negotiable. Upon referral, the agency head noted "some confusion as to the precise issue in question." However, the agency head determined that the issue involved "the establishment of particular career ladder and related types of positions;" and that the issue as so stated was nonnegotiable under section 11(b) of the Order.

3. Redefinition of proposal by union. The union filed a petition for review of the agency head determination with the Council (FLRC No. 70A-12). In its petition, the union redefined its current proposal and the dispute as follows:

. . . The only issue in dispute is whether existing GS-13 positions will be filled by employees with Bureau experience at the GS-12 level (Union's proposal) or whether these GS-13 positions will be open to Headquarters-wide competition (management's unilateral determination). Thus, in essence the real dispute is over the area of consideration for GS-13 level positions in the Bureau of Health Insurance

This initial appeal was dismissed by the Council as untimely filed (Report No. 4). The union thereafter submitted a new request for a negotiability determination to the agency head, relying on its prior appeal to the Council and enclosing a copy of such appeal with its

request. The agency head in a brief letter to the union adhered to his earlier determination, without adverting to the proposal and dispute as redefined in the union's appeal and as submitted to him for determination.

The union then filed the instant appeal with the Council, relying upon and enclosing its initial petition for review. No opposition was filed by the agency. Upon Council acceptance of the present appeal for review, the union filed its brief, again stating:

In summary, the only issue in dispute is whether existing GS-13 positions in the Bureau of Health Insurance will be filled by employees with Bureau experience at the GS-12 level (Union's proposal) or whether these GS-13 positions will be open to Headquarters-wide competition (management's unilateral determination). Thus, the real dispute is over the area of consideration for GS-13 level positions in the Bureau which we contend is clearly negotiable by virtue of . . . Section 11(a) of Executive Order 11491 and, more specifically, FPM Chapter 335, Subchapter 5-1c(2) and (3).

. . . The Union is only insisting that the area of consideration for filling vacant GS-13 positions in the bargaining unit be subject to the collective bargaining process rather than agency fiat. [Emphasis in part supplied.]

The agency thereafter requested oral argument to clarify the negotiability issues, which request was opposed by the union. The Council denied the agency's request, stating:

In the Council's opinion, the record clearly establishes that the dispute in this case involves the negotiability of the union's proposal that 'existing GS-13 positions [in the Bureau of Health Insurance] will be filled by employees with Bureau experience at the GS-12 level.' . . .

Following the Council's denial of its request for oral argument, the agency timely filed a brief in the case.

Opinion

The issue presented is whether the union's proposal, namely, that existing GS-13 positions in BHI be filled by employees with Bureau experience at the GS-12 level, is negotiable under the Order.^{2/}

The union, as already mentioned, asserts that its proposal concerns the "area of consideration" for filling GS-13 positions and is negotiable under section 11(a) of the Order^{3/} and related provisions in the Federal Personnel Manual (FPM Chapter 335, Subchapter 5-1.c.(2) and (3)).^{4/}

The agency does not deny in its brief that the "area of consideration" for filling positions under a promotion plan, as defined in the FPM,

^{2/} The union also argued in its appeal that its proposal is negotiable by reason of provisions in its agreement with the activity. However, such questions of contract interpretation are not properly before the Council in this proceeding. Accordingly, we do not pass upon this contention. U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), at p. 2.

^{3/} Section 11(a) of the Order reads 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, including policies set forth in the Federal Personnel Manual, published agency policies and regulations . . . and this Order

^{4/} FPM Chapter 335, Subchapter 5-1.c., includes the following examples of promotion matters generally appropriate for agency consultation or negotiation with employee organizations:

(2) Coverage of a promotion plan, such as what occupations, grade levels, organizational subdivisions, and geographical locations will be included;

(3) Delineation of the minimum area of consideration and the systematic method of extending the area when necessary.

is in general negotiable.^{5/} However, the agency in effect argues that (1) the proposal does not actually concern "areas of consideration"; and (2) in any event, the proposal is inconsistent with the requirements imposed both by the FPM and by published agency policies and is therefore nonnegotiable.^{6/} We shall consider each of these agency contentions below.

(1) As to the agency's claim that the union's proposal does not involve "areas of consideration," it is plain that the proposal, viewed in the light of the express intent of the union, seeks to identify an area of intensive search for eligible candidates for GS-13 level positions, i.e., employees with Bureau experience at the GS-12 level, and thereby falls within the FPM definition of "area of consideration."^{7/} As previously noted in this regard, the union explained the intent of its own proposal, namely: "The Union is only insisting that the area of consideration for filling vacant GS-13 positions in the bargaining unit be subject to the collective bargaining process rather than agency fiat." While the agency asserts that such delineation

^{5/} FPM Chapter 335, Subchapter 3-3.a., contains the following definitions relating to "area of consideration":

(1) Area of consideration means the area in which an agency makes an intensive search for eligible candidates during a specific promotion action. It must at least include the minimum area designated in the promotion plan.

(2) Minimum area of consideration means the area designated by the promotion plan in which the agency should reasonably expect to locate enough highly qualified candidates to fill vacancies in the positions covered by the plan. The agency must include this area in its initial search for candidates.

^{6/} The agency also argues that the establishment of "career ladders" and "sequential positions" would require changes in positions, which are excepted from the obligation to bargain under section 11(b) of the Order. However, apart from other considerations, the agency fails to detail any specific changes which would be required in any existing positions by reason of the union's proposal in this case.

^{7/} Fn. 5, supra.

of "area of consideration" is "usually" done on a geographical basis, nothing in the FPM provides that it must be so limited.^{8/}

Accordingly, we find that the agency's contention that the union's proposal does not involve "area of consideration" is without merit.^{9/}

(2) As to the agency's further contention that the union's proposal is inconsistent with the FPM and with published agency policies, this argument appears impliedly predicated on the agency's belief that the proposal would establish experience at the GS-12 level as a qualification standard for GS-13 positions. It appears further based on the belief that the proposal would restrict consideration for GS-13 positions to the 910 employees of BHI or "a mere 6 percent" of the 17,000 employees in the bargaining unit. Such Bureau-wide limitation, according to the agency, would conflict with the required size of the minimum area of consideration in the FPM,^{10/} and the requirement in published agency policy that areas of consideration "be as broad as is administratively feasible."^{11/}

However, this contention by the agency is based on a misinterpretation of the union's proposal.

To repeat, the union's proposal, according to that organization's express intent, speaks only to the "area of consideration" for filling vacant GS-13 positions, that is, the area in which the agency

^{8/} FPM Chapter 335, Subchapter 3-3.b., states in relevant part:

b. Determining the minimum area. (1) Each promotion plan designates a minimum area of consideration. The minimum area may be designated by organization (for example an entire agency, a bureau, a division, or a field installation), by occupation, by grade level, by geographic location, or by any other means or combination of means which reasonably meets the agency's needs and affords employees adequate opportunities for advancement. (2) The nature and size of the minimum area of consideration vary with the types of positions involved and the qualifications required
. . . .

^{9/} Cf. Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), at p. 6.

^{10/} Fn. 5, supra.

^{11/} HEW Personnel Manual Instruction 335-6, Section 40C.1.b.

makes an intensive search for eligible candidates during a specific promotion action. The proposal, as so limited by the union and as we therefore so construe it for purposes of this decision, does not establish BHI experience at GS-12 level as a qualification for GS-13 positions. Moreover, nothing in the proposal limits consideration of candidates to those within BHI at the time of the vacancy. Nor does the proposal negate in any manner the need to comply with other pertinent FPM requirements, e.g., the need to extend the minimum area of consideration if it does not produce at least three highly qualified candidates; to allow employees outside the minimum area to file voluntary applications; and to consider, along with employees in the minimum area, such voluntary applicants who meet the position qualifications.^{12/}

In view of the agency's erroneous interpretation of the union's proposal, and under these particular circumstances, we reject the agency's contention that the union proposal is nonnegotiable under the FPM and published agency policy.^{13/}

Conclusion

For the foregoing reasons, we find that the union's proposal that existing GS-13 positions in BHI be filled by employees with Bureau experience at the GS-12 level is negotiable under section 11(a) of the Order. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide herein only the issue as to the mutual obligation of the parties under section 11(a) of the Order to negotiate on the proposal.

Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, we find that the determination of the agency that the union's proposal is nonnegotiable must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 23 1973**

^{12/} FPM Chapter 335, Subchapter 3-3.d.; see also HEW Personnel Manual Instruction 335-6, Section 40C.1.c. Of course, other requirements of the Civil Service Commission entitling employees under certain circumstances to special or priority consideration for promotion must also be considered. (See, e.g., FPM Chapter 335, Subchapter 4-3.c.(2) and 6-4.c.; and FPM Supp. 990.1, Book III, Section 713.271.)

^{13/} Veterans Administration Research Hospital, Chicago, Illinois, fn. 9, supra.

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, S.C. The negotiability dispute involved the union's proposal that union representatives have a right to "review all standards used in the formulation of Merit Promotion Procedures including . . . the 'Internal Qualification Guides for Trades and Labor Jobs.' " The Guide is an issuance of the Civil Service Commission, and the agency determined that the proposal was nonnegotiable under CSC requirements.

Council action (May 23, 1973). Based on CSC advice as to the meaning of its own directives, the Council sustained the agency's determination that the union's proposal was nonnegotiable.

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

Federal Employees Metal Trades
Council of Charleston

and

FLRC No. 73A-7

Charleston Naval Shipyard,
Charleston, S.C.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During negotiations concerning promotion plans a dispute arose over the negotiability of the following proposal by the union:

Council representatives shall have the right to review all standards used in the formulation of Merit Promotion Procedures including but not limited to the "X-118C Handbook" and the "Internal Qualification Guides for Trades and Labor Jobs."

The parties reached agreement with respect to union access to Handbook X-118C but not with respect to union access to the "Internal Qualification Guides for Trades and Labor Jobs" which is an issuance of the Civil Service Commission.

The negotiability dispute was referred by the union to the Department of the Navy, which referred it in turn to the Department of Defense for the agency head determination called for in section 11(c) of the Order. The Department of Defense determined that the proposal is nonnegotiable under Civil Service Commission requirements.

Opinion

The union contends that there is no specific Civil Service Commission prohibition against union review of the "Guides" and that, in view of its representation obligation, the union has an "inherent right" of access to the "Guides." The union asserts that, in the absence of a specific Commission requirement of confidentiality, its right to the information in the "Guides" is supported by certain provisions of law and of Executive Order 11491, as amended.

The agency contends that the Commission has explicitly restricted access to the "Guides" to Federal personnel offices and to the Commission by a statement on the cover and an explanation in the Preface to the publication.^{1/}

The sole issue present in this case is whether the Civil Service Commission has prohibited the review by a labor organization of the "Internal Qualification Guides for Trades and Labor Jobs." Since the Commission has primary responsibility for the issuance and interpretation of its policies and regulations, 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:

You inquire if the question presented by the Metal Trades Council whether a proposal that union representatives "shall have the right to review all standards used in the formulation of Merit Promotion Procedures including ...the 'Internal Qualification Guides for Trades and Labor Jobs'" would conflict with CSC directives.

Making the "Guides" available for review of union representatives conflicts with the provision of Chapter 337, Subchapter 3-3 of the Federal Personnel Manual, which states in pertinent part:

"...Because knowledge of precise rating information might give candidates an unfair advantage in applying for jobs, these plans may only be made available to persons participating in job elements examining in an official Government capacity...."

^{1/} On the cover of the "Guides" is the statement: "USE RESTRICTED TO FEDERAL PERSONNEL OFFICES AND THE U.S. CIVIL SERVICE COMMISSION." The Preface to the publication states in part as follows:

Because knowledge of precise rating information might give candidates an unfair advantage in applying for jobs, Internal Qualification Guides for Trades and Labor Jobs is not available to the general public. Copies will be provided by individual Federal agencies only to persons participating in job element examining in an official Government capacity.

While availability of the guides is restricted to appropriate Government officials engaged in rating candidates for trades and labor jobs, this policy does not prohibit rating information being made available as needed in resolving specific appeals and grievances subject to the use of adequate precautions to preserve its continued confidentiality.

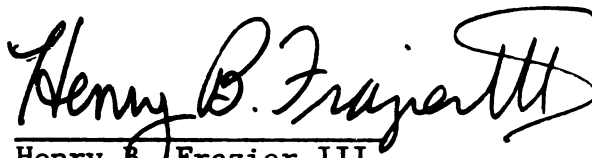
Based on the foregoing interpretation by the Civil Service Commission of its own directives we find that the subject agency restriction on access to the "Guides" is consistent with CSC requirements.

Conclusion

For the above-mentioned reasons, we find, contrary to the union's contentions, that the determination by the agency that the union proposal was nonnegotiable under Civil Service Commission regulations was proper.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 23 1973**

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina. The negotiability appeal in this case concerned matters, the general subject areas of which were already covered at the time of the appeal in an agreement entered into by the parties. The agreement, expiring on December 22, 1975, is subject to reopening only upon the mutual consent of the parties.

Council action (May 23, 1973). The Council decided to grant the agency's motion to dismiss the union's petition on the ground, as similarly determined by the agency, that the issues raised therein are moot. (Decision letter attached.)

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 23, 1973

Mr. Charles H. Sanders, Jr.
President, Federal Employees Metal
Trades Council of Charleston
114 South Walnut Street
Summerville, South Carolina 29483

Re: Federal Employees Metal Trades
Council of Charleston and
Charleston Naval Shipyard,
Charleston, South Carolina,
FLRC No. 73A-10

Dear Mr. Sanders:

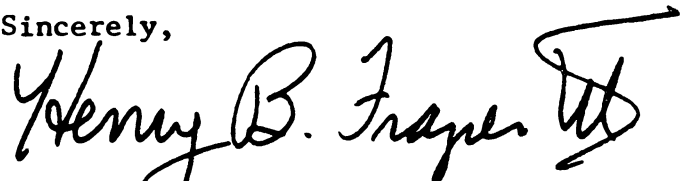
The Council has carefully considered your petition for review of a negotiability dispute, and the agency's motion to dismiss your petition, in the above-entitled case.

As appears from your petition and the agency's motion, the parties have already entered into a collective bargaining agreement, expiring on December 22, 1975, which contains provisions dealing with the general subject matter areas raised in your negotiability appeal. That agreement is subject to reopening, so far as here pertinent, only upon the mutual consent of the parties.

Under these circumstances, the Council is of the opinion, as similarly determined by the agency, that the issues raised in your appeal are now moot. (See AFGE Local 1960 and Naval Air Rework Facility, Naval Air Station, Pensacola, Florida, FLRC No. 70A-6, Report of Case Decisions No. 2, dated January 8, 1971.) The Council has therefore directed that the agency's motion to dismiss the instant proceeding be granted.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: W. Gundlach, Capt.
Navy

P. J. Burnsky
MTD

United States Naval Weapons Center, China Lake, California, A/SLMR No. 128. Upon a unit clarification petition filed by Local No. F-32, International Association of Fire Fighters, AFL-CIO, the Assistant Secretary found that certain individuals classified as "fire captains" were not supervisors within the meaning of section 2(c) of the Order. The Council accepted the petition for review filed by the agency, determining that the holding raised certain questions with respect to the interpretation of section 2(c) which were major policy issues. (Report No. 28) Specifically, the two issues raised were: Should section 2(c) be applied in the disjunctive; and does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendation ineffective within the meaning of section 2(c)?

Council action (May 25, 1973). The Council held that section 2(c) must be applied in the disjunctive. That is, any individual who possesses the authority to perform a single function described in section 2(c), provided he does so in a manner requiring the use of independent judgment, is a supervisor and must be excluded from the unit. Further, the Council held that the mere fact that a recommendation is reviewed or approved by a higher ranking management official does not, in itself, render a recommendation ineffective. Rather, the Assistant Secretary must look to the nature and scope of the review in order to determine the effectiveness of the recommending authority within the meaning of section 2(c). The case was remanded to the Assistant Secretary for action consistent with the principles discussed in the decision.

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

United States Naval Weapons Center
China Lake, California

and

A/SLMR No. 128
FLRC No. 72A-11

Local No. F-32, International
Association of Fire Fighters,
AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from a Decision and Order Clarifying Unit in which the Assistant Secretary held, among other things, that the GS-7 fire captains employed at the China Lake Naval Weapons Center were not supervisors within the meaning of section 2(c) of the Order.^{1/} This holding raised certain questions with respect to the interpretation of section 2(c) which the Council determined are major policy issues warranting review. Specifically, the two issues raised are: should section 2(c) be applied in the disjunctive, and, secondly, does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective within the meaning of section 2(c). The facts giving rise to this appeal are set forth below.

Local No. F-32, IAFF, is the exclusive bargaining representative of all Fire Division employees at China Lake. Historically, the GS-7 fire captains had been included in the unit; but in 1970, the Navy excluded

1/ Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

them from the unit pursuant to section 24(d) of the then current Order.^{2/} The union filed a clarification of unit petition, seeking the inclusion of the fire captains, contending that they were not supervisors within the meaning of section 2(c).

The Assistant Secretary found in favor of the union and directed that the fire captains be included in the unit. In so finding, he concluded, in essence, that the fire captains did not possess the necessary indicia of supervisory authority described in section 2(c). Specifically at issue herein are the Assistant Secretary's conclusions that the fire captains do not "effectively" recommend employees for promotion because their recommendations must be reviewed at several different levels before a final decision is made, and his conclusion that the decisions of the fire captains at the first step of the grievance procedure "are not determinative but are subject to multiple levels of appeal."

Contentions

The Navy contends that the Assistant Secretary's interpretation of section 2(c) in this case ignores both the literal language and the clear intent of the Order. Specifically, the Navy argues that section 2(c) must be applied in the disjunctive and, therefore, if the fire captains possess even one of the indicia set forth in section 2(c), they must be excluded from the unit as supervisors. Additionally, the Navy argues that the Assistant Secretary erred in concluding that the recommendations of fire captains are not effective recommendations simply because they are subject to review by higher ranking officials; for example, the review of recommendations for promotion and of grievance adjustments.

The union contends that section 2(c) need not be applied strictly in the disjunctive; and that the factual findings of the Assistant Secretary are supported by the record evidence and represent an appropriate interpretation of section 2(c).

Opinion

The two issues raised will be discussed separately:

1. Should section 2(c) be applied in the disjunctive?

Section 2(c) provides as follows:

^{2/} Section 24(d) of Executive Order 11491, prior to the 1971 amendments, provided that "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition"

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

As apparent from the use of the conjunction "or", section 2(c) is written in the disjunctive. If applied as written, section 2(c) has the effect of excluding from the unit any individual who possesses the authority to perform even one of the functions described in section 2(c), provided he does so in a manner requiring the use of independent judgment. We believe section 2(c) should be so applied.

As a general rule of statutory construction, words are to be given the meaning commonly attributed to them in the absence of a legislative intent to the contrary.^{3/} In this case, there is no indication of an intent contrary to the literal language of the Order, and indeed, the purposes of the Order fully support a literal application of section 2(c). As we have stated in previous decisions, the Order intended that supervisors be clearly identified and fully integrated into the management structure.^{4/} Consistent with this objective, the Presidential Study Committee recommended that the present definition of supervisor be adopted. By applying section 2(c) as it is written -- in the disjunctive -- a clear delineation can be drawn between supervisory employees and nonsupervisory employees. Thus, the disjunctive approach is a very specific standard. It requires only that an individual possess one of the characteristics described in section 2(c); not some or most of those characteristics. This specific standard eliminates degree questions and, therefore, determinations as to the supervisory status of an individual can be made with more certainty and clarity. It was precisely this type of clarity and certainty which the Study Committee hoped to achieve by recommending that the present definition be adopted.

In view of the above, we find that section 2(c) must be applied in the disjunctive. Accordingly, any individual who possesses the authority to perform a single function described in section 2(c), provided he does so in a manner requiring the use of independent judgment, is a supervisor and must be excluded from the unit. We recognize that there may be

^{3/} 50 Am. Jur., Statutes, §238 and §239 (1944).

^{4/} United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4; Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, FLRC No. 72A-15.

factual situations wherein the nature and degree of the evidence is insufficient to establish the actual existence of such authority, and we leave these determinations to the discretion and judgment of the Assistant Secretary. However, once the possession of the authority to perform one of the functions set forth in section 2(c) has been established, we hold that the individual is a supervisor and must be excluded from the unit.

2. Does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective? Section 2(c) requires that an individual possess the authority actually to perform one of the tasks listed therein, or that an individual possess the authority "effectively to recommend such action." In our view, the mere fact that a recommendation is reviewed or approved by a higher ranking management official does not, in itself, render a recommendation ineffective. Rather, we hold that the Assistant Secretary must look to the nature and scope of the review in order to determine the effectiveness of the recommending authority within the meaning of section 2(c). Thus, as a general rule, the evidence must establish only that a recommendation is made on behalf of management, that it is based upon the independent judgment of the alleged supervisor, and that the recommendation -- either considered separately or in conjunction with the recommendations of other supervisors or management officials -- could result in a decision by management to hire, transfer, suspend, or take any of the other actions set forth in section 2(c). To be effective, it is not necessary that one recommendation by one individual be the sole criteria used by higher management in determining whether to take one of the actions listed in section 2(c).

As a practical matter, any other interpretation of the term "effective" would be clearly contrary to the realities of the exercise of authority in the Federal sector. For example, with respect to promotions, in the Federal sector virtually all decisions as to promotions to a higher grade level are made pursuant to established procedures which explicitly require that the recommendation of a lower level supervisor be reviewed or approved by higher officials before being put into effect. Therefore, the key to determining the effectiveness of an alleged supervisor's recommendation is not the mere fact of review, but the impact which that recommendation has upon the overall promotional procedures in force at an activity. In other words, the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level.

With respect to the review of first step grievance adjustments, we must first point out that a decision at the first or informal stage of a grievance procedure is the final and only decision at that level. If the decision at the first step is satisfactory to the grievant, no appeal is taken and the individual who possessed the authority to make the decision at the first step has, in fact, made the final decision as to that grievance. Moreover, even if the decision at the first step

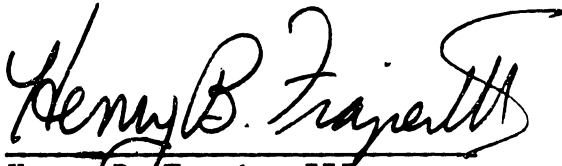
is appealed and reversed, this does not alter the authority of the individual who made the first step decision. That individual still possesses the authority to adjust grievances at the first step. Grievance procedures commonly provide for the right of appeal to a higher level, and this right of appeal is a key element in most grievance procedures. Accordingly, if the evidence is sufficient to establish that individuals actually possess the authority to adjust grievances at the first step of the grievance procedure, those individuals are supervisors within the meaning of section 2(c).

Thus, section 2(c) must be interpreted in a manner consistent with the realities of the exercise of authority in the Federal sector. If only those individuals who possessed the unqualified authority to promote, or to make the final decision at the last stage of a grievance procedure were considered supervisors, only top officials would be supervisors and there would be no lower level supervisors in the Federal sector. We see no basis for adopting such a strained interpretation of section 2(c). Rather, we believe that a common sense interpretation of section 2(c) requires that the nature and scope of the review must determine the effectiveness of a recommendation, not the fact of review alone.

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. We leave to him the determination as to whether an individual possesses the authority of a supervisor, as described in section 2(c).

Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, we remand this case to the Assistant Secretary for a determination as to whether the fire captains are supervisors within the meaning of section 2(c) of the Order, consistent with the principles discussed herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 25 1973**

Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129.

Upon a unit clarification petition filed by Local No. F-48, International Association of Fire Fighters, AFL-CIO, the Assistant Secretary found that certain individuals classified as "fire captains" were not supervisors within the meaning of section 2(c) of the Order. The Council accepted the petition for review filed by the agency, determining that the holding raised certain questions with respect to the interpretation of section 2(c) which were major policy issues. (Report No. 28) Specifically, the principal issue raised in this case was whether the modifying terms adopted in the Assistant Secretary's decision were consistent with the intended meaning of the Order, e.g., "formal" discipline, "permanent" transfer, "formal" grievances, "sufficient" authority.

Council action (May 25, 1973). The Council held that the modifying language adopted by the Assistant Secretary in his decision was contrary to the literal language and purposes of 2(c) and may not be relied upon. The case was remanded to the Assistant Secretary for action consistent with the principles discussed in the decision.

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

Mare Island Naval Shipyard
Vallejo, California

and

A/SLMR No. 129
FLRC No. 72A-12

Local No. F-48, International Association
of Fire Fighters, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from a Decision and Order Clarifying Unit in which the Assistant Secretary held, among other things, that the GS-6 and GS-7 fire captains employed at the Mare Island Naval Shipyard were not supervisors within the meaning of section 2(c) of the Order.^{1/} This holding raised a question with respect to the interpretation of section 2(c) which the Council determined is a major policy issue warranting review. Specifically, the issue raised is whether the modifying terms adopted in the Assistant Secretary's decision are consistent with the intended meaning of the Order. The facts giving rise to this appeal are set forth below.

Local No. F-48, IAFF, is the exclusive bargaining representative of all Fire Division employees at Mare Island. Historically, both the GS-6 and the GS-7 fire captains had been included in the unit; but, in 1970, the Navy excluded them from the unit pursuant to section 24(d) of the Order.^{2/} The union filed a clarification

1/ Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

2/ Section 24(d) of Executive Order 11491, prior to the 1971 amendments, provided that "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition. . . ."

of unit petition, seeking the inclusion of the fire captains, contending that they were not supervisors within the meaning of section 2(c).

The Assistant Secretary found in favor of the union and directed that the fire captains be included in the unit. In so finding, he concluded, in essence, that the fire captains did not possess the necessary indicia of supervisory authority described in section 2(c). Specifically at issue herein is the Assistant Secretary's finding that the fire captains are not supervisors "since they do not exercise sufficient authority requiring the use of independent judgment...." [Emphasis added.] Also at issue are the following findings:

Thus, the record shows that Captains have no authority to hire or discharge or impose formal discipline; make permanent transfers; suspend, lay off, recall, or promote; dispose of formal grievances; and they may not grant leave except in emergencies. [Emphasis added.]

Contentions

The Navy contends that the Assistant Secretary has modified the literal language of section 2(c) by the imposition of qualifications to the indicia of supervisory status contained in that section. Specifically, the Navy argues that the Assistant Secretary's decision requires that a person impose "formal" discipline, adjust "formal" grievances, make "permanent" transfers, and exercise "sufficient" authority requiring independent judgment to be a supervisor within the meaning of the Order, and that such requirements are inconsistent with the purposes of the Order.^{3/}

The union argues that the decision of the Assistant Secretary is consistent with the purposes of the Order and that the Navy is, in essence, seeking only a review of the Assistant Secretary's factual findings. In its view, the record evidence fully supports the Assistant Secretary's conclusion that the fire captains are not supervisors.

^{3/} The Navy also contends that section 2(c) should be applied in the disjunctive. On this date, the Council issued its Decision on Appeal from Assistant Secretary Decision in the matter of United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11. For the reasons stated therein, we hold that section 2(c) must be applied in the disjunctive and, therefore, if the evidence is sufficient to establish that the fire captains in this case possess even one of the indicia of supervisory authority set forth in section 2(c), they must be excluded from the unit as supervisors.

Opinion

Section 2(c) provides as follows:

'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

As we stated in our decision in the China Lake case,^{4/} in the absence of a legislative intent to the contrary, the language of section 2(c) should be given the meaning commonly attributed to it. If given its commonly accepted meaning, the term "grievance" includes both formal and informal grievances, and the term "discipline" includes both formal and informal discipline. Similarly, the term "transfer" includes all transfers whether permanent or temporary. Finally, the term "independent judgment" requires only that a decision or recommendation be based upon the opinion of an alleged supervisor, as opposed to being dictated by established procedures or higher authorities. We believe giving these terms their commonly accepted meaning is consistent with the purposes of the Order.

As we stated in the China Lake decision, interpretations of section 2(c) must be compatible with the realities of the exercise of authority in the Federal sector. Thus, if only those who adjust formal grievances, or formally discipline, or permanently transfer, or only those whose judgment is not influenced by any other procedures or authorities were to be adjudged supervisors, only top officials of government could be covered by the section 2(c) definition. Lower level supervisors who, for example, adjust employees' "informal" grievances, who give "informal" reprimands, and who make "temporary" transfers would not be supervisors as defined by the Order, notwithstanding the impact which these actions have upon the affected employees. Such a result, in our view, would be totally inconsistent with the realities of the exercise of supervisory authority in the Federal sector.

Since the indicia of supervisory status found in section 2(c) contains no qualifying terms, and because the adoption of an interpretation which would, in effect, add such qualifications, would conflict with

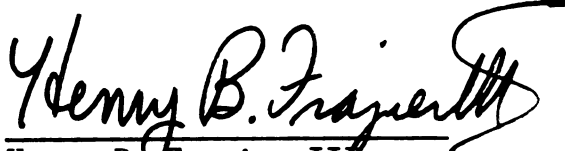
^{4/} See note 3, supra.

the realities of the exercise of authority in the Federal sector, we conclude that such qualifications of the indicia of supervisory authority set forth in section 2(c) would be inconsistent with the purposes of the Order and may not be relied upon. If the evidence is sufficient to establish that an individual possesses the authority to adjust grievances or impose discipline, formally or informally, or that an individual possesses the authority to transfer employees for long or short periods of time, and that his decision to do so is based upon his own judgment, and not simply dictated by established procedures or directed by higher officials, then that individual is a supervisor within the meaning of section 2(c).

We recognize that there may be cases in which the evidence offered is insufficient to establish the existence of supervisory authority, e.g., that an individual's actions with respect to the processing of a grievance is of a routine or clerical nature. However, as we made clear in China Lake, we leave the determinations as to the sufficiency of the evidence to the discretion of the Assistant Secretary. We hold that the literal meaning of the indicia of supervisory authority set forth in section 2(c) of the Order may not be modified or qualified in a manner which is inconsistent with the purposes of the Order.

Accordingly, pursuant to section 2411.17 of the Council's rules of procedure, we remand this case to the Assistant Secretary for a determination as to whether the fire captains are supervisors within the meaning of section 2(c) of the Order, consistent with the principles discussed herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 25 1973**

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina. The negotiability dispute involved the union's proposal that food service facilities for civilian personnel be operated directly by a cafeteria board of directors, rather than by an outside concessionaire.

Council action (May 25, 1973). The Council held that the union's proposal is outside the scope of bargaining under section 11(a) of the Order. Accordingly, the Council sustained the agency head's determination that the subject proposal is nonnegotiable.

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

Federal Employees Metal
Trades Council of Charleston

and

FLRC No. 72A-27

Charleston Naval Shipyard
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (Federal Employees Metal Trades Council of Charleston) is the exclusive bargaining representative of all ungraded employees, with certain exceptions not here material, at the Charleston Naval Shipyard, Charleston, South Carolina.

During negotiations between the union and the Shipyard, the union submitted the following proposal concerning the operation of food service facilities:

It is agreed and understood that the Food Services Board shall operate the food service facilities of the Charleston Naval Shipyard. The current food service contract with A.R.A. Concessionaire shall be revoked.

The "Food Services Board" referred to in the union's proposal (otherwise designated as the Board of Directors of the Charleston Naval Shipyard Cafeteria Association) is a civilian nonappropriated fund activity established at the Shipyard to make food service available for civilian personnel. The Board, according to the case record, consists of nine members, four of whom are representatives of labor organizations representing Shipyard employees.^{1/}

The Board operates subject to the overall responsibility and authority of the Shipyard Commander and in accordance with the policy of the Department of the Navy detailed in Civilian Manpower Management Instruction (CMMI) 790, particularly Subchapter 7 relating to "Civilian Nonappropriated Fund Activities."

^{1/} The union here involved represents some 4600 of the 7000 civilians at the Shipyard and has two seats on the Board; two other labor organizations representing Shipyard employees have one seat each.

The Board is authorized, subject to the approval of the Shipyard Commander, to provide food services either directly through a manager, or indirectly through an outside concessionaire (CMMI 790.7, subparagraphs 7-11.c. and 1.). However, it is Navy policy that the services of concessionaires be utilized to the maximum extent possible (CMMI 790.7, subparagraph 7-11.1.).

For a number of years, the Board, with the approval of the Shipyard Commander, has chosen to provide food services by use of an outside concessionaire, most recently ARA Services, Inc. It is this practice which the union sought to change by the instant proposal that the Board itself, rather than a concessionaire, operate the food service facilities at the Shipyard.

The Shipyard took the position that the union's proposal is nonnegotiable. Upon referral, the Department of Defense (DOD) upheld that position, on the ground, among others, that the matter is outside the scope of bargaining under section 11(a) of the Order. The union appealed to the Council, disagreeing with the agency determination. DOD filed a brief in support of its position.

Opinion

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, 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 this Order [Emphasis supplied.]

The agency asserts primarily that the union's proposal that food service facilities be managed directly by the Board rather than by a private firm under contract is nonnegotiable under 11(a), because it concerns the method of management of food service, rather than personnel policies, practices or matters affecting working conditions of unit employees. The union argues, however, that its proposal relates to the quality of food, prices for food, and the like, which are matters affecting working conditions of the unit employees and are therefore negotiable.^{2/}

^{2/} The union, in its appeal, requested permission to present oral argument before Council. This request is denied since the submissions of the parties adequately reflect the issues and the respective positions of the parties.

We agree with the position of the agency that the union's proposal is outside the scope of required bargaining under section 11(a) of the Order. For it is plain, from its explicit terms, that the proposal is concerned exclusively with who will provide food service at the Shipyard, that is, the Board itself or an outside contractor, and not, as claimed by the union, with such matters as the quality of the food, the nature of the food service facilities, or the like.

As the agency properly determined in the above regard:

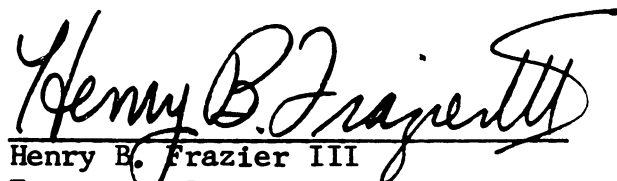
. . . Your proposal does not extend to the adequacy of the food service or its responsiveness to or impact on the demonstrated needs of bargaining unit employees. Rather it is limited solely to the vehicle or method of management of the service itself -- i.e., whether it is to be operated directly by a cafeteria board or indirectly by a concessionaire. The Charleston Naval Shipyard is not obligated under Section 11(a) of the Order to negotiate with respect to the method of management of food service facilities since the vehicle for providing the service does not, in itself, involve personnel policies, practices, or matters affecting working conditions of unit employees.

Since the union's proposal falls outside the scope of required bargaining under section 11(a) of the Order, we find that such proposal is not one on which the agency is obligated to negotiate.

Conclusion

For the foregoing reasons, and pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is hereby sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **MAY 25 1973**

United States Army Electronics Command, Fort Monmouth, New Jersey,
A/SLMR No. 216. Local 476, National Federation of Federal Employees
(NFFE), appealed to the Council from the Assistant Secretary's
decision dismissing the representation petitions filed by NFFE in
Assistant Secretary Cases Nos. 32-2003, 32-2235, 32-2393, and
32-2432.

Council action (May 25, 1973). The Council denied review since NFFE
did not allege, nor did it otherwise appear, that any facts or cir-
cumstances were present in the case which would indicate that a
major policy issue was present, or that the decision of the Assistant
Secretary was arbitrary and capricious.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 25, 1973

Mr. Irving I. Geller
General Counsel
National Federation of
Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Re: United States Army Electronics Command,
Fort Monmouth, New Jersey, A/SLMR No.
216, FLRC No. 72A-52

Dear Mr. Geller:

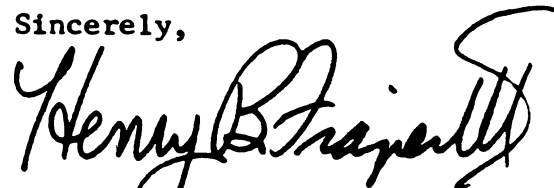
Reference is made to your petition for review of the Assistant Secretary's decision in the above-entitled case, wherein he dismissed the representation petitions in cases nos. 32-2003, 32-2235, 32-2393, and 32-2432.

We have carefully considered the decision of the Assistant Secretary, your petition for review, and the exhibits submitted in support of your petition for review. Section 2411.12 of the Council's rules of procedure provides that a petition for review of a decision of the Assistant Secretary will be granted only where there are major policy issues present, or where it appears that the decision was arbitrary and capricious. Your petition for review does not allege, nor does it appear, that there are any facts or circumstances present in this case which would indicate that a major policy issue is present, or that the decision of the Assistant Secretary was arbitrary and capricious.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

G. Sommer
AFGE

W. Robertson
USAEC

Department of the Army, U.S. Army Communications Systems, Fort Monmouth, New Jersey, Assistant Secretary Case No. 32-2580 (RO). The Regional Administrator dismissed objections filed by Local 476, National Federation of Federal Employees (NFFE), to the runoff election held in this case. NFFE appealed to the Council from the Assistant Secretary's decision upholding such dismissal.

Council action (May 25, 1973). The Council denied review since NFFE did not allege, nor did it otherwise appear, that any facts or circumstances were present in the case which would indicate that a major policy issue was present, or that the decision of the Assistant Secretary was arbitrary and capricious.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 25, 1973

Mr. Herbert Cahn
President, Local 476
National Federation of
Federal Employees
P. O. Box 204
Little Silver, N.J. 07739

Re: Department of the Army, U.S. Army
Communications Systems, Fort Monmouth,
New Jersey, Assistant Secretary Case
No. 32-2580 (RO), FLRC No. 72A-53

Dear Mr. Cahn:

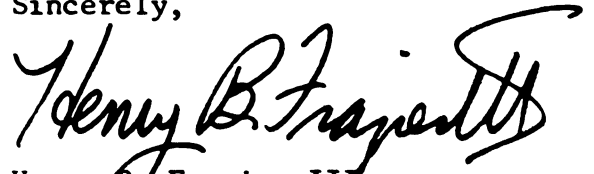
Reference is made to your petition for review of the Assistant Secretary's decision affirming the Regional Administrator's dismissal of your objections to the runoff election held in the above-named case.

We have carefully considered the decision of the Assistant Secretary, the decision of the Regional Administrator, and your petition for review. Section 2411.12 of the Council's rules of procedure provides that a petition for review of a decision of the Assistant Secretary will be granted only where there are major policy issues present, or where it appears that the decision was arbitrary and capricious. Your petition for review does not allege, nor does it appear, that there are any facts or circumstances present in this case which would indicate that a major policy issue is present, or that the decision of the Assistant Secretary was arbitrary and capricious.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

J. E. Harvey
AFGE Local 1904

CG ECOM
USACSA

FLRC No. 71A-48

Local 3, American Federation of Technical Engineers, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania. The case involved two questions: (1) The negotiability under the Order of a union proposal which would limit the discretion of the agency to assign to supervisors work normally performed in the bargaining unit; and (2) whether an agency may properly withhold approval of a negotiated agreement because it deems a provision thereof to be in conflict with the Order.

Council action (June 29, 1973). As to the first question, based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56, (described above) the Council sustained the agency determination that the union proposal was nonnegotiable under section 12(b)(5) of the Order. As to the second question, the Council, based on its decision in the Supships, USN, 11th Naval District case, FLRC No. 71A-49, (described above) rejected the union contention that the agency was without authority to disapprove provisions in an agreement negotiated by the local parties.

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

Local 3, American Federation of
Technical Engineers, AFL-CIO

and

FLRC No. 71A-48

Philadelphia Naval Shipyard,
Philadelphia, Pennsylvania

DECISION ON NEGOTIABILITY ISSUE

Background

Local 3 of the American Federation of Technical Engineers is the exclusive bargaining representative of certain technical employees of the Philadelphia Naval Shipyard. The local parties entered into a collective bargaining agreement, subject to agency approval pursuant to section 15 of the Order.^{1/}

Subsequently, the agency determined that the provision in the agreement relating to the assignment to supervisors of work normally performed by bargaining unit employees contravened section 12(b) of the Order, and declined to approve the agreement. The text of the disputed provision is set forth below:

Article XV - Promotions, Assignments, & Details

Section 9 - It is agreed that supervisors shall be assigned duties as specified in their P.D.'s and not assigned to perform the duties of unit employees except for the purposes of demonstrations, instructions, checking work performed by unit employees,

1/ Section 15 of the Order, as amended, provides:

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 . . . and regulations of other appropriate authorities

relieving employees for personal needs or in cases of emergencies. For purposes of this section, an emergency is defined as unforeseen or unexpected situations calling for immediate action.

The union appealed to the Council from the agency determination. The union's petition for review was accepted, and the union and the agency filed briefs. An amicus curiae brief was accepted from the American Federation of Government Employees, AFL-CIO, supporting the negotiability of the disputed proposal.

Opinion

Two questions are before the Council for resolution in this case, i.e., (1) the negotiability under the amended Order of the union proposal, and (2) whether an agency may properly withhold approval of a negotiated agreement because it deems a provision thereof to be in conflict with the Order. These questions will be considered separately below.

1. The negotiability of the proposal.

The proposal, which would limit the discretion of the agency to assign to supervisors work normally performed in the bargaining unit, bears no material difference from Article IX, Sec. 4 of the union's proposal on work assignment which was before the Council in Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, decided this date.

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the union proposal under consideration in this case must also be held violative of section 12(b)(5) of the Order and, therefore, nonnegotiable.

2. The agency's refusal to approve the negotiated agreement.

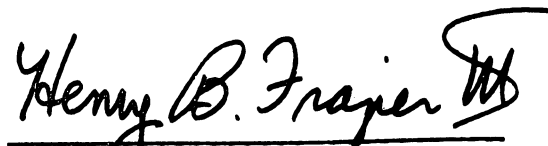
Resolution of this issue is governed by the Council's decision in Local 174 American Federation of Technical Engineers, AFL-CIO, and Supships, USN, 11th Naval District, San Diego, California, FLRC No. 71A-49, decided this date.

Based on the applicable discussion and analysis in the Supships, USN, 11th Naval District decision, where we held that the requirement that an agreement conform to the Order was inherent in the section 15 agreement approval process, we must reject the union contention in this case that the agency was without authority to refuse to approve the agreement negotiated by the local parties.

Conclusion

Based on the reasons set forth above, we find that the determination by the agency that the union proposal here involved was nonnegotiable under the Order was proper and must be sustained.

By the Council.



Henry B. Frazier III
Executive Director

Issued: **JUN 29 1973**

Local 174, American Federation of Technical Engineers, AFL-CIO and Subships, USN, 11th Naval District, San Diego, California. The dispute involved the negotiability under the Order of union proposals which would limit agency discretion (1) to assign supervisors to perform work normally performed by bargaining unit personnel, and (2) to contract out work normally performed in the bargaining unit. A further question was whether an agency may properly withhold approval of a negotiated agreement on the ground that provisions thereof are deemed to be in conflict with the Order.

Council action (June 29, 1973). Based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56, (described above) the Council sustained the agency determination that the union proposals were nonnegotiable under section 12(b)(5) of the Order. Further, the Council held that under the provisions of section 15 of the Order, an agency head or his designee may properly disapprove provisions in a negotiated agreement deemed violative of the Order. The Council noted, in the latter regard, that such agency action would of course be subject to Council review under the procedures established in section 11(c) of the Order and in the Council's rules.

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

Local 174, American Federation
of Technical Engineers, AFL-CIO

and

FLRC No. 71A-49

Supships, USN, 11th Naval District,
San Diego, California

DECISION ON NEGOTIABILITY ISSUE

Background

Local 174 of the American Federation of Technical Engineers, AFL-CIO, is the exclusive bargaining representative of certain technical employees of Supships, USN, 11th Naval District at San Diego, California. The union and the activity entered into a collective bargaining agreement, subject to agency approval pursuant to section 15 of the Order.^{1/}

Subsequently, the agency determined that the provisions in the agreement relating to contracting out and the assignment to supervisors of work normally performed by bargaining unit employees contravened section 12(b) of the Order, and declined to approve the agreement. The disputed provisions are set forth below:

ARTICLE XXIV

Contracting of Work

Section 1. It will be the policy of the Employer that work normally performed by employees in the Unit will

1/ Section 15 of the Order, as amended, provides:

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 . . . and regulations of other appropriate authorities

not be contracted for on a farm-in/farm-out basis unless beyond the capacity of the employees in the Unit and/or economic considerations dictate the need for such action. The Employer will consult with the Union when there is to be a change in this policy.

ARTICLE XXIX

General Provisions

Section 4. Supervisors shall not perform work or assume duties of employees covered by this Agreement except when instructing or training employees, in cases of emergency, or when special skills are required. The Union will be notified in writing of the circumstance which necessitated such an assignment.

Thereupon, the union appealed to the Council from that determination under 11(c)(4) of the Order. The union's petition for review was accepted, and briefs were filed by the parties. Amicus curiae briefs were accepted from the American Federation of Government Employees, AFL-CIO, in support of the negotiability of the disputed proposals, and from the National Aerospace Services Association in support of the agency's position that agency contracting out decisions are nonnegotiable.

Opinion

The primary questions for Council resolution concern the negotiability under the Order of the union proposals to limit agency discretion to: (1) assign supervisors to perform work normally performed by bargaining unit personnel, and (2) contract out work that is normally performed by bargaining unit personnel.

A further question is whether an agency may properly withhold approval of a negotiated agreement upon the basis that provisions thereof are deemed to be in conflict with the Order.

The questions will be treated separately below:

1. The negotiability of the proposals.

The two proposals, which would limit the agency's discretion to contract out work (Article XXIV, Sec. 1) and to assign work normally performed by employees in the bargaining unit to supervisory personnel (Article XXIX, Sec. 4), bear no material difference from two disputed proposals (Article XXV, Sec. 1 and Article IX, Sec. 4) before the Council in Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, decided this date.

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the union proposals under consideration in this case must also be held violative of section 12(b)(5) of the Order and, therefore, nonnegotiable.

2. The agency's refusal to approve the negotiated agreement.

As set forth above, section 15 of the Order mandates that agreements negotiated by local parties be subject to the approval of the agency head (or his designee). However, in its brief the union questions the very existence of the right of an agency head to disapprove a provision of an agreement once it has been negotiated, agreed upon, and incorporated in a signed agreement by the parties at the bargaining table. Thus, the union's argument fails to acknowledge the authority reserved to an agency head under section 15 to disapprove an agreement if it does not conform "to applicable laws, existing published agency policies and regulations . . . and regulations of other appropriate authorities"

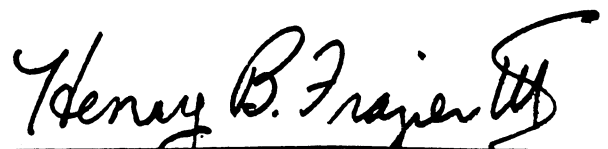
In the subject case the agency disapproved the agreement on the ground that the two disputed provisions infringed upon reserved agency rights under the Order. Although not alluded to by the union, it should be noted that "Order" is not specified in section 15 as a ground for disapproving an agreement. However, the absence of specific reference to the Order does not mean that conformity to the Order may not be considered by an agency head during the agreement approval process. In the light of the purposes of section 15, to assure conformity of the agreement with supervening requirements, it is clear that the Order is included within "applicable laws" referred to in section 15. Moreover, the requirement that an agreement be in conformity with the Order is inherent in the section 15 approval process by virtue of its relationship to section 11(a) and (c) of the Order which recognize the authority of an agency head to determine nonnegotiability of proposals which conflict with the Order. Such actions by the agency during the approval process under section 15 are, of course, subject to review by the Council upon compliance by the parties with the provisions of section 11(c) of the Order and the Council's implementing regulations.

Accordingly, the union's contention relating to the agency's authority to disapprove provisions which it deems contrary to the Order is without merit.

Conclusion

Based on the reasons set forth above, we find that the determination by the agency that the union proposals here involved were nonnegotiable under section 12(b)(5) of the Order was proper and must be sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: JUN 29 1973

Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia. In this case the Council was presented with a negotiability dispute over union proposals relating to "work assignment" and "contracting out." Specifically, the "work assignment" proposal would limit agency discretion to assign supervisors, military personnel and other nonbargaining unit personnel to perform work historically performed by bargaining unit employees. The "contracting out" proposal would limit agency discretion to contract out or transfer out work normally performed by personnel in the bargaining unit. The principal issues were whether these proposals violate E.O. 11491, as amended.

Council action (June 29, 1973). The Council sustained DOD's determination that the proposals here involved contravene management's reserved right under section 12(b)(5) of the Executive Order "to determine the . . . personnel by which . . . [agency] operations are to be conducted." However, the Council emphasized that this decision does not foreclose all bargaining on matters relating to "work assignment," "contracting out" and "transfer out." Consistent with its earlier holding in the VA Research Hospital case, FLRC No. 71A-31, (Report No. 31), proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves. Moreover, proposals to establish appropriate arrangements for unit employees adversely affected by the impact of decisions to contract out, transfer out or reassign work normally or historically performed by bargaining unit personnel would be negotiable.

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

Tidewater Virginia Federal Employees
Metal Trades Council

FLRC No. 71A-56

and

Naval Public Works Center,
Norfolk, Virginia

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The Tidewater Virginia Federal Employees Metal Trades Council (MTC) holds exclusive recognition for a unit of approximately 1,500 wage employees of the Naval Public Works Center, Norfolk, Virginia. During negotiations MTC presented two proposals dealing with "work assignment" and "contracting out of bargaining unit work."¹ / The text of the proposals is set forth below:

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.

Section 2. The Employer agrees to make every reasonable effort, commensurate with PWC administrative authority, to prohibit military personnel, temporarily or permanently assigned within the Sewell's Point Complex, from performing work historically performed by PWC unit employees where specifically authorized by appropriate regulations. Any complaint initiated by Council in this connection shall be promptly investigated by the Employer, and the Council shall be advised of the corrective actions taken by the employer in respect thereto.

¹ / A third proposal originally at issue, dealing with changes in the basic workweek, is now resolved, the agency having declared the proposal negotiable based upon the Council's decision in Charleston Naval Supply Center, FLRC No. 71A-52 (November 24, 1972).

. . . .

Section 4. With the exception of employees designated as Leader, no supervisory or other employees of the Employer not covered by this Agreement shall be assigned to perform work historically performed by employees in the unit, except when actually engaged in instructing or training employees or in cases of emergencies. For purposes of this Agreement, emergencies are defined as an unforeseen combination of circumstances or unexpected situation demanding immediate action.

ARTICLE XXV - CONTRACTING OUT
OF BARGAINING UNIT WORK

Section 1. It is understood by the parties hereto that decisions regarding contracting work out of the unit and transfer of work within the Public Works Center are areas of discretion of the Employer. However, it will be the policy, of the Employer that work normally performed in the unit will not be contracted out or assigned to employees not in the bargaining unit, unless such work is beyond the capacity or capability of unit employees to perform or if economic situations or technological changes dictate that such work be performed outside the unit. In this regard, the Employer agrees to consult with the union concerning any work situation changes affecting employees in the unit.

[Section 2. The Employer agrees to notify the union of any contracting-out actions which will displace any career employee. The Employer further agrees to minimize displacement action through realignment, retraining, and restricting in-hires, and to exert other action necessary to retain career employees.]2 /

Section 3. The employer further agrees that when the work load is such that R.I.F. action may become necessary, the employer shall halt all contracting out of bargaining unit work ninety (90) days prior to the R.I.F. action.

The activity asserted that the union's proposals were nonnegotiable. Upon referral, the agency head determined that the proposals were nonnegotiable particularly under section 12(b) of the Order.

2 / The agency held this section to be negotiable, so it is not at issue.

MTC appealed to the Council from the agency head's determinations, asserting that the proposals do not violate the Order. The Council accepted the union's petition for review, and the agency and the union filed briefs. Amicus curiae briefs were accepted from the National Aerospace Services Association (NASSA) which opposed the negotiability of the "contracting out" proposal and from the American Federation of Government Employees, AFL-CIO (AFGE), which supported the negotiability of both proposals.

Opinion

The principal issues for Council resolution are: Whether MTC's "work assignment" proposal which would affect agency discretion to assign supervisors, military personnel and other nonbargaining unit personnel to perform work historically performed by bargaining unit employees is violative of the Order; and whether MTC's "contracting out" proposal which would affect agency discretion to contract or transfer out work normally performed by personnel in the bargaining unit is violative of the Order. Each of the two issues will be discussed separately below:

1. The "Work Assignment" Proposal. This proposal (article IX, sections 1, 2 and 4), in essence, constitutes a work-preservation-for-bargaining-unit-employees provision which proscribes the assignment of work normally performed by unit employees to supervisors, military personnel and other nonunit employees except under certain limited conditions.

Among other grounds, the agency asserts that the proposal is nonnegotiable under section 12(b) because: (1) section 12(b)(5) of the Order reserves to agency management the right ". . . to determine the methods, means, and personnel by which such operations are to be conducted. . . ."; and (2) the proposal would interfere with the agency's right to utilize its employees in the most efficient and economical manner which is, in effect, protected by 12(b)(4) of the Order.

On the other hand, MTC argues, in support of the negotiability of its work assignment proposal, that: (1) the negotiability of the proposal is manifest from the fact that the parties had included the proposal in each of their prior agreements executed under E.O. 10988, and the proposal to include them in the new agreement was made during negotiations under E.O. 11491 which was intended to broaden rather than narrow the scope of bargaining; (2) the establishment of appropriate bargaining units, in essence, vests bargaining unit employees with the exclusive right to perform bargaining unit work--otherwise, the designation of an appropriate unit is meaningless, and permitting nonunit employees to perform unit work constitutes erosion of the union's certified status and its ability to preserve the work of the employees it represents; and (3) the issue "is

one that has been favorably decided in the private sector under the National Labor Relations Act, as amended." 3 /

Thus, the specific question is whether the "work assignment" proposal is a matter on which the agency is obligated to negotiate under section 11(a) of the Order, or is a matter that is excluded from such obligation by section 12(b) of the Order?

Section 11(a) of the Order, which establishes the bargaining obligation for agencies and unions holding exclusive recognition, describes the scope of negotiations as including "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 . . . this Order."

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; . . .

. . . .

The requirement of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

Section 12(b) establishes rights expressly reserved to management officials under any bargaining agreement. The mandatory nature of this reservation

3 / AFGE makes similar arguments to the Council and emphasizes the substantial incidence of similar provisions in bargaining agreements throughout the Federal service.

was underscored in our recent decision in the VA Research Hospital case⁴ / where, in interpreting and applying section 12(b)(2), we said:

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.

Although the decision in the VA Research Hospital case dealt only with the interpretation and application of section 12(b)(2), this reasoning is equally applicable to section 12(b)(5).

We turn to an examination of the precise scope of the right reserved to management under section 12(b)(5). Agency management retains the right to determine the methods, means, and personnel by which agency operations are to be conducted. The terms "methods, means and personnel" are not defined in the Order. As a general rule of statutory construction, words in a statute are to be given their common meaning, in the absence of a legislative intent to the contrary.⁵ / No intent is evident in the Order or in the 1969 Study Committee Report and Recommendations which accompanied E.O. 11491 that the words "methods," "means" and "personnel" are to be accorded any meanings other than the common meanings ascribed to them. The common meanings of these terms, as indicated by their dictionary definitions, are as follows:⁶ /

"Method" is "a procedure or process for obtaining an object" or "a way, technique, or process of or for doing something." In other words, a method is the "procedure followed in doing a given kind of work or achieving a given end." Synonyms for method include mode, manner, way and system. The term "methods," as used in the Order, therefore means the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted--in short, how operations are to be conducted.

"Mean" is "something by the use or help of which a desired end is attained or made more likely: an agent, tool, device, measure, plan

⁴ / Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972). In this case, we found a union proposal, which would require that, upon request of the union, a management official who had not participated in the selection of an employee for promotion would review the promotion decision and render a final decision thereon, to be negotiable under section 11(a) of the Order, and not precluded by agency regulations or section 12(b)(2) of the Order.

⁵ / 50 Am. Jur. Statutes § 238 (1944).

⁶ / Webster's Third New International Dictionary (1966).

or policy for accomplishing or furthering a purpose." Synonyms for mean include instrument, agent, instrumentality, organ, medium, vehicle and channel. The term "means," as used in the Order, therefore includes the instruments (e.g., an in-house, Government facility or an outside, private facility; centralized or decentralized offices) or the resources (e.g., money, plant, supplies, equipment or materiel) to be utilized in conducting agency operations--in short, what will be used in conducting operations.

Finally, "personnel" is "a body of persons employed in some service (as the Army or Navy, a factory, office, airplane)." It also means "persons of a particular (as professional or occupational) group such as military personnel." Thus, as 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.

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 nature of this proposal is clearly distinguishable from the proposal in the VA Research Hospital case which we held negotiable and not violative of section 12(b)(2) of the Order. In the VA Research Hospital case the basic issue was whether the union's proposal dealing with promotions (see footnote 4, supra) violated the retained management right to promote employees in positions within the agency. We concluded that the union's proposal dealt with procedures which management would observe leading to the exercise of the retained management right and did not interfere with the exercise of that right itself. As we said in our decision in that case:

However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the

extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

Here, the union's proposal would establish procedures whereby higher level management review of a selection for promotion may be obtained before the promotion is consummated. The proposal does not require management to negotiate a promotion selection or to secure union consent to the decision. Nor does it appear that the procedure proposed would unreasonably delay or impede promotion selections so as to, in effect, deny the right to promote reserved to management by section 12(b) (2).

The proposal regarding work assignment in the present case does not deal with procedures which management will follow preceding the exercise of its right to determine the personnel by whom its operations are to be conducted. Instead, the proposal in this case would place a limitation on the exercise of the right itself. It would generally ban the assignment of certain work to military personnel, supervisory personnel and nonunit personnel, thereby reducing management's options in determining which personnel and the type of personnel who will conduct operations at the Naval Public Works Center.

Turning to MTC's contentions, it relies on "private sector" practice, where the National Labor Relations Board has held proposals to define unit work and to restrict its assignment to nonunit personnel as being subject to mandatory bargaining under the National Labor Relations Act.⁷ / However, such "private sector" practice is without controlling significance in the Federal sector. There is no counterpart in private sector statute to the absolute reservation of authority in agency management which is mandated by section 12(b) of the Order and which must be included verbatim in agreements negotiated in the Federal sector. Moreover, the NLRA, unlike the Order, acknowledges a "preservation-of-work" principle by providing procedures for the determination of "work jurisdiction disputes" between competing groups of employees.⁸ /

Finally, as to MTC's reliance upon the inclusion of the proposed provision in prior agreements between the parties, such bargaining history is not dispositive. As we said in the Kirk Army Hospital case:

⁷ / See, e.g., Crown Coach Corp., 155 NLRB 625 (1965).

⁸ / Labor-Management Relations Act (Taft Hartley Act) §§ 8(b)(4)(D) & 10(k), 29 U.S.C. §§ 158(b)(4)(D) & 160(k) (1970).

Although other contracts may have included such provisions, as claimed by the union, this circumstance cannot alter the express language and intent of the Order and is without controlling significance in this case.9 /

In summary, negotiation within the Federal sector of a proposal, such as the proposal in this case, which attempts to establish a work preservation principle is proscribed by section 12(b)(5) inasmuch as that section requires agency management to reserve on a continuing basis the right to decide what methods, means, and personnel will be utilized to accomplish its work. The union's proposal here would negate that right with respect to the work of the unit involved. Accordingly, we find that the work assignment proposal violates section 12(b)(5) of the Order and is, therefore, nonnegotiable.10 /

2. The "Contracting Out" Proposal. While this proposal (article XXV, sections 1 and 3) recognizes the activity's right to contract out or transfer within the activity "bargaining unit work," it requires that the activity adopt a policy not to take either of the aforementioned actions "unless such work is beyond the capacity or capability of unit employees to perform or if economic situations or technological changes dictate that such work be performed outside the unit." In addition, the proposal would require that contracting out be halted 90 days prior to an anticipated reduction-in-force affecting the bargaining unit.

The agency asserts, among other grounds, that the proposal is nonnegotiable under section 12(b) because: (1) it infringes upon the agency's exclusive right under section 12(b)(5) of the Order to determine the methods, means and personnel by which agency operations are conducted; (2) it would interfere with the agency's right to utilize its employees in the most efficient and economical manner under section 12(b)(4) of the Order; and (3) it would destroy management's right under section 12(b)(3) to relieve employees for lack of work. In further amplification, the agency contends that (1) the proposed limitation upon the agency's discretion to contract out work is against the public interest and intrudes on the mission of the agency since the Federal Government utilizes its purchasing power, including the contracting out of work, to achieve desirable social goals, e.g., to help establish minimum wage floors, to promote private sector equal employment opportunity, to stimulate the economy, and to create employment opportunities for veterans; and (2) ". . . it is already Federal public policy as expressed in OMB circular A-76 and in governmental policy with

9 / U.S. Kirk Army Hospital, Aberdeen, Md., FLRC No. 70A-11
(March 9, 1971), at p. 3.

10 / As already mentioned, the agency also relied upon section 12(b)(4) of the Order as a basis for holding the proposal nonnegotiable. However, it is not necessary for us to rule on this contention since the issue may be resolved completely upon the basis of section 12(b)(5) of the Order.

respect to subcontracting, to make determinations on whether work shall be performed by the private sector or by Government employees on other grounds than purely the capacity of Government employees to perform it or economic considerations."11/

MTC in urging the negotiability of its proposal relies upon (1) the inclusion of the proposal in prior agreements between the parties without any claim by agency management that the administration of that provision in any manner abridged its reserved rights; (2) the substantial incidence and prominence of such provisions in Federal sector agreements; (3) the clear negotiability of contracting out proposals in the private sector; and (4) its contention that management may not contract out work except upon the grounds provided for in the proposal ". . . and, in fact, if [the agency were to contract out for other reasons] it would, in effect, be possibly not upholding the requirements of section 12(b)(4) of the Executive Order."12/

The contracting out/transfer out proposal, like the work assignment proposal, constitutes an assertion of "work preservation" which is contrary to the right reserved to agency management by section 12(b)(5) of the Order, as discussed in detail above. The analysis of section 12(b)(5) and the conclusions reached regarding its meaning and application to the work assignment proposal are equally applicable to and dispositive of the contracting out/transfer out proposal herein.

In summary, the contracting out/transfer out proposal would serve as a restraint upon reserved management discretion by restricting the factors which the agency can rely on in reaching a decision as to whether such work should be contracted out or transferred out. (The limited grounds recognized by the proposal are cost, capacity of unit employees to perform the work, and technological considerations.) Thus, the proposal would proscribe management action based upon OMB Circular A-76, as revised (August 30, 1967), which establishes "the basic policies to be applied by executive agencies in determining whether commercial and industrial products and services used by the government are to be provided by private suppliers or by the government itself." The guidelines in the circular are "in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs . . . [except where] it is in the national interest for the government to provide

11/ NASSA, asserting the nonnegotiability of the proposal, relies essentially upon the same grounds raised by the agency.

12/ AFGE, asserting the negotiability of the proposal, relies essentially upon the same grounds raised by MTC and contends that the proposal is consistent with OMB Circular A-76, as revised.

directly the products and services it uses." This government policy is certainly a major consideration affecting the exercise of an agency's reserved rights under section 12(b)(5) of the Order.13/

The proposal does not deal with the procedures which management might follow in exercising its right to determine the personnel by which its operations are to be conducted, as discussed above. Instead, the proposal would strictly limit the factors which management could consider in making the judgment as to whether contract personnel or other nonunit personnel will be utilized to perform work normally performed in the unit. In that sense, the proposal goes to the heart of the decisionmaking process and is substantive rather than procedural in nature.

As to MTC's reliance on "private sector" practice, the distinctions in labor relations policies between the private and Federal sectors, as reflected in the NLRA and in E.O. 11491, and the special public policy considerations relevant to Federal Government contracting are so substantial as to warrant rejection of private sector experience and law as controlling on the subject. As we pointed out in our discussion of the work assignment proposal, there is no counterpart in private sector law to the absolute reservation of authority in agency management which is mandated by section 12(b) of the Order. This management rights preservation clause is not only part of the Order but, as required by the Order, must be inserted in all agreements negotiated in the Federal sector.

Finally, as to MTC's reliance upon the inclusion of similar provisions in prior agreements between the parties as well as other Federal sector agreements, such bargaining history is without controlling significance. As discussed above, similar provisions in other contracts, including previous contracts between the parties, "cannot alter the express language and intent of the Order."14/

Accordingly, it is clear, and we find that the contracting out/transfer out proposal is violative of section 12(b)(5) of the Order.15/

13/ In its own terms A-76 represents policy guidance of a general nature rather than strict injunction and, therefore, does not constitute a regulation of appropriate authority as that phrase is used in the Order. Further, paragraph 4 of the circular indicates that its instructions are not intended to supplant agency obligations under statute, regulation, "or other appropriate authority," which presumably includes E.O. 11491. Therefore, the union's proposal is not deemed nonnegotiable on the basis of OMB Circular A-76 alone, but, as indicated above, the policies in A-76 are relevant considerations in the exercise of an agency's reserved rights under section 12(b)(5) of the Order.

14/ See n. 10, supra.

15/ Since this issue may be resolved completely upon the basis of section 12(b)(5), it is unnecessary to pass upon the agency contentions with respect to 12(b)(3) and (4) of the Order.

Although we have concluded that the specific proposals herein are violative of section 12(b)(5) of the Order and hence nonnegotiable, we must emphasize that this decision does not foreclose all bargaining on matters relating to "work assignment," "contracting out" and "transfer out." Consistent with our holding in the VA Research Hospital case, proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves. To repeat the key language of the VA Research Hospital decision in this regard:

However, there is no implication that such reservation of decision making and action authority [under 12(b)(2) in the VA Research Hospital case and under 12(b)(5) in the present case] is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

Moreover, it is not controverted that a proposal to establish appropriate arrangements for unit employees adversely affected by the impact of decisions to contract out, transfer out or reassign work normally or historically performed by personnel in the bargaining unit would be negotiable. Thus, in this case, the agency determined, and we wholeheartedly agree with that determination, that article XXV, section 2 is negotiable. To repeat, that section provides:

The Employer agrees to notify the union of any contracting-out actions which will displace any career employee. The Employer further agrees to minimize displacement action through realignment, retraining, and restricting in-hires, and to exert other action necessary to retain career employees.

In this connection, Section E.1. of the Report which accompanied E.O. 11491, Labor-Management Relations in the Federal Service (1971), indicated:

. . . They [labor organizations] are, however, concerned with the assignment of personnel and the technology of performing work because personnel actions in these areas directly affect the jobs of employees While recognizing the right of an agency to assign personnel or to introduce new machines and working processes, some labor organizations want to assure the right of exclusive

representatives to negotiate protective arrangements for employees adversely affected by personnel policies, changing technology, and partial or entire closure of an installation.

The 1961 task force, in its discussion of this matter, noted that major reorganizations or changes in work methods, while not negotiable themselves, will involve implementation problems that may be negotiable--such as promotion, demotion, and training procedures. Experience has shown that many agencies and labor organizations have negotiated agreements dealing with the impact of such actions on employees.

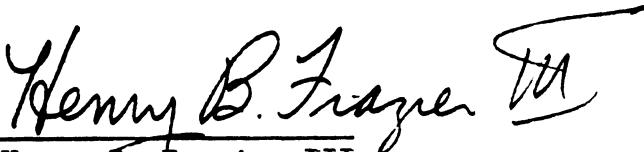
. . . As further clarification, a sentence should be added . . . providing that agencies and labor organizations shall not be precluded from negotiating agreements providing for appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

The sentence which was added was the last sentence of section 11(b) which makes specific provision for the negotiation of "agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

Conclusion

Based on the foregoing reasons, we find that the determination by the Department of Defense that the union's proposals here involved were non-negotiable under section 12(b)(5) of the Order was proper and must be sustained.^{16/}

By the Council


Henry B. Frazier III
Executive Director

Issued: JUN 29 1973

^{16/} The Council further directs that MTC's request for oral argument be denied since the submissions of the parties adequately reflect the issues and positions of the parties.

Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina. The dispute in this case concerned the negotiability under the Order of union proposals which would: (1) limit agency discretion in assigning to nonunit personnel work normally performed by bargaining unit personnel; (2) require the assignment of each unit employee to one appropriate civilian supervisor for certain supervision; and (3) limit agency management discretion in the assignment of certain duties to unit employees.

Council action (June 29, 1973). Based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56 (described above) the Council sustained the agency determination that the first proposals were nonnegotiable under section 12(b)(5) of the Order. The Council held that the second proposal is one about which the agency may but is not required to negotiate under section 11(b) of the Order. Finally, based on its decision in the Griffiss Air Force Base case, FLRC No. 71A-30, (Report No. 36) the Council found that the third proposal was also one about which the agency may but is not required to negotiate under 11(b) of the Order. (However, the Council noted, as it had also so emphasized in the Griffiss case, that its decision does not mean that conditions deriving from the assignment of the duties involved would be outside the obligation to bargain under section 11(b) of the Order.) Accordingly, the Council sustained the agency head's determination of nonnegotiability.

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

Federal Employees Metal Trades
Council of Charleston, AFL-CIO

and

FLRC No. 72A-33

Charleston Naval Shipyard
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUES

Background

The Federal Employees Metal Trades Council of Charleston is the exclusive bargaining representative of an activity-wide unit of wage system employees of the Charleston Naval Shipyard at Charleston, South Carolina.

During negotiations with the activity, the union submitted two proposals pertaining to the assignment to nonunit personnel of work normally performed by bargaining unit employees; a proposal which would require the assignment of each unit employee to one appropriate civilian supervisor for certain supervision purposes; and a proposal which would limit agency management discretion in the assignment of certain duties to unit employees.

The proposals are set forth below:

Article XIX

Trade or Craft Jurisdiction

Section 4. Supervisors and/or other employees of the Employer not covered by this Agreement shall not be assigned to perform the duties of the employees in the unit.

Article XXXI

Employee Services

Section 21. Management agrees that work regularly and historically assigned to and performed by Unit employees covered by this agreement will not be assigned to Military personnel or to other employees excluded from the Unit. Further, the Management

agrees to prohibit military personnel from performing work historically performed by Unit employees. Any complaint of the military personnel performing work of employees in the Unit and the military employees are not assigned to the Head of the Activity shall be promptly investigated by Management and the Council shall be advised of the corrective action taken by Management in respect thereto.

Article XXXI

Section. 11. Management agrees that each employee of the Unit will be assigned to one appropriate civilian supervisor to whom he should report for such matters as job assignments, occupational guidance, and such other matters included in the prerogatives of the particular level of supervision. This does not preclude the change in assignments or instructions by appropriate higher echelons of management as warranted by an unforeseen combination of circumstances requiring immediate action.

Article XXXI

Section 19. 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.

The activity contended that the proposals were nonnegotiable. Upon referral, the Department of Defense determined that the proposals were nonnegotiable under the Order. The union appealed to the Council from that determination under section 11(c)(4) of the Order. The Council accepted the union's petition for review and briefs were filed by the parties.^{1/}

Opinion

The three questions for Council resolution concern the negotiability under the Order of (1) the union proposals which would limit agency discretion in assigning to nonunit personnel work normally performed by bargaining unit personnel; (2) the proposal which would require the assignment of each unit employee to one appropriate civilian supervisor for certain

^{1/} The union, in its appeal, requested an opportunity to present oral argument before the Council. That request is denied as the submissions of the parties adequately reflect the issues and their respective positions.

supervision; and (3) the proposal which would limit agency management discretion in the assignment of certain duties to unit employees. The proposals will be considered separately below.

1. Assignment to nonunit personnel of work normally performed by unit employees.

The proposals, Article XIX, Section 4, and Article XXXI, Section 21, which would limit the agency's discretion to assign to nonunit personnel work normally performed by employees in the bargaining unit, bear no material difference from the union's work assignment proposal (Article IX, Sections 1, 2 and 4) which was before the Council in Tidewater Virginia Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, decided this date.

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the union proposals numbered Article XIX, Section 4, and Article XXXI, Section 21, under consideration in this case, must also be held violative of section 12(b)(5) of the Order and, therefore, non-negotiable.

2. Assignment of each unit employee to one appropriate civilian supervisor.

The principal issue here is whether the union proposal (Article XXXI, Section 11), which would require, except in certain limited situations, that each employee in the unit be assigned to one appropriate civilian supervisor for such purposes as job assignment and occupational guidance, falls within the area of mandatory bargaining defined by section 11(a) of the Order; or whether, as contended by the agency, it is excepted under section 11(b) from the agency's obligation to bargain.

The union takes the position that in order for the employees in the bargaining unit to perform their daily duties in an orderly fashion, they must report to one appropriate civilian supervisor "for job assignments, occupational guidance and such other matters included in the prerogatives of the particular level of supervision." The union argues that a proposal to this effect is consistent with the intent of the Order.

Section 11(a) provides that an agency and a labor organization that has been accorded exclusive recognition shall negotiate "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 this Order."

Section 11(b) excludes from the section 11(a) obligation to bargain, matters with respect to, among other things, the agency "organization" and "the numbers, types, and grades of positions or employees assigned to an organization unit, work project or tour of duty."

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 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. Moreover, the proposal that each employee be assigned to one supervisor is integrally related to the numbers and types of positions and employees assigned to the organizational unit or units involved in this case. Therefore, the union proposal numbered Article XXXI, Section 11, is excluded under section 11(b) from the agency's obligation to bargain.^{2/}

3. Assignment of duties to unit employees.

The principal issue in this regard is whether the proposal (Article XXXI, Section 19), which would restrict agency discretion in the assignment of certain duties to unit employees unless the particular duties are outlined in a job description, falls within the area of mandatory bargaining defined by section 11(a) of the Order, or whether it is excepted under section 11(b) from the agency's obligation to bargain. Resolution of this issue is governed by our decision in International Association of Firefighters Local F-111 and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 19, 1973), where we held, among other things, that job content is excepted from the obligation to bargain.

Based on our holding in Griffiss, therefore, the union's proposal numbered Article XXXI, Section 19, under consideration in this case, must also be held to be outside the agency's obligation to bargain, under section 11(b) of the Order.

It should be carefully noted, however, as we emphasized in Griffiss, that our decision with regard to this proposal does not mean that conditions deriving from the assignment of certain duties would be excepted from the

2/ See Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972); and International Association of Firefighters Local F-111 and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 19, 1973).

Although the obligation to bargain does not extend to the subject of assignment of unit employees "to one appropriate civilian supervisor," a proposal dealing with the elimination of confusion resulting from conflicting directions from more than one supervisor, e.g., a proposal outlining the procedures an employee should follow when faced with such a conflict, would, of course, be negotiable.

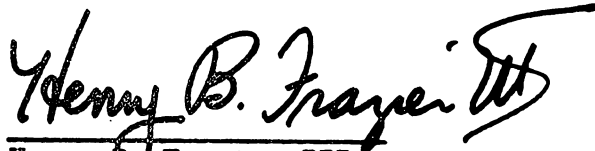
obligation to bargain under section 11(b) of the Order. In this case, for example, a proposal directed toward the prevention, elimination or reduction to the lowest possible level of any hazards, physical hardships, or working conditions of an unusually severe nature might very well have been considered negotiable. However, the union does not assert, nor does it appear from its petition, that such a purpose was sought to be accomplished by the subject proposal before the Council.

Conclusion

For the reasons set forth above, and pursuant to section 2411.27 of the Council's Rules and Regulations, we find as follows:

1. The determination by the agency that the two union proposals concerning the assignment out of work normally performed by employees in the unit (Article XIX, Section 4 and Article XXXI, Section 21) were nonnegotiable under section 12(b)(5) of the Order was proper and must be sustained.
2. The determination by the agency that the agency was not obligated to negotiate on the union proposal which would require that each unit employee be assigned to one appropriate civilian supervisor (Article XXXI, Section 11) was proper and must be sustained.
3. The union proposal which would restrict agency discretion in the assignment of certain duties to unit employees (Article XXXI, Section 19) is excepted under section 11(b) of the Order from the agency's obligation to bargain.

By the Council.


Henry B. Frazier III
Executive Director

Issued: JUN 29 1973

Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina. The negotiability dispute in this case involved two union proposals, one of which would limit the agency's discretion to contract out work and to assign to nonunit personnel work normally performed by employees in the bargaining unit, and the other which relates to the establishment of the basic workweek for certain employees.

Council action (June 29, 1973). Based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56, (described above) the Council sustained the agency determination that the first union proposal was nonnegotiable under section 12(b)(5) of the Order. The Council held that the union's second proposal (relating to basic workweek) is negotiable under section 11(a) of the Order, except for a single sentence about which the agency may but is not required to bargain under section 11(b) of the Order. Accordingly, the agency head's determination was sustained in part and set aside in part.

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

Federal Employees Metal Trades
Council of Charleston, AFL-CIO

and

FLRC No. 72A-35

Charleston Naval Shipyard
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUES

Background

The Federal Employees Metal Trades Council of Charleston represents an activity-wide unit of wage system employees of the Charleston Naval Shipyard at Charleston, South Carolina.

During negotiations with the activity, the union presented a proposal dealing with the subjects of contracting out and assignment out of work normally performed by employees in the unit to non-unit personnel, and another proposal dealing with the subject of basic workweek.^{1/} The proposals are set forth below:

Article 27. Section 1.

Decisions regarding contracting out work of the Unit and transfer of work within the Charleston Naval Shipyard which is within the discretion of the Employer, shall be subject to negotiations between the Council and the Employer. Therefore, the Employer agrees it will be the policy that work historically performed in the Unit will not be contracted out or assigned to employees not in the bargaining Unit, unless such work is beyond the capacity or capability of the Unit employees to perform. [In this regard, the Employer agrees to notify and consult with the Council concerning any work situation changes affecting employees in the Unit.]^{2/}

1/ A third proposal originally at issue, also pertaining to basic workweeks, is now resolved, the agency having declared the proposal negotiable based upon the Council's decision in Charleston Naval Supply Center, FLRC No. 71A-52 (November 24, 1972).

2/ The agency held that the portion of the proposal within the brackets to be negotiable. This portion, therefore, is not at issue here.

Article 8, Section 3.

Basic work weeks other than Monday through Friday may be established for employees whose jobs are directly related to service-type functions which must be performed more than five days a week and cannot be performed during the normal working hours or days (Monday through Friday) of the Unit as set forth in Sections 2, and 6. of this Article. The Employer agrees that the number of such employees assigned to a work week of other than Monday through Friday will be the minimum necessary to perform the service-type functions and such assignments will not be utilized to meet temporary peak workloads. [In selecting employees for assignment to a work week other than Monday through Friday, the Employer agrees to assign employee(s) by job rating, on a rotational basis in order of increasing seniority in accordance with their current date of employment within the Unit.]^{3/} The Employer agrees to schedule the nonwork days of employees so assigned such that whenever practicable they will be consecutive. These service-type functions are as follows:

Ship maintenance watches

Swimming pool watches

ARD (Floating Drydock) watches

Utility equipment operations & service watches

Power House & Heating Plant watches

Air Compressor equipment operation watches

Garbage disposal functions

Equipment maintenance watches

Maintenance, repair, or installation of plant facilities and equipment which cannot be performed without disruption to the productive process during normal productive hours. It is agreed and understood that basic work weeks of other than Monday through Friday may be established for dredging operations when it becomes necessary to operate the Dredge on all days of the week. In this connection the non-work days shall be consecutive.

3/ See note 2 supra.

The activity contended that the proposals were nonnegotiable. Upon referral, the Department of Defense determined that the combined contracting out - assignment out proposal was nonnegotiable based primarily on section 12(b)(5) of the Order, and that, under section 11(b) of the Order, the basic workweek proposal was outside the activity's obligation to bargain.

The union appealed to the Council from that determination under section 11(c)(4) of the Order. The Council accepted the union's petition for review and briefs were filed by the parties.

Opinion

The questions for Council resolution concern the negotiability under the Order of (1) the union proposal relating to assigning out or contracting out work normally performed by bargaining unit personnel; and (2) the proposal relating to the establishment of basic workweeks. The proposals will be considered separately below:

1. Assigning out and contracting out of work normally performed by unit employees.

The proposal, Article 27, Section 1, which would limit the agency's discretion to contract out work and to assign to nonunit personnel work normally performed by employees in the bargaining unit, bears no material difference from two disputed proposals, Article XXV, Section 1, and Article IX, Sections 1 and 4, which were before the Council in Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, decided this date.

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the union proposal numbered Article 27, Section 1 under consideration in this case must also be held violative of section 12(b)(5) of the Order and, therefore, nonnegotiable.

2. Basic workweek.

The principal issue for Council resolution with regard to this proposal, Article 8, Section 3, is whether the union's proposal relating to the basic workweek for unit employees whose positions are directly related to the performance of certain enumerated service-type functions is one about which the agency is obligated to negotiate under section 11(a) of the Order, or whether such proposal is excepted from the obligation to bargain under section 11(b). Resolution of this issue is governed by the Council's decisions in AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenpoint, N.Y., FLRC No. 71A-11 (July 9, 1971); and Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972).

In Charleston Naval Supply Center, in distinguishing the situation in that case from the one before the Council in Plum Island, we said, in pertinent part:

...[T]he provision of section 11(b) in question ["However, the obligation to meet and confer does not include matters with respect to...the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty;..."] was intended to apply to an agency's right to establish staffing patterns for its organization and the accomplishment of its work.... In the facts of that case, which dealt with a situation of round-the-clock operations and a work schedule of rotating tours of duty, the number and duration of the tours were integrally related to the numbers and types of workers assigned to those tours. Together they determined the agency's staffing pattern for accomplishing the work. Thus, the union's proposal in that case, which would require bargaining on any changes in existing tours of duty, would also have established an obligation to bargain on any changes in the numbers and types of workers assigned, matters which section 11(b) expressly excluded from such obligation.

In the instant case, the circumstances in the bargaining unit and the union's proposal are materially different from those in Plum Island. There is no indication that the proposal to affirm Monday through Friday as the basic workweek for unit employees (other than those whose jobs are directly related to continuous operations and certain named functions of the activity) would require bargaining on 'the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.' For it does not appear that the basic workweek for employees here proposed is integrally related in any manner to the numbers and types of employees involved. Absent this integral relationship to staffing pattern, the proposal does not conflict with section 11(b), and Plum Island is inapposite.^{4/}

Applying the principles enunciated in the above-quoted portion of our decision in the Charleston Naval Supply Center case to the union's basic workweek proposal in this case, we conclude that the proposal is negotiable, with the exception of that sentence in the proposal which reads:

The Employer agrees that the number of such employees assigned to a work week of other than Monday through

^{4/} Charleston Naval Supply Center, FLRC No. 71A-52(November 27, 1972), p. 5. Footnotes omitted.

Friday will be the minimum necessary to perform the service-type functions and such assignments will not be utilized to meet temporary peak workloads.

This excepted sentence is integrally related to the numbers of employees that the activity might assign to particular tours of duty. Therefore, under section 11(b) of the Order, this sentence of the proposal is one about which the agency is not under an obligation to bargain. The remainder of the proposal, however, is not integrally related to staffing patterns and hence is not excluded from the activity's bargaining obligation.

Conclusions

Based on the reasons set forth above, we find that the determination by the agency that the union proposal concerning the contracting out and assignment to nonunit personnel of work normally performed by employees in the bargaining unit was nonnegotiable under section 12(b)(5) of the Order was proper and must be sustained.


Further, we find that the agency determination that the activity was not obligated to bargain concerning the union's basic workweek proposal, was proper only in part, i.e., with regard to that sentence which reads:

...The Employer agrees that the number of such employees assigned to a work week of other than Monday through Friday will be the minimum necessary to perform the service-type functions and such assignments will not be utilized to meet temporary peak workloads.

To that extent only, the agency head determination was proper and is hereby sustained.

Finally, we find that the remainder of the union's basic workweek proposal is a negotiable matter under section 11(a) of the Order. Pursuant to section 2411.27 of the Council's Rules and Regulations, therefore, the Department of Defense determination as it affects this part of the union proposal must be set aside. The foregoing decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the negotiable portion of the union's proposal. We decide herein only the issue as to the mutual obligation of the parties under section 11(a) of Executive Order 11491 to negotiate on the proposal.

By the Council.


Henry B. Frazier II
Executive Director

Issued: JUN 20 1973

Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania. The dispute involved the negotiability under the Order of (1) a union proposal which would limit agency discretion in contracting out work normally performed by bargaining unit employees, and (2) a union proposal which would, in effect, restrict agency discretion in the assignment of overtime.

Council action (June 29, 1973). Based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56, (described above) the Council sustained the agency determination that the union proposal on contracting out violated section 12(b)(5) of the Order. However, regarding the union's proposal relating to the assignment of overtime, the Council held that the proposal is negotiable under section 11(a) of the Order, and rejected the agency's contentions that the proposal is violative of section 12(b)(5) of the Order, or outside the agency's obligation to bargain under section 11(b) of the Order. Accordingly, the Council set aside the agency's determination of nonnegotiability on this proposal.

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

Philadelphia Metal Trades
Council, AFL-CIO

and

FLRC No. 72A-40

Philadelphia Naval Shipyard,
Philadelphia, Pennsylvania

DECISION ON NEGOTIABILITY ISSUES

Background

The Philadelphia Metal Trades Council represents an activity-wide unit of wage system employees of the Philadelphia Naval Shipyard at Philadelphia, Pennsylvania.

During the course of negotiations between the union and the activity, the union presented a proposal dealing with the contracting out of work normally performed by employees in the unit and another proposal dealing with the assignment of overtime.^{1/} The proposals are set forth below:

Article XXX, Section 2

In these matters wherein the Employer has discretion, it will be the policy of the Employer that work normally performed in the unit will not be contracted out.

[In this regard, the Employer agrees to consult with the Union concerning work situation changes adversely affecting unit employees. This subject will be discussed at regularly scheduled meetings and will be designed to serve as a means of consultation. This does not preclude the Union from requesting consultations in this regard when they deem it necessary.]^{2/}

^{1/} Two other proposals originally at issue, pertaining to the subjects of basic workweek and basic work shift, are now resolved, the agency having declared the proposals negotiable based upon the Council's decision in Charleston Naval Supply Center, FLRC No. 71A-52 (November 24, 1972).

^{2/} The agency determined the portion of the proposal within the brackets to be negotiable so it is not at issue.

Article X, 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.

The activity contended that the proposals were nonnegotiable. Upon referral, the Department of Defense determined that the proposals were nonnegotiable based primarily on section 12(b)(5) of the Order, and, in addition, relying on section 11(b) of the Order, that the proposal pertaining to the assignment of overtime was outside the activity's obligation to bargain.

The union appealed to the Council from that determination under section 11(c)(4) of the Order, and briefs were filed by the parties.^{3/}

Opinion

The questions for Council resolution concern the negotiability under the Order of (1) the union proposal which would limit agency discretion in contracting out work normally performed by bargaining unit personnel; and (2) the proposal which would, in effect, restrict agency discretion in the assignment of overtime. The proposals will be considered separately below:

1. Contracting out of work normally performed by unit employees.

The proposal, Article XXX, Section 2, which would limit the agency's discretion to contract out work normally performed by employees in the bargaining unit bears no material difference from Article XXV, Section 1, of the union's proposal on contracting out which was before the Council in Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, decided this date.

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the union proposal numbered Article XXX, Section 2 under consideration in this case must also be held violative of section 12(b)(5) of the Order and, therefore, nonnegotiable.

2. Overtime assignments.

The principal issue is whether the union proposal (Article X, Section 11), which would, in effect, prevent the agency from making overtime assignments

^{3/} The union, in its appeal, requested an opportunity to present oral argument before the Council. That request is denied as the submissions of the parties adequately reflect the issues and their respective positions.

of work normally performed by employees in the collective bargaining unit to nonunit personnel where the sole purpose of doing so is to deny overtime work to unit employees, falls within the area of mandatory bargaining defined by section 11(a) of the Order, or whether it concerns a matter about which the agency is prohibited from bargaining by section 12(b)(5) of the Order or one excluded under section 11(b) from the agency's obligation to bargain.

Section 11(a) of the Order, which relates to the negotiation of agreements between an agency and the exclusive representative of its employees, places a mutual obligation on the parties to meet 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 . . . and this Order." Section 11(b), however, excludes from this obligation to negotiate "matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Further, section 12(b) expressly reserves to management, under any negotiated agreement, the right "(5) to determine the methods, means and personnel by which such [the agency's] operations are to be conducted."

The union disagrees with the agency's contentions that the proposal is violative of section 12(b)(5) of the Order and excepted under section 11(b) from the obligation to bargain, arguing that the proposal is clearly negotiable. The principal grounds relied on by the agency will be considered separately below.

a. Section 12(b)(5).

In a previous Council decision dealing with the subject of overtime^{4/}, we said:

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. . . .

^{4/} 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).

Under the union proposal in the present case, where management determines that overtime work is necessary to accomplish certain tasks which are normally performed by unit employees, those employees could not be denied the opportunity to perform the overtime based on the mere fact of their status as employees in the exclusive bargaining unit. Thus, the union's proposal deals with the assignment of overtime.

This proposal is clearly distinguishable from the work assignment proposal (Article IX, Section 4) in the Norfolk Naval Public Works Center case.^{5/} 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. 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 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.

b. Section 11(b).

For similar reasons, since the proposal is solely concerned with overtime assignments for unit employees, it is not integrally related to organization staffing patterns and, therefore, section 11(b) of the Order is not applicable.^{6/}

Accordingly, we must disagree with the agency's determination that the proposal is nonnegotiable under section 12(b)(5) of the Order, and the agency's further determination that the proposal is excluded under section 11(b) from the agency's obligation to bargain.

Conclusion

Based on the reasons set forth above, we find, first, that the agency determination that the union proposal pertaining to contracting out

^{5/} Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 1973), p. 2.

^{6/} See Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972).

(Article XXX, Section 2) was nonnegotiable under section 12(b)(5) of the Order was proper and must be sustained.

Second, we find that the agency erred in its determination that the union's proposal concerning overtime assignments (Article X, Section 11) was non-negotiable under section 12(b)(5) of the Order, or, in the alternative, excepted under section 11(b) from its obligation to bargain. The proposal in question is a negotiable matter "affecting working conditions" under section 11(a) of the Order. Pursuant to section 2411.27 of the Council's Rules and Regulations, therefore, the Department of Defense determination as it affects this proposal must be set aside. The foregoing decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide herein only the issue as to the mutual obligation of the parties under section 11(a) of Executive Order 11491 to negotiate on the proposal.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **JUN 29 1973**

U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., Assistant Secretary Case No. 22-3617 (CA). The Assistant Secretary affirmed the Regional Administrator's dismissal of a complaint filed by Local 2554, American Federation of Government Employees, AFL-CIO (AFGE), finding that further proceedings were not warranted on the complaint which was predicated on the activity's alleged "unilateral cancellation" of a grievance arbitration proceeding. In so finding, the Assistant Secretary distinguished the case on its facts from Long Beach Naval Shipyard, A/SLMR No. 154. AFGE appealed to the Council alleging that: (1) the Assistant Secretary erred in distinguishing the Long Beach case from the situation in their case; and (2) the Assistant Secretary's decision presented a major policy issue concerning the effectiveness of arbitration in the Federal service.

Council action (July 23, 1973). As to the first contention, the Council determined that it was neither alleged, nor appeared, that the Assistant Secretary's decision with respect to the applicability of the Long Beach case was in any manner arbitrary and capricious. As to the second contention, noting that it relates to the resolution of arbitrability questions which are now specifically covered by section 13(d) of the Order, the Council found that the decision clearly did not present a major policy issue relating to the effectiveness of arbitration in the Federal service. Accordingly, the Council denied review of the AFGE's appeal under section 2411.32 of its rules.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 23, 1973

Mr. Neal H. Fine
Assistant to the Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Re: U.S. Department of Justice, Immigration
and Naturalization Service, Washington,
D.C., Assistant Secretary Case No.
22-3617 (CA), FLRC No. 73A-8

Dear Mr. Fine:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case in which he affirmed the Regional Administrator's dismissal of your complaint alleging a violation of sections 19(a)(1) and (6) of the Order.

In his decision, the Assistant Secretary found that further proceedings were not warranted on your complaint which was predicated on the activity's alleged "unilateral cancellation" of grievance arbitration proceedings. The Assistant Secretary distinguished the present case on its facts from Long Beach Naval Shipyard, A/SLMR No. 154, where the activity had cancelled the scheduled arbitration hearing and, as a result, the grievance was not arbitrated. The Assistant Secretary had ruled in that case that the activity had violated sections 19(a)(1) and (6) of the Order.

Here, unlike in Long Beach, the Assistant Secretary found that, although the activity announced that it would not participate in the arbitration hearing (because it disputed the arbitrability of the grievance), the arbitration proceeding took place; an activity representative remained at the hearing as an observer; and the arbitration decision, which was favorable to the union, was appealed to the Council. (The Council dismissed the appeal concluding that since the dispute giving rise to the arbitration no longer existed, the agency's petition for review was moot. American Federation of Government Employees (National Border Patrol Council) and United States Immigration and Naturalization Service, Department of Justice, FLRC No. 72A-28, Report No. 34)

In your petition for review, you contend that (1) the Assistant Secretary erred in distinguishing the Long Beach case from the situation in the present case; and (2) the Assistant Secretary's decision presents a major policy issue concerning the effectiveness of arbitration in the Federal service.

As to (1), you neither allege, nor does it appear, that the Assistant Secretary's decision with respect to the applicability of the Long Beach case was in any manner arbitrary and capricious. Consequently, such contention provides no basis for Council review. As to (2), the instant case relates to the resolution of an arbitrability question, which is now specifically covered by section 13(d) of the amended Order. In the latter regard, section 13(d) provides that 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 that agreement, may be referred to the Assistant Secretary for decision. As a result, the Assistant Secretary's decision clearly does not present a major policy issue relating to the effectiveness of arbitration in the Federal service.

Accordingly, your appeal fails to meet the requirements for review as provided under section 2411.32 of the Council's rules of procedure and the Council has therefore directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a stylized "B".

Henry B. Frazier III
Executive Director

cc: A/SLMR
Department of Labor

E. A. Loughran
INS

NFFE Local 997 and Ames Research Center, National Aeronautics and Space Administration. The agency head determined that the union's proposal which, according to the agency head, sought union representation on the activity's "Personnel Boards" was nonnegotiable. In its appeal to the Council from that determination, the union, although advertng to the Personnel Boards, indicated that its principal concern is with merit promotion matters, and that it seeks representation on "Rating Panels" which, unlike the Personnel Boards, handle such matters under the agency Merit Promotion Plan. The agency, in its response, contests union representation on the Personnel Boards, but concedes that union representation on the Rating Panels would be negotiable.

Council action (July 23, 1973). The Council held that union clarification is necessary to reflect the precise intent of its proposal, and that, unless and until the agency head than determines that the clarified proposal is nonnegotiable, the conditions for Council review have not been met. Accordingly, the Council denied the union's petition for review as prematurely filed, without passing on the merits of the case.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 23, 1973

Mr. Michael Forscey
Staff Attorney
National Federation of
Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Mr. E. M. Shafer
Associate General Counsel
National Aeronautics and
Space Administration
600 Independence Avenue, S.W.
Washington, D.C. 20546

Re: NFFE Local 997 and Ames Research
Center, National Aeronautics and
Space Administration, FLRC No.
73A-12

Gentlemen:

Reference is made to the union's petition for review of a negotiability dispute, and the agency's statement of position thereon, in the above-entitled case.

It appears from the record that the agency head rendered his determination of nonnegotiability upon a proposal by the union which, according to the agency head, sought union representation on "Personnel Boards" at the activity. These Boards, established under Ames Management Manual 3260-2, dated March 27, 1970, are composed of management representatives and are responsible for evaluating and deciding a variety of personnel matters, such as personnel policies, career growth promotions, and the like. Under section 2.b. of that Manual, actions taken under the NASA Merit Promotion Plan are expressly not to be submitted to the Personnel Boards.

In its appeal to the Council from the agency head determination, the union, while advertng to the Personnel Boards, indicates that its principal concern is with the "pre selection promotion procedures" for merit promotions at the activity, and that it seeks union representation on the "Rating Panels" which are established to assist in the competitive evaluation of candidates for merit promotion under the NASA Merit Promotion Plan.

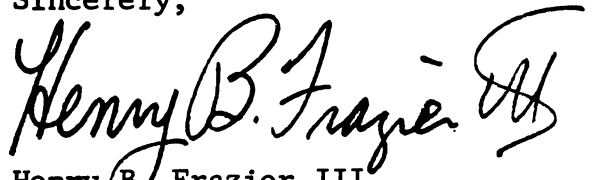
The agency, in its statement of position on the union's appeal, contests union representation on the Personnel Boards. However, the agency concedes, that, if what the union is indeed seeking here is union representation on the Rating Panels, such matter would be negotiable.

Under these conditions, we believe that clarification of its proposal by the union is essential to reflect the precise intent of that proposal. Unless and until the agency head then determines that the proposal as so clarified is nonnegotiable, the conditions for Council review prescribed in section 11(c)(4) of the Order, and section 2411.22 of the Council's rules of procedure, have not been met.

Therefore, without passing on the merits of the case, the Council is of the opinion that the union's appeal is prematurely filed, and the Council has directed that the petition for review be denied on that ground.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

National Federation of Federal Employees, Local No. 75, and Defense Contract Administration Services District, Cincinnati, Ohio. In this case, the agency determined that particular language of the union's proposals was nonnegotiable. The union appealed to the Council from that determination, including in its appeal an express statement of the purpose of the proposals. The agency, in its response, did not dispute the negotiability of such purpose as now stated by the union in its appeal and indicated that language consistent therewith would be acceptable.

Council action (July 24, 1973). The Council held that further clarification of its proposals by the union to reflect its stated intent is indicated, and that, unless and until the agency head then determines such clarified proposals to be nonnegotiable, the requirements for Council review have not been met. Accordingly, the Council denied the union's petition for review as prematurely filed, without passing on the merits of the case.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 24, 1973

Mr. Robert J. De Villiers
President, Local No. 75
National Federation of
Federal Employees
Room 9012B, Federal Office
Building
550 Main Street
Cincinnati, Ohio 45202

Mr. William C. Valdes
Staff Director
Office of Civilian Personnel
Policy - OASD (M&RA)
The Pentagon, Room 3D281
Washington, D.C. 20301

Re: Defense Contract Administration Services
District, Cincinnati, Ohio and National
Federation of Federal Employees, Local
No. 75, FLRC No. 72A-51

Gentlemen:

Reference is made to the petition for review of a negotiability dispute filed by the union in the above-entitled case.

The sole purpose of the union's proposals here involved (sections 27.7 and 27.12 attached), according to the union's appeal, is that "management should not coerce, harass, intimidate or threaten contracting officers or other employees to attempt to force them to change their positions on matters relating to their areas of responsibility." [Emphasis by union.]

The agency takes issue with the negotiability of particular language used by the union in seeking to accomplish this purpose. But the agency does not dispute the negotiability of the union's objective. Rather, as the agency stated in its response to the union's appeal:

If the objective of Local 75 is to obtain agreement language saying that management officials will not improperly coerce, harass, or intimidate employees, under normal circumstances it would seem highly probable that mutually acceptable language to this effect

could be worked out between the parties. The Defense Supply Agency and the Department of Defense would, of course, prefer that the matter be resolved in that way

Under these circumstances, we believe that further clarification of the proposals by the union is indicated, so as more specifically to reflect its intent. Unless and until the agency head then determines that such clarified proposals are nonnegotiable, the conditions for Council review prescribed in section 11(c)(4) of the Order, and section 2411.22 of the Council's rules of procedure, have not been met.

Accordingly, without passing on the merits of the case, the Council is of the opinion that the union's appeal herein is prematurely filed, and the Council has directed that the petition for review be denied on that ground.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive, flowing style with a prominent initial "H" and a long, sweeping underline.

Henry B. Frazier III
Executive Director

Attachment

27.7 Warranted contracting officers are representatives of the Federal Government vested with specially designated sovereign power and authority. That sovereign power and authority carries with it an equal obligation to the taxpayer, to the contractor and to the Government, with public interest as its sole objective.

It is necessary that these contracting officers make decisions which are supportable by facts. Management agrees that contracting officers will not be coerced, harassed or intimidated to attempt to force them to change their positions on matters relating to their areas of responsibility. Management is enjoined from using RIF actions, rotation of employees, re-assignment of work, or other punitive actions, or the threat of these actions, to interfere, restrain or direct any contracting officer to change a decision or support a decision contrary to his personal convictions. Violations of this provision will be reported directly to the General Accounting Office by Local 75.

27.12

The mission of the District requires the services of many employees with certain specific professional and/or technical skills derived during years of experience in their careers while pursuing this mission. It is necessary that these employees make decisions which are supportable by facts. Management agrees that employees will not be coerced, harassed or intimidated to attempt to force them to change their positions on matters relating to their areas of responsibility. Management is enjoined from using RIF actions, rotation of employees, re-assignment of work, or other punitive actions, or the threat of these actions, to interfere, restrain or direct any employee to change a decision or support a decision contrary to his personal convictions. This is construed to include and encompass the employees official vote on any of the several District boards of which he may be a member. Violations of this provision are subject to the grievance procedures herein.

Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168. Upon a complaint filed by Local 3095, American Federation of Government Employees, AFL-CIO, the Assistant Secretary found that the activity violated section 19(a)(6) of the Order by refusing to sign a previously negotiated agreement. As a remedy, the Assistant Secretary ordered, among other things, the posting of a notice to all employees concerning the refusal to sign the agreement. The agency filed a petition for review, objecting only to that portion of the Assistant Secretary's decision and order relating to the posting of the notice. The Council accepted the petition for review, having determined that the propriety of the notice requirement in the circumstances of this case raised a major policy issue which warranted review. (Report No. 30.)

Council action (July 25, 1973). The Council found that while the Assistant Secretary has the authority to fashion an appropriate notice and order it posted, if he considers this an appropriate remedy to an unfair labor practice, the Council may review his remedial requirements in the same manner and pursuant to the same standards as other issues reviewed by the Council. The Council found that the notice at issue, which informed and assured employees that the rights guaranteed them by the Order will be protected, was consistent with the Order.

In sustaining the Assistant Secretary's notice posting requirement the Council recognized the serious dilemma which agency management is in when faced with circumstances such as those which were present in this case. The Council directed that the Assistant Secretary review and revise his case handling procedures in order to permit agencies to await a decision of the Assistant Secretary in a representation case without incurring the risk of an unfair labor practice finding. In so holding, the Council emphasized that representation proceedings should be given priority only where the related representation and unfair labor practice cases involve the same underlying issue.

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

Headquarters, United States
Army Aviation Systems Command

and

A/SLMR No. 168
FLRC No. 72A-30

Local 3095, American Federation
of Government Employees, AFL-CIO

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 3095, American Federation of Government Employees, AFL-CIO (AFGE), found that the activity violated section 19(a)(6)^{1/} of the Order by refusing to sign a previously negotiated agreement. As a remedy, the Assistant Secretary ordered, among other things, the posting of a notice to all employees concerning the refusal to sign the agreement. The propriety of the notice under the circumstances present in this case is the major policy issue which the Council determined warranted review. A brief statement of the pertinent facts is set forth below.

In May 1970, AFGE was certified as exclusive bargaining representative of a unit of 53 wage board employees at Headquarters, U.S. Army Aviation Systems Command (AVSCOM) in St. Louis, Missouri. In May 1971, after reaching agreement on the ground rules which were to govern negotiations, the parties began negotiations toward their first agreement.

On June 4, 1971, while negotiations were in progress, the Army filed a petition with the Assistant Secretary in anticipation of the reorganization of the AVSCOM Headquarters. This reorganization, which was effective on July 1, 1971, combined portions of the AVSCOM Headquarters and the nearby, recently inactivated, Granite City Army Depot (GCAD) under a new subordinate element of AVSCOM Headquarters designated as Headquarters and Installation Support Activity (HISA). Specifically, 49 of the 53 AVSCOM employees represented by AFGE, and 35 GCAD wage board employees represented by the International Union

^{1/} Section 19(a)(6) of the Order provides that agency management shall not ". . . refuse to consult, confer, or negotiate with a labor organization as required by this Order."

of Operating Engineers (IUOE) were reassigned to the new HISA command. In its petition, the Army argued that, that because of the reorganization, employees from the two existing units were now under the same command and, therefore, two separate units were no longer appropriate. It contended that one overall unit of wage board employees was now the appropriate unit and requested that an election be conducted in order to determine which of the two unions should represent employees in the overall unit.^{2/}

While this petition was pending before the Assistant Secretary, AFGE and AVSCOM continued to negotiate. However, as found by the Assistant Secretary:

It is clear from the record in the subject case that the parties had completed their negotiations and that no substantive issues remained unresolved as of October 7, 1971. In this connection, the parties were in complete accord with respect to the terms and conditions of employment to be included in their finalized agreement. However, notwithstanding the fact that full accord had been reached by the parties, the Respondent refused to sign any agreement embodying such terms and conditions of employment.

AFGE charged that this refusal to sign the agreement was a violation of section 19(a)(6) of the Order, but the Army again advised that it would not sign the agreement until the representation issue had been resolved by the Assistant Secretary.

On February 8, 1972, AFGE filed a 19(a)(6) complaint against AVSCOM. On February 16, 1972, AFGE and AVSCOM submitted a Stipulation of Facts which, in effect, requested that the Assistant Secretary render a decision without a hearing on the question of whether the Army had violated section 19(a)(6) by refusing to sign the agreement pending the decision of the Assistant Secretary in the related representation proceeding.

On May 18, 1972, the Assistant Secretary issued his decision in the representation proceeding, AVSCOM, A/SLMR No. 160. He found, in pertinent part, that while certain conditions of employment for the affected employees changed as a result of the reorganization, subsequent to the reorganization and reassignment of personnel there had been no change in the employees' duty stations, missions, immediate supervision or

^{2/} The Army mistakenly filed a clarification of unit petition which the Assistant Secretary found to be an inappropriate vehicle for attaining the results sought by the Army. However, in view of the Army's clearly stated intent to raise a question concerning representation as to the existing units, and to seek an election in a new overall unit, the Assistant Secretary treated the Army's petition as if it had been filed as a representation (agency) petition. Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160 [hereinafter cited as AVSCOM, A/SLMR No. 160].

job content. The Assistant Secretary concluded that there was insufficient basis to support AVSCOM's contention that the units represented by the AFGE and IUOE were no longer appropriate. Accordingly, he ordered that the petition be dismissed.

On June 27, 1972, the Assistant Secretary issued his decision in the instant case. Citing his decision in AVSCOM, A/SLMR No. 160, the Assistant Secretary found that because the existing units remained viable units, AFGE was entitled to continued recognition. Therefore, the Army's refusal to sign the agreement reached in October 1971, constituted a violation of section 19(a)(6) of the Order. The Army was ordered to sign the agreement upon request, and to post a notice, furnished by the Assistant Secretary, addressed to all employees. The text of the notice was as follows:

WE [the activity] WILL NOT refuse to sign the negotiated collective bargaining agreement agreed to on October 7, 1971, with the American Federation of Government Employees, Local 3095, AFL-CIO.

WE WILL, upon request, sign the negotiated collective bargaining agreement which was previously agreed to on October 7, 1971, with the American Federation of Government Employees, Local 3095, AFL-CIO.

This notice was to be signed by the Commanding Officer of the Activity and posted in conspicuous places for a period of 60 days.

The Army appealed to the Council, objecting only to that portion of the Assistant Secretary's decision and order relating to the posting of the above notice.^{3/} The Army requested a stay of the order to post the notice, and, pursuant to section 2411.47(c)(2) of its rules of procedure, the Council granted a stay pending final disposition of the Army's appeal.

Contentions

The Army does not dispute the Assistant Secretary's finding that it is obligated to sign the agreement of October 1971. It objects, however, to the requirement that it post the notice to employees on the grounds that this requirement is unnecessarily punitive and inconsistent with the purposes of the Order in the circumstances of this case. Thus, the Army argues that it was faced with a good faith doubt as to the continued appropriateness of the existing units and, accordingly, it filed

^{3/} The agency did not appeal the findings of the Assistant Secretary that the activity had committed an unfair labor practice - the finding upon which the remedy was based - nor that portion of the remedy which required the activity to cease and desist from refusing to sign the agreement and to sign the agreement if requested to do so by the union.

a petition with the Assistant Secretary to resolve the representation issue. The Army points out that until that representation issue was decided by the Assistant Secretary, either course of action open to it was at least potentially a violation of the Order. That is, if the existing units were found to be inappropriate, as contended by the Army, signing the contract could constitute a violation of section 19(a)(3).^{4/} On the other hand, because the existing units were found to be appropriate, it was a violation of section 19(a)(6) to refuse to sign the contract. The Army argues that in view of this dilemma, and particularly considering the lack of any evidence of bad faith on its part, that the notice posting requirement in this case is unnecessarily humiliating and inconsistent with the purposes of the Order.

AFGE contends that the notice in this case is an appropriate remedy. Not only is it appropriate, the union argues, but it is virtually the only remedy available in this type of a case.

The Assistant Secretary filed a special brief in this matter urging that the Council uphold his notice posting requirement in this case. He argues that the notice simply informs employees that the Army is required to sign the negotiated agreement and that, notwithstanding the good or bad faith of the activity, the employees should be informed and assured that the negotiated agreement will be signed. If the Assistant Secretary is to be truly able to remedy unfair labor practices, he must, he argues, be free to fashion notices such as this, in order that employees will be informed of their rights and assured that these rights are being protected.

Opinion

Section 6(b) of the Order empowers the Assistant Secretary to require an agency or a labor organization to cease and desist from violations of the Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of the Order. Further, the Presidential Study Committee Report specifically refers to the use of notices as a remedy in unfair labor practice cases.^{5/} In our view,

4/ Section 19(a)(3) provides, in pertinent part, that agency management shall not ". . . sponsor, control, or otherwise assist a labor organization"

5/ The Report provides:

If he [the Assistant Secretary] finds . . . 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 including, where appropriate, remedial action to be taken and notices to be posted. [Emphasis added.]

Labor-Management Relations in the Federal Sector. 1971, 41.

therefore, the Assistant Secretary clearly has the authority to fashion the appropriate notice and order it posted, if he considers this an appropriate remedy to an unfair labor practice.

While the Assistant Secretary possesses this authority, it is equally clear that the Council may review his remedial requirements in the same manner and pursuant to the same standards as other issues reviewed by the Council. Section 4(c) of the Order provides that the Council may, at its discretion, consider appeals from Assistant Secretary decisions, and we view the remedial portion of a decision as an integral part of a decision. Accordingly, where questions arise with respect to remedy, the Council may accept such a question for review, consistent with its requirements for review as set forth in section 2411.12 of the Council's rules of procedure.

In this case, we find that the notice posting requirement is consistent with the purposes of the Order. As found by the Assistant Secretary, AVSCOM continued to negotiate with AFGE and reached complete accord with respect to the terms to be included in their finalized agreement. However, AVSCOM failed to give force and effect to the agreement and instead notified AFGE that it would not execute an agreement, thereby failing to meet its obligation to sign an agreement once its terms have been agreed upon. In substance, the contents of the notice amount to a simple assurance by the activity to its employees that it will sign the negotiated agreement as directed by the Assistant Secretary. Its purpose is only to inform and assure employees that the rights guaranteed to them by the Order will be protected. Since the Army, in this case, does not contest the Assistant Secretary's decision that it was obligated to sign the negotiated agreement, we do not view a notice which merely conveys this information to employees as inconsistent with the purposes of the Order.

While we do not agree with the Army's contention that the notice in this case is improper, we 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 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.

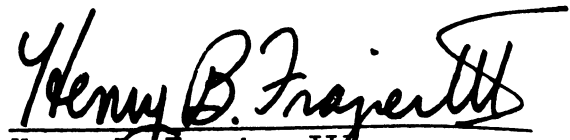
Rather, we believe that procedures can and must be devised which will permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from 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.

In so holding, we point out that representation proceedings should be given priority only where appropriate. For example, if other evidence of misconduct is involved, or, if after the representation decision has issued, an agency still refuses to accord a labor organization the representative status to which it is entitled, it is, of course, appropriate to proceed with an unfair labor practice complaint. We hold only that where related representation and unfair labor practice cases involve the same underlying issue, and where there is no other evidence of misconduct, the Order requires that the agency be permitted to remain neutral during the pendency of the representation petition without incurring the risk of 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.

For the foregoing reasons, pursuant to 2411.17 of the Council's rules of procedure, we vacate our stay of the order to post the notice and sustain the Assistant Secretary's notice posting requirement in this case. We further direct that the Assistant Secretary review and revise his case handling procedures in order to permit agencies to await his decision in a representation case without incurring the risk of an unfair labor practice finding, as discussed herein.

By the Council.


Henry B. Frazier II
Executive Director

Issued: JUL 25 1973

American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator). The Council (the Secretary of Labor not participating) accepted the union's petition for review in this case limited solely to the question of whether the arbitrator was authorized to award "priority consideration" under the agreement to two nongrievants, as well as the grievant (Report No. 32).

Council action* (July 31, 1973). The Council held that the issue of contractual relief for nongrievants was not included in the question presented to the arbitrator, and he therefore exceeded his authority when he awarded them the relief of "priority consideration" under the agreement. Accordingly, the Council modified the arbitrator's award by striking the portion awarding "priority consideration" under the agreement to the nongrievants. As modified, the award was sustained.

*The Secretary of Labor did not participate in this decision.

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

American Federation of Government
Employees, Local 12 (AFGE)

and

FLRC No. 72A-3

U.S. Department of Labor

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose primarily from the remedy awarded by the arbitrator for the agency's admitted procedural violation of Article XI of the parties' collective bargaining agreement.

Article XI, entitled "Merit Staffing," establishes the procedures to be followed in filling positions in the bargaining unit. Unless specifically excepted, no position may be filled except as a result of advertising the vacancy; qualified candidates are certified to the selecting official, who may make his selection only from the candidates on the certificate based on his judgment of how well the candidate will perform in the particular position being filled; and no selection shall be made unless and until the selecting official has interviewed all available candidates on the certificate who are within the unit.

Although an employee passed over for promotion may not grieve his nonselection under the agreement,^{1/} he may grieve a procedural violation of Article XI and obtain the remedy prescribed in XI-I-4-c, which provides:

Where it has been established that a qualified employee has been passed over through violation of this article, and it is not feasible to set aside the action, then the employee who has [sic: was] passed over shall be given priority consideration for the next appropriate vacancy, before candidates under a new promotion or placement action are considered. An employee selected on the basis of this consideration shall be exempted from the requirement for competitive procedures, in accordance with Civil Service regulations.

^{1/} Article VI, entitled "Grievance Procedures," does not apply to "[n]onselection for promotion from a group of properly ranked and certified candidates" (VI-B-2-b-(4)).

The position of Labor Economist GS-13 was posted, and five candidates (Gartaganis, Kasunic, Lukasiewicz, Phillips, and Wertz) were certified as "highly qualified." The selecting official was advised by an agency personnel officer that, since the official was familiar with the qualifications of the first four candidates listed, the official did not have to interview them. Accordingly, he interviewed only one candidate (Wertz) of whose qualifications he had no direct knowledge. He selected one of the four noninterviewed candidates (Lukasiewicz) for the position.

One of the noninterviewed candidates, Phillips, filed an individual grievance alleging that he was injured because the selection was made without the interview required under the merit staffing procedures established by Article XI.^{2/} The grievant requested, for himself, the remedy provided by XI-I-4-c, i.e. "priority consideration for the next appropriate vacancy, before candidates under a new promotion or other placement action are considered," which was interpreted by the grievant as meaning the injured employee is to be "offered" the next opening in his classification series at the next higher grade. The other non-interviewed candidates (Gartaganis and Kasunic) did not file grievances. It is uncontroverted that the union offered them an opportunity to participate in the grievance, and that they declined.

In answer to Phillips' grievance, the agency agreed that Article XI was violated by his not being interviewed, but denied that he had been passed over through the violation since the selecting official was thoroughly familiar with the grievant's work and qualifications. Nevertheless, the agency directed that the grievant be given "priority consideration for the next appropriate vacancy" at the GS-13 level within the Office of Manpower and Employment Statistics. "In the interest of equity," the agency stated that it was advising the two other non-interviewed candidates, by separate communication, that this priority consideration would also be afforded them. The agency emphasized that "priority consideration" is not tantamount to selection but refers to consideration.

Not satisfied with the agency's view of "priority consideration," Phillips made a "personal presentation" of his grievance to a grievance examiner - - an impartial third party authorized by the agreement (VI-J-3) to conduct factfinding and to make a written report of his findings and recommendations to the agency. The agency chose not to appear at the presentation. The grievance examiner considered two questions: (1) the meaning of "priority consideration for the next appropriate vacancy," and (2) the right of the agency to unilaterally enlarge upon the

2/ In his capacity as a shop steward, Phillips had previously brought to the attention of the selecting official the "injury suffered by those [noninterviewed] candidates" and the remedy provided by XI-I-4-c to an employee passed over in violation of Article XI. Although the official admitted that a "procedural error" had been made and offered to make himself available to discuss each candidate's qualifications with him, he did not offer the remedy provided by XI-I-4-c.

individual grievance and confer upon the two other candidates a right to priority consideration.

In his report to the agency, the grievance examiner found that "priority consideration" meant the promotion of Phillips for the next appropriate vacancy at the GS-13 level for which he qualified, without competition or comparison of his qualifications with other employees. He also found that the two other noninterviewed candidates had waived their eligibility to acquire "priority consideration" when they failed to timely file a grievance. He recommended that the agency (1) promote Phillips to the next appropriate vacancy at the GS-13 level, the duties of which he is qualified to perform, and (2) inform the two other noninterviewed candidates that it wrongfully informed them that it was placing them in priority consideration status, and physically strike from its personnel records any entry that would indicate their entitlement to such status.

In the agency's decision required by VI-J-4 of the agreement^{3/} on the grievance examiner's report, the agency rejected his findings and his two recommendations. As to the grievance examiner's first recommendation, the agency maintained that "priority consideration" connotes consideration rather than mandatory selection. With respect to his second recommendation, i.e., to cancel the agency's extension of priority consideration to the two nongrievants, as well as to the grievant, the agency replied that when it learns of any abridgement of an employee's rights under the agency's own Merit Staffing Plan required by the Civil Service Commission regulations, the agency has a positive obligation to correct it, and this obligation exists independently from and therefore is not dependent upon the filing of a grievance.

With approval of the union,^{4/} the grievance was appealed to arbitration under the agreement.^{5/} In the meantime, Phillips and the two nongrievants had been interviewed, in July 1971, for another opening but had been rejected. During the arbitration, the agency contended that those interviews constituted "priority consideration," and therefore its agreement violation had been remedied in July 1971. That none of the three was selected was, the agency asserted, irrelevant since the selecting official found none qualified for that particular vacancy.

^{3/} VI-J-4 provides that the assistant secretary or administration head to whom the grievance examiner's written report is submitted shall render a decision thereon within 15 workdays of receipt of the report and shall give the parties notice thereof.

^{4/} VI-I-2 of the agreement provides that a decision, rendered as the result of a personal presentation to a grievance examiner, may be appealed to arbitration under VI-K of the agreement if "Labor Local 12 approves and agrees to pay half the cost of an arbitrator."

^{5/} VI-K-3 of the agreement provides that an arbitrator's decision "shall be binding on each party to the proceeding, although exceptions to an arbitrator's award may be filed with the Federal Labor Relations Council as prescribed by section 14(b) of Executive Order 11491."

Arbitrator's Award

The arbitrator stated that three questions were primarily in dispute:

- (1) the meaning of the term "priority consideration" in XI-I-4-c of the agreement between the parties;
- (2) the scope of the applicable remedy for the procedural breach; and
- (3) whether the violation was thereafter effectively remedied.

In response to question (1), the arbitrator in his award determined that the words "priority consideration" in XI-I-4-c of the agreement do not mean that the employee receiving such consideration is thereby automatically entitled to be appointed to the vacancy for which he is then considered. In the opinion accompanying his award, the arbitrator explained that in this case "consideration," priority or not, does not mean automatic selection because, otherwise, nothing is left to consider. Moreover, he stated that the agreement remedy under XI-I-4-c, as it would apply to Phillips, provides not only for "priority" consideration for Phillips before other candidates are considered, but if he were selected on the basis of such consideration he would also be exempted from the requirement for competitive procedures, in accordance with Civil Service regulations.

In deciding question (2), the arbitrator's award determined that the agency did not act improperly in extending priority consideration to the two nongrievants, as well as to Phillips. In the opinion accompanying his award, the arbitrator discussed the union's contention that the agency acted erroneously when it said that not only Phillips but the two other noninterviewed candidates were entitled to "priority consideration" -- erroneous, according to the union, because only Phillips filed a grievance and hence the two other candidates had waived their rights. Had this been an arbitration in the private sector, and even in the public sector, the arbitrator said he would generally agree but for one thing: the agency had a dual obligation - - under the agreement and the Civil Service Commission regulation - - and the same remedy as to priority consideration is mandated by both, i.e., to the grievant by the agreement, and to the nongrievants by the regulations. Even then, the arbitrator said, the propriety of the agency extending relief to nongrievants was not free of doubt, since he could find nothing in the agreement or the regulations to indicate whether the right to priority consideration may effectively be waived by a failure to grieve.^{6/} The arbitrator stated

^{6/} Section J of Article XI ("Merit Staffing") provides in part that "This article shall be interpreted in accordance with the Department of Labor and Civil Service Commission regulations."

that, due to the agency's dual obligation, public and not simply private, the better argument would appear to require the conclusion that the agency was not remiss in extending relief to the non-grievants under the Civil Service Commission regulations. The arbitrator also questioned whether, in view of the agency's right to see that the proper procedure is followed, its rights in the matter could be effectively waived by anyone else, but he said his conclusion did not rest on this aspect alone.

In making his award in answer to question (3) (whether the violation was thereafter effectively remedied), the arbitrator determined that the agency's July 1971 interviews did not constitute "priority consideration," and that Phillips and the two other noninterviewed candidates remain entitled to "priority consideration" under XI-I-4-c of the agreement "for the next appropriate vacancy." His award was based on the following reasoning from his accompanying opinion:^{7/} The agency had the burden of showing that its agreement violation had been effectively remedied by its July 1971 interviews, but Phillips testified, without contradiction, that the selecting official who conducted the July interviews said he did so under duress and was "furious" about it. Therefore, the agency's failure to discharge its burden of proof meant, "as a practical matter," that the grievant and the two other men were still entitled to the "priority consideration" required by the agreement.

Union's Appeal to Council

The union filed a petition for review of the arbitrator's award on the basis of three exceptions.^{8/} Under section 2411.32 of the Council's rules of procedure, the Council (the Secretary of Labor not participating) accepted the petition for review of one exception, namely that the arbitrator exceeded his authority in answering question (3) by awarding relief to nongrievants.^{9/} Therefore, the Council's review of the

^{7/} In making this portion of his award, the arbitrator expressly incorporated by reference the reasons stated in his accompanying opinion.

^{8/} The union also requested the Council to stay the arbitrator's award until the Council rules on the merits of the union's petition; this request was denied.

^{9/} The union's two other exceptions to the arbitrator's award contended that: (1) implementation of the arbitrator's determination of the meaning of "priority consideration" under the agreement would involve violation of Civil Service Commission regulations, and (2) the arbitration proceedings were tainted by the arbitrator's failure to exclude the testimony of an agency witness. However, those exceptions did not meet the requirements for review under the Council's rules of procedure.

arbitrator's award is limited to the following portion made in response to question (3):

The Department did not . . . grant priority consideration in July 1971 to Irving P. Phillips and the other two candidates involved (Arthur Gartaganis and Kevin Kasunic). These three men remain entitled to 'priority consideration' per XI-I-4-c of the Agreement 'for the next appropriate vacancy' as more fully detailed in said Agreement.

The union filed a brief; the agency did not, choosing to rely on a portion of its brief to the arbitrator and a portion of its opposition to the union's petition for review.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides in pertinent part that "An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on . . . grounds similar to those applied by the courts in private sector labor-management relations." The law is well settled in the private sector that, if the arbitrator's award determines an issue not included in the subject matter submitted to arbitration, a challenge to the award will be sustained on the ground that the award is in excess of his authority.^{10/}

The question before the Council is whether the arbitrator decided an issue not specifically or necessarily included^{11/} in question (3) and thereby exceeded his authority by awarding relief to the two non-grievants when he answered that question, which asks:

(3) Whether the violation was thereafter effectively remedied.

The first question to determine is what was submitted to the arbitrator for decision. This is decided by the submission agreement^{12/} and the

^{10/} See e.g., Local 791, I.U.E. v. Magnavox Co., 286 F. 2d 465 (6th Cir. 1960).

^{11/} In addition to determining those issues specifically included in the particular question submitted, the award may extend to issues that necessarily arise therefrom. See e.g., Luggage Workers Union v. Neevel Co., 325 F. 2d 992, 994 (8th Cir. 1964) and Rheem Mfg. Co. v. Stove Mounter's Union, Local 61, AFL-CIO, 336 P. 2d 181, 184 (Cal. Ct. App., 1st Dist. 1959).

^{12/} The basic purpose of a submission agreement is to specify in writing the disputed issue, to formulate it as a question or questions to be posed
(cont'd)

collective bargaining agreement. In the absence of a submission agreement in this case, the arbitrator's unchallenged formulation of question (3) may be regarded as the equivalent of a submission agreement. There are two arbitration provisions of the agreement which could restrict or guide an arbitrator.^{13/}

There is no dispute that question (3) included the issue of whether the agency's July 1971 interviews of the grievant and the two other candidates effectively constituted the remedy of "priority consideration" required by XI-I-4-c and, in event of a negative answer, the issue of whether the grievant remains entitled to such "priority consideration." The only dispute is whether question (3) also included the issue of entitlement of nongrievants to such contractual relief.

Phillips' original grievance sought "priority consideration" under XI-I-4-c of the agreement only for himself.^{14/} The two other noninterviewed candidates declined to seek such relief. When Phillips made a "personal presentation of his grievance" to the grievance examiner (VI-I-1-b; emphasis added), he challenged the agency's unilateral grant of the same relief to candidates who had chosen not to grieve. Nothing in the record before the Council indicates that Phillips' individual grievance was thereafter expanded to seek relief for those candidates when his grievance was appealed to arbitration. On the contrary, at the arbitration hearing, the grievant and the union continued to challenge the agency's right to extend the contractual remedy under XI-I-4-c to nongrievants. It would appear from the foregoing that the question of whether the violation was effectively remedied applied only to the grievant, and that therefore the arbitrator had no authority to award such relief to the nongrievants under the agreement.

12/ (cont'd)

before the arbitrator. The submission agreement sets forth the issue to be arbitrated in precise language, which defines and circumscribes the authority of the arbitrator. See Prasow & Peters, Arbitration and Collective Bargaining, at p. 18 (1970).

13/ One provision is broad: "The arbitrator shall render a written decision according to his best judgment within the limits set by this agreement and applicable laws, orders, and regulations" (VI-K-2). However, the second provision specifically restricts the arbitrator: "Arbitration under this article shall not extend to changes in agreements or to the merits or desirability of agency policy or procedures, or of law, or of civil service regulations" (VI-K-3).

14/ The union asserts without contradiction that, in contrast with the individual grievance procedure established by Article VI which is involved here, the procedures established by Article VII, entitled "Union-Management
(cont'd)

The agency argues that the matter of "prospective" relief to nongrievants was put in issue when the grievant contended during the arbitration hearing that, even under the agency's interpretation of "priority consideration," the agency's contract breach was not remedied by its July 1971 interviews. Furthermore, the agency contends, the arbitrator accepted this contention (i.e., formulated it as question (3)), and his award of a "prospective" remedy to nongrievants is consistent with his other findings. However, the fact that the grievant's contention about the asserted ineffectiveness of the agency's July 1971 interviews related to two other noninterviewed candidates, as well as Phillips, does not mean that the arbitrator thereby became authorized to award a remedy under the agreement to any employee other than the individual grievant.

Alternatively, the agency argues that assuming arguendo the arbitrator exceeded his authority under question (3) by awarding "priority consideration" under the agreement to nongrievants, this constitutes "harmless error" because the agency assertedly would still have an obligation to award the same relief under Civil Service Commission regulations to all three noninterviewed candidates. However, question (3) authorized the arbitrator to determine whether the agency's agreement violation was effectively remedied only with respect to the individual grievant and, if not, to determine whether the grievant was therefore still entitled to "priority consideration" under the agreement. Accordingly, we are confined to determining whether the arbitrator exceeded his authority by awarding "priority consideration" under the agreement to nongrievants, and not whether any nongrievants are entitled to the same relief under Civil Service Commission regulations.^{15/}

We are of the opinion that the arbitrator answered a question not presented to him when he awarded relief under the agreement to two nongrievants, as well as the grievant, and that he thereby exceeded his authority. We believe that the award must be modified by striking that portion awarding relief to the two nongrievants.^{16/}

14/ (cont'd)

Grievances," cover disputes over the interpretation and application of the agreement the resolution of which would apply to all employees affected.

15/ We do not pass upon the agency's contention that Civil Service Commission regulations obligate the agency to grant the same relief to the two other noninterviewed candidates.

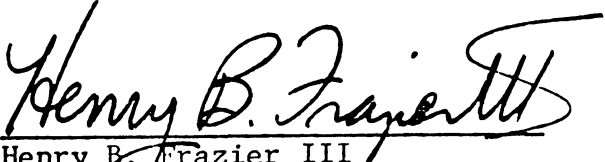
16/ Although the union contended that the Council should set aside the arbitrator's entire award and opinion as null and void ab initio, we find no basis for such action.

Conclusion

For the foregoing reasons, we find that the arbitrator answered a question not presented to him and thereby exceeded his authority by awarding "priority consideration" under XI-I-4-c of the agreement to two nongrievants.

Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify paragraph 4 of the arbitrator's award by striking the award of "priority consideration" under the agreement to Arthur Gartaganis and Kevin Kasunic. As so modified, the award is sustained.

By the Council.*


Henry B. Frazier III
Executive Director

Issued: JUL 31 1973

*The Secretary of Labor did not participate in this decision.

Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139; and Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256. These two cases involved the same issue, that is, the propriety of the Assistant Secretary's holding, in effect, that an agency must make available on "official time" necessary union witnesses for participation at formal unit determination hearings, and that refusal to do so is violative of section 19(a)(1) of the Order. The Council accepted the cases for review having determined that major policy issues are present in the Assistant Secretary's decisions.

Council actions (August 8, 1973). The Council found that there is no present obligation under the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings; and that the agencies' failure to grant such time in these cases, and their policies against such a practice, are therefore not violative of section 19(a) of the Order. Accordingly, the Council set aside the Assistant Secretary's findings that the agencies had violated section 19(a)(1) of the Order.

However, the Council further noted that the Assistant Secretary had indicated that, to fulfill his responsibilities under the Order, it is essential for agencies to grant official time to union witnesses. In addition, the Council noted that section 6(d) of the Order provides the Assistant Secretary with the authority to prescribe regulations needed to administer his functions. The Council concluded therefore that "where the Assistant Secretary determines, based upon his experience, that, in order to administer those aspects of his functions which require a formal hearing [under section 6(a)(1), (2), (3), (4) and (5) of the Order], there is an established need for necessary witnesses to be on official time for the period of their participation at such hearings, we would view it as consistent with the Order for the Assistant Secretary to promulgate such a requirement by regulation so long as it is consistent with other provisions of law."

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

Department of the Navy and
the U.S. Naval Weapons Station,
Yorktown, Virginia

and

A/SLMR No. 139
FLRC No. 72A-20

National Association of
Government Employees,
Local R4-1

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 National Association of Government Employees, Local R4-1, (herein called the union) held, among other things, that the Department of the Navy and the U.S. Naval Weapons Station (herein called the agency), jointly violated section 19(a)(1) of the Order^{1/} by refusing to grant "official time" to witnesses who appear on behalf of a labor organization at a formal unit determination hearing. The agency appealed to the Council. The Council accepted the petition for review, deciding that this holding presented a major policy issue.

Decision of the Assistant Secretary

The Assistant Secretary's determination that the Order requires agencies to grant official time to union witnesses at unit determination hearings was premised upon his view of the scope of the rights accorded by section 1(a) of the Order, his views of the philosophy of the Order, his interpretation of the Council's Report and Recommendations on the amendments of Executive Order 11491 and his asserted needs for effective administration of the Order.

More particularly, with respect to the scope of the rights accorded by section 1(a) of the Order,^{2/} the Assistant Secretary stated:

^{1/} Section 19(a)(1) provides that "Agency management shall not - interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;"

^{2/} Section 1(a) provides, in pertinent part, that "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."

In my view, the right to assist a labor organization does not accord to Federal employees a protected right merely to present their views to the Assistant Secretary but places on agency management an affirmative obligation to facilitate the exercise of that right to present views on behalf of a labor organization where the right involved is directly related to the implementation of the processes of the Executive Order, including the development of full and complete factual records upon which I can render unit determination decisions.

Relying on language from the preamble to the Order which states that "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," the Assistant Secretary further concluded that there is an Executive Order philosophy of "encouraging such relationships." In his view, an application of that philosophy would,

. . . require necessarily that agency management make available on official time essential witnesses at non-adversary fact-finding proceedings held pursuant to the Regulations of the Assistant Secretary to assure a full and fair hearing based upon which I can fulfill the responsibility assigned me by the President under Section 6(a)(1) of Executive Order 11491.[3/]

Finally, as indicated in the above-quoted passages from his decision, the Assistant Secretary was of the opinion that establishing such an obligation on agency management would result in the "development of full and complete factual records upon which I can render unit determination decisions." This he reasoned would "assure a full and fair hearing based upon which I can fulfill the responsibility assigned me by the President under Section 6(a)(1) of the Executive Order."

Contentions

The agency filed a brief contending that this decision by the Assistant Secretary established a doctrine that "agency management has an affirmative obligation to facilitate the exercise of employee rights directly

3/ Section 6(a)(1) 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."

related to the implementation of the processes of the Executive Order." The agency argues that not only is there no basis in the Order for such a doctrine but that the Order mandates a totally opposite conclusion. Additionally, the agency contends that: (1) there is no evidence that union witnesses have not appeared at unit determination hearings and hence no evidence that the Assistant Secretary has been hampered in carrying out his responsibilities under section 6(a)(1) of the Order; (2) that the decision of the Assistant Secretary will foment additional litigation; and (3) that the Assistant Secretary's decision is contrary to private sector practice and precedent.

The union in its brief asserted that the policy of the agency which requires union witnesses at representation hearings to take annual leave or leave without pay while agency witnesses who testify at the same hearings are in a duty status is inherently discriminatory and punishes union witnesses solely for giving testimony under the Order. It contended, in this regard, that agency witnesses are always on official time at unit determination hearings. Additionally, the union argues that the majority practice by agencies before the decision was to carry union witnesses on official time and that private sector doctrine to the contrary is not applicable to the Federal labor relations program.

The American Federation of Government Employees, AFL-CIO, which was permitted to file a brief as an amicus curiae in behalf of itself, the International Association of Fire Fighters, the International Association of Machinists and Aerospace Workers, the Laborers International Union of North America and the International Brotherhood of Electrical Workers, urges the Council to sustain the decision of the Assistant Secretary.

Opinion

The conclusions and findings of the Assistant Secretary set forth above raise certain major policy questions with respect to the interpretation of section 1(a) of the Order and the philosophy of the Order as to management's obligations toward labor organizations. Additionally, a question is raised with respect to the Assistant Secretary's use of an unfair labor practice finding as the means of announcing a procedure which will enable him to fulfill his responsibilities under the Order.

The Assistant Secretary concluded that section 1(a) of the Order places on agencies an affirmative obligation to grant official time to union witnesses for participation at formal unit determination hearings. We do not agree with the Assistant Secretary's interpretation of section 1(a). As noted by the Assistant Secretary, section 1(a) does give employees a protected right to form, join and assist a labor organization or to refrain from such

activity. Further, 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" as found by the Assistant Secretary. The underlying protected right of employees is a right to engage in or to refrain from union activity "freely and without fear of penalty or reprisal," and this right can hardly be deemed to import a duty of assistance to employees by management in their activity on behalf of a labor organization. Even if an agency grants official time to employees who appear in their official capacity as witnesses for the agency, it does not follow, as contended by the union, that the refusal to grant the same right to union witnesses constitutes improper "discriminatory" treatment. Again, the right protected by the Order is to engage in activity on behalf of the union, not the right to be assisted by management in such activity. 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.

Similarly, we find inconsistent with the Order the Assistant Secretary's statement of the "Executive Order philosophy" which he believes is reflected in that part of the preamble which provides:

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; (Emphasis added)

"Providing employees an opportunity" to participate in such formulation and implementation of personnel policies and practices through labor-management relationships does not reflect a policy of "encouraging such relationships." Rather, the Study Committee in recommending the issuance of Executive Order 11491 recognized a "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."^{4/} To that end, section 1(a) of the Order grants to employees the right to engage in union activity and the right to refrain from any such activity and mandates that the heads of agencies assure employees that no interference, restraint, coercion or discrimination is practiced within

^{4/} Labor-Management Relations in the Federal Service, 1971, p. 36. (Emphasis added.)

the agency to encourage or discourage membership in a labor organization. Additionally, if a majority of employees selects a labor organization as their exclusive representative, agency management must comply with the letter and spirit of the obligations imposed on it by the Order concerning its relationship with the exclusive bargaining representative. These provisions provide the framework for constructive bilateral relationships, if a labor organization is selected by the employees. They do not reflect a philosophy of encouraging such bilateral relationships, but a philosophy of balancing rights and obligations. Accordingly, the preamble of the Order does not support a finding of an unfair labor practice because an agency failed and refused to grant official time to union witnesses at formal unit determination hearings.

In his decision the Assistant Secretary indicated that requiring agencies to grant official time to union witnesses would facilitate "the development of full and complete factual records upon which I can render unit determination decisions." The Assistant Secretary, in effect, has indicated that such a requirement was essential for him to fulfill his responsibilities under the Order. However, as concluded above, there is no express requirement in the Order that an agency grant official time to union witnesses at unit determination hearings. In that regard, the agency's failure to do so could not have been an unfair labor practice. We therefore hold that the agency in the instant case did not fail to comply with any existing obligation under the Order by its policy of refusing to grant official time to union witnesses.

Accordingly, as there is no obligation under the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, the agency's failure to do so in the instant case, and its policy against such a practice, cannot be violative of section 19(a) of the Order.

We have held herein that the Order does not require agencies to grant official time to union witnesses at formal unit determination hearings. However, the Assistant Secretary has indicated that, in order to fulfill his responsibilities under the Order, it is essential for agencies to grant official time to union witnesses at such hearings. Section 6(d) of the Order provides the Assistant Secretary with the authority to prescribe regulations needed to administer his functions under the Order.^{5/} Accordingly, where the Assistant Secretary determines, based upon his experience, that, in order to administer those aspects of his functions which require a formal hearing, there is an established need for necessary witnesses to be on official time for the period of their participation

^{5/} Section 6(d) provides that "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order."

at such hearings, we would view it as consistent with the Order for the Assistant Secretary to promulgate such a requirement by regulation so long as it is consistent with other provisions of law.^{6/}

The issue of official time for witnesses in the instant case concerned only necessary union witnesses who appear at formal unit determination hearings. In reaching our conclusions in this case, we have also considered the issue as it pertains to other formal hearings held by the Assistant Secretary to administer his functions under the Order.^{7/} Our view that it would be consistent with the Order for the Assistant Secretary to promulgate a regulation requiring that necessary witnesses be on official time for the period of their participation at formal hearings is predicated on the needs of the Assistant Secretary to facilitate the exercise of his functions under the Order. Therefore, where the Assistant Secretary determines, based upon his experience, that, in order to administer those aspects of his functions which require a formal hearing under section 6(a)(1), (2), (3), (4) and (5) of the Order, there is an established need for necessary witness to be on official time for the period of their participation at such formal hearings, we would view it as consistent with the Order for the Assistant Secretary to promulgate an appropriate regulation pursuant to his authority under section 6(d) of the Order.

6/ During its 1971 review of the Federal labor relations program the Council considered a proposal to prescribe uniform policy regarding official time for employees representing labor organizations in third-party proceedings. At the time of the review there appeared to be no compelling reason for the Council to recommend a revision of the Order which would require uniformity of practice on this matter. However, in our view, the Assistant Secretary's exercise of his regulatory authority in this area when he finds an established need for such a requirement in order to discharge his functions is consistent with the present provisions of the Order and not inconsistent with our determination at the time of the review.

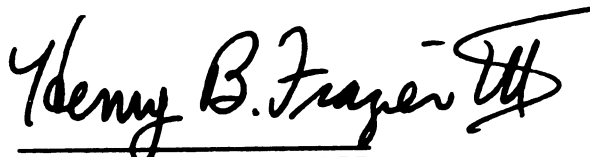
7/ Section 6(a) provides: The Assistant Secretary shall--

- (1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;
- (2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;
- (3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council;
- (4) decide unfair labor practice complaints and alleged violations of the standards of conduct for labor organizations; and
- (5) decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement.

For the foregoing reasons, and pursuant to section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's finding that the Department of the Navy and the U.S. Naval Weapons Station violated section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing.

Pursuant to section 2411.17(c) of the Council's rules of procedure, we hereby remand this matter to the Assistant Secretary for purposes of compliance consistent with this decision.

By the Council.

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a horizontal line under the name.

Henry B. Frazier III
Executive Director

Issued: AUG 8 1973

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

Department of the Army,
Reserve Command Headquarters,
Camp McCoy, Sparta, Wisconsin,
102nd Reserve Command,
St. Louis, Missouri

and

A/SLMR No. 256
FLRC No. 73A-18

American Federation of Government
Employees, Local 3154, AFL-CIO

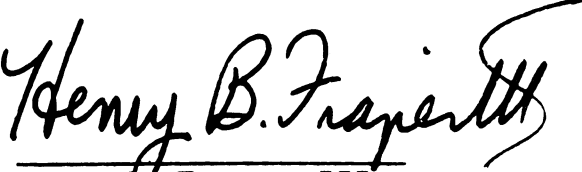
DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

This appeal, which was accepted for review by the Council, arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by American Federation of Government Employees, Local 3154, AFL-CIO (herein called the union) held, among other things, that Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri (herein called activity), had violated section 19(a)(1) of the Order by promulgating or maintaining a policy of refusing to make available on official time necessary union witnesses for participation at formal unit determination hearings held pursuant to the Regulations of the Assistant Secretary. In reaching his decision on this issue in the instant case, the Assistant Secretary relied exclusively on his decision in Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139.

On this date the Council has issued its Decision On Appeal From Assistant Secretary Decision in the matter of Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, FLRC No. 72A-20, in which it set aside the Assistant Secretary's finding that the agency violated section 19(a)(1) of the Order by refusing to grant official time to union witnesses for participation at a formal unit determination hearing. For the reasons fully set forth in that Decision, and pursuant to section 2411.17 of the Council's rules of procedure, we find that the Assistant Secretary's decision

with respect to a finding of a violation of section 19(a)(1) of the Order to be inconsistent with the purposes of the Order, and, therefore, it is set aside.1/

By the Council.


Henry B. Frazier III
Executive Director

Issued: AUG 8 1973

1/ Another issue raised by the agency in its request for review involved the propriety of the Assistant Secretary imposing as precedent a decision which the Council had previously stayed. The Council did not grant review of this issue. While the agency, in its brief, in effect, requested reconsideration of the Council's determination, no persuasive reasons were advanced for such reconsideration and the request is denied.

National Federation of Federal Employees, Local 476 and Joint Tactical Communications Office, Ft. Monmouth, New Jersey. In this case, the Council was presented with a negotiability dispute involving the validity under the amended Order of an agency regulation (section VII. B. 4. b.(1) of DOD Directive 1426.1) which, as interpreted by the agency head, required that, where the parties to negotiations want to provide for dues withholding pursuant to section 21 of the Order, the arrangements must either be incorporated in the basic collective bargaining agreement or in a separate agreement made expressly dependent upon the basic agreement.

Council action (August 8, 1973). The Council held that the agency directive, by mandating the form that a dues withholding agreement may take, rather than leaving such a matter to the parties at the bargaining table, violated section 21 of the Order. Accordingly, the Council set aside the determination of the agency head in this case.

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

National Federation of Federal
Employees, Local 476

and

FLRC No. 72A-42

Joint Tactical Communications
Office, Ft. Monmouth, New Jersey

DECISION ON NEGOTIABILITY ISSUE

Background

National Federation of Federal Employees, Local 476 holds exclusive recognition for a unit of employees of the Joint Tactical Communications Office at Ft. Monmouth, New Jersey. During negotiation of a basic labor-management agreement between the activity and the union, a negotiability dispute arose involving section VII.B.4.b.(1) of Department of Defense (DOD) Directive 1426.1, Labor-Management Relations in the Department of Defense, issued on December 9, 1971.

Section VII.B.4.b.(1) of DOD Directive 1426.1 provides, in pertinent part:

b. Where dues are to be withheld, the following matters related thereto, among others, are for joint determination by the parties:

(1) Whether dues withholding arrangements are to be incorporated in the basic agreement between the parties or, as an alternative, set forth in a supplement thereto.

The parties had entered into a separate dues withholding agreement on August 9, 1971, prior to the commencement of their basic labor agreement negotiations. The separate agreement makes no reference to a basic collective bargaining agreement. The union proposed, in effect, the continuation of the separate agreement. The activity informed the union that based on the disputed DOD directive provision, the separate agreement could not continue in effect independent of the basic labor agreement that the parties were then negotiating.

The dispute was referred to the Department of Defense for an agency head determination. The resultant determination supported the Army position. As interpreted by the DOD, section VII.B.4.b.(1) of DOD Directive 1426.1

requires that where the parties want to provide for dues withholding pursuant to section 21 of the Order, the arrangements must either be incorporated in a basic agreement or in a separate document which is made expressly dependent upon that basic agreement.

The union appealed to the Council, asserting, in essence, that the DOD directive provision violated the Order.

Opinion

The principal issue before the Council is whether an agency regulation requiring that dues withholding arrangements either be incorporated in a basic collective bargaining agreement, or in a supplemental or separate agreement which is nevertheless made expressly dependent upon the existence of the basic labor-management agreement, is consistent with section 21 of the Order.

The agency contends that its requirement reflects the intent of the Order and represents a valid exercise of agency regulatory authority. That contention must be examined in the light of Federal sector labor-management relations policy and experience with regard to dues withholding.

The negotiation of arrangements between agencies and labor organizations for payroll deduction of labor organization dues is a practice of several years standing in the Federal service.

On June 22, 1961, the President of the United States designated a special task force to review and advise him on employee-management relations in the executive branch of the government. In its report, A Policy for Employee-Management Cooperation in the Federal Service, dated November 30, 1961, the Task Force stated, at p. 21:

One of the requests most frequently heard by the Task Force at its public hearings is that the Government provide for the withholding of employee organization dues from the paychecks of members

.

The Task Force considers that withholding dues is a proper service that may be provided to an employee organization that has been granted formal recognition for purposes of consultation, or has been granted exclusive recognition. This should not be a matter of right, but rather a privilege that may be granted in the case of formally recognized organizations, or an agreement to be negotiated for in the case of organizations with exclusive representation.

Withholding of dues must be entirely voluntary, based upon individual authorization, and provision must be made for employees to revoke the authorization at stated intervals. The cost of dues withholding should be paid by the employee organization, not by the Government.

The new program for employee-management cooperation in the Federal service recommended by the Task Force was established by Executive Order 10988, issued by President Kennedy on January 17, 1962. The voluntary withholding of employee organization dues was not expressly authorized in E.O. 10988.

However, by memorandum dated May 21, 1963, the President requested the Chairman of the Civil Service Commission to initiate the necessary action to develop regulations, standards and procedures to permit departments and agencies to operate a system of voluntary withholding of employee organization dues for members who elected to pay dues in that fashion. The President stated that in developing those instructions the withholding of dues was to be viewed as a service that the departments and agencies might provide to recognized employee organizations.

Acting on the President's request, the Civil Service Commission issued regulations authorizing agencies to permit employees to make allotments for the payment of dues to employee organizations to which the agency had accorded formal or exclusive recognition under E.O. 10988 and with which the agency had "agreed in writing to deduct allotments for the payment of dues...."^{1/} Thereafter, dues withholding arrangements were negotiated between agencies and appropriate employee organizations in accordance with the Commission's authorization.

On October 29, 1969, President Nixon issued Executive Order 11491, which, as of January 1, 1970, revoked E.O. 10988 and prescribed new policies governing labor-management relations in the executive branch. Section 21 of the new executive order provided, in pertinent part:

Sec. 21. Allotment of dues. (a) When a Labor organization holds formal or 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 from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions

^{1/} 5 C.F.R. § 550.304(5) (1964).

The Study Committee Report and Recommendations which led to the issuance of E.O. 11491, had considered the subject of dues withholding as it then existed in the Federal service and concluded as follows:

Payroll deduction of labor organization dues in accordance with voluntary employee allotments has worked well as a union security measure in the Federal program, and this form of union security should be continued in order to foster stability in labor-management relations.

...Agencies and labor organizations which hold formal or exclusive recognition should be permitted to negotiate agreements for the voluntary withholding of the regular dues of the organization, with the costs of the withholding paid by the organization.2/

The subsequent Report and Recommendations on the Amendment of Executive Order 11491, recommended the deletion of the requirement from the Order that the costs of making dues deduction be recovered from labor organizations, leaving this matter to be negotiated by the parties.3/ This recommendation was adopted and Section 21, Allotment of dues, now provides, in pertinent part:

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.
(Emphasis added)

The agency regulation at issue in this case requires that dues withholding arrangements either be incorporated in a basic collective bargaining agreement, or in a supplemental or separate agreement which is nevertheless made expressly dependent upon the existence of the basic labor-management agreement. The agency contends that its requirement reflects the intent of the Order and represents a proper and valid exercise of agency regulatory authority. In our view, however, the agency has misinterpreted the intent of the Order. The history of payroll deduction of union dues in the Federal sector demonstrates that dues deduction is a matter to be negotiated

2/ Labor-Management Relations in the Federal Service, 1971, p. 47.

3/ Id., p. 30.

by agencies and unions and that the deduction of such dues is to be based upon bilaterally agreed upon arrangements. While the agency regulation at issue in this case permits negotiations on the substance of dues deductions, it limits the area of negotiations by mandating the form that an agreement may take.

There is no indication in the language or intent of the Order that only the substance of dues withholding arrangements was to be negotiable, with the form of those arrangements reserved to unilateral determination by agency management. On the contrary, it 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. Whether those arrangements are contained in a basic labor agreement, or in a separate independent or contingent agreement, is a matter of form which is subject to such bilateral determination by the parties.

In summary, it was intended by section 21 and by the Council in recommending the subsequent amendment to section 21, that the form and the 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. However, the inclusion of dues withholding arrangements in a basic labor agreement or in a separate contingent agreement is not inherently inconsistent with the Order and the Report. Such a dues withholding arrangement which is a part of or in some way connected to the basic agreement would be proper if established through the process of negotiations just^{4/} as would a dues withholding arrangement in a separate, noncontingent agreement.

Therefore, the Department of Defense directive provision under consideration in this case, as interpreted by the DOD, is inconsistent with the intent of section 21 of the Order and, moreover, in discord with the requirement of section 23 of the Order that each agency issue appropriate policies and regulations consistent with the Order for its implementation.

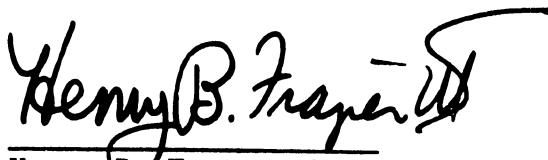
Conclusion

Section VII.B.4.b.(1) of DOD Directive 1426.1, dated December 9, 1971, as interpreted by the Department of Defense, violates section 21 of Executive Order 11491, as amended.

4/ See generally AFGE Local 1668 and Elmendorf Air Force Base (Wildwood AFS), FLRC No. 72A-10, May 15, 1973; and AFGE Local 2028 and Veterans Administration Hospital, Pittsburgh, Pennsylvania (University Drive), FLRC No. 72A-39, May 15, 1973.

Accordingly, pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the Department of Defense determination in this case must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: AUG 8 1973

U.S. Department of Defense, Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, A/SLMR
No. 211. In his decision, the Assistant Secretary dismissed the 19(a)(6) complaint filed by the union, concluding that the agency's position that it could not negotiate a separate dues withholding agreement, because of an existing agency policy which required that the subject of dues withholding be considered as a part of the "total bargaining package," raised a negotiability issue, which issue is properly resolved through the section 11(c)(2) -- 11(c)(4) procedures of the Order. The union appealed to the Council, contending that the Assistant Secretary erred in treating this matter as a negotiability dispute and arguing that his failure to resolve the issue raised a major policy issue.

Council action (August 8, 1973). The Council held that the decision of the Assistant Secretary was consistent with the Order and did not raise a major policy issue. The Council also noted that the underlying negotiability issue in this case has been resolved by the Council's decision in NFFE Local 476 and Joint Tactical Communications Office, Ft. Monmouth, New Jersey, FLRC No. 72A-42 (~~described below~~). Accordingly, the Council denied review of the union's appeal under section 2411.12 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 8, 1973

Mr. David J. Markman
Attorney at Law
National Federation of
Federal Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: U.S. Department of Defense, Department
of the Army, Army Materiel Command,
Automated Logistics Management Systems
Agency, A/SLMR No. 211, FLRC No. 72A-49

Dear Mr. Markman:

The Council has carefully considered your petition for review and the agency's request for denial of review of the Assistant Secretary's decision in the above-entitled case dismissing your complaint alleging a violation of section 19(a)(6) of the Order.

The Assistant Secretary found that the agency's position that it could not negotiate a separate dues withholding agreement, as requested by the union, because of an existing agency policy which requires that the subject of dues withholding be considered a part of the "total bargaining package" raises a negotiability issue. The Assistant Secretary concluded that proper resolution of such an issue is through the section 11(c)(2) -- 11(c)(4) procedures of the Order, and, accordingly, an unfair labor practice complaint could not be entertained at the time. In your petition for review you contend principally that the Assistant Secretary erred in treating this matter as a negotiability dispute and argue that his failure to resolve the issue raises a major policy issue.

In the Council's view, the decision of the Assistant Secretary does not present a major policy issue. The Assistant Secretary's determination that proper resolution of a negotiability issue is through the procedures provided in section 11(c)(2) -- 11(c)(4) of the Order is consistent with the Order.

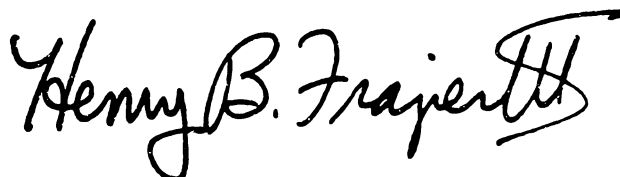
It was also noted in the above regard that on this date the Council issued its decision in NFFE Local 476 and Joint Tactical Communications Office, Ft. Monmouth, New Jersey, FLRC No. 72A-42, in which it found that an agency

may not unilaterally require that dues withholding agreements be made expressly dependent upon the existence of the basic labor-management agreement. Therefore, the underlying negotiability issue in the case which you have appealed to the Council has been resolved.

Accordingly, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and the Council has therefore directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a long, horizontal flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. D. Harman
ALMSA

Philadelphia Metal Trades Council and Philadelphia Naval Shipyard Employees' Cafeteria Association. The negotiability dispute in this case involved the union's proposal in substance that, if the Cafeteria Association, which now directly operates the cafeteria facilities at the Shipyard, elects to contract out such operations, the contractor would be required to maintain existing personnel and assume the bargaining agreement between the Cafeteria Association and the union, for a period of six months.

Council action (August 10, 1973). The Council held that the union's proposal would render it more difficult if not impossible to locate an acceptable contractor and would thereby constrain management in its determination as to whether the cafeteria operations should be contracted out. Accordingly, based on its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56 (Report No. 41), the Council ruled that the union's proposal violates management's rights under section 12(b)(5) of the Order, and sustained the agency's determination of nonnegotiability on that ground. However, the Council emphasized, as it had in the Norfolk Naval Public Works Center case, that proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves; and that nothing in the instant decision precludes the parties from negotiating appropriate arrangements, consistent with applicable law, regulations and the Order, for employees adversely affected by the impact of any determination by the activity to contract out its cafeteria operations, as provided in section 11(b) of the Order.

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

Philadelphia Metal Trades Council

and

FLRC No. 73A-5

Philadelphia Naval Shipyard
Employees' Cafeteria Association

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (Philadelphia Metal Trades Council) represents cafeteria workers employed by the Philadelphia Naval Shipyard Employees' Cafeteria Association, a nonappropriated fund activity which directly operates the cafeteria facilities at the Shipyard.^{1/}

During the course of negotiations between the union and the Cafeteria Association, the union submitted the following proposal:

Should the Employer decide to contract out the Cafeteria services and facilities to a private vendor, all sections of this agreement will remain in force for a period of six months.

The purpose of this proposal, as indicated by the union, is to assure that, if the Cafeteria Association, with the approval of the Shipyard Commander, elects to contract out the cafeteria operations, the contractor would be required by the activity to maintain existing personnel, and to assume the bargaining agreement between the Cafeteria Association and the union, for a period of six months.

^{1/} Civilian Manpower Management Instruction (CMMI) 790, issued by the Department of the Navy, provides in Subchapter 7 for the establishment and functioning of civilian nonappropriated fund activities, such as the Cafeteria Association here involved. Under that Instruction, the Cafeteria Association is subject to the overall responsibility and authority of the Shipyard Commander and, contingent upon the approval of the Commander, the Cafeteria Association is authorized to provide food services either directly through a manager, or indirectly through an outside concessionaire. (See, e.g., CMMI 790.7, subparagraphs 7-4.b.; and 7-11.a., c., and 1.) However, it is Navy policy that the services of concessionaires be used to the maximum extent possible. (CMMI 790.7, subparagraph 7-11.1.)

The Cafeteria Association asserted that the proposal was nonnegotiable. Upon referral, the Department of Defense upheld the activity's position on the ground, among others, that the proposal violates management's rights under section 12(b)(5) of the Order.^{2/}

The union appealed to the Council, disagreeing with the agency determination. The agency filed a statement of position in support of its determination, and the union supplemented its appeal in response thereto.

Opinion

The principal issue with which we are confronted is whether the union's proposal, which would attach specified conditions to the contracting out of cafeteria operations by the activity, violates management's rights under section 12(b)(5) of the Order.

The Council recently considered at length the validity under 12(b)(5) of proposed limitations by a union on management's discretion to contract out unit work, in the Norfolk Naval Public Works Center case, FLRC No. 71A-56, issued June 29, 1973.^{3/} As we held in that case, the limitations proposed therein (based on cost, capacity of unit personnel, and technological considerations) "would serve as a restraint upon reserved management discretion by restricting the factors which the agency can rely on in reaching

2/ Section 12(b)(5) of the Order provides that:

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;

.

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

3/ See also Supships, USN, 11th Naval District, San Diego, California, FLRC No. 71A-49 (June 29, 1973); Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-35 (June 29, 1973); and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, FLRC No. 72A-40 (June 29, 1973).

a decision as to whether such work should be contracted out;" and the union's proposal thereby violated management's right to determine the personnel by which its operations are to be conducted under section 12(b)(5) of the Order.

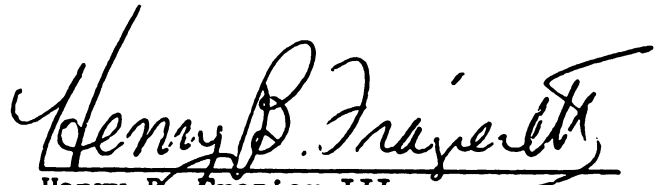
As already mentioned, the union's proposal in the instant case would limit the exercise of management's right to contract out its cafeteria operations by requiring that any contractor selected by the agency must agree to maintain existing personnel and to assume the union's bargaining agreement with the Cafeteria Association for a period of six months. Such conditions imposed upon the contractor would obviously render it more difficult if not impossible to locate an acceptable concessionaire and as a result would constrain management in its determination as to whether the cafeteria operations should be contracted out. For the reasons detailed in the Norfolk Naval Public Works Center case, such constriction of management's discretion as to whether to contract out is violative of management rights under 12(b)(5) and renders the union's proposal nonnegotiable.

Before concluding, however, we must emphasize, as we did in the Norfolk Naval Public Works Center case, that "proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves." Likewise, nothing in our decision herein precludes the parties from negotiating appropriate arrangements, consistent with applicable law, regulations and the Order, for employees adversely affected by the impact of any determination by the activity to contract out its cafeteria operations, as provided in section 11(b) of the Order.

Conclusion

Based on the foregoing reasons, we find that the determination by the Department of Defense that the union's proposal here involved was non-negotiable under section 12(b)(5) of the Order was proper and must be sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: AUG 10 1973

Association of Civilian Technicians, Inc., and State of New York National Guard. The agency head determined that two union proposals were nonnegotiable on the grounds, among others, that they violated agency regulations, as interpreted by the agency head. The union appealed to the Council from this determination, arguing that the regulations relied on by the agency head are violative of applicable law and the Order. Subsequently, the Council was administratively informed that the subject regulations had been superseded by new regulations issued by the agency.

Council action (August 13, 1973). Since it was unclear to the Council whether and to what extent such changes in the subject regulations would alter the agency head's determination of non-negotiability in this case, the agency was requested to clarify its determination in the light of the changes in its regulations. Further, the union was granted the opportunity to file comments on such clarification.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 13, 1973

Mr. William C. Valdes
Staff Director
Office of Civilian Personnel
Policy - OASD (M&RA)
The Pentagon, Room 3D281
Washington, D.C. 20301

Mr. Vincent J. Paterno
National President
Association of Civilian
Technicians, Inc.
414 Hungerford Drive, Suite 401
Rockville, Maryland 20850

Re: Association of Civilian Technicians,
Inc., and State of New York National
Guard, FLRC No. 72A-47

Gentlemen:

Reference is made to the negotiability determination of the agency dated September 27, 1972, which was appealed to the Council by the union in the above-entitled case.

In that determination, the agency ruled that two union proposals were nonnegotiable, based on the grounds, among others, that the proposal dealing with "Discharge from the National Guard" is violative of NGR 635-200, and that the proposal dealing with the "Use of Military Rank and Courtesy" is violative of Joint NGR 51/ANGR 40-01, par. 2-5, as interpreted by the agency head.

The Council is now administratively informed that both of the above-cited regulations relied upon by the agency have been superseded, viz: NGR 635-200 by NGR 600-200, and NGR 51/ANGR 40-01 by TPM 200.

Since it is unclear whether and to what extent such changes in the subject regulations would alter the agency head's determination of non-negotiability in this case, the agency is requested to clarify its determination of September 27, 1972, in the light of the changes in its regulations. It is further requested that such clarification be

filed by the agency with the Council, together with a statement of service on the union, by the close of business on August 28, 1973. Additionally, the union is granted 15 days from the date of service of such clarification to file any comments thereon which it desires, together with a statement of service on the agency.

For the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, prominent "H" and "F".

Henry B. Frazier III
Executive Director

Pattern Makers League of North America, AFL-CIO and Naval Ship Research and Development Center, Bethesda, Maryland. This case involved two questions: (1) The negotiability under section 12(b)(5) of the Order of a union proposal which would limit agency discretion to assign to nonunit personnel work normally performed by employees in the bargaining unit; and (2) whether the agency properly withheld approval of a negotiated agreement under section 15 because it deemed a provision thereof to be in conflict with section 12(b)(5) of the Order.

Council action (August 17, 1973). As to the first question, based upon its decision in the Norfolk Naval Public Works Center case, FLRC No. 71A-56 (Report No. 41), the Council sustained the agency determination that the union proposal was nonnegotiable under section 12(b)(5) of the Order. As to the second question, based upon its decision in the Supships, USN, 11th Naval District case, FLRC No. 71A-49 (Report No. 41), the Council upheld the agency's action disapproving the provision in the agreement on the grounds that the provision was in conflict with section 12(b)(5) of the Order.

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

Pattern Makers League of North
America, AFL-CIO

and

FLRC No. 73A-28

Naval Ship Research and Development
Center, Bethesda, Maryland

DECISION ON NEGOTIABILITY ISSUE

Background

The Naval Ship Research and Development Center of Bethesda, Maryland, and a Local Association of the Pattern Makers League of North America, AFL-CIO, reached agreement at the local level on the terms of an agreement, subject to agency approval pursuant to section 15 of the Order.^{1/}

Subsequently, the Department of the Navy determined that a portion of the provision relating to the assignment of work normally performed by bargaining unit employees contravened section 12(b) of the Order. The text of the disputed provision is set forth below:

Article XVIII - Trade Jurisdiction

Section 2. The Employer agrees that no work ordinarily performed by members of the Unit will be accomplished with non-unit personnel if qualified members of the Unit are available in sufficient numbers to meet deadlines and costs and if the work is within the capability of NSRDC facilities and equipment.

[The Employer will consult with the Association before contracting out work.]^{2/}

^{1/} Section 15 of the Order, as amended, provides:

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 . . . and regulations of other appropriate authorities. . . .

^{2/} The agency agreed that the portion of the proposal within the brackets was negotiable. This portion, therefore, is not at issue.

Upon referral, the Department of Defense (DOD) determined that the proposal was nonnegotiable, relying primarily on its conclusion that the proposal was inconsistent with section 12(b)(5) of the Order which requires that management retain the right to determine the personnel by which work operations are to be conducted. The union appealed to the Council from that determination under section 11(c)(4) of the Order and the agency filed a statement of position.

Opinion

Two questions are before the Council for resolution in this case, i.e., (1) the negotiability under section 12(b)(5) of the amended Order of the union's proposal, and (2) whether the agency properly withheld approval of a negotiated agreement because it deemed a provision thereof to be in conflict with section 12(b)(5) of the Order. These questions will be considered separately below.

1. The negotiability of the proposal.

The portion of the proposal which would limit the agency's discretion to assign to nonunit personnel work normally performed by employees in the bargaining unit bears no material difference from the union's work assignment proposal (Article IX, Sections 1, 2 and 4) which was before the Council in Tidewater Virginia Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973).

Based on the applicable discussion and analysis in the Norfolk Naval Public Works Center decision, the disputed portion of Article XVIII, Section 2, under consideration in this case, must also be held violative of section 12 (b)(5) of the Order and, therefore, nonnegotiable.

2. The agency's refusal to approve the negotiated agreement.

Resolution of this issue is governed by the Council's decision in Local 174 American Federation of Technical Engineers, AFL-CIO and Supships, USN, 11th Naval District, San Diego, California, FLRC No. 71A-49 (June 29, 1973).

Based on the applicable discussion and analysis in the Supships, USN, 11th Naval District decision, where we held that the requirement that an agreement conform to the Order was inherent in the section 15 agreement approval process, we uphold the agency's action in this case disapproving the provision on the grounds that it was contrary to section 12(b)(5) of the Order.


Conclusion

Based upon the foregoing, we find that the determination by the agency that the union's proposal concerning the assignment to nonunit personnel of work

normally performed by employees in the bargaining unit was nonnegotiable under section 12(b)(5) of the Order was proper and must be sustained.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.



Henry B. Frazier III
Executive Director

Issued: AUG 17 1973

Department of the Navy, Naval Weapons Station, Yorktown, Virginia,
Assistant Secretary Case No. 22-2881 (RO). The union (International
Association of Machinists and Aerospace Workers, AFL-CIO) appealed
to the Council from the Assistant Secretary's decision and direction
of election, and requested a stay of the election pending Council
determination of its appeal.

Council action (August 23, 1973). The Council denied review of the
union'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 the union's request for stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1973

Mr. Floyd E. Smith
International President
International Association of
Machinists & Aerospace
Workers, AFL-CIO
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

Re: Department of the Navy, Naval Weapons
Station, Yorktown, Virginia, Assistant
Secretary Case No. 22-2881 (RO), FLRC
No. 73A-37

Dear Mr. Smith:

Reference is made to your petition for review, and your request for stay of election pending decision on your appeal, in the above-entitled case.

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 an Assistant Secretary's decision 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, the Council has directed that your appeal be 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 stay pending decision on your appeal is therefore likewise denied.

By direction of the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor
B. E. Gustafson
Navy
R. P. Kaplan
NAGE

U.S. Army Electronics Command Maintenance Directorate, Ft. Monmouth, N.J., Assistant Secretary Case No. 32-3169 E.O. The union (Local 1904, American Federation of Government Employees, AFL-CIO) appealed to the Council for review of a decision of the Assistant Secretary. The petition for review was due, under the Council's rules, on or about July 16, 1973. However, the petition was not filed with the Council until July 30, 1973, or approximately two weeks late, and no extension of the time for filing was either requested by the union or granted by the Council.

Council action (August 31, 1973). Since 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

August 31, 1973

Mr. Anton E. Sperling
Chairman Litigation Committee
American Federation of Government
Employees, AFL-CIO
Local 1904
P. O. Box 231
Eatontown, New Jersey 07724

Re: U.S. Army Electronics Command
Maintenance Directorate, Ft.
Monmouth, N.J., Assistant
Secretary Case No. 32-3169 E.O.,
FLRC No. 73A-34

Dear Mr. Sperling:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-named case. The Council has determined that your petition was untimely filed under the Council's rules of procedure and therefore cannot be accepted for review.

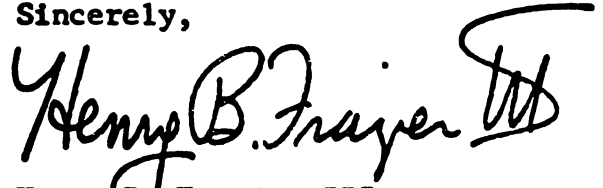
Section 2411.13(b) of the Council's rules provides that a petition for review must be filed within 20 days from the date of service of the Assistant Secretary's decision; under section 2411.45(c) three additional days are allowed when service is by mail; and under section 2411.45(a) such petition for review must be received in the Council's office before the close of business of the last day of the prescribed time limit. In computing these time limits, as provided in section 2411.45(b) of the Council's rules, if the last day for filing a petition falls on a Saturday, Sunday or Federal legal holiday the period for filing shall run until the end of the next day which is not a Saturday, Sunday or Federal legal holiday.

The Assistant Secretary's decision in this case was dated June 21, 1973, and appears to have been mailed to your organization on or about that date. Therefore, under the above rules, your petition for review was due in the Council's office on or about July 16, 1973. However, your appeal was not filed with the Council until July 30, 1973, or approximately two weeks late, and no extension of time was either requested by your organization or granted by the Council under section 2411.45(d) of the Council's rules.

Accordingly, as your petition for review was untimely filed, and apart from other considerations, the Council has directed that your petition for review be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a long, horizontal flourish extending to the right.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

M. R. MacKenzie
Dept. of the Army

IAM-AW Lodge 2424 and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md. During negotiations with Aberdeen Research and Development Center, a tenant activity at Aberdeen Proving Ground (APG), the union proposed an article concerning non-supervisory wage grade promotions within the unit. In separate negotiations with Kirk Army Hospital, also a tenant activity at APG, the union proposed an identical article, as well as one dealing with placement, rehiring and promotion of employees affected by reduction in force. The Department of Defense (DOD) determined (1) that numerous sections of the wage grade promotions article are nonnegotiable under section 11(a) of the Order because they conflict with provisions of the APG merit promotion plan; and (2) a number of sections of such article are nonnegotiable for other reasons under the Order. Further, DOD determined that a section of the reduction-in-force article, dealing with repromotion of employees affected by reduction in force, is nonnegotiable under 12(b)(2) of the Order. The union appealed to the Council disagreeing with the agency's determination.

Council action (September 17, 1973). The Council determined, as to (1), that the APG merit promotion directive is not an "applicable regulation" within the meaning of section 11(a) of the Order which may properly limit the scope of negotiations at the tenant activities. With respect to (2), the Council decided, contrary to the agency head's determination, that the following proposals are not violative of the Order: The proposed procedure for the acceptance of voluntary applications from agency employees outside the minimum area of consideration; and the proposed procedure whereby, under particular circumstances (personal relationship between the selecting supervisor and any referred candidates), the promotion selection would be made at the next higher management level. However, the Council agreed with the agency that the proposed assignment of a screening function for promotion eligibility is outside the agency's obligation to bargain under section 11(b) of the Order.

Finally, as to the union's proposal dealing with repromotion of employees affected by reduction in force, the Council decided, consistent with the agency head determination, that this proposal conflicts with the right to promote employees reserved to management by section 12(b)(2) of the Order. However, the Council emphasized that section 12(b)(2) does not prohibit agencies from negotiating procedures which management will observe in reaching the decision or taking the promotion action involved, so long as any negotiated procedures which might result do not interfere with the exercise of the right reserved under section 12(b)(2) and do not conflict with applicable laws and regulations.

Accordingly, the agency head's determination was sustained in part and set aside in part.

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

Lodge 2424, IAM-AW

and

FLRC No. 72A-18

Kirk Army Hospital and Aberdeen
Research and Development Center,
Aberdeen, Md.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

Petitioner represents wage grade employees in two separate bargaining units at the Aberdeen Research and Development Center (ARDC) and at the Kirk Army Hospital (KAH). During separate negotiations with these activities disputes arose as to the negotiability of portions of union proposals entitled "Non-supervisory Wage Grade Promotions Within the Unit" (proposed both at ARDC and KAH), and "Placement, Rehiring and Promotion of Employees Affected by Reduction in Force" (proposed only at KAH). The circumstances surrounding these disputes are as follows:

ARDC and KAH are Department of the Army "tenant" activities located at the Aberdeen Proving Ground (APG), an Army "host" installation. That is, APG provides the activities with physical accommodations and various house-keeping and administrative services. However, the "tenant" activities are organizationally distinct from APG and do not report through the commanding officer of APG in the Army's chain of command.^{1/}

Army policy requires that "all civilian personnel functions at an Army installation normally will be administered through one civilian personnel office. This office will provide civilian personnel services for all Army activities located at the installation" ^{2/} Accordingly, the APG civilian personnel office provides personnel administration services for the more than 8,700 employees of APG and its 18 "tenants" (including ARDC and KAH). This arrangement is documented by servicing agreements between the head of APG and the respective heads of ARDC and KAH. Among other

^{1/} According to the agency, the commanding officer of KAH reports through Headquarters, First Army while the respective commanding officers of both ARDC and APG report through the Army Materiel Command.

^{2/} Civilian Personnel Regulation (CPR) 200, Chapter 254.1-2a(2), dated 15 November 1971.

things, these agreements provide that "Employees of the serviced activity will be covered in the promotion and Placement Program of the servicing installation" The local merit promotion regulation, issued by the head of APG, reflects this arrangement. It states that the directive is "applicable to the Civil Service employment of all activities at this installation."

Higher-level Army policy, with respect to the matter of promotion plans at installations where there are personnel administration servicing arrangements, provides for a "Standard Practice" and a "Discretionary Practice." The former calls for an installation-wide plan, such as the one promulgated by the APG regulation. The latter provides for the negotiation of separate promotion plans at serviced activities if, among other circumstances, there are "exclusively recognized bargaining units in either [serviced or servicing activities] with whom plans may be negotiated" ^{3/}

During negotiations with ARDC, the union proposed an article concerned with promotion procedures covering unit positions. The proposed article expressly states that its provisions shall govern in the event of conflict with the local installation-wide merit promotion procedures established by the APG regulation.

During separate negotiations with KAH, the union proposed an identical article and, also, another concerning employees affected by reduction in force. A single section of the latter is before us. It concerns repromotion of employees who had accepted demotion voluntarily in lieu of reduction in force.

When disputes as to the negotiability of these proposals were referred to the agency head for his determination, the Department of Defense determined that: (1) numerous sections of the wage grade promotions article are non-negotiable because they conflict with provisions of the installation-wide APG promotion plan which is controlling; ^{4/} (2) certain other sections of the wage grade promotions proposal conflict with sections 11(a), 11(b) and 12(b) of the Order; and, (3) section 4 of the proposal dealing with employees affected by reduction in force conflicts with section 12(b) of the Order.

3/ CPR 200, Chapter 254.2-5c(2), dated 15 November 1971.

4/ Besides finding them to be barred from negotiations by the APG regulation, the agency also determined that certain sections of the wage grade promotions proposal deal with aspects of Civil Service Commission requirements concerning the "Job Qualification System for Trades and Labor Occupations." However, it found no conflict between the proposals and the CSC requirements. Nonetheless, the agency head found each such section to be nonnegotiable because "It deals with matters which are prescribed by the Commission" In our opinion, this agency head determination of nonnegotiability not grounded on a finding that the proposal "violates" or conflicts with any appropriate authority is, on its face, improper. The limiting language of section 11(a), i.e., ". . . so far as may be appropriate under applicable laws and regulations, including the policies set (cont'd)

The union appealed to the Council, disagreeing with the agency's determinations and asserting that they conflict with CSC regulations and the Order.

The Council accepted the union's appeal since it met the conditions for review prescribed in section 11(c)(4) of the Order. The agency filed a document in lieu of a brief (hereinafter referred to as the agency brief).

Opinion

Of the several issues presented in this case, the broadest, touching all but a few of the disputed provisions in the union's proposals, concerns whether, under section 11(a) of the Order, the servicing, "host" installation's merit promotion regulation, as interpreted by the agency head, may properly limit the scope of negotiations on the matters covered by that directive at the serviced, "tenant" activities.^{5/} The other issues raised involve questions as to whether certain other sections of the proposals, individually, are encompassed by the bargaining obligation of section 11(a) of the Order; infringe upon rights reserved to management by section 12(b) of the Order; or cover matters excluded from the agency's obligation to bargain by section 11(b) of the Order.^{6/}

The grounds upon which the agency based its determinations of nonnegotiability will be reviewed separately below.^{7/}

4/ (cont'd)

forth in the Federal Personnel Manual," must be read in conjunction with the grounds upon which a union may appeal to the Council from an agency determination of nonnegotiability stated in 11(c)(4). That is, as it pertains here, when the union disagrees with such determination that a proposal would "violate" the regulation of appropriate authority outside the agency. Otherwise, agency heads could make unappealable and thus, in effect, final determinations of nonnegotiability, a result not contemplated by the Order.

5/ All sections so affected are in proposed article XVII, "Nonsupervisory Wage Grade Promotions Within the Unit." They are reproduced in an Appendix to the opinion.

6/ The proposed sections as to which these issues are raised are quoted in the opinion.

7/ In its brief, the agency contended that, because of the small number of employees at the activities relative to the installation, separate negotiated promotion plans for ARDC and KAH would be too "fragmented" and, thus, are "effectively ruled out by the criteria established by the Civil Service Commission in Federal Personnel Manual Chapter 335 and by the Department of the Army in its Civilian Personnel Regulation 300, Chapter 335." However, we think contentions of such a general nature, unsupported by specific reference to provisions violated, would not be sufficient

(cont'd)

I. Article XVII: "Nonsupervisory Wage Grade Promotions Within the Unit"
(proposed at ARDC and KAH).

1. The APG regulation as a bar to negotiations under section 11(a).
The agency determined that numerous sections of this proposal conflict with the APG plan and are nonnegotiable because the respective commanding officers of the serviced, "tenant" activities:

. . . do not have discretion to negotiate separate promotion plans covering the employees in the IAM units, but are bound by the servicing agreements^{8/} and by the APG Regulation which establishes a Merit Promotion Plan applicable to employees at all activities on the installation. [Emphasis and footnote added.]

In its petition to the Council, the union claimed that the APG regulation as interpreted by the agency head, in effect, violates the bargaining obligation of section 11(a) of the Order. Thus, the question presented by this aspect of the case is whether the agency's determination is proper and should be sustained, or whether, as the union contends, such determination improperly interprets the bargaining obligation imposed by section 11(a) of the Order and should be set aside.

The bargaining obligation established by section 11(a) is expressly limited, among other ways, by the phrase "applicable laws and regulations, including . . . published agency policies and regulations."^{9/} The Council has indicated

7/ (cont'd)

basis to find this matter nonnegotiable. Also, these contentions seem to address the appropriateness of the bargaining units involved rather than the negotiability of the union's proposals. Our review of the FPM revealed no provision which would prohibit negotiation of a promotion plan by virtue of the nature of a bargaining unit. Moreover, the agency head did not rely on these grounds in his determination.

8/ The agency conceded, in its brief, that a servicing agreement "does not, per se, restrict the authority of . . . [the commanding officer of a "tenant" activity] or the scope of negotiation between him and a union representing his employees." Accordingly, the Council considers the agency to have withdrawn its reliance on the servicing agreements as a bar to negotiations.

9/ Section 11(a) provides in relevant 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, including policies set forth in the Federal Personnel Manual, published agency policies and regulations . . . and this Order

in previous decisions that this section of the Order, by reference to such policies and regulations as an appropriate limitation on the scope of negotiations, fully supports the statutory authority of the agency head to issue regulations^{10/} for the operation of his department and the conduct of his employees. Further, the Council has held that such support extends to those policies and regulations issued for the same purposes by components and subordinate echelons within an agency pursuant to authority delegated from a higher level within the agency.^{11/}

Nonetheless, it must not be supposed that all "published agency policies and regulations" are "applicable . . . regulations" within the meaning of the limiting language of section 11(a) so that they may properly limit the scope of negotiations in every set of circumstances. The clear import of the Council's decision in the Merchant Marine Academy case^{12/} is to the contrary.

The Merchant Marine decision concerned a higher-level agency regulation which dealt with terms and conditions of employment unique to a particular bargaining unit. As the Council explained in that decision, the meaning of the phrase "applicable laws and regulations, including . . . published agency policies and regulations" in section 11(a), is as follows:^{13/}

. . . the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity. Any other interpretation of the phrase 'published agency policies and regulations' in the context of the Order, which would permit ad hoc limitations on the scope of negotiations in a particular bargaining unit, would make a mockery of the bargaining obligation. For it would mean that a superior official could unilaterally dictate any limit on the scope of negotiations in a particular agency activity merely by publishing instructions to the activity head with respect to personnel policies and working conditions unique to that activity. [Additional emphasis supplied.]

^{10/} See, e.g., Federal Aviation Administration, FLRC No. 71A-57 (May 9, 1973), at p. 6; and Department of Air Force, Sheppard Air Force Base, FLRC No. 71A-60 (April 3, 1973), at p. 8.

^{11/} Department of Air Force, Sheppard Air Force Base, supra note 10 (regulation issued by major subordinate echelon of agency). See, also, 5 U.S.C. 301-302.

^{12/} U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 15, 1972).

^{13/} Id. at 6.

Hence, the decision held that, notwithstanding the validity of the agency regulation for other purposes, it did ". . . not, within the meaning of section 11(a), limit the agency's obligation to negotiate with the recognized union on the union's proposed changes in matters covered by that directive"14/ That is, the regulation relied upon by the agency head was held not to be an "applicable . . . regulation" within the meaning of the limiting language of section 11(a) because it dealt only with terms and conditions of employment at a single subordinate activity of the agency.

It follows a fortiori from the holding of the Merchant Marine decision that a local regulation, issued by an agency activity, is not an "applicable . . . regulation" which properly may limit the local scope of negotiation under section 11(a) of the Order since the regulation would deal only with terms and conditions of employment at that activity. Thus, in terms of the instant case, regulations issued by the respective commanding officer of either ARDC or KAH plainly could not properly preclude the union from bargaining with the issuing activity on otherwise negotiable matters covered by the regulations.

The record in the instant case shows, however, that the regulation in question was not directly issued by the commanding officers of ARDC and KAH, themselves. Instead, in connection with and furtherance of a personnel servicing arrangement, each delegated his personnel management authority, including the authority to issue personnel policy directives, to the commanding officer of APG. The latter, exercising the authority so delegated to him, issued the regulation promulgating the installation-wide promotion plan here at issue. Accordingly, insofar as the APG regulation purports to cover employees in the ARDC and KAH bargaining units, its force derives from the authority delegated to the commanding officer of APG by the ARDC and KAH commanding officers.

However, as already indicated, the commanding officers of ARDC and KAH could not properly limit their own obligations to bargain with the union on otherwise negotiable matters under section 11(a) merely by issuing a regulation. Likewise, in our opinion, the APG merit promotion regulation, unilaterally imposed on the ARDC and KAH bargaining units under the authority delegated by the activity commanding officers in connection with a servicing arrangement, must constitute an equally improper limitation on the scope of bargaining at the activities.

In other words, the delegations, by the activity commanding officers, of their personnel management authority in no way modifies the operation of section 11(a) with regard to actions taken pursuant to such authority. The process of delegation adds nothing to the authority conveyed. Therefore, the APG regulation, which would not qualify as an "applicable . . . regulation," i.e., a proper limitation on the local scope of negotiation, under section 11(a) if self-imposed by the activities' commanding officers, obviously will not become "applicable" merely because it was issued by one to whom those commanding officers delegated their respective authority to promulgate such a regulation.

14/ Id. at 7.

Accordingly, based on the foregoing considerations, we find that, notwithstanding the validity of the APG regulation for other purposes, it does not properly limit the agency's obligation to negotiate with the union at ARDC and KAH on matters covered by the directive.

2. The obligation to negotiate matters affecting the rights of non-unit employees under section 11(a) of the Order. Section 2b of the union's wage grade promotions proposal provides:

Current Army employees in the competitive service outside the minimum area may submit voluntary applications at any time for consideration for promotion or for positions with potential for promotion provided they apply on Standard Form 171, such application is not for a specific vacancy, and such voluntary application is not for any position for which recruitment action has already been initiated. Such applications shall be effective for only one year.

The agency determined that this section of the union's proposal is non-negotiable on the grounds that the ARDC and KAH activity heads are not obligated to bargain matters dealing with the rights of activity personnel not included in the unit and, in substance, have no authority to bargain matters dealing with the rights of Army personnel not employed by ARDC or KAH.

The union argues, in effect, that the proposal covers matters within the activity heads' bargaining obligations under section 11(a) of the Order; unit positions would be affected; and, the proposal is "compatible" with Federal Personnel Manual requirements.

As previously noted, section 11(a) creates a limited mutual obligation to bargain with respect to "personnel policies and practices."^{15/} The sole question concerning us here is whether such obligation encompasses the union's proposal which, although plainly concerned with agency personnel policies and practices, deals, as characterized by the agency, with the rights of activity employees who are not in the bargaining unit and other Army employees who are not employed by the activities where the units are located.

The proposal would establish a procedure for the acceptance of voluntary applications from agency employees outside the minimum area of consideration. The FPM directs agencies to allow the submission of such applications.^{16/} This requirement is expressed so that, in large part, the development of detailed procedures is left to the discretion of each agency.

^{15/} Fn. 9, supra.

^{16/} FPM Chapter 335.3-3d(3).

Clearly, the overall process of choosing from among available options in designing the agency's procedure would, in effect, determine the distinctive framework within which unit employees would have to compete with outside applicants for unit jobs. Hence, the agency's characterization of the proposal, reiterated above, fails to take into account the relevant impact the proposal would have on the unit, itself.

In our opinion, it is manifest that the matters dealt with by the union's proposal, i.e., the procedural context in which unit employees must compete for unit positions, fall squarely within the ambit of agency "personnel policies and practices" which, unless otherwise excepted or prohibited, are within the bargaining obligation of the agency under section 11(a) of the Order. Furthermore, we note that a particular proposal directly affecting legitimate and important interests of a bargaining unit is not rendered nonnegotiable merely because it, also, would have some effect on the rights of non-unit employees of the agency. Many proposals concerning "minimum areas of consideration," commonly recognized to be bargainable and which the agency acknowledges to be negotiable matters under Army policy, fall in this category.

Accordingly, we find that the proposal falls within the meaning of agency "personnel policies and practices" made negotiable by section 11(a) of the Order. Moreover, since the agency neither referred to nor relied upon published agency policy to support its determination we are not presented with the question and, accordingly, make no ruling as to whether or to what extent such agency directive might properly limit negotiations on the proposal. Furthermore, we find nothing in the record which indicates that the proposal conflicts with regulations of appropriate authority outside the agency or with applicable law or the Order so as, thereby, to be excluded from the bargaining obligation. Hence, we conclude that the proposal is a negotiable matter under section 11(a) of the Order.

3. Assignment of a management responsibility: The effect of section 11(b) of the Order. Section 4d of the union's wage grade promotions proposal provides:

The screening of candidates to determine basic eligibility shall be a function of the Civilian Personnel Division and the rating panel.

The agency head determined that the quoted provision ". . . purporting to assign this responsibility . . . is non-negotiable." He indicated however, that there would be no objection to including in the agreement a factual statement reflecting how or by whom the screening function is performed.

The union contends that this section of their proposal is a restatement of language included in the APG promotion plan and is, therefore, merely a factual statement. But, at the same time, the union argues, in effect, that the assignment of this function is a negotiable matter.

In our opinion, the language of the proposal is more than merely a statement of fact and does, as the agency head noted, purport to assign responsibility for performing an agency function. Thus, in effect, it is a proposal to bargain with respect to the functional structure of the agency.

Section 11(b) of the Order excepts from the agency's obligation to bargain matters with respect to ". . . its organization . . ." As the Council explained in the Griffiss Air Force Base case, the administrative and functional structure of an agency, i.e., the systematic grouping of the agency's work, comprises the agency's "organization" as that term is used in section 11(b).^{17/}

Accordingly, we find that this section of the union's proposal would require the agency to bargain on matters with respect to its "organization" and, therefore, conflicts with section 11(b) of the Order.

4. Promotion procedure: The effect of sections 11(b) and 12(b) of the Order. The union's wage grade promotions proposal, section 6b, provides:

Should any personal relationship exist between the selecting supervisor and any referred candidates the supervisor shall refer the certificate to the next higher supervisor for selection.

The agency head determined that this section of the union's proposal would apply only to supervisors, who are neither represented by the union nor in the bargaining unit covered by the agreement. He further determined that the proposed requirement would infringe on agency rights under sections 11(b) and 12(b)(2) of the Order, to assign responsibility for promotion selection and to select for promotion.

The union argues that the proposal would protect unit employees from possible favoritism and does not infringe on management's rights under the Order.

a. The effect of section 12(b)(2). The language of section 12(b)(2) manifests the intent to bar from agreements provisions which infringe upon

^{17/} Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), at p. 8.

management officials' exercise of their existing rights to take the personnel actions specified therein, in this case, to promote employees.^{18/}

In connection with applying this section of the Order in the V.A. Research Hospital case, the Council stated:^{19/}

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. However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

In that case, the union's proposal would have established a procedure whereby the union could obtain higher-level management review of a promotion selection before that action could become final. In those circumstances, the Council considered that the proposal did ". . . not require management to negotiate a promotion selection or to secure union consent to the decision."^{20/}

Here, the proposal would establish a procedure whereby, under particular circumstances, the promotion selection itself would be made at the next

18/ Section 12 provides in relevant part:

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

19/ Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), at p. 3.

20/ Ibid.

higher management level. Although this proposal, obviously, is distinguishable from the one in the V.A. case, we think such distinction is not meaningful for the purpose of applying section 12(b)(2). This proposal, as well as the one in V.A., would not require management to negotiate a promotion selection; neither would it interfere with the reservation to management of ultimate decision making and action authority. Furthermore, the agency does not argue, nor does it otherwise appear, that the proposal would have the effect of interfering with such reserved authority by causing unreasonable delay in the selection. Accordingly, we find that section 12(b)(2) of the Order does not bar negotiations on this section of the union's proposal.

b. The effect of section 11(b) of the Order. Section 11(b) provides in relevant part:

. . . the obligation to meet and confer does not include matters with respect to the . . . [agency's] 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 agency head determined, also, that this part of the union's proposal conflicts with section 11(b) because it infringes on the right of agency management ". . . to decide to whom the responsibility for selection will be assigned."

However, we do not find this characteristic present in the proposal. On the contrary, the proposal contains no language which would prevent the agency from assigning to any of its positions the responsibility to make promotion selections. It merely would establish a procedure, operative only upon the occurrence of a contingency (the existence of a "personal relationship"), briefly suspending the authority of a particular incumbent to perform the assigned responsibility under circumstances which might give the appearance of favoritism.^{21/} Thus, contrary to the agency head's characterization of the union's proposal, in our opinion the proposal would not have the effect of interfering with management's right to assign the responsibility for selection.

^{21/} The union in its petition alludes to material contained in the Federal Personnel Manual with respect to protection of the merit process from favoritism arising out of personal relationships. In this regard, the FPM provides in Chapter 335.3-9, as follows:

b. Prohibition on nepotism and personal favoritism. Agencies must adopt adequate procedures to insure that promotions are not based on personal relationship or other types of personal favoritism or patronage.

Accordingly, in view of the erroneous characterization of the union's proposal by the agency and the particular circumstances of this case, we find that the proposal does not pertain to matters excepted from the agency's obligation to bargain by section 11(b).^{22/}

II. Article XXIX: "Placement, Rehiring and Promotion of Employees Affected by Reduction in Force" (proposed at KAH).

The agency determined that section 4 of this union proposal ". . . would place restrictions on management's right to select for promotion" under section 12(b)(2) of the Order and, therefore, is nonnegotiable.^{23/}

The union argues that its intent is not to determine who will be promoted, but to establish a procedure as to how such determination will be made. It further argues that the agency determination as to the nonnegotiability of this proposal conflicts with the Order and the FPM.

22/ Cf., Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), at pp. 5-6.

23/ The union's proposal provides:

Section 4. In the case of demotions taken voluntarily in lieu of separation of a reduction in force action, the Employer will promote in inverse order of their standing on the reduction in force register at the time of the demotion the employee so affected to the position from which he was demoted (or one exactly like it) when such a position becomes vacant and is to be filled. The only acceptable bases for non-promotion are:

- a. The employee does not meet medical requirement.
- b. An officially documented unsatisfactory performance rating.
- c. The employee is not qualified. The employee will be considered qualified if he meets the current minimum qualifications requirements.

Eligibility for repromotion to a position from which demoted (or one exactly like it) will extend for a period of two (2) years. If the position is to be filled after a two (2) year period, the employee who took a demotion in lieu of a RIF will be promoted back to his former position (or one exactly like it) with the Employer furnishing a retraining program, if required.

We have previously noted that section 12(b)(2) dictates that management officials retain their existing authority to promote employees. Moreover, since the emphasis of 12(b)(2) is on the reservation of management authority to decide and act on this matter, no right accorded to a union may be permitted to interfere with this authority.

The union's proposal covers employees who voluntarily accepted a lower-grade position in lieu of reduction in force, i.e., who were demoted without personal cause. With respect to the repromotion rights of such employees, the FPM plainly specifies that, even though they are entitled to "special consideration," they are "not guaranteed repromotion."^{24/} In other words, a selection decision remains to be made by the selecting official.

We think the language of this proposal, through the use of the phrases "will promote" and "will be promoted" clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had been made to fill a position by promotion. The proposal would deprive the selecting official of the discretion inherent in making such a decision.

Accordingly, we find the proposal to be in conflict with the right to promote employees reserved to management by section 12(b)(2) of the Order.

However, as we have indicated in prior Council decisions, section 12(b)(2) does not prohibit agencies from negotiating procedures which management will observe in reaching the decision or taking the promotion action involved, so long as any negotiated procedures which might result do not interfere with the exercise of the right reserved under 12(b)(2) and do not conflict with applicable laws and regulations.^{25/}

Conclusions

For the foregoing reasons, we find that:

1. The agency head's determinations as to the nonnegotiability of the following union proposals were proper:

- (a) Article XVII, section 4d; and,
- (b) Article XXIX, section 4.

^{24/} FPM Chapter 335.4-3c(2).

^{25/} See, e.g., Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), at p. 3.

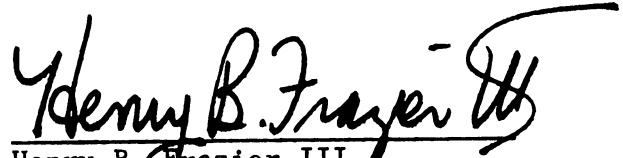
Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, these determinations of the agency head are sustained.

2. The following union proposals are negotiable matters under section 11(a) of the Order: Article XVII, section 1; 2a-b; 3a-b; 4e; 5c-d; 6a-b; 7a-e. 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 on the record before us, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of Executive Order 11491.

Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, we find that the agency head's determinations that these proposals are nonnegotiable are improper, and the determinations must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **SEP 17 1973**

APPENDIX

Sections of union's proposed Article XVII which the agency head determined to be nonnegotiable, in whole or in part, based on the APG regulation.

Article XVII. Nonsupervisory Wage Grade Promotions Within the Unit

Section 1. This Article establishes procedures for promotion for all Career and Career-Conditional employees covered by exclusive recognition by the Union to positions within the unit as defined by this agreement.

Section 2.a. The minimum area of consideration for locating candidates for positions covered by this Article will be all activities of the installation and those elements located elsewhere but serviced by the installation Civilian Personnel Officer. For temporary promotions see Article XVIII.

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Section 3.a. Vacancies to be filled shall be announced by an official vacancy announcement issued by the Employer which shall be posted on all official bulletin boards for at least ten (10) calendar days prior to the closing date. Applications will not be considered if received in the Civilian Personnel Division after the closing date unless justifiable cause can be shown and accepted by the Civilian Personnel Division with concurrence of the rating panel. Ten (10) copies of such announcements will be furnished to the President of Local 2424, IAM, by the APG Distribution Center, Mail Distribution, at the same time distribution is made for posting.

Section 3.b. As a minimum all vacancy announcements will contain the following information:

- (1) Title, series and grade of position.
- (2) Promotion Potential of the position, if known.
- (3) Organizational location of position.
- (4) Minimum area of consideration.
- (5) Description of duties and responsibilities.
- (6) The minimum qualifications for eligibility established or approved by the Civil Service Commission, including written test requirements and test rating standards.
- (7) Selective placement factors, if any.
- (8) The evaluation methods to be used and the numerical scores required for "highly qualified."
- (9) The number of vacancies, if known, to be filled at the time of issuance and a statement that future selections for promotions may be made from the register established as a result of the announcement.
- (10) The length of time the register will be in effect.
- (11) What the employee has to do to apply.
- (12) Supervisory appraisals will be used and will be discussed with the employee prior to forwarding to the Civilian Personnel Division.
- (13) EEO statement will be included.

Section 4.e. Candidates will be rated to determine whether they meet the minimum standards for eligibility by evaluation of experience and training. Evaluation under job element procedures only will be used. The credit on all elements shall be based on the evaluation of all valid information as it relates to experience, training, awards, etc. Supervisor's appraisal shall not be the sole basis for determining the credit on the screen-out element. Written test will not be used to determine basic eligibility, unless required by the Civil Service Commission.

Section 5.c. The evaluation of each candidate shall be based on:

(1) Written tests: Tests will not be used unless the test is required or approved by the Civil Service Commission.

(2) Supervisory appraisal of performance: One appraisal will be obtained for each eligible candidate from his current supervisor if the candidate has been under his supervision for the past year, or his most recent supervisor who has supervised him for one year. The appraisal shall be made on a form as set forth at the end of this Article. This form may be revised when mutually agreed to by the Employer and the Union. The Job Element Column of the appraisal form shall contain the same elements as those on the rating schedule. If "Unable to Judge" is marked, the appraisal for that particular element shall be disregarded. The appraising supervisor shall discuss the appraisal with the employee prior to forwarding same to the Civilian Personnel Division. A copy of the appraisal may be obtained by the employee from the supervisor upon request. It is agreed that supervisor appraisals will not be utilized in evaluating an employee(s) potential.

(3) Experience: Experience will be evaluated from the employee's application and Official Personnel Folder and supplemental questionnaires, where sufficient information is not available from the other sources. If a supplemental questionnaire is utilized, it must be completed by all candidates competing for the position. Such evaluation shall consist of the type and quality of experience the candidate has in relation to the requirements of the position to be filled. Length of directly related qualifying Federal experience and length of service (based on Federal Service Computation date) will in that order be used to break ties, i.e., the employee with the most experience or service shall appear on the register above other employees he is tied with.

(4) Awards: Due weight must be given to any awards received by candidates. Such information shall be obtained from the candidate's application and Official Personnel Folder.

(5) Training, Self-development, and Outside Activities: Evaluation of this factor shall be job related and shall be obtained from the candidate's application and Official Personnel Folder.

(6) Personal characteristics, when required.

Section 5.d. All applicants will be rated in accordance with a rating schedule established by the rating panel in conjunction with the Civilian Personnel Division. Elements, in addition to those in CSC XII8 C for each family of trades, may be added to the rating schedule only when necessary to properly evaluate a candidate for a specialized position. Elements not pertinent to the position evaluation may be deleted. The rating schedule shall provide for a means to establish a numerical score for each candidate. Each candidate shall be assigned a numerical score in accordance with the rating schedule and only those who attain a score of 80 or more shall be placed on a register and in descending numerical order. Each applicant shall be notified of his score and his relative standing on the register at the time the register is established.

Section 6.a. Selection for filling such vacancies shall be made from a certificate containing the five (5) highest candidates on the register as a result of the evaluation process. In the event there are only three (3) or four (4) candidates on the register, all candidates will be certified. If there are less than three (3) candidates, the area of consideration will be systematically extended. Extension may be modified as follows:

(1) If past experience indicates that one or more of the successive extensions will not produce a minimum of best qualified candidates, or if broad geographic extension is not practicable (e.g., for most trades and labor positions) the extension considered likely to be most productive or most beneficial to the government will be initially used.

(2) If the minimum area has produced at least one highly qualified available candidate acceptable to the selecting official, and there is reasonable evidence that the candidate(s) would be among the best qualified if the area of consideration was extended, extension of area is not required.

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Section 7.a. Except for continuously open registers the Employer agrees to renew all promotion registers before selecting from them if the registers have been in existence for more than one year. Each promotion register must have an establishment date.

Section 7.b. The Employer agrees that promotion registers shall not be terminated during the one-year life of the registers.

Section 7.c. Announcements for establishing registers may be opened on a continuous basis in cases of a heavy turnover in the position or where experience has indicated it is difficult to obtain highly qualified candidates.

Section 7.d. All candidates placed on a promotion register will be selectable providing they are within reach for certification.* Candidates receiving a score of 80 or higher shall be considered highly qualified and only those will be placed on the register.

Section 7.e. Employees who are new to the minimum area of consideration will have 30 calendar days to file for any announcement which closed prior to his entry on duty provided the register is still active. In this case, the employee's rating shall be computed as of the closing date of the announcement.

*Corrected version. In its brief the agency indicated:

If the word 'selected' in the first sentence of this section is considered to have been changed to 'selectable,' in accordance with the IAM's statement in their April 5 petition, we have no further objection to the sentence.

American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator). The parties submitted to arbitration both a question as to the arbitrability of the meaning of the contractual term "priority consideration" and a grievance alleging that the grievant had been passed over for promotion in violation of the merit staffing procedures established by the collective bargaining agreement. The arbitrator, after deciding that the dispute over the meaning and applicability of the contractual remedy of "priority consideration" was arbitrable, determined that the grievant had been denied the "full and fair consideration" required by the agreement and therefore was entitled to the contractual remedy of "priority consideration." The agency took exception on the ground that the arbitrator exceeded his authority under the agreement for various reasons asserted in its petition for review.

Council action* (September 17, 1973). The Council determined that the agency's petition failed to meet the requirements for review set forth in section 2411.32 of its rules of procedure. Accordingly, the Council directed that review of the agency's petition be denied.

*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

September 17, 1973

Messrs. Thomas E. Angelo
and Lawrence Z. Lorber
Attorneys of the Solicitor
U.S. Department of Labor
Washington, D.C. 02010

Re: American Federation of Government
Employees, Local 12 and U.S.
Department of Labor (Daly, Arbitrator),
FLRC No. 72A-55

Gentlemen:

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

The grievant, one of three candidates passed over for promotion to an Economist GS-13 position, filed a grievance alleging a violation of the merit staffing procedures established by the collective bargaining agreement. The grievance examiner recommended a finding in favor of the grievant and that he be given the remedy, provided for in the agreement, of "priority consideration for the next appropriate vacancy, before candidates under a new promotion or other placement action are considered." The grievance examiner went on to interpret this provision in the grievant's case to mean "that he shall be offered appointment to the next vacancy of a GS-13 position for which he is qualified." The recommendations of the grievance examiner were rejected by the agency. The union took the grievance to arbitration.

The arbitrator noted in his decision that although the parties were not in total agreement as to nature of the issue, they did agree on one phase of the issue: "Whether the question of priority consideration is a proper subject for consideration at this arbitration." Prior to the arbitration hearing the agency had pointed out to the arbitrator and to the union that another arbitrator (Samuel H. Jaffee) had ruled in an award issued December 22, 1972 in an earlier case between the same parties on the meaning of the term "priority consideration" found in the parties' negotiated agreement. The agency contended that this earlier interpretation of the agreement was binding on the agency, the union, and the arbitrator in the present case. Consequently, the agency

contended that the meaning of the contractual remedy of "priority consideration" had become a nonarbitrable matter.

In his decision the arbitrator first dealt with the issue of "arbitrability," i.e., the issue on which the parties had agreed: whether the question of "priority consideration" was a proper subject for consideration by him. He determined that he was authorized to interpret and apply the remedy of "priority consideration" as provided for in the negotiated agreement, and announced his own interpretation of that term. This interpretation was identical to that announced by the earlier arbitrator, namely, that the grievant must be considered but not necessarily selected for the next appropriate vacancy before other candidates can be considered. As to the merits, he determined that the grievant had been denied the "full and fair consideration" intended by the agreement and that the grievant was therefore entitled to the contractual relief of "priority consideration." Your petition takes exception to the arbitrator's award on the ground that the arbitrator exceeded his authority under the agreement for the various reasons discussed later.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based on 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."

First, your petition, in effect, asks the Council to set aside that portion of the arbitrator's decision in which he determined that the dispute over the meaning and applicability of the contractual remedy of "priority consideration" was "arbitrable." In support of this exception, you assert that the arbitrator exceeded his authority under the agreement for the reason that he ruled on a "question of arbitrability" which should have been referred to a member of the Civil Service Commission under the amendments to sections 6 and 13 of E.O. 11491. However, you do not contend that the grievance was not subject to arbitration under the agreement which is the question provided for referral to the Assistant Secretary, or here a member of the Civil Service Commission, under section 13(d) of the Order. Moreover, whether the question of "priority consideration" was a proper subject for consideration by the arbitrator was, by agreement of the parties, submitted to the arbitrator and you failed to initiate any request for ruling by a member of the Civil Service Commission of the issue involved. Finally, it may be noted that the interpretation of "priority consideration" announced by the arbitrator in this case was identical to that announced by the earlier arbitrator and to that sought by the agency. Therefore, your exception to that portion of the arbitrator's

decision relating to "priority consideration" provides no basis for review under section 2411.32 of the Council's rules of procedure.

Next, your petition, in essence, requests that the Council set aside the arbitrator's determination that, under his interpretation of the agreement, the grievant was denied the "full and fair consideration" prescribed by the agreement. You contend that the arbitrator exceeded his authority under the agreement for the reason that this determination assertedly was based, in whole or in part, on requirements not found within the agreement or related regulations or on provisions of the agreement which were not considered in the grievance procedure (e.g., agreement provisions calling for consultation with the union in the naming of individuals to be placed on the lists of persons from whose ranks merit staffing panels are to be constituted, and for the panel members to be given "training" and a "copy of this article.") However, the Supreme Court has emphasized that "If the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). Therefore, a challenge to the arbitrator's interpretation of the agreement does not assert a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations, and provides no basis for acceptance of your petition for review under section 2411.32 of the Council's rules.

Your final contention that the arbitrator exceeded his authority under the agreement is based on the asserted confusion in the arbitrator's rationale in his opinion. However, as the courts have indicated, it is the award rather than the conclusion or the specific reasoning employed that a court must review. See e.g., American Can Co. v. United Paperworkers, AFL-CIO, Local 412, — F. Supp. —, 82 LRRM 3055, 3058 (E. D. Pa. 1973). Moreover, the arbitrator's ultimate determinations on the merits of the grievance are clear and unambiguous, namely:

However, because of the irregularities in Panel procedures and in the presentation of material before the Panel, it must be concluded that the consideration given the Grievant was not in accord with the "full and fair consideration" intended by the Labor Agreement. Therefore the Grievant must be given the only remedy provided a passed-over employee by the Labor Agreement: "priority consideration for the next appropriate vacancy".

Thus, your petition, as based on the arbitrator's rationale, does not assert a ground similar to those upon which challenges to labor arbitration awards in the private sector are sustained by courts, and provides no basis for acceptance of your petition for review under section 2411.32 of the Council's rules.

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

By direction of the Council.*

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H".

Henry B. Frazier III
Executive Director

cc: C. M. Webber
AFGE

*The Secretary of Labor did not participate in this decision.

NFFE Local 1636 and New Mexico National Guard. This negotiability dispute involved a union proposal that technicians employed by the New Mexico National Guard not be required to wear the military uniform while they are performing civilian technician duties. (Technicians, by statute, are required to become members of the National Guard in a military capacity.)

Council action (September 17, 1973). The Council held, contrary to the union's contentions, that the regulation relied upon by the agency head in his determination of nonnegotiability is not violative of statutory provisions. Accordingly, the Council sustained the agency head's determination.

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

NFFE Local 1636

and

FLRC No. 73A-13

New Mexico National Guard

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (NFFE Local 1636) represents a unit of National Guard technicians employed by the New Mexico National Guard. These technicians must, as a prerequisite to their civilian employment with the Guard, become members of the Guard in a military capacity, pursuant to 32 U.S.C. 709(b).^{1/} As a result, these technicians are also in the excepted service under 32 U.S.C. 709(d).^{2/}

During the course of collective bargaining negotiations between the union and the activity, the union made the following proposal:

That civilian technicians will not be required to wear the military uniform appropriate to their service in the performance of their civilian duties in the Army and Air National Guard Technician Program as established under the National Guard TPP [Technician Personnel Pamphlet] 904.

The activity asserted that the proposal is nonnegotiable because it violates Technician Personnel Manual 200, Chapter 213.2, Subchapter 2, para. 2-4

^{1/} 32 U.S.C. 709(b) provides in pertinent part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

^{2/} 32 U.S.C. 709(d) provides in pertinent part as follows:

[A] position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(hereinafter referred to as TPM 200).^{3/} Upon referral for negotiability determination, the agency head (in this case, the Chief of the National Guard Bureau) upheld the activity's position, based on the finding that the subject proposal is indeed violative of TPM 200.^{4/} The union appealed to the Council, seeking review of this agency head determination, pursuant to section 11(c)(4)(ii) of the Order. The crux of the union's appeal to the Council is that TPM 200, as interpreted by the agency head, is violative of applicable law.

Opinion

In its petition for review, the union asserts that TPM 200, as interpreted by the agency head, is violative of 10 U.S.C. 771 and 772(a)^{5/}; 32 U.S.C.

^{3/} TPM 200, dated September 7, 1972, deals in part with the wearing of the uniform by National Guard technicians. Insofar as is relevant to this case, it provides as follows:

2-4. WEARING OF THE UNIFORMS

Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties. When the uniform is deemed inappropriate for specific positions and functions, adjutants general may authorize other appropriate attire.

^{4/} In his determination, the agency head noted:

Under paragraph 2-4, of the Technician Personnel Manual, the authority of the Adjutants General to authorize exceptions to the uniform requirement is limited to 'specific positions and functions' for which the uniform is deemed inappropriate. Adjutants General under this regulation, do not have authority to agree to any general relaxation of the uniform requirement, as proposed by NFFE. Although an Adjutant General may agree to a specific exception to this requirement, he may do so only where he determines that the wearing of the military uniform would be inappropriate in a particular situation or under particular conditions.

^{5/} 10 U.S.C. 771 provides as follows:

§ 771. Unauthorized wearing prohibited.

Except as otherwise provided by law, no person except a member of the Army, Navy, Air Force, or Marine Corps, as the case may be, may wear --

(cont'd)

702(a)^{6/}; and 18 U.S.C. 702^{7/}. Thus, the issue in the case is whether TPM 200 violates one or more of the above-cited statutory provisions^{8/}

5/ (cont'd)

(1) the uniform, or a distinctive part of the uniform, of the Army, Navy, Air Force, or Marine Corps; or

(2) a uniform any part of which is similar to a distinctive part of the uniform of the Army, Navy, Air Force, or Marine Corps.

10 U.S.C. 772(a) serves as an exception to 10 U.S.C. 771, and provides as follows:

§ 772. When wearing by persons not on active duty authorized.

(a) A member of the Army National Guard or the Air National Guard may wear the uniform prescribed for the Army National Guard or the Air National Guard, as the case may be.

6/ 32 U.S.C. 702(a) provides as follows:

§ 702. Issue of supplies.

(a) Under such regulations as the President may prescribe, the Secretary of the Army and the Secretary of the Air Force may buy or manufacture and, upon requisition of the governor of any State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the National Guard of the District of Columbia, issue to its Army National Guard and Air National Guard, respectively, the supplies necessary to uniform, arm, and equip that Army National Guard or Air National Guard for field duty.

7/ 18 U.S.C. 702 provides as follows:

§ 702. Uniform of armed forces and Public Health Service.

Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than \$250 or imprisoned not more than six months, or both.

8/ In addition to the union's petition for review and the agency's statement of position, there also appears in the case record a motion to dismiss the union's petition, filed by the activity on March 14, 1973, ruling on which was previously reserved by the Council. As grounds for its motion, the activity relies on the alleged untimeliness of the petition, and the assertion

(cont'd)

thereby rendering the regulation invalid as a bar to negotiations on the union's proposal, pursuant to section 11(a) of the Order. The validity of TPM 200 as it relates to each of these U.S. Code provisions will be considered below.

I. 10 U.S.C. 771 and 772(a)

As noted above, these sections provide respectively that only members of the armed forces (i.e., Army, Navy, Air Force, or Marine Corps) may wear the military uniform; and that as an exception to this general rule, a National Guardsman may wear the military uniform prescribed for his particular branch of the National Guard. The union contends that Guard technicians are not authorized to wear the uniform under either of these statutes. First, they are not members of the armed forces branches specified in section 771. Second, in the union's view section 772(a) authorizes Guardsmen to wear the uniform "only . . . during inactive duty for training purposes . . ., as for example for unit training assemblies and for summer camp and/or field training." The union therefore concludes that TPM 200 violates these statutory provisions because the regulation requires Guard technicians to wear the uniform in circumstances not authorized by statute (i.e., during the performance of civilian technician duties). No legal precedent or other authoritative interpretation of 10 U.S.C. 772(a) is advanced by the union in support of its view as to the meaning of this statute.

The agency responds to this argument by claiming that 10 U.S.C. 772(a) neither enumerates the particular circumstances under which the uniform may be worn nor identifies any occasions when it may not be. Rather, it provides only that Guardsmen may wear the uniform.

Consequently, in the agency's view TPM 200 is not violative of this Code section because the regulation concerns itself with specific situations which are not dealt with in the statute.

We are of the opinion that the union's interpretation of 10 U.S.C. 771 and 772(a) is without foundation, and must therefore be rejected. While it is true that National Guard technicians are not members of any of the branches of the armed services specified in section 771, this section must, by its terms, be considered in conjunction with section 772(a), which states simply that a member of the National Guard may wear the military uniform appropriate to his particular branch. Neither a plain reading of section 772(a), nor an examination of the manner in which it has been applied, indicates that the section is intended to delineate those situations in which Guardsmen may or may not wear the uniform. Consequently, TPM 200 cannot be said to be inconsistent with 10 U.S.C. 771 and 772(a), and the regulation is held to be valid with regard to these sections of the U.S. Code.

8/ (cont'd)

that the regulation does not violate applicable law, outside regulation, or the Order. However, it is clear that the petition was timely filed, and the motion is therefore denied as to this ground. As to whether TPM 200 is a lawful regulation, ruling on this issue is made by way of this decision.

II. 32 U.S.C. 702(a)

This section provides essentially that the Secretaries of the Army or Air Force may, upon requisition of a State Governor, issue to the appropriate branch of the State National Guard "supplies necessary to uniform, arm, and equip that [branch of the Guard] for field duty." The union contends that this section permits Guardsmen, including technicians, to wear the uniform only during field duty. Hence, because TPM 200 mandates that the uniform be worn during the performance of civilian technician duties, the union concludes that the regulation violates this statutory provision. Again, however, the union does not advance any legal precedent or other authoritative interpretation of 32 U.S.C. 702(a) to support its position as to the meaning of this section of the U.S. Code.

The agency responds to this contention by again arguing that this Code section does not impose limitations on when the uniform shall be worn. Rather it simply authorizes the procurement and issuance of those supplies, including uniforms, which are necessary to prepare Guardsmen for field duty, without specifying the circumstances in which the uniform may or may not be worn.

We are of the opinion that the union's interpretation of 32 U.S.C. 702(a) is incorrect. By its terms, the statute is a grant of authority to the Secretaries of the Air Force and the Army, enabling them to issue field duty supplies, such as uniforms, to the National Guard. At no point does it describe, much less restrict, the circumstances in which uniforms so issued may be worn. Consequently, the regulation, TPM 200, deals with a matter which is not addressed in 32 U.S.C. 702(a), and cannot be said to be violative of that Code section. The union's argument in this regard is therefore rejected.

III. 18 U.S.C. 702

This section provides that whoever wears the military uniform, or a distinctive part thereof, "without authority," will be subject to fine and/or imprisonment. The union argues that TPM 200, by requiring technicians to wear the uniform in circumstances not authorized by 10 U.S.C. 771 and 772(a), will cause technicians to be subject to punishment under this section. For this reason, the union concludes that the regulation is violative of 18 U.S.C. 702.^{9/} However, the union cites no instances in which a technician has been charged with or prosecuted for, much less convicted of, a violation of 18 U.S.C. 702 for wearing the military uniform, as support for its argument as to the meaning of this section of the Code.

^{9/} The agency did not respond to this union contention in its statement of position.

We are of the opinion that this union argument as to the applicability of 18 U.S.C. 702 to this case is without merit. The imposition of punishment under this section is predicated on a finding that the military uniform has been worn "without authority." However, as indicated above, members of the National Guard are authorized, pursuant to section 772(a) of Title 10, to wear the military uniform. Since technicians must be members of the National Guard, they would not appear to be subject to punishment under 18 U.S.C. 702, and as a result TPM 200 cannot be said to be violative thereof.

IV. 32 U.S.C. 709(b)

In addition to the above-cited statutory provisions, the union, in a response to the agency's statement of position, claims for the first time that TPM 200 violates 32 U.S.C. 709(b). This Code section provides that National Guard technicians, while so employed, shall be members of the National Guard. According to the union, this provision should be interpreted to require the military uniform to be worn only for "unit training assemblies, or for field training" (i.e., military functions), and not while they are working in their civilian capacity as technicians. Because TPM 200 requires technicians to wear the military uniform while performing technician duties and hence, in the union's view, while working as civilians, the union is of the view that the regulation violates the statute.^{10/}

32 U.S.C. 709(b) is not directed to those situations in which the uniform may or may not be worn. Rather, it simply requires Guard membership of all technicians as a condition of their employment as technicians. Further, research on the subject discloses no support whatsoever for the union's interpretation of this statute, nor has the union offered any such support. As a result, we are of the opinion that the union's argument with regard to this statute must also be rejected.

Conclusion

The issue of whether National Guard technicians should have to wear the military uniform while performing technician duties has apparently led to much controversy. Reasonable men may differ as to the wisdom of the agency regulation (TPM 200). However, it is not the function of the Council under section 11(c) of the Order, to pass upon the wisdom of agency regulations.^{11/} Moreover, it is not the Council's function to pass upon the wisdom of a proposal made by a party during negotiations, such as the union's proposal in this case. The function of the Council in this case is limited, under the Executive Order, to a determination as to whether the agency regulation, as interpreted by the agency head, violates one or more of the statutory provisions cited, thereby rendering the regulation invalid as a bar to negotiations on the union's proposal.


^{10/} The agency did not respond to this union contention in its statement of position.

^{11/} Cf. National Federation of Federal Employees, Local 779 and Department of the Air Force, Sheppard Air Force Base, Texas, FLRC No. 71A-60 (April 3, 1973) at p. 8.

We must find that TPM 200 is not in conflict with the provisions of the U.S. Code relied on by the union for the above-described reasons. Accordingly, the agency head's determination as to the nonnegotiability of the union's proposal, based on the subject National Guard Bureau regulation, was proper.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: **SEP 17 1979**

Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator).

The arbitrator determined that the agency had just cause for issuing a letter of reprimand to an employee, but reduced the reckoning period for the letter from two years to one year. In taking exceptions to the arbitrator's award, the union contended that the arbitrator was biased and failed to follow the standards of courts as to the burden and quantum of proof, and challenged various findings of fact.

Council action (September 17, 1973). The Council determined that the union's petition either failed to assert a ground upon which the Council reviews arbitration awards or, where it did, the petition did not support its assertions with facts and circumstances, as required by section 2411.32 of the Council's rules of procedure. Accordingly, the Council directed that review of the union's petition be denied.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 17, 1973

Mr. Herbert Fuller
Counsel
Federal Employees Metal Trades Council
601 Georgia Street
Vallejo, California 94590

Re: Federal Employees Metal Trades Council,
Vallejo, California and Mare Island
Naval Shipyard, Vallejo, California
(Hughes, Arbitrator), FLRC No. 73A-20

Dear Mr. Fuller:

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.

The award shows that the activity issued a two-year letter of reprimand to the grievant for making a disrespectful reply to a foreman. When the grievance was submitted to arbitration under the collective bargaining agreement, the union contended that the grievant's reply was made in jest and therefore the grievant did not intend any disrespect. It was the award of the arbitrator that the letter of reprimand was proper and for just cause but, because he found that a letter of reprimand for two years was too severe in view of the offense, his award reduced the reckoning period from two years to one year. The union requests that the Council set aside the arbitrator's award on the basis of three exceptions discussed later.

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's first exception contends that the arbitrator assertedly made various findings of fact not supported by a preponderance of the evidence. However, the law is well settled in the private sector that an arbitrator's findings as to the facts are not to be

questioned by the courts, and the award will not be reviewed or set aside for obvious error in such findings. Therefore, the union's first exception does not assert a ground similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

The union's second exception contends that the arbitrator assertedly applied erroneous standards with respect to the burden and measure of proof. Specifically, the union contends that the arbitrator allegedly failed to follow the normal and accepted standards of courts when he placed the burden on the grievant to prove beyond a reasonable doubt that his reply was not intended to be disrespectful. However, it is well established in the private sector that the rules or law regarding judicial procedure and evidence do not apply to arbitration hearings unless the collective bargaining agreement requires, or the arbitrator announces prior to the hearing, that such rules or law are to be followed. Here, the union does not assert and it does not appear that specific rules of procedure or evidence were announced prior to the hearing by the arbitrator or are required by the collective bargaining agreement. Moreover, a challenge to an arbitrator's award will not be sustained on the ground that the arbitrator, as a basic part of his decisional process, established what he considered an appropriate standard of proof. See e.g., Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc., — F.2d — , 83 LRRM 2652, 2654 (5th Cir. 1973). Thus, the union's second exception does not assert a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations.

Alternatively, the union's second exception contends that the arbitrator acted contrary to all rules and regulations — including Navy grievance procedures and Civil Service Commission regulations, and that such rules and regulations allegedly place a burden on management to prove its charges by substantial evidence. Therefore, the Council has considered the union's second exception as contending that the arbitrator's award violates appropriate regulation, which is a specific ground upon which the Council will accept petitions for review of an arbitration award. However, the union's petition does not identify any specific regulation which the award assertedly violates. Moreover, the union's petition does not attempt to show how unidentified regulations, presumably applicable to an agency grievance procedure, could control in any manner an arbitration proceeding established by the parties' negotiated agreement. Thus, the union's alternative contention in its second exception does not appear to be supported by the facts and circumstances described in its petition.

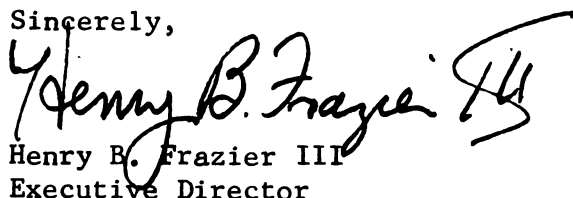
The union's third exception contends that the arbitrator's alleged bias made his award arbitrary and capricious. Courts sustain challenges to arbitration awards in the private sector on the grounds of bias or prejudice. See e.g., Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), holding that arbitrators should

declare to the parties any dealings which might create an impression of possible bias. (This holding in a commercial arbitration case has also been applied in private sector labor-management relations cases. See e.g., Brewery Workers Joint Local v. P. Ballantine & Sons, — F. Supp. —, 83 LRRM 2712 (D.N.J. 1973) and cases cited therein at p. 2723.) In support of its charge of bias, the union's petition refers to assorted examples of the arbitrator's conduct of the hearing (e.g., the arbitrator cautioned the grievant not to argue with activity counsel during cross-examination although a foreman engaged in an allegedly similar argument but was not cautioned). It is the arbitrator's responsibility to control the conduct of the hearing. And the fact that the arbitrator conducted the hearing in a way which one side or the other did not like is no ground for bias. See e.g., Nadalen Full Fashion Knitting Mills, Inc. v. Barbizon Knitwear Corp., 206 Misc. 757, 134 N.Y.S.2d 612, 614 (Sup. Ct. 1954). Although the union's third exception does assert a ground similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases, the union's petition does not appear to present facts and circumstances to support such assertion.

Therefore, the union's petition either does not assert a ground upon which the Council will accept petitions for review of an arbitration award or, where it does, the petition does not appear to furnish facts and circumstances to support its assertions. 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 direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, stylized "H" and "F".

Henry B. Frazier III
Executive Director

cc: A. Di Pasquale
Navy

P. J. Burnsky
MTD

Department of the Navy, Naval Weapons Station, Yorktown, Virginia,
Assistant Secretary Case No. 22-2881 (RO). The union (International
Association of Machinists and Aerospace Workers, AFL-CIO) again peti-
tioned the Council for review of a representation decision of the
Assistant Secretary, and requested a stay pending Council determina-
tion of its appeal. (Previous appeal denied as interlocutory in
FLRC No. 73A-37 (Report No. 44).) However, at the time of this
second appeal, the matter was still pending before the Assistant
Secretary, on the union's objections to the representation election
conducted by the Assistant Secretary.

Council action (September 20, 1973). The Council denied review of
the union's further 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 the union's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 20, 1973

Mr. Floyd E. Smith
International President
International Association of
Machinists & Aerospace
Workers, AFL-CIO
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

Re: Department of the Navy, Naval Weapons
Station, Yorktown, Virginia, Assistant
Secretary Case No. 22-2881 (RO), FLRC
No. 73A-49

Dear Mr. Smith:

Reference is made to your petition for review, and request for stay, of the representation decision of the Assistant Secretary, in the above-entitled case.

As you were previously advised in connection with this same matter before the Assistant Secretary (FLRC No. 73A-37, Council decision letter dated August 23, 1973), 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 an Assistant Secretary's decision 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.


The Council is administratively informed that this matter is still pending before the Assistant Secretary, now on objections which were filed by your organization to the representation election conducted by the Assistant Secretary on August 30, 1973. Consequently, no final disposition of the case has been made by the Assistant Secretary from which an appeal may be taken under the Council's rules.

Therefore, the Council has directed that your appeal again be 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 stay pending decision on your appeal is therefore likewise denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

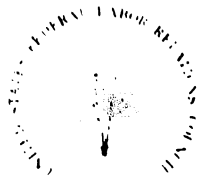
cc: A/SLMR
Dept. of Labor

B. E. Gustafson
Navy

R. P. Kaplan
NAGE

Social Security Administration Regional Office, New York, New York,
Assistant Secretary Case No. 30-4720. The Assistant Secretary dis-
missed a complaint alleging a violation of section 19(a)(1) by
reason of a violation of section 7(e) of the Order. (Section 7(e)
provides in pertinent part that "An agency shall establish a system
for intra-management communication and consultation with its super-
visors or associations of supervisors.") The Assistant Secretary
ruled that section 7(e) cannot be enforced through a complaint filed
by an individual under section 19(a)(1) of the Order. Additionally,
the Assistant Secretary observed that an association of supervisors
could not assert a section 7(e) right under section 19(a)(5) or (6)
of the Order because it is not a labor organization as defined in
the Order and that the complainant was seeking to accomplish indirectly
that which cannot be done directly.

Council action (September 28, 1973). The Council held that the
Assistant Secretary's findings and decision did not present a
major policy issue and did not appear arbitrary and capricious.
The Council concluded that the clear intent of section 7(e) is
to give direction to agency management in carrying out its manage-
rial responsibilities, and that there was no intent to establish
a right which may be enforced either by an individual or a labor
organization through the filing of a complaint alleging a viola-
tion of section 19(a) of the Order. Further, the Council referred
the complainant to the Civil Service Commission for review of his
allegation that his agency was circumventing the Federal Personnel
Manual guidance to agencies on the criteria for consultative rela-
tionships under section 7(e). Accordingly, the Council denied
review of the appeal under section 2411.12 of its rules.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 28, 1973

Mr. Howard T. O'Brien
P.O. Box 513
Troy, New York 12181

Re: Social Security Administration
Regional Office, New York, New
York, Assistant Secretary Case
No. 30-4720, FLRC No. 73A-17

Dear Mr. O'Brien:

The Council has carefully considered your petition for review of the Assistant Secretary's decision dismissing your complaint in the above-named case. Additionally, the Council has considered the Agency's motion to dismiss and opposition to acceptance of your petition.

In your complaint you allege that the Social Security Administration violated the Executive Order. Particularly, you allege that section 7(e), which states in pertinent part, "An agency shall establish a system for intra-management communication and consultation with its supervisors or associations of supervisors," was being violated. The Assistant Secretary dismissed your complaint upon a finding that section 7(e) of the Order cannot be enforced through a complaint filed by an individual under section 19(a)(1) of the Order. Additionally, the Assistant Secretary observed that an association of supervisors could not assert a section 7(e) right under section 19(a)(5) or (6) of the Order because it is not a labor organization as defined in section 2(e) and that your complaint is seeking to accomplish indirectly that which cannot be done directly.

You argue, in essence, in your appeal, that section 7(e) rights do accrue to individual supervisors and that as supervisors are "employees" under section 2 of the Order, they may seek protection of those rights by filing unfair labor practice complaints. You also contend that the Civil Service Commission has issued regulations to implement section 7(e) and that the agency has introduced arbitrary factors which circumvent those regulations.

In our view, the Assistant Secretary's findings and decision do not present major policy issues and do not appear arbitrary and capricious.

As already stated, section 7(e) requires agencies to establish a system for intra-management communication and consultation with its supervisors or associations of supervisors. The Study Committee Report and Recommendations, which accompanied Executive Order 11491, stated that "Agencies should take steps to assure that supervisors and associations of supervisors are afforded the opportunity to participate in a meaningful way in the management process and have their problems carefully considered." (Labor-Management Relations in the Federal Service, 1971, p. 40.) The express language of section 7(e) and the Study Committee Report clearly disclose that the intent of section 7(e) is to give direction to agency management in carrying out its managerial responsibilities, i.e., that management should afford supervisors an opportunity to participate in the "management process." There was no intent to establish a right which may be enforced either by an individual or a labor organization through the filing of a complaint alleging a violation of section 19(a) of the Order.

This is not to say that there is no remedy if an agency fails to implement the direction of section 7(e). As you stress in your appeal, Chapter 251 of the Federal Personnel Manual gives guidance to agencies on the criteria for consultative relationships under section 7(e). You allege that your agency has "introduced an arbitrary factor which circumvents the intent of the FPM." Such alleged conduct should be referred to the Civil Service Commission for review rather than being used as the basis for an unfair labor practice complaint filed with the Assistant Secretary.

Accordingly, because your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and without passing on the timeliness of your appeal, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: P. J. Fasser, Jr.
Dept. of Labor

I. L. Becker
SSA

National Federation of Federal Employees Local 1636 and Adjutant General of New Mexico. The negotiability dispute in this case involved a union proposal that wage grade National Guard technicians receive overtime pay for hours worked in excess of eight hours a day, or 40 hours a week.

Council action (October 18, 1973). The Council held that the agency head determination that the union's proposal is nonnegotiable, by reason of statutory proscriptions (32 U.S.C. 709(g)(2) provides that technicians shall not receive compensation for overtime hours worked, but shall receive compensatory time off instead) and implementing agency regulations, was valid. Accordingly, the agency head's determination was sustained.

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

National Federation of Federal
Employees Local 1636

and

FLRC No. 73A-23

Adjutant General of New Mexico

DECISION ON NEGOTIABILITY ISSUE

Background of Case

National Federation of Federal Employees (NFFE) Local 1636 represents Army and Air National Guard technicians who are wage grade employees employed by the New Mexico State National Guard. These technicians are hired pursuant to 32 U.S.C. 709(a),^{1/} and as such are subject to pertinent provisions of the U.S. Code and regulations prescribed by the Secretaries of the Army and Air Force.

During negotiations between the union and the activity, the union made the following proposal with regard to the wage grade technicians:

Wage Grade employees will be paid 1½ times his regular hourly wages for overtime for over an eight hour day or over 40 hours in one work week for Army and Air National Guard technicians.

The activity took the position that this proposal is nonnegotiable. Upon referral, the agency head sustained the activity's position, determining that the proposal is nonnegotiable because it is violative of 32 U.S.C. 709(g)(2)^{2/}

1/ 32 U.S.C. 709(a) provides in pertinent part as follows:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, . . . persons may be employed as technicians

2/ 32 U.S.C. 709(g)(2) provides in pertinent part as follows:

Notwithstanding . . . any other provision of law, . . . technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

and implementing agency regulations.^{3/}

The union appealed to the Council from this determination and the agency filed a statement of position in support of its determination.

Opinion

The union claims that its proposal for the payment of overtime to wage grade technicians of the National Guard is negotiable because in effect the agency has misconstrued 32 U.S.C. 709(g)(2), and in any event, it is "only fair and right" that such technicians receive the same overtime pay as other civil service employees. We find no merit in the union's contentions.

Section 709(g)(2) of Title 32 expressly provides that, notwithstanding any other provision of law, technicians shall not receive compensation for overtime hours worked, but shall receive compensatory time off instead. Even assuming an ambiguity in the statutory language, the legislative history of this provision makes it clear that Congress intended to grant technicians "compensatory time off in lieu of overtime and differential pay"4/ (Emphasis supplied.) Accordingly, we find, as did the agency, that the union's proposal for overtime pay to technicians is contrary to 32 U.S.C. 709(g)(2) (and the agency's regulations implementing that statutory provision).

^{3/} Section 1-3 of Technician Personnel Manual 550.1, issued on November 30, 1972, by the Departments of the Army and Air Force provides in relevant part as follows:

1-3. OVERTIME PAY

a. Authorization. Technicians under either the General Schedule or wage schedule are not entitled to compensation for overtime work. If overtime work is required, the technician will be granted an amount of compensatory time off from his scheduled tour of duty equal to the amount of any time spent by him in irregular or regular overtime work, subject to management controls. (par 6-46, Technician Personnel Pamphlet 904).

c. Overtime pay. Not applicable to National Guard technicians (PL 90-486, 13 August 1968).

d. Compensatory time off. Compensatory time off will be granted to technicians in an amount equal to any time spent in irregular or regular overtime work, subject to management controls. (par 6-46, Technician Personnel Pamphlet 904). Compensatory leave charges will be the same as annual leave (see par S2-4B, Book 630, FPM Supplement 990-2).

^{4/} H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968), U.S. Code Congressional and Administrative News, 90th Cong., 2d Sess., Vol. 3 (1968), p. 3321.


While the union further argues that, in any event, it is "only fair and right" that wage grade Guard technicians receive the same overtime pay as other civil service employees, such argument is addressed to the advisability of the statute and not to its meaning and applicability. In deciding negotiability appeals under section 11(c)(4) of the Order, it is not the function of the Council to pass upon the advisability of policies established by statute.

Conclusion

For the foregoing reasons, we are of the opinion that the agency head's determination as to the nonnegotiability of the union's proposal, based on 32 U.S.C. 709(g)(2), and the agency regulations (TPM 550.1) which implement that statute, was valid.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: OCT 18 1973

American Federation of Government Employees, AFL-CIO, Local 1960 and Naval Air Rework Facility, Pensacola, Florida. The dispute in this case involved the negotiability under the Order of the union's proposal concerning the repromotion of employees who were demoted voluntarily in lieu of separation in a reduction-in-force action.

Council action (October 18, 1973). Based upon its decision in Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (Report No. 44), the Council sustained the agency determination that the union proposal was nonnegotiable under section 12(b)(2) of the Order. However, the Council emphasized, as it had in the Kirk Army Hospital decision, that section 12(b)(2) does not prohibit agencies from negotiating procedures which management will observe in reaching the decision or taking the promotion action involved, so long as any negotiated procedures which might result do not interfere with the exercise of the right reserved under 12(b)(2) and do not conflict with applicable laws and regulations.

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

American Federation of Government
Employees, AFL-CIO, Local 1960

and

FLRC No. 73A-24

Naval Air Rework Facility,
Pensacola, Florida

DECISION ON NEGOTIABILITY ISSUE

Background

During the course of negotiations between the Naval Air Rework Facility and the union (American Federation of Government Employees, AFL-CIO, Local 1960), the union submitted the following proposal:

It is hereby agreed that exception to the above agreed promotional policy can be affected when the following circumstances exist:

a. REPROMOTIONAL ELIGIBLES

After the effective date of this contract, Unit employees who take demotions voluntarily, in lieu of separation because of reduction-in-force actions, and who apply for repromotions will be promoted to their former ratings in inverse order of retention standing before filling vacancies by competitive promotion action. Such promotions will be governed by the following criteria:

(1) The employee's service in the higher rate was satisfactory.

(2) The employee's conduct prior to demotion and his conduct during the period subsequent to his demotion was satisfactory based on an overall review of the employee's personnel record.

(3) The area of consideration for all reduction-in-force actions shall be the Naval Air Rework Facility Command. All complaints in regards to this Article will be processed in accordance with the negotiated grievance procedure if applicable or appropriate regulations.

Agency management took the position that the proposal was nonnegotiable. Upon referral, the Department of Defense upheld the activity's position on the ground, among others, that the proposal violates management's rights under section 12(b)(2) of the Order.1/

The union appealed to the Council from that determination under section 11(c)(4) of the Order and the agency filed a statement of position.

Opinion

The question before the Council for resolution in this case is the negotiability, under section 12(b)(2) of the Order, of the union's proposal. This proposal bears no material difference from the union's proposal concerning the repromotion of employees who are demoted voluntarily in lieu of separation in a reduction-in-force action (Article XXIX, Section 4) which was before the Council in Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 17, 1973).

1/ Section 12(b)(2) of the Order provides that:

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, and to suspend, demote, discharge, or take other disciplinary action against employees;

.

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

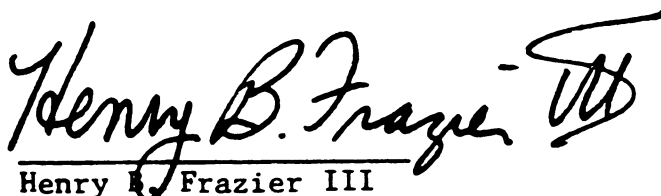
Based on the applicable discussion and analysis in the Kirk Army Hospital decision, the disputed provision under consideration in this case must also be held violative of section 12(b)(2) of the Order and, therefore, nonnegotiable.

Before concluding, however, we must emphasize, as we did in the Kirk Army Hospital decision, that "section 12(b)(2) does not prohibit agencies from negotiating procedures which management will observe in reaching the decision or taking the promotion action involved, so long as any negotiated procedures which might result do not interfere with the exercise of the right reserved under 12(b)(2) and do not conflict with applicable laws and regulations."

Conclusion

Based on the foregoing reasons, we find that the determination by the Department of Defense that the union's proposal here involved was nonnegotiable under section 12(b)(2) of the Order was proper and must be sustained.

By the Council.



Henry B. Frazier III
Executive Director

Issued: OCT 18 1973

United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272. Upon a complaint filed by Dennis J. Brodie, an individual, alleging that the agency had violated E.O. 11491 by terminating him on December 26, 1970 because of his union activities, the Assistant Secretary found that the issue in the complaint was subject to an established appeals procedure under the parties' negotiated agreement. Accordingly, he concluded that section 19(d) of the Order controlled the disposition of the case. (Section 19(d) of the original Order, as herein applicable, provided in pertinent part, "When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint.") He further concluded that he was not intended under that provision of the Order to review established grievance and appeals procedures to determine whether such procedures have been applied in a fair and regular manner or whether they have provided an adequate remedy. The complainant appealed to the Council, contending that the Assistant Secretary's decision presents major policy issues and appears arbitrary and capricious.

Council action (October 18, 1973), The Council decided that the complainant's appeal did not establish any basis for review under the Council's rules since the issue in the complaint was clearly subject to an established grievance or appeals procedure and, therefore, the Assistant Secretary lacked jurisdiction in the matter. (See Federal Aviation Administration, Assistant Secretary Case Nos. 22-1990, etc.; 22-2007, etc.; and 22-2651, 2654 (CA); FLRC Nos. 71A-33, 71A-44 and 71A-53, respectively, (Report No. 17).) Accordingly, without passing on the timeliness of the appeal, the Council denied review of the complainant's appeal pursuant to section 2411.12 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 18, 1973

Mr. Thomas A. Hett
Attorney at Law
Serpico, Stamos, Novelle, Devorak,
Navigato & Hett, Ltd.
54 West Randolph Street
Chicago, Illinois 60601

Re: United States Postal Service, Berwyn
Post Office, Illinois, A/SLMR No. 272,
FLRC No. 73A-27

Dear Mr. Hett:

The Council has carefully considered your petition for review of the Assistant Secretary's decision dismissing your complaint in the above-named case. Additionally, the Council has considered the agency's opposition to acceptance of your petition and your reply to the agency's opposition. For the reasons indicated below, the Council has directed that your petition be denied.

In the complaint filed by Dennis J. Brodie, it was alleged, in relevant part, that the United States Postal Service had violated Executive Order 11491 by terminating him on December 26, 1970 because of his activities as president of the local union which represented employees of the agency. With respect to that allegation, the Assistant Secretary found that the record established that the issue in the complaint was subject to an established appeals procedure under the parties' negotiated agreement and, accordingly, section 19(d) controlled the disposition of the case. (Section 19(d) of Executive Order 11491, prior to the amendments which were effective November 24, 1971, and as herein applicable, provided in pertinent part, "When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint.") The Assistant Secretary further concluded that he was not intended under that provision of E.O. 11491 to review established grievance and appeals procedures to determine whether such procedures have been applied in a fair and regular manner or whether they have provided an adequate remedy.

You contend in your appeal that the Assistant Secretary's decision presents major policy issues and that the decision appears arbitrary and capricious. In our view, the appeal does not establish any basis for review under the Council's rules. In Federal Aviation Administration, Assistant Secretary Case Nos. 22-1990, etc.; 22-2007, etc.; and 22-2651, 2654(CA); FLRC Nos. 71A-33, 71A-44 and 71A-53 (Report No. 17), the Council considered appeals from Assistant Secretary decisions dismissing unfair labor practice complaints for lack of jurisdiction under section 19(d). In the FAA cases, it was specifically alleged that the grievance and appeals procedures of the agency did not accord due process and the Assistant Secretary should not defer to such procedures. In declining to accept the cases for review, the Council stated:


The plain language of section 19(d) excluded from the complaint procedures of the Assistant Secretary issues which were subject to established grievance or appeal procedures.

Here, as in the FAA cases, the issues in the complaint were clearly subject to an established grievance or appeals procedure. Accordingly, the Assistant Secretary lacked jurisdiction in this matter.

Since the Assistant Secretary's decision does not present any major policy issues and since it does not appear from the appeal that the decision was arbitrary and capricious, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure and, accordingly, without passing on the timeliness of your appeal, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept of Labor

N. Fencil
U.S.P.S.

FLRC NO. 73A-30

U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 281. The Assistant Secretary dismissed the complaint filed by National Federation of Federal Employees, Local 476, (NFFE), alleging that the agency violated section 19(a)(1) of the Order by its refusal to maintain on official time an employee of the agency serving as witness-in-waiting, union representative and assistant to union counsel at a formal unit determination hearing. NFFE appealed to the Council, contending that the Assistant Secretary's decision presents a major policy issue.

Council action (October 18, 1973). Based upon its decision in U.S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, decided August 8, 1973 (Report No. 43), the Council held that the Assistant Secretary's decision in the instant case was clearly proper and did not present a major policy issue or other ground for review. Accordingly, the Council denied the union's appeal under section 2411.12 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 18, 1973

Mr. Irving I. Geller
General Counsel
National Federation of
Federal Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: U.S. Army Electronics Command, Fort Monmouth,
New Jersey, A/SLMR No. 281, FLRC No. 73A-30

Dear Mr. Geller:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case, and, for the reasons indicated below, has directed that your petition be denied.

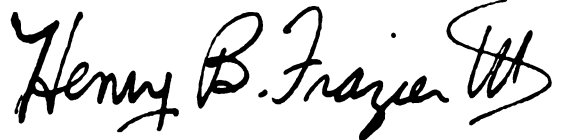
In his decision (as relevant to your appeal), the Assistant Secretary dismissed your complaint that the agency violated section 19(a)(1) of the Order by its refusal to maintain on official time an employee of the agency serving as a witness-in-waiting, union representative and assistant to union counsel at a formal unit determination hearing. You contend in your appeal that this decision presents a major policy issue for Council resolution.

In U.S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, decided August 8, 1973, (Report No. 43), the Council found that while there is no obligation under section 1(a) of the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, it would be consistent with the Order for the Assistant Secretary to promulgate a regulation under section 6(d) requiring that necessary witnesses be on official time for the period of their participation at formal hearings, if the Assistant Secretary determines that such a procedure is necessary to administer those aspects of his functions which require a formal hearing. In the absence of such a regulation, the Council found the agency's failure to grant such official time and its policy against such a practice were not violative of section 19(a) of the Order. The Council's decision in the Yorktown case, and the reasons set forth therein, while pertaining to union witnesses, are clearly dispositive of your appeal in the instant case relating to official time for an employee acting as a witness-in-waiting, union representative and assistant to union counsel. Consequently, your appeal from the Assistant Secretary's dismissal of your complaint presents no major policy issue or other ground to warrant Council review.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a long, horizontal flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

D. Cole
USAEC

U.S. Army Electronics Command, Ft. Monmouth, New Jersey, Assistant Secretary Case No. 32-3164 E.O. The Assistant Secretary dismissed the complaint filed by Local 476, National Federation of Federal Employees (NFFE), alleging that the agency violated sections 19(a)(1), (2), (3), (4) and (6) of the Order by its refusal to maintain on official time an employee of the agency serving as union representative at a formal unit determination hearing. NFFE appealed to the Council, contending that the Assistant Secretary's decision presented a major policy issue.

Council action (October 18, 1973). Based upon its decision in U.S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, decided August 8, 1973 (Report No. 43), the Council held that the Assistant Secretary's decision was clearly proper and did not present a major policy issue or other ground for review. Accordingly, the Council denied the union's appeal under section 2411.12 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 18, 1973

Mr. Irving I. Geller
General Counsel
National Federation of
Federal Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: U.S. Army Electronics Command, Ft. Monmouth,
New Jersey, Assistant Secretary Case No.
32-3164 E.O., FLRC No. 73A-35

Dear Mr. Geller:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case, and, for the reasons indicated below, has directed that your petition be denied.

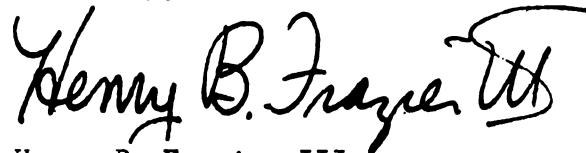
In his decision, the Assistant Secretary dismissed your complaint that the agency violated sections 19(a)(1), (2), (3), (4) and (6) of the Order by its refusal to maintain on official time an employee of the agency serving as a union representative at a formal unit determination hearing. You contend in your appeal that this decision presents a major policy issue for Council resolution.

In U.S. Naval Weapons Station, Yorktown, Virginia, FLRC No. 72A-20, decided August 8, 1973, (Report No. 43), the Council found that while there is no obligation under section 1(a) of the Order for an agency to grant official time to union witnesses for participation at formal unit determination hearings, it would be consistent with the Order for the Assistant Secretary to promulgate a regulation under section 6(d) requiring that necessary witnesses be on official time for the period of their participation at formal hearings, if the Assistant Secretary determines that such a procedure is necessary to administer those aspects of his functions which require a formal hearing. In the absence of such a regulation, the Council found the agency's failure to grant such official time and its policy against such a practice were not violative of section 19(a) of the Order. The Council's decision in the Yorktown case, and the reasons set forth therein, while pertaining to union witnesses, are clearly dispositive of your appeal in the instant case relating to official time for an employee acting as a union representative at a formal unit determination hearing. Consequently, your appeal from the Assistant Secretary's dismissal of your complaint presents no major policy issue or other ground to warrant Council review.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a distinct "III" at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

D. Cole
USAEC

American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania. The negotiability dispute involved the union's proposals concerning (1) establishing a tour of duty for unit physicians; (2) requiring the hospital director to request employment of non-VA physicians to perform weekend and holiday Officer of the Day duties; and (3) prohibiting the assignment of autopsy duties to unit physicians when a pathologist is employed by the hospital.

Council action (December 12, 1973). As to (1), the Council, distinguishing the Charleston Naval Supply Center case, FLRC No. 71A-52, upheld the agency determination of nonnegotiability, based on agency regulations as issued pursuant to explicit statutory authority and as interpreted by the agency head. With respect to (2), the Council held that the hospital director's actions in requesting the employment of additional physicians constitute an integral part of the agency's hiring process, and that the union's proposal which would require such actions to be taken by the hospital director interferes with management's reserved right "to hire" under section 12(b)(2) of the Order. Finally, as to (3), the Council, based on the decision and analysis in the Griffiss Air Force Base case, FLRC No. 71A-30, ruled that the union's proposal is outside the agency's obligation to bargain under section 11(b) of the Order. Accordingly, the agency head's determination of nonnegotiability was sustained.

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

American Federation of Government
Employees Local 1966

and

FLRC No. 72A-41

Veterans Administration Hospital
Lebanon, Pennsylvania

DECISION ON NEGOTIABILITY ISSUES

Background of Case^{1/}

The union, representing a unit of physicians at the Veterans Administration Hospital, Lebanon, Pa., presented the following proposals relating to the duty of physicians, during negotiations between the parties:

PHYSICIANS DUTY

Section 1. The administrative work week shall begin at 12:01 a.m. Sunday and extend through 12:00 midnight the following Saturday. Normally the basic work week shall be Monday through Friday, and Saturday and Sunday shall be the administrative non-duty days.

Section 2. The hours of duty will be from 8:00 a.m. to 4:30 p.m., including a non-paid lunch period of one-half ($\frac{1}{2}$) hour.

Section 3. The hospital director agrees to request in accordance with the procedures of Title 38 the employment of non-VA physicians to perform weekend and holiday O.D. duty.

Section 4. Staff physicians shall not be required to perform autopsies when there is a pathologist employed by the hospital.

The activity took the position that each of the four sections of the proposed article was nonnegotiable. Upon referral, the agency head upheld the activity, determining in part that: Sections 1 and 2 are

^{1/} The docket number of the case appears in the caption as corrected to accord with the Council's records.

nonnegotiable under agency regulations; and sections 3 and 4 infringe on rights reserved to management by sections 11(b) and 12(b) of the Order.

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

Opinion

The negotiability questions relating to the respective proposals will be considered separately below.

1. Tour of Duty proposals. Sections 1 and 2 of the article involved would establish a tour of duty for staff physicians to extend normally from Monday through Friday^{2/} with the hours of each workday extending from 8:00 a.m. to 4:30 p.m.

Section 11(a) of the Order provides:

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, a national or other controlling agreement at a higher level in the agency, and this Order

The agency asserts that negotiations on sections 1 and 2 are barred principally because they conflict with agency regulations. More particularly, the agency relies on VA Manual, MP-5, Part II, Chapter 7, Change 3, paragraph 3 which provides:

- a. Full time physicians, dentists, and nurses to whom the provisions of this chapter apply shall be continuously subject to call unless officially excused by proper authority. This requirement as to availability exists 24 hours per day, 7 days per week.
- b. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential

^{2/} The word "normally" was intended by the union to cover an exception from the prescribed tours for the occasions when physicians have to perform weekend Officer of the Day (O.D.) duty.

activities within the administrative discretion of the Chief Medical Director and officials designated by him.

Further, the agency relies on a supplement to the foregoing regulation, Department of Medicine and Surgery (DM&S) Supplement, MP-5, Part II, Chapter 7, Change 1, paragraph 7.04, which provides:

- b. Because of the continuous nature of the services rendered at hospitals, the Hospital Director, or the person acting for him (in no case less than a Chief of Service), has the authority to prescribe any tour of duty to insure adequate professional care and treatment to the patient.
[Emphasis in original.]

These regulations were issued by the agency pursuant to and in implementation of 38 U.S.C. 4108 which provides with respect to the administration of the VA Department of Medicine and Surgery that:

Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, and nurses.

The union claims the agency regulations are not a bar to negotiations because: (1) Such regulations, as interpreted by the agency head, are overprescriptive and thereby, in effect, violate section 11(b) of the Order; (2) the agency has misinterpreted its own regulations; and (3) "duty schedules" historically have been negotiable in the Federal sector. We cannot agree with the union's contentions in this case.

At the outset, the circumstances in the present case must be carefully distinguished from those in the Charleston Naval Supply Center case,^{3/} where the Council held that the agency was obligated to negotiate with the union concerning a union proposal on the basic workweek and hours of work of unit employees. In that case there was no showing by the agency that the basic workweek for the employees involved was integrally related to the numbers and types of employees in question, which would have excepted the proposal from the agency's bargaining obligation under section 11(b) of the Order, or that the proposal was otherwise violative of any other provisions in the Order. We adhere to that decision.

^{3/} Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972), Report No. 31.

However, the Charleston decision is not dispositive of the instant case. For here, unlike in Charleston, the agency, pursuant to explicit statutory authority, has issued regulations which, as interpreted by the agency head, are applicable to and render non-negotiable the union's proposals. In other words, the agency relies on its published agency policies and regulations, issued pursuant to statutory authority, to bar negotiations under section 11(a) of the Order.

The union argues, as previously indicated, that the agency's regulations are overly prescriptive and, therefore, are invalid as a bar to negotiations under section 11(b) of the Order. Section 11(b) provides in pertinent part that:

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
. . . .

The Council has previously explained in its Sheppard Air Force Base decision^{4/} that section 11(b) may not be considered alone but only in conjunction with section 11(a); and section 11(a), which prescribes the bargaining obligation, expressly limits such obligation to those matters which may be appropriate under applicable laws and regulations including, among others, published agency policies and regulations. Further, in Sheppard, the Council held that higher level agency regulations, which applied uniformly and equally to more than one activity within the agency, were completely consistent with the obligations imposed by section 11(a) and could properly limit the scope of negotiations at subordinate activities under the Order.

The record of the instant case indicates that the VA regulations in question were issued pursuant to 38 U.S.C. 4108 and apply uniformly to VA physicians at the various subordinate activities of the agency. Under these circumstances, we find that the regulations relied upon by the agency were issued to achieve a desired degree of uniformity and equality in the administration of matters common to employees of several subordinate agency activities, i.e., the implementation of 38 U.S.C. 4108, and do not conflict with the obligations imposed on the agency by section 11(a) of the Order.^{5/}

^{4/} National Federation of Federal Employees, Local 779, and Department of the Air Force, Sheppard Air Force Base, Texas, FLRC No. 71A-60 (April 3, 1973), Report No. 36.

^{5/} Id. at 3-8. See also Local Lodge 2424, IAM-AW and Aberdeen Proving Ground Command, FLRC No. 72A-37 (May 22, 1973), Report No. 39, at pp. 4-5.

As to the union's further contention that the agency head has misinterpreted his own regulations, section 11(c)(3) of the Order expressly provides that, "An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final." Thus, the Council is bound by the agency head's interpretation.^{6/} In other words, the Council may not substitute its interpretation of an agency's regulations for the agency head's determination as to the interpretation of those regulations.

Finally, as to the union's reliance on the alleged historical negotiability of "duty schedules," such bargaining history is not of controlling significance where, as here, applicable published agency regulations limit the scope of bargaining under section 11(a) of the Order. As the Council stated in the Kirk Army Hospital case:^{7/}

Although other contracts may have included such provisions, as claimed by the union, this circumstance cannot alter the express language and intent of the Order and is without controlling significance in this case.

For the foregoing reasons, therefore, we find that the agency head's determination as to the nonnegotiability of sections 1 and 2 of the proposed article on physician duty was valid and must be upheld.

2. Office of the Day (O.D.) proposal. Section 3 of the article in question, as previously set forth, would require the hospital director to request approval (by the appropriate regional medical director) to employ non-VA physicians to perform weekend and holiday O.D. duty which currently is performed by staff physicians at the activity.

The agency asserts in substance that the actions required of the hospital director, by agency regulations discussed below, constitute an integral part of the agency's hiring process, and that the proposal is therefore nonnegotiable because it interferes with management's reserved right "to hire" employees under section 12(b)(2) of the Order.^{8/}

^{6/} Local Lodge 2424, IAM-AW and Aberdeen Proving Ground Command, FLRC No. 72A-37 (May 22, 1973), Report No. 39, at p. 4.

^{7/} International Association of Machinists and Aerospace Workers and U.S. Kirk Army Hospital, Aberdeen, Md., FLRC No. 70A-11 (March 9, 1971), Report No. 5, at p. 3. See also Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Va. FLRC No. 71A-56 (June 29, 1973), Report No. 41, at pp. 7-8.

^{8/} The agency also contends, in effect, that the proposal violates management's reserved right "to determine the methods, means and personnel" by which its operations are conducted under section 12(b)(5) of the Order. However, in view of our decision herein, we find it unnecessary to pass on this contention.

The union argues that its proposal, which is intended to eliminate "unreasonable" and "discriminatory" working conditions, does not violate management rights because the hospital director would only have to "request" the employment of non-VA physicians to perform weekend and holiday O.D. duty.

Section 12(b) of the Order provides in relevant part 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 --

. . . .

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . .

As to the meaning of 12(b)(2), the Council, in its VA Research Hospital decision, explained as follows:^{9/}

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

Turning to the facts in the present case, 38 U.S.C. 4114 authorizes the VA to employ physicians on other than a full-time basis. To implement this statute, the agency issued regulations concerning the employment of physicians on a fee basis, as here sought to be accomplished by the union. These regulations (VA Manual, DM&S Supplement, MP-5, Part II, Chapter 3, paragraph 3.10(d)(3)) provide in relevant part that:

^{9/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Ill., FLRC No. 71A-31 (November 22, 1972), Report No. 31, at p. 3.

(3) Physicians Providing Medical Supervision as Medical Officer of the Day or as Admitting Physician.

Appropriate Regional Medical Directors will approve all tours of duty and establish fees per tour for Medical Officers of the Day providing medical supervision on wards . . . during nights, weekends, and holidays, except for full-time VA staff physicians assigned this duty as part of their overall patient care responsibilities . . . Requests for establishing tours of duty for Medical Officers of the Day . . . will be submitted to the appropriate REGIONAL MEDICAL DIRECTOR . . . and will contain the following information:

- (a) Explanation and justification of need . . . including reason(s) staff physicians cannot provide medical supervision during this period.
- (b) Number and type of tours to be established
- (c) Recommendation of fee to be established for each tour with justification

The hospital director, according to the agency, is the individual at the hospital level who must take the initiative for the hiring of additional physicians under this directive.

It is clear from the foregoing regulations that the hospital director constitutes an intrinsic part of the agency's hiring decision and action. More particularly, the hospital director must exercise his judgment as to the need for the non-VA physicians. Further, it is he who must then initiate and justify the request upon which the hiring depends, including in his request the explanation and justification of the need, the specification as to tours, and the recommendation and justification of the fees to be paid.

Since the hospital director's exercise of judgment and then his request for employment of additional physicians constitute an integral part of the agency's hiring process, the union's proposal which would require such actions by the hospital director plainly interferes with management's reserved authority "to hire" under section 12(b)(2) of the Order. Accordingly, we are of the opinion, as determined by the agency head, that the union's proposal is nonnegotiable.

3. Duty assignment proposal. Section 4 of the union's proposed article, as already set forth, would prohibit the assignment of autopsy duties to staff physicians when there is a pathologist employed by the hospital.

The union argues, contrary to the agency, that its proposal concerns matters affecting working conditions which are not excepted from the agency's obligation to bargain by the Order. More specifically, the union asserts that autopsy duties are not reasonably related to the "qualifications and position" of staff physicians, and that nothing in the Order proscribes the negotiation of a proposal which would prevent the assignment of such duties when a pathologist is present.

The Council had occasion to pass upon an analogous question which arose in the recent Griffiss Air Force Base case.^{10/} There, the union proposed that unit firefighters not be assigned certain civil disturbance and other duties allegedly unrelated to those duties usually associated with such personnel. The Council decided that the union's proposal was outside the agency's obligation to bargain under section 11(b) of the Order. In this connection, the Council found that:^{11/}

. . . job content in general is 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.

Further, as to whether a different result should obtain where the union's proposals are directed only to the assignment of allegedly unrelated duties, the Council observed that the duties involved were hardly "totally unrelated" to the ordinary duties which might be expected to be performed by firefighters. In any event, the Council ruled:

. . . nothing in section 11(b) of the Order . . . renders the exception from the obligation to bargain on job content dependent in any manner on the degree of relationship of the assigned duties to the principal job function. [Emphasis in original.]

^{10/} 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.

^{11/} Id. at 10.

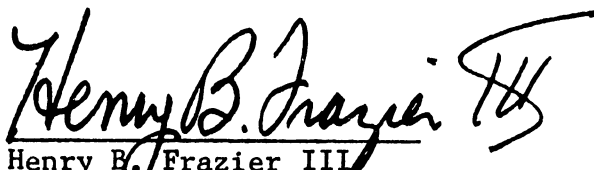
In the instant case, the union seeks to limit the assignment to staff physicians of autopsy duties, claiming that such duties are not reasonably related to those of the staff physicians. Based upon the decision and analysis in the Griffiss case, we find that the union's proposal is outside the agency's obligation to bargain under section 11(b) of the Order and, under the circumstances of this case, is nonnegotiable.

Conclusion

For the foregoing reasons, we find that the agency head's determination as to the nonnegotiability of sections 1, 2, 3 and 4 of the union's proposed article was valid.

Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 12, 1973

International Association of Machinists and Aerospace Workers, Arsenal Lodge No. 81, AFL-CIO and Rock Island Arsenal, Rock Island, Illinois (Sembower, Arbitrator). The arbitrator determined that the agency had violated the collective bargaining agreement and applicable rules of procedure in selecting a candidate for promotion. The arbitrator directed the agency to nullify the selection and to fill the vacancy in accordance with regulations and the agreement. The agency filed two exceptions to the arbitrator's award, asserting in effect (1) that the arbitrator violated various regulations by substituting his judgment in areas which, by regulation, are reserved to management, and thereby exceeded his authority; and (2) that implementation of the award would require the agency to violate various regulations. The agency also requested a stay of the arbitrator's award.

Council action (December 12, 1973). The Council determined that the agency's petition failed to describe facts and circumstances adequately to support its exceptions, as required by section 2411.32 of the Council's rules of procedure. Accordingly, the Council directed that review of the agency's petition, and that the agency's request for stay, be denied.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1973

Mr. Ben B. Beeson
Director of Civilian Personnel
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: International Association of Machinists
and Aerospace Workers, Arsenal Lodge No.
81, AFL-CIO and Rock Island Arsenal, Rock
Island, Illinois (Sembower, Arbitrator),
FLRC No. 73A-29

Dear Mr. Beeson:

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

The award shows that a rating panel placed four names on the list of "best-qualified candidates" for a promotion, and that one of those four, Mr. St. Dennis, was selected by the activity. Two of those candidates not selected filed a grievance seeking to set aside Mr. St. Dennis' promotion and the ratings which had been used as a basis for his selection. The parties submitted the grievance to arbitration under the collective bargaining agreement.

The arbitrator determined that the selection of Mr. St. Dennis had been in violation of Article XIII, Section 2, of the agreement^{1/} and the "applicable rules of procedure" for filling such a vacancy.

1/ Section 2 of Article XIII, entitled "Promotions and Details," provides in pertinent part that:

Promotions shall be made on the basis of qualifications, merit, and fitness. The selecting supervisor or official shall select candidates on the basis of their inclusion on lists of best qualified in accordance with the spirit and intent of governing regulations outlined by higher authority.

As a remedy, he directed that management take steps to "nullify" the selection of Mr. St. Dennis and to fill the vacancy "in accordance with regulations and the Negotiated Agreement." The agency requests that the Council set aside 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."

The agency's first exception contends, in effect, that the arbitrator violated various regulations by substituting his judgment in areas which, by regulation, are reserved to management, and thereby exceeded his authority. However, it is uncontroverted that the arbitrator was authorized by the parties' negotiated agreement to determine the grievance submitted to arbitration. Section 9 of Article XIII provides that an employee may file a grievance if he alleges that the procedures of the merit promotion plan were not followed or if he believes that his qualifications were not properly evaluated. Article XXIII provides that the arbitration of unresolved grievances provided for therein is binding and appealable only to the Council under the provisions of E.O. 11491.

As was indicated above, the arbitrator found that the selection of Mr. St. Dennis had been in violation of a specific provision of the negotiated agreement and the "applicable rules of procedure." And it fails to appear from the agency's petition that the arbitrator, in making his determination, invaded any area specifically reserved to the exclusive discretion of agency management by any cited regulation. Thus, the arbitrator did not substitute his judgment for that of management in the selection of one individual from a group of properly ranked "best-qualified" candidates, but rather determined that the selected individual was improperly placed on the list of "best-qualified" candidates. Accordingly, the agency's petition does not furnish the facts and circumstances to support the assertion in its first exception, as required by section 2411.32 of the Council's rules of procedure.

The agency's second exception contends that implementation of the award would require the agency to violate various regulations. Here, again, there appears to be nothing in the regulations adverted to by the agency which would prevent it from implementing the award. Furthermore, the

arbitrator specifically directed that the remedy which he ordered be carried out in accordance with "regulations and the Negotiated Agreement." Thus, implementation of the award, as directed by the arbitrator, would not, contrary to the agency's contention, deprive Mr. St. Dennis of rights with respect to removal guaranteed by regulations. Moreover, the arbitrator's direction is consistent with the standard practice in the Federal sector: when a promotion is found to be in violation of merit requirements, the agency is directed to take corrective action and, in so doing, the rights guaranteed by regulations to the employee improperly promoted are fully protected. Therefore, the agency's second exception does not appear to be supported by the facts and circumstances described in the agency's petition, as required by section 2411.32.

Accordingly, the Council has directed that the agency's petition be 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 Council has directed that the agency's request for a stay be denied under section 2411.47(d) of the Council's rules.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: F. E. Smith
IAM-AW

Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance Payment Center, Birmingham, Alabama, Assistant Secretary Case No. 40-4647 (CA). The Assistant Secretary dismissed the complaint filed by Donald G. Jolly, which alleged that the activity violated section 19(a)(1) and (6) of the Order through its dealings with the trustee designated by the American Federation of Government Employees, AFL-CIO, to conduct the affairs of AFGE Local 2206. The Assistant Secretary found nothing improper in such dealings, and noted that at all material times, the National AFGE (National Council of Social Security Payment Center Locals) was the exclusive bargaining representative of the activity's employees. Jolly appealed to the Council contending, in effect, that the decision of the Assistant Secretary was arbitrary and capricious, specifically because the Assistant Secretary improperly failed to order a hearing on the subject complaint.

Council action (December 12, 1973). The Council held that nothing in the appeal indicated that any substantial factual issues existed which required a hearing by the Assistant Secretary, or that the Assistant Secretary's decision was in any other manner arbitrary and capricious. The Council further held that the petition neither alleged, nor did it appear, that the Assistant Secretary's decision presented a major policy issue. Accordingly, the Council denied review of Jolly's appeal pursuant to section 2411.12 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1973

Mr. Carl E. Chamblee
Attorney at Law
2230 Third Avenue North
Birmingham, Alabama 35203

Re: Department of Health, Education
and Welfare, Social Security
Administration, Bureau of Retirement and Survivors Insurance
Payment Center, Birmingham, Alabama,
Assistant Secretary Case No. 40-4647
(CA), FLRC No. 73A-31

Dear Mr. Chamblee:

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.

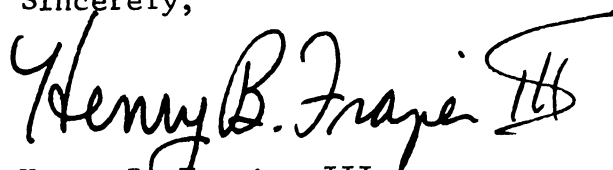
In his decision, the Assistant Secretary dismissed the complaint, filed by the individual complainant (Donald G. Jolly), which alleged that the activity violated section 19(a)(1) and (6) of the Order through its dealings with the trustee designated by the American Federation of Government Employees, AFL-CIO, (AFGE) to conduct the affairs of AFGE Local 2206 between August 18 and August 30, 1972. The Assistant Secretary found nothing improper in such dealings since the evidence did not establish any attempt by the activity to control the internal affairs of the local or to avoid any bargaining obligations under the Order. Further, the Assistant Secretary noted that at all material times, the National AFGE (National Council of Social Security Payment Center Locals) was the exclusive bargaining representative of the activity's employees. In your petition you contend, in effect, that the decision of the Assistant Secretary was arbitrary and capricious, specifically because the Assistant Secretary improperly failed to order a hearing on the subject complaint.

In the Council's opinion, nothing in your appeal indicates that any substantial factual issues exist which required a hearing by the Assistant Secretary, or that the Assistant Secretary's decision was in any other manner arbitrary and capricious. Moreover, your petition neither alleges, nor does it appear therefrom, that any major policy issue is presented by the Assistant Secretary's decision.

Accordingly, your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and the Council has therefore directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a distinct "III" at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

E. J. Listerman
SSA

Secretary of the Army, Washington, D.C., Assistant Secretary Case No. 22-3767 (CA). In this case, employee Sperling filed a complaint asserting that subordinate echelons of the Department of the Army violated section 19(a)(1), (2), and (4) of the Order by reason of (a) an allegedly false and denigrating statement concerning Sperling's use of his union position, made by a witness during an agency grievance proceeding; and (b) the agency's failure to investigate the truthfulness of the witness' statement. The Assistant Secretary dismissed the complaint, finding that no reasonable basis therefor was established. Sperling appealed to the Council, claiming that the Assistant Secretary's decision presents a major policy issue and is arbitrary and capricious. In support of his appeal, Sperling alleged, for the first time, that the witness involved was a management or supervisory official; further, Sperling relied upon alleged supervisory comments on his career appraisal form, adverting to Sperling's union office, although this matter was not referred to in any manner in his complaint.

Council action (December 12, 1973). The Council held that the decision of the Assistant Secretary did not present a major policy issue, nor did it appear arbitrary and capricious. In this connection, the Council held that Sperling's allegations regarding the witness' status and the career appraisal form cannot serve as a basis for Council review. The Council cited section 2411.51 of its rules of procedure, which provides that "the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary." Accordingly, the Council denied review of Sperling's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1973

Mr. Anton E. Sperling
70 Reeds Road
New Shrewsbury, New Jersey 07724

Re: Secretary of the Army, Washington,
D.C., Assistant Secretary Case No.
22-3767 (CA), FLRC No. 73A-39

Dear Mr. Sperling:

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

The Assistant Secretary dismissed your unfair labor practice complaint, which alleged violations of section 19(a)(1), (2), and (4) of the Order by the Army Materiel Command, the U.S. Army Electronics Command, and the U.S. Army Civilian Appellate Review Agency. Your complaint was predicated in part upon an allegedly false and denigrating statement made by Victor J. Marasco, a Technical Publications Program Specialist in the Materiel Command, during an agency grievance proceeding. This statement was to the effect that you were making use of your position as a union official, rather than your qualifications, in attempting to further your career. Your complaint was further predicated on the failure of agency representatives to investigate Marasco's statement to determine its truthfulness.

In his decision, the Assistant Secretary adopted the reasoning of the Regional Administrator that nothing in the Order or its history indicates that in a grievance proceeding it is incumbent upon one of the parties to ascertain the truthfulness of all statements made by a witness which might unfairly fall upon any individual against whom the statement is directed, and that failure to do so constitutes an unfair labor practice. The Assistant Secretary concluded that no reasonable basis for your complaint was established, since "there was no evidence that the Agency interfered with your rights assured by the Executive Order or discriminated against you based on union membership considerations or because you filed a complaint or gave testimony under the Order."

In your appeal to the Council, you contend in substance that the Assistant Secretary's decision presents a major policy issue and is arbitrary and capricious, principally because Marasco is a management

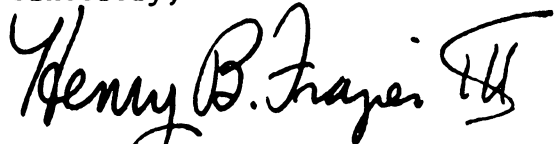
or supervisory official whose statement is attributable to, and the responsibility of, the agency. You further rely on a claim that, over the years, your career appraisal form has included a supervisory comment advertizing to your union office, which comment is violative of the Order under Assistant Secretary precedent.

In the opinion of the Council, the Assistant Secretary's decision does not present a major policy issue, nor does it appear in any manner arbitrary and capricious. In this connection, so far as can be determined from your appeal, no allegation was made, and no evidence was adduced, before the Assistant Secretary to establish that Marasco was a managerial or supervisory official. Likewise, your assertion with regard to the inclusion on your career appraisal form of a supervisory comment regarding your union office was not alleged or even referred to in your unfair labor practice complaint. Consequently, pursuant to section 2411.51 of the Council's rules of procedure (which provides, in pertinent part, that "the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary . . ."), these contentions in your appeal cannot serve as a basis for Council review.

Accordingly, since the Assistant Secretary's decision does not present a major policy issue nor appear arbitrary and capricious, the Council has directed, pursuant to section 2411.12 of its rules, that your petition for review be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

V. L. Edwards, Jr.
USAMC

National Oceanic and Atmospheric Administration, National Ocean Survey, A/SLMR No. 285. The Assistant Secretary dismissed the complaint filed by the National Maritime Union (NMU) that the agency violated section 19(a)(1), (5) and (6) of the Order by refusing to recognize and negotiate or confer with NMU as exclusive representative of alleged accretions or additions to NMU's unit. NMU appealed to the Council, contending that the Assistant Secretary's decision appeared arbitrary and capricious and presented a major policy issue.

Council action (December 12, 1973). The Council held that the Assistant Secretary's decision did not appear in any manner arbitrary and capricious; and that, in the particular facts and circumstances of this case and from the record as a whole before the Council, no major policy issue was presented by the Assistant Secretary's decision in this case. In so deciding, the Council did not pass on the propriety of the accretion standard as set forth in Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282 and applied by the Assistant Secretary in the subject decision. Accordingly, the Council denied review of the union's appeal under section 2411.12 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1973

Mr. Stanley B. Gruber
Counsel
National Maritime Union
of America, AFL-CIO
36 Seventh Avenue
New York, N.Y. 10011

Re: National Oceanic and Atmospheric
Administration, National Ocean
Survey, A/SLMR No. 285, FLRC No.
73A-40

Dear Mr. Gruber:

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

In his decision, the Assistant Secretary dismissed your complaint that the agency violated section 19(a)(1), (5) and (6) of the Order by refusing to recognize and negotiate or confer with NMU as exclusive representative of alleged accretions or additions to NMU's unit.

You contend in your appeal that the Assistant Secretary's decision appears arbitrary and capricious and presents a major policy issue.

In the Council's view, the decision of the Assistant Secretary does not in any manner appear arbitrary and capricious. Moreover, the Council is of the opinion that, in the particular facts and circumstances of this case and from the record as a whole before the Council, no major policy issue is presented by the Assistant Secretary's decision in this case. In so concluding, the Council does not pass on the propriety of the accretion standard as set forth in Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282 and applied by the Assistant Secretary in the subject decision.

Accordingly, as your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council has directed that review of your appeal be denied.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

P. Walper
NOAA

K. Olsen
Alaska Fishermen's Union

AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada. The negotiability dispute in this case concerned a union proposal which was disapproved by the Air Force during the agency review process under section 15 of the Order. Following this disapproval action by the agency, the parties entered into an agreement which included a provision dealing with the disputed subject matter, and which contained no applicable reopening or saving clause. Thereafter, the union initiated the instant appeal relating to the negotiability of the earlier proposal which had been disapproved by the Air Force.

Council action (December 12, 1973). The Council, relying on established Council precedent, dismissed the union's petition on the ground that the issues raised were rendered moot by the agreement between the parties. In this regard, the Council found without controlling significance the fact that the dispute arose during and with respect to the agency review process, since the agency head or his designee was empowered under section 15 to disapprove provisions of an agreement deemed violative of the Order, and such disapproval action would have been subject to Council review except for the subsequent agreement of the parties.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1973

Mr. Clyde M. Webber
National President
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: AFGE Local 1199 and Commander, 57th
Combat Support Group (TAC), Nellis
Air Force Base, Las Vegas, Nevada,
FLRC No. 73A-47

Dear Mr. Webber:

The Council has carefully considered your petition for review of a negotiability dispute, and the agency statement of position, in the above-entitled case.

As appears from the record in this case, the dispute concerns a proposal which, although agreed to by the local parties, was disapproved by the Air Force during the agency review process. Subsequently, the local parties entered into a collective bargaining agreement which was approved on May 29, 1973, and extends to May 29, 1975, and which includes a provision dealing with the subject matter involved in your negotiability appeal. That agreement contains neither a reopening nor a saving clause here applicable.

The Council has indicated in previous decisions that a negotiability dispute is rendered moot where the parties execute a bargaining agreement which deals with the disputed matter otherwise subject to Council review, and the agreement contains neither a saving nor operative reopening clause. (See AFGE Local 1960 and Naval Air Rework Facility, Naval Air Station, Pensacola, Fla., FLRC No. 70A-6, (Report of Case Decisions No. 2, dated January 8, 1971), and Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 73A-10, (Report of Case Decisions No. 39, dated June 1, 1973).)

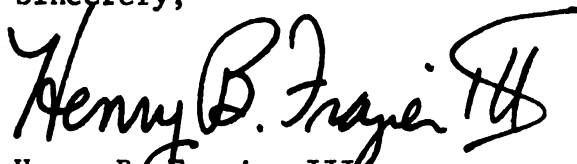
In the Council's opinion, those decisions are here controlling, and, contrary to the union's contention, it is without dispositive significance that the dispute arose during, and with respect to,

the agency review process. The agency head or his designee was empowered under section 15 of the Order to disapprove provisions of the agreement which were deemed violative of the Order. Such disapproval action as here taken by the agency under section 15 would have been subject to Council review under the procedures established in section 11(c) of the Order and the Council's rules, except for the subsequent agreement of the parties. (See Local 174, American Federation of Technical Engineers, AFL-CIO and Supships, USN, 11th Naval District, San Diego, California, FLRC No. 71A-49, (Report of Case Decisions No. 41, dated June 29, 1973).)

For the foregoing reasons, the Council finds, as similarly concluded by the agency head, that the issues raised in your appeal were rendered moot by the agreement between the parties. The Council has therefore directed that your appeal be dismissed on this ground.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: W. C. Valdes
DOD

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina. In this case, the Council was presented with a negotiability dispute concerning a union proposal which would limit the agency's discretion in assigning journeyman level work to apprentices; and a second union proposal which would affect the agency's discretion in assigning apprentices to training off-station or away from the Charleston Naval Shipyard.

Council action (December 27, 1973). The Council, based on its decision in the Griffiss Air Force Base case, FLRC No. 71A-30, sustained the agency determination that the agency is not obligated to bargain concerning the specific union proposals here involved (dealing with job content) under section 11(b) of the Order.

However, the Council observed that, if the union's proposals as written had clearly reflected the intent of the union, as characterized in its petition and during oral argument (e.g., to deal with the selection of personnel for overtime assignments and to insure equity and fairness in the selection of unit employees for training), the proposals might well have been determined to fall within the obligation to bargain imposed by section 11(a) of the Order. The Council further pointed out that, if the parties had discussed alternatives to the union's proposals -- in light of the union's stated intent -- it is possible that agreement could have been reached on appropriate subject matter for negotiation. The case, according to the Council, illustrates the situation which prompted its September 10, 1973, Information Announcement relating to the failure of parties during negotiations to attempt to work out matters bilaterally. The Council expressed the hope that its Announcement will encourage parties to use the negotiation process more imaginatively in working out their differences on negotiability problems than was evident here, before resorting to third party procedures.

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

Federal Employees Metal Trades
Council of Charleston

and

FLRC No. 72A-46

Charleston Naval Shipyard
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUES

Background

The Federal Employees Metal Trades Council of Charleston (FEMTC) represents an activity-wide unit of approximately 4,000 employees of the Charleston Naval Shipyard, Charleston, South Carolina. During negotiation of a basic labor-management agreement, the union submitted two proposals dealing with the subject of apprentices. The text of the proposals is set forth below:

Article 20, Section 7

The Employer agrees that apprentices shall be assigned journeyman level work for training purposes and not as a means of displacing or substituting for a journeyman.

Article 20, Section 8

The Employer agrees that apprentices in their first year of apprenticeship will not be assigned to 'off-station' training. Apprentices in second and later years of their apprenticeship will not be assigned to 'off-station' training in preference to a qualified journeyman.

The activity asserted that the proposals were nonnegotiable. Upon referral, the agency head upheld the activity's position on the ground, among others, that the proposed Article 20, Section 7 and Article 20, Section 8 were outside the activity's obligation to bargain under section 11(b) of the Order.

The union appealed to the Council from the agency head's determinations, and the agency filed a statement of position in support of

its determinations. Subsequently, pursuant to section 2411.48 of the Council's Rules and Regulations, the Council heard oral argument in the case.^{1/}

Opinion

The two questions for Council resolution concern the negotiability under the Order of (1) the union proposal which would limit the agency's discretion in assigning journeyman level work to apprentices; and (2) the proposal which would affect the agency's discretion in assigning apprentices off-station or away from the Charleston Naval Shipyard. The proposals will be considered separately below.

1. Assigning journeyman level work to apprentices.

The principal issue here is whether the union proposal (Article 20, Section 7), which would limit the agency's discretion in assigning journeyman level work to apprentices, concerns a matter about which the agency is obligated to negotiate under section 11(a) of the Order, or whether, as contended by the agency, it is excluded under section 11(b) from its obligation to bargain.

Section 11(a) of the Order, which relates to the negotiation of agreements between an agency and the exclusive representative of its employees, places a mutual obligation on the parties to meet 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 . . . and this Order." Section 11(b), however, excludes from this obligation to negotiate "matters with respect to . . . its organization; . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty."

The union disagrees with the agency's determination that the proposal falls within the exceptions from the obligation to bargain under 11(b) of the Order.

In urging the negotiability of the proposal, FEMTC argues, among other things, that the proposal is designed to (1) preclude management from arbitrarily using apprentices as a means of displacing or substituting

^{1/} A proposal submitted by management dealing with the subject of negotiated grievance procedures, which was also at issue originally in this case, is now resolved, the agency having rescinded its determination that inclusion of the proposal in the agreement was mandatory, based on the Council's decision in AFGE Local 1668 and Elmendorf Air Force Base (Wildwood AFS), FLRC No. 72A-10 (May 15, 1973), Report of Case Decisions Number 38, dated May 21, 1973.

them for journeymen; (2) preclude the Shipyard from assigning apprentices nontraining duties which would deny journeymen and helpers overtime assignments on weekends; and (3) insure that apprentices would receive their proper training.

We are not here faced, however, with a decision concerning the intent of the union proposal, but rather with the specific language presented for negotiation. In our opinion, the language of the union proposal, dealing as it does with the subject matter of assignment of journeyman level work to apprentices, clearly falls within the ambit of section 11(b) of the Order, as a matter related to the job content of positions or employees assigned to a work project or tour of duty.

In our decision in International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (Report No. 36), we concluded that the clause in 11(b) "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty," embraces the content of the individual job. Additionally, we concluded that job content, in general, is excluded from the obligation to bargain under the terms "organization" and "numbers, types, and grades of positions or employees assigned to a work project or tour of duty" in section 11(b) of the Order. Accordingly, as the union's proposed Article 20, Section 7 relates to job content of the apprentices, the agency may, but is not obligated to bargain over it under section 11(b) of the Order. We therefore uphold the agency head's determination that the proposal is nonnegotiable.

2. Assigning apprentices off-station or away from the Shipyard.

The union's proposal numbered Article 20, Section 8 would preclude the Charleston Naval Shipyard from assigning apprentices in their first year of apprenticeship to training off-station or away from the Shipyard; and from assigning apprentices in their second and later years of apprenticeship to off-station training in preference to a qualified journeyman. The principal issue with regard to this proposal is whether it concerns a matter about which the agency is obligated to negotiate under section 11(a) of the Order, or whether, as contended by the agency, it is one excluded under section 11(b) from its obligation to bargain.

Sections 11(a) and 11(b) are described in pertinent part on page 2 above.

As with the first proposal discussed above, this second proposal clearly relates to the assignment of job content to positions or employees. While the section 8 proposal deals with the assignment of "training" rather than "work," training is no less a part of the content of a job. Thus, it is excluded from the obligation to bargain under section 11(b) of the Order.^{2/} We therefore uphold the agency head's determination that the proposal is nonnegotiable.

We have held that the two union proposals at issue in this case deal with matters outside the agency's obligation to negotiate under section 11(b) of the Order, that is, job content. During oral argument in this case the union sought to clarify the disputed proposals as being primarily related to the distribution of nontraining overtime and the training of journeymen and apprentices. FEMTC argued, for example, that its second proposal was aimed at insuring equity and fairness in the selection of unit employees for training, and particularly to prevent management from arbitrarily denying off-station training opportunities to journeymen employees in the unit. Further, in this regard, the union contended that the proposal was not directed at formal, off-station training which is part of the apprenticeship training program but at off-station training conducted for the purpose of updating trade skills, i.e., training of special importance to journeymen. While viewing the second proposal as relating to job content, the agency conceded that a proposal setting forth practices and procedures for selection of employees for training assignments would be negotiable. However, it was asserted by the union during the oral argument that the representatives of management did not offer any alternatives, feasible and acceptable to management, which would deal with the union's concern over the training of employees. Moreover, it does not appear that there was any attempt by the Shipyard's representatives to ascertain the underlying problems of the employees in the unit or the purposes of their exclusive bargaining representative in submitting the proposals.

This case is illustrative of the situation which prompted the Council to issue its September 10, 1973 Information Announcement, where it said in part:

In some instances, management representatives have failed to offer feasible, negotiable alternatives to union proposals when they believe the union's proposals to be nonnegotiable. Instead, the management representatives have simply asserted that the

^{2/} International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report of Case Decisions Number 36, dated April 27, 1973.

union proposals are nonnegotiable giving the unions

FLRC NO. 72A-47

Association of Civilian Technicians, Inc., and State of New York National Guard. This negotiability dispute involved two union proposals: First, that a National Guard technician, who is required by statute to become a member of the Guard in a military capacity as a prerequisite to his civilian employment, have the option of immediate separation from the Guard when he ceases to be employed as a technician; and second, that technicians be required to use military rank only when actually performing military duties.

Council action (December 27, 1973). The Council held that the union's first proposal, dealing with the discharge of technicians from the National Guard, is outside the scope of bargaining under section 11(a) of the Order; and that the union's second proposal, dealing with the use of military rank, is contrary to a valid agency regulation, as interpreted by the agency head. Accordingly, the agency head's determination that these proposals are nonnegotiable was sustained.

As with the first proposal discussible giving the unions

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

Association of Civilian
Technicians, Inc.

and

FLRC No. 72A-47

State of New York National
Guard

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The union (Association of Civilian Technicians, Inc.) represents a unit of technicians employed by the National Guard of the State of New York. These technicians must, as a prerequisite to their civilian employment with the Guard, become members of the Guard in a military capacity, pursuant to 32 U.S.C. 709(b).^{1/}

During the course of negotiations between the union and the activity, the union made the following proposals:

- I. Discharge from the National Guard - A technician shall have the option of immediate separation from the National Guard at the time he ceases to be a technician, if he makes a request to the Chief of Staff to the Governor prior to the date of separation. This section shall not apply to those technicians serving under military obligation of service and not having completed six years.
- II. Use of Military Rank and Courtesy - Military rank will only be required when the employee is actually performing military duties.

^{1/} 32 U.S.C. 709(b) provides in pertinent part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

UNITED STATES

As with the first proposal discussed, ^{able} giving the unions

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, a national or other controlling agreement at a higher level in the agency, and this Order

. . . .

As already mentioned, the union proposed that those National Guard technicians who have completed their six year military obligation shall have the option of immediate separation from the Guard when they cease to be employed as technicians. The agency determined that this proposal is nonnegotiable because it concerns the discharge of an individual as a member of the National Guard, which is outside the scope of required bargaining under section 11(a) of the Order. The union argues in substance that the technician's civilian employment is contingent, by statute, on his National Guard membership, and therefore his separation from the Guard upon termination as a technician is a condition of employment which is bargainable under section 11(a). We cannot agree with the union's position.

32 U.S.C. 709(b) makes military membership in the National Guard a prerequisite for civilian employment as a National Guard technician. In a sense, therefore, it could be considered a precondition for an employment relationship whose terms are subject to the Order. The precondition itself, however, is not covered by the Order, but is a wholly separate enlistment contract which is mandated by statute and controlled by the regulations which implement that statute. The enlistment contract is for military service which entails numerous obligations and responsibilities attendant upon and required to be fulfilled by all members of the National Guard, regardless of the nature of their civilian employment.

It is obvious that the union proposal here is directed solely to the benefit of individuals who will have terminated their status as employees under the Executive Order. There is no assertion by the union that the requirement of Guard membership for civilian technicians be altered for members of the bargaining unit who retain their status as employees since such a proposal would clearly contravene 32 U.S.C. 709(b) and would therefore be nonnegotiable under section 11(a). Based upon the facts here presented, it is equally clear that the union proposal is nonnegotiable under the Order because the subject with which the proposal is concerned is not a working condition arising under or controlled by the Order, but rather a postemployment status which is outside of the purview of the Order and is solely governed by statute.

Under these circumstances, we are of the opinion that the union's proposal concerns a matter which falls outside the scope of required bargaining by the agency under section 11(a) of the Order.

Upon referral for negotiability determination, the Department of Defense determined that these proposals were nonnegotiable. This determination, as subsequently clarified,^{2/} was based on the grounds that the first proposal, dealing with discharge from the National Guard, involves a matter which is outside the scope of bargaining under section 11(a) of the Order; and that the second proposal, dealing with the use of military rank, is contrary to paragraph 2-4 of Technician Personnel Manual (TPM) 200.^{3/}

The union appealed to the Council, disagreeing with the agency determination that its proposal is outside the scope of bargaining under section 11(a) of the Order; and asserting that TPM 200, as interpreted by the agency head, is violative of applicable law and the Order. The agency filed a statement of position in support of its determination.

Opinion

The negotiability of the respective union proposals will be considered separately below.

1. Proposal concerning "Discharge from the National Guard."

Section 11(a) of the Order provides, in pertinent part, as follows:

Section 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive

^{2/} After the appeal was filed in this case, the Council was administratively informed that the agency regulations cited in the agency head's determination of nonnegotiability had been superseded. As a result, the determination was referred back to the agency for clarification in light of the changes in the regulations. (Report of Case Decisions No. 43, August 31, 1973.) The agency filed such a clarification, and the union filed comments thereon.

^{3/} The relevant portion of TPM 200, as relied on by the agency, provides as follows:

2-4. Wearing of the Uniform. Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties. When the uniform is deemed inappropriate for specific positions and functions, adjutants general may authorize other appropriate attire

As with the first proposal discussable giving the unions

With respect to the "due regard" provision in section 11(b), the union has failed to demonstrate that the regulation, either by its fundamental nature or in the circumstances surrounding its issuance, improperly limits or dilutes the scope of negotiations and hence conflicts with the bargaining obligation. Rather, it is apparent that TPM 200 extends, by its terms, alike to all subordinate activities within the National Guard, and is intended to implement broad agency purposes. Such a regulation, for the reasons fully detailed in the Council's Sheppard Air Force Base decision,^{6/} is completely consistent with the obligation imposed by section 11 of the Order and may properly limit the scope of negotiations at subordinate activities under the Order. As a result, the Council is of the opinion that TPM 200 is not violative of section 11(b) of the Order.

With regard to the Memorandum of Understanding between the Civil Service Commission and the Department of the Army concerning the Army Reserve Technicians, this memorandum is obviously not dispositive because it deals with Army Reserve Technicians, as opposed to National Guard technicians here involved. Further, as pointed out by the agency in its statement of position, the current Memorandum of Understanding provides in section 9 that:

Military courtesy will be required of technicians when serving in a military capacity such as at drills, inspections, on active duty, or at military functions and at other times when wearing the uniform.

For these reasons, and apart from other considerations, this argument by the union must also be rejected.

Based on the foregoing, we find that TPM 200, as interpreted by the agency head, is not invalid under applicable law or the Order. As a result, we uphold the agency's determination of nonnegotiability of the proposal, based on this regulation.

Conclusion

In summary, we find that the union's proposal dealing with discharge of technicians from the National Guard when they cease to be employed as technicians does not fall within the scope of required bargaining under section 11(a) of the Order; and that TPM 200, as interpreted by the agency head, does not conflict with applicable law or the provisions of the Order.

6/ National Federation of Federal Employees Local 779, and Department of the Air Force, Sheppard Air Force Base, Texas, FLRC No. 71A-60, issued April 3, 1973 (Report No. 36).

2. Proposal concerning "Use of Military Rank and Courtesy."

As previously indicated, the agency determined that the union's proposal that the use of military rank not be required of technicians while they are performing technician duties is nonnegotiable, since it is contrary to TPM 200, which requires the wearing of the uniform when performing technician duties.

More specifically, the agency determined that the use of military rank is "inseparably related" to the wearing of the uniform; that the regulatory provision for the wearing of the uniform thereby implicitly includes the requirement that military rank be observed; and that because the regulation bars the Adjutant General from agreeing to any general relaxation of the uniform requirement, he is likewise without authority to agree to any general relaxation of the use of military rank, as proposed by the union.

The union argues that TPM 200, as so interpreted by the agency head, is "overly broad" and in effect violates the "due regard" provision in section 11(b) of the Order.^{4/} In addition, the union asserts that the regulation invoked by the agency violates the "intent" of the Order by reason of a "higher controlling agreement" between the Civil Service Commission and the Department of the Army, relating to Army Reserve Technicians, in which the use of military courtesy is required only when the individual is serving in a military capacity.^{5/}

4/ Section 11(b) of the Order reads in relevant part as follows:


In prescribing regulations . . . , an agency shall have due regard for the obligation imposed by paragraph (a) of this section

5/ The union also contends that TPM 200 is invalid on such grounds as the inadvisability of the regulation; the incorrectness of the agency head's interpretation of the regulation; and the alleged unconstitutionality of the regulation as interpreted by the agency head. However, the advisability of the agency regulation is not a proper matter for Council review of a negotiability dispute under section 11(c)(4) of the Order. (See National Federation of Federal Employees Local 1636 and New Mexico National Guard, FLRC No. 73A-13, issued September 17, 1973 (Report No. 44), at p. 8.) Further, regarding the propriety of the agency head's interpretation of the agency's regulation, the Council, under the express terms of section 11(c)(3) of the Order, is bound by the agency head's interpretation of agency regulations. In other words, the Council may not substitute its interpretation of an agency's regulations for the agency head's determination as to the interpretation of those regulations. (Local Lodge 2424, IAM-AW and Aberdeen Proving Ground Command, FLRC No. 72A-37, issued May 22, 1973 (Report No. 39).) Finally, as to the alleged unconstitutionality of the regulation, no persuasive reason is advanced by the union or appears in support of this argument. (Cf. New Mexico National Guard, supra.) Therefore, based on the foregoing, these union contentions are rejected.

Accordingly, the agency head's determination as to the nonnegotiability of the union's proposals was valid.

Pursuant to section 2411.27 of the Council's rules of procedure, the determination of the agency head is therefore sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: DEC 27 1973

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

American Federation of Government
Employees, National Joint Council
of Food Inspection Locals

and

FLRC No. 73A-36

Office of the Administrator, Animal
and Plant Health Inspection Service, U.S.
Department of Agriculture

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The American Federation of Government Employees, National Joint Council of Food Inspection Locals is the national exclusive bargaining representative for all meat and poultry inspectors of the Animal and Plant Health Inspection Service (APHIS) within the Department of Agriculture. During the course of negotiations between the union and the agency, the union submitted the following proposal:

WORKWEEK: It is agreed that the basic workweek is forty (40) hours and the basic workday is eight (8) hours. The workweek shall commence at 6:00 a.m. and shall not commence after 6:00 p.m. on each Monday. It shall consist of five (5) consecutive eight (8) hour days, Monday through Friday.^{1/}

(a) A workday shall consist of eight (8) consecutive hours excluding the lunch mealtime.

(b) The lunch period shall be no less than thirty (30) minutes or more than sixty (60) minutes and shall occur not less than four (4) hours or more than five (5) hours after the start of the day.

The agency determined that the proposal was nonnegotiable insofar as it related to the establishment of a basic Monday through Friday workweek and limitations upon the starting time for that workweek. The union appealed this determination to the Council under section 11(c)(4) of the Order, and the agency filed a statement of position.

^{1/} The parties' contentions were limited to the underlined portion of the proposal.

As with the first proposal discussed above, this second proposal clearly relates to the assignment of job content to positions or employees. While the section 8 proposal deals with the assignment of "training" rather than "work," training is no less a part of the content of a job. Thus, it is excluded from the obligation to bargain under section 11(b) of the Order.^{2/} We therefore uphold the agency head's determination that the proposal is nonnegotiable.

We have held that the two union proposals at issue in this case deal with matters outside the agency's obligation to negotiate under section 11(b) of the Order, that is, job content. During oral argument in this case the union sought to clarify the disputed proposals as being primarily related to the distribution of nontraining overtime and the training of journeymen and apprentices. FEMTC argued, for example, that its second proposal was aimed at insuring equity and fairness in the selection of unit employees for training, and particularly to prevent management from arbitrarily denying off-station training opportunities to journeymen employees in the unit. Further, in this regard, the union contended that the proposal was not directed at formal, off-station training which is part of the apprenticeship training program but at off-station training conducted for the purpose of updating trade skills, i.e., training of special importance to journeymen. While viewing the second proposal as relating to job content, the agency conceded that a proposal setting forth practices and procedures for selection of employees for training assignments would be negotiable. However, it was asserted by the union during the oral argument that the representatives of management did not offer any alternatives, feasible and acceptable to management, which would deal with the union's concern over the training of employees. Moreover, it does not appear that there was any attempt by the Shipyard's representatives to ascertain the underlying problems of the employees in the unit or the purposes of their exclusive bargaining representative in submitting the proposals.

This case is illustrative of the situation which prompted the Council to issue its September 10, 1973 Information Announcement, where it said in part:

In some instances, management representatives have failed to offer feasible, negotiable alternatives to union proposals when they believe the union's proposals to be nonnegotiable. Instead, the management representatives have simply asserted that the

2/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report of Case Decisions Number 36, dated April 27, 1973.

union proposals are nonnegotiable giving the unions no alternative but to appeal or to drop the matter from negotiations. On the other hand, where management has offered alternatives, some union representatives have appealed the negotiability of their proposals without first considering and discussing the management proposals at the bargaining table. Both actions are a disservice to labor-management relations and demonstrate a failure on the part of the parties to attempt to work matters out bilaterally.


It is our hope that the Announcement will encourage agencies and labor organizations to use the negotiation process more imaginatively in working out their differences on negotiability problems than was evident here, before resorting to third party procedures.

In this case, the intent of the union's proposals, as characterized by the union in its petition to the Council and during oral argument, was, for example, to deal with the selection of personnel for overtime assignments^{3/} and to insure equity and fairness in the selection of unit employees for training. Had the union's proposals as written clearly reflected such an intent, the proposals could very well have been determined to fall within the obligation to bargain imposed by section 11(a) of the Order, absent any showing by the agency that the proposals would violate applicable law, regulation of appropriate authority outside the agency or agency regulations. Moreover, had the parties discussed alternatives to the union's proposals -- in light of the union's stated intent -- it is possible that agreement could have been reached on appropriate subject matter for negotiation.

Conclusion

For the reasons set forth above, we find that the determination that the agency is not obligated to bargain concerning the specific union proposals here involved must be sustained under section 11(b) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: DEC 27 1973

3/ See the Report accompanying E.O. 11491, Section E.1., Labor-Management Relations in the Federal Service (1969).

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. The negotiability dispute in this case involved a union proposal relating to the establishment of a basic workweek and limitations upon the starting time of that workweek, for meat and poultry inspectors employed by the agency.

Council action (December 27, 1973). The Council held that the union proposal was negotiable under section 11(a) and rejected, as insufficiently supported, the agency's contentions that bargaining is proscribed by applicable statute or the Order. Accordingly, the Council set aside the agency's determination of nonnegotiability in this case.

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

American Federation of Government
Employees, National Joint Council
of Food Inspection Locals

and

FLRC No. 73A-36

Office of the Administrator, Animal
and Plant Health Inspection Service, U.S.
Department of Agriculture

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The American Federation of Government Employees, National Joint Council of Food Inspection Locals is the national exclusive bargaining representative for all meat and poultry inspectors of the Animal and Plant Health Inspection Service (APHIS) within the Department of Agriculture. During the course of negotiations between the union and the agency, the union submitted the following proposal:

WORKWEEK: It is agreed that the basic workweek is forty (40) hours and the basic workday is eight (8) hours. The workweek shall commence at 6:00 a.m. and shall not commence after 6:00 p.m. on each Monday. It shall consist of five (5) consecutive eight (8) hour days, Monday through Friday.^{1/}

(a) A workday shall consist of eight (8) consecutive hours excluding the lunch mealtime.

(b) The lunch period shall be no less than thirty (30) minutes or more than sixty (60) minutes and shall occur not less than four (4) hours or more than five (5) hours after the start of the day.

The agency determined that the proposal was nonnegotiable insofar as it related to the establishment of a basic Monday through Friday workweek and limitations upon the starting time for that workweek. The union appealed this determination to the Council under section 11(c)(4) of the Order, and the agency filed a statement of position.

^{1/} The parties' contentions were limited to the underlined portion of the proposal.

Opinion

This case involves the extent of the agency's obligation to negotiate with the union concerning the particular days of the week which will constitute the basic workweek for unit employees and limitations upon the starting time for that workweek. The agency contends that the proposal to establish a basic Monday through Friday workweek and to limit the starting time is non-negotiable because it (1) violates applicable statutes and (2) is not a topic which the agency must bargain about under the Order.

We will review each of these grounds below:

1. Applicable Statutes. The agency contends that the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. and the Poultry Products Inspection Act, 21 U.S.C. § 451 et seq. delegate to the Secretary of Agriculture the "inherent authority" to specify the basic workweek and hours of work for the employees involved herein "in order to maintain the efficiency necessary for the effective execution of the Acts." In this regard, the agency claims that the union proposal would "usurp" this inherent authority delegated to the Secretary. In other words, the agency asserts that sharing the exercise of this authority through negotiations with the union would violate the statutes involved. In effect, the agency seems to contend that the authority to specify the basic workweek and hours of work is somehow solely and exclusively reserved by the statutes to agency management. We find nothing in the statutes or their legislative histories to support this contention.

The agency also argues that the union proposal would restrict the operational flexibility of the regulated industry, thereby decreasing productivity and raising operating costs which eventually will be passed on to the consumer. To so restrict this flexibility would be contrary to the statutes because "[n]owhere in the Federal Meat Inspection Act or the Poultry Products Inspection Act has Congress expressed an intent to restrict the operational flexibility of the regulated industry."

The agency's submission in this case does not establish that the proposal would so restrict the operational flexibility of the regulated industry. In any event, assuming that the agency is correct in its contention, we cannot infer from the absence of an affirmative Congressional intent to restrict such flexibility the presence of an intent to prevent such a restriction, as the agency would have us do. Furthermore, our research fails to find support for the agency assertion that "[n]owhere in the Federal Meat Inspection Act or the Poultry Products Inspection Act has Congress expressed an intent to restrict the operational flexibility of the regulated industry." For example, both acts specifically provide that the industry should bear the cost of an APHIS inspector's overtime.^{2/}

Therefore, we find that neither the Federal Meat Inspection Act nor the Poultry Products Inspection Act constitutes a bar to the negotiability of the union proposal.

^{2/} Federal Meat Inspection Act, 21 U.S.C. § 695 (1970); Poultry Products Inspection Act, 21 U.S.C. § 468 (1970).

The agency also argues that the union proposal is nonnegotiable because it would require that all meat or poultry plants which operate on Saturday, or which commence work prior to 6 a.m. or after 6 p.m. on Monday, pay agency inspectors overtime even if the inspector's work does not exceed an eight-hour day or a forty-hour week. Although the agency does not cite a statute, it seems to be contending that the union proposal conflicts with 5 U.S.C. § 5542(a). That section of the code reads, in pertinent part, that:

Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work

The agency's position is without merit. Nothing in the language of the union proposal would require the payment of overtime to the inspectors before the statutory minimums have been met. Accordingly, we find that 5 U.S.C. § 5542(a) does not constitute a bar to negotiability of the union proposal.^{3/}

2. Executive Order 11491 as amended. The agency contends that the union proposal to establish a basic Monday through Friday workweek is nonnegotiable because it would require the agency to pay otherwise avoidable overtime for Saturday work in violation of the agency's right, under section 12(b)(4) of the Order, to maintain the efficiency of its operation, and in violation of the agency's right, under section 12(b)(5) of the Order, to determine the methods, means, and personnel by which its operations are to be conducted. Furthermore, the agency argues that the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order because it would constitute negotiations with respect to the mission of the agency and its budget.

a. Section 12(b)(4). The agency argues that the union proposal is nonnegotiable because it would result in overtime expenses which would conflict with the agency's right, under 12(b)(4) of the Order, to maintain efficient agency operations. Section 12(b)(4) provides that:

(b) management officials of the agency retain the right, in accordance with applicable laws and regulation--

.
(4) to maintain the efficiency of the Government operations entrusted to them

3/ See 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., FLRC No. 71A-46 (November 21, 1972), Report No. 30, at p. 6.

Since the agency head determination and the agency's statement of position address only the cost factor of the union proposal concerning the basic workweek, the agency is in effect equating efficiency with economy of operation in its application of section 12(b)(4).

The Council has previously applied section 12(b)(4) in a negotiability dispute over a proposal concerning the basic workweek in the Charleston case.^{4/} In that case we held that a union proposal to affirm Monday through Friday as the basic workweek for most unit employees was negotiable under section 11(a) of the Order, and set aside as insufficiently supported the determination of the Department of Defense that the proposal was nonnegotiable under section 12(b)(4) of the Order. As we indicated in that decision:

The general premise which underlies the agency's interpretation is that a proposal which would result in increased costs, ipso facto, would result in decreased efficiency of operations. We recently considered and rejected a similar contention in the Little Rock case.^{4/} As we said in that decision:

In our opinion, the agency's position equating reduced premium pay costs with efficient and economical operations improperly ignores the total complex of factors encompassed within the concept of 'efficiency and economy.' It fails to take into account, for example, the adverse effects of employee dissatisfaction with existing assignment practices, and the very real possibility that revised practices along the lines proposed, by reason of their actual impact on the employees, might well increase, rather than reduce, overall efficiency and economy of operations.

In general, agency determinations as to negotiability made in relation to the concept of efficiency and economy in section 12(b)(4) of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of employees, rather than an arbitrary determination based only on the anticipation of increased costs. Other factors such as the potential for improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety, and the like, are valid considerations.^{3/} We believe that where otherwise negotiable proposals are involved the management right in section

^{4/} Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 27, 1972), Report No. 31, at pp. 3-4.

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. [Footnotes omitted.]

Instead of applying the test described above to this union proposal, the agency asserts that this case should be distinguished from Charleston because it involves a service oriented agency and overtime costs which are borne by private industry rather than by the government. In other words, the agency contends that the result in the Charleston case would not obtain here because the test applied must vary with the source of funds involved or the type of service being rendered. We disagree. Nothing in section 12(b)(4) makes it dependent upon the source of funds involved or the type of service being rendered.

Accordingly, since the agency has failed to demonstrate that the union proposal would result in increased costs which are not offset by compensating factors, and based upon the above reasoning, we find that the agency's determination of nonnegotiability under section 12(b)(4) of the Order is improper and must be set aside.

b. Section 12(b)(5). Next the agency contends that the union proposal is nonnegotiable because it would limit management in the exercise of its rights under 12(b)(5). Section 12(b)(5) states that:

(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.

The Council has previously had occasion to consider the meaning of the terms "method," "means" and "personnel" as they are used in section 12(b)(5). In Tidewater the Council said:^{5/}

The term "methods," as used in the Order . . . means . . . how operations are to be conducted . . . The term "means," as used in the Order . . . includes . . . what will be used in conducting operations Finally, "personnel" . . . means who will conduct agency operations.

The crux of the union proposal, as reflected in the documents filed by both parties, is the establishment of a basic workweek for overtime purposes.

5/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41, at pp. 5-6.

The union proposal does not address, nor seek to limit, management's right to choose the methods and means by which agency operations are to be conducted, either within or outside the proposed basic workweek. Further, the union proposal does not in any way limit management in its selection of personnel for overtime work. For these reasons, the agency's reliance upon section 12(b)(5) is misplaced.

Accordingly, we find that the agency's determination of nonnegotiability under section 12(b)(5) of the Order is improper and must be set aside.

c. Section 11(b). The agency also argues that, under section 11(b) of the Order, it is not obligated to negotiate this union proposal. It contended that this would, in effect, constitute negotiations with respect to the mission of the agency and its budget. Although this contention is made by the agency, nothing is provided in the agency's statement of position nor in the agency head's determination to demonstrate such a connection between the union proposal and the mission or the budget of the agency.^{6/}

Accordingly, we find that the agency's determination of nonnegotiability under section 11(b) of the Order is improper and must be set aside.

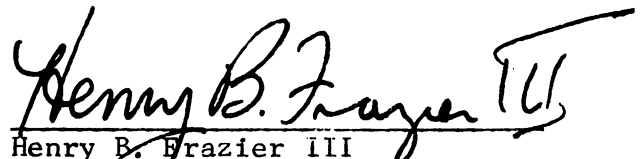
In summary, we find that the agency's determination, that the union proposal is nonnegotiable because it violates applicable statutes and is not a topic which the agency must bargain about under the Order, is improper.

This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before us, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of Executive Order 11491.

Conclusion

For the reasons discussed above, and pursuant to section 2411.27 of the Council's Rules and Regulations we find that the Agency head determination in this case must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: ~~DEC 17 1971~~

^{6/} The agency admits, in its statement of position "that the Union does not advocate no work on Saturday." Moreover, as was noted above, the statutes specifically provide that the industry should bear the cost of an APHIS inspector's overtime work.

INTERPRETATIONS AND POLICY STATEMENTS

January 1, 1970 through December 31, 1973

FLRC No. 70P-1 Dues withholding for supervisors.

A labor organization asked the Council to direct an agency to restore dues withholding for supervisors who were dropped from allotment rolls in September 1969 because they were no longer in units of formal or exclusive recognition. The organization asserted that E.O. 11491 allowed for continuation of dues withholding for such supervisors.

The Council, on May 26, 1970, declined to consider the request for the reasons that the action complained of was taken prior to issuance of E.O. 11491, the policies of the Order were not retroactive, and no authority was given the Council to reopen a matter completed prior to the operative date of the new program.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

MAY 26 1970

Mr. John F. Griner
National President
American Federation of Government
Employees
400 First Street, N.W.
Washington, D.C. 20001

Re: FLRC No. 70P-1

Dear Mr. Griner:

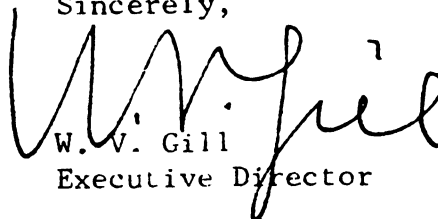
Your letter of April 14, 1970, reference 8d/E.O. 11491, requesting the Council to direct the Department of Defense to restore the dues withholding privileges of supervisors dropped from the allotment rolls on September 1, 1969, has been carefully considered. For the reasons indicated below, your request must be denied.

The actions of the Department of Defense in terminating the dues allotments of its supervisors on September 1, 1969, pursuant to the Defense memorandum of March 4, 1969, were fully accomplished before the issuance of Executive Order 11491 on October 29, 1969, and before the general effective date of the new Order on January 1, 1970. No provision was made in Executive Order 11491 for the retroactive application of either its policies, procedures or requirements; and no authority was granted to the Council to reopen any matter already completed on the operative date of the new program.

Accordingly, the Council is of the opinion that the termination of dues withholding authorizations of supervisors by the Department of Defense on September 1, 1969, is outside the jurisdiction of this agency and, without passing on the merits of the question, the Council denies your request that it intervene in the matter.

By direction of the Council

Sincerely,



W. V. Gill
Executive Director

FLRC No. 70P-2 Regulations governing relations with supervisors.

An association of supervisors recommended that the Council issue regulations to govern Federal agency relationships with supervisors and associations of supervisors under section 7(e) of the Order.

The Council, on June 8, 1970, advised the association that, after review of the background of section 7(e), it had concluded that it was not the intent of the Order that this provision be implemented by Council regulations setting forth uniform requirements for agency arrangements and, accordingly, that it would not issue the recommended regulations.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 8, 1970

Mr. Fred J. O'Dwyer
President
National Association of Postal
Supervisors
P.O. Box 1924
Washington, D. C. 20013

Re: FLRC No. 70P-2

Dear Mr. O'Dwyer:

The Council has considered the recommendation in your letter of January 28, 1970 that it issue regulations to govern Federal agency relationships with supervisors and associations of supervisors.

While it recognizes the special factors in your organization's relationships, the Council is of the opinion, after review of the background of section 7(e), that it is not the intent of the Order that this provision be implemented by Council regulations setting forth uniform requirements for agency arrangements. Accordingly, the Council will not issue rules relating to agency-supervisor relationships at this time.

I am enclosing a copy of the first two parts of the Council's proposed rules, which will be published in the Federal Register on June 10, 1970.

By direction of the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. V. Gill".

W. V. Gill
Executive Director

Enclosure

FLRC No. 70P-3 Official time for negotiations.

A labor organization asked the Council to recommend a change in section 20 of the Order to provide that employees who represent a labor organization in negotiations shall be on official time.

The Council, on July 2, 1970, advised the organization that because of the widespread interest of agencies and other organizations in this matter and the Council's desire to consult fully with all interested parties, it had decided that this issue should be taken up along with other proposed changes in the Order as part of the first annual review of the program.

UNITED STATES .
FEDERAL LABOR RELATIONS COUNCIL

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

July 2, 1970

Mr. John F. Griner
National President
American Federation of
Government Employees
400 1st Street, N. W.
Washington, D. C. 20001

Re: FLRC No. 70P-3

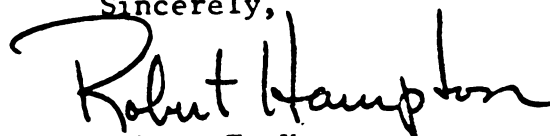
Dear Mr. Griner:

This is in reply to your letter of June 1, 1970, urging the Federal Labor Relations Council to consider and recommend to the President a change in Executive Order 11491 which would provide for labor-management negotiations on official time.

The Council has carefully considered your request and recognizes the seriousness of the issue. However, because of the widespread interest of agencies and other organizations in this matter and in keeping with the Council's desire to consult fully with all interested parties, it has decided that this issue should be taken up along with other proposed changes in the Order as part of the first annual review of the program, which is to be held in October as called for by the President at the time of the signing of the Order. The Council has decided to schedule general public hearings in October for this purpose. The time and place of the hearings will be announced as soon as arrangements are completed.

The Council appreciates your concern with the section 20 issue. We are looking forward to a comprehensive presentation on the experience of the American Federation of Government Employees on this and other matters in the October hearings.

Sincerely,



Robert E. Hampton
Chairman

A labor organization asked the Council to instruct agencies that employees who supervise foreign nationals only are exempt from the provisions of section 24(d) of the Order which required the exclusion of supervisors from units of formal and exclusive recognition and from coverage by negotiated agreements by December 31, 1970. The union contended that the reasons for excluding supervisors from such coverage were not applicable to supervisors of foreign national employees.

The Council, on September 28, 1970, denied the request on the grounds that suitable adjudicatory procedures were available under the Order for resolution of the issue.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 28, 1970

Mr. John F. Griner
National President
American Federation of
Government Employees
400 1st Street, NW.
Washington, D.C. 20001

Re: FLRC No. 70P-4

Dear Mr. Griner:

This is in further reply to your letter of June 17, 1970, Reference 8g/L-3102, which asks the Council to instruct agencies that employees who supervise foreign nationals only are exempt from the provisions of Executive Order 11491 which excluded supervisors from units of formal and exclusive recognition and from coverage by negotiated agreements.

After careful study the Council has decided not to consider your request for a ruling on this matter because under its proposed rules in Part 2410, interpretations of the Order will be issued only in unusual circumstances where normal adjudicatory procedures are not suitable. The problem you have referred to us is one for which the program does provide suitable adjudicatory procedures and no unusual circumstances prevail which would justify taking the issue for resolution outside these procedures.

Your letter indicates that action will be taken shortly to exclude supervisors from units in which exclusive recognition is held by locals of AFGE. In view of your disagreement with the propriety of this proposed action it is appropriate for you to utilize the procedures established by the Assistant Secretary of Labor.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andrew G. Wolf".

Andrew G. Wolf
Acting Executive Director

cc: D.H. Green
Office of Assistant Secretary
of Defense (M&RA)

FLRC No. 71P-1 Right of attorneys to join or be represented by labor organizations.

An agency asked the Council to decide whether under the Order Federal employees engaged as attorneys may join or be represented by labor organizations which admit to membership and represent employees who are not attorneys. A petition seeking exclusive recognition for a unit of professional and non-professional employees, including attorneys, was currently pending. The agency asserted that opinions interpreting the Canons of Professional Ethics (now the Code of Professional Responsibility) of the American Bar Association raised a major policy issue.

The Council, on May 20, 1971, denied the request under section 2410.2 of its rules, advising the agency that suitable adjudicatory procedures are provided under the Order for resolution of the alleged issue.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 20, 1971

Mr. Samuel R. Pierce, Jr.
General Counsel
Department of the Treasury
15th & Pennsylvania Avenue, NW.
Washington, D.C. 20220

Re: FLRC No. 71P-1

Dear Mr. Pierce:

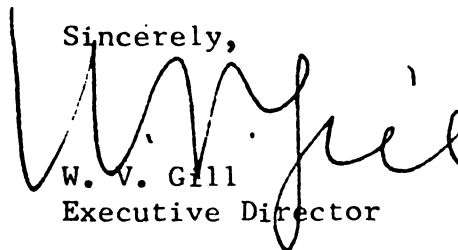
This is in further reply to your letter of April 12, 1971, requesting the Council to consider and decide, as a major policy issue, whether under Executive Order 11491 Federal employees engaged as attorneys may join or be represented by labor organizations which admit to membership and represent other categories of employees and, pending resolution of that issue, to request the Assistant Secretary to hold in abeyance a representation case numbered 70-1877.

The Council has carefully considered your request and has determined that it fails to meet the requirements contained in section 2410.2 of the Council's rules of procedure. Suitable adjudicatory procedures are provided under the Order for resolution of the alleged issue.

Accordingly, the Council has directed that your request be denied.

For the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. V. Gill".

W. V. Gill
Executive Director

FLRC No. 71P-2 Termination of formal recognition and dues withholding based on formal recognition.

Several labor organizations asked the Council to extend the date for termination of formal recognition or authorize continuation of dues withholding based on formal recognition beyond July 1, 1971. The Council considered several alternative proposals. A principal proposal was for extension of formal recognition and related dues withholding until representation proceedings pending on July 1, 1971, have been completed. The Council's rules terminating formal recognition on July 1, 1971, were issued on February 12, 1971, as Part 2412 of Title 5 of the Code of Federal Regulations (36 F.R. 2909). Part 2412 was adopted after considering the views submitted by agencies, labor organizations, and other interested persons in response to proposed rules on this subject published on September 29, 1970 (35 F.R. 15161).

The Council, on May 26, 1971, disapproved the labor organizations' proposals, after concluding that a delay beyond July 1, 1971, in the termination of formal recognition and related dues withholding would not contribute to the effectuation of the purposes of Executive Order 11491. The Council's decision was based on the following reasons:

1. Any further continuation of formal recognition and related dues withholding would unreasonably defer achieving a significant purpose of the Order, which is to clarify and strengthen the concept of exclusive recognition.
2. Since no new grants of formal could be made after October 29, 1969, formal recognition and related dues withholding give an advantage in representation proceedings to unions which held such benefits prior to that date over competing unions which do not have these benefits. It was deemed improper to continue this inequitable situation any longer than necessary.
3. Termination of formal recognition was prescribed by the Order, so affected organizations have been aware of the impending action since October 29, 1969. Some representation proceedings would be pending on any termination date established. The proposed Council rules set April 1, 1971, as the termination date; in adopting final rules the Council extended this date to July 1, 1971. It was believed that ample notice of the termination of formal recognition and related benefits had been provided.
4. While continuation of formal recognition and related dues withholding until representation proceedings pending on July 1 are completed would avoid an interruption of relationships for those unions with formal recognition which succeed in obtaining exclusive recognition as a result of the proceedings, it would also permit continuation for unions which do not obtain such recognition. On balance, it was concluded that this result would not be in the best interests of the program.

However, the Council recognized the desirability of avoiding any extended interruption in existing labor-management relationships and, on June 28, 1971, requested the Assistant Secretary of Labor for Labor-Management Relations to expedite the completion of representation proceedings pending on July 1 which involve units of employees not currently represented under exclusive recognition so as to minimize the extent of interruption of relationships for unions which held formal recognition prior to July 1 and obtain exclusive recognition as a result of such proceedings.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 26, 1971

Mr. Nathan T. Wolkomir
President
National Federation of
Federal Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: FLRC No. 71P-2

Dear Mr. Wolkomir:

This is in reply to your letter of May 18, 1971, which requested that the Council issue a policy statement authorizing the continuation of dues withholding agreements heretofore negotiated, notwithstanding the Council's regulations providing for the termination of formal recognition on July 1.

The Council has carefully considered your request, as well as several alternative proposals advanced by other organizations. It has concluded that to continue dues withholding agreements based on formal recognition beyond July 1 would not contribute to effectuation of the purposes of Executive Order 11491.

As you know, the termination of formal recognition was prescribed by the Order. Affected organizations have been aware of this impending action since October 1969. Proposed Council rules issued in September 1970 set April 1, 1971 as the termination date. The Council's final rules extended this date to July 1. It is apparent that there has been ample advance notice of the termination of formal recognition and the related benefit of dues withholding.

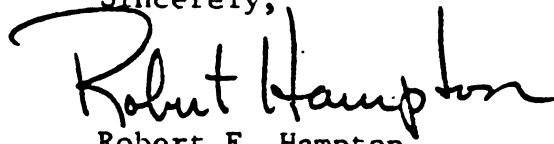
The Council believes that any further continuation of dues withholding based on formal would unreasonably defer achieving a significant purpose of the Order, which is to clarify and support the concept of exclusive recognition. Further, since no new grants of formal could be made after October 29, 1969, formal recognition and related dues withholding give an advantage in representation proceedings to organizations which held such benefits prior to that date over competing organizations which do not have these benefits. It would be unreasonable to continue this inequitable situation any longer than necessary. On balance, the Council

cannot conclude that continuation of dues withholding agreements heretofore negotiated would be in the best interests of the program.

I regret that we cannot comply with your request.

For the Council.

Sincerely,

A handwritten signature in cursive script that reads "Robert Hampton". The signature is written in black ink and is positioned above the printed name and title.

Robert E. Hampton
Chairman

FLRC No. 71P-3

A labor organization asked the Council for an interpretation of E.O. 11491 which would affirm the right of a supervisor to choose any individual, including an official of a labor organization which represents the supervisor's employees, as a representative in a grievance action filed pursuant to an agency grievance procedure.

In this case the top management official in a major subdivision of an agency had declined to accept a union official as the representative of certain supervisors in a grievance action. Subsequently, the supervisors withdrew their grievance.

The Council, on August 23, 1971, declined to consider the issue under section 2410.2 of its rules, inasmuch as the union could raise the issue under the unfair labor practice procedures provided under the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1971

Mr. Robert M. Tobias
Staff Counsel
National Association of
Internal Revenue Employees
Suite 1100 - 711 Fourteenth St., NW.
Washington, D.C. 20005

Re: FLRC No. 71P-3

Dear Mr. Tobias:

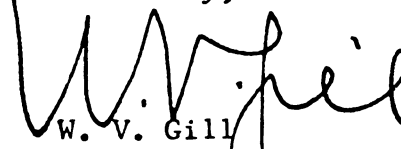
This is in further reply to your request of May 11, 1971, that the Council issue an interpretation of Executive Order 11491 affirming the right of supervisory employees to choose any individual as a representative in a grievance filed pursuant to an agency grievance procedure.

The Council has carefully considered your request and has determined that it fails to meet the requirements contained in section 2410.2 of the Council's rules of procedure. Suitable adjudicatory procedures are provided under the Order for resolution of the alleged issue.

Accordingly, the Council has directed that your request be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

A labor organization asked the Council to issue a policy statement that the authority of an agency head under section 15 of the Order does not extend to negating a provision of an agreement which is not in conflict with published agency policy. In this case, a local agreement had been negotiated which described the unit and coverage of the agreement as including a certain category of employees. Subsequently, but prior to action on the agreement by the head of the agency under section 15, local management determined that employees in this category were supervisors and should be excluded from the unit and from coverage of the agreement in accordance with section 24(d) of the Order. The agreement was later approved by the agency head subject to this exclusion. The agency opposed the organization's request to the Council on the grounds that the issue is subject to the Assistant Secretary's adjudicatory procedures under the Order.

The Council, on August 23, 1971, declined to consider the issue under section 2410.2 of its rules on the grounds that suitable adjudicatory procedures are provided under the Order for resolution of the matter. Procedures are available under section 11(c)(4) of the Order to resolve any dispute arising from disapproval by an agency head of a provision of an agreement on the grounds that it does not conform to applicable law or regulations of other appropriate authorities. If an agency head should disapprove a provision of an agreement on grounds other than those authorized in section 15, his action may be challenged as an unfair labor practice. The question in this case of whether these employees are supervisors could be resolved under the representation procedures provided under the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1971

Mr. Patrick E. Zembower
Federal Representative
American Nurses' Association, Inc.
1030 15th Street, NW.
Washington, D.C. 20005

Re: FLRC No. 71P-4

Dear Mr. Zembower:

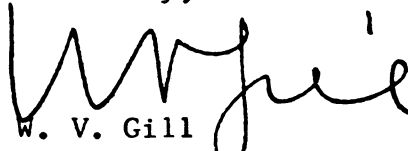
This is in further reply to your petition of May 21, 1971, requesting the Council to consider and decide, as a major policy issue, a question relating to the requirements of section 15 of Executive Order 11491, in the matter of the Veterans Administration Hospital, Danville, Illinois and the Illinois Nurses' Association.

The Council has carefully considered your request and has determined that it does not meet the requirements contained in section 2410.2 of the Council's rules since suitable adjudicatory procedures are provided under the Order for resolution of the alleged issues involved in the dispute.

Accordingly, the Council has directed that your request be denied.

For the Council.

Sincerely,


W. V. Gill
Executive Director

FLRC No. 71P-9

An agency asked the Council to decide certain questions raised in connection with a representation petition filed by a council of unions seeking national exclusive recognition for all eligible agency employees. The petition was pending before a Department of Labor Area Administrator. The issues were:

(1) Do representation actions in local units (i.e. certifications, recognitions, elections or representation hearings) within the past 12 months operate as bars to the petition?

(2) If the union council is certified as exclusive representative of a nationwide unit, are the numerous exclusive recognitions for local units presently held by other unions continued or abrogated? Do negotiated agreements in these units remain in effect and operate as bars? If so, what happens when the agreements expire?

(3) If the union council becomes the exclusive representative, could it have dues deductions go directly to its constituent locals?

The Council, on August 25, 1971, declined to issue an interpretation or policy statement on these issues, pointing out that the questions relating to recent representation actions and existing units and agreements are for resolution in the pending representation proceeding, to the extent required, and that arrangements for union dues deductions are for negotiation between the parties, subject to the appeal procedures prescribed in section 11(c) of the Order if a union proposal is deemed to be not negotiable.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 25, 1971

Honorable Donald E. Johnson
Administrator, Veterans
Administration
Washington, D.C. 20420

Re: FLRC No. 71P-9

Dear Mr. Johnson:

This is in further reply to your letter of August 5, 1971, requesting the Council to consider and decide, as major policy issues, questions relating to a representation petition filed by the Council of AFGE Veterans Administration Locals and other AFL-CIO affiliates for a unit of all eligible employees in the Veterans Administration.

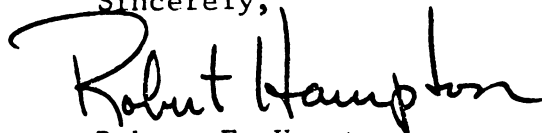
The Council has carefully considered your request and has determined, under section 2410.2 of its rules, that suitable adjudicatory procedures are provided under the Order for resolution of the issues presented. Accordingly, the Council will not issue an interpretation or policy statement on these matters.

The questions pertaining to recent representation actions (i.e. certifications, recognitions, elections and representation hearings), and to the status of existing units and agreements, relate to the representation proceeding pending before the Department of Labor's Washington Area Administrator. They should be resolved, to the extent required, by the determinations of the Assistant Secretary of Labor in that proceeding, subject to Council review.

The question whether dues deductions may go to constituent unions of the AFGE Council (assuming the Council is certified as the exclusive representative) may be resolved in the negotiation of dues withholding arrangements. If the AFGE Council should propose such an arrangement and your agency determines that the proposal is not negotiable, procedures are provided under section 11(c) of the Order for the resolution of such negotiability issues.

For the Council.

Sincerely,



Robert E. Hampton
Chairman

CC: AFGE NFFE
ANA NAGE
NAPFE Dept. of Labor

FLRC No. 71P-5

A labor organization which represents marine supervisory personnel in private industry asked the Council to amend section 24(a)(2) of Executive Order 11491 to allow unions that traditionally represent supervisors in private industry to represent such supervisors in the Federal service even though they did not hold exclusive recognition for such supervisors in any Federal agency on the date of the Order.

The Council, on September 20, 1971, decided that it would not consider the request to amend the Order at this time, since it was received after the Council completed its 1971 general review of the program which resulted in the amendments prescribed by Executive Order 11616 of August 26, 1971. The union was informed that when the Council initiates the next review of the program the union would be notified so that it could renew its recommendations for the amendment of section 24(a)(2) at that time.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 20, 1971

Mr. David R. Carlton
President, Marine Officers Association
Teamsters Local No. 54
300 South Grand Boulevard
St. Louis, Missouri 63103

Re: FLRC No. 71P-5

Dear Mr. Carlton:

This is in further reply to your letter of June 1 requesting the Council to amend section 24(a)(2) of Executive Order 11491 to extend the savings clause for the representation of certain management officials or supervisors to labor organizations that did not hold such representation rights on the date of the Order.

The Council has reviewed your request but has decided that it should not be considered at this time since it was received after Council action was completed on its 1971 general review of the Order. The 1971 review was initiated with public hearings in October 1970 which were announced in advance in the Federal Register and the various news media. Some 200 proposals were received from Federal agencies, labor organizations and other interested persons. The review resulted in Executive Order 11616 of August 26, 1971 which amended Executive Order 11491 in accordance with the Council's report and recommendations to the President. A copy of the amendments to the Order and the Council's report is enclosed for your information.

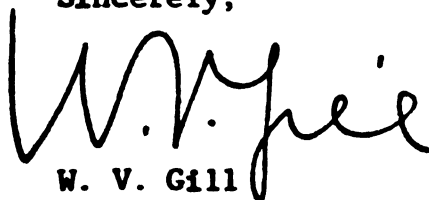
In its 1971 review the Council heard proposals for amendment of section 24(a)(2), but they referred to revision of that aspect of the section which restricts supervisor representation to labor organizations "which historically or traditionally represent the management officials or supervisors in private industry." These proposals were not considered favorably. No one suggested revision of the last clause in the section, the date restriction which is the subject of your recommendation. Consequently, this matter was not considered by the Council in its deliberations.

Another review will be conducted next year. The Council will again solicit the comments and proposals of labor organizations, agencies, and other interested parties. We will advise you of the particulars of that review when arrangements for it have been made should you wish

at that time to renew your recommendation regarding section 24(a)(2) or offer any other proposals for the improvement of labor-management relations in the Federal service.

For the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "W. V. Gill". The signature is fluid and cursive, with the first name "W." and last name "Gill" clearly legible.

W. V. Gill
Executive Director

Enclosure

An agency requested that its Foreign Service employees be exempted from Executive Order 11491 and be included in the coverage of the then proposed Executive order* on employee-management relations for Foreign Service employees in the foreign affairs agencies (State, AID, and USIA).

The Council advised the agency, on October 13, 1971, that it had decided against recommending inclusion of the agency's Foreign Service employees in the coverage of the proposed Executive order because, among other reasons, the unique conditions of employment on which exemption of Foreign Service personnel in State, AID, and USIA from E.O. 11491 was based were not present in the Foreign Service of the agency making the request.

The Council pointed out that the absence of career Foreign Service appointments in the agency, the limited mobility between supervisory and non-supervisory assignments, the limited rotation of assignments between the United States and overseas, the absence of cross-utilization of Foreign Service personnel between State/AID/USIA and the agency, and the agency's authority to modify Foreign Service personnel policies or to establish new ones, all indicated fundamental differences between the conditions of Foreign Service employment in the foreign affairs agencies and such employment in the agency making the request.

*Executive Order 11636, issued December 17, 1971.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 13, 1971

Mr. Charles M. Odell
Director of Personnel
ACTION
806 Connecticut Avenue
Washington, D.C. 20525

Re: FLRC No. 71P-10

Dear Mr. Odell:

This is in response to your recommendation that ACTION Foreign Service employees be exempted from the coverage of Executive Order 11491, as amended, and be included in the coverage of the proposed Executive order on employee-management relations in the Foreign Service.

The Council has carefully considered your request, but has decided against recommending inclusion of ACTION Foreign Service employees in the coverage of the proposed Executive order.

A major reason for this decision was the policy already set out by the President in Executive Order 11603 of June 30, 1971. By that Order the President transferred the Peace Corps from the Department of State to ACTION and delegated to its Director the functions of prescribing regulations and making determinations relating to the appointment of Peace Corps Foreign Service employees which previously had been delegated to the Secretary of State under E.O. 11041 of August 2, 1962. Thus, the President, by his Reorganization Plan and Executive Order 11603, has indicated that the Peace Corps and its staff more properly fit into a grouping of volunteer action programs than a grouping of foreign affairs agencies. To adopt your recommendation would run counter to these recent actions by the President.

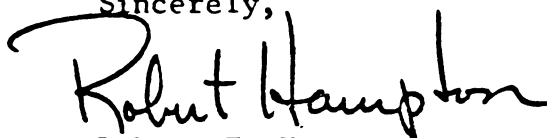
Moreover, the Council concluded that the principal bases on which the President approved exemption of Foreign Service personnel in the State Department, AID, and USIA from E.O. 11491, as amended, are not applicable to Foreign Service personnel of ACTION. The absence of career Foreign Service appointments, the limited mobility between supervisory and non-supervisory assignments, the limited rotation of assignments between the United States and overseas, the absence of cross-utilization of Foreign Service personnel between the foreign affairs agencies and ACTION, and ACTION's authority to modify Foreign Service personnel policies or to establish new ones, all indicate fundamental differences between the conditions of Foreign Service employment in the foreign affairs agencies and such employment in ACTION. These differences relate directly to

the bases on which the President approved the State Department's request for a separate employee-management relations program suited to the unique conditions of Foreign Service employment in the foreign affairs agencies.

I regret that, for these reasons, we are unable to respond favorably to your recommendation.

By direction of the Council.

Sincerely,

A handwritten signature in cursive script that reads "Robert Hampton". The signature is written in black ink and is positioned above the typed name and title.

Robert E. Hampton
Chairman

An agency requested an interpretation of § 2412.2(c) of the Council's rules to resolve a dispute with a labor organization as to its entitlement to national consultation rights. The organization represented a unit of 800 employees in the headquarters office of the agency, which constituted more than 10 percent of the agency's total employment; however, the agency believed that the language of § 2412.2(c)(1) precluded counting employees in a headquarters unit in determining an organization's entitlement to national consultation rights. § 2412.2(c)(1) provides: "In determining whether a labor organization meets the requirements ... [for national consultation rights] the following will not be counted: (1) At the agency level, employees represented by the labor organization under exclusive recognition at the agency level."

The Council advised the agency, on November 8, 1971, that issuance of an interpretation of its rules applicable to the particular situation would be inappropriate since such eligibility questions are decided by the Assistant Secretary of Labor, under 29 CFR § 202.2(d), subject to Council review. However, it observed that the provision of the rules in question refers only to employees under national exclusive recognition at the agency level, i.e. employees in a unit which extends throughout the agency, and that in order to clarify this intent for general application the Council's rules will be amended by substituting the term "national exclusive recognition" for "exclusive recognition" in subparagraphs 2412.2(c)(1) and (2) and 2412.3(d)(1) and (2).

National consultation rights are provided for by section 9 of Executive Order 11491, as amended, so as to enable a union which represents a substantial number of employees in local units of the agency, either at headquarters or in field activities, to consult on substantive personnel policies that are national in scope and, therefore, affect the employees it represents. Section 9 includes a provision which expressly precludes the granting of such rights for units of employees for which the union already holds national exclusive recognition. The rationale for the prohibition is that national consultation rights are less both in form and substance than rights under national exclusive recognition, inasmuch as the latter entitle the union to negotiate on personnel policies and practices and matters affecting working conditions in the nationwide unit represented.

A copy of the amendments to the Council's rules is attached. They will be published in the Federal Register on December 9, 1971.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1971

Honorable George M. Stafford
Chairman, Interstate
Commerce Commission
Washington, D.C. 20423

Re: FLRC No. 71P-8

Dear Mr. Chairman:

This is in further reply to your letter of August 4 requesting the Council to review the positions of the AFGE and the ICC regarding a disagreement over the interpretation of the Council's rules regarding eligibility for national consultation rights and to issue an interpretation applicable to this particular situation.

The Council has carefully considered your request and has determined that while it should not issue an interpretation of its rules applicable specifically to this case, it should issue clarifying amendments to Part 2412 of its rules for general application with respect to the question involved.

National consultation rights are designed to give unions with substantial representation in local units, either at headquarters or in field activities, an opportunity to consult on agencywide personnel policies. The intent of the exclusion in section 2412.2 of the Council's rules is to preclude unions from acquiring national consultation rights for a unit for which the union already holds national exclusive recognition. The rationale for the prohibition is that national consultation rights provide a lesser form of recognition than national exclusive; a union with national exclusive recognition is entitled to negotiate on personnel policies and practices and matters affecting working conditions of the employees it represents, whereas a union with national consultation rights can only consult on substantive personnel policies which affect the employees it represents under exclusive recognition.

In order to clarify this intent, the Council's rules will be amended by substituting the term "national exclusive recognition" for "exclusive recognition" in subparagraphs 2412.2(c)(1) and (2) and 2412.3(d)(1) and (2).

The Council concluded that, under section 2410.2 of its rules, it should

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER XIV--FEDERAL LABOR RELATIONS COUNCIL
AND FEDERAL SERVICE IMPASSES PANEL

SUBCHAPTER B--FEDERAL LABOR RELATIONS COUNCIL

PART 2412--NATIONAL CONSULTATION RIGHTS AND
TERMINATION OF FORMAL RECOGNITION

Subpart A--National Consultation Rights and
Termination of Formal Recognition at the National Level

National Consultation Rights

In order to clarify which employees will not be counted in determining eligibility for national consultation rights and on whose behalf a labor organization may not exercise national consultation rights, the term "national exclusive recognition" is substituted for "exclusive recognition" where these words appear in paragraphs 2412.2(c)(1) and (2) and paragraphs 2412.3(d)(1) and (2). Accordingly, Part 2412 is amended as follows:

1. In § 2412.2 paragraph (c) is revised to read as follows:

§ 2412.2 Requesting; granting; criteria.

* * * * *

(c) In determining whether a labor organization meets the requirements as prescribed in paragraphs (a)(2) and (b)(2) of this section, the following will not be counted:

(1) At the agency level, employees represented by the labor organization under national exclusive recognition granted at the agency level.

(2) At the primary national subdivision level, employees represented by the labor organization under national exclusive recognition granted at the agency level or at that primary national subdivision level.

* * * * *

2. In § 2412.3 paragraph (d) is revised to read as follows:

§ 2412.3 Obligation to consult.

* * * * *

(d) A labor organization which holds national consultation rights may exercise those rights in behalf of all the employees it represents under exclusive recognition in the agency or in the primary national subdivision which has granted those rights except:

(1) At the agency level, the labor organization may not exercise those rights in behalf of employees represented under national exclusive recognition granted at the agency level.

(2) At the primary national subdivision level, the labor organization may not exercise those rights in behalf of employees represented under national exclusive recognition granted at the agency level or at the primary national subdivision level.

* * * * *

The Council concluded that, under section 2410.2 of its rules, it should

(5 U.S.C. 552; E.O. 11491, 34 F.R. 17605, 3 CFR 191, 1969 Comp.,
as amended by E.O. 11616, 36 F.R. 17319.)

This amendment shall become effective on the date of its
publication in the Federal Register.

For the Council.


Robert E. Hampton
Chairman



The Council concluded that, under section 2410.2 of its rules, it should not issue an interpretation of its rules specifically applicable to the situation in ICC because suitable adjudicatory procedures are provided under the Order for resolution of questions of eligibility in particular situations. Such eligibility questions are decided by the Assistant Secretary of Labor, under 29 C.F.R. § 202.2(d), subject to Council review. Therefore, if the union does not agree with your final determination in accord with 2412.2(c), as amended, regarding its eligibility for national consultation rights, it can appeal to the Assistant Secretary for a resolution of the question.

For the Council.

Sincerely,



W.W. Gill
Executive Director

cc: National Headquarters,
AFGE
AFGE, Local 1779

A union requested a policy decision that employees who are promoted to supervisory positions after December 31, 1970 may continue union dues withholding, if desired, under section 550.310 of the Civil Service Commission's regulations. It contended that the intent of the Report and Recommendations accompanying E.O. 11491 and of the Civil Service regulation was to permit this and that such employees are, in effect, excluded from units of recognition by reason of section 24(d) of the Order.

The Council advised the union, on January 19, 1972, that it found no basis in the Order, its accompanying Report and Recommendations, or in CSC regulations, as interpreted by the Commission, for any conclusion other than that employees who are promoted to supervisory positions after December 31, 1970 are not eligible to continue dues withholding to a labor organization.

The Report and Recommendations accompanying Executive Order 11491 included a recommendation that:

Any supervisor who has a union dues withholding authorization in force at the time he is excluded from a formal or exclusive unit by action of the [recommendation that supervisors be excluded from current units by not later than one year from the effective date of the Order] should be permitted to continue his dues authorization in effect, if he desires to do so, so long as his authorization otherwise meets the conditions of the organization's dues withholding agreement with the agency.

This recommendation was implemented by Civil Service Regulation 550.310, Savings provision, which provided for the "...continuation of an allotment of dues to a labor organization by a supervisor when he desires to continue the dues withholding authorization which would otherwise have been cancelled because he was excluded from a formal or exclusive unit of a labor organization by reason of the requirements of Section 24(d) of Executive Order 11491." (Section 24(d) provided that "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition....") The Civil Service Commission has advised the Council that this savings provision does not apply to an employee who is promoted to a supervisory position subsequent to December 31, 1970.

The Council found no basis in the Order for the union's contention that an employee who is promoted to a supervisory position subsequent to December 31, 1970, is excluded from the unit of recognition by reason of section 24(d). Indeed, deletion of section 24(d) from the Order by the E.O. 11616 amendments clearly established that it was a transitional provision applicable only to persons who were supervisors in units of recognition before December 31, 1970. Employees promoted to supervisory positions subsequent to December 31, 1970, are excluded from units of recognition by the requirement of section 10(b) that a unit may not include any management official or supervisor, rather than by section 24(d).

They lose union dues withholding rights by reason of the section 21(a) limitation that dues withholding extends only to members of the organization in the unit of recognition.

In rendering its decision, the Council noted that supervisory employees are eligible under section 21(b) of the Order and Civil Service Commission regulations for dues withholding to an association of management officials or supervisors if they are members of such an association which has a dues withholding agreement with the agency.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1972

Mr. John F. Griner
National President
American Federation of
Government Employees
400 First Street, NW.
Washington, D.C. 20001

Re: FLRC No. 71P-7

Dear Mr. Griner:

This is in further reply to your letter of July 15, 1971 which requested a policy decision that employees who are promoted to supervisory positions subsequent to December 31, 1970 may continue union dues withholding if they so desire, under section 550.310 of the Civil Service Commission's regulations, because they are excluded from units of recognition by reason of section 24(d) of the Order.

After careful consideration, the Council has concluded that there is no basis for the policy decision requested.

The Report and Recommendations accompanying Executive Order 11491 included a recommendation that:

Any supervisor who has a union dues withholding authorization in force at the time he is excluded from a formal or exclusive unit by action of the foregoing recommendation should be permitted to continue his dues authorization in effect, if he desires to do so, so long as his authorization otherwise meets the conditions of the organization's dues withholding agreement with the agency.

The "foregoing recommendation" which is referred to stated:

...we recommend that recognition should not be granted for any unit which includes supervisors, or managerial executives, and that supervisors should not participate in the management or representation of labor organizations granted recognition under the order. Such persons should be excluded from current

units of formal or exclusive recognition and from coverage by negotiated agreements not later than 1 year from the effective date of the new order.

Section 24(d), by its language: "By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition..." plainly was intended to implement only the last sentence of the Report material cited above, which referred to persons who were supervisors in units of recognition on or before December 31, 1970.

Thus the Council finds no basis for the interpretation you have suggested, i.e. that an employee who is promoted to a supervisory position subsequent to December 31, 1970 is excluded from the unit of recognition by reason of section 24(d). Indeed, deletion of section 24(d) from the Order by the E.O. 11616 amendments establishes quite clearly that this was a transitional provision for the limited purpose stated.

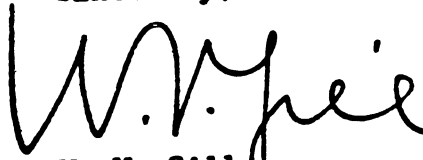
The Civil Service Commission has provided the Council with an official interpretation of section 550.310 of its regulations, the saving provision which permits continued union dues withholding by supervisors excluded from units of recognition by reason of section 24(d). The Commission advises that this saving provision does not apply to an employee who is promoted to a supervisory position subsequent to December 31, 1970.

Employees promoted to supervisory positions subsequent to December 31, 1970 are excluded from units of recognition by the requirements of section 10(b), rather than section 24(d). They lose union dues withholding rights by reason of the section 21(a) limitation of such rights to members in the unit. In this connection, it may be noted that employees promoted to supervisory status become eligible under section 21(b) and Civil Service Commission regulations for dues withholding to an association of management officials or supervisors if they become members of such an association which has a dues withholding agreement with the agency.

Accordingly, the Council finds no basis in Executive Order 11491, its accompanying Report and Recommendations, or Civil Service Commission regulations for any conclusion other than that employees who are promoted to supervisory positions after December 31, 1970 are not eligible to continue union dues withholding.

By direction of the Council.

Sincerely,



W. V. Gill
Executive Director

A labor organization asked the Council to issue an interpretation as to whether the Chairman of the Civil Service Commission, by simultaneously holding the chairmanship of the Federal Labor Relations Council, as provided for in section 4(a) of Executive Order 11491, as amended, is holding "another office or position in the Government of the United States" in violation of 5 U.S.C. § 1101.

The Council, on January 28, 1972, advised the union that its request for a ruling as to the legal sufficiency of section 4(a) of the Order was denied. The Council determined that it did not possess the power to pass upon the legal sufficiency of a provision of the Executive Order under which it was established, from which it derives its authority, and which it is charged with administering. The Council did note that the Justice Department had approved E.O. 11491 as to legality prior to its promulgation and, consequently, the Council has no reason to doubt the legal sufficiency of section 4(a).



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 28, 1972

Messrs. Gordon P. Ramsay
and Rexford T. Brown
Attorneys at Law
Gadsby and Hannah
1700 Pennsylvania Avenue, NW.
Washington, D.C. 20006

Re: FLRC No. 71P-11

Gentlemen:

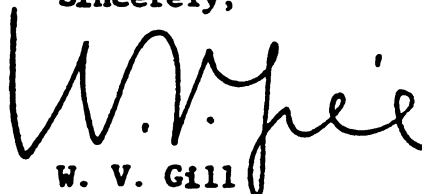
This is in further reply to your letter of October 29, 1971, requesting a Council interpretation pursuant to section 4(b) of Executive Order 11491, as amended. Specifically, you request the Council to issue an interpretation as to whether Robert E. Hampton, Chairman of the Civil Service Commission, by simultaneously holding the chairmanship of the Federal Labor Relations Council as provided in section 4(a) of the Order, is holding "another office or position in the Government of the United States" in violation of 5 U.S.C. § 1101.

The Council has carefully considered your request and has determined that it does not have the authority to issue such an "interpretation." In effect, you have requested a ruling as to the legal sufficiency of section 4(a) of the Order. The Council does not possess the power to pass upon the legal sufficiency of a provision of the Executive Order under which it was established, from which it derives its authority and which it is charged with administering. Accordingly, the Council has directed that your request be denied.

In this connection, it should be noted that, in accordance with the provisions of E.O. 11030, as amended, the Justice Department approved E.O. 11491, as to both form and legality, prior to its promulgation by the President; consequently, the Council has no reason to doubt the legal sufficiency of section 4(a) of the Order.

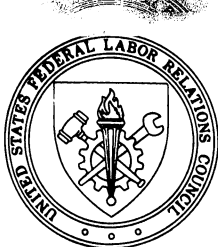
For the Council.

Sincerely,


W. V. Gill
Executive Director

An employee asked the Council to issue an interpretation or policy statement concerning the relationship of grievance arbitration awards under Executive Order 11491 to decisions by the Comptroller General.

The Council, on February 1, 1972, advised the employee that consideration of the issue described is not warranted at this time.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 1, 1972

Mr. Amedeo Greco, Attorney
4950 North Newhall Street
Whitefish Bay, Wisconsin 53217

Re: FLRC No. 71P-6

Dear Mr. Greco:

This is in further reply to your letters of June 30 and September 22 which asked the Council to issue an interpretation or policy statement concerning the relationship of grievance arbitration under Executive Order 11491 to Comptroller General decisions.

The Council understands that your interest in this matter relates to the general effectiveness of the Federal labor relations program, rather than a request for reconsideration of your grievance. The Council has, of course, no authority to review decisions of the Comptroller General.

The Council appreciates your interest in the effective operation of the program. However, it has determined that consideration of the issue you describe is not warranted at this time.

For the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. V. Gill".

W. V. Gill
Executive Director

A union asked the Council to decide certain questions raised by its representation petition, seeking national exclusive recognition, which was pending before the Assistant Secretary of Labor. The issues were:

1. "What is 'national exclusive recognition' and does the unit sought . . . constitute an appropriate unit for such . . . recognition [?]"
2. "The efficacy and propriety of a hearing scheduled by the Regional Administrator, Labor-Management Services Administration . . . for the limited purpose concerning the status of Petitioner's adequacy of showing of interest."

The Council, on May 24, 1972, declined to issue an interpretation or policy statement on these issues since they could be decided in the pending adjudicatory proceeding before the Assistant Secretary, subject to review by the Council.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 24, 1972

Mr. Raymond J. Malloy
Associate Staff Counsel
American Federation of Government
Employees, AFL-CIO
400 First Street, N.W.
Washington, D.C. 20001

Re: Veterans Administration and Council
of AFGE Veterans Administration
Locals, et al, Assistant Secretary
Cases Nos. 22-2635 (RO) and 22-2692
(RO), FLRC No. 72P-1

Dear Mr. Malloy:

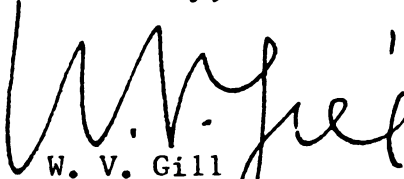
This is in further reply to your request of March 24, 1972, for the Council to decide as major policy issues certain questions related to the cases referenced above which are currently in process before the Assistant Secretary.

The Council has carefully considered your request, but has determined that the questions you raise can be decided, to the extent appropriate, in the current proceeding before the Assistant Secretary, subject to review by the Council.

Accordingly, since the adjudicatory procedures provided under Executive Order 11491, as amended, are suitable for resolution of the issues presented, the Council will not issue an interpretation of the order or policy statement on these matters under Part 2410 of its rules.

For the Council.

Sincerely,


W. V. Gill
Executive Director

Three professional associations requested the Council to take action to reverse the decision of the Assistant Secretary of Labor in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170. In that decision the Assistant Secretary, in pertinent part, promulgated the criteria he will use in determining whether or not employees are professional employees who are entitled to a self-determination election before being placed in a unit with nonprofessionals.

The Council, on October 11, 1972, declined, under Part 2410 of its rules, to issue an interpretation of the Order or a policy statement concerning the propriety of the Assistant Secretary's definition of professional employee since suitable adjudicatory procedures are provided under the Order for resolution of the issue. The Council noted that the case is still pending before the Assistant Secretary. It advised the associations that after the Assistant Secretary has made a final decision on the entire proceeding before him by resolving the objections to the election and issuing a certification, that decision may be appealed to the Council by a party to the proceeding. It was noted that while the associations are not parties to the proceeding before the Assistant Secretary, upon the filing of a timely appeal, Part 2411 of the Council's rules provides that, upon request, interested persons may be granted permission for the filing of briefs and oral arguments as amicus curiae. If for any reason the issue is not considered by the Council under the adjudicatory procedures, the associations may renew their requests for Council action under Part 2410 concerning the definition of professional employee.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 11, 1972

Mr. George E. Bradley
Executive Director
Organization of Professional Employees
of the U.S. Department of Agriculture
P.O. Box No. 381
Washington, D.C. 20044

Dear Mr. Bradley:

This is in further reply to your letter of August 14, 1972, requesting the Council "to take such action as is authorized under section 4 of Executive Order 11491 to insure that rights, privileges and freedom of choice are maintained for the professional Federal employee," to suspend application of the definition of professional employee promulgated by the Assistant Secretary in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, and to develop an "acceptable definition" to be used in lieu of that promulgated by the Assistant Secretary.

The Council has carefully considered your request and has determined, under section 2410.2 of its rules, that suitable adjudicatory procedures are provided under E.O. 11491, as amended, for resolution of the issue you raise concerning the propriety of the Assistant Secretary's definition of professional employee.

After the Assistant Secretary has made a final decision of the entire proceeding before him in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, that decision may be appealed to the Council by a party to the proceeding.

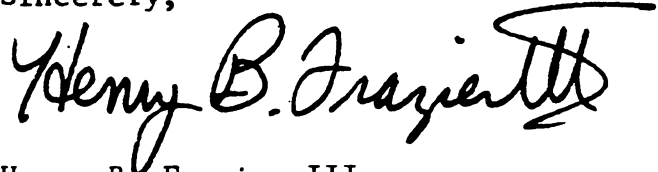
While your organization is not a party to the proceeding before the Assistant Secretary, should an appeal be duly filed by a party and review granted by the Council, the Council's rules provide that, upon request, interested persons may be granted permission for the filing of briefs and oral arguments as amicus curiae. If, following final decision by the Assistant Secretary, no appeal is filed or if the adjudicatory procedures are otherwise unavailable or unsuitable for resolution of the issue presented, you may, at that time, renew your request for Council action concerning the definition of professional employee under Part 2410 of the Council's rules.

Regarding the reiteration of your previous request to the Civil Service Commission for a separate Executive order governing relationships between agencies and professional organizations, the Council considered a similar request by the National Federation of Professional Organizations in 1970. The Council concluded that the problems of definition of "professional organization" and of overlapping rights and competition with labor organizations made it impracticable to adopt the NFPO recommendation. However, the Council did recommend that section 7(d)(3) of E.O. 11491 should be amended by adding "professional" to the types of lawful associations, not qualified as labor organizations, with which an agency may deal and consult on matters or policies which involve the organization's members or are of particular applicability to the organizations or its members so long as these dealings and consultations are not inconsistent with the rights of recognized labor organizations. The President approved this recommendation and so amended the Order.

In this connection, timely public notice will be issued as to when the Council will again hold hearings to review experience under the Order. The Council will be pleased at that time to consider your views on this and any other matters.

For the Council.

Sincerely,



Henry B. Frazier III
Acting Executive Director

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 11, 1972

Mr. Robert S. Rummell, Chairman
Professional Affairs Committee
Society for Range Management
Room 610, Rosslyn Plaza E
1621 North Kent Street
Arlington, Virginia 22209

Dear Mr. Rummell:

This is in further reply to your letter of August 30, 1972, requesting "such action as needed to undo the potential harm" resulting from the definition of professional employee promulgated by the Assistant Secretary in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

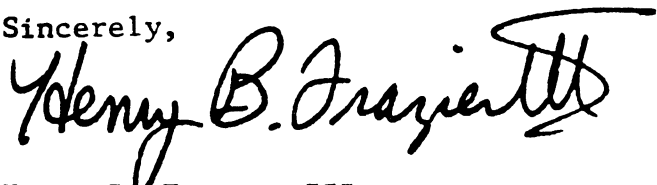
The Council has carefully considered your request and has determined, under section 2410.2 of its rules, that suitable adjudicatory procedures are provided under E.O. 11491, as amended, for resolution of the issue you raise concerning the propriety of the Assistant Secretary's definition of professional employee.

After the Assistant Secretary has made a final decision of the entire proceeding before him in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, that decision may be appealed to the Council by a party to the proceeding.

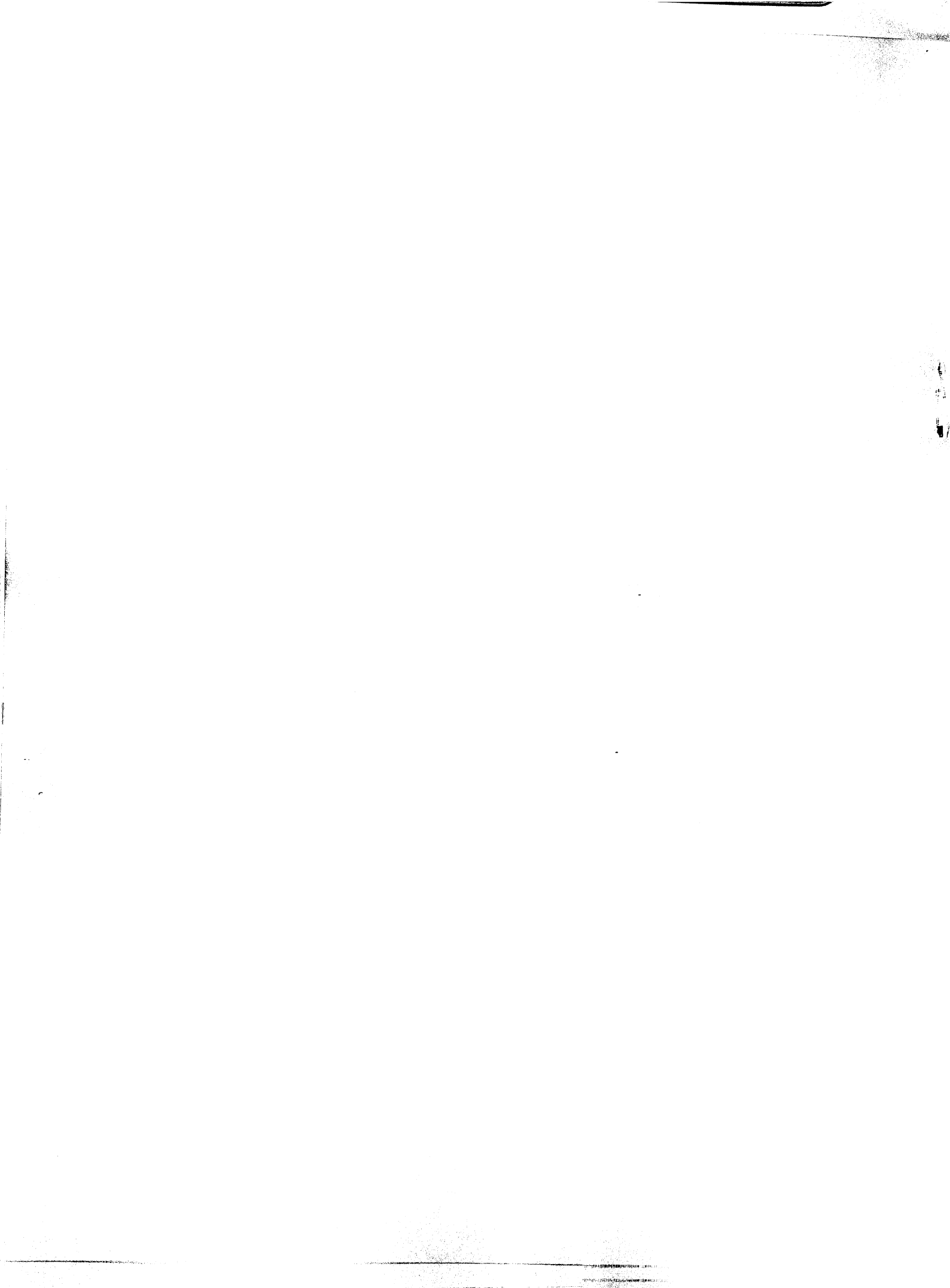
While your organization is not a party to the proceeding before the Assistant Secretary, should an appeal be duly filed by a party and review granted by the Council, the Council's rules provide that, upon request, interested persons may be granted permission for the filing of briefs and oral arguments as amicus curiae. If, following final decision by the Assistant Secretary, no appeal is filed or if the adjudicatory procedures are otherwise unavailable or unsuitable for resolution of the issue presented, you may, at that time, renew your request for Council action concerning the definition of professional employee under Part 2410 of the Council's rules.

For the Council.

Sincerely,



Henry B. Frazier III
Acting Executive Director
662c



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 11, 1972

Mr. Roy W. Olson, President
National Federation of
Professional Organizations
806 15th St., N.W.
444 Shoreham Building
Washington, D.C. 20003

Re: FLRC No. 72P-2

Dear Mr. Olson:

This is in further reply to your letter of August 29, 1972, requesting the Council "to clarify and reverse" the definition of professional employee promulgated by the Assistant Secretary in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

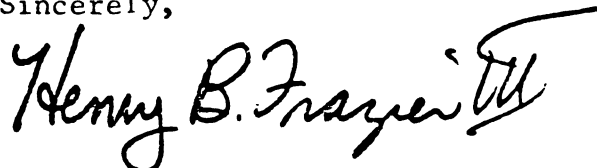
The Council has carefully considered your request and has determined, under section 2410.2 of its rules, that suitable adjudicatory procedures are provided under E.O. 11491, as amended, for resolution of the issue you raise concerning the propriety of the Assistant Secretary's definition of professional employee.

After the Assistant Secretary has made a final decision of the entire proceeding before him in Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170, that decision may be appealed to the Council by a party to the proceeding.

While your organization is not a party to the proceeding before the Assistant Secretary, should an appeal be duly filed by a party and review granted by the Council, the Council's rules provide that, upon request, interested persons may be granted permission for the filing of briefs and oral arguments as amicus curiae. If, following final decision by the Assistant Secretary, no appeal is filed or if the adjudicatory procedures are otherwise unavailable or unsuitable for resolution of the issue presented, you may, at that time, renew your request for Council action concerning the definition of professional employee under Part 2410 of the Council's rules.

For the Council.

Sincerely,



Henry B. Frazier III
Acting Executive Director

An agency asked the Council to issue a policy statement concerning an agency's authority to comply with a backpay provision of an arbitrator's award issued under a negotiated procedure giving nonveteran Schedule A attorneys a right to grieve adverse actions. More specifically, the agency asked the Council to decide the following questions:

- May an agency head approve the disbursement of agency funds for payment of wages and allowances to employees returned to their rolls and/or made whole by an arbitrator's ruling?
- Is the Council vested with the authority to affirm that portion of an arbitrator's decision which provides for the payment of back wages and allowances? If so, may the agency head order fund disbursement based on the Council's ruling?

The Council, on March 20, 1973, advised the agency as follows:

All arbitrators are, of course, governed by applicable law, appropriate regulations and E.O. 11491, as amended (please see section 2411.37 of the Council's rules). In this regard, the Council has considered carefully your questions. Section 5 U.S.C. 5596, of the United States Code which provides for backpay due to unjustified personnel actions states that the Civil Service Commission shall prescribe regulations to carry out the section. Section 550.803 of the Commission's regulations implement section 5 U.S.C. 5596. Since the Civil Service Commission has the primary responsibility for the issuance and interpretation of its own directives, the Council, in accordance with usual Council practice, requested the Commission for an interpretation of its directives as they pertain to the questions raised in your inquiry. The Commission replied as follows:

We find no difference between these questions, as far as the law and the Commission's regulations are concerned.

The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the . . . [agency head] or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression on his own initiative does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision. Therefore, the questions submitted . . . are answered in the affirmative.

Where a binding arbitration award provides for back pay, the action of the appropriate authority in the agency approving the disbursement of funds in conformance with the award constitutes the administrative determination required to entitle the employee to back pay in accordance with section 5596 of title 5, United States Code, and the regulations of the Civil Service Commission.

Thus, with respect to your questions, an agency head may approve the disbursement of agency funds for payment of back wages and allowances to an employee restored to the agency rolls and/or made whole by an arbitrator's award under a negotiated procedure giving nonveteran Schedule A attorneys a right to grieve adverse actions. This is equally true if the arbitration award has been sustained on appeal by the Council.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 20, 1973

Honorable Edward B. Miller
Chairman
National Labor Relations Board
Washington, D.C. 20570

Re: FLRC No. 72P-3

Dear Chairman Miller:

This is in further reply to your letter of September 18, 1972, asking the Council to issue a policy statement concerning an agency's authority to comply with a backpay provision of an arbitrator's award issued under a negotiated procedure giving nonveteran Schedule A attorneys a right to grieve adverse actions. Specifically, you ask that the Council decide the following questions:

May the NLRB Chairman or General Counsel approve the disbursement of agency funds for payment of wages and allowances to employees returned to their rolls and/or made whole by an arbitrator's ruling?

Is the Council vested with the authority to affirm that portion of an arbitrator's decision which provides for the payment of back wages and allowances? If so, may the NLRB Chairman or General Counsel order fund disbursement based on the Council's ruling?

All arbitrators are, of course, governed by applicable law, appropriate regulations and E.O. 11491, as amended (please see section 2411.37 of the Council's rules). In this regard, the Council has considered carefully your questions. Section 5 U.S.C. 5596, of the United States Code which provides for backpay due to unjustified personnel actions states that the Civil Service Commission shall prescribe regulations to carry out the section. Section 550.803 of the Commission's regulations implement section 5 U.S.C. 5596. Since the Civil Service Commission has the primary responsibility for the issuance and interpretation of its own directives, the Council, in accordance with usual Council practice, requested the Commission for an interpretation of its directives as they pertain to the questions raised in your inquiry. The Commission replied as follows:

We find no difference between these questions, as far as the law and the Commission's regulations are concerned.

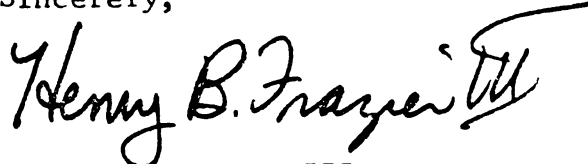
The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the Chairman of the Board or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression on his own initiative does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision. Therefore, the questions submitted by Mr. Miller are answered in the affirmative.

Where a binding arbitration award provides for back pay, the action of the appropriate authority in the agency approving the disbursement of funds in conformance with that award constitutes the administrative determination required to entitle the employee to back pay in accordance with section 5596 of title 5, United States Code, and the regulations of the Civil Service Commission.

Thus, with respect to your questions, an agency head may approve the disbursement of agency funds for payment of back wages and allowances to an employee restored to the agency rolls and/or made whole by an arbitrator's award under a negotiated procedure giving nonveteran Schedule A attorneys a right to grieve adverse actions. This is equally true if the arbitration award has been sustained on appeal by the Council.

For the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a prominent flourish at the end.

Henry B. Frazier III
Executive Director



SELECTED INFORMATION ANNOUNCEMENTS

January 1, 1970 through December 31, 1973





UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E Street, N.W. - Washington, D.C. 20415

INFORMATION ANNOUNCEMENT

MARCH 22, 1972

The Federal Labor Relations Council has approved the attached questions and answers which relate to the application of revised requirements for negotiated grievance procedures in the Federal labor-management relations program under Executive Order 11491, as amended.

The amended grievance requirements were prescribed by Executive Order 11616 of August 26, 1971, upon recommendation by the Council. They are applicable to agreements between Federal agencies and labor organizations that are established, extended, or renewed on or after November 24, 1971. They do not affect agreements entered into before that date.

Reports to the Council indicate that questions still remain as to proper application of certain portions of new section 13(a). The Q and A attached is intended to promote a better understanding of this section, which reads as follows:

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 may not cover any other matters, including matters for which statutory appeals procedures exist, and shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

Attachment

QUESTIONS AND ANSWERS RELATING TO SECTION 13(a)
OF EXECUTIVE ORDER 11491, AS AMENDED

Scope of Negotiated Grievance Procedures

1. Q - May a grievance procedure be negotiated which covers grievances that do not involve the interpretation or application of the agreement?

A - No. By providing that "a negotiated grievance procedure may not cover any other matters," the Order limits the coverage of negotiated grievance procedures to grievances which involve the interpretation or application of provisions of the agreement. Grievances not involving interpretation or application of the agreement may be resolved through agency systems provided for by Civil Service Commission regulations or other available agency procedures.

2. Q - Is the phrase "including matters for which statutory appeals procedures exist" intended as a further limitation on matters which may be covered by the negotiated grievance procedure?

A - Yes, it rules out coverage of any matters that are already covered by statutory appeals procedures. This prevents duplication or overlap in avenues of redress which could occur, for example, if a matter subject to a statutory appeals procedure also touches on provisions of the agreement.

3. Q - How would this work if an agreement has provisions concerning disciplinary actions?

A - The negotiated grievance procedure could not cover disciplinary actions which may be appealed under statutory appeals procedures (for example: removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay, when subject to the adverse action appeals system). It could cover other disciplinary actions, such as suspensions for 30 days or less, if they involve interpretation or application of agreement provisions.

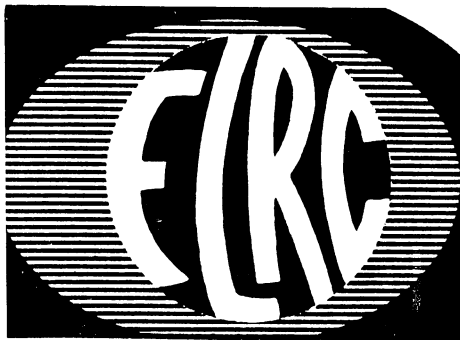
4. Q - Does "statutory appeals procedures" refer only to procedures directly prescribed by statute?

A - No. It includes appeals procedures established by Executive order or regulations of appropriate authorities outside the agency to implement or administer responsibilities assigned by statute with respect to the subject matter involved.

The term "statutory," as used here, means relating to or conforming to statute as well as created, defined or required by statute. (See definitions in Webster's Third New International Dictionary, Unabridged, 1966; Black's Law Dictionary, Revised Fourth Edition, 1968.)

Employee Presentation of Grievances
Under a Negotiated Grievance Procedure

5. Q - May an employee in the unit present a grievance over the interpretation or application of the agreement without the approval of the exclusive representative?
- A - Yes. There is no requirement that the exclusive representative approve the presentation of a grievance by an employee in the unit represented. (Of course, arbitration may be invoked only by the agency or the exclusive representative, as provided in section 13(b).)
6. Q - May an employee in the unit present a grievance over the interpretation or application of the agreement without being represented by the exclusive representative?
- A - Yes. The phrase "without the intervention of the exclusive representative" means that the grievant may present a grievance without representation by the exclusive union.
7. Q - What are the rights of the exclusive representative when an employee presents his own grievance?
- A - The exclusive representative must be given an opportunity to be present at the adjustment and the adjustment may not be inconsistent with the terms of the agreement. In addition, section 10(e) of the Order requires that the exclusive representative be given an opportunity to be represented at all formal discussions between management and employees concerning grievances.
8. Q - Can the employee choose a representative other than the exclusive representative when presenting a grievance over the interpretation or application of the agreement?
- A - No. A grievant who does not choose to be represented by the exclusive union must represent himself unless the agreement makes provision for other representation.
9. Q - What procedure does such a grievant use in presenting a grievance over the interpretation or application of the agreement?
- A - The negotiated grievance procedure. It is the exclusive procedure for resolving grievances over the interpretation or application of the agreement.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E Street, N.W. - Washington, D.C. 20415

INFORMATION ANNOUNCEMENT

September 27, 1972

The Council today announced a number of steps it has taken to improve procedures and expedite the processing of appeals cases.

Revised rules for the appeals function have been approved and will be issued in the near future. These changes will reduce the number of appeals filed that do not meet the conditions for review and will eliminate delays and extra correspondence in case processing that are due to lack of specificity in some of the current rules.

In addition, an intensive review of operating experience has resulted in the adoption of a number of operating policies to expedite case processing.

Inadequate Submissions. In 40% of the cases which have been filed with the Council it has been necessary for the petitioner to supplement its filing with additional information. Supplements have been required because the initial filings failed to meet the Council's express rules for (a) a complete "self-contained" document, (b) in an original and three copies, (c) with a statement of service on the other parties, and (d) where applicable, with the approval of the union's national president. It has been the policy of the Council to notify a petitioner of defects in filings and to give him a reasonable time to correct such defects. While this will continue to be the Council's policy, hereafter the notification will be accompanied by a specified time limit for compliance and notice that failure to comply within that time limit will result in dismissal of the petition.

Extension of Time Limits. Council regulations permit the Executive Director to extend regulatory time limits for "good cause shown." The intent of this rule is to provide reasonable flexibility in circumstances which are beyond the control of a party; it is not intended to provide extensions solely for the convenience of a party. In the past, extensions have been granted for such reasons as: "the petition was delayed in channels and just reached me"; "the attorney is out-of-town"; "the attorney has three briefs due the same day."

Such reasons refer primarily to the convenience of a party and generally will not warrant extensions in the future. Hereafter, the public interest in expeditious case processing and the degree to which the circumstances presented are substantially beyond the control of the party will be of major significance in evaluating requests for extensions.

Untimely Petitions. Thirteen percent (13%) of the petitions filed with the Council have been untimely. Since the Council's rules provide a method for requesting an extension of time limits before such time limits expire, Council policy is not to waive untimely filing except in the most extraordinary circumstances. In order to dispose promptly of timeliness questions, the Council will hereafter consider, out of docket order, the resolution of such issues.



UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

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

INFORMATION ANNOUNCEMENT

September 10, 1973

The Federal Labor Relations Council recently held a conference with the other third-party principals involved in the Federal labor-management relations program under E.O. 11491, as amended.

The participants included the Council, the Chairman and members of the Federal Service Impasses Panel, the Assistant Secretary of Labor for Labor-Management Relations, the Director of the Federal Mediation and Conciliation Service, and their key assistants. The purpose of the conference was to provide an opportunity for the Council to exchange views with the other third parties on the state of the program.

As a result of the conference, the Council has identified some facets of the program which may require Council action. Some of these areas of more immediate concern deal with the negotiation process and include protracted negotiations on the issues of official time for negotiations and the service charge for dues withholding; the impact of the expiration of an agreement on dues withholding arrangements; unnecessary delays in approving negotiated agreements; and the failure of unions and agencies, in some cases, to negotiate agreements. In the coming months the Council will be studying these and other issues looking toward improving the Federal labor-management relations program.

With respect to the matter of negotiations generally and more particularly to the scope of negotiations, it should be noted that the Report and Recommendations which led to the issuance of E.O. 11491 provides:

We firmly believe that agency regulatory authority must be retained, but fruitful negotiations can take place only where management officials have sufficient authority to negotiate matters of concern to employees. Therefore, except where negotiations are conducted at the national level, agencies should increase, where practicable, delegations of authority on personnel policy matters to local managers to permit a wider scope for negotiation.

Agencies should not issue over-prescriptive regulations, and should consider exceptions from agency regulations on specific items where both parties request an exception and the agency considers the exception feasible.

As a result, section 11(b) of the Order provides:

In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation [to bargain]

Further, in describing the requirement for the approval of negotiated agreements, section 15 recognizes that agencies may grant exceptions to agency policies and regulations:

. . . 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)

The Council is of the opinion that parties in some local negotiations have not, to date, taken full advantage of the opportunity to seek exceptions to agency policies and regulations. Some negotiability disputes involving the validity of agency regulations have been brought to the Council without an attempt first to seek an exception to the agency regulation.

In other recent negotiations, the Council has concluded that some negotiability disputes have been brought to the Council prematurely. In some instances, management representatives have failed to offer feasible, negotiable alternatives to union proposals when they believe the union's proposals to be nonnegotiable. Instead, the management representatives have simply asserted that the union proposals are non-negotiable giving the unions no alternative but to appeal or to drop the matter from negotiations. On the other hand, where management has offered alternatives, some union representatives have appealed the negotiability of their proposals without first considering and discussing the management proposals at the bargaining table. Both actions are a disservice to labor-management relations and demonstrate a failure on the part of the parties to attempt to work matters out bilaterally.

A fundamental purpose of the labor-management relations program is to give unions and agencies an opportunity to work out their differences to the maximum extent possible without intervention by the Council or the other third parties in the program. Therefore, parties are urged, where appropriate, (1) to take full advantage of the opportunity to work out mutually acceptable language designed to deal with problems peculiar to the installations involved and jointly seek exceptions to agency regulations, and (2) to seek feasible, acceptable alternatives to proposals which are allegedly nonnegotiable before appealing the matter to the Council.



UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

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

To Heads of Agencies and Presidents of Labor Organizations:

In furtherance of its responsibility to administer Executive Order 11491, as amended, the Council has approved the following general guidance:

I. Official time for employees when engaged as labor organization representatives in negotiations with agency management. Section 20 of Executive Order 11491, as amended, provides, in pertinent part:

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.

This provision in E.O. 11491, as amended, is a modification of the original provision. Originally the Order prohibited official time for employees when engaged as labor organization representatives in negotiations with agency management. In 1971, following a general review of the Federal labor-management relations program the Council recommended to the President that:

Section 20 should be modified to eliminate the prohibition of official time for employees when engaged as labor organization representatives in negotiations with agency management. The parties may negotiate on the issue within specified limits.

In the accompanying report the Council indicated that it had "concluded that the program will benefit by modifying present policy so as to permit the negotiating parties, when circumstances warrant, to agree to a reasonable amount of official time for employees who represent the

union in negotiations during regular working hours. This change will enlarge the scope of negotiations and promote responsible collective bargaining."

The Civil Service Commission, in conjunction with the Office of Management and Budget, has reported to the Council, under section 25(a) of the Order, that in the overwhelming number of cases union and management representatives have worked out arrangements amicably, expeditiously and without undue hardships or delays in negotiations. They reported that a survey of representative field activities showed that 75% had established official time arrangements calling for the permissible maximum of 40 hours; 14% for less than 40 hours; and 11% for one-half the time during regular duty hours spent in negotiations. Mutual agreement on the use of official time has permitted the parties in these cases to move on to the consideration of personnel policy matters and practices affecting working conditions of concern to employees in the bargaining unit.

On the other hand, the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel report that disagreement over official time is the most frequent issue in cases in which they have participated. (Admittedly such cases represent a small number of the total negotiations that take place between unions and management under the Federal program.) In these cases protracted disputes over official time have resulted in excessive amounts of time spent not only by the parties directly involved, but also by third-party representatives. The result has been in these few cases that the official time provisions of section 20 of the Order are not being used to enhance the productive consideration of substantive matters of mutual concern to management and unions. Thus, in these cases, the official time provisions of section 20 have not produced benefits for the Federal labor-management relations program nor have they promoted responsible collective bargaining as the Council had indicated the amendments were intended to do.

Accordingly, agencies and unions are advised that they should not permit negotiations over official time for employees who are serving as union negotiators to interfere with the consideration of more substantial issues nor with the negotiation of an overall agreement. The relative significance of the official time issue should be kept in proper perspective. Thus, unless there are very persuasive reasons for not doing so, the parties should be able to agree to either 40 hours or one-half of the total time spent in negotiations during regular working hours for the union negotiators expeditiously and without the intervention of third-party representatives.

II. Cost of dues deductions. On the recommendation of the Council section 21 of Executive Order 11491 was amended, effective November 24, 1971, to eliminate the requirement that agencies recover the costs of

making dues deductions from labor organizations. In its report the Council indicated that, in its opinion, "removal of this requirement will improve the collective bargaining process by enlarging the scope of negotiable matters. The question of a service charge for payroll deductions is a meaningful economic item suitable for bargaining between the parties in the same way as other matters governing the labor-management relationship. If the agency agrees to no service charge or a reduced service charge below actual costs of the dues withholding service, presumably it would be done on the basis that offsetting benefits of commensurate value will be obtained from the labor agreement."

Prior to this amendment the Civil Service Commission had established a uniform two-cent service charge per deduction as a reasonable average charge based on costs estimates furnished by agencies.

The Civil Service Commission, in conjunction with the Office of Management and Budget, has reported to the Council that a survey of representative field installations reveals that the parties had agreed to continue the 2-cent fee at 76% of the installations reporting; they had agreed to a higher fee at 12%; and they had agreed to a lower fee at 12%. Of those higher than 2 cents, most were for 5 cents or less.

However, as with the matter of official time for negotiations, the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel have reported that disagreement over the costs of dues deductions is a frequent issue in cases in which they have participated. Again, of course, such cases represent a very small minority of the total negotiations that take place. In these relatively few cases in which disagreement arose it generally involved (1) a determination by agency management that the actual costs of the dues withholding service was considerably in excess of the previously mandated 2 cents and (2) disagreement between the parties as to the accuracy and validity of the cost factors cited by the agency and the need to recover full costs.

Costs vary from agency to agency and even at different installations within an agency, and in accordance with the scope and complexity of the provisions incorporated into the dues withholding arrangements being considered by the parties. However, in reaching agreement on the matter of charges (which is left to the parties) relevant factors for consideration include not only actual costs and offsetting benefits which might be obtained from the labor agreement but also the amount previously charged and the amount of time spent by the parties discussing the issue between themselves and with third-party involvement. In this regard, the amendment to section 21 was not intended to result in significant increases over the previous standard two-cent fee nor in protracted disputes. The removal of the requirement for the recovery of costs was, as the Council indicated in its report, intended to "improve the collective bargaining process." It was not intended to interfere with the collective bargaining process.

Accordingly, as with the matter of official time, agencies and unions are advised that in the interest of responsible collective bargaining they should not permit negotiations over the matter of a charge for dues withholding to interfere with consideration of more substantial issues. Again, the relative importance of this matter shall be judged in relation to the scope of the total labor-management relationship. Thus, the parties should, as a general practice, be able to agree to a service charge of two cents per deduction unless there is mutual acknowledgement by the negotiating parties of the justification for, or benefits from agreement to a fee above or below two cents.

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Executive Director

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January 1, 1970 through December 31, 1973



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