

DECISIONS AND  
INTERPRETATIONS  
OF THE  
FEDERAL  
LABOR RELATIONS  
COUNCIL

Volume 3









DECISIONS AND INTERPRETATIONS  
OF THE  
FEDERAL LABOR RELATIONS COUNCIL

---

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

---

Volume 3

(Cite as: 3 FLRC—)

January 1, 1975 through December 31, 1975

---

U.S. Government Printing Office  
Washington, D.C. 1977

FLRC-77-1

MEMBERS OF THE FEDERAL LABOR RELATIONS COUNCIL

During the period January 1, 1975 through  
December 31, 1975

CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION

Honorable Robert E. Hampton  
Chairman of the Council  
Jan. 1, 1975-

SECRETARY OF LABOR

Honorable Peter J. Brennan  
Jan. 1, 1975-Mar. 15, 1975

Honorable John T. Dunlop  
Mar. 18, 1975-

DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Honorable Roy L. Ash  
Jan. 1, 1975-Feb. 3, 1975

Honorable James T. Lynn  
Feb. 10, 1975-

---

EXECUTIVE DIRECTOR

Henry B. Frazier III  
Jan. 1, 1975-  
1900 E Street, NW.  
Washington, D.C. 20415

## **CONTENTS**

	Page
<b>Part I. Tables of Decisions and Interpretations</b>	
Appeals Decisions by Docket Numbers.....	7
Appeals Decisions by Agencies.....	25
Appeals Decisions by Labor Organizations.....	47
Appeals Decisions by Individuals.....	59
Interpretations and Policy Statements by Docket Numbers and Subjects.....	63
Selected Information Announcement by Date and Subject.....	67
 <b>Part II. Texts of Decisions and Interpretations</b>	
Appeals Decisions .....	73
Interpretations and Policy Statements.....	865
Selected Information Announcement.....	885
 <b>Part III. Subject Matter Index</b>	
Subject Matter Index.....	895





PART I.

TABLES OF DECISIONS AND INTERPRETATIONS

---

January 1, 1975 through December 31, 197<sup>5</sup>



APPEALS DECISIONS BY DOCKET NUMBERS

---

January 1, 1975 through December 31, 1975



APPEALS DECISIONS BY DOCKET NUMBERS

FLRC Number	Type	Case Title	Page
73A-4	ARB	American Federation of Government Employees, Local No. 2532, and Small Business Administration (Dorsey, Arbitrator)	267
73A-9	A/S	Veterans Administration, A/SLMR No. 240	160
73A-36	NEG	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	324
73A-46	ARB	Naval Rework Facility, Naval Air Station, Jacksonville, Florida and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator)	657
73A-56	ARB	American Federation of Government Employees, AFL-CIO, Department of Labor Local 12 and U.S. Department of Labor (Harkless, Arbitrator)	279, with- drawn
73A-59	A/S	Department of Defense, State of New Jersey, A/SLMR No. 323	284
74A-4	ARB	American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator)	559
74A-8	A/S	Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-4939 (GA)	178
74A-9	A/S	General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333	228

FLRC Number	Type	Case Title	Page
74A-13	NEG	Immigration and Naturalization Service and American Federation of Government Employees	380
74A-15	ARB	Professional Air Traffic Controllers Organization and Federal Aviation Administration, Portland, Maine, Air Traffic Control Tower (Gregory, Arbitrator)	703
74A-16	A/S	Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region and Weather Service Offices (Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota), A/SLMR No. 331	433
74A-19	A/S	Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667	120
74A-20	NEG	National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service	91
74A-22	A/S	Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360	787
74A-24	NEG	Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, 73 FSIP 27	352
74A-25	ARB	Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Robertson, Arbitrator)	Withdrawn
74A-28	A/S	Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364	235

FLRC Number	Type	Case Title	Page
74A-29	ARB	Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator)	720
74A-30	NEG	AFGE Local 2118 and Los Alamos Area Office, ERDA	296
74A-31	NEG	NFFE Local 1555 and Tobacco Division, AMS, USDA	247
74A-32	NEG	NFFE Local 1555 and Tobacco Division, AMS, USDA	138
74A-33	NEG	Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington	75
74A-36	NEG	American Federation of Government Employees Local 2640 and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey	100
74A-38	ARB	NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator)	475
74A-40	ARB	Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator)	83
74A-41	A/S	Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, A/SLMR No. 372	501
74A-44	A/S	Defense Mapping Agency Topographic Center, Providence Office, Rhode Island, Assistant Secretary Case No. 31-7566 (AP)	203

FLRC Number	Type	Case Title	Page
74A-46	A/S	Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412	188
74A-47	A/S	Department of Defense, Army Materiel Command, Tooele Army Depot, Tooele, Utah, A/SLMR No. 406	128
74A-48	NEG	AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland	396
74A-50	A/S	Local 2677, National Council of OEO Locals, American Federation of Government Employees, AFL-CIO and Office of Economic Opportunity, Assistant Secretary Case Nos. 22-5178 (AP) and 22-5189 (AP)	87
74A-51	ARB	Social Security Administration and American Federation of Government Employees, AFL-CIO, SSA Local 1923 (Strongin, Arbitrator)	728
74A-53	A/S	Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411	157
74A-54	A/S	United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400	686
74A-57	ARB	American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator)	562
74A-59	A/S	Office of Economic Opportunity, Washington, D.C., Assistant Secretary Case No. 22-5216 (AP)	171
74A-60	A/S	American Federation of Government Employees Local 987, A/SLMR No. 420	207



FLRC Number	Type	Case Title	Page
74A-63	NEG	AFGE Local 2456 and Region 3, General Services Administration, Baltimore, Maryland	439
74A-65	A/S	Treasury Disbursing Center, Austin, Texas, Assistant Secretary Case No. 63-4816 (CA)	116
74A-66	NEG	NFFE Local 943 and Keesler Air Force Base, Mississippi	735
74A-67	NEG	American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado	767
74A-69	NEG	NAGE Local R1-34 and U.S. Army Natick Laboratories, Massachusetts	143
74A-70	A/S	U.S. Department of Army Picatinny Arsenal, Assistant Secretary Case No. 32-3528 (RO)	146
74A-72	A/S	Council of Customs Locals, AFGE, Locals 2652, 2768, and 2899, AFL-CIO, Assistant Secretary Case No. 30-5569 (CO)	110
74A-73	A/S	U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, A/SLMR No. 428	270
74A-74	A/S	U.S. Army Aeronautical Depot, Maintenance Center, Corpus Christi, Texas, Assistant Secretary Case No. 63-4887 (CA)	149
74A-75	ARB	The Supervisor, New Orleans, Louisiana Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3157 (Moore, Arbitrator)	405

FLRC Number	Type	Case Title	Page
74A-76	ARB	Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator)	409
74A-77	A/S	Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435	491
74A-78	A/S	Arizona National Guard, Air National Guard, Sky Harbor Airport, A/SLMR No. 436	151
74A-80	A/S	Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432	697
74A-82	A/S	United States Air Force, Kingsley Field, Klamath Falls, Oregon, A/SLMR No. 443	154
74A-83	A/S	Department of Agriculture, Office of Investigation, Temple, Texas, Assistant Secretary Case No. 63-4992 (RO)	113
74A-84	A/S	Keesler Technical Training Center, Keesler Air Force Base, Mississippi, Assistant Secretary Case No. 41-3673 (CA)	212
74A-85	ARB	Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator)	508
74A-86	A/S	Iowa State Agricultural Stabilization and Conservation Service Office, Department of Agriculture, A/SLMR No. 453	215
74A-87	A/S	Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-568	219
74A-88	ARB	Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator)	451

FLRC Number	Type	Case Title	Page
74A-89	ARB	American Federation of Government Employees, Local 2047, AFL-CIO and Defense General Supply Center (Boyd, Arbitrator)	131
74A-90	A/S	Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, Assistant Secretary Case No. 50-11018 (CA)	256
74A-91	A/S	Office of Economic Opportunity, Region IX, San Francisco, California and American Federation of Government Employees, Local 3009, Assistant Secretary Case No. 70-4236 (AP)	222
74A-92	A/S	United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, A/SLMR No. 462	305
74A-94	A/S	Office of Economic Opportunity, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 2677, National Council of OEO Locals, Assistant Secretary Case No. 22-5368 (AP)	367
74A-95	A/S	National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457	617
74A-96	A/S	Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri and Kansas City, Missouri, A/SLMR No. 458	371
74A-97	A/S	Federal Deposit Insurance Corporation, A/SLMR No. 459	80
74A-98	A/S	Securities and Exchange Commission, Assistant Secretary Case No. 22-5371 (CA)	225

FLRC Number	Type	Case Title	Page
74A-99	ARB	Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (Di Stefano, Arbitrator)	308
74A-100	A/S	National Treasury Employees Union Chapter 47, Decision (unnumbered) of Director, LMWP	104
74A-101	NEG	NFFE Local 1655 and Illinois Army National Guard	198
74A-102	ARB	Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator)	533
74A-103	ARB	American Federation of Government Employees, Local 2110, AFL-CIO, and Veterans Administration Hospital, Palo Alto, California (Staudohar, Arbitrator)	107
74A-104	NEG	NAGE Local 5-65 and Memphis Naval Air Station, Millington, Tennessee	483
75A-1	A/S	Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448	264
75A-2	NEG	NFFE Local 1615 and Andrews Air Force Base	Withdrawn
75A-3	A/S	Department of Transportation, Federal Highway Administration and National Federation of Federal Employees, Local 1348, Assistant Secretary Case No. 71-3009	312
75A-5	A/S	Veterans Administration Hospital, Montrose, New York, A/SLMR No. 470	259

FLRC Number	Type	Case Title	Page
75A-6	NEG	AFGE Local 3157 and Supervisor, New Orleans, La., Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture	665
75A-7	ARB	Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator)	415
75A-8	A/S	Social Security Administration, Mid-America Program Center, BRSI, Kansas City, Missouri, Assistant Secretary Case No. 60-3836 (CA)	276
75A-9	ARB	Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator)	461
75A-10	ARB	Local 1884, AFGE, AFL-CIO, and Providence Office, U.S. Army Topographic Production Center (Schmidt, Arbitrator)	133
75A-11	A/S	Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-573	136
75A-12	A/S	Department of Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-574	375
75A-13	NEG	Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20	635
75A-15	ARB	Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Eigenbrod, Arbitrator)	466
75A-16	ARB	National Association of Government Employees Local R5-108 and Tennessee Army National Guard (Board of Review of the Department of Personnel, State of Tennessee, Arbitrator)	175

FLRC Number	Type	Case Title	Page
75A-17	ARB	Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator)	421
75A-18	A/S	Department of Health, Education, and Welfare, Social Security Administration, Albuquerque Data Operations Center, Albuquerque, New Mexico, Assistant Secretary Case No. 63-4833 (RO)	430
75A-19	A/S	U.S. Department of Health, Education and Welfare, Social Security Administration, Grand Rapids, Michigan, Assistant Secretary Case No. 52-5578 (RO)	841
75A-20	A/S	U.S. Department of Agriculture, Agricultural Research Service, Eastern Regional Research Center (ERRC), Philadelphia, Pennsylvania, A/SLMR No. 479	445
75A-21	ARB	AFGE Local 2028 (Professional Staff Nurses Unit "PNSU") and Veterans Administration Hospital, University Drive, Pittsburgh, Pennsylvania (Oakland) (Tive, Arbitrator)	573
75A-22	A/S	Office of Economic Opportunity, Assistant Secretary Case No. 22-5512 (AP)	With- drawn
75A-23	ARB	Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Doherty, Arbitrator)	850
75A-24	A/S	U.S. Department of the Air Force, Westover, Massachusetts, Air Force Base, Assistant Secretary Case No. 31-8619 (RO)	315
75A-26	ARB	Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator)	578

FLRC Number	Type	Case Title	Page
75A-27	NEG	NUCO Ind. and Labor Management Services Administration (U.S. Department of Labor)	810
75A-28	NEG	AFGE Local 2151 and General Services Administration, Region 3	668
75A-29	A/S	Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 477	538
75A-30	ARB	Frances N. Kenny and National Weather Service (Lubow, Arbitrator)	713
75A-31	ARB	Federal Aviation Administration, Department of Transportation, Fort Worth Air Route Traffic Control Center and Professional Air Traffic Controllers Organization (Jenkins, Arbitrator)	857
75A-34	ARB	American Federation of Government Employees, Local 1857, AFL-CIO and Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California (Shepard, Arbitrator)	262
75A-35	A/S	Headquarters, Army and Air Force Exchange Service, Ohio Valley Exchange Region, Assistant Secretary Case No. 50-11136 (CA)	514
75A-36	ARB	Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator)	569
75A-37	A/S	National Science Foundation, Assistant Secretary Case No. 22-3870 (RO)	201
75A-38	A/S	Internal Revenue Service, Los Angeles District, Los Angeles, California, Assistant Secretary Case No. 72-4736	488

FLRC Number	Type	Case Title	Page
75A-39	A/S	Federal Deposit Insurance Corporation, A/SLMR No. 459	518
75A-40	NEG	Local Lodge 2331, IAM&AW and 2750th Air Base Wing, Wright-Patterson Air Force Base	587
75A-41	NEG	American Federation of Government Employees, Local 2667, and Equal Employment Opportunity Commission	With- drawn
75A-43	A/S	Internal Revenue Service, Omaha District Office, Assistant Secretary Case No. 60-3722 (G&A)	591
75A-44	NEG	NAGE Local R12-183 and U.S. Department of the Air Force, McClellan Air Force Base, California	With- drawn
75A-45	ARB	American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator)	822
75A-47	A/S	Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3246	522
75A-48	ARB	Community Services Administration and National Council of CSA Locals (American Federation of Government Employees) (Edgett, Arbitrator)	542
75A-49	A/S	U.S. Department of the Interior, U.S. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495	318
75A-50	ARB	Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator)	547



FLRC Number	Type	Case Title	Page
75A-51	A/S	Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2575	526
75A-52	A/S	National Federation of Federal Employees, Decision (unnumbered) of Acting Director, LMSE	321
75A-54	ARB	Federal Aviation Administration, Kansas City, Missouri and Professional Air Traffic Controllers Organization (Yarowsky, Arbitrator)	470
75A-55	A/S	Department of Air Force, K. I. Sawyer Air Force Base, Michigan, Assistant Secretary Case No. 52-5862 (CA)	552
75A-56	ARB	Internal Revenue Service (Ogden Service Center) and National Association of Internal Revenue Service Employees, Chapter 67 (Gorsuch, Arbitrator)	650
75A-57	A/S	Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-587 (CA)	595
75A-58	NEG	Pennsylvania Nurses Association and Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania	377
75A-59	A/S	Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486	529
75A-60	A/S	Department of Commerce, U.S. Merchant Marine Academy, Assistant Secretary Case No. 30-5585 (CA)	598
75A-61	A/S	Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida, A/SLMR No. 514	831

FLRC Number	Type	Case Title	Page
75A-62	A/S	Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506	449, 565
75A-63	ARB	National Weather Service, N.O.A.A., U.S. Department of Commerce and National Association of Government Employees (Strongin, Arbitrator)	555
75A-64	A/S	American Federation of Government Employees, AFL-CIO (Veterans Administration Hospital, New Orleans, Louisiana), Assistant Secretary Case No. 64-2513 (CO)	625
75A-65	A/S	United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519	835
75A-66	A/S	Department of Transportation, Federal Aviation Administration, A/SLMR No. 517	613
75A-67	A/S	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5288 (CA)	601
75A-68	A/S	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5276 (CA)	604
75A-69	A/S	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5278 (CA)	607
75A-70	A/S	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5277 (CA)	610
75A-71	ARB	Community Services Administration and American Federation of Government Employees (AFL-CIO), Local 2677 (Dorsey, Arbitrator)	742

FLRC Number	Type	Case Title	Page
75A-72	A/S	Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan, Assistant Secretary Case No. 52-5817 (CA)	676
75A-73	A/S	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case Nos. 63-5349 (CA) and 63-5357 (CA)	584
75A-74	ARB	National Archives and Records Service and American Federation of Government Employees, Local 2578 (Strongin, Arbitrator)	679
75A-75	A/S	U.S. Department of the Interior, U.S. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495	694
75A-76	A/S	Arizona National Guard, Air National Guard, Sky Harbor Airport, Phoenix, Arizona, Assistant Secretary Case No. 72-4777	628
75A-78	A/S	General Services Administration, Federal Supply Service, Assistant Secretary Case No. 22-5725 (CA)	784
75A-79	A/S	New York Army and Air National Guard, Albany, New York, A/SLMR No. 441	748
75A-82	A/S	U.S. Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2649 (CA)	752
75A-83	A/S	Veterans Administration Hospital, New Orleans, Louisiana, Assistant Secretary Case No. 64-2464 (CA)	632
75A-84	ARB	Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator)	777

FLRC Number	Type	Case Title	Page
75A-86	A/S	Department of the Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 532	760
75A-88	A/S	Department of the Navy and U.S. Civil Service Commission and Federal Employees Metal Trades Council, Long Beach, California, A/SLMR No. 529	763
75A-89	A/S	Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 537	756
75A-92	A/S	Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3253	710
75A-94	ARB	American Federation of Government Employees, AFL-CIO, Local 1345 and Army and Air Force Exchange Services, Ft. Carson, Colorado (Rentfro, Arbitrator)	With- drawn
75A-97	NEG	Federal Employees Metal Trades Council of Vallejo, California and Mare Island Naval Shipyard	839
75A-99	A/S	United States Department of Army, Headquarters, Army Materiel Command, Alexandria, Virginia, Assistant Secretary Case No. 22-5819	861
75A-111	NEG	National Federation of Federal Employees Local 405 and U.S. Army Troop Support Command, St. Louis, Missouri	817

APPEALS DECISIONS BY AGENCIES

---

January 1, 1975 through December 31, 1975



APPEALS DECISIONS BY AGENCIES

Agency	FLRC Number	Page
A		
Aberdeen Proving Ground, Aberdeen, Maryland	74A-46	188
-- Defense Property Disposal Office	74A-22	787
Aeronautical Depot, Maintenance Center, Corpus Christi, Texas	74A-74	149
Agricultural Marketing Service		
-- Grain Division, Louisiana Commodity Inspection and Grain Inspection Branches, New Orleans	74A-75 75A-6	405 665
-- Tobacco Division	74A-31 74A-32	247 138
Agricultural Research Service		
-- Eastern Region Research Center, Philadelphia, Pennsylvania	75A-20	445
-- Plum Island Animal Disease Center	74A-73	270
Agricultural Stabilization and Conservation Service, Iowa State Office	74A-86	215
Agriculture, Dept. of		
-- Agricultural Marketing Service		

Agency	FLRC Number	Page
-- Grain Division, Louisiana Commodity Inspection and Grain Inspection Branches, New Orleans	74A-75	405
	75A-6	665
-- Tobacco Division	74A-31	247
	74A-32	138
-- Agricultural Research Service	75A-65	835
-- Eastern Regional Research Center, Philadelphia, Pennsylvania	75A-20	445
-- Plum Island Animal Disease Center	74A-73	270
-- Agricultural Stabilization and Conservation Service, Iowa State Office	74A-86	215
-- Animal and Plant Health Inspection Service	73A-36	324
-- Farmers Home Administration, Little Rock, Arkansas	75A-62	449, 565
-- Office of Automated Data Systems, St. Louis and Kansas City, Missouri	74A-96	371
-- Office of Investigation, Temple, Texas	74A-83	113
Air Force, Dept. of		
-- Blaine Air Force Station, Washington	74A-33	75
-- Davis-Monthan Air Force Base, Arizona	74A-92	305
-- 416th Combat Support Group (SAC), Griffiss Air Force Base, New York	75A-45	822
-- 31st Combat Support Group (TAC), Homestead Air Force Base, Florida	75A-51	526
	75A-82	752



Agency	FLRC Number	Page
-- K. I. Sawyer Air Force Base, Michigan	75A-55	552
-- Keesler Air Force Base, Mississippi	74A-66	735
-- Keesler Technical Training Center	74A-84	212
-- Kingsley Field, Klamath Falls, Oregon	74A-82	154
-- Sacramento Air Logistics Center, McClellan Air Force Base, California	75A-34	262
-- National Guard Bureau		
-- Arizona National Guard, Sky Harbor Airport, Phoenix, Arizona	74A-78 75A-76	151 628
-- Illinois Army National Guard	74A-101	198
-- New Jersey National Guard, Trenton, New Jersey	73A-59	284
-- New York Army and Air National Guard, Albany, New York	75A-79	748
-- Tennessee Army National Guard	75A-16	175
-- Warner Robins Air Materiel Area, Robins Air Force Base, Georgia	74A-8	178
-- 4392d Aerospace Support Group, Vandenberg Air Force Base, California	74A-77 75A-89	491 756
-- Westover Air Force Base, Massachusetts	75A-24	315
-- 2750th Air Base Wing, Wright- Patterson Air Force Base, Ohio	75A-40	587
Animal and Plant Health Inspection Service	73A-36	324
Army, Dept. of		

Agency	FLRC Number	Page
-- Aberdeen Proving Ground, Aberdeen, Maryland	74A-46	188
-- Defense Property Disposal Office	74A-22	787
-- Aeronautical Depot, Maintenance Center, Corpus Christi, Texas	74A-74	149
-- Army Materiel Command		
-- Alexandria, Virginia	75A-99	861
-- Tooele Army Depot, Tooele, Utah	74A-47	128
-- Indiana Army Ammunition Plant, Charlestown, Indiana	74A-90 75A-84	256 777
-- Natick Laboratories, Massachusetts	74A-69	143
-- National Guard Bureau		
-- Arizona National Guard, Sky Harbor Airport, Phoenix, Arizona	74A-78 75A-76	151 628
-- Illinois Army National Guard	74A-101	198
-- New Jersey National Guard, Trenton, New Jersey	73A-59	284
-- New York Army and Air National Guard, Albany, New York	75A-79	748
-- Tennessee Army National Guard	75A-16	175
-- Picatinny Arsenal, Dover, New Jersey	74A-70 75A-86	146 760
-- Topographic Center, Providence Office, Rhode Island	74A-44 75A-10	203 133
-- Troop Support Command, St. Louis, Missouri	75A-111	817

Army and Air Force Exchange Service

Agency	FLRC Number	Page
-- MacDill Air Force Base Exchange, MacDill Air Force Base, Florida	75A-61	831
-- Ohio Valley Exchange Region	75A-35	514
Army Materiel Command		
-- Alexandria, Virginia	75A-99	861
-- Tooele Army Depot, Tooele, Utah	74A-47	128
Army National Guard		
-- Illinois	74A-101	198
-- New York	75A-79	748
-- Tennessee	75A-16	175
B		
Baltimore Naval Plant Representative Office, Baltimore, Maryland	75A-59	529
Blaine Air Force Station, Washington	74A-33	75
Bureau of Prisons	74A-24	352
C		
Charleston Naval Shipyard, Charleston, South Carolina	75A-7	415
Civil Service Commission	75A-88	763
Commerce, Dept. of		

Agency	FLRC Number	Page
-- National Oceanic and Atmospheric Administration		
-- National Ocean Survey	74A-36	100
-- National Weather Service	74A-16	433
	74A-20	91
	75A-30	713
	75A-63	555
-- Patent and Trademark Office, Washington, D.C.	75A-13	635
-- U.S. Merchant Marine Academy	75A-60	598
Community Services Administration	74A-29	720
	75A-48	542
	75A-71	742
Crane Naval Ammunition Depot, Crane, Indiana	74A-19	120
Customs Service	74A-72	110
D		
Davis-Monthan Air Force Base, Arizona	74A-92	305
Defense, Dept. of		
-- Army and Air Force Exchange Service		
-- MacDill Air Force Base Exchange, MacDill Air Force Base, Florida	75A-61	831
-- Ohio Valley Exchange Region	75A-35	514
-- Defense Mapping Agency, Topographic Center, Providence Office, Rhode Island \	74A-44	203
	75A-10	133
-- Defense Supply Agency		

Agency	FLRC Number	Page
-- Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio	74A-41	501
-- Defense General Supply Center, Richmond, Virginia	74A-89 74A-99	131 308
-- Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland	74A-22	787
-- National Guard Bureau		
-- Arizona National Guard, Sky Harbor Airport, Phoenix, Arizona	74A-78 75A-76	151 628
-- Illinois Army National Guard	74A-101	198
-- New Jersey National Guard, Trenton, New Jersey	73A-59	284
-- New York Army and Air National Guard, Albany, New York	75A-79	748
-- Tennessee Army National Guard	75A-16	175
-- State of New Jersey, New Jersey National Guard, Trenton, New Jersey	73A-59	284
Defense Mapping Agency, Topographic Center, Providence Office, Rhode Island	74A-44 75A-10	203 133
Defense Supply Agency		
-- Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio	74A-41	501
-- Defense General Supply Center, Richmond, Virginia	74A-89 74A-99	131 308

Agency	FLRC Number	Page
-- Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland	74A-22	787
E		
Energy Research and Development Admin- istration, Los Alamos Area Office	74A-30	296
F		
Fallon Naval Air Station, Fallon, Nevada	74A-80	697
Farmers Home Administration, Little Rock, Arkansas	75A-62	449, 565
Federal Aviation Administration		
-- Aeronautical Center, Oklahoma City, Oklahoma	74A-38	475
-- Birmingham Municipal Airport, Birmingham, Alabama	75A-15	466
-- Dallas-Fort Worth International Airport, Texas	74A-88	451
-- Des Moines Air Terminal, Des Moines, Iowa	75A-54	470
-- Des Moines, Iowa, Municipal Airport	75A-66	613
-- Eastern Region, Airway Facilities Division	75A-50	547
-- Fort Worth Air Route Traffic Control Center	75A-31	857
-- Portland, Maine, Air Traffic Control Tower	74A-15	703
-- Portland, Oregon Airport	75A-9	461

Agency	FLRC Number	Page
-- Southwest Region, Tulsa Airway Facilities Sector, Tulsa, Oklahoma	74A-28	235
Federal Deposit Insurance Corporation	74A-97 75A-39	80 518
Federal Highway Administration		
-- Region 10, Vancouver, Washington	75A-3	312
Federal Prison Industries, Inc.		
-- Washington, D.C.	74A-24	352
Federal Supply Service	75A-78	784
G		
General Services Administration		
-- Federal Supply Service	75A-78	784
-- National Archives and Records Service	75A-74	679
-- Region 3, Baltimore, Maryland	74A-48 74A-63 75A-28	396 439 668
-- Region 9, San Francisco, California	74A-9	228
Geological Survey, Mid-Continent Mapping Center	75A-49 75A-75	318 694
Griffiss Air Force Base, 416th Combat Support Group (SAC), New York	75A-45	822

## H

## Health, Education, and Welfare, Dept. of

## -- Social Security Administration

-- Albuquerque Data Operations Center, Albuquerque, New Mexico	75A-18	430
-- Bureau of Retirement and Survivors Insurance		
-- Chicago, Illinois	75A-17	421
-- Mid-America Program Center, Kansas City, Missouri	75A-8	276
-- Kansas City Payment Center	74A-53	157
-- Grand Rapids, Michigan	75A-19	841
-- Baltimore, Maryland	74A-51	728

Homestead Air Force Base, 31st Combat Support Group (TAC), Homestead, Florida	75A-51	526
	75A-82	752

## Housing and Urban Development, Dept. of

-- Detroit Area Office, Detroit, Michigan	75A-72	676
--	--------	-----

## I

Immigration and Naturalization Service	74A-13	380
Indiana Army Ammunition Plant, Charlestown, Indiana	74A-90	256
	75A-84	777

## Interior, Dept. of



Agency	FLRC Number	Page
-- Geological Survey, Mid-Continent Mapping Center	75A-49	318
	75A-75	694
Internal Revenue Service		
-- Los Angeles District, Los Angeles, California	75A-38	488
-- Ogden Service Center, Ogden, Utah	75A-56	650
-- Omaha District Office, Omaha, Nebraska	75A-43	591
-- Southeast Service Center, Chamblee, Georgia	75A-1	264
J		
Jacksonville Naval Rework Facility, Jacksonville, Florida	73A-46	657
Justice, Dept. of		
-- Bureau of Prisons	74A-24	352
-- Federal Prison Industries, Inc., Washington, D.C.	74A-24	352
-- Immigration and Naturalization Service	74A-13	380
K		
K. I. Sawyer Air Force Base, Michigan	75A-55	552
Keesler Air Force Base, Mississippi	74A-66	735
-- Keesler Technical Training Center	74A-84	212
Kingsley Field, Klamath Falls, Oregon	74A-82	154

Agency	FLRC Number	Page
<b>L</b>		
Labor, Dept. of		
-- Labor Management Services Administration	75A-27	810
-- Washington, D.C.	73A-56 75A-36	279 569
Labor Management Services Administration	75A-27	810
Long Beach Naval Shipyard, Long Beach, California	74A-40 75A-88	83 763
Louisville Naval Ordnance Station, Louisville, Kentucky	74A-54	686
Lyndon B. Johnson Space Center, Houston, Texas	74A-95	617
<b>M</b>		
MacDill Air Force Base, Florida, Army and Air Force Exchange Service, MacDill Air Force Base Exchange	75A-61	831
Mare Island Naval Shipyard, Vallejo, California	75A-97	839
McClellan Air Force Base, Sacramento Air Logistics Center, California	75A-34	262
Memphis Naval Air Station, Millington, Tennessee	74A-104	483
Merchant Marine Academy	75A-60	598

Agency	FLRC Number	Page
N		
Natick Laboratories, Massachusetts	74A-69	143
National Aeronautics and Space Administration		
-- Lyndon B. Johnson Space Center, Houston, Texas	74A-95	617
National Archives and Records Service	75A-74	679
National Guard Bureau		
-- Arizona National Guard, Sky Harbor Airport, Phoenix, Arizona	74A-78 75A-76	151 628
-- Illinois Army National Guard	74A-101	198
-- New Jersey National Guard, Trenton, New Jersey	73A-59	284
-- New York Army and Air National Guard, Albany, New York	75A-79	748
-- Tennessee Army National Guard	75A-16	175
National Ocean Survey	74A-36	100
National Oceanic and Atmospheric Administration		
-- National Ocean Survey	74A-36	100
-- National Weather Service	74A-16 74A-20 75A-30 75A-63	433 91 713 555
National Science Foundation	75A-37	201

Agency	FLRC Number	Page
Navy, Dept. of		
-- Charleston Naval Shipyard, Charleston, South Carolina	75A-7	415
-- Crane Naval Ammunition Depot, Crane, Indiana	74A-19	120
-- Long Beach Naval Shipyard, Long Beach, California	74A-40 75A-88	83 763
-- Mare Island Naval Shipyard, Vallejo, California	75A-97	839
-- Memphis Naval Air Station, Millington, Tennessee	74A-104	483
-- Naval Air Station, Fallon, Nevada	74A-80	697
-- Naval Ammunition Depot, Crane, Indiana	74A-19	120
-- Naval Ordnance Station, Louisville, Kentucky	74A-54	686
-- Naval Plant Representative Office, Baltimore, Maryland	75A-59	529
-- Naval Rework Facility, Naval Air Station, Jacksonville, Florida	73A-46	657
-- Norfolk Naval Shipyard, Norfolk, Virginia	74A-85	508
-- Pearl Harbor Naval Shipyard, Honolulu, Hawaii	74A-87 75A-11 75A-12 75A-57	219 136 375 595
-- Puget Sound Naval Shipyard, Bremerton, Washington	75A-47	522
Norfolk Naval Shipyard, Norfolk, Virginia	74A-85	508

## 0

## Office of Economic Opportunity

-- Region V, Chicago, Illinois	75A-29	538
-- Region VII, Kansas City, Missouri	74A-102	533
-- Region IX, San Francisco, California	74A-91	222
-- Washington, D.C.	74A-4	559
	74A-50	87
	74A-57	562
	74A-59	171
	74A-76	409
	74A-94	367
	75A-23	850
	75A-26	578

## P-Q

Patent and Trademark Office	75A-13	635
Pearl Harbor Naval Shipyard, Honolulu, Hawaii	74A-87	219
	75A-11	136
	75A-12	375
	75A-57	595
Picatinny Arsenal, Dover, New Jersey	74A-70	146
	75A-86	760
Puget Sound Naval Shipyard, Bremerton, Washington	75A-47	522

## R

Robins Air Force Base, Warner Robins Air Materiel Area, Georgia	74A-8	178
--	-------	-----

Agency	FLRC Number	Page
S		
Small Business Administration		
-- Washington, D.C.	73A-4	267
Securities and Exchange Commission	74A-98	225
Social Security Administration		
-- Albuquerque Data Operations Center, Albuquerque, New Mexico	75A-18	430
-- Bureau of Retirement and Survivors Insurance		
-- Chicago, Illinois	75A-17	421
-- Mid-America Program Center, Kansas City, Missouri	75A-8	276
-- Kansas City Payment Center	74A-53	157
-- Grand Rapids, Michigan	75A-19	841
-- Baltimore, Maryland	74A-51	728
T		
Topographic Center, Providence Office, Rhode Island	74A-44 75A-10	203 133
Transportation, Dept. of		
-- Federal Aviation Administration		
-- Aeronautical Center, Oklahoma City, Oklahoma	74A-38	475
-- Birmingham Municipal Airport, Birmingham, Alabama	75A-15	466

Agency	FLRC Number	Page
-- Dallas-Fort Worth International Airport, Texas	74A-88	451
-- Des Moines Air Terminal, Des Moines, Iowa	75A-54	470
-- Des Moines, Iowa, Municipal Airport	75A-66	613
-- Eastern Region, Airway Facilities Division	75A-50	547
-- Fort Worth Air Route Traffic Control Center	75A-31	857
-- Portland, Maine, Air Traffic Control Tower	74A-15	703
-- Portland, Oregon Airport	75A-9	461
-- Southwest Region, Tulsa Airway Facilities Sector, Tulsa, Oklahoma	74A-28	235
-- Federal Highway Administration		
-- Region 10, Vancouver, Washington	75A-3	312
Treasury, Dept. of		
-- Internal Revenue Service		
-- Los Angeles District, Los Angeles, California	75A-38	488
-- Ogden Service Center, Ogden, Utah	75A-56	650
-- Omaha District Office, Omaha, Nebraska	75A-43	591
-- Southeast Service Center, Chamblee, Georgia	75A-1	264
-- Treasury Disbursing Center, Austin, Texas	74A-65	116

Agency	FLRC Number	Page
-- U.S. Customs Service	74A-72	110
Troop Support Command, St. Louis, Missouri	75A-111	817
U		
U.S. Customs Service	74A-72	110
U.S. Merchant Marine Academy	75A-60	598
V		
Vandenberg Air Force Base, 4392d Aerospace Support Group, California	74A-77 75A-89	491 756
Veterans Administration	73A-9	160
-- Veterans Administration Center, Bath, New York	75A-92	710
-- Veterans Administration Data Processing Center, Austin, Texas	75A-67 75A-68 75A-69 75A-70 75A-73	601 604 607 610 584
-- Veterans Administration Hospital		
-- Denver, Colorado	74A-67	767
-- Montrose, New York	75A-5	259
-- New Orleans, Louisiana	75A-64 75A-83	625 632
-- Palo Alto, California	74A-103	107
-- Pittsburgh, Pennsylvania (Leech Farm Road)	75A-58	377



Agency	FLRC Number	Page
-- Pittsburgh, Pennsylvania (University Drive)	75A-21	573

W-X-Y-Z

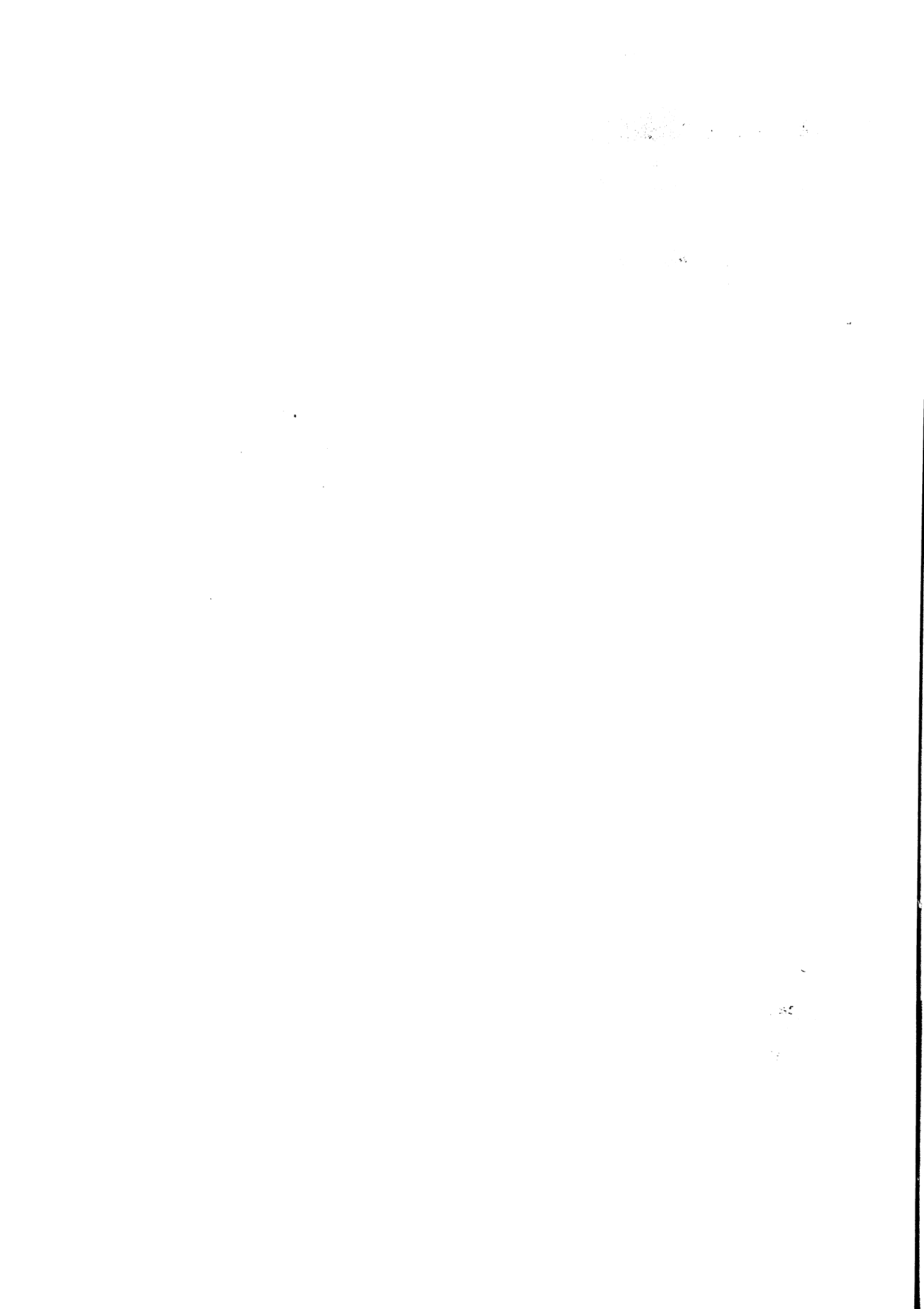
Westover Air Force Base, Massachusetts	75A-24	315
Wright-Patterson Air Force Base, 2750th Air Base Wing, Ohio	75A-40	587



APPEALS DECISIONS BY LABOR ORGANIZATIONS

---

January 1, 1975 through December 31, 1975



APPEALS DECISIONS BY LABOR ORGANIZATIONS

Labor Organization	FLRC Number	Page
<b>A-B-C-D-E-F-G-H</b>		
<b>American Federation of Government Employees, AFL-CIO</b>		
-- Council of Customs Locals		
-- Locals 2652, 2768, 2899	74A-72	110
-- Council of Locals 1497 and 2165	74A-48	396
-- Council of Prison Locals	74A-24	352
-- Council of Veterans Administration Locals	73A-9	160
-- Local 12	73A-56 75A-36	279 569
-- Local 63	74A-33	75
-- Local 225	75A-86	760
-- Local 987	74A-8 74A-60	178 207
-- Local 1331	75A-20	445
-- Local 1336	74A-53 75A-8	157 276
-- Local 1395	75A-17	421
-- Local 1415	74A-19	120
-- Local 1497	74A-48	396
-- Local 1841	74A-80	697
-- Local 1857	75A-34	262
-- Local 1884	74A-44 75A-10	203 133

Labor Organization	FLRC Number	Page
-- Local 1923	74A-51	728
-- Local 1940	74A-73	270
-- Local 2028	75A-21	573
-- Local 2047	74A-89 74A-99	131 308
-- Local 2110	74A-103	107
-- Local 2118	74A-30	296
-- Local 2151	75A-28	668
-- Local 2163	74A-9	228
-- Local 2165	74A-48	396
-- Local 2202	75A-38	488
-- Local 2241	74A-67	767
-- Local 2284	74A-95	617
-- Local 2396	74A-9	228
-- Local 2424	74A-9	228
-- Local 2440	75A-5	259
-- Local 2456	74A-63	439
-- Local 2476	74A-16	433
-- Local 2530	74A-9	228
-- Local 2532	73A-4	267
-- Local 2578	75A-74	679
-- Local 2612	75A-45	822
-- Local 2624	75A-61	831
-- Local 2640	74A-36	100
-- Local 2649	74A-29	720
-- Local 2652	74A-72	110

Labor Organization	FLRC Number	Page
-- Local 2677	74A-4	559
	74A-50	87
	74A-57	562
	74A-76	409
	74A-94	367
	75A-23	850
	75A-26	578
	75A-71	742
-- Local 2691	74A-102	533
-- Local 2768	74A-72	110
-- Local 2781	75A-35	514
-- Local 2816	75A-29	538
-- Local 2899	74A-72	110
-- Local 3009	74A-91	222
-- Local 3046	74A-78	151
	75A-76	628
-- Local 3157	74A-75'	405
	75A-6	665
-- Local 3272	75A-19	841
-- Local 3403	75A-37	201
-- Local 3426	74A-41	501
-- Local 3488	74A-97	80
	75A-39	518
-- National Border Patrol Council	74A-13	380
-- National Council of CSA Locals	75A-48	542
-- National Council of Immigration and Naturalization Service Locals	74A-13	380
-- National Council of OEO Locals	74A-59	171
	74A-94	367
	74A-102	533
-- National Council of Social Security Payment Center Locals, Local 1395	75A-17	421

Labor Organization	FLRC Number	Page
-- National Joint Council of Food Inspection Locals	73A-36	324
American Nurses Association	73A-9	160
-- Pennsylvania Nurses Association	75A-58	377
Arkansas Association of FmHA Clerks	75A-62	449, 565
Association of Civilian Technicians	75A-79	748
I-J-K		
International Association of Fire Fighters, AFL-CIO	73A-9	160
-- Local F-176	74A-92	305
-- Local F-185	75A-24	315
International Association of Machinists and Aerospace Workers, AFL-CIO		
-- Local Lodge 830	74A-54	686
-- Local Lodge 2266	74A-28	235
-- Local Lodge 2331	75A-40	587
-- Local Lodge 2424	74A-22 74A-46	787 188
International Brotherhood of Electrical Workers, AFL-CIO	73A-9	160
-- Local 574	75A-47	522
International Federation of Federal Police	74A-9	228



## L

Laborers International Union of North America, AFL-CIO	73A-9	160
--	-------	-----

## M

Metal Trades Council, AFL-CIO		
-- Charleston, South Carolina	75A-7	415
-- Honolulu, Hawaii	74A-87	219
	75A-11	136
	75A-12	375
	75A-57	595
-- Long Beach, California	74A-40	83
	75A-88	763
-- Tidewater, Virginia	74A-85	508
-- Vallejo, California	75A-97	839

## N-O

National Alliance of Postal and Federal Employees	73A-9	160
National Army and Air Technicians Association, I.U.E., AFL-CIO		
-- Local 375	73A-59	284
National Association of Air Traffic Specialists	75A-66	613
National Association of Government Employees	73A-9	160
-- Central Region Council of National Weather Service Locals	74A-16	433

Labor Organization	FLRC Number	Page
-- Eastern Region Council of National Weather Service Locals	75A-30	713
	75A-63	555
-- Local R1-34	74A-69	143
-- Local R2-10R	75A-50	547
-- Local R5-65	74A-104	483
-- Local R5-82	73A-46	657
-- Local R5-108	75A-16	175
-- Local R8-14	74A-38	475
-- National Weather Service Regional Councils and Locals	74A-20	91
National Federation of Federal Employees	73A-9	160
-- Local 73	74A-41	501
-- Local 143	75A-19	841
-- Local 169	75A-64	625
	75A-83	632
-- Local 405	75A-52	321
	75A-111	817
-- Local 491	75A-92	710
-- Local 704	74A-82	154
-- Local 823	74A-86	215
-- Local 862	74A-47	128
-- Local 943	74A-66	735
	74A-84	212
-- Local 1001	74A-77	491
	75A-89	756
-- Local 1042	75A-18	430

Labor Organization	FLRC Number	Page
-- Local 1084	75A-49	318
	75A-75	694
-- Local 1119	75A-5	259
-- Local 1167	75A-51	526
	75A-82	752
-- Local 1256	75A-55	552
-- Local 1332	75A-99	861
-- Local 1348	75A-3	312
-- Local 1375	74A-83	113
-- Local 1437	74A-70	146
-- Local 1552	75A-65	835
-- Local 1555	74A-31	247
	74A-32	138
-- Local 1581	74A-90	256
	75A-84	777
-- Local 1624	75A-59	529
-- Local 1633	74A-96	371
-- Local 1642	75A-78	784
-- Local 1655	74A-101	198
-- Local 1745	74A-65	116
	75A-67	601
	75A-68	604
	75A-69	607
	75A-70	610
	75A-73	584
-- Local 1804	75A-72	676
National Marine Engineers Beneficial Association	75A-9	461

National Treasury Employees Union

Labor Organization	FLRC Number	Page
-- Chapter 3	75A-43	591
-- Chapter 47	74A-100	104
-- Chapter 67	75A-56	650
-- Chapter 70	75A-1	264
National Union of Compliance Officers	75A-27	810

### P-Q-R

Patent Office Professional Association	75A-13	635
Pennsylvania Nurses Association, ANA	75A-58	377
Professional Air Traffic Controllers Organization, AFL-CIO		
-- Birmingham, Alabama	75A-15	466
-- Des Moines, Iowa	75A-54	470
-- Fort Worth, Texas	74A-88 75A-31	451 857
-- Portland, Maine	74A-15	703
-- Portland, Oregon	75A-9	461

### S-T

Service Employees International Union, AFL-CIO	73A-9	160
---	-------	-----

### U

United Brotherhood of Carpenters and Joiners of America, AFL-CIO	73A-9	160
---	-------	-----

Labor Organization

FLRC Number

Page

V-W-X-Y-Z

Veterans Administration Independent  
Service Employees Union

73A-9

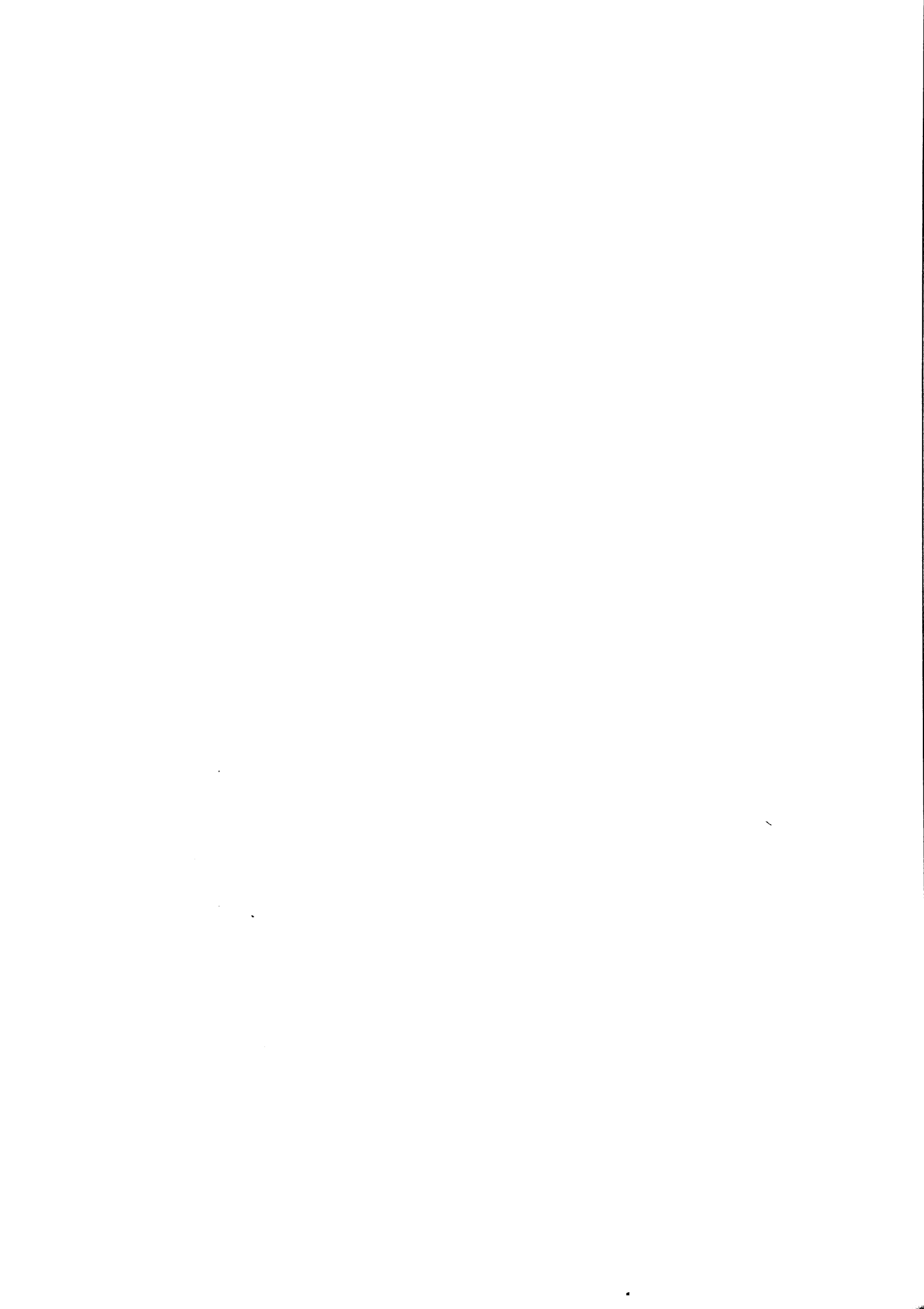
160



APPEALS DECISIONS BY INDIVIDUALS

---

January 1, 1975 through December 31, 1975





# APPEALS DECISIONS BY INDIVIDUALS

Individuals	FLRC Number	Page
-- Borenstein, Sol	74A-100	104
-- Estes, Shelton M.	75A-52	321
-- Fox, Rheamarie M.	74A-98	225
-- Paquette, Donald R.	75A-60	598
-- Rivera, Francisco	74A-74	149
-- Scaggs, Lewis M.	74A-60	207



INTERPRETATIONS AND POLICY STATEMENTS  
BY DOCKET NUMBERS AND SUBJECTS

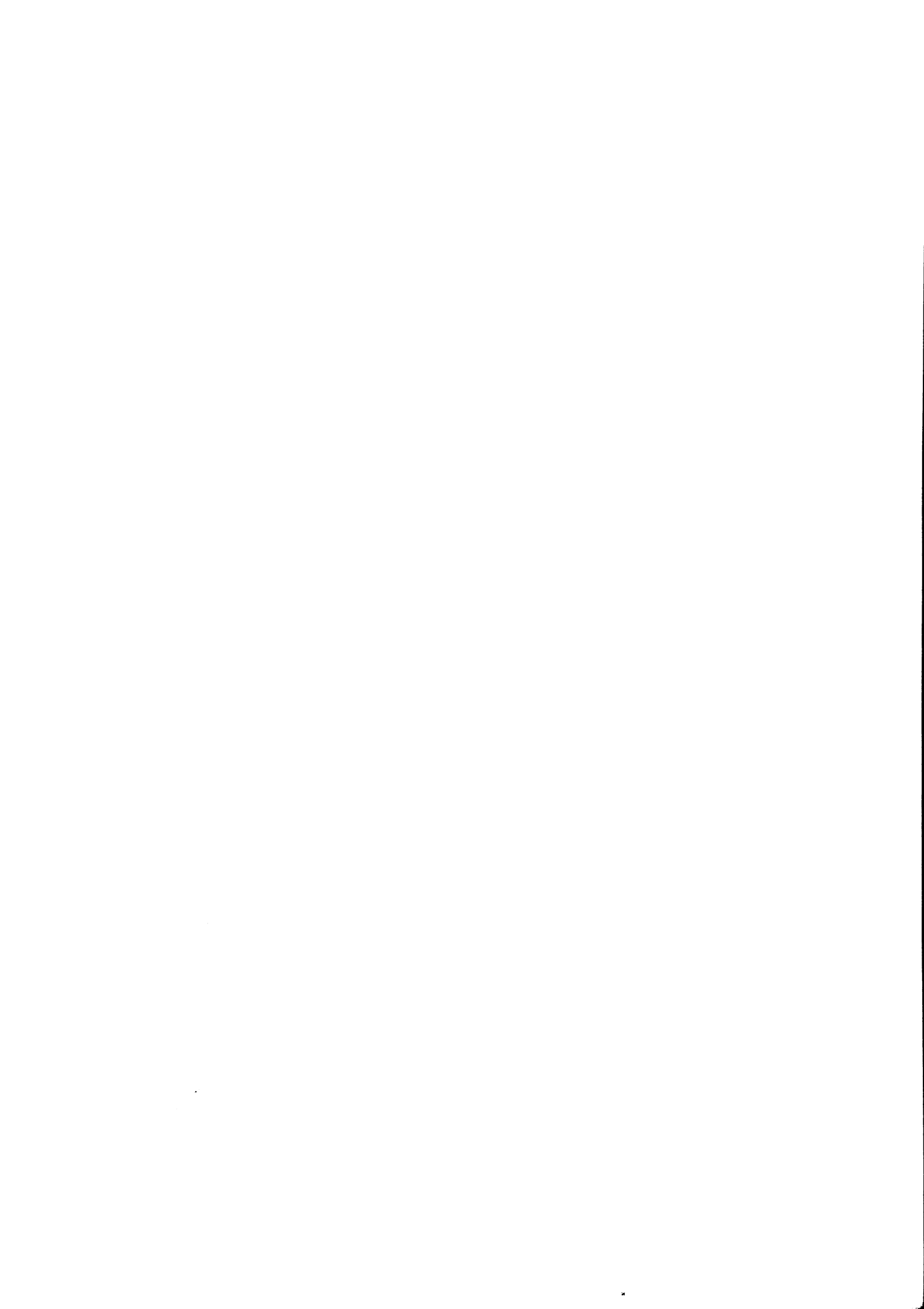
---

January 1, 1975 through December 31, 1975



INTERPRETATIONS AND POLICY STATEMENTS  
BY  
DOCKET NUMBERS AND SUBJECTS

FLRC Number	Subject	Page
73P-1	Negotiability Determinations of the Assistant Secretary in the Context of Unfair Labor Practice Proceedings	867
75P-1	Use of Official Time	874



SELECTED INFORMATION ANNOUNCEMENT  
BY DATE AND SUBJECT

---

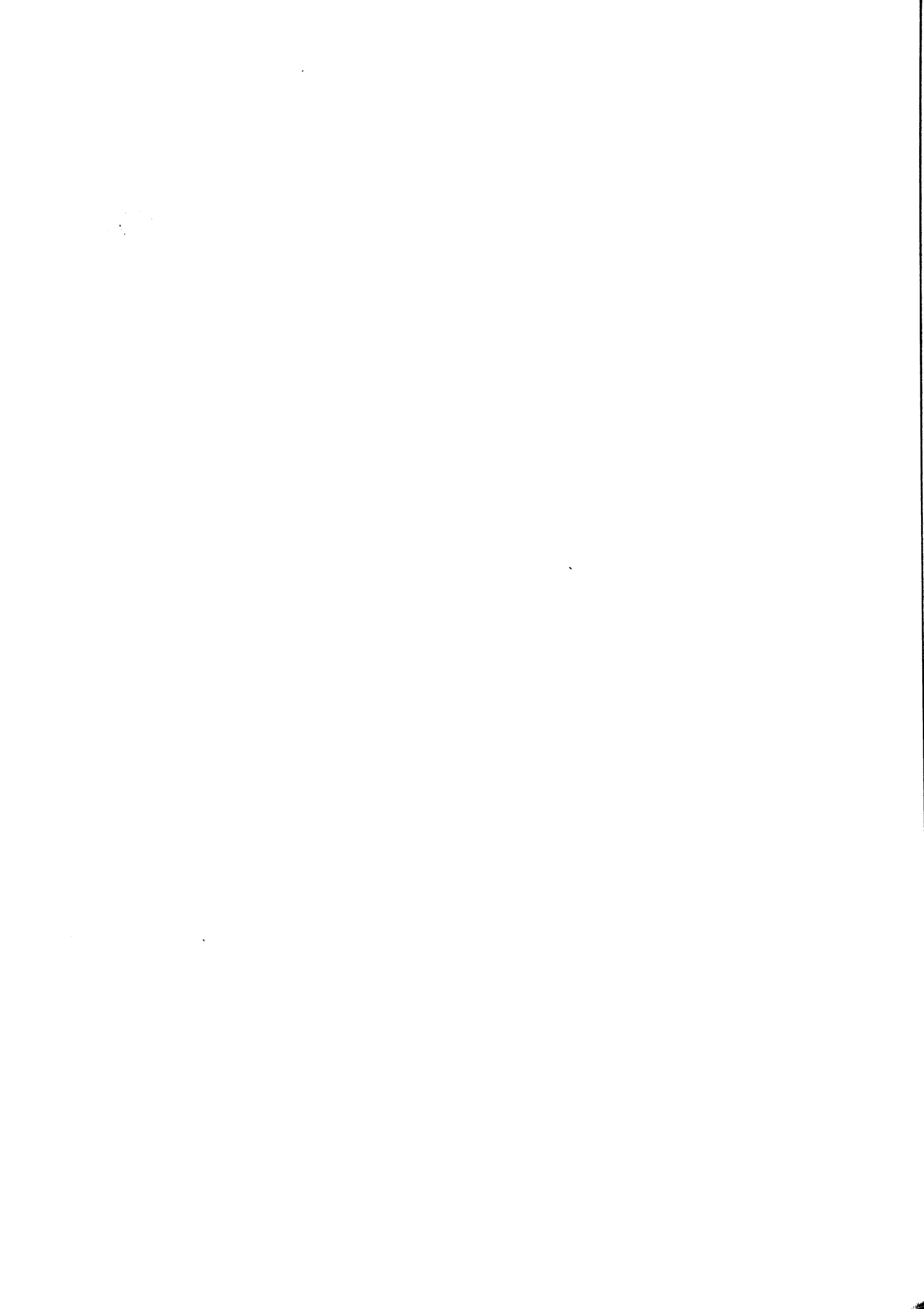
January 1, 1975 through December 31, 1975





SELECTED INFORMATION ANNOUNCEMENT  
BY DATE AND SUBJECT

Date of Issuance	Subject	Page
September 24, 1975	Revision of Council rules.	887



PART II.

TEXTS OF DECISIONS AND INTERPRETATIONS

---

January 1, 1975 through December 31, 1975



APPEALS DECISIONS

---

January 1, 1975 through December 31, 1975



Local 63, American Federation of Government Employees, AFL-CIO, and Blaine Air Force Station, Blaine, Washington. The negotiability dispute in this case involved the union proposal which would prevent the filling of any vacancy on a permanent basis, when a formal grievance is filed under the agency grievance procedure, until the grievance is finally resolved or until an employee has exercised any of his statutory or mandatory placement rights, whichever first occurs.

Council action (January 8, 1975). The Council held that the disputed provision would so unreasonably delay the exercise of management's reserved authority to take personnel actions on a permanent basis under section 12(b)(2) of the Order as in effect to negate that authority. Accordingly, the Council sustained the agency head determination that the proposal is nonnegotiable.

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

Local 63, American Federation of  
Government Employees, AFL-CIO

and

FLRC No. 74A-33

Blaine Air Force Station, Blaine,  
Washington

DECISION ON NEGOTIABILITY ISSUE

Background of Case

Local 63, American Federation of Government Employees, AFL-CIO (AFGE), is the exclusive bargaining representative of an activity-wide unit of all nonsupervisory civilian employees at the Blaine Air Force Station, Blaine, Washington. Blaine AFS is located in Washington State some six miles south of the Canadian border and 130 miles north of the nearest major metropolitan area of Seattle, Washington. McChord Air Force Base, which is located some 160 miles from Blaine AFS, provides civilian personnel administration services to Blaine AFS pursuant to a servicing arrangement between the two activities.

The employees in the unit at Blaine AFS for which AFGE Local 63 holds exclusive recognition are assigned to the 757th Radar Squadron. The unit encompasses 29 positions, including 16 different Classification Act and wage grade job series, requiring a wide variety of skills and experience. Ten of these positions are one-of-a-kind positions within the unit; for example, there is one electrician, one boiler plant equipment mechanic, one water treatment operator, one air conditioning equipment mechanic, and one cook, among others. The 757th Radar Squadron performs a vital aerospace defense function on a continuous basis, 24 hours per day, seven days per week. No other civilian employees (except supervisors) are located at Blaine AFS.

Following negotiations, the local parties reached an agreement covering the employees in the bargaining unit. However, upon review, the Aerospace Defense Command of the Department of the Air Force disapproved as nonnegotiable the following underscored sentence in Section 7, Article XVIII, Promotions:

Disputes arising out of the rating or ranking of an employee under the promotion plan shall be processed in accordance with the Air Force grievance procedure. When a formal grievance is filed, the vacancy will not be filled on a permanent basis until final resolution of the grievance, or until an employee exercises any statutory or mandatory placement rights he might have, whichever occurs first.



Upon referral, the Department of Defense upheld the position of the Aerospace Defense Command, principally on the ground that the disputed sentence violates section 12(b)(2) of the Order.<sup>1/</sup> AFGE appealed to the Council, disagreeing with the agency determination;<sup>2/</sup> and the agency filed a statement of position in support of its determination.

### Opinion

The issue presented is whether the subject provision which would restrict the filling of a vacancy on a permanent basis, when a formal grievance is filed under the agency grievance procedure, violates reserved management authority under section 12(b)(2) of the Order and is therefore nonnegotiable.

Section 12(b)(2) provides as follows:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements --

. . . . .

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations --

. . . . .

(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.

---

<sup>1/</sup> The agency head also asserted that the sentence in question violated section 12(b)(4) of the Order. In view of our decision herein, we find it unnecessary to pass upon the applicability of section 12(b)(4) to the subject provision.

<sup>2/</sup> In its appeal, AFGE also requested (1) that the case be referred to a "factfinding hearing"; and (2) that portions of the agency head determination be stricken. However, as to (1), no persuasive reason was advanced for any hearing in the instant case. And, as to (2), the questioned portions of the agency head determination were not relied upon by the Council in reaching its decision in this case. For these reasons, and apart from other considerations, the union's requests are denied.

As already mentioned, the disputed provision would prevent the filling of any vacancy on a permanent basis, when a formal grievance is filed under the agency grievance procedure, until the grievance is finally resolved or until an employee has exercised any of his statutory or mandatory placement rights, whichever first occurs.

The agency determined that, under the circumstances here involved, the subject provision would so interfere with, impede, and unreasonably delay the filling of a vacancy as effectively to deny management's right under 12(b)(2) to hire, promote, transfer, or assign an employee into the position on a permanent basis. However, AFGE argues that the provision merely establishes a procedure which management will observe in exercising its 12(b)(2) rights, which is negotiable under the Order. We cannot agree with the union's position.

The Council considered a related question in the VA Research Hospital case.<sup>3/</sup> There, the union proposed that the first-line selecting official notify the union of a promotion selection, and that the union then be permitted, within a brief period (completion of the union steward's second tour of duty after receipt of notice of the proposed selection), to obtain higher level management review before the promotion was effected. In rejecting the agency's contention that the proposal violated section 12(b)(2) of the Order, the Council stated (at p. 3 of its decision):

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). [Emphasis added.]

Unlike in the VA Research Hospital case, the disputed provision in the instant case, in our opinion, would so unreasonably delay the exercise of management's reserved authority under section 12(b)(2) as in effect to negate that authority.

3/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31.

More particularly in the above regard, it is clear from the express language employed in 12(b)(2) that management's reserved authority under that section extends to the right to take personnel actions on a permanent basis, viz., to hire, promote, transfer, assign, etc. Further, as emphasized in the VA Research Hospital decision, this authority includes the right of management to accomplish such personnel actions promptly, or, stated otherwise, without unreasonable delay.

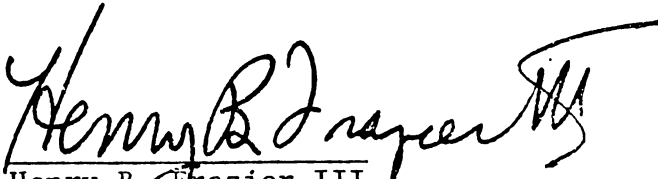
Under the disputed provision in the present case, management would be prevented from taking any personnel actions to fill a vacancy at the activity on a permanent basis if a formal grievance is filed, until the agency grievance procedure is completely exhausted (unless an employee has previously exercised any statutory or mandatory placement rights). Under this provision, unlike that in the VA Research Hospital case, no precise and readily definable limitation is established before the personnel actions may be effected by the agency. Moreover, while temporary expedients might be available, the potential delay in filling the vacancy on a permanent basis in the present case, unlike that in VA Research Hospital, would in all likelihood extend for a period of months as demonstrated by past experience in processing grievances under the agency grievance procedure.<sup>4/</sup> Such delay is plainly unreasonable and renders the procedure sought to be adopted in the disputed provision violative of management's reserved authority under section 12(b)(2) of the Order.

Accordingly, we sustain the agency's determination as to the nonnegotiability of the second sentence of Section 7, Article XVIII, in the local agreement.

#### 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's determination as to the nonnegotiability of the second sentence of Section 7, Article XVIII, of the local agreement was valid and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: January 8, 1975

<sup>4/</sup> According to the uncontroverted statement of the agency, grievances involving merit promotions, which were filed under the Air Force grievance procedure (AFR 40-771) during a representative period in fiscal year 1974, required an average of some four months before the final Air Force decision was rendered, because of "due process features" of the grievance procedure.

Federal Deposit Insurance Corporation, A/SLMR No. 459. The agency appealed to the Council from the Assistant Secretary's decision insofar as he found that a unit of bank examiners was appropriate for the purpose of exclusive recognition and from his direction of an election in that unit (which election is still pending). The agency also requested a stay pending Council determination of its appeal.

Council action (January 14, 1975). The Council, pursuant to section 2411.41 of its rules (5 CFR 2411.41), denied review of the agency's interlocutory appeal, without prejudice to the renewal by the agency 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 a stay. As pertains to the agency's request in its appeal that the Council revise its rule proscribing interlocutory appeals in representation cases, the Council advised the agency that it is currently undertaking a reexamination of the rules and regulations pertaining to its review functions under the Order (Council Information Announcement of December 12, 1974), and stated that it would entertain the agency's views on changing the rule involved during that reexamination.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

January 14, 1975

Mr. John F. Betar  
Administrative Counsel  
Office of the General Counsel  
Federal Deposit Insurance Corporation  
550 17th Street, NW.  
Washington, D.C. 20429

Re: Federal Deposit Insurance Corporation,  
A/SLMR No. 459, FLRC No. 74A-97

Dear Mr. Betar:

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

In his decision, the Assistant Secretary found, among other things, that a unit of bank examiners was appropriate for the purpose of exclusive recognition and directed that an election be held in that unit. No final disposition in the case has been rendered as pertains to that unit.

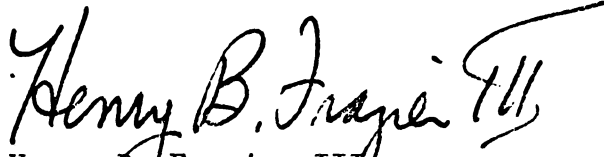
Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here 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.\*/

\*/ While your petition for review requests the Council to revise its policy with regard to interlocutory appeals in representation cases, you are advised that the Council is currently undertaking a reexamination of the rules and regulations pertaining to its review functions under the Order (see the Council's Information Announcement of December 12, 1974, a copy of which is enclosed for your convenience). Agencies and labor organizations have been invited to submit recommendations for changes in the Council's procedures. The Council will entertain your views on changing the rule here involved during such reexamination.

Since a final decision has not been 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 in the entire case by the Assistant Secretary. Your further request for a stay pending decision on your appeal is therefore likewise denied.

By 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 long horizontal flourish extending to the right.

Henry B. Frazier III  
Executive Director

Enclosure

cc: A/SLMR  
Dept. of Labor

Hyman L. Erdwein  
AFGE

Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator). The issue submitted to the arbitrator in this case was whether the facility had "just cause for withholding four hours of overtime pay and issuing a reprimand for [the grievant's] alleged absence from the job site . . . ." The arbitrator determined that the grievant was entitled to the 4 hours of overtime pay which had been withheld; ordered the removal of the reprimand from the grievant's record for being absent from the jobsite; and directed that a reprimand be placed in the grievant's file for failure to clock out properly. The union took exception to that portion of the arbitrator's award which directed that a reprimand be placed in the grievant's file for a failure to clock out properly on the grounds that the arbitrator exceeded his authority by deciding an issue which was not submitted to him.

Council action (January 15, 1975). The Council determined that the union's exceptions were not supported by facts and circumstances which would warrant review as required by section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). More particularly, the Council found under all the circumstances, including the testimony proffered by the parties concerning the grievant's failure to clock out, that the arbitrator had a reasonable basis to conclude that the grievant's conduct in the latter regard presented an issue which necessarily arose from the particular question submitted to the arbitrator for resolution, and was within the scope of his authority. Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

January 15, 1975

Mr. Russ Hatfield, President  
Federal Employees Metal Trades  
Council, Long Beach--AFL-CIO  
P.O. Box 20310  
Long Beach, California 90801

Re: Long Beach Naval Shipyard and  
Federal Employees Metal Trades  
Council (Steese, Arbitrator),  
FLRC No. 74A-40

Dear Mr. Hatfield:

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

As indicated in the award, the grievant in this case was issued a reprimand and was refused pay for 4 hours at the appropriate overtime rate on the basis that he had been absent from his jobsite during the second half of the swing shift to which he had been assigned. The question submitted to the arbitrator, by stipulation of the parties, was whether the facility had ". . . : just cause for withholding four hours of overtime pay and issuing a reprimand for [the grievant's] alleged absence from the job site . . . ." The arbitrator heard conflicting testimony concerning the presence or absence of the grievant at the jobsite, and whether the grievant showed up at the end of his shift to pick up his timecard and clock out. The arbitrator concluded, based on the testimony that grievant had been present for the second half of the shift and was present at quitting time, that the issue of 4 hours' pay should be resolved in favor of the grievant. He found that grievant did not show up to pick up his timecard and did not clock out that night and, therefore, concluded that the grievant had failed to clock out in accordance with the established procedure contained in the facility's regulations. The arbitrator issued his award in which he answered the question specifically submitted to arbitration in the negative, determined that the grievant was entitled to the 4 hours of overtime pay withheld, ordered the removal of the reprimand from the grievant's record for being absent from the jobsite, and ordered that a reprimand be placed in the grievant's file for failure to clock out properly. The union takes exception to that portion of the arbitrator's award which directs that a reprimand be placed in the grievant's file for a failure to clock out properly.



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."

As indicated, the union excepts to that portion of the award which directs that a letter of reprimand be placed in the grievant's file for failure to clock out properly. In this regard, the union asserts that the arbitrator went beyond the limits of the issue submitted by the parties, concerning the grievant's alleged absence from the job-site, by finding the grievant responsible for failing to clock out properly, an issue which the facility had allegedly never considered as the basis for disciplinary action in this case. Thus, the union contends, the arbitrator exceeded the scope of his authority by going beyond the issue agreed to by the parties and deciding an issue other than that agreed upon by the parties.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator did not decide the question submitted to arbitration and determined issues not included in the question submitted to arbitration, thereby exceeding his authority. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60. In that case the Council concluded that it was clear that the arbitrator had answered the question at issue. In the present case before us, there is no question that the arbitrator answered the question at issue. Further, in our decision in FLRC No. 73A-44, the Council reiterated a point which it had made earlier in FLRC No. 72A-3,<sup>\*/</sup> namely:

In addition to determining those issues specifically included in the particular question submitted, the award may extend to issues that necessarily arise therefrom.

It is significant in this regard that, while the grievant's alleged absence from the jobsite was the specific issue submitted to the arbitrator, both parties proffered testimony at the arbitration hearing concerning the grievant's failure to clock out, indicating that the parties themselves considered this matter to be an important element in the specific issue subject to the review of the arbitrator. Given these

---

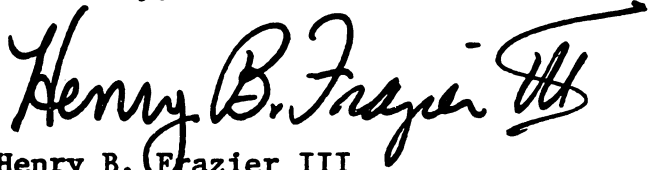
<sup>\*/</sup> American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

circumstances, the Council finds that the arbitrator was not without a reasonable basis from which he could conclude that the grievant's failure to clock out was an issue which necessarily arose from the particular question submitted, and was, therefore, within the scope of his authority in resolving that question and in fashioning the remedy accordingly. We conclude, therefore, that the union's petition does not present the facts and circumstances necessary to support its assertion that the arbitrator exceeded the scope of his authority by determining an issue not included in the question submitted to arbitration.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Henry B. Frazier III  
Executive Director

cc: A. DiPasquale  
Navy

Local 2677, National Council of OEO Locals, American Federation of Government Employees, AFL-CIO and Office of Economic Opportunity, Assistant Secretary Case Nos. 22-5178 (AP) and 22-5189 (AP). The Assistant Secretary determined that two grievances which the union sought to arbitrate were not subject to the arbitration procedure in the parties' existing agreement. He found that the gravamen of the grievances involved the agency's failure to post and fill certain vacancies. He concluded that the grievances were outside the scope of the negotiated grievance procedure, reasoning that the filling of vacancies is a right reserved to management under section 12(b) of the Order and that such right is not subject to waiver through the negotiation process. The union appealed to the Council alleging that the Assistant Secretary's decision presents major policy issues.

Council action (January 15, 1975). The Council determined that the Assistant Secretary's decision did not present major policy issues. The Council concluded that the Assistant Secretary did not exceed the bounds of his authority under section 13(d) of the Order when he determined that the grievances were not subject to arbitration because the relief sought would contravene section 12(b) of the Order which must be incorporated in every agreement. The Council further determined that the petition neither alleged, nor did it appear, that the Assistant Secretary's decision was arbitrary and capricious. Accordingly, the Council denied review of the union's appeal pursuant to section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

January 15, 1975

Mr. Clyde M. Webber  
National President  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Local 2677, National Council of OEO Locals,  
American Federation of Government Employees,  
AFL-CIO and Office of Economic Opportunity,  
Assistant Secretary Case Nos. 22-5178(AP),  
22-5189(AP), FLRC No. 74A-50

Dear Mr. Webber:

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

The Assistant Secretary denied your request to reverse the Assistant Regional Director's report and findings that two grievances (consolidated for purposes of the report and findings), one filed by Local 2677 and the other filed by National Council of OEO Locals, were not subject to the arbitration procedure in the existing agreement between the union and the agency. According to the record, the grievances sought to be arbitrated alleged that the agency had failed to post and fill a number of vacant positions within the agency thereby violating the following provision of the existing agreement:

**Filling vacancies.** The parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system. Whenever management determines such emergency exists, it will notify the union of the reasons in advance . . . .

As a remedy the union requested that the "vacant positions be posted for merit promotion within two weeks, and that selections be made and personnel actions completed for these positions within five weeks from today."

The Assistant Secretary found that the gravamen of the grievances involved the agency's failure to post and fill certain vacancies. He further found that the filling of vacancies is a right clearly reserved to management under section 12(b) of the Order and that such right is not subject to waiver through the negotiation process. Accordingly, he concluded that the subject grievances, which sought to require the agency to fill certain vacancies, were outside the scope of the contractual arbitration procedure, citing several Council decisions in support of his conclusion.

In your petition for review, you contend the Assistant Secretary's decision presents major policy issues, principally on the ground that the Assistant Secretary went beyond the bounds of the authority given him in section 13(d) of the Order when he held that the grievances were not subject to arbitration because they invaded management rights protected by section 12(b) of the Order. Your position is that the decision should have been based exclusively on whether the grievances involved an interpretation or application of the negotiated agreement.

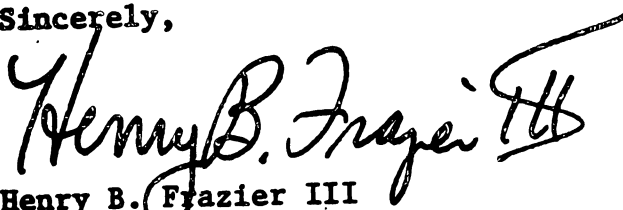
In the Council's opinion, the Assistant Secretary's decision does not present major policy issues. Section 13(d) of the Order provides: "Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may be referred to the Assistant Secretary for decision." Thus, the Assistant Secretary's decision in the subject case determined that the grievances were not subject to arbitration because the relief sought would contravene section 12(b) of the Order which must be incorporated in every agreement. Contrary to your contention, he did not exceed the bounds of his authority in so doing. Section 12(a) of the Order provides, in pertinent part, that "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 . . . ." As to the meaning of section 12(b), the Council, in its decisions, consistently has emphasized that the rights reserved to management officials under that section, including those to hire, promote, transfer or assign employees, are mandatory and no right accorded to unions under the Order may be permitted to interfere with that authority. See, National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61 and cases cited therein at footnote 4.

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither allege, nor does it appear, that the decision is arbitrary and capricious, your appeal fails

to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review of the decision is hereby denied.

By 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/SLMR  
Dept. of Labor

Director of Personnel  
OEO

P. Kete  
National Council of OEO  
Locals, Local 2677

National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service.

The dispute concerned the negotiability of the union's proposal that it have a right to membership on all Regional Manpower Utilization Councils of the agency.

Council action (January 27, 1975). The Council held, contrary to the union's contentions, that the agency's regulations, as interpreted and relied upon by the agency head in his determination of nonnegotiability, do not deny the union any right under section 10(e); and are valid as limitations on the bargaining obligation under section 11(a) of the Order. In this latter regard, the Council distinguished its prior decisions In VA Hospital, Montgomery, Alabama, FLRC No. 73A-22, Report No. 48; VA Research Hospital, FLRC No. 71A-31, Report No. 31; and Kirk Army Hospital, FLRC No. 72A-18, Report No. 44. Accordingly, the Council sustained the agency head's determination that the proposal is nonnegotiable.

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

National Association of Government  
Employees

and

FLRC No. 74A-20

U.S. Department of Commerce, National  
Oceanic and Atmospheric Administration,  
National Weather Service

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During the course of negotiations between the National Weather Service and the National Association of Government Employees, a dispute arose over the negotiability of the following union proposal:

The Union will have the right to have a member on all Regional Manpower Utilization Councils.

Upon referral, the National Oceanic and Atmospheric Administration (NOAA) determined that the proposal was nonnegotiable under agency regulations<sup>1/</sup> (NOAA Directives Manual, Chapter 06, Section 06, subparagraph 2.b.(1)),<sup>1/</sup> which, in effect, limit membership on such councils to management officials.

1/ 06-06 NOAA MANPOWER UTILIZATION REVIEW COUNCIL AND MANPOWER UTILIZATION COUNCILS

2. Description of Councils

b. Manpower Utilization Councils

- (1) Membership - These Councils are established within the Office of the Administrator, the Office of the Assistant Administrator for Administration, and the Major Line Components. Each shall have at least one Council for its headquarters office and may establish other subordinate Councils either at its headquarters offices or at field headquarters, as appropriate. The membership  
(Continued)



The union appealed from this determination to the Council under section 11(c)(4) of the Order and the agency filed a statement of position.

Opinion

The union contends, in effect, that the agency regulation in question, interpreted and relied upon by the agency to preclude union representation on Regional Manpower Utilization Councils, violates sections 11(a) and 10(e) of the Order, thereby interfering with the union's right to represent employees in the unit. Thus, the question presented for Council resolution in this case is whether the agency regulation, as interpreted by the agency head, is violative of the Order and, therefore, not a valid bar to negotiability of the union's proposal.

The union's arguments with respect to sections 11(a) and 10(e) will be discussed separately below.

Section 11(a).

The union principally asserts that section 11(a) of the Order guarantees the right of the union to " . . . meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions . . . . "; under agency regulations (NOAA Directives Manual, Chapter 06, Section 06, subparagraph 2.b.(2)),<sup>2/</sup>

(Continued)

of these Councils will be formally designated by the Administrator, the Assistant Administrator for Administration or the Director, Major Line Component, as appropriate, and should consist of top management officials of the organizational component. A representative of the Personnel Division will serve as the Executive Secretary and attend each MUC meeting.

2/ 06-06 NOAA MANPOWER UTILIZATION REVIEW COUNCIL AND MANPOWER UTILIZATION COUNCILS

. . . . .

2. Description of Councils

. . . . .

b. Manpower Utilization Councils

. . . . .

(Continued)

Manpower Utilization Councils consider personnel policies and practices and matters affecting the working conditions of the employees represented by the union; and, therefore, the effect of subparagraph 2.b.(1) of the regulation, limiting membership on the councils to management officials, is to deny the union's right under section 11(a).

The union bases its assertions on its interpretation of the language of section 11(a), as well as certain prior decisions of the Federal Labor Relations Council and language in the 1969 Study Committee Report and Recommendations which led to the issuance of E.O. 11491.

We find that the union's assertions relating to the meaning and effect of section 11(a) of the Order to be without merit.

Section 11(a), which prescribes the bargaining obligation between an agency and a labor organization that has been accorded exclusive recognition is expressly limited, among other ways, by the phrase "applicable laws and regulations, including . . . published agency policies and regulations."<sup>3/</sup>

---

(Continued)

- (2) Functions - Each MUC will meet at least quarterly. The functions of the MUC include, but are not limited to, the following:
- (a) Providing advice, counsel and line support to the Council Chairman regarding personnel policies and procedures; and
  - (b) Reviewing and recommending to the selecting official personnel actions (e.g., appointments, promotions, reassignments, quality step increases, cash awards, bronze medals) to positions at the GS-15 (and equivalent) level and below.

The union states that through its proposal it is seeking to have a member on the councils when they consider actions described in 2.b.(2)(b) relating to employees in the unit and the first level of supervisors above the unit; and to be included in all meetings and discussions of the councils with regard to the functions described in 2.b.(2)(a).

3/ 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 . . . .

As to the meaning of this provision of section 11(a), the Council has held that higher level agency regulations issued to achieve a desirable degree of uniformity and equality in the administration of matters common to more than one activity within the agency were completely consistent with the obligation imposed by section 11(a) and could properly limit the scope of negotiations at subordinate activities of the agency.<sup>4/</sup>

The record in the instant case indicates that the NOAA regulation in question was issued to establish Manpower Utilization Councils as "management committees" responsible to assure that the merit principles of the Federal service are upheld and that NOAA supervisors are acting in a responsible and consistent fashion within the framework of Civil Service Commission, Department of Commerce and NOAA personnel regulations; these committees also serve as a forum for the discussion and evaluation by management of its current managerial practices and policies; and that attendance at these committees, without exception, has been restricted to appropriate management officials.

Hence, we find that the regulation was issued to achieve a desirable degree of uniformity and equality in management's administration of matters common to all of the various subordinate activities of NOAA, including the National Weather Service, through Manpower Utilization Councils. In this regard, it is our view that the regulation as interpreted by the agency head in the context of this dispute limits only membership, including attendance, at Manpower Utilization Councils. It does not purport to limit negotiation with labor organizations on those matters which are otherwise negotiable simply because such matters are also subject to consideration by the councils. The regulation does not, for example, preclude negotiation of procedures which management will observe in reaching promotion or reassignment decisions, or procedures related to the impact of such decisions, to the extent consonant with law and regulation, even though promotion and reassignment matters are also considered by the councils. Thus, the agency regulation here involved is an applicable regulation within the meaning of section 11(a) of the Order, i.e., one that does not improperly limit the bargaining obligation imposed by section 11(a).

Prior decisions of the Council, relied on by the union, as previously noted, do not support a different conclusion. Specifically, the union relies on the Council's VA Hospital, Montgomery;<sup>5/</sup> VA Research Hospital;<sup>6/</sup>

4/ United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30; accord, NFFE Local 779 and Department of the Air Force, Sheppard Air Force Base, Texas, FLRC No. 71A-60 (April 3, 1973), Report No. 36.

5/ AFGE Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48.

6/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31.

and Kirk Army Hospital<sup>7/</sup> decisions. In the two VA cases, the Council held that the agency failed to establish that its regulations, raised as bars to negotiation of union proposals, were applicable regulations within the meaning of section 11(a) because the agency had misinterpreted the bargaining proposals. And, in the Kirk Army Hospital case, the Council held that the agency regulation raised therein to bar negotiation of the union's proposals was not an applicable regulation within the meaning of section 11(a) because the regulation was not issued at a higher level in the agency.

In VA Hospital, Montgomery, the union proposal provided:

The employer agrees to appoint a physician of the Unit to Professional Standards Board, when the Board is considering physicians of the Unit for recommendation for promotion.

It is agreed that the Unit physician will be selected from a list recommended by the Union. The recommended physician must meet the criteria established for Board members. If the Administrator determines that the recommended physician(s) does not meet this criteria, he will then appoint another physician from the bargaining unit who he deems qualified.

The agency head determined that the proposal was nonnegotiable because it conflicted with published agency regulations (VA Manual, DM&S Supplement, MP-5, Part II, paragraph 2.05c) which provided :

Persons selected to serve on Professional Standards Boards will be chosen from the most capable, experienced and responsible personnel.

The agency head characterized the union's proposal as requiring the appointment of a unit physician to serve on Professional Standards Boards even though the agency might find that no unit physician meets the criteria for Board membership established by agency regulations.

The Council concluded that such a characterization of the proposal was erroneous; while the proposal could be so interpreted, the Council concluded that the language of the proposal as a whole expressly limited the requirement to appoint a physician from the unit to such physicians as the agency official making such appointment "deems qualified" under agency regulations. Thus, the proposal would require the appointment of only those unit physicians who met the criteria established for Board members in the agency regulation. The Council therefore concluded that the agency had failed to establish that its regulation is applicable so as to preclude negotiation of the proposal under section 11(a) of the Order.

Here, in sharp contrast to the situation in VA Hospital, Montgomery, the proposal would require the appointment of persons to the MUC's who

---

<sup>7/</sup> Local Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Maryland, FLRC No. 72A-18 (September 17, 1973), Report No. 44.

clearly could not meet the requirements of the NOAA directive, and, in this regard, there is no question as to whether the union proposal is being misinterpreted.

In VA Research Hospital, the union proposal provided, in effect, that, in promotion actions, 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.<sup>8/</sup>

The agency took the position that the union's proposal was nonnegotiable because it would violate, inter alia, an agency regulation which required that the "responsibility of selection must be vested in a selecting official."

In making his determination, the agency head relied on a characterization of the union's proposal as one 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." The Council concluded that the agency had misinterpreted the union proposal in these regards. Instead, the record established 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. Therefore, in view of the agency's erroneous characterization of the union's proposal, the Council found that the agency had failed to establish that its regulation was applicable so as to preclude negotiation of that particular proposal under section 11(a) of the Order. Here again, in sharp contrast, there is no question in the present case as to the intended meaning of the union proposal.

8/ Specifically, the provision read 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.

Thus, in the present case, the meaning of the union's proposal is clear and has not been misinterpreted by the agency; and, as indicated, there is no question that the regulation at issue is a higher level regulation. Therefore, the cited cases do not lend support to the union's argument.

Finally, we must reject the union's assertion, previously mentioned, that the 1969 Study Committee Report and Recommendations which led to the issuance of E.O. 11491 contains language that supports the union's position herein. The union cites that part of the Introduction of the Report which noted that employee-management relations should be improved by providing employees an opportunity for greater participation in developing policies and procedures affecting the conditions of their employment, and which identified a need for program change in the area of "an enlarged scope of negotiation and better rules for insuring that it is not arbitrarily or erroneously limited by management representatives."<sup>9/</sup> and that part of the Report which states that "agencies should not issue over-prescriptive regulations . . . ." <sup>10/</sup>

With regard to the language relied upon, the Council has previously indicated that, notwithstanding such exhortative statements, the Report as well as the Order fully supports the authority of an agency head to issue regulations for the operation of the agency.<sup>11/</sup> As the Council emphasized in its decision in Merchant Marine Academy:<sup>12/</sup>

[W]e 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. [Footnote omitted.]

Accordingly, for the foregoing reasons, we find that the agency regulation here involved, as interpreted by the agency head, is consistent with section 11(a) of the Order.

#### Section 10(e).

The union also contends that the agency regulation in question, as interpreted by the agency head, in effect denies the union the right guaranteed to it by section 10(e) of the Order to be represented at formal

<sup>9/</sup> Labor-Management Relations in the Federal Service (1971), at 35.

<sup>10/</sup> Id., at 43.

<sup>11/</sup> Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57 (May 9, 1973), Report No. 37, at 6; cf., Sheppard Air Force Base, supra note 4, at 3-4; see also 5 U.S.C. 301-302 (1970).

<sup>12/</sup> Supra note 4, at 6.

discussions between management and employees or employee representatives concerning personnel policies and practices and matters affecting general working conditions of employees in the unit.

We find this union assertion to be without merit.

Section 10(e) states, in pertinent part:

. . . The labor organization [that has been accorded exclusive recognition] shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Thus, the plain language of section 10(e) grants labor organizations the right to be represented at formal discussions between management and employees or between management and employee representatives concerning matters described in the provision. However, such discussions as may occur under the regulation in question here are expressly limited to management officials. In this regard, nothing in the "legislative history" of section 10(e) suggests that the right to be represented, granted therein to labor organizations, was intended to extend to discussions among management officials, whether such discussions are formal or informal, and regardless of their subject matter.


Hence, in the Council's view, contrary to the union's contention, section 10(e) does not extend any right to labor organizations to be present at intra-management discussions, even if such discussions may be formal and pertain to grievances, personnel policies and practices, or other matters affecting the general working conditions of the employees in the unit.

Accordingly, we find that the agency regulation here involved, as interpreted by the agency head, does not deny the union any right under section 10(e) of the Order.

#### Conclusion

Based on the reasons set forth above and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the determination by the agency head that the union proposal here involved is nonnegotiable was proper and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: January 27, 1975

American Federation of Government Employees Local 2640 and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey. The negotiability dispute concerned the union's proposal for union representation on the agency's Manpower Utilization Councils.

Council action (January 27, 1975). The Council found no material difference between the disputed provision in this case and the union's proposal in the National Weather Service case, FLRC No. 74A-20 [in Report No. 62]. Accordingly, based on its decision in National Weather Service, the Council sustained the agency head's determination in the present case that the proposal is nonnegotiable under agency regulations.



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

American Federation of Government  
Employees Local 2640

and

FLRC No. 74A-36

U.S. Department of Commerce,  
National Oceanic and Atmospheric  
Administration, National Ocean  
Survey

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During the course of negotiations between American Federation of Government Employees Local 2640 (AFGE) and the National Ocean Survey (NOS), a dispute arose concerning the negotiability of the following union proposal:

The Manpower Utilization Council, consisting of Management and a non-voting Union representative, sitting as an observer, will limit the best qualified list to show the names of three candidates for the vacancy to be filled from a certificate, with one additional candidate added to the certificate for each additional vacancy. Only in cases where meaningful distinction cannot be made as to relative qualifications among a smaller number of candidates, up to eight candidates may be listed on a merit promotion certificate. Consideration shall be given to seniority (total government service) only when all other factors are equal. [Emphasis added to indicate disputed provision.]

Upon referral, the Department of Commerce determined that, "Since NOAA [National Oceanic and Atmospheric Administration] has a published policy<sup>\*/</sup> . . . which prescribes the MUC membership . . . the proposal of

\*/ The regulation relied on (NOAA Directives Manual, Chapter 06-06) provides as follows:

06-06 NOAA MANPOWER UTILIZATION REVIEW COUNCIL AND MANPOWER UTILIZATION COUNCILS

. . . . .  
(Continued)

Local 2640 to have a non-voting Union Representative on the Manpower Utilization Council is non-negotiable." [Footnote added.]

The union appealed to the Council from this determination under section 11(c)(4) of the Order and the agency filed a statement of position.

### Opinion

The question before the Council relates to the negotiability of the union's proposed provision concerning union representation on the agency's Manpower Utilization Councils.

In our view, the provision here in dispute bears no material difference from the union's proposal concerning union membership on Regional Manpower Utilization Councils of NOAA's National Weather Service which was before the Council in National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, FLRC No. 74A-20, decided this date. In that case, the Council sustained the agency head's determination that the union's proposal for union "membership" on such councils was rendered nonnegotiable by the same agency regulation at issue in the instant case, which regulation the agency interpreted as limiting membership, including attendance, at such councils to management officials.

Accordingly, based on the applicable discussion and analysis in the National Weather Service decision, the union proposal under consideration in the instant case providing for attendance at Manpower Utilization Council meetings must also be held violative of a valid agency regulation, as interpreted by the agency head, and, therefore, nonnegotiable.

---

(Continued)

#### 2. Description of Councils

. . . . .

##### b. Manpower Utilization Councils

(1) Membership - These Councils are established within the Office of the Administrator, the Office of the Assistant Administrator for Administration, and the Major Line Components. Each shall have at least one Council for its headquarters office and may establish other subordinate Councils either at its headquarters offices or at field headquarters, as appropriate. The membership of these Councils will be formally designated by the Administrator, the Assistant Administrator for Administration or the Director, Major Line Component, as appropriate, and should consist of top management officials of the organizational component. A representative of the Personnel Division will serve as the Executive Secretary and attend each MUC meeting.


In so holding, we do not intend to imply that the agency regulation in question might properly limit negotiation of otherwise negotiable matters simply because such matters are also subject to consideration by the agency's Manpower Utilization Councils. As we pointed out in our decision in the National Weather Service case, at page 4:

. . . [I]t is our view that the regulation as interpreted by the agency head in the context of this dispute limits only membership, including attendance, at Manpower Utilization Councils. It does not purport to limit negotiation with labor organizations on those matters which are otherwise negotiable simply because such matters are also subject to consideration by the councils. The regulation does not, for example, preclude negotiation of procedures which management will observe in reaching promotion or reassignment decisions, or procedures related to the impact of such decisions, to the extent consonant with law and regulation, even though promotion and reassignment matters are also considered by the councils . . . .

#### Conclusion

For the foregoing reason, and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the determination by the agency that the union proposal here involved is nonnegotiable is proper and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: January 27, 1975

National Treasury Employees Union Chapter 47, Decision (unnumbered) of Director, LMWP. The individual complainant (Sol Borenstein) appealed to the Council from the decision of the Director, Office of Labor-Management and Welfare Pension Reports (LMWP), which decision (tacitly recognized by the complainant as "a final decision of the Assistant Secretary") was issued as corrected on July 11, 1974, and concerning which the complainant's request for reconsideration was denied on August 12, 1974. The appeal was due, under the Council's rules, within 23 days from the date of service of the decision on the complainant. However, the appeal was not filed with the Council until December 23, 1974, and no extension of the time for filing was either requested by the complainant or granted by the Council.

Council action (January 30, 1975). The Council held that, without passing upon whether the date of issuance of the subject decision is July 11 or August 12, 1974 for purposes of Council review, the complainant's appeal was untimely filed under the Council's rules. Therefore, 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

January 30, 1975

Mr. Sol Borenstein  
1388 West 6th Street  
Brooklyn, New York 11204

Re: National Treasury Employees Union Chapter 47,  
Decision (unnumbered) of Director, LMWP, FLRC  
No. 74A-100

Dear Mr. Borenstein:

Receipt on December 23, 1974, is acknowledged of your petition for review of the decision of the Director, Office of Labor-Management and Welfare Pension Reports (LMWP) in the above-mentioned case. According to your appeal, the final decision in your case was issued by the Director, LMWP, concerning section 18 of the Order, as provided for in section 204.64(b) of the rules of the Assistant Secretary (29 CFR 204.64(b)); and, as you recognize in your appeal, such a decision is "a final decision of the Assistant Secretary," subject to Council review within the meaning of section 2411.13(a) of the Council's rules of procedure, (5 CFR 2411.13(a)). However, for the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Section 2411.13(b) of the Council's rules (5 CFR 2411.13(b)) provides that an appeal must be filed within 20 days from the date of service of the Assistant Secretary's decision on the party seeking review; under section 2411.45(c) of the rules (5 CFR 2411.45(c)), three additional days are allowed when service is by mail; and under section 2411.45(a) of the rules (5 CFR 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.

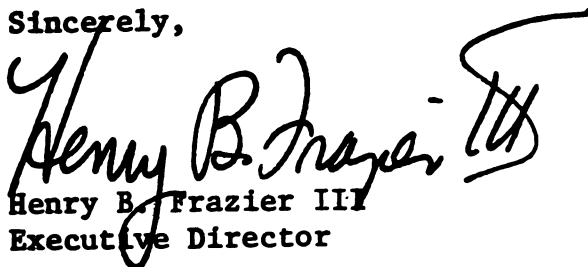
The decision of the Director, LMWP, was issued as corrected July 11, 1974, and the denial of your request for reconsideration was dated August 12, 1974. Your petition for review was not filed until several months later, December 23, 1974, and no extension of time was either requested by you or granted by the Council under section 2411.45(d) of the Council's rules (5 CFR 2411.45(d)). Without passing on whether the date of the decision

of the Director, LMWP, and thereby the decision of the Assistant Secretary, was issued July 11, 1974, or August 12, 1974, your appeal was not filed in the Council's office within 23 days from the date of service of the decision upon you.

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

By 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

American Federation of Government Employees, Local 2110, AFL-CIO and Veterans Administration Hospital, Palo Alto, California (Staudohar, Arbitrator). The union appealed to the Council from the arbitrator's award in this case. Preliminary examination of the appeal reflected deficiencies in meeting various procedural requirements under the Council's rules. The union was notified of these deficiencies and of the time and manner to effect compliance with the rules. In addition, the union was advised that further processing of its appeal was contingent upon its compliance with the Council's requirements within the time specified in the notification. The union's later submittal failed to satisfy these requirements in a number of respects, namely, submission of an approval of the appeal by the national president of the labor organization or his designee and inclusion of a statement of service on the agency.

Council action (January 31, 1975). The Council dismissed the appeal because of the failure to comply with the Council's rules of procedure within the time limits provided therefor.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

January 31, 1975

Mr. Joseph Sanders, President  
American Federation of Government  
Employees, Local 2110  
VA Hospital, Box V-11  
3801 Miranda Avenue  
Palo Alto, California 94304

Re: American Federation of Government Employees,  
Local 2110, AFL-CIO, and Veterans Administration  
Hospital, Palo Alto, California (Staudohar,  
Arbitrator), FLRC No. 74A-103

Dear Mr. Sanders:

By Council letter of January 7, 1975, your representative (Mr. Frank Waltjen) was advised that preliminary examination of your appeal reflected apparent deficiencies in meeting various requirements of the Council's rules (a copy of which was enclosed for your information). The pertinent sections of the rules included: Section 2411.42 which provides that the Council shall consider a petition for review from a labor organization only when the national president of the labor organization or his designee has approved submission of the petition; and section 2411.46 which provides that any party filing a document is responsible for simultaneously serving a copy on all other parties and that a statement of service, which shall include the names of the parties served, their addresses, the date of service, the nature of the document served, and the manner in which service was made, shall be submitted at the time of filing.

You were likewise advised in the Council's letter that:

Further processing of your appeal is contingent upon your immediate compliance with the above provisions of the Council's rules. Accordingly, you are hereby granted until the close of business on January 24, 1975 to file additional materials in compliance with these requirements, along with a statement of service thereof as provided in section 2411.46(b) of the rules. Failure to do so will result in the dismissal of your appeal.

While on January 17, 1975, you supplied certain of the materials referred to in the Council's letter, you failed to submit an approval of your



petition by the national president of your labor organization or his designee. Furthermore, you failed to include a statement of service on the agency with respect to your letter to the Council, received January 17, 1975, and attached correspondence.

Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure within the time limits provided therefor.

For your convenience, the papers which you submitted in this case are returned herewith.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

Enclosures

cc: W. Hicks  
VA

Council of Customs Locals, AFGE, Locals 2652, 2768, and 2899, AFL-CIO, Assistant Secretary Case No. 30-5569 (CO). The Assistant Secretary denied the complainant's request for review (seeking reversal of the Acting Assistant Regional Director's dismissal of an unfair labor practice complaint) because the request for review was filed untimely with him. The complainant appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (February 5, 1975). The Council concluded that the Assistant Secretary's decision did not appear arbitrary and capricious and presented no major policy issue. Accordingly, without passing upon the question of the timeliness of the petition for review which was filed with the Council, the Council, pursuant to section 2411.12 of its rules of procedure (5 CFR 2411.12), denied review of the appeal.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 5, 1975



Mr. Robert M. Tobias, Counsel  
National Treasury Employees Union  
Suite 1101 - 1730 K Street, NW.  
Washington, D.C. 20006

Re: Council of Customs Locals, AFGE,  
Locals 2652, 2768, and 2899,  
AFL-CIO, Assistant Secretary Case  
No. 30-5569 (CO), FLRC No. 74A-72

Dear Mr. Tobias:

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

In this case, the Assistant Secretary denied the complainant's request for review seeking reversal of the Acting Assistant Regional Director's dismissal of an unfair labor practice complaint. The Assistant Secretary found that the request for review was procedurally defective in that it was filed untimely with him; that is, it was not received in his office until after the due date. The Assistant Secretary concluded that under these circumstances, the merits of the case would not be considered and the request for review seeking reversal of the dismissal of the complaint was denied.

In your petition for review you, as Counsel for the complainant, contend in substance that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue with respect to the application of the Assistant Secretary's published regulations insofar as they concern the definition of service and its relation to procedural time limits. In summary, you contend that under the Assistant Secretary's regulations the date of service of a document issued by the Assistant Secretary is or should be the date on which the document is received and not the date on which it was deposited in the mails.

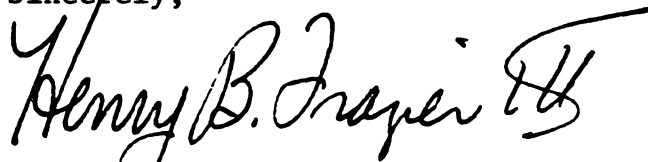
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear arbitrary and capricious nor do they present a major policy issue. As to your contention that his decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his decision. The Assistant Secretary has the authority,

pursuant to section 6(d) of Executive Order 11491, as amended, to prescribe regulations needed to administer his functions under the Order. His decision was based on the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary wrongly applied these regulations to the facts and circumstances of this case. With respect to the alleged major policy issue in this case, your petition offers no evidence to suggest that the Assistant Secretary's definition of service is inconsistent either with the purposes of the Order or with other applicable authority.

Accordingly, without passing upon the question of the timeliness of your petition for review which was filed with the Council, review of your appeal is hereby denied since it fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure.

By 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

G. B. Landsman  
AFGE

W. Sansone  
Customs

Department of Agriculture, Office of Investigation, Temple, Texas, Assistant Secretary Case No. 63-4992 (RO). The Assistant Secretary's decision upheld the Assistant Regional Director's denial, as untimely filed, of the request by the National Federation of Federal Employees Local 1375 (NFFE) to intervene in the representation proceeding filed by the American Federation of Government Employees Local 3542. NFFE filed an appeal with the Council contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (February 5, 1975). The Council decided that the Assistant Secretary's decision did not appear arbitrary and capricious and that it did not present a major policy issue. Accordingly, the appeal was denied under section 2411.12 of the Council's rules (5 CFR 2411.12); likewise, the union's request for a stay was denied.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415  
February 5, 1975

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

Re: Department of Agriculture, Office of  
Investigation, Temple, Texas, Assistant  
Secretary Case No. 63-4992 (RO),  
FLRC No. 74A-83

Dear Mr. Tilton:

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

The Assistant Secretary's decision upheld the Assistant Regional Director's denial, as untimely filed, of the request by the National Federation of Federal Employees Local 1375 (NFFE) to intervene in the representation proceeding filed by the American Federation of Government Employees Local 3542 (AFGE). The Assistant Secretary found, among other things, that: By letter dated June 21, 1974, the Area Office had notified NFFE of the filing of the AFGE petition, and set forth the requirements of Section 202.5 of the Assistant Secretary's Regulations which provides for filing a notice of intervention within 10 days after the initial date of posting of a notice of representation petition filed by another labor organization; and, on June 24, 1974, the prescribed Notice to Employees of the petition in this matter was posted by the Activity indicating, in accordance with the Assistant Secretary's Regulations, that any incumbent union must file a request to intervene within 10 days of such posting. The Assistant Secretary further found that NFFE's request to intervene was not filed until July 9, 1974, i.e., beyond the permissible 10-day period, and that good cause had not been shown for extending the period for timely intervention.

In substance your petition challenges the propriety of the Assistant Secretary's rule requiring that incumbent unions must timely intervene in representation elections and the application of that rule in the circumstances of this case. As for the propriety of the rule, no persuasive reason is advanced in your appeal for overturning this established policy. (Veterans Administration Hospital, Butler, Pa., Assistant Secretary Case No. 21-3923 (RO), FLRC No. 74A-5 (June 18, 1974), Report No. 54.) As to the application of that rule in the instant case,

it does not appear from your appeal that such application was without reasonable justification or presents a major policy issue. We do not, of course, here pass upon the propriety of the AFGE petition before the Assistant Secretary in the subject case.

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 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. The request for stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

P. H. Yczarowitz  
Agriculture

T. E. Swain  
AFGE

Treasury Disbursing Center, Austin, Texas, Assistant Secretary Case No. 63-4816 (CA). The Assistant Secretary dismissed the unfair labor practice complaint filed by NFFE Local 1745, which alleged violations of subsections 19(a)(1) and 19(a)(2) of the Order. The union appealed to the Council, contending that the Assistant Secretary's decision raised a major policy issue.

Council action (February 6, 1975). The Council concluded that the Assistant Secretary's decision in the instant case did not present a major policy issue, and, therefore, failed to meet the Council's requirements for review under section 2411.12 of the Council's rules (5 CFR 2411.12). Accordingly, the union's petition was denied.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 6, 1975

Ms. Janet Cooper  
Staff Attorney  
National Federation of Federal  
Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Treasury Disbursing Center, Austin, Texas,  
Assistant Secretary Case No. 63-4816 (CA),  
FLRC No. 74A-65

Dear Ms. Cooper:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case. The Assistant Secretary denied your request for review seeking reversal of the Assistant Regional Director's dismissal of your unfair labor practice complaint, in which you alleged agency violations of subsections 19(a)(1) and 19(a)(2) of the Order.<sup>1/</sup> These alleged violations were based upon the agency's refusal to permit an employee to choose as his own representative at the informal stage of an agency grievance procedure a union representative from a union other than that which was certified as the exclusive representative for the bargaining unit in which he was employed.

The Assistant Secretary, in agreement with the Assistant Regional Director, concluded that further proceedings were unwarranted. However, contrary to the Assistant Regional Director, he found that section 10(e) of the Order (upon which the Assistant Regional Director relied) sets forth only an exclusive representative's right to be present at "formal" discussions involving employees of the unit, citing his decision in U.S. Department of the Army Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278, and related decisions, as authority for his conclusion in this regard. The Assistant Secretary concluded that because the Complainant, NFFE Local 1745, was not the exclusive representative

---

<sup>1/</sup> The Assistant Regional Director's findings with regard to the 19(a)(2) portion of the Complaint were not challenged in your appeal to the Assistant Secretary and hence are not before the Council.

of the unit in which the grievant was employed, it had no section 10(e) rights under the Order. Concerning the union's contention that section 7(d)(1) of the Order protects an employee's option to choose his own representative in an agency grievance procedure regardless of exclusive recognition, the Assistant Secretary, citing his decision in Fort Wainwright, held that section 7(d)(1) does not establish any rights for employees, organizations or associations enforceable under section 19 of the Order. He found, rather, that it was intended to delineate those instances in which employees may choose a representative other than their exclusive representative in certain grievance or appellate actions, and those instances in which an agency may consult and/or deal with certain organizations or associations not qualified as labor organizations without violating section 19 of the Order.

In your petition for review you contend that the Assistant Secretary's decision raises a major policy issue in that he has incorrectly interpreted section 7(d)(1). On October 22, 1974, after the appeal in the instant case had been filed, the Council issued its decisions in Internal Revenue Service, Chicago District, FLRC No. 73A-32, (November 22, 1974), Report No. 58, and Internal Revenue Service, Western Service Center, Ogden, Utah, FLRC No. 73A-33, (November 22, 1974), Report No. 58, sustaining Assistant Secretary decisions wherein he concluded, as in the instant case, that section 7(d)(1) of the Order does not confer any rights enforceable under section 19 of the Order.

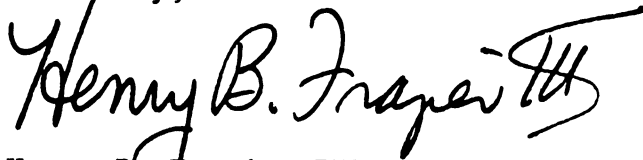
The Council's conclusions in this regard, as they appeared in FLRC No. 73A-32, are as follows:

In our opinion, the literal meaning of the quoted language [sec. 7(d)(1)] is clear and unambiguous. The language neither explicitly nor impliedly purports to confer on employees any rights, whatsoever. Rather, the language plainly means only that the according of exclusive recognition to a labor organization does not preclude an employee from choosing his own grievance or appeals representative (except under a negotiated grievance procedure) in the event that the employee would have been entitled to make such a choice if recognition of the labor organization had not been accorded. Thus, the purpose manifested by the language of section 7(d)(1) merely is to explicate that the according of recognition, on the one hand, is unrelated to the choosing by an employee of his representative in a grievance or appeals action (except under a negotiated grievance procedure), on the other.

For the reasons set forth in those Council decisions we conclude, pursuant to section 2411.12 of the Council's rules of procedure, that the Assistant Secretary's decision in the instant case does not present a major policy issue and, therefore, fails to meet the Council's requirements for review.<sup>2/</sup> Accordingly, your petition for review is denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

G. Clark  
Treasury

---

<sup>2/</sup> Your petition does not raise a question with regard to the Assistant Secretary's interpretation of section 10(e) of the Order. In fact, in your petition you concede that "the case does not involve the right of an exclusive representative to be present at a formal discussion under section 10(e) of the Executive Order." Therefore, no issue is presented concerning the Assistant Secretary's decision in this regard.

Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667. This appeal arose from a decision of the Assistant Secretary, who, upon the filing of an Application for Decision on Grievability by Local 1415, AFGE, held that the matters in dispute should be resolved through the negotiated grievance procedure. The Council accepted the agency's petition for review of this decision on the ground that a major policy issue is present, namely: Whether the standard used by the Assistant Secretary for determining whether the grievance was subject to the negotiated grievance procedure in this case was proper under section 13(d) of the Order (Report No. 54).

Council action (February 7, 1975). The Council ruled that the Assistant Secretary had not made the necessary determinations and had not used the proper standard for determining whether the grievance in this case was subject to the negotiated grievance procedure. Accordingly, pursuant to section 2411.17 of the Council's rules (5 CFR 2411.17), the Council set aside the Assistant Secretary's decision and remanded the case to the Assistant Secretary for reconsideration and decision consistent with the standard applicable to the resolution of grievability disputes as explained in the Council's decision.

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

Department of the Navy, Naval  
Ammunition Depot, Crane, Indiana

and

Local 1415, American Federation  
of Government Employees, AFL-CIO

Assistant Secretary Case  
No. 50-9667  
FLRC No. 74A-19

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary, who upon the filing of an Application for Decision on Grievability by Local 1415, American Federation of Government Employees, AFL-CIO (AFGE) held that the matters in dispute should be resolved through the negotiated grievance procedure.

The underlying circumstances of the case, as established by the findings of the Assistant Secretary, briefly stated, are as follows:

By letter dated December 18, 1972, the Crane Naval Ammunition Depot informed a Wage Grade probationary employee that his employment would be terminated during the probationary period, based on deficiencies in the individual's work performance. The employee was informed of his right to appeal the decision to the Civil Service Commission.<sup>1/</sup>

1/ Statutory basis for the use of the probationary period is established in 5 U.S.C. § 3321; and 5 CFR 315.806 governs appeal of an agency's decision to terminate a probationary employee. That section of the Civil Service Commission's regulations provides, in pertinent part:

Sec. 315.806 Appeal rights to the Commission.

(a) Right of appeal. An employee may appeal to the Commission in writing an agency's decision to terminate him under section 315.804 or section 315.805 only as provided in paragraphs (b) and (c) of this section. The Commission's review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) On discrimination. (1) An employee may appeal under this subparagraph a termination which he alleges was based on discrimination because of race, color, religion, sex, or national

(Continued)

On or about December 22, 1972, the employee grieved the termination under the provisions of the negotiated grievance procedure of the agreement. In his grievance, the employee alleged that the termination had, in various ways, violated the provisions of Article XX, Acceptable Level of Competence of the agreement.<sup>2/</sup> The activity denied that the termination was grievable under the agreement. Subsequently, in accordance with Part 205 of the Assistant Secretary's regulations, Local 1415 filed an Application for Decision on Grievability with the Assistant Secretary.

The Assistant Secretary referred the matter to the negotiated grievance procedure, finding:

In my view, there is sufficient evidence upon which one may reasonably conclude, as contended by the AFGE, that probationary employees are protected from improper termination by Article XX (Acceptable Level of Competence) of the negotiated agreement, and have a right under such agreement to process grievances concerning their terminations through the negotiated grievance procedure.

I, therefore, conclude that, in circumstances such as these, where the matters in dispute involve the interpretation and application of certain provisions of the parties' negotiated agreement, and the agreement provides a means by which such dispute may be resolved, it will effectuate the purposes of the Order to direct the parties to resolve the dispute through their negotiated grievance procedure. Thus, it is concluded that the issue as to whether Shoultz's termination is covered by the terms of the instant agreement as well as the issue as to whether the Activity violated such agreement in its treatment of Shoultz, should be resolved through the negotiated grievance procedure. (Emphasis supplied.)

---

(Continued)

origin. The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission. (2) An employee may appeal under this subparagraph a termination not required by statute which he alleges was based on partisan political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.

(c) On improper procedure. A probationer whose termination is subject to section 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

<sup>2/</sup> The Article is reproduced in full in the Appendix to the present decision.

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

The Council decided, under section 2411.12 of its rules of procedure (5 CFR 2411.12), that a major policy issue is present, namely: Whether the standard used by the Assistant Secretary for determining whether the grievance was subject to the negotiated grievance procedure in this case was proper under section 13(d) of the Order. The Council also determined that the agency's request for a stay met the criteria for granting such a request as set forth in section 2411.47(e) of its rules (5 CFR 2411.47(e)), and granted the request. Neither party filed a brief on the merits as provided for in section 2411.16 of the Council's rules (5 CFR 2411.16).

### Opinion

Section 6(a)(5) of the Order<sup>3/</sup> provides in pertinent part that the Assistant Secretary shall:

(5) decide questions as to whether a grievance is subject to a negotiated grievance procedure . . . as provided in section 13(d) of the Order.

Section 13(d) provides that "questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision."<sup>4/</sup> Section 13(d) further permits a party to refer to the Assistant Secretary questions ". . . as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement . . . ."

---

<sup>3/</sup> The pertinent provisions of sections 6 and 13 of the Order, which are referred to herein, appear as set forth in E.O. 11491, as amended by E.O. 11616 and E.O. 11838. While the subject decision of the Assistant Secretary was decided under the Order prior to amendment by E.O. 11838, the Order was not changed in respects which are material in the present case.

<sup>4/</sup> While the most recent amendments to section 13(d) require that disagreements between the parties on questions of whether a grievance is on a matter subject to a statutory appeal procedure be referred to the Assistant Secretary for decision, there was no such explicit requirement in the Order at the time this matter was before the Assistant Secretary. However, as noted in footnote 3 above, this change in the Order is not material to the resolution of the present case before the Council since the matter had been taken to the Assistant Secretary for resolution.

It is clear from the express language in these provisions that in resolving a grievability dispute, if as here, an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question.<sup>5/</sup> Further, in any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. Further, the Assistant Secretary must also consider ". . . existing . . . laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual . . . ."<sup>6/</sup>

In summary, where there is a question as to whether a grievance is over a matter for which a statutory appeal procedure exists, the Assistant Secretary must consider laws or regulations pertaining to that statutory appeal procedure. Further, where there is a question as to whether the grievance is on a matter subject to the negotiated grievance procedure, such questions must be resolved by considering the relevant agreement provisions in the light of related provisions of statute, the Order, and regulations.

Grievability questions cannot be considered in vacuo by looking only at the negotiated agreement, but must be resolved in full recognition of the existing legal and regulatory structure established by statute, the Order,

---

<sup>5/</sup> Section 13(a) of the Order provides, in pertinent part, that a negotiated grievance procedure "may not cover matters for which a statutory appeal procedure exists . . . ."

<sup>6/</sup> Section 12(a) of the Order provides:

(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.



and applicable regulations. This is especially true where special meaning is attached to words and phrases by statute, the Order, or regulation, and there is no indication that any other than the special meaning is intended by the parties. Where the same words or phrases appear in negotiated agreements or where such words or phrases appear in provisions which repeat, supplement, or have a close interface with provisions of statute, the Order, or regulation, the Assistant Secretary must consider the applicability of the established meaning of such words and phrases when resolving grievability disputes. Thus, in considering the provision sought to be grieved, the Assistant Secretary must ascertain the applicability of that negotiated provision to the grievance in light of relevant provisions in statute, the Order, and regulations. That is, he must decide whether that provision, in light of statute, the Order, and regulation, has any application to the grievance.<sup>7/</sup>

In applying these general principles to the case before us, we find that the Assistant Secretary has not made the necessary determinations and has not used the proper standard for determining whether the grievance in this case was subject to the negotiated grievance procedure. First, among the questions raised by the agency before the Assistant Secretary was a question concerning the applicability to the case of that provision of section 13(a) of the Order which precludes the use of a negotiated grievance procedure to resolve matters for which statutory appeals procedures exist. In denying review, the Assistant Secretary made no finding regarding whether or not the grievance is on a matter for which a statutory appeal procedure exists. Second, the Assistant Secretary made no determination as to whether the grievance is on a matter subject to the negotiated grievance procedure. Instead, he ruled that this question "should be resolved through the negotiated grievance procedure." As we have previously indicated, where such a "grievability" or "arbitrability" dispute is referred to the Assistant Secretary, either by operation of the Order or by voluntary agreement of the parties, he must resolve that dispute; he may not pass it on to an arbitrator for resolution. Finally, although the agency offered detailed contentions concerning the relevance of certain provisions of statute and regulation to the provisions of the negotiated agreement which were being grieved, including arguments regarding the intent of the parties to the negotiated agreement as well as their past practice, there is no indication that the Assistant Secretary considered them or made any findings in this regard. This is especially significant in the instant case where, as previously indicated, the negotiated provision which was alleged to have been violated dealt with a matter--"acceptable level of competence"--which is established

---


<sup>7/</sup> The relevance of such provisions of law and regulation to the meaning of provisions in negotiated agreements is often within the special knowledge of the parties who negotiated the agreement. Therefore, it is incumbent upon the parties to present to the Assistant Secretary, as the agency did in this case, any contentions concerning the relationship between the relevant provisions of the negotiated agreement and provisions of statute, the Order, and regulation.

specifically in statute and dealt with extensively in Civil Service Commission regulations and the Federal Personnel Manual.<sup>8/</sup> The phrase has a special meaning in the Federal sector and that special meaning must be considered by the Assistant Secretary when he determines whether the subject matter of the grievance, i.e., the termination of grievant's employment during his probationary period, is on a matter covered by a provision in the negotiated agreement pertaining to "acceptable level of competence."

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 decision that the issue as to whether the employee's termination is covered by the terms of the agreement should be resolved through the negotiated grievance procedure.

Pursuant to section 2411.17(c) of the Council's rules of procedure, we hereby remand this case to the Assistant Secretary for reconsideration and decision consistent with the standard applicable to the resolution of grievability disputes as explained herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: February 7, 1975.

Attachment

<sup>8/</sup> See 5 U.S.C. § 5335, 5 CFR 531.401-531.407 and chapter 531, subchapter 4, of the Federal Personnel Manual.

## APPENDIX

### Article XX, Acceptable Level of Competence

SECTION 1. When the supervisor's evaluation leads to the conclusion that an employee's work is not of an acceptable level of competence, the employee will be notified in writing, in accordance with applicable regulations, at least 60 days in advance of the date on which he will become eligible for a within grade increase. Failure to inform the employee of any factor that raises a question about his work being of an acceptable level of competence does not delay or otherwise affect the requirement for a determination to be made at the completion of the employee's waiting period. The notice to the employee will include:

a. Any defect in the quantity or quality or both of his work which would be the basis for withholding a within grade increase.

b. A statement of the acceptable level of competence on each aspect of his performance that is not satisfactory.

c. What the employee must do to bring his performance up to the acceptable level.

SECTION 2. When the supervisor determines the employee's work is not of an acceptable level of competence, he shall notify the employee in writing no later than the date upon which he becomes eligible for within grade salary increase. Such notification will include:

a. The basis for the negative determination.

b. The employee's right to secure reconsideration of the negative determination.

c. The time limits within which the employee may request reconsideration.

SECTION 3. When the supervisor makes a negative determination without informing the employee 60 days in advance of any factor that raises a question about his work being of an acceptable level of competence, he shall make another determination no later than 60 days after the date on which the employee completed the waiting period.

SECTION 4. NAD Crane agrees to give employees opportunity to request reconsideration of the negative determination in accordance with applicable regulations.

Department of Defense, Army Materiel Command, Tooele Army Depot, Tooele, Utah, A/SLMR No. 406. The Assistant Secretary dismissed a complaint filed by NFFE Local 862, which had alleged that the agency violated section 19(a)(1) and (6) of the Order by conduct related to a guard official of a union admitting to membership non-guards. The union appealed to the Council, contending that the Assistant Secretary's decision presents major policy issues or is arbitrary and capricious.

Council action (February 13, 1975). The Council, by reason of the adoption of E.O. 11838 which deleted provisions in the Order relevant to the complaint, denied the union's appeal 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

February 13, 1975

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

Re: Department of Defense, Army Materiel  
Command, Tooele Army Depot, Tooele,  
Utah, A/SLMR No. 406, FLRC No. 74A-47

Dear Mr. Sussman:

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

The Assistant Secretary dismissed an unfair labor practice complaint filed by the National Federation of Federal Employees, Ind., Local 862. The complaint alleged that the Army Materiel Command (AMC) had violated section 19(a)(1) and (6) of the Order by issuing a memorandum to the Tooele Army Depot stating that an employee who was a guard must be replaced as the president of Local 862 because of the apparent conflict of interest involved when a guard serves as an official of a labor organization which admits to membership employees other than guards. The complaint also alleged that Tooele, in compliance with the AMC memorandum, violated the Order by refusing to consult with the elected guard employee as the appropriate representative of Local 862. The Assistant Secretary relied on his decision in Veteran's Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21, wherein he held, in pertinent part, that it was inconsistent with the intent of sections 1(b), 10(b)(3) and 10(c) of the Order for a guard to serve as president of a nonguard labor organization, as "Such participation . . . 'result[s] in a conflict or apparent conflict of interest . . . ' and is also ' . . . incompatible with . . . the official duties of the employees.'" Consequently, in the present case the Assistant Secretary determined that for a guard to participate in the management of a nonguard labor organization, which represents a unit of guards and two units of nonguards, gives rise to a conflict or apparent conflict of interest and is incompatible with the official duties of the employee within the meaning of section 1(b) of the Order. Thus, the Assistant Secretary found that the conduct of AMC and Tooele was not violative of Executive Order 11491.

In your petition for review, you contend that the Assistant Secretary's decision presents major policy issues or is arbitrary and capricious.

Subsequent to the Assistant Secretary's decision, E.O. 11838 was issued (40 F.R. 5743, February 7, 1975) which, upon its effective date, deletes section 2(d), 10(b)(3) and 10(c) from the Order, thereby eliminating the separate representation policy governing guards. In recommending this change the Council concluded that "[g]uards should be treated for representation purposes the same as other employees." Under these circumstances, as the basis for the Assistant Secretary decisions which deal with the separate status of guards has been removed from the Order, there is no major policy issue present warranting Council consideration. With regard to your contentions concerning matters relied upon by the Assistant Secretary in his determinations it does not appear that the Assistant Secretary acted without reasonable justification in his decision.\*/

Accordingly, your petition for review is denied, without passing on the merits of the questions raised in the appeal.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor  
  
W. J. Shrader  
Dept. of the Army

---

\*/ We deem it unnecessary to decide whether the evidence or issues in the agency's brief to the Assistant Secretary, which is incorporated by reference in its letter of opposition to review, should be considered in light of section 2411.51 of the Council's rules, as the above decision is dispositive of the case.

American Federation of Government Employees, Local 2047, AFL-CIO and Defense General Supply Center (Boyd, Arbitrator). The union (AFGE Local 2047) appealed to the Council from the arbitrator's award in this case. The union was notified that its appeal failed to include the approval of the national president of the labor organization, as required by the Council's rules, and was provided time to effect compliance with the rules. Further, the union was advised that failure to effect compliance would result in dismissal of the appeal. The union failed to make the necessary submission within the time limit provided therefor.

Council action (February 13, 1975). 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

February 13, 1975

Mr. Adam Wenckus  
President/Executive Secretary  
American Federation of Government  
Employees, Local 2047  
P.O. Box 3742  
Richmond, Virginia 23234

Re: American Federation of Government Employees,  
Local 2047, AFL-CIO and Defense General  
Supply Center (Boyd, Arbitrator), FLRC  
No. 74A-89

Dear Mr. Wenckus:

By Council letter of January 30, 1975, you were advised that your petition for review of the arbitration award in the above-entitled case failed to include the approval of the national president of the labor organization, as required by section 2411.42 of the Council's rules.

You were also advised in the Council's letter:

Further processing of your appeal [is] contingent upon your immediate compliance with the above-mentioned provision of the Council's rules. Accordingly, you are hereby granted until the close of business on February 6, 1975, to file additional material in compliance with this requirement, along with a statement of service thereof as provided in section 2411.46(b) of the rules. Failure to do so will result in the dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided therefor. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III", is written over a typed name and title. The signature is written in dark ink and includes a large, stylized flourish at the end.

Henry B. Frazier III  
Executive Director

cc: R. J. Simboli  
DSA



Local 1884, AFGE, AFL-CIO, and Providence Office, U.S. Army Topographic Production Center (Schmidt, Arbitrator). The union filed a petition for review of the arbitrator's award with the Council on January 31, 1975. Under the Council's rules, the petition was due on or about January 27, 1975. No extension of time for filing was either requested by the union or granted by the Council.

Council action (February 13, 1975). Because the union's petition was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 13, 1975

Mr. Louis Conti, President  
American Federation of Government  
Employees, AFL-CIO, Local 1884  
Brookside Avenue  
West Warwick, Rhode Island 02893

Re: Local 1884, AFGE, AFL-CIO, and Providence Office,  
U.S. Army Topographic Production Center (Schmidt,  
Arbitrator), FLRC No. 75A-10

Dear Mr. Conti:

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

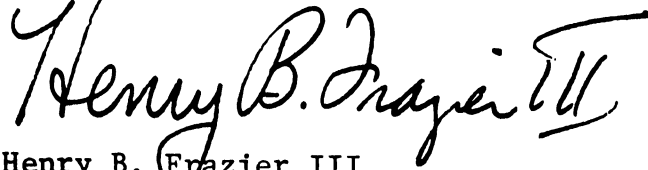
Section 2411.33(b) of the Council's rules provides that a petition for review must be filed within 20 days from the date the arbitrator's award was served upon the party seeking review. Section 2411.46(c) provides that the date of service shall be the date the award was desposited in the mail or delivered in person, as the case may be. Where such service was made by mail, section 2411.45(c) provides that 3 days shall be added to the time period within which the petition must be filed. Additionally, under section 2411.45(a), any petition filed must be received in the Council's office before the close of business of the last day of the prescribed time period. In computing these time periods, section 2411.45(b) provides that 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 January 2, 1975, and so far as your appeal indicates, was served on the union on or about that date. Therefore, under the Council's rules, stated above, your petition for review was due in the Council's office on or about January 27, 1975. However, your petition was not received by the Council until January 31, 1975, and no extension of time was either requested by you or granted by the Council under section 2411.45(d) of the Council's rules.

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

By 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 initial "H" and a long, sweeping underline.

Henry B. Frazier III  
Executive Director

cc: H. L. Yingling  
DMA

Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-573. On January 15, 1975, the Council granted the union's request for an extension of time until January 30, 1975, to file an appeal in the present case. However, the union did not file its appeal until February 3, 1975, and no further extension of time for filing was either requested by the union or granted by the Council.

Council action (February 14, 1975). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied review.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 14, 1975

Mr. Jack L. Copess  
Secretary Treasurer, Hawaii Federal  
Employees Metal Trades Council  
925 Bethel Street, Room 210  
Honolulu, Hawaii 96813

Re: Department of the Navy, Pearl Harbor  
Naval Shipyard, Assistant Secretary  
Case No. 73-573, FLRC No. 75A-11

Dear Mr. Copess:

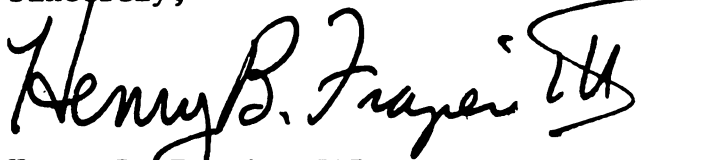
Reference is made to your petition for review of the Assistant Secretary's decision in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

On January 15, 1975, the Council granted your request, without objection by the agency, for an extension of time until January 30, 1975 to file an appeal in the present case. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the Council's office on or before the close of business on January 30, 1975. However, your appeal was not received by the Council until February 3, 1975, and no further extension of time for filing was either requested by the union or granted by the Council.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: T. Haycock  
Navy

NFFE Local 1555 and Tobacco Division, AMS, USDA. The negotiability dispute concerned a union proposal that the agency return to duty on July 1 of each year all Tobacco Inspectors furloughed at the close of the previous summer-and-fall tobacco marketing season.

Council action (February 21, 1975). The Council held that the proposal would abridge management's reserved authority, under section 12(b)(2) of the Order, to decide and act concerning the assignment of its employees. Accordingly, the Council sustained the agency head's determination that the proposal is nonnegotiable.

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

NFFE Local 1555

and

FLRC No. 74A-32

Tobacco Division, AMS, USDA

DECISION ON NEGOTIABILITY ISSUE

Background

To carry out its functions pursuant to the Tobacco Inspection Act, 7 U.S.C. 511 (1970), the Tobacco Division of the Department of Agriculture's Agricultural Marketing Service (AMS) employs Federal Tobacco Inspectors during the summer-and-fall tobacco marketing season. With the close of each season, when work is no longer available, these Inspectors are placed on furlough--being recalled to duty when the season reopens the following summer.<sup>1/</sup> Agency management bases these annual recall dates directly upon the opening dates of the tobacco auction markets, over which it has no control. Such opening dates, (and, hence, the recall dates of the Inspectors) vary from year to year depending primarily upon the growing conditions of the tobacco crops.

NFFE Local 1555 represents all Tobacco Inspectors in the Tobacco Division. During recent contract negotiations with the Division, the union offered the following proposal to establish a fixed recall date for all Inspectors:<sup>2/</sup>

All employees shall be returned to duty on July 1 of each year.

---

<sup>1/</sup> Competitive employees, such as Tobacco Inspectors, are typically placed on furlough in response to a temporary lack of work or funds, and as an alternative to separation or reassignment. Although such employees are not furloughed unless it seems certain that they will be recalled to duty in the same position within a year, furlough does not, in itself, constitute "an absolute commitment of recall." Federal Personnel Manual, Chapter 351, Subchapter 6-3.

<sup>2/</sup> In its appeal the union adds that its objective of a fixed recall date might be satisfied by a date other than July 1. So far as our decision herein is concerned, however, the precise date is unimportant.

The Division referred the proposal to AMS, which determined it to be nonnegotiable under section 12(b) of the Order.<sup>3/</sup> The union petitioned the Council, under section 11(c)(4) of the Order, for review of that determination. The Department of Agriculture filed a statement of position.

### Opinion

The question to be resolved in this case is whether the union's proposal violates section 12(b) of the Order and is, therefore, nonnegotiable.

Section 12 provides, in relevant part, as follows:

Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

- . . . . .
- (b) management officials retain the right, in accordance with applicable laws and regulations--
- . . . . .
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . . .

The agency principally contends that the proposal is nonnegotiable under section 12(b)(2) because it would interfere with management's reserved right to "assign" Tobacco Inspectors. The union argues that the proposal does not interfere with agency rights under section 12(b)(2) because it neither influences the recall or recruitment of Tobacco Inspectors nor mandates the duties which will be assigned by the agency to such Inspectors.

The language of section 12(b)(2) manifests an intent to bar from agreements provisions which infringe upon management officials' authority to decide and act concerning the personnel actions specified therein. Thus, the Council stated in its VA Research Hospital decision,<sup>4/</sup> and has repeatedly emphasized, that:

---

<sup>3/</sup> In view of our decision herein under section 12(b)(2), it is unnecessary to reach, and we therefore make no ruling upon, the parties' contentions with respect to sections 12(b)(1) and 12(b)(4).

<sup>4/</sup> Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31. The principle set forth in this decision has several times been reaffirmed. See, e.g., Local 174

(Continued)



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. [Emphasis added.]

In terms of the instant case, management's reserved authority under section 12(b)(2) of the Order "to hire, promote, transfer, assign, and retain employees in positions within the agency . . ." clearly includes the authority to decide whether or not to recall employees from furlough. Moreover, such reserved authority necessarily encompasses the timing of the decision and action involved.<sup>5/</sup> Thus, whether to recall all or any of its furloughed employees to duty, and when such recall should occur, are, under section 12(b)(2) of the Order, matters for the agency alone to decide.

The union's proposal, however, would abridge the agency's authority in this regard by requiring that all furloughed Tobacco Inspectors be recalled to duty on a single date, without reference to the opening of the market season (over which the agency has no control), or to the number of positions to be filled, or to any other circumstances which the agency might legitimately consider. Such denial of agency management's reserved authority to decide and act concerning the assignment of its employees is prohibited by section 12(b)(2), for it is clear from the Order itself, as well as from previous Council decisions already noted, that no interference with respect to the matters enumerated in section 12(b)(2) may be permitted. Accordingly, we must hold the proposal nonnegotiable under section 12(b)(2).

---

(Continued)

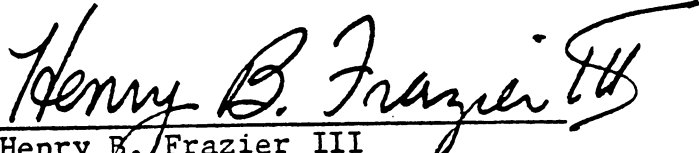
International Federation of Professional and Technical Engineers, AFL-CIO, CLC, and Long Beach Naval Shipyard, Long Beach, California, FLRC No. 73A-16 (July 31, 1974), Report No. 55; American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 12, 1973), Report No. 46; IAM-AW Lodge 2424 and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 17, 1973), Report No. 44; Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41.

<sup>5/</sup> Cf. National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61, in which we held that section 12(b)(2) reserves to agency management not only the right to decide whether or not to fill a position but also the right to change that decision once made.

Conclusion

Based upon the reasons set forth above, and pursuant to section 2411.27 of the Council's rules and regulations, we find that the agency head's determination that the union proposal here involved is nonnegotiable under section 12(b)(2) of the Order was proper and must, therefore, be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: February 21, 1975.

NAGE Local R1-34 and U.S. Army Natick Laboratories, Massachusetts. The agency determined that the union's proposal was nonnegotiable under published agency regulations. The union appealed to the Council, in effect disagreeing with the agency's interpretation of the subject regulations.

Council action (February 21, 1975). 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

February 21, 1975

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

Re: NAGE Local R1-34 and U.S. Army  
Natick Laboratories, Massachusetts,  
FLRC No. 74A-69

Dear Mr. Hickey:

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

The Council has carefully considered your appeal, and the statement of position 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 2411.22 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.

The Department of the Army determined in the present case that the proposal of your organization was not negotiable under the provisions of published agency regulations (AR 230-1, Non-Appropriated Funds and Related Activities, AR 230-81/AFR 176-14, Civilian Non-Appropriated Funds and Related Activities). In your appeal you dispute the propriety of that determination based on your interpretation that the cited agency regulations are not applicable to the proposal of your organization.

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 directives, as interpreted by the agency head, violate 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, in accordance with section 2411.22 of the Council's rules, review of your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III  
Executive Director

cc: W. J. Schrader  
Army

U.S. Department of Army Picatinny Arsenal, Assistant Secretary Case No. 32-3528 (RO). The Assistant Secretary denied the request for review, filed by NFFE, seeking reversal of the Assistant Regional Director's Report and Findings on Objections to Conduct of Election which had found the union's objections without merit. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (February 21, 1975). The Council held that the union's petition for review does not meet the requirements of section 2411.12 of the Council's rules (5 CFR 2411.12); that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, nor does it present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 21, 1975

Ms. Janet Cooper  
Staff Attorney  
National Federation of  
Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: U.S. Department of Army Picatinny  
Arsenal, Assistant Secretary Case  
No. 32-3528 (RO), FLRC No. 74A-70

Dear Ms. Cooper:

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

The Assistant Secretary denied your request for review seeking reversal of the Assistant Regional Director's Report and Findings on Objections to Conduct of Election which found your objections to be without merit. In doing so, the Assistant Secretary concluded that you did not meet the burden of proof necessary to establish by a preponderance of the evidence that the conduct involved improperly affected the results of the election or that a relevant question of fact exists warranting a hearing.

In your appeal, you contend, essentially, that the decision of the Assistant Secretary is arbitrary and capricious because (1) his failure to find objectionable certain management statements constituted a failure to follow his own precedents on neutrality, and (2) his failure to find objectionable certain alleged posting deficiencies constituted a violation of section 202.17(a) of his own rules of procedure. You also contend that the decision presents a major policy issue concerning whether management may in the presence of eligible voters express preference for a particular union or an opinion about the outcome of an election.

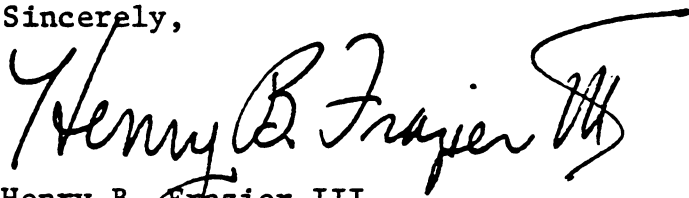
In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules, that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present a major policy issue. With respect to your contentions that his decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification. Instead, the Assistant Secretary relied upon established policy

reflected in his own rules of procedure and case precedents in determining that the union had not met the burden of proof necessary to establish by a preponderance of evidence that the conduct involved improperly affected the results of the election. As to the alleged major policy issue, the Council is of the opinion that the Assistant Secretary's determination that, in the circumstances presented where the eligible voters who were present were representatives of NFFE, the remarks made did not constitute conduct which improperly affected the results of the election does not present a major policy issue warranting Council review in the case.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

W. Oglesby  
Army

R. E. Matisko  
AFGE



U.S. Army Aeronautical Depot, Maintenance Center, Corpus Christi, Texas,  
Assistant Secretary Case No. 63-4887 (CA). The Assistant Secretary sustained the Assistant Regional Director's dismissal of the unfair labor practice complaint filed by the individual complainant (Francisco Rivera), which alleged that the agency failed to promote him because of union activity. The complainant appealed to the Council from the Assistant Secretary's decision.

Council action (February 21, 1975). The Council denied the complainant's petition for review pursuant to section 2411.12 of its rules of procedure (5 CFR 2411.12), because the appeal neither alleged, nor did it appear therefrom, that the Assistant Secretary's decision was in any manner arbitrary and capricious or presented any major policy issues; moreover, nothing in the appeal indicated that any substantial factual issue existed which would require a hearing by the Assistant Secretary.

UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 21, 1975

Mr. Francisco Rivera  
Chief Steward  
American Federation of Government  
Employees, Local 2142  
229 Havana Street  
Corpus Christi, Texas 78405

Re: U.S. Army Aeronautical Depot, Maintenance Center,  
Corpus Christi, Texas, Assistant Secretary Case  
No. 63-4887 (CA), FLRC No. 74A-74

Dear Mr. Rivera:

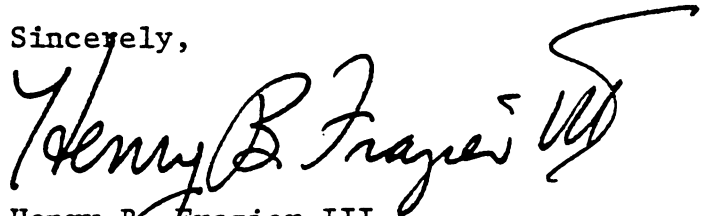
The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case. In agreement with the Assistant Regional Director, the Assistant Secretary found that insufficient evidence had been presented to establish a reasonable basis to support the complaint that you were denied a promotion because of union activity, and therefore concluded that the complaint was properly denied.

Your petition for review neither alleges, nor does it appear therefrom, that the Assistant Secretary's decision was in any manner arbitrary and capricious or presented any major policy issues. Moreover, in the Council's opinion, nothing in your appeal indicates that any substantial factual issues exist which required a hearing by the Assistant Secretary.

Accordingly, 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 therefore directed that review of your appeal be denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

Col. John W. Campbell  
Corpus Christi Army Depot

Arizona National Guard, Air National Guard, Sky Harbor Airport, A/SLMR No. 436. The Assistant Secretary determined, pursuant to a clarification of unit petition filed by the activity, that an Aircraft Instrument and Control Systems Mechanic (Leader), WG-12, was not a supervisor within the meaning of section 2(c) of the Order. The agency sought Council review of the Assistant Secretary's decision, contending that it was arbitrary, capricious and inconsistent with the provisions of the Order.

Council action (February 21, 1975). The Council held that the Assistant Secretary's decision did not appear arbitrary and capricious, and that the decision raised no major policy issues with respect to the provisions of the Order relied upon by the agency. Accordingly the Council denied the agency's petition for review since it failed to meet the standards prescribed in section 2411.12 of the Council's rules (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 21, 1975

Colonel Edward M. Fender  
Personnel Officer  
Arizona Air National Guard  
5636 East McDowell Road  
Phoenix, Arizona 85008

Re: Arizona National Guard, Air  
National Guard, Sky Harbor Airport,  
A/SLMR No. 436, FLRC No. 74A-78

Dear Colonel Fender:

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

The Assistant Secretary determined, pursuant to a clarification of unit petition filed by the activity, that one employee, an Aircraft Instrument and Control Systems Mechanic (Leader), WG-12, was not a supervisor within the meaning of section 2(c) of the Order. The Assistant Secretary found that the evidence was insufficient to establish that supervisory authority is vested in the leader since he does not hire, fire, or transfer employees, and such direction as he gives to the other employee in the organizational unit is routine in nature, does not require the exercise of independent judgment and is dictated by established procedures. Moreover, the Assistant Secretary found that the evidence did not establish that the leader promotes or effectively evaluates other employees.

In your petition for review you contend that the Assistant Secretary's decision was arbitrary, capricious and inconsistent with provisions of section 1(b) and 2(c) of the Order, principally because the Assistant Secretary failed to consider evidence establishing that the leader performs one or more of the functions enumerated in section 2(c) of the Order.

In the Council's opinion, your petition does not meet the criteria for review as set forth in section 2411.12 of the Council's rules of procedure. That is, in our view, the Assistant Secretary's decision appears neither arbitrary nor capricious, nor does it present a major policy issue. As to your contention that the decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the leader is not a supervisor within the meaning of section 2(c), in that the decision is based upon established principles reflected in his previous published decisions and upon the record in the case.

Regarding your contention that the decision is inconsistent with section 1(b) of the Order, the Council is of the opinion that the Assistant Secretary's decision does not present a major policy issue concerning the meaning or application of section 1(b). Section 1(b) provides:

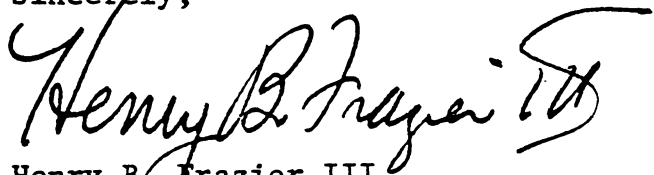
(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

The Assistant Secretary determined that the individual here involved is not a supervisor. Further, there was no contention that the individual here involved was an employee whose "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."

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

G. B. Landsman  
AFGE

United States Air Force, Kingsley Field, Klamath Falls, Oregon, A/SLMR No. 443. The Assistant Secretary decided that the agency engaged in conduct violative of section 19(a)(1) of the Order. The agency petitioned the Council for review, on the grounds that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue; the agency also requested a stay of the subject decision and order.

Council action (February 28, 1975). The Council held that, in the circumstances here involved, the Assistant Secretary's decision does not appear arbitrary and capricious, nor does it present a major policy issue warranting Council review. Accordingly, as the agency's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the agency's petition. The request of the agency for a stay was likewise denied under section 2411.47(c)(2) of the rules (5 CFR 2411.47(c)(2)).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

February 28, 1975

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

Re: United States Air Force, Kingsley  
Field, Klamath Falls, Oregon,  
A/SLMR No. 443, FLRC No. 74A-82

Dear Major Sklute:

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

The Assistant Secretary found, in pertinent part, that the activity violated section 19(a)(1) of the Order by unilaterally establishing, without prior explanation or consultation, a new working condition whereby the President of the exclusive representative (but no other unit employee) was required, on a temporary, experimental basis, to maintain a permanent log of the time he was absent from his duty station on authorized union business. The Assistant Secretary concluded that the natural and foreseeable consequences of the activity's conduct would reflect to other employees a disparagement of an official of their exclusive representative which would tend to restrain employees such as the Union President from exercising rights assured by the Order. Additionally, the Assistant Secretary found that the activity's conduct in implementing the change without affording the exclusive representative notice and an opportunity to meet and confer thereon had the improper effect of evidencing to unit employees that it could act unilaterally with respect to their terms and conditions of employment without regard to their exclusive representative.

In your appeal, you contend, in essence, that the decision of the Assistant Secretary is arbitrary and capricious because: (1) there was insufficient evidence to support an independent violation of section 19(a)(1); and (2) the 19(a)(1) finding, therefore, must have been a derivative violation of section 19(a)(6) but nowhere was a 19(a)(6) violation alleged or litigated. You also contend that the decision presents a major policy issue concerning whether the Assistant Secretary may find a 19(a)(1) violation as a derivative violation of section 19(a)(6) where the section 19(a)(6) violation was neither alleged nor litigated.

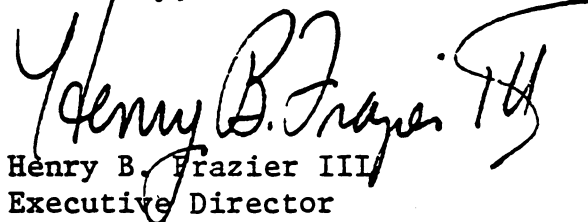
With respect to your contentions, clearly, it would be improper to find a 19(a)(1) violation as a derivative violation of section 19(a)(6) where the section 19(a)(6) violation is neither alleged nor litigated. Rather, when an independent violation of section 19(a)(1) is alleged the Assistant Secretary must find sufficient evidence to support it. Viewed in this context, and under the circumstances in this case, it does not appear that the Assistant Secretary acted without reasonable justification in finding an independent section 19(a)(1) violation, nor does it appear from your petition that the Assistant Secretary's decision is not consistent with his previous decisions.

As to the alleged major policy issue, the Council is of the opinion that, in the circumstances presented where a violation of section 19(a)(1) was both alleged and litigated, the Assistant Secretary's decision does not present a major policy issue warranting Council review in this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is denied. Likewise, the Council has directed that your request for a stay be denied under section 2411.47(c)(2) of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

I. Geller  
NFFE



Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411. The Assistant Secretary found that the agency violated section 19(a)(1) and (6) of the Order. The agency petitioned the Council to review the Assistant Secretary's decision, contending that the decision is arbitrary and capricious and presents a major policy issue. Further, the agency requested a stay.

Council action (March 3, 1975). The Council ruled that the Assistant Secretary's decision neither appears arbitrary and capricious, nor presents a major policy issue. Accordingly, since the agency's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the agency's petition. The Council likewise denied the agency's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

March 3, 1975

Mr. Irving L. Becker  
SSA Labor Relations Officer  
Social Security Administration  
6401 Security Boulevard  
Room 6-2608, West High Rise Building  
Baltimore, Maryland 21235

Mr. James R. Rosa  
Staff Counsel, American Federation  
of Government Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Department of Health, Education, and Welfare,  
Social Security Administration, Kansas City  
Payment Center, Bureau of Retirement and  
Survivors Insurance, A/SLMR No. 411, FLRC  
No. 74A-53

Gentlemen:

The Council has carefully considered the agency's petition for review and request for stay of the Assistant Secretary's decision and the union's opposition thereto<sup>1/</sup> in the above-entitled case.

The unfair labor practices found by the Assistant Secretary in this case stem from a complaint by the union alleging that the agency had violated section 19(a)(1) and (6) by failing and refusing to provide the Local with, and subsequently destroying, certain data ("machine utilization reports"). These reports had been relied upon by supervisory personnel (during the course of a semi-annual "progress interview") to give what was, in effect, an unfavorable appraisal to a unit employee.

The Assistant Secretary, relying on the precedent established in Department of Defense, State of New Jersey, A/SLMR No. 323, and that the reports in question constituted relevant and necessary information in connection with a determination by the union as to whether to initiate grievances, and that the refusal of the agency to make available such information, together with its destruction, constituted a violation of sections 19(a)(1) and 19(a)(6) of the Order. He rejected, as without merit, the agency's assertions that it was prohibited from

<sup>1/</sup> The union, in its opposition, requested permission to present oral argument before the Council. This request is denied since the submissions of the parties adequately reflect the issues and the respective positions of the parties.

disclosing the information contained in the utilization reports, and that the supervisors in question acted contrary to agency policy.

In the agency's petition for review, it contends that the Assistant Secretary's decision in this case is arbitrary and capricious and raises a major policy issue because, in effect, he failed to apply, sua sponte, section 19(d) of the Order to dismiss the complaint.<sup>2/</sup> Further, the agency contends that the decision is arbitrary and capricious in that the union failed to establish by a preponderance of the evidence, as required by section 203.14 of the Assistant Secretary's Regulations, the allegations in its complaint.

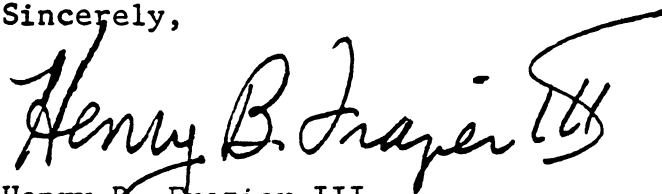
In the Council's view, the agency's petition for review fails to meet the requirements of section 2411.12 of the Council's rules. The agency has failed to show that the issues here involved were raised under a grievance procedure. Furthermore, the Assistant Secretary found that the union sought the reports in order to "determine whether or not to go through the formality of processing grievances. . . ." Thus, in the circumstances of this case, no issue is presented as to whether or not the Assistant Secretary is obligated to consider the applicability of section 19(d), sua sponte, in matters brought before him under sections 6(a)(4) and 19 of the Order. Therefore, the Council finds that this case does not present a major policy issue regarding the application of section 19(d) of the Order.

Moreover, with regard to the agency's contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that he acted without reasonable justification in his decision.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

---

2/ Section 19(d) provides, in pertinent part:

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

Veterans Administration, A/SLMR No. 240. This case involved attempts by several labor organizations to consolidate units currently represented by those labor organizations into different bargaining units. The Assistant Secretary's decision in the matter, which was reached under the Order before the recent amendment thereof by E.O. 11838, was accepted by the Council for review (Report No. 42).

Council action (March 11, 1975). The Council, in its decision, noted that, under the Order as amended by E.O. 11838, specific provisions are made for achieving consolidation of units and that these provisions are applicable in this case. In view of these changed circumstances by reason of the amendments to the Order, the Council, without ruling as to the propriety of the Assistant Secretary's decision, remanded the case to the Assistant Secretary for disposition consistent with the Order as amended.

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

VETERANS ADMINISTRATION

Activity

and

Council of AFGE Veterans Administration  
Locals and Other AFL-CIO Affiliates,  
Carpenters and Joiners of America;  
International Brotherhood of Electrical  
Workers; International Association of  
Firefighters; Laborers International  
Union of North America; Service Employees  
International Union (Assistant Secretary  
Case No. 22-2635 (RO))

and

National Alliance of Postal and Federal  
Employees; National Federation of Federal  
Employees; Veterans Administration and  
Independent Service Employees Union;  
National Association of Government  
Employees; American Nurses Association

Intervenors

VETERANS ADMINISTRATION

A/SLMR No. 240  
FLRC No. 73A-9

Activity

and

American Nurses Association (Assistant  
Secretary Case No. 22-2692 (RO))

and

Council of AFGE Veterans Administration  
Locals and Other AFL-CIO Affiliates,  
Carpenters and Joiners of America;  
International Brotherhood of Electrical  
Workers; International Association of  
Firefighters; Laborers International  
Union of North America; Service Employees  
International Union; and National Federation  
of Federal Employees

Intervenors

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

The Assistant Secretary's Decision

The Council of AFGE Veterans Administration Locals and other AFL-CIO affiliates, Carpenters and Joiners of America; International Brotherhood of Electrical Workers; International Association of Firefighters; Laborers International Union of North America; and Service Employees International Union filed a petition seeking an election in a unit composed of all employees including professionals employed by the Veterans Administration (herein referred to as VA). The American Nurses Association filed a petition seeking an election in a unit composed of all professional registered nurses employed in the Department of Medicine and Surgery of the VA. The Assistant Secretary directed a consolidated hearing in these cases,

for the limited purpose of ascertaining whether, and to what extent, the existing agreement bars which have not been waived by all parties to the agreement would effect the adequacy of the Petitioners' showing of interest in view of the Assistant Secretary's decision in U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110, [1/] and the fact that the Petitioners included in support of their showing of interest employees covered by current negotiated agreements between themselves and the Activity, the Veterans Administration.

The Assistant Secretary found that the petitioners included in support of their showing of interest, employees covered by negotiated agreements between them and the VA and that the VA did not agree to waive such agreements to the extent that they constituted procedural bars to an election. He then found applicable the following principles:

- A. The agreement bar principles as set forth in . . . [Assistant Secretary's] Regulations will be deemed applicable irrespective of whether the unit sought is nationwide in scope. Thus . . . where a petition for a broad unit seeks to include employees who are already represented exclusively by other labor organizations in existing less comprehensive

---

1/ In this case the Assistant Secretary held, in pertinent part, that a party to a negotiated agreement may not waive an "agreement bar" unilaterally. The phrase "agreement bar" is a reference to the provisions of the Assistant Secretary's regulations which essentially preclude the filing of a representation petition during the life of an agreement.

units and who are covered by existing negotiated agreements which constitute bars at the time the petition is filed, I will not, absent unusual circumstances, permit those units covered by negotiated agreements to be included in the broad petitioned for unit. Nor will I permit a petitioning labor organization to utilize in its showing of interest for a petitioned for broad unit, employees encompassed by the petition who are in an existing less comprehensive unit represented by another labor organization and covered by a signed agreement which constitutes a bar to an election.

- B. Where an agreement bar exists, such bar may not be waived unilaterally. . . . In the absence of mutual waiver of an agreement bar, a petitioning labor organization may not utilize a showing of interest from a unit in which the bar exists.
- C. Where a petitioner seeks a unit which encompasses a unit or units in which it already holds exclusive recognition (but no negotiated agreement exists), in order to permit the employees in such unit or units to be counted for purposes of the petitioner's showing of interest, the petitioner will be required to waive its exclusive recognition status in such unit or units and agree, in effect, to risk that recognition in the event that it proceeds to an election in the broad unit and loses. . . .
- D. Where there is an otherwise valid agreement which is terminable at will, or which contains other defects which would cause such agreement not to constitute a bar to an election sought by a third party, I find that the parties to such agreement are bound by its terms absent an affirmative act of termination. Thus, in my view, in order to utilize employee members covered by such an agreement for the purpose of showing of interest, a labor organization which is party to the agreement must affirmatively indicate a willingness (1) to terminate its agreement prior to the election, and (2) to waive its exclusive recognition status and, in effect, put such status "on the line" at the election. [Footnote omitted.]

The VA would not waive existing agreement bars. Further, as to negotiated agreements which, because of certain defects, would not constitute bars as to third parties, the petitioning labor organizations had neither taken action to terminate such agreements, nor indicated an intent to waive their exclusive recognition status in the unit encompassed by their petitions in the event that they proceed to an election in the petitioned for units and lose. Accordingly, the Assistant Secretary found that such existing units may not be included in any unit found appropriate and the employees in such units may not be utilized for the purpose of establishing the petitioning

labor organizations showing of interest in any residual unit found appropriate. The Assistant Secretary concluded:

As I am advised administratively that the showing of interest of each of the Petitioners in the subject cases is inadequate with respect to any residual units herein not subject to procedural bars, I shall dismiss the petitions.

### Appeal to the Council

The Decision and Order of the Assistant Secretary was appealed to the Council by the AFGE Veterans Administration Locals and other AFL-CIO affiliates. Upon consideration of the petition for review and the opposition for review filed by the VA, the Council determined that major policy issues were presented by the decision of the Assistant Secretary and therefore accepted the petition for review. Briefs were filed by the VA, the AFGE Veterans Administration Locals and other AFL-CIO affiliates, and the American Nurses Association. Additionally, National Federation of Federal Employees was permitted to file a brief as an amicus curiae.

Subsequent to Council acceptance of the instant case, the Council commenced a general review of the Federal labor-management relations program. During the review the Council considered, inter alia, the following three areas which had direct application to the issue raised by the parties in this case. Specifically:

Should unions and agencies be permitted to consolidate bilaterally their existing units without meeting the requirements of a secret ballot election if the resulting unit is otherwise in conformity with the provisions of the Order?

What should be the Executive Order policy with respect to the consolidation of bargaining units?

What changes in the Order or its implementation should be made for this purpose?

The Council determined that final disposition of the appeal of the Assistant Secretary's decision in this case should be deferred pending completion of the general review.

On February 6, 1975, Executive Order 11838 was issued (40 F.R. 5743, February 7, 1975) amending Executive Order 11491. Section 10(a) of the Order has been amended to provide:

An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative; provided that this section shall not preclude an agency from according exclusive recognition to



a labor organization, without an election, where the appropriate unit is established through the consolidation of existing exclusively recognized units represented by that organization. [Added language underscored.]

Moreover, section 10(d)(4) was added so as to authorize:

Elections may be held to determine whether a labor organization should be recognized as the exclusive representative of employees in a unit composed of employees in units currently represented by that labor organization or continue to be recognized in the existing separate units.

The Council's report to the President which accompanied the amending Order describes the intent of these amendments. The Council concluded, in pertinent part:

Almost all agencies and labor organizations which participated in the general review expressed strong support for a policy which would facilitate the consolidation of existing exclusive recognitions. Moreover, we are convinced from our experience and analysis that the Federal labor-management relations program will be improved by a reduction in the unit fragmentation which has developed over the 12 years of labor-management relations under Executive orders.

The consolidation of units will substantially expand the scope of negotiations as exclusive representatives negotiate at higher authority levels in Federal agencies. The impact of Council decisions holding proposals negotiable will be expanded. In our view, the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest.

Currently, agencies and labor organizations mutually desiring to consolidate the labor organization's existing exclusive units must go through the election procedures called for in section 10(a) of the Order. This requirement must be met even though the employees involved have already voted in a secret ballot election to have the labor organization as their exclusive representative, and there appears to be no question that a majority of the employees desire to retain the labor organization as their representative. We see no need to require that an election be held before such recognized units can be consolidated into a broader unit. In such circumstances, the agency and the labor organization should be free to agree bilaterally to consolidation without an election. Accordingly, we recommend that section 10(a) be amended to provide for such consolidation without an election.

In recommending this change, we are mindful of the fact that the employees who will be affected by the proposed bilateral consolidation may wish an opportunity to express their views on such a change in the structure of their unit for representation. Therefore, in recognition of a need to afford some protection to the rights of the employees, we recommend that they should have adequate notice of a proposed consolidation and should have a right to vote on the proposal if a sufficient number in the proposed consolidated unit have indicated opposition to the consolidation.

Accordingly, we recommend that the Order be amended to provide that such employees could petition the Assistant Secretary to hold such elections as are necessary to determine whether the employees in the proposed consolidated unit wish to be represented in that unit or existing units. In such circumstances, the labor organization should not be required to risk its existing certifications because no question would have been raised concerning the desire of the employees to be represented by the exclusive representative. Should the employees in the proposed consolidated unit who cast ballots oppose the consolidation, the existing unit structure should continue.

A consolidated unit established by bilateral agreement must still conform to the appropriate unit criteria contained in the Order. To assure such conformity, the parties' agreement on a proposed consolidation of existing units should be submitted for review through processes to be established by the Assistant Secretary. If it is determined that the unit conforms to the appropriate unit criteria contained in the Order, and there has not been a question raised as to whether the labor organization represents a majority of the employees in the proposed unit, the Assistant Secretary, pursuant to his section 6(a)(1) authority to decide questions as to appropriate units, should certify that organization as the exclusive representative of the employees in the newly established consolidated appropriate unit. In making his determination on the appropriateness of the proposed consolidated unit, the Assistant Secretary should be mindful of the policy of facilitating the consolidation of existing bargaining units.

A proposal to consolidate existing units may not always be agreeable to the other party. Where there is no bilateral agreement on the consolidation a party should be permitted to petition the Assistant Secretary to hold an election on the consolidation issue. Pursuant to such a petition, the Assistant Secretary could hold such elections as are necessary to determine whether the employees in the proposed consolidated unit wish to be represented in that unit or to continue to be represented in their existing units. As in the circumstances where affected employees raise issue with a proposed consolidation, but there is no doubt that the labor

organization has majority support in the existing units, we do not feel it appropriate that the labor organization risk losing its status as the recognized bargaining representative in its existing exclusive units.

In order to provide for the type of consolidation elections which we feel the Assistant Secretary should conduct, we recommend that section 10(d) of the Order be amended to permit elections to determine whether a labor organization should be recognized as the exclusive representative of employees in a unit composed of employees in units currently represented by that labor organization or continue to be recognized in the existing separate units.

We believe that the principles and procedures described herein should apply only where a labor organization or where two or more labor organizations jointly seek to consolidate existing units within a single agency.

Section 10(b) of the Executive order prohibits the establishment of a unit if it includes both professional and nonprofessional employees, unless a majority of the professional employees votes for inclusion in the unit. We believe this requirement should likewise apply where consolidation of existing bargaining units is proposed. That is, in every case where a consolidation of units would mix both professional and nonprofessional employees, all of the involved professionals, including those already in mixed units, should be given a separate self-determination election on the issue of being included in the proposed consolidated unit with nonprofessionals. While professional employees already in mixed units would have voted once for inclusion with nonprofessionals, they would have made that selection in the context of a unit structure which differs from that of the proposed consolidation unit.

We are mindful that providing professional employees with a self-determination election might detract from our recommended policy of facilitating the consolidation of existing bargaining units in that it might result in separate consolidated professional and nonprofessional units. We believe, however, that this requirement would strike a balance between the proposed policy on consolidation of units and the existing policy concerning the inclusion of professional employees in a unit with nonprofessional employees.

The processing of petitions for exclusive recognition by the Assistant Secretary is affected by certain "bars to elections," either specifically provided for in the Order or fashioned by the Assistant Secretary in his regulations or case decisions. More particularly, a petition is untimely if filed within 12

months of a valid election or within 12 months after the certification of a labor organization as the exclusive representative of employees in an appropriate unit, commonly referred to as an "election bar" and a "certification bar" respectively. Further, when there is a signed agreement having a term not to exceed 3 years, a petition for an election among covered employees is untimely unless filed between the 90th and 60th day preceding the expiration of the agreement, commonly called an "agreement bar."

In our view, such bars foster desired stability in labor-management relations in that parties to an existing bargaining relationship have a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation. Where no labor organization is certified, the employees and agency management know for a fixed period of time the status of any exclusive representation issues. However, where parties to such a relationship bilaterally seek to consolidate existing exclusive units to establish what they feel is a more stable relationship, we do not feel that they should be impeded by the same restrictions which apply to an attempt to raise a question concerning representation. Accordingly, we feel that parties should be free to consolidate units bilaterally notwithstanding when a valid election might have been held or when a certification might have last issued or the existence of an agreement between those parties. That is, "election bar," "certification bar," and "agreement bar" rules should not apply to the parties when they seek bilaterally to consolidate existing units.

When a labor organization or agency seeks to consolidate units by petitioning the Assistant Secretary to hold an election to determine whether the employees wish to be represented in the proposed unit or in their existing units, it should also be able to do so notwithstanding election bars, the involved labor organization's certifications or its valid agreements. While it is true that an agreement is reached bilaterally and one party may object to the other's seeking to waive the agreement as a bar, we view the furtherance of the policy favoring consolidation of units to outweigh a legitimate concern for the viability of an agreement. In this regard, consolidation permits parties to arrive at a new agreement broader in coverage and scope than the agreements which covered smaller fragmented units. However, a proposed consolidation, either through bilateral agreement between the parties or through a petition to the Assistant Secretary, should not constitute a waiver of the existing labor organization's certification and agreement bars insofar as they preclude the raising of a question concerning representation. That is, such bars should be applicable

to an attempt by a rival labor organization to replace the existing exclusive representative or a petition by employees for a vote on whether the labor organization should cease to be the exclusive representative.

The procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation. Where a labor organization seeks a unit which includes its existing units together with employees who are currently unrepresented, the unrepresented employees should have the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented in that unit by any intervening labor organization. Similarly, where a labor organization seeks a unit which includes its existing units together with employees represented by a different labor organization, the currently fashioned election, certification and agreement bars enjoyed by the incumbent organization would be applicable. If an election is held in such a situation, the employees would have the option of being represented in the consolidated unit, being unrepresented, or, if they constitute a separate appropriate unit, being represented by the incumbent labor organization or any intervening organization.

We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. We believe that the proposed modifications of the Order and subsequent actions of the Assistant Secretary will facilitate the consolidation of existing units, which will do much to accomplish the policy of creating more comprehensive units. We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.

#### Opinion

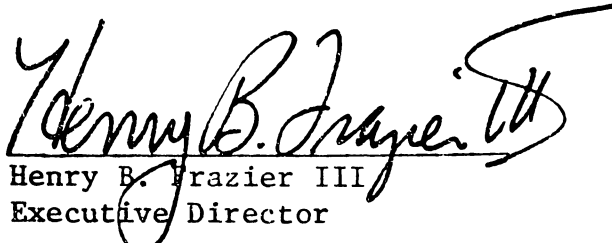
The instant case involved attempts by several labor organizations to consolidate units currently represented by those labor organizations into different bargaining units. The decision of the Assistant Secretary was reached under the Order before it was amended by E.O. 11838. Under the

amended Order specific provisions are made for achieving such consolidation and those provisions are applicable to this case.

Specifically, under the amended Order the VA and the AFGE Veterans Administration Locals and other AFL-CIO affiliates in the one case and the VA and American Nurses Association in the other are now enabled to agree bilaterally to consolidate units represented by those organizations into new consolidated units, subject to the right of affected employees to petition for an election on the consolidation issue and the requirement that the Assistant Secretary review the proposed units to determine whether they conform to the appropriate unit criteria contained in the Order. In reviewing the proposed units to determine whether they conform to the appropriate unit criteria contained in section 10(b) of the Order, the Assistant Secretary must give equal weight to each of the three criteria. In the absence of such bilateral agreement, petitions can be filed (or in the alternative, the existing petition amended) for elections to determine whether the AFGE Veterans Administration Locals together with other AFL-CIO affiliates and the American Nurses Association respectively should be recognized as the exclusive representative of employees in new units. In the event the Assistant Secretary determines such proposed units conform to the appropriate unit criteria contained in the Order and elections are held, the participating labor organizations would not risk losing their status as the exclusive representatives in the existing units should the employees reject consolidation of those existing units. Further, the holding of such an election would not be affected by otherwise appropriate election bars, certification bars and agreement bars affecting the petitioning organizations. Of course, any incumbent labor organization in a unit sought to be included in the consolidated unit would have to meet the Assistant Secretary's petitioning requirements. Additionally, the unions seeking consolidation concurrently could seek to obtain representation of employees who are currently unrepresented and/or employees represented by a different labor organization and include them in the proposed consolidated unit subject to the applicable bar rules and election requirements.

In view of these changed circumstances by reason of the amendments to the Order, we will render no decision as to the propriety of the Assistant Secretary's decision here involved. Rather, the case is remanded to the Assistant Secretary for disposition consistent with the Order as amended.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: March 11, 1975

Office of Economic Opportunity, Washington, D.C., Assistant Secretary Case No. 22-5216 (AP). The Assistant Secretary found that the grievance of the union (National Council of OEO Locals) was an arbitrable dispute over the proper and intended interpretation and application of the parties' agreement. The agency appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (March 11, 1975). The Council held that the Assistant Secretary's decision does not present a major policy issue and does not appear to be arbitrary and capricious. Accordingly, since the agency's appeal failed to meet the requirements for review under section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

March 11, 1975

Mr. Randolph G. Johnson  
Acting Director of Personnel  
Office of Economic Opportunity  
Executive Office of the President  
Washington, D.C. 20506

Re: Office of Economic Opportunity,  
Washington, D.C. and the National  
Council of OEO Locals, Assistant  
Secretary Case No. 22-5216 (AP),  
FLRC No. 74A-59

Dear Mr. Johnson:

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

The Assistant Secretary set aside the Assistant Regional Director's report and findings that the grievance filed by the National Council of OEO Locals was not subject to the arbitration procedure in the existing agreement between the union and the agency. The grievance initially filed by the union alleged that the agency had failed to supply information to the union as required by section 6 of the amendments to the existing agreement:

Both Parties agree that within two weeks after confirmation the OEO Director will submit to the National Council a full list of all current management positions subject to Senate confirmation and will thereafter indicate any change within 24 hours of its occurrence.

Further, the grievance cited Article 2, Section 2 of the agreement, which requires the agency to abide by all laws, including Title VI, section 601(a) of the Economic Opportunity Act of 1964. This statutory provision, according to the union, requires OEO to staff "one Deputy Director and five Assistant Directors." As remedies, the union requested that the names of a Deputy Director and five Assistant Directors be submitted to the Senate for confirmation and that it receive a list of the names and positions within ten days.

The Assistant Regional Director, in passing on the agency's application for a decision on grievability or arbitrability, found that the grievance was not arbitrable on the ground that the first of the union's



requested remedies was barred by section 12(b) of the Order. The record in the case (which was obtained from the Assistant Secretary pursuant to section 2411.50 of the Council's rules (5 CFR 2411.50)) indicated that the union, in a submission to the Labor-Management Services Administration prior to the issuance of the Assistant Regional Director's report and findings, attempted to modify its grievance by withdrawing the first of its two initial remedial requests. In its request for review filed with the Assistant Secretary, the union reasserted its withdrawal of the remedial request. In his decision, the Assistant Secretary found that the union conceded that the "grievance [did] not involve the filling of vacancies in the management of the agency . . . ," and on that basis he further found that the grievance was an arbitrable dispute over the proper and intended interpretation and application of the agreement.

However, in its petition to the Council for review of the Assistant Secretary's decision, the agency referred to another union remedial request--the removal of unauthorized personnel holding positions subject to Senate confirmation. The record obtained from the Assistant Secretary indicated that the union, as a part of the same submission to the Labor-Management Services Administration in which it attempted to modify its grievance by withdrawing the first of its two initial remedial requests, had requested as an alternative remedy "that the agency simply identify the duties and positions subject to Senate approval and remove any illegal incumbents of those positions . . . ." Neither the Assistant Regional Director nor the Assistant Secretary made any finding with respect to this alternative remedial request.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue, principally on the ground that it puts the arbitrator in the position of making a decision which might be repugnant to section 12(b) of the Order. It is your contention that acceptance of the union's requested remedies would clearly be repugnant to section 12(b) and that the grievance therefore is not arbitrable.

In the Council's opinion, the Assistant Secretary's decision does not present a major policy issue. The Assistant Secretary found that the grievance did not involve the filling of vacancies, a right reserved to management by section 12(b) of the Order. (See National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61 and cases cited therein at footnote 4.) Thus, consistent with the Assistant Secretary's finding, it is the Council's view that the grievance does not involve the submission by the agency to the Senate of nominations for confirmation. Further, there is no indication in the decision of the Assistant Secretary, nor in the remedies initially requested by the union, that the grievance involves the removal of personnel from management positions. Consistent with these facts, it is also the Council's view that this remedy is not a part of the grievance before it. Hence, contrary to your contention, the grievance, as construed by the Assistant

Secretary and the Council, should not put the arbitrator in the position of making a decision which is repugnant to section 12(b) of the Order. The only issue for the arbitrator is the agency's compliance with section 6 of the amendments to the agreement. In this connection, it is noted that the union, in its opposition filed with the Council, indicated that it seeks, in its own words, "information as to the specific location within OEO's table of organization of the Assistant Director positions, with or without incumbents." Resolution of this issue by the arbitrator in a manner consistent with the views expressed herein will not lead to conflict with section 12(b). Moreover, with respect to your contention that his decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification.

Since the Assistant Secretary's decision does not present a major policy issue and does not appear to be arbitrary and capricious, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review of the decision is hereby denied. Likewise, and apart from other considerations, the agency's request for a stay is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

P. Kete  
National Council of  
OEO Locals

National Association of Government Employees Local R5-108 and Tennessee Army National Guard (Board of Review of the Department of Personnel, State of Tennessee, Arbitrator). The union filed a petition for review of the arbitration award with the Council on February 13, 1975. Under the Council's rules, the petition was due on February 7, 1975. No extension of time for filing was either requested by the union or granted by the Council.

Council action (March 13, 1975). Because the union's petition was untimely filed, and apart from any other consideration, the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

March 13, 1975

Mr. James L. O'Dea III  
Legislative Counsel  
National Association of  
Government Employees  
2139 Wisconsin Avenue, NW.  
Washington, D.C. 20007

Re: National Association of Government Employees  
Local R5-108 and Tennessee Army National Guard  
(Board of Review of the Department of Personnel,  
State of Tennessee, Arbitrator), FLRC No. 75A-16

Dear Mr. O'Dea:

The Council has carefully considered your petition for review of an arbitration award filed in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Section 2411.33(b) of the Council's rules provides that a petition for review must be filed within 20 days from the date the arbitrator's award was served upon the party seeking review. Section 2411.46(c) provides that the date of service shall be the date the award was deposited in the mail or delivered in person, as the case may be. Where such service was made by mail, section 2411.45(c) provides that 3 days shall be added to the time period within which the petition must be filed. Additionally, under section 2411.45(a), any petition filed must be received in the Council's office before the close of business of the last day of the prescribed time period. In computing these time periods, section 2411.45(b) provides that 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.

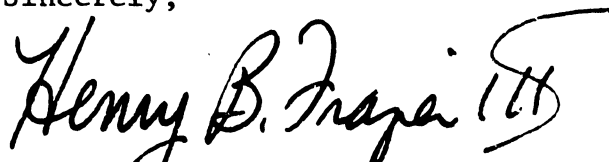
The arbitration award in this case was dated January 15, 1975, and appears to have been mailed to you on that date. Therefore, under

the Council's rules, stated above, your petition for review was due in the Council's office before close of business on February 7, 1975. However, your petition was not received by the Council until February 13, 1975, and no extension of time was either requested by you or granted by the Council under section 2411.45(d) of the Council's rules.

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

By 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 flourish at the end.

Henry B. Frazier III  
Executive Director

cc: Tennessee Army National  
Guard

Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-4939 (GA). The Assistant Secretary decided that certain grievances over the interpretation and application of an agreement between AFGE Local 987 and the activity were subject to arbitration under that agreement. Upon appeal by the agency, the Council determined that the Assistant Secretary's decision presents major policy issues and accepted the case for review (Report No. 53).

Council action (March 17, 1975). Although disagreeing with the Assistant Secretary's reasoning in certain respects, the Council held that the Assistant Secretary's decision that the grievances here involved are subject to arbitration under the parties' negotiated agreement is consistent with the purposes of the Order. Accordingly, pursuant to section 2411.17(b) of its rules (5 CFR 2411.17(b)), the Council sustained the Assistant Secretary's decision.

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

Headquarters, Warner Robins Air  
Materiel Area, Robins Air Force  
Base, Georgia

and

Assistant Secretary  
Case No. 40-4939(GA)  
FLRC No. 74A-8

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 who, acting upon an application for a decision on grievability and arbitrability filed by the American Federation of Government Employees, AFL-CIO (hereinafter referred to as "AFGE" or "the union"), determined that certain grievances over the interpretation and application of an agreement between AFGE Local 987 and Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Georgia (hereinafter referred to as "the activity"), were subject to arbitration under that agreement.

The pertinent facts in the case, as found by the Assistant Regional Director for Labor-Management Services, U.S. Department of Labor, Atlanta Region, Atlanta, Georgia, which formed the basis for the Assistant Secretary's decision, are as follows: AFGE Local 987 and the activity entered into an agreement which became effective upon approval by Air Force headquarters (hereinafter referred to as "HQ USAF" or "the agency") prior to the amendment of Executive Order 11491 by Executive Order 11616. Subsequent to the effective date of the E.O. 11616 amendments, i.e., November 24, 1971, the parties executed a Memorandum of Understanding, described as "an agreement on ground rules to govern the negotiation of a written agreement pursuant to the provisions of E.O. 11491. . . ." This Memorandum of Understanding provided, among other things, that: "In the interim, all Agreements to which these negotiations pertain are extended until the Agreement is approved by HQ USAF and National Office AFGE." The negotiations between the parties did not result in a new basic labor agreement until approximately two years had elapsed. During that period of time, certain grievances arose concerning alleged violations of the parties' pre-E.O. 11616 agreement

by the activity, and the parties agreed to submit the grievances to arbitration under the terms of that agreement. Prior to arbitration of the grievances, however, the activity notified the arbitrators who had been selected by the parties that it was withdrawing from the scheduled arbitrations based on a HQ USAF determination to the effect that a valid agreement did not exist at the time the alleged violations occurred. The union responded by filing an application for a decision on grievability and arbitrability with the Assistant Secretary.

The Assistant Secretary found, in agreement with the Assistant Regional Director, and contrary to the activity's and the agency's position, that the Assistant Secretary has jurisdiction in this matter and that the grievances involved are subject to arbitration under the terms of the parties' negotiated agreement. In this regard, the Assistant Secretary made a number of determinations. He determined that it was the intent of the parties in signing the Memorandum of Understanding to extend the terms of their initial agreement until such time as they negotiated a new agreement; by its terms, the Memorandum of Understanding became effective on the date it was executed and there is no evidence that it was subject to the approval of the activity's headquarters; and the evidence establishes that the parties applied the terms of their initial agreement after signing the Memorandum without any question being raised as to its validity. The Assistant Secretary also determined, in effect, for purposes of establishing his jurisdiction, that when the parties signed the Memorandum of Understanding they thereby "entered into" an agreement within the meaning of section 13(e) of the Order.<sup>1/</sup> In this connection, the Assistant Secretary concluded that the union's application is not barred by section 13(e) of the Order or section 205.2(b) of his regulations.<sup>2/</sup> The Assistant Secretary further determined that there

---

1/ Section 13(e) of the Order, as amended by E.O. 11616, provided:

(e) No agreement may be established, extended or renewed after the effective date of this Order which does not conform to this section. However, this section is not applicable to agreements entered into before the effective date of this Order.

2/ Section 205.2(b) of the Assistant Secretary's Regulations, which merely reflects the above quoted provision of the Order, provides as follows:

Part 205 - GRIEVABILITY AND ARBITRABILITY PROCEEDINGS

§ 205.2 Action to be taken before filing an application.

. . . . .

(b) Applications under this section may not be filed with respect to any agreement entered into before November 24, 1971.



is no indication in the Order that the Assistant Secretary's responsibility under section 13(d) of the Order<sup>3/</sup> is in any way conditioned upon whether the grievance arbitration provision of the agreement involved meets the criteria of section 13(a).<sup>4/</sup>

The agency appealed to the Council alleging that the Assistant Secretary's decision presents major policy issues and that it is, in effect, arbitrary and capricious. The Council determined that major policy issues are presented by the subject decision of the Assistant Secretary and accepted the agency petition for review. The union and the agency thereupon filed briefs with the Council. The agency also requested a stay of the Assistant Secretary's decision pending Council resolution of the appeal. The Council determined that issuance of a stay was warranted in this case and granted the agency request.

### Opinion

The two questions presented for Council decision in this case concern (1) the jurisdiction of the Assistant Secretary; and (2) the responsibility of the Assistant Secretary when a question is raised in a matter before him as to whether a negotiated agreement, or provision thereof, conforms to the Order. The questions will be treated separately below.

3/ Section 13(d) of the Order, as amended by E.O. 11616, provided:

(d) 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.

4/ Section 13(a) of the Order, as amended by E.O. 11616, provided:

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.

1. Jurisdiction of the Assistant Secretary.

The threshold question presented by this case is whether the Assistant Secretary properly asserted jurisdiction over this dispute. For the reasons stated below, we believe that he did.

As indicated previously, the parties entered into their initial agreement before the effective date of E.O. 11616, which amended E.O. 11491. Subsequent to the effective date of that amending Executive order, the parties executed their Memorandum of Understanding which, among other things, prescribed the ground rules for the negotiation of a new agreement and indicated that their existing agreement was extended until such time as the new agreement resulting from their negotiations was approved by HQ USAF and National Office AFGE. The Assistant Secretary found, in essence, for purposes of establishing his jurisdiction, that when the parties signed the Memorandum, they thereby "entered into" an agreement within the meaning of E.O. 11491, as amended by E.O. 11616. In the Assistant Secretary's view, the Memorandum of Understanding did not require HQ USAF or National Office AFGE approval but was intended only to govern the relationship of the parties until a new basic labor agreement was negotiated and approved. The grievances which precipitated the union's application to the Assistant Secretary for a decision on grievability and arbitrability arose after the signing of the Memorandum of Understanding and involved alleged violations of the provisions of the interim agreement entered into by that memorandum.

The agency contends first that no valid agreement was in effect between the parties at the time the instant grievances arose. However, assuming that a valid agreement was in effect, the agency contends that section 13(e) of the Order, as amended by E.O. 11616, precludes the Assistant Secretary from asserting jurisdiction under section 13(d). The agency argues, in this regard, that the agreement here involved was entered into before the effective date of E.O. 11616, and hence, questions as to whether a particular grievance concerns a matter subject to arbitration under the negotiated grievance procedure of the parties' agreement are not within the jurisdiction of the Assistant Secretary under 13(d) of E.O. 11491, as amended by E.O. 11616.

Section 6(a) of the Order, as amended by E.O. 11616, provided, in pertinent part:

Sec. 6. Assistant Secretary for Labor-Management Relations.

(a) The Assistant Secretary shall--

. . . . .

(5) decide questions as to whether a grievance is subject to

a negotiated grievance procedure or subject to arbitration under an agreement.

In this connection, section 13(d) of the amended Order provided:

(d) 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.

Section 13(e) of the Order, as amended by E.O. 11616, provided, in pertinent part:

(e) . . . [T]his section is not applicable to agreements entered into before the effective date of this Order.<sup>5/</sup>

It is clear that the express language of section 13(e) establishes that the authority of the Assistant Secretary to decide questions that cannot be resolved by the parties as to whether a grievance is subject to arbitration under an agreement depends on whether the parties' agreement was entered into after the effective date of E.O. 11616. If, therefore, in connection with adjudicating an arbitrability question submitted to him for decision pursuant to section 13(d) of the Order, the Assistant Secretary determines that the agreement involved was entered into prior to November 24, 1971 (the effective date of E.O. 11616), the Assistant Secretary must conclude that section 13 is not applicable to that agreement and that he lacks jurisdiction to decide the question.

As previously indicated, however, the Assistant Secretary determined in this case that the evidence established that it was the intent of the parties in executing their post-E.O. 11616 Memorandum of Understanding to extend the terms of their earlier agreement until such time as they negotiated a new agreement. The Assistant Secretary also determined, in effect, for purposes of establishing his jurisdiction, that when the parties signed the Memorandum of Understanding they thereby "entered into" an agreement within the meaning of section 13(e) of the Order, as amended by E.O. 11616. We conclude, therefore, that the Assistant Secretary's jurisdiction to decide the arbitrability question presented was thereby properly established.

Accordingly, we must reject the agency's contention that section 13(e) of the Order, as amended, precludes the Assistant Secretary from asserting jurisdiction in this case.

---

<sup>5/</sup> This provision of section 13 is reflected in section 205.2(b) of the Assistant Secretary's regulations. See note 2 supra for the pertinent text of the provision.

## 2. Responsibility of the Assistant Secretary.

We turn our attention now to the second question presented by this case, namely, what is the responsibility of the Assistant Secretary when, as here, a question is raised in a matter before him as to whether an agreement, or a provision thereof, conforms to the Order.<sup>6/</sup>

The agency principally contends that the Assistant Secretary was required to regard the parties' pre-E.O. 11616 agreement, as extended by their Memorandum of Understanding, as invalid since the negotiated grievance procedure of the agreement had not been brought into conformity with section 13(a) of the amended Order, as required by section 13(e).<sup>7/</sup> In this connection, the agency argues, among other things, that the negotiated grievance procedure is contrary to section 13(a) in that it allows for the processing of grievances concerning matters other than the interpretation or application of the agreement.

The Assistant Secretary found, when the same contention was raised before him, that there is no indication in the Order that his

---

<sup>6/</sup> The subject decision of the Assistant Secretary was decided under E.O. 11491, as amended by E.O. 11616, and prior to amendment by E.O. 11838. Since the appeal to the Council presented major policy issues concerning the meaning and application, in the particular facts of this case, of the amendments effected by E.O. 11616, the Council's decision is based on those amendments. While E.O. 11838 has further amended certain provisions of the Order which are relevant in this case (i.e. sections 6(a)(5) and 13), the principles herein established as to the responsibility of the Assistant Secretary in resolving grievability and arbitrability issues will continue to apply in such cases arising under the Order as amended by E.O. 11838.

<sup>7/</sup> The agency also contends that the parties' agreement should have been regarded as invalid on the basis that their Memorandum of Understanding was not approved by HQ USAF pursuant to section 15 of the Order. However, the Assistant Secretary found that by its terms, the Memorandum became effective on the date that it was executed; there was no evidence that it was subject to the approval of the activity's headquarters; and, further, that the parties applied the terms of the Memorandum on and after its effective date (a period of approximately two years) without any question being raised as to its validity. Moreover, we note that the agency's regulations provide for the extension of existing agreements in connection with negotiations if the parties so agree; and for the amendment of agreements by the parties without any requirement for review by HQ USAF but, rather, only approval by the activity commander. Therefore, we agree with the Assistant Secretary in this regard and consider this argument by the agency to be without merit.

responsibility to decide grievability and arbitrability questions submitted to him under section 13(d) of the Order, as amended, is in any way conditioned upon whether the grievance arbitration provision in the agreement involved meets the criteria of section 13(a) of the Order. For the reasons stated below, we disagree with this specific finding of the Assistant Secretary, but find, in the circumstances of this case, that the Assistant Secretary decided the arbitrability question presented to him in a manner consistent with the Order.

Section 13(a) of the Order, as amended by E.O. 11616, provided, in pertinent part:

Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure 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. . . .

Section 13(d) of the Order, as amended by E.O. 11616, provided:

(d) 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.

Section 13(e) of the Order, as amended by E.O. 11616, provided, in pertinent part:

(e) No agreement may be established, extended or renewed after the effective date of this Order which does not conform to this section . . . .

We agree with the agency that the language of section 13(e) set forth above requires that agreements established, extended or renewed after November 24, 1971, must conform to the requirements of section 13, including those expressed in section 13(a). However, the agency has misconstrued both the effect of the failure by the activity and AFGE Local 987 to bring the grievance procedure of their pre-E.O. 11616 agreement into complete conformity with section 13(a) of the amended Order when they entered into that agreement after November 24, 1971, by executing their Memorandum of Understanding, and the responsibility of the Assistant Secretary in deciding grievability and arbitrability questions involving grievances over the interpretation or application of that agreement.

When a grievability or arbitrability issue is referred to the Assistant Secretary, he has a responsibility to resolve that dispute. In so doing, "the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved."<sup>8/</sup>

Clearly, the Assistant Secretary cannot give effect to any agreement provision that is contrary to the Order. Hence, where the Assistant Secretary finds a conflict between the language of a particular agreement provision and the Order, the Assistant Secretary must apply the agreement in conformity with the Order. The obverse is also true, i.e., the Assistant Secretary must give effect to a particular agreement provision involved in a matter before him to the extent that it is consistent with the Order, and, of course, with applicable law and regulation. Thus, for example, failure of negotiating parties to negotiate a grievance procedure that conforms in all respects to section 13(a) of the Order, as amended, does not result in the invalidation of the parties' agreement, nor does such failure render unenforceable those provisions of the negotiated grievance procedure which are in conformity with the Order. On the contrary, the conforming provisions must be given effect.

In carrying out these responsibilities, the Assistant Secretary is not required to review every provision of the negotiated agreement in the case before him in order to insure the conformity of the agreement to the Order. However, the Assistant Secretary does have a definite responsibility insofar as a particular agreement provision's conformity to the Order is relevant to the issue before him. Specifically, where a question of an agreement provision's conformity to the Order is raised in a grievability or arbitrability issue before him, the Assistant Secretary must consider the question--and any related arguments--and make a determination concerning its relevance and impact on the issue before him. Where the Assistant Secretary finds that the question is relevant to the grievability or arbitrability issue before him, and, further, that the language of the disputed agreement provision does conflict with the Order, the Assistant Secretary must resolve the grievability or arbitrability issue in a manner consistent with the Order.

When these principles are applied to the facts of this case, it becomes apparent that the Assistant Secretary fulfilled his responsibility under the Order in resolving the instant arbitrability dispute. The record shows that the Assistant Secretary considered the contention and related arguments of the agency that the negotiated

---

<sup>8/</sup> Department of Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19 (February 7, 1975), Report No. 63.

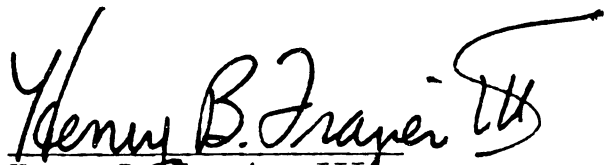
grievance procedure of the parties' agreement did not conform in all respects to section 13(a) of the amended Order. The record further establishes that the grievances here involved concerned the interpretation or application of the parties' agreement and that the negotiated grievance procedure of the agreement provided for the arbitration of such grievances. Thus, in finding the grievances arbitrable, the Assistant Secretary gave effect only to that portion of the negotiated grievance procedure that was in conformity with section 13(a) of the Order, notwithstanding the fact that certain other aspects of the provision, not relevant to disposition of this case, may not have been in conformity.

Accordingly, although we disagree with the Assistant Secretary's finding that there is no indication in the Order that his responsibility under section 13(d) of the Order, as amended, is in any way conditioned upon whether the grievance arbitration provision in the agreement meets the criteria of section 13(a) of the Order, we find, in the circumstances of this case, that the Assistant Secretary resolved the matter in a manner consistent with the Order.

For the reasons set forth above, we find that the Assistant Secretary's decision that the grievances here involved are subject to arbitration under the parties' negotiated agreement is consistent with the purposes of the Order.

Accordingly, pursuant to section 2411.17(b) of the Council's Rules and Regulations, we sustain the Assistant Secretary's decision and vacate our earlier stay of that decision.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: March 17, 1975

Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412. Pursuant to section 2411.4 of the Council's rules (5 CFR 2411.4) and section 203.25(d) of the Assistant Secretary's regulations (29 CFR 203.25(d)), the Assistant Secretary referred the following major policy issues to the Council for decision: (1) Whether the Assistant Secretary has the authority to enforce under section 19 of the Order a binding arbitration award in which no exceptions were filed with the Council; and (2) if the Assistant Secretary has the authority to enforce a binding arbitration award, whether a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment is dispositive of the matter.

Council action (March 20, 1975). As to (1), the Council decided that the Assistant Secretary has the authority under section 6(a)(4) and (b) of the Order to find that a party has committed an unfair labor practice by its failure to comply with an arbitration award under a negotiated grievance procedure to which no exceptions were filed with the Council (just as he may in a case in which a party fails to comply with an award after exceptions were filed with the Council and the Council has either rejected the appeal or issued a decision upholding the award).

With respect to (2), the Council held that, in an unfair labor practice complaint case alleging refusal to comply with an arbitration award, a defense that a party cannot comply with the award until it receives authorization from the Comptroller General to make payment is not dispositive of the unfair labor practice complaint. However, in the latter regard, the Council added that the Assistant Secretary, in fashioning a remedy in such cases, may not require a party to comply with an award that violates applicable law, appropriate regulation or the Order; and that, while the Assistant Secretary, after appropriate consideration which may include referral to proper authorities for legal interpretations, may ultimately conclude that the arbitrator's award is contrary to applicable law, appropriate regulation or the Order, he may nevertheless find that the respondent has committed an unfair labor practice by failure to meet its obligations under the Order. As the Council further noted, this decision does not prevent agencies from exercising their statutory rights to seek rulings directly from the Comptroller General; but the fact that an agency has sought such a ruling does not relieve the agency of its obligations under the Order and, therefore, is not a defense to an unfair labor practice complaint.



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

Department of the Army,  
Aberdeen Proving Ground

and

A/SLMR No. 412  
FLRC No. 74A-46

International Association of Machinists  
and Aerospace Workers, Local Lodge 2424

DECISION ON REFERRAL OF MAJOR POLICY  
ISSUES FROM ASSISTANT SECRETARY

Background of Case

In his consideration of this case the Assistant Secretary found that the International Association of Machinists and Aerospace Workers, Local Lodge 2424 (the union) filed an unfair labor practice complaint charging the Department of the Army, Aberdeen Proving Ground (the agency) with a violation of section 19(a)(1) and (6) of the Order by refusing to seek review by the Federal Labor Relations Council or to comply with a binding arbitration award issued pursuant to the terms of the parties' negotiated agreement. The Assistant Secretary found, based upon the undisputed facts as stipulated by the parties, that the collective bargaining agreement between the union and the agency provided for the deduction by the agency of union dues from the pay of eligible employees within the unit who voluntarily authorized such deductions, and the transmittal to the union of an amount equal to the total of all such deductions (less 2 cents for each individual deduction) not later than 3 workdays after each payday. When a unit employee who had filed such a dues withholding authorization was promoted to a job outside the unit, the agency, contrary to the terms of the agreement, failed to terminate the authorization. Instead the agency continued to deduct and remit such dues to the union until over a year later when the agency discovered its mistake and ceased such deductions. The agency reimbursed the employee for \$80.33 (the amount of dues erroneously deducted from his pay). When the agency next transmitted to the union dues which had been deducted from employee pay, the agency deducted the amount of \$80.33. The union filed a grievance under the negotiated grievance procedure requesting payment of the withheld amount of \$80.33. The grievance proceeded to arbitration and the arbitrator found that the agency had violated the agreement by withholding from a payment of deducted union dues an amount previously paid to the union by mistake. Finding that "the particular method used in the instant case violated the provisions of the Collective Bargaining Agreement," the arbitrator ordered the agency to reimburse the union in the amount of \$80.33 which had been improperly withheld.

The agency has not compiled with the arbitrator's award nor has the agency filed a petition for review of the award with the Council. Instead the agency sought an advance decision from the Comptroller General of the United States requesting answers to the following questions:

- (1) Was the action to deduct the \$80.33 for the erroneous payments to the union correct?
- (2) If the deduction for the erroneous payments was correct, what action then should be taken in reply to the Award of Arbitration?
- (3) If it is held that the arbitrator was correct, what is the appropriate fund citation from which to make payments?

In defense of the unfair labor practice charge, the agency stated that it is unable to make payment of the amount involved because no appropriation exists for payment and a special authorization from the Comptroller General of the United States is needed in order to implement the award.

Under these circumstances the Assistant Secretary concluded that certain major policy issues had been raised which, pursuant to section 2411.4 of the Council's rules of procedure<sup>1/</sup> and section 203.25(d) of the Assistant Secretary's regulations, he referred to the Council for decision:

- (1) Whether the Assistant Secretary has the authority to enforce under section 19 of the Order a binding arbitration award in which no exceptions were filed with the Council; and
- (2) If the Assistant Secretary has the authority to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter?

1/ Section 2411.4 of the Council's rules of procedure provides:

Notwithstanding the procedures set forth in this part, the Assistant Secretary or the panel may refer for review and decision or general ruling by the Council any case involving a major policy issue that arises in a proceeding before either of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Council shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

## Opinion

The issues referred to the Council raise questions about the enforcement of arbitration awards which are of substantial importance to the labor-management relations program under the Order.

### 1. Authority of the Assistant Secretary to Enforce Arbitration Awards.

As the Assistant Secretary pointed out in his referral, while "the Order provides specifically that parties may file exceptions to arbitration awards with the Federal Labor Relations Council under regulations prescribed by the Council, the Order and the Rules and Regulations of the Federal Labor Relations Council are silent with respect to the procedure to follow in order to obtain enforcement of arbitration awards."

Executive Order 11491, as amended, provides in section 4(c) that:

- (c) The Council may consider, subject to its regulations—
- (1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;
  - (2) appeals on negotiability issues as provided in section 11(c) of this Order;
  - (3) exceptions to arbitration awards; and
  - (4) other matters it deems appropriate to assure the effectuation of the purposes of this Order.<sup>2/</sup>

Section 13(b) of the Order provides, in relevant part, that "Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council."<sup>3/</sup> In discussing exceptions to arbitration awards, the Study Committee Report and Recommendations which led to the issuance of E.O. 11491 stated that "[c]hallenges to such awards should be sustained only on grounds similar to those applied by the courts in private sector labor-management relations, and procedures for the consideration of exceptions on such grounds should be developed by the Council."<sup>4/</sup> There was no mention of enforcement of arbitration awards in the Study Committee Report.

---

<sup>2/</sup> It should be noted that the Council's authority under section 4(c) is cast in discretionary terms--the "Council may consider, subject to its regulations." (Emphasis added.)

<sup>3/</sup> This sentence originally constituted section 14(b) of the Order; when the Order was amended by E.O. 11616 in 1971, section 14(b) was revoked and the sentence was incorporated in section 13(b).

<sup>4/</sup> Labor-Management Relations in the Federal Service (1969), p. 42.

When the Council first issued Part 2411 of its Rules and Regulations on September 29, 1970, Subpart B of Part 2411 established a single set of procedures under which the Council would review: (1) awards of arbitrators under the Order; (2) decisions of the Assistant Secretary under section 6 of the Order; and (3) decisions of agency heads on negotiability issues provided under section 11(c)(4) of the Order. The alternative actions available to the Council in issuing its decisions on the merits in all three types of cases were described in one section (§ 2411.20(a)) which provided, in relevant part:

§ 2411.20 Council decision; compliance actions.

(a) The Council shall issue its decision sustaining, enforcing, modifying, and enforcing as so modified, setting aside in whole or in part, or remanding the decision or award. . . .

These rules were in effect from September 29, 1970, until October 3, 1972.

In 1972 the Council assessed its experience under its initial rules of procedure and concluded that some changes in Part 2411 would better assure the effectuation of the purposes of the Order. The Council published a proposed revision of Part 2411 in the Federal Register (37 F.R. 9138), and invited comments and suggestions from interested persons. One of the changes proposed and eventually adopted was a rearrangement of the format of Part 2411 to establish three separate subparts, each of which was limited to rules of procedure governing one particular type of review case. Another proposed change was the deletion from the rules of the alternative of a Council decision "enforcing" an arbitration award. In explanation of the latter proposed change, the Council stated that:<sup>5/</sup>

The existing provision [§ 2411.20(a)] describes the alternatives open to the Council in all three types of review cases. The modifications are necessary to accurately describe the Council's function in deciding arbitration award cases since this subpart is limited to those cases. The alternative of "enforcing" would not appear to be involved in this function.

In response, only one objection to the change was received. The AFL-CIO, speaking for the international unions affiliated with that organization, objected to the deletion of "enforcing" from the list of possible actions which the Council might take in arbitration cases.

The Council considered the comments that were received (37 F.R. 20668) and concluded that section 2411.37(b) should be adopted and issued as proposed, namely:

<sup>5/</sup> FLRC Information Announcement of May 3, 1972, "Request for Comments on Proposed Revision of Council Rules," Comparative Analysis, Subpart D, § 2411.32.

(b) The Council shall issue its decision sustaining, modifying, setting aside in whole or in part, or remanding the award.

Thus, it is clear that the Council then concluded, and we agree, that the enforcement of arbitration awards was not a role contemplated for the Council in carrying out its function of considering "exceptions to arbitration awards" under section 4(c)(3) of the Order and as amplified in the Study Committee Report which led to the issuance of the Order (quoted above). Instead, the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order.

Significantly in this regard, where disputes arise concerning the alleged failure of a party to abide by an arbitration award, such disputes may involve factual questions which must be resolved in order to determine whether or not an award has been implemented. Such disputed issues of fact, frequently entailing credibility determinations, are best resolved through a hearing as provided under the unfair labor practice procedures of the Assistant Secretary. For this reason complaints concerning the alleged failure of a party to abide by an arbitration award, where that party has not filed with the Council a petition for review of the award under the Council's rules of procedure, can and should be resolved by the Assistant Secretary under his authority in section 6(a)(4)<sup>6/</sup> to decide the unfair labor practice complaints specified in section 19 of the Order. The Council is of the opinion that these procedures, as reflected in the rules, are consistent with and implementive of the language and purposes of the Order.

Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. The Council recognizes that this method for seeking enforcement of arbitration awards may require the initiation of separate

---

<sup>6/</sup> Section 6(a)(4) of the Order provides, in relevant part:

(a) The Assistant Secretary shall—

(4) decide unfair labor practice complaints . . . .

proceedings under the Order. Therefore, the Council believes it would be appropriate for the Assistant Secretary to expedite the processing of unfair labor practice cases which pertain to the enforcement of arbitration awards. Furthermore, the Council itself will expedite the processing of any appeals which it might receive from decisions of the Assistant Secretary in such cases.

## 2. Defenses to Unfair Labor Practice Complaints Alleging Refusal to Comply with Arbitration Awards.

We turn next to the question of whether, if the Assistant Secretary has the authority to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter? As we have already determined, the Assistant Secretary does have the authority under sections 6(a)(4) and 19 of the Order, and under the circumstances described above, to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. As to whether a party may rely upon a defense that it cannot comply with an arbitration award until it may be assured of the legality of the award (e.g., until it receives appropriate authorization from the Comptroller General), such a defense may not lie to the unfair labor practice proceeding. In this connection, the party has ample opportunity to raise such questions concerning the legality of the award in exceptions filed with the Council. A party's refusal to comply with an arbitration award issued under a negotiated grievance procedure where the party has failed to file exceptions with the Council is a failure to comply with its obligations under the Order and may be deemed an unfair labor practice. And such a party may not relieve himself of such obligations under the Order by requesting an opinion from another agency such as the United States General Accounting Office. Hence, such action is not a defense to an unfair labor practice charged for failure to implement an arbitration award issued under the negotiated grievance procedure in an agreement, such as that in this case.<sup>7/</sup>

7/ We recognize that disbursing officers and agency heads have a statutory right under 31 U.S.C. § 74 to seek rulings from the Comptroller General on questions involving payments to be made by or under them. We believe the view taken herein regarding the respective jurisdictions of the General Accounting Office and the Council to be consistent with the position taken by the Comptroller General in his recent decision in B-180010, October 31, 1974, 54 Comp. Gen. 312, wherein he stated in pertinent part:

[S]ection 13(b) of Executive Order No. 11491 provides that either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal Labor Relations Council. . . .

(Continued)

However, the Assistant Secretary, in fashioning a remedial order in unfair labor practice cases, may not require a party to engage in an illegal action. In this connection, the Assistant Secretary's remedial order must "effectuate the purposes of the Order."<sup>8/</sup> Obviously, it would be inconsistent with such purposes to require a party to violate applicable law, appropriate regulation or the Order.<sup>9/</sup> Thus, where the Assistant Secretary finds that an agency has committed an unfair labor practice under Executive Order 11491, as amended, by its failure to abide by an arbitration award to which no exceptions were filed with the Council, the Assistant Secretary may not, as part of his remedial order, direct the agency to comply with an award which the Comptroller General has determined, under 31 U.S.C. § 74, to call for an improper payment and, hence, to be contrary to law.

---

(Continued)

When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involved matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award.

While the decision herein recognizes the obligation of agencies under the Order to file exceptions to arbitration awards with the Council where agencies have questions as to the legality of such awards, at the same time it does not prevent agencies from exercising their statutory rights to seek rulings directly from the Comptroller General. However, the fact that an agency has sought a ruling directly from the Comptroller General does not relieve the agency of its obligations under the Order and, hence, is not a defense to an unfair labor practice complaint.

8/ Section 6(b) of the Order states:

In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

9/ In this regard, it should be noted that section 2411.37(a) of the Council's rules provides, in pertinent part, that "[a]n award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order . . . ." Thus, for example, if the Council finds that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council will modify or set aside that award.

In the present case, subsequent to the referral of the case to the Council by the Assistant Secretary, the Comptroller General has issued an advance decision in response to the agency's questions regarding the arbitration award. The Comptroller General concluded that the action to deduct the \$80.33 for the erroneous payments to the union was correct, stating that "no authority exists to pay an additional amount, notwithstanding the arbitration award.<sup>10/</sup> Therefore, in this particular case, should the Assistant Secretary find that the agency did commit an unfair labor practice in failing to abide by an award to which no exceptions were filed with the Council, he may not, as a part of his remedial order, direct the agency to comply with the arbitration award.

In summary, in an unfair labor practice complaint case, where it is alleged that the respondent has failed to comply with an arbitration award issued under a negotiated grievance procedure and the respondent has failed to file with the Council a petition for review of the award under the Council's rules of procedure, neither a defense that the award violates applicable law, appropriate regulation or the Order, nor a defense that the respondent has referred the question of the legality of the award or its implementation to another agency, including the General Accounting Office, is dispositive of the unfair labor practice complaint. While the Assistant Secretary, after appropriate consideration, which may include referral to proper authorities for legal interpretations, may ultimately conclude that the arbitrator's award is contrary to applicable law, appropriate regulation or the Order, the Assistant Secretary may nevertheless find that the respondent has committed an unfair labor practice by failure to meet its obligations under the Order. Should the Assistant Secretary so find that an unfair labor practice has been committed, he may not include in his remedy a requirement that the complainant comply with an award that is contrary to applicable law, appropriate regulation or the Order.

#### Conclusion

Therefore, in response to the Assistant Secretary's questions:

(1) The Assistant Secretary has the authority under section 6(a)(4) and (b) of the Order to find that a party has committed an unfair labor practice by its failure to comply with an arbitration award under a negotiated grievance procedure to which no exceptions were filed with the Council (just as he may in a case in which a party fails to comply with an award after exceptions were filed with the Council and the Council has either rejected the appeal or issued a decision upholding the award.)

(2) In an unfair labor practice complaint case alleging refusal to comply with an arbitration award, a defense that a party cannot comply with the award until it receives authorization from the Comptroller General to make payment is not dispositive of the unfair labor practice complaint. However,

---

<sup>10/</sup> Decision of the Comptroller General of the United States, B-180095, October 1, 1974.



in fashioning a remedy in such cases, the Assistant Secretary may not require a party to comply with an award that violates applicable law, appropriate regulation or the Order. While the Assistant Secretary, after appropriate consideration, which may include referral to proper authorities for legal interpretations, may ultimately conclude that the arbitrator's award is contrary to applicable law, appropriate regulation or the Order, the Assistant Secretary may nevertheless find that the respondent has committed an unfair labor practice by failure to meet its obligations under the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: March 20, 1975

NFFE Local 1655 and Illinois Army National Guard. The agency determined that the union's proposal was nonnegotiable under published agency regulations. The union appealed to the Council, in substance disputing the agency's interpretation of the subject regulations.

Council action (April 2, 1975). 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

April 2, 1975

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

Re: NFFE Local 1655 and Illinois Army  
National Guard, FLRC No. 74A-101

Dear Mr. Tilton:

Reference is made to your appeal to the Council for review of a negotiability determination by the National Guard Bureau in the above-entitled case.

The Council has carefully considered your appeal, and the statement of position submitted 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, incorporated by reference in section 2411.22 of the Council's rules, 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.

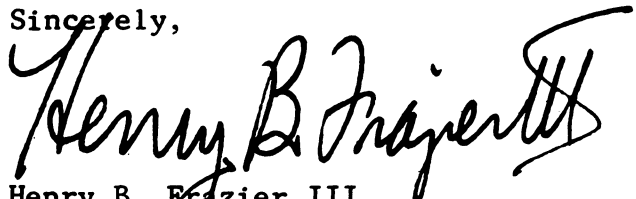
The National Guard Bureau determined in the present case that your organization's proposals are not negotiable because they contravene published agency regulations, principally Technician Personnel Manual 200(213.2), Subchapter 2-4, "Wearing of the Uniforms," and Technician Personnel Manual 600(610.1), Subchapter 1-4b, "Establishment of Work Schedules." In your appeal you dispute the propriety of that determination based on your contention that the agency has erred in the interpretation of the cited regulations.

However, since the agency did not determine that your proposals would violate applicable law, outside regulation, or the Order, section 11(c)(4)(i) of the Order is clearly inapplicable to your appeal. Likewise, you do not assert, nor can it be inferred from your appeal, that the agency's regulations, as interpreted by the agency head, violate any applicable law, outside regulation, or the Order. Hence, your appeal is not reviewable under the provisions of section 11(c)(4)(ii).

Accordingly, since your appeal fails to meet the conditions for review set forth in section 11(c)(4)(i) or (ii) of the Order, in accordance with section 2411.22 of the Council's rules, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: W. A. Robertson  
NGB-TNL-L

National Science Foundation, Assistant Secretary Case No. 22-3870 (RO). The agency appealed to the Council from the Assistant Secretary's decision on challenged ballots. However, no final disposition of the entire representation case had been rendered by the Assistant Secretary.

Council action (April 4, 1975). The Council, pursuant to section 2411.41 of its rules (5 CFR 2411.41), denied review of the agency's interlocutory appeal, without prejudice to the renewal by the agency 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

April 4, 1975

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

Re: National Science Foundation, Assistant Secretary  
Case No. 22-3870 (RO), FLRC No. 75A-37

Dear Mr. Grotke:

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

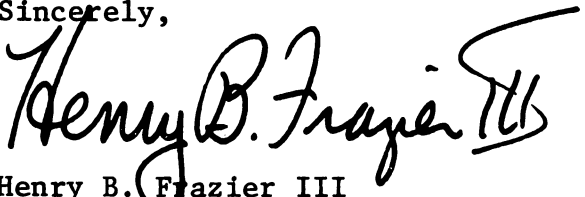
In his Decision on Challenged Ballots, the Assistant Secretary overruled challenges to certain ballots and directed that such ballots be opened and counted, and that the Assistant Regional Director serve a Revised Tally of Ballots on the parties and take such additional action as required by the Regulations of the Assistant Secretary. However, no final disposition in the case has been rendered.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of 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 the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

J. P. Gannon  
AFGE

R. V. Seidel  
AFGE

Defense Mapping Agency Topographic Center, Providence Office, Rhode Island, Assistant Secretary Case No. 31-7566 (AP). This appeal arose from a decision by the Assistant Secretary who, upon the filing of an Application for Decision on Grievability by the agency, ruled that the matters in dispute should be resolved through the negotiated grievance procedure. The Council accepted the agency's petition for review of this decision on the ground that a major policy issue is present, namely: Whether the standard used by the Assistant Secretary for determining whether the grievance was subject to the negotiated grievance procedure in this case was proper under section 13(d) of the Order (Report No. 60).

Council action (April 10, 1975). The Council held, based on its decision in the Crane Naval Ammunition Depot case, FLRC No. 74A-19, Report No. 63, that the Assistant Secretary had not made the necessary determinations and had not used the proper standard for determining whether the grievance in this case was subject to the negotiated grievance procedure. Accordingly, pursuant to section 2411.17 of the Council's rules (5 CFR 2411.17), the Council set aside the Assistant Secretary's decision and remanded the case to the Assistant Secretary for appropriate action consistent with the Council's decision.

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

Defense Mapping Agency Topographic  
Center, Providence Office, Rhode Island

and

American Federation of Government  
Employees, AFL-CIO, Local 1884

Assistant Secretary  
Case No. 31-7566 (AP)  
FLRC No. 74A-44

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from the Assistant Secretary's decision upholding the Assistant Regional Director's finding, upon the filing of an Application for Decision on Grievability by the Defense Mapping Agency Topographic Center, Providence Office (agency), that the matters in dispute should be resolved through the negotiated grievance procedure.

The underlying circumstances of the case, briefly stated, are as follows: The agency posted a vacancy announcement for a new position entitled Security Specialist (General) GS-11, which position was subsequently filled. Local 1884, American Federation of Government Employees, AFL-CIO (AFGE) filed a grievance "over application of higher authority regulations"<sup>1/</sup> in filling the position alleging that the agency had committed "Merit Promotion Program violations, regulatory violations and procedural violations, specifically, violations of Qualification Standards, CSC handbook X118 and FPM 335, Promotion and Internal Placement and agency regulations." AFGE requested processing of the grievance in accordance with the negotiated grievance procedure set forth in Article XXIV of the agreement contending that the position was within the bargaining unit and hence, subject to the article

1/ Article XXIV, Section 12 of the negotiated agreement provides:

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. However, the above does not preclude grievances over the application of higher authority regulations.



entitled "Promotion" (Article XXI) of the agreement.<sup>2/</sup> The agency denied that the grievance procedure was applicable because the higher authority regulations cited by AFGE had not been incorporated, referenced or cited in the negotiated agreement, as required by Article XXIV, Section 12. Subsequently, in accordance with Part 205 of the Assistant Secretary's regulations, the agency filed an Application for Decision on Grievability.

On review of the Assistant Regional Director's Report and Findings on Grievability, the Assistant Secretary found that the subject agreement "does not clearly exclude the position of Security Specialist (General) from the bargaining unit, and hence . . . the filling of this position arguably is subject to the provisions of Article XXI of the agreement." The Assistant Secretary concluded that "the issue as to whether questions related to the procedure in filling of the position of Security Specialist (General) are subject to the terms of Article XXI of the agreement should be resolved through the negotiated grievance-arbitration procedure."

The agency appealed the decision to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues and AFGE filed an opposition to the appeal. The Council accepted the agency's petition for review concluding that, under section 2411.12 of its rules of procedure (5 CFR 2411.12), a major policy issue is present, namely: Whether the standard used by the Assistant Secretary for determining whether the grievance was subject to the negotiated grievance procedure in this case was proper under section 13(d) of the Order. The Council also determined that the agency's request for a stay met the criteria for granting such a request as set forth in section 2411.47(e) of its rules (5 CFR 2411.47(e)), and granted the request. The agency and AFGE filed briefs with the Council as provided in section 2411.16 of the Council's rules (5 CFR 2411.16).

#### Opinion

The Council recently considered the above major policy issue in Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19 (February 7, 1975), Report No. 63, wherein it concluded:

. . . in any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved.

---

<sup>2/</sup> Article XXI concerns "[p]romotions up to and including GS-12 positions in the Cartographic Field which are included in the Unit. . . ."

In applying these general principles to the case before us, we find that the Assistant Secretary has not made the necessary determinations and has not used the proper standard for determining whether the grievance in this case was subject to the negotiated grievance procedure. The Assistant Secretary made no determination as to whether the grievance was on a matter subject to the negotiated grievance procedure. Instead, he ruled that this question "should be resolved through the negotiated grievance-arbitration procedure." As we previously indicated in the Crane decision cited above, where such a "grievability" or "arbitrability" dispute is referred to the Assistant Secretary, either by operation of the Order or by voluntary agreement of the parties, he must resolve that dispute; he may not pass it on to an arbitrator for resolution. Furthermore, although the question of the applicability and effect of Article XXIV, Section 12 of the negotiated agreement on the grievability dispute was submitted to the Assistant Secretary for resolution, there is no indication that he considered it or made any findings in this regard. This is especially significant since a determination as to whether Article XXIV, Section 12 makes grievances over the application of higher authority regulations subject to the negotiated grievance procedure, without further incorporation or reference in the agreement, is essential to the disposition of the grievability dispute.

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 decision that the issue as to whether questions related to the procedure in filling of the position are subject to the terms of Article XXI of the agreement should be resolved through the negotiated grievance-arbitration procedure.

Pursuant to section 2411.17(c) of the Council's rules of procedure, we hereby set aside the decision of the Assistant Secretary and remand the case to him for appropriate action consistent with our decision.

By the Council.

  
Henry B. Brazier III  
Executive Director

Issued: April 10, 1975

American Federation of Government Employees Local 987, A/SLMR No. 420. The Assistant Secretary dismissed the unfair labor practice complaint filed by the individual complainant (Lewis M. Scaggs), which alleged violations of section 19(b)(1) and (3) of the Order by the union. The complainant appealed to the Council, contending in effect that the Assistant Secretary's decision appears arbitrary and capricious and presents major policy issues.

Council action (April 10, 1975). The Council concluded that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue. Accordingly, the Council denied the complainant's petition for review, since it failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

April 10, 1975

Mr. Lewis M. Scaggs  
P.O. Box 205  
Warner Robins, Georgia 31093

Re: American Federation of Government  
Employees Local 987, A/SLMR No. 420,  
FLRC No. 74A-60

Dear Mr. Scaggs:

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

The Assistant Secretary dismissed the complaint, filed by an employee who was a member of American Federation of Government Employees Local 987 ("the union"). According to the Assistant Secretary, the complaint alleged that the union had violated section 19(b)(1) and (3) of the Order when agents of the union, who were likewise employees, confronted the complainant on two occasions and asked him to cease distributing dues checkoff revocation forms and when one agent threatened to "blackball" him if he left the union and later attempted to rejoin. The complainant had executed a form which served to revoke his voluntary dues checkoff and passed out copies of the form to employees in the unit during duty hours and at their worksites.

The Assistant Secretary concluded that, in the particular facts of the case, the union's conduct was not violative of section 19(b)(1) of the Order. The Assistant Secretary ruled, in effect, that the union's requests to the employee to discontinue distribution of the forms were in furtherance of its proper interests and consistent with its rights and did not interfere with, restrain, or coerce the employee in the exercise of his rights under the Order. Moreover, the Assistant Secretary found that the statement concerning an intent to "blackball" Norris in the future if he attempted to rejoin the union was not violative of 19(b)(1) under the circumstances of the case. In this regard, the Assistant Secretary noted that the statement was made during the height of a heated confrontation, was made in only one instance by one of the three agents of the union, entailed no job-related threat or threat of bodily injury and, in effect, was a statement by one individual member concerning his intentions if Norris in the future sought to reenter the union. The Assistant Secretary further found that the union had not violated section 19(b)(3) of the Order because there was insufficient evidence to establish that the actions of the union's agents were for the purpose of hindering or impeding Norris' work performance.

In your petition for review you assert, in essence, that the decision of the Assistant Secretary is arbitrary and capricious in that it is not supported by the findings of fact. You also assert, in substance, that the decision presents major policy issues in that it is inconsistent with the provisions and intent of the Order, principally because section 20 of the Order does not proscribe the distribution of dues checkoff revocation forms by employees during duty hours; and because of the right of employees under section 1(a) to distribute union dues checkoff revocation forms, which right is protected from interference by a labor organization under section 19(b)(1) of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; his decision does not appear arbitrary and capricious nor does it present a major policy issue.

With regard to your contentions concerning matters relied upon by the Assistant Secretary in his determination, it does not appear that the Assistant Secretary acted without reasonable justification in his decision.

As to the alleged major policy issue concerning section 20, the Administrative Law Judge found that the complainant's action was proscribed by that section which provides, in pertinent part, "[s]olicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned." While the Administrative Law Judge relied on this provision in dismissing the complaint against the union, the Assistant Secretary did not rely or even pass upon this finding in dismissing the complaint; hence, no major policy issue is presented by the Assistant Secretary's decision as to the applicability of section 20 herein. To avoid any misunderstanding in this regard, we do not, in so ruling, find that the conduct of complainant in distributing dues checkoff revocation forms during duty hours or the union's conduct in opposing such activity during duty hours was in any way consistent with the restrictions imposed by section 20. Rather, we simply hold that the Assistant Secretary's decision does not present a major policy issue with regard to section 20 in the present case.

As to the alleged major policy issue regarding section 1(a) of the Order, that provision guarantees to employees "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." The Assistant Secretary implicitly concluded that the complainant, in distributing dues checkoff revocation forms, was engaging in a right protected by section 1(a) of the Order but that the union's conduct in this case did not amount to an interference with that right and consequently did not violate section 19(b)(1) of the Order. While you contend that the requests of

the union agents to cease such distribution alone constituted a violation of that right under section 1(a), nothing in the Assistant Secretary's decision in this regard presents a major policy issue. For, as indicated by the Assistant Secretary, the Order recognizes the right of a labor organization to protect itself from those acts of its members which threaten its continued existence,<sup>1/</sup> and the union's efforts here were consistent with that right.

While you further argue that the "blackball" statement violated section 19(b)(1), the Assistant Secretary, as already mentioned, found that it was not unlawful under the circumstances of this case, citing its isolated nature, the heated nature of the discussion during which it was made, the absence of a job-related threat or threat of bodily injury and the fact that it was, in effect, a statement of intention by one individual member of the union should the complainant resign from the union and later seek to rejoin. The Assistant Secretary's conclusion in this regard does not present a major policy issue warranting Council review in the circumstances presented.<sup>2/</sup>

---

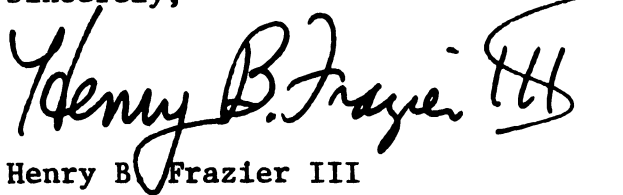
1/ As noted by the Assistant Secretary, a labor organization, pursuant to section 19(c) of the Order, may protect itself from those acts of its members which threaten its continued existence by subjecting those members to discipline, including, in appropriate cases, expulsion, if such discipline is meted out in accordance with procedures under the labor organization's constitution or by-laws which conform to the requirements of the Order.

2/ Subsequent to the Assistant Secretary's decision in the present case, the Council held in another case that a denial of reinstatement to membership of an employee who had voluntarily resigned from the union is a denial of "membership" within the terms of section 19(c) and, therefore, any denial of reinstatement must be based on either failure to meet certain occupational standards, or a failure to tender fees and dues, in order to be sanctioned under the Order, thereby sustaining the Assistant Secretary's decision in that case. American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas), and American Federation of Government Employees, Washington, D.C., A/SLMR No. 294, FLRC No. 73A-43 (October 25, 1974), Report No. 59. Clearly, therefore, improper denial of reinstatement by a labor organization or a threat by a labor organization improperly to deny reinstatement to an employee (even if unaccompanied by any threats related to his job or threats of bodily injury) would be contrary to the Order. In the present case, as noted above, the Assistant Secretary found that the "blackball" threat, in effect, was a statement by one individual member concerning his intentions if the employee in the future sought to reenter the union and, hence, by implication, was not a threat by a labor organization.

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

By 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 flourish at the end.

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

E. Maddox  
AFGE Local 987

J. R. Rosa  
AFGE

Keesler Technical Training Center, Keesler Air Force Base, Mississippi, Assistant Secretary Case No. 41-3673 (CA). The Assistant Secretary denied the request for review of the Assistant Regional Director's dismissal of the unfair labor practice complaint filed by the union (National Federation of Federal Employees). The union appealed to the Council, contending essentially that the decision of the Assistant Secretary presents a major policy issue.

Council action (May 6, 1975). The Council held that the Assistant Secretary's decision does not raise a major policy issue warranting review. Further, the Council ruled that the union did not allege, nor does it otherwise appear, that the Assistant Secretary's decision was in any manner arbitrary and capricious. Accordingly, the Council denied the union's petition, since it failed to meet the requirements for review as provided in section 2411.12 of the Council's rules (5 CFR 2411.12).





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 6, 1975

Ms. Lisa Renee Strax  
Staff Attorney, National  
Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Keesler Technical Training Center, Keesler Air  
Force Base, Mississippi, Assistant Secretary  
Case No. 41-3673 (CA), FLRC No. 74A-84

Dear Ms. Strax:

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

The Assistant Secretary denied your request for review of the Assistant Regional Director's dismissal of your unfair labor practice complaint alleging violations of section 19(a) of the Order. In doing so, the Assistant Secretary found that the Commanding Officer of the activity had notified the union in a meeting on February 20, 1974, of a change which was to be made in local parking policy required by the government-wide energy conservation policy which had been published in the Federal Register and promulgated by the General Services Administration. The Commanding Officer subsequently issued an activity-wide memorandum on February 26, 1974, which provided, in essence, that this GSA policy would be implemented on March 7, 1974. The Assistant Secretary found that despite these notifications the union failed to ask the activity to meet and confer on either the impact of the change on employees in the unit which you represent or on the procedures for implementing the new policy. The Assistant Secretary concluded that the activity was therefore under no obligation to meet and confer on these matters.

In your appeal, you contend, essentially, that the decision of the Assistant Secretary presents a major policy issue concerning the meaning of the term "consultation" as used throughout the Order and related statutes.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue. As was stated in the Report and Recommendations of the Federal

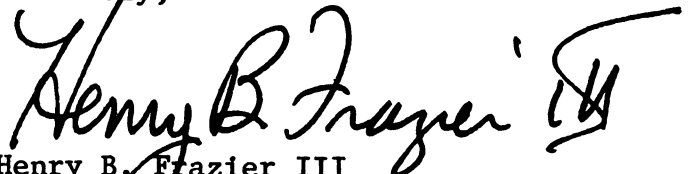
[W]e believe that the confusion which has developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate" with respect to relationships between agencies and labor organizations in the Order should be eliminated. The parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way. In the Federal labor-management relations program, "consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under section 9 of the Order. The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

The Assistant Secretary, in finding that the activity was under no obligation to meet and confer under the circumstances of this case, addressed the agency's obligation under the Order in his decision (which obligation is described in the above-quoted paragraph from the Council's subsequently issued Report). Consequently, the decision does not raise a major policy issue warranting review. Further, you do not allege, nor does it otherwise appear, that the Assistant Secretary's decision was in any manner arbitrary and capricious.

Since the Assistant Secretary's decision does not present a major policy issue, nor does it appear arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is denied.

By 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 extending to the right.

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

G. O. Chastain  
Air Force

Iowa State Agricultural Stabilization and Conservation Service Office, Department of Agriculture, A/SLMR No. 453. The Assistant Secretary dismissed a 19(a)(1) and (6) unfair labor practice complaint filed by the union (National Federation of Federal Employees) against the Iowa State Agricultural Stabilization and Conservation Service Office. The union appealed to the Council, contending that the decision of the Assistant Secretary is arbitrary and capricious and presents a major policy issue.

Council action (May 6, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue. Therefore, since the union's petition failed to meet the requirements for review as set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the union's appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 6, 1975

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

Re: Iowa State Agricultural Stabilization and  
Conservation Service Office, Department of  
Agriculture, A/SLMR No. 453, FLRC No. 74A-86

Dear Mr. Sussman:

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

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge, dismissed a 19(a)(1) and (6) complaint filed against the Iowa State Agricultural Stabilization and Conservation Service Office. The complaint arose when the Agricultural Stabilization and Conservation Service (ASCS), due to a presidential impoundment of funds in a program which it administered, decided to effectuate a reduction in force in its state offices, including the Iowa State Office. The implementation of this decision was by subordinate organizational elements within the Agricultural Stabilization and Conservation Service: the Deputy Administrator for State and County Operations (DASCO) and the Management Field Office (MFO), an element under the Deputy Administrator for Management. DASCO decided which positions were to be abolished in, among others, the Iowa State Office, and the MFO decided which employees were as a consequence to be separated or transferred. The Iowa State Office had no authority to take any of the personnel actions necessary to implement the reduction in force. Throughout this process, there was no communication or consultation with the Iowa State Office by DASCO or MFO. When, at a meeting in Washington, the Executive Director of the Iowa State Office was informed of the reduction in force, and given reduction in force notices for the personnel in his office affected thereby, he immediately ordered his office to notify the union. The union subsequently made a number of requests of the Executive Director for information about the reduction in force, and he provided them with that information to the extent that it was available to him. Also, union officials and national staff met with the Executive Director and MFO officials to discuss the reduction in force, and though the latter were authorized to rescind the personnel actions, the union proposed no alternative implementation procedures which would make that possible.

The Assistant Secretary dismissed the complaint, adopting the finding that neither before nor after the notices of a reduction in force were delivered to its Executive Director did the Iowa State Office fail to consult with the union to the extent of its authority so to do. The Assistant Secretary also adopted the finding of the Administrative Law Judge that it was not necessary to reach any conclusion or make any recommendation as to whether DASCO or MFO had any obligation or violated any obligation it had to the union, since neither one was named in the complaint as a party to the action. Further, the Assistant Secretary adopted the finding of the Administrative Law Judge, distinguishing Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, that DASCO and MFO were not the agents or representatives of the Iowa State Office in this case, since the decision to have the reduction in force and the decision on how it should be effectuated were not decisions of the activity, which was not even consulted as the decisions were being made.

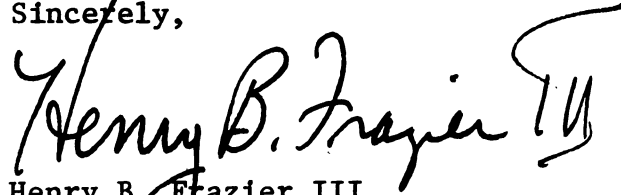
In your petition for review you contend that the decision of the Assistant Secretary is arbitrary and capricious in that it dismisses the complaint where there was a sufficient showing that the agency and the activity failed to consult with the recognized bargaining agent and the activity seeks to avoid the jurisdiction of the Order by transferring its duty to act to the agency. You also contend that the decision of the Assistant Secretary presents, as a major policy issue, the following question: "Can an agency answer the complaint, file motions on behalf of the activity, and participate in discovery procedures with the Labor-Management Services Administration, have its representatives present at the hearing and avoid the jurisdiction of the Order?"

In the Council's opinion, your petition for review does not meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. That is, based upon the contentions described above, the Assistant Secretary's decision does not appear arbitrary and capricious and does not present major policy issues. With regard to your contention that the decision of the Assistant Secretary appears arbitrary and capricious, it is the opinion of the Council that nothing in your appeal indicates that any persuasive evidence was adduced which was not properly considered by the Assistant Secretary. Nor, in the Council's view, was the decision of the Assistant Secretary without reasonable justification in the circumstances of this case. With regard to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting particularly that the complaint named only the Iowa State Office, the decision of the Assistant Secretary to dismiss your complaint against the Iowa State Office of the Agricultural Stabilization and Conservation Service does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

H. J. Gormley  
ASCS

Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-568. The Assistant Secretary affirmed the Assistant Regional Director's dismissal of an unfair labor practice complaint filed by the union (Hawaii Federal Employees Metal Trades Council), finding that insufficient evidence had been presented to establish a reasonable basis for that complaint. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (May 6, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not raise a major policy issue warranting review. Accordingly, the Council denied the union's petition for review, since it failed to meet the requirements for review as set forth in section 2411.12 of the Council's rules (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 6, 1975

Mr. Jack L. Copess  
Secretary-Treasurer, Hawaii Federal  
Employees Metal Trades Council  
925 Bethel Street, Room 210  
Honolulu, Hawaii 96813

Re: Department of the Navy, Pearl Harbor  
Naval Shipyard, Assistant Secretary Case  
No. 73-568, FLRC No. 74A-87

Dear Mr. Copess:

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

The Assistant Secretary affirmed the Assistant Regional Director's dismissal of your complaint, finding that insufficient evidence had been presented to establish a reasonable basis for that complaint. According to the findings of the Assistant Regional Director, the chief union steward of a shop located at the Pearl Harbor Naval Shipyard, following a change ordered by the shop superintendent in the time allowed employees for the storage of tools, sought an immediate conference with the superintendent, but was informed that a meeting could not be held until the next morning. Moreover, the Assistant Regional Director specifically found that the union had made no showing, e.g., by citing reasons of health or safety, as to how postponement of the meeting to the following morning would accrue to its disadvantage. The Assistant Secretary agreed with the Assistant Regional Director that the failure of the shop superintendent to meet immediately with the chief steward, instead of the following morning, "did not, standing alone, constitute a failure to meet and confer at a reasonable time . . . as required by section 11(a) of the Order."

In your petition for review, you contend that the decision of the Assistant Secretary is arbitrary and capricious in that it disregarded principally the "urgency of the situation" which existed at the time the chief steward made his request to meet with the shop superintendent and the "disastrous subsequent events" which are largely traceable to the failure of the shop superintendent to grant that request. You also contend that the decision of the Assistant Secretary presents a major policy issue concerning the nature of the right of a certified bargaining representative to consultation in "extraordinary situations."

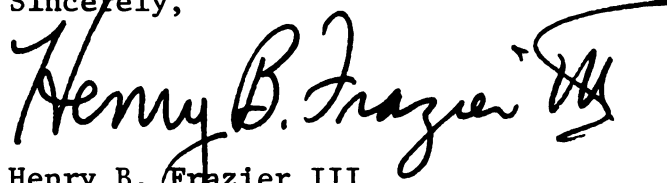


In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review. That is, based upon the contentions described above, the Assistant Secretary's decision does not appear arbitrary and capricious and does not present major policy issues. With regard to your contention that the decision of the Assistant Secretary appears arbitrary and capricious, the Council finds that nothing in your appeal indicates that substantial factual issues exist which would require a hearing. Thus, though in your petition for review you refer to the "urgency of the situation" and the "disastrous" events which resulted therefrom, there is no indication in that petition that any evidence in support of these factual allegations was presented to the Assistant Secretary, and the Assistant Regional Director specifically found that no showing had been made as to how the postponement of the meeting would have accrued to the union's disadvantage. Moreover, it does not appear that the findings and decision of the Assistant Secretary were without reasonable justification in the circumstances of this case. With regard to the alleged major policy issue, the Council is of the opinion that in the circumstances of this case, noting particularly that there is nothing to substantiate the allegation of an "extraordinary situation" in this case, the Assistant Secretary's determination that a reasonable basis for the complaint does not exist does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

T. Haycock  
Navy

Office of Economic Opportunity, Region IX, San Francisco, California and American Federation of Government Employees, Local 3009, Assistant Secretary Case No. 70-4236 (AP). The Assistant Secretary dismissed the agency's application for decision on grievability and arbitrability because the parties (who had proceeded to arbitration) had entered into a settlement agreement which disposed of the subject grievance, and the issue raised in the case was therefore moot. The agency appealed to the Council, contending that the Assistant Secretary erred in failing to resolve various procedural and substantive questions raised in its request for review before him, and seeking that the Council either remand the case to the Assistant Secretary or itself resolve these questions.

Council action (May 6, 1975). The Council held that the Assistant Secretary's decision dismissing the case by reason of the settlement agreement disposing of the subject grievance plainly does not present a major policy issue or appear in any manner arbitrary and capricious. Therefore, the Council ruled that the agency's appeal failed to meet the requirements for review as set forth in section 2411.12 of the Council's rules (5 CFR 2411.12) and no basis for remand was provided. The Council further denied the agency's request that the Council resolve the questions raised before the Assistant Secretary in this case, since such an advisory opinion is precluded under section 2411.52 of the Council's rules (5 CFR 2411.52). Accordingly, without passing upon the questions raised by the agency before the Assistant Secretary, the Council denied the agency's appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 6, 1975

Mr. Randolph G. Johnson  
Acting Director of Personnel  
Office of Economic Opportunity  
Executive Office of the President  
Washington, D.C. 20506

Re: Office of Economic Opportunity, Region IX,  
San Francisco, California and American  
Federation of Government Employees, Local 3009,  
Assistant Secretary Case No. 70-4236 (AP),  
FLRC No. 74A-91

Dear Mr. Johnson:

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

The Assistant Regional Director, in his report and findings on your application for decision on grievability and arbitrability, concluded that the subject grievance of the union was arbitrable. You requested the Assistant Secretary to review and reverse that determination. In his decision, the Assistant Secretary found that, after the Assistant Regional Director's determination, the parties (who had proceeded to arbitration) had entered into a settlement agreement which disposed of the subject grievance. He therefore ruled that the issue raised in the case was moot and dismissed your application for decision on grievability and arbitrability.

In your appeal to the Council, you contend that the Assistant Secretary erred in failing to resolve the questions raised in your request for review before him, namely: (1) whether the parties to an agreement can seek to stay arbitration where there is a question of arbitrability; (2) whether the provisions of the Order relating to the scope of arbitration can be waived by either party, particularly as to an arbitration which will treat subject matter for which a statutory appeals system exists; and (3) whether arbitration can be invoked to resolve a grievance encompassing the issue of sex discrimination. You further seek that the Council either remand the case to the Assistant Secretary or itself resolve these questions.

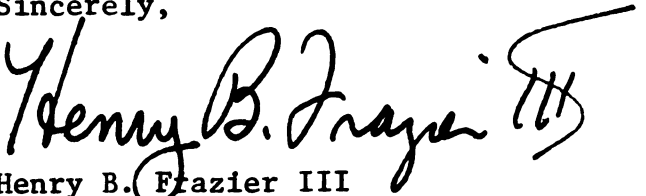
In the Council's opinion, the Assistant Secretary's decision that the instant case be dismissed, by reason of the settlement agreement disposing of the subject grievance, plainly does not present a major policy

issue or appear in any manner arbitrary and capricious. Accordingly, your appeal fails to meet the requirements for review of that decision as set forth in section 2411.12 of the Council's rules of procedure and, hence, no basis for remand is provided. As to your request that the Council in any event resolve the questions which you had raised before the Assistant Secretary, such an advisory opinion is precluded under section 2411.52 of the Council's rules.

Therefore, without passing upon the questions which you had raised before the Assistant Secretary, your appeal to the Council is denied.

By 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 initial "H" and a stylized "B" and "F".

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

C. Diez  
AFGE

Securities and Exchange Commission, Assistant Secretary Case No. 22-5371 (CA). The Assistant Secretary denied the request filed by the individual complainant (Mrs. Rheamarie M. Fox) for reversal of the Acting Assistant Regional Director's dismissal of the complainant's unfair labor practice complaint filed against the agency. The complainant appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

Council action (May 6, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious, nor does it present any major policy issues. Accordingly, the Council denied the complainant's petition for review, since it failed to meet the requirements for review as provided in section 2411.12 of the Council's rules (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 6, 1975

Mrs. Rheamarie M. Fox  
602 A Street, SE.  
Washington, D.C. 20003

Re: Securities and Exchange Commission, Assistant  
Secretary Case No. 22-5371 (CA), FLRC No. 74A-98

Dear Mrs. Fox:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and all materials submitted therewith, in the above-entitled case.

The Assistant Secretary denied your request for reversal of the Acting Assistant Regional Director's dismissal of your unfair labor practice complaint filed against the agency. In doing so, the Assistant Secretary found that (a) evidence indicated that your dues deduction was cancelled subsequent to your expulsion from the union and in accordance with the requirements of the Federal Personnel Manual, and, further, the evidence was insufficient to establish that the Securities and Exchange Commission conspired with AFGE Local 2497 to cause your expulsion; (b) the acts of harassment complained of occurred more than nine months prior to the filing of the complaint and were, therefore, untimely filed; and (c) the acts alleged concerning your job description were not properly part of the complaint, since no charge in this matter had been filed with the agency.

In your appeal, you contend, essentially, that the decision of the Assistant Secretary is arbitrary and capricious because the Assistant Secretary failed to consider evidence and to state in his decision certain material facts necessary to correctly consider the allegations. You also contend that the decision presents major policy issues concerning (a) the alleged "conflict of interest position" of certain Council members and management of the Securities and Exchange Commission, (b) the alleged refusal of the Assistant Secretary to consider taped materials submitted with the complaint, and (c) the maintenance of democratic procedures and fiscal integrity within AFGE Local 2497.

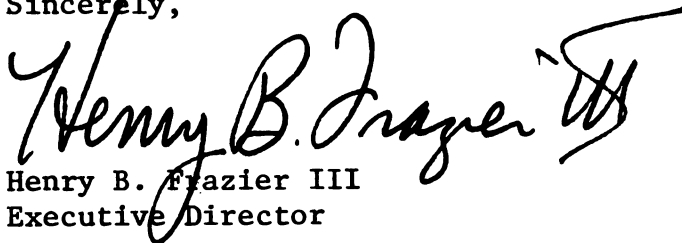
In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules, that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present any major policy issues. With respect to your

contentions that the decision is arbitrary and capricious, in the Council's opinion, nothing in your appeal indicates that any persuasive evidence was adduced which was not properly considered by the Assistant Secretary; your appeal does not demonstrate that substantial factual issues exist requiring a hearing; and the decision of the Assistant Secretary does not appear to be without reasonable justification or in any other manner appear arbitrary and capricious. With respect to the alleged major policy issue concerning the alleged "conflict of interest position" of certain Council members, section 4(a) of Executive Order 11491, as amended, established the Council and its composition. Your appeal provides no basis to support your assertion that a major policy issue is presented by the alleged conflict of interest or with respect to the Council or to the management of the Securities and Exchange Commission. Further, your appeal does not support your contention that a major policy issue warranting review is presented with respect to evidence considered by the Assistant Secretary. As to the alleged major policy issues regarding the maintenance of democratic procedures and fiscal integrity within a local union, the Council is of the opinion, noting particularly that the complaint involved in your proceeding is not against a union but against an agency, that a major policy issue warranting review is not presented by the Assistant Secretary's decision.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

D. J. Romanski  
SEC

E. H. Gilmore

General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333. This appeal arose from a representation decision of the Assistant Secretary, issued before the adoption of E.O. 11838, concerning a representation petition filed by the International Federation of Federal Police seeking a unit of all guards and Federal Protective Officers employed by and assigned to GSA Region 9. The Assistant Secretary decided, among other things, (1) that guards at Las Vegas, Nevada, currently represented by an AFGE local in a mixed guard and nonguard unit (not covered by an agreement), had an option to remain in the mixed unit; and (2) that agreements between the agency and AFGE locals in Phoenix, Arizona and Sacramento, California, alleged by the agency to be invalid under section 13 of the Order, constituted bars to elections in these units. Upon appeal by the agency, the Council determined that the Assistant Secretary's decision presented major policy issues and accepted the case for review (Report No. 53).

Council action (May 9, 1975). As to (1), the Council, by reason of the adoption of E.O. 11838 which eliminated the separate representation policy governing guards, held that the issue here involved was in effect rendered moot and that no major policy issue remained to warrant Council consideration. As to (2), the Council, based on the reasoning in its decision in the Warner-Robins case, FLRC No. 74A-8 (Report No. 65), and without passing on whether the grievance clauses in question met the requirements of the Order, sustained the Assistant Secretary's decision in this case.



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

General Services Administration,  
Region 9, San Francisco, California

and

International Federation of  
Federal Police

A/SLMR No. 333  
FLRC No. 74A-9

and

American Federation of Government  
Employees, AFL-CIO, Locals 2530,  
2424, 2396 and 2163

DECISION ON APPEAL FROM ASSISTANT SECRETARY DECISION

Background of Case

This appeal from a decision and direction of election by the Assistant Secretary stems from a representation petition filed by the International Federation of Federal Police (IFFP) seeking an election in a unit of all guards and Federal Protective Officers (FPO's) employed by and assigned to the General Services Administration, Region 9. The agency agreed that the claimed unit was appropriate. However, four locals of the Intervenor, the American Federation of Government Employees, AFL-CIO (AFGE), which held exclusive recognition for four units within the Region, which units included guards and FPO's,<sup>1/</sup> raised questions pertaining to agreement and recognition bars, as well as the appropriateness of the petitioned-for unit.<sup>2/</sup>

---

<sup>1/</sup> The three units represented by AFGE Locals 2530, 2163, and 2396, respectively, were "mixed" units. The fourth unit, represented by AFGE Local 2424, was an all-guard unit.

<sup>2/</sup> Section 202.3 of the Assistant Secretary's rules reads in pertinent part as follows:

(c) When an agreement covering a claimed unit has been signed by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows:

(Continued)

The Assistant Secretary held, in pertinent part, that the existence of negotiated agreements between the agency and AFGE Locals 2530 and 2163 barred the inclusion of certain guards and FPO's in existing units located in Phoenix, Arizona, and Sacramento, California, in the petitioned-for unit. In so doing, the Assistant Secretary rejected the agency's assertions that the agreements between it and AFGE Locals 2530 and 2163 were defective and, therefore, did not constitute bars to the IFFP's petition. In essence, the agency had alleged that these agreements did not include bilaterally negotiated grievance procedures meeting the requirements of section 13 of the amended Order. However, the Assistant Secretary found that Local 2530's supplemental agreement contained a grievance procedure divided into various steps which, in his view, satisfied the requirements of the Order, and that Local 2163's negotiated agreement contained a grievance procedure which was consistent with the criteria set forth in section 13 of the Order.

With regard to AFGE Locals 2424 and 2396, the Assistant Secretary found that neither had entered into a negotiated agreement with the agency encompassing their respective units, and therefore, that under these circumstances, there was no procedural bar to processing the subject petition with regard to the guards and FPO's represented by these locals in existing units.<sup>3/</sup>

Additionally, with respect to the mixed unit of guards and nonguards located in Las Vegas, Nevada, represented by AFGE Local 2396, the Assistant Secretary found, in accordance with Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, that severance of the guard employees was warranted and that AFGE Local 2396, a nonguard labor organization, would not be placed on the ballot. However, consistent with his rationale in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, the Assistant Secretary determined that if the guard employees in the Las Vegas unit did not choose the IFFP as their exclusive representative, they would be viewed to have indicated their desire to remain in the existing mixed unit of guards and nonguards represented by the AFGE Local 2396. If, on the other hand, the majority of the guard employees in the Las Vegas unit voted for the IFFP, there would be a pooling of the ballots with those voting in the residual Regionwide election. As the result of the election conducted on this basis, the guard employees in the Las Vegas unit represented by AFGE Local 2396 did not choose the IFFP as their exclusive representative and were, thus, permitted to remain in their existing mixed unit.

---

(Continued)

(1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed; or

(2) Not more than ninety (90) days nor less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it was signed; or . . . .

<sup>3/</sup> The Assistant Secretary's findings in this regard are not before us on appeal.

The agency thereupon petitioned the Council for review of those portions of the Assistant Secretary's decision concerning the asserted agreement bars and the self-determination option extended to the guard members of Local 2396, asserting that his ruling on these matters was arbitrary and capricious and presented major policy issues. The Council agreed that major policy issues are presented by the subject decision and accepted the agency's petition for review.<sup>4/</sup>

A decision on the merits was then deferred pending the completion of the Council's general review of labor-management relations in the Federal sector wherein one of the issues to be considered was closely related to an issue raised by the appeal in the instant case.<sup>5/</sup>

### Opinion

The appeal presented the following major policy issues with respect to the interpretation of sections 10 and 13 of the Order.

1. Is the Assistant Secretary's decision, founded upon the rationale expressed in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, which permits guards to elect to remain in units represented by a labor organization which admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards, consistent with the purposes of the Order in situations where their severance from a mixed unit would otherwise result in the formation of an appropriate regionwide all guard unit?
2. What is the responsibility of the Assistant Secretary in a unit determination proceeding where, as here, an agreement is asserted as a bar to an election and a party supporting the claimed unit raises a question as to whether the agreement, or a provision thereof, conforms to the Order?

These issues will be discussed separately below.

First, as to the Assistant Secretary's rule as set out in Rocky Mountain Arsenal, subsequent to the Assistant Secretary's decision, E.O. 11838 was issued (40 F.R. 5743, February 7, 1975) which, upon its effective date, deletes sections 2(d), 10(b)(3) and 10(c) from E.O. 11491, as amended, (thereby eliminating the separate representation policy governing guards). Under these circumstances, as the basis for the Assistant Secretary decisions which deal with the separate status of guards has been

---

<sup>4/</sup> The Council also denied the agency's request that the Assistant Secretary's decision be held in abeyance pending the outcome of their appeal.

<sup>5/</sup> The specific issue in question was included among those to be reviewed by the Council in its Information Announcement of December 18th, 1973. It read as follows: "I.3. What should be the Executive Order policy with respect to guards? (See sections 2(d) and 10(b)(3))."

removed from the Order, the issue described above has been, in effect, mooted. Accordingly, we find that no major policy issue remains warranting Council consideration in this regard.<sup>6/</sup>

With respect to the second issue described above, the agency argued, essentially, and in pertinent part, that its negotiated agreements with AFGE Locals 2530 and 2163 contained certain grievance clauses which were contrary to the provisions of section 13 of the Order, and/or omitted others required by that section. Specifically, the agency asserted that the contracts in question contained the following defects:

Local 2530 - The grievance procedure was contrary to the provisions of section 13(a) of the Order in that it included a broad definition of grievable matters, many of which were not contained in the agreement, and failed to incorporate a provision which would reserve to employees the right to present 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 the opportunity to be present at the adjustment.

Local 2163 - The grievance procedure was contrary to the provisions of section 13(a) of the Order in that it did not contain a provision which permitted employees to present grievances to the agency and have them adjusted as long as the adjustment was not inconsistent with the terms of the agreement, or a provision that provided an opportunity for the exclusive representative to be present at any adjustment of the grievance (only at the request of the employee or employees).

It also failed to preclude an employee from designating any person other than the exclusive representative to represent him in a grievance without the approval of the exclusive representative, contrary to section 13 as clarified by questions 6-9 of the Council's check list of March 22, 1972, concerning that section.

Local 2530 and Local 2163 - The grievance procedure does not restrict the use of the procedure to the consideration of grievances over the interpretation or application of the agreement, which is a violation of section 13.

It argued, in effect, that these alleged defects were sufficient to prevent the contracts from being considered as bars to an election in the units represented by Locals 2530 and 2163.

On March 28, 1975, we issued our decision in Headquarters, Warner-Robins Air Materiel Area, Robins Air Force Base, Georgia, FLRC No. 74A-8, (March 17, 1975), Report No. 65, wherein we considered, among other matters,

6/ Accord, Department of Defense, Army Materiel Command, Tooele Army Depot, Tooele, Utah, FLRC No. 74A-47 (February 13, 1975), Report No. 63.

the responsibility of the Assistant Secretary when, as here, a question is raised in a matter before him as to whether an agreement, or a provision thereof, conforms to the Order.<sup>7/</sup>

There we found, in relevant part, that:

Clearly, the Assistant Secretary cannot give effect to any agreement provision that is contrary to the Order. Hence, where the Assistant Secretary finds a conflict between the language of a particular agreement provision and the Order, the Assistant Secretary must apply the agreement in conformity with the Order. The obverse is also true, i.e., the Assistant Secretary must give effect to a particular agreement provision involved in a matter before him to the extent that it is consistent with the Order, and, of course, with applicable law and regulation. Thus, for example, failure of negotiating parties to negotiate a grievance procedure that conforms in all respects to section 13(a) of the Order, as amended, does not result in the invalidation of the parties' agreement, nor does such failure render unenforceable those provisions of the negotiated grievance procedure which are in conformity with the Order. On the contrary, the conforming provisions must be given effect.

In carrying out these responsibilities, the Assistant Secretary is not required to review every provision of the negotiated agreement in the case before him in order to insure the conformity of the agreement to the Order. However, the Assistant Secretary does have a definite responsibility insofar as a particular agreement provision's conformity to the Order is relevant to the issue before him. Specifically, where a question of an agreement provision's conformity to the Order is raised in a grievability or arbitrability issue before him, the Assistant Secretary must consider the question--and any related arguments--and make a determination concerning its relevance and impact on the issue before him. Where the Assistant Secretary finds that the question is relevant to the grievability or arbitrability issue before him, and, further, that the language of the disputed agreement provision does conflict with the Order, the Assistant Secretary must resolve the grievability or arbitrability issue in a manner consistent with the Order.

---

<sup>7/</sup> In Warner-Robins, wherein a question was raised concerning the Assistant Secretary's responsibility to decide grievability and arbitrability questions submitted to him under section 13(d), the agency contended that the Assistant Secretary was required to regard the parties' pre-E.O. 11616 agreement as extended by their Memorandum of Understanding as invalid since the negotiated grievance procedure of the agreement had not been brought into conformity with section 13(a) of the amended Order, as required by section 13(e). In this connection, the agency argued, among other things, that the negotiated grievance procedure was contrary to section 13(a) in that it allowed for the processing of grievances concerning matters other than the interpretation or application of the agreement. The Assistant Secretary found no indication in the Order that his responsibility in this regard was in any way conditioned upon whether the agreement involved met the criteria of section 13(a) of the Order.

Applying the principles enumerated therein, which are equally applicable to the facts of this case insofar as they relate to the Assistant Secretary's responsibility in giving effect to an agreement,<sup>8/</sup> it is clear that the alleged failure of the parties to negotiate grievance procedures that conformed in certain respects to section 13(a) of the Order as amended would not be sufficient to invalidate the parties' agreements for the purpose of asserting them as bars to an election unless it could be shown that the Assistant Secretary's decision in confirming the existence of the bars would somehow "give effect to" the alleged non-conforming provisions. However, nothing has been presented by the agency, nor is there anything in the record, to show that the conformity of the negotiated grievance procedures herein to section 13 of the Order was relevant to the agreement bar issues which were before the Assistant Secretary.

Accordingly, for the foregoing reasons, and without passing on whether the grievance clauses in question meet the requirements of the Order, we sustain the Assistant Secretary's decision and direction of election in this case pursuant to section 2411.17(b) of the Council's rules of procedure.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: May 9, 1975

---

<sup>8/</sup> The instant decision of the Assistant Secretary was decided under E.O. 11491, as amended by E.O. 11616, and prior to amendment by E.O. 11838. However, we find that the principles established in Warner-Robins and applied herein concerning the Assistant Secretary's responsibilities remain unaffected by these amendments and apply as well today as before E.O. 11838's promulgation.

Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364. This appeal arose from a decision of the Assistant Secretary, dismissing an agency petition for an election in a sectorwide unit consisting of those eligible employees of the activity currently represented by the union (Local Lodge 2266, International Association of Machinists and Aerospace Workers (IAM&AW), AFL-CIO) and those eligible employees placed under the activity's jurisdiction as a result of an agency reorganization. Upon appeal by the agency, the Council determined that the Assistant Secretary's decision presents major policy issues and accepted the case for review (Report No. 54).

Council action (May 9, 1975). The Council held that the Assistant Secretary did not give full and careful consideration to all record evidence concerning each of the three appropriate unit criteria in section 10(b) of the Order; did not affirmatively determine that the existing unit represented by the union, which the Assistant Secretary found still appropriate, will promote effective dealings and efficiency of agency operations; and did not give equal weight to those criteria in his deliberations. Accordingly, the Council set aside the Assistant Secretary's decision as inconsistent with section 10(b) of the Order and remanded the case to him for reconsideration consistent with the Council's decision.

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

Department of Transportation,  
Federal Aviation Administration,  
Southwest Region, Tulsa Airway  
Facilities Sector

and

A/SLMR No. 364  
FLRC No. 74A-28

Local Lodge 2266, International  
Association of Machinists and  
Aerospace Workers (IAM&AW), AFL-CIO

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary dismissing a representation petition filed by the Southwest Region of the Federal Aviation Administration (FAA) concerning the Tulsa Airway Facilities Sector (hereinafter referred to as "Tulsa AFS" or "the activity").

The pertinent facts in the case as found by the Assistant Secretary are as follows: Since 1966, Local Lodge 2266 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as "the union") has represented eligible employees of the FAA Southwest Region's Tulsa AFS headquarters at Tulsa, Oklahoma, and field offices at Bartlesville and Ponca City, Oklahoma. In 1971, the FAA reorganized its Southwest Region, assigning offices located at Fort Smith and Fayetteville, Arkansas, and McAlester, Oklahoma, to the Tulsa AFS. This reorganization resulted in an increase in the number of eligible employees in the enlarged Tulsa AFS from approximately 31 to approximately 45.

The Southwest Region filed an RA petition with the Assistant Secretary<sup>1/</sup> seeking an election in a sectorwide unit consisting of all of the activity's eligible employees, both those currently represented by the union and those placed under the activity's jurisdiction as a result of the reorganization. The union opposed the petition. The Assistant Secretary dismissed the petition, finding that the employees in the existing unit represented by the union continued to share a clear and identifiable community of interest separate from those assigned to the activity as a result of the reorganization.

---

<sup>1/</sup> The Southwest Region also filed a CU petition with the Assistant Secretary concerning the Tulsa AFS which is not at issue before the Council.



The agency appealed to the Council and the Council determined that major policy issues are presented by the subject decision of the Assistant Secretary and accepted the agency petition for review. The agency thereupon filed a brief with the Council. The union did not file a brief in this case.

### Opinion

This case presents two major policy issues for Council resolution, as follows:

1. Whether the Assistant Secretary must affirmatively determine that a particular unit will ensure a clear and identifiable community of interest among the employees concerned, and will promote effective dealings and efficiency of agency operations before that unit can be found to be an appropriate unit for purposes of exclusive recognition under the Order.

2. What is the nature of the Assistant Secretary's responsibility in unit determination proceedings with regard to the development and consideration of evidence concerning the appropriate unit criteria in section 10(b) of the Order?

These issues will be dealt with separately below.

1. Whether the Assistant Secretary must affirmatively determine that a particular unit will ensure a clear and identifiable community of interest among the employees concerned, and will promote effective dealings and efficiency of agency operations before that unit can be found to be an appropriate unit for purposes of exclusive recognition under the Order.

The agency principally contends that the Assistant Secretary failed properly to consider and apply all three of the appropriate unit criteria of section 10(b) of the Order in the instant case. In that regard, the agency argues, among other things, that the language of section 10(b) and the 1969 Study Committee Report and Recommendations make it clear that promotion of effective dealings and efficiency of agency operations are affirmative requirements and that they are intended to have equal status with employee community of interest in unit determinations. For the reasons which follow, the Council finds merit in the agency's contention and related argument and concludes that the decision of the Assistant Secretary is not consistent with the language and intent of section 10(b) of the Order.

The agency's contention and related argument must be examined in the light of the Assistant Secretary's interpretation and application of section 10(b) and Federal labor-management policy and experience with regard to determination of appropriate units for purposes of exclusive recognition.

First, with regard to the Assistant Secretary's interpretation and application of section 10(b), it is evident that the Assistant Secretary did not make affirmative findings in this case that the unit determined to be

appropriate will promote effective dealings and efficiency of agency operations.

As indicated above, the Assistant Secretary found that the employees in the existing unit represented by the union continued to share a clear and identifiable community of interest separate from those assigned to the activity as a result of the Federal Aviation Administration's reorganization of its Southwest Region, and, on that basis, dismissed the agency petition for an election.<sup>2/</sup>

In his decision, the Assistant Secretary determined that: (1) after the reorganization, all of the activity's employees remained in essentially the same physical locations and performed the same job functions as before the reorganization; (2) while all of the activity employees are under the overall direction of the Sector Manager, the immediate supervision of the employees remained the same; and (3) while the employees represented by the union and those added to the activity's jurisdiction as a result of the reorganization have comparable working conditions and training, and perform essentially the same duties, there is little or no interchange between the two groups and they have few job-related contacts. The Assistant Secretary also determined that the unit represented by the union has experienced stable and effective labor-management relations. In this latter regard, the Assistant Secretary, in a footnote, stated:

Noting the established bargaining history with respect to the unit represented by the IAM, the fact, standing alone, that an additional unit or units subsequently may be established to cover those employees added to the Activity's jurisdiction as a result of the reorganization was not considered to require a finding that the unit represented by the IAM necessarily will fail to promote effective dealings and efficiency of agency operations.

In our opinion, this does not constitute an affirmative determination that the unit which the Assistant Secretary ultimately concluded was the appropriate one in this situation will promote effective dealings and efficiency of agency operations. The question remains as to whether section 10(b) of the Order requires such affirmative determinations. Federal labor-management relations policy and experience with regard to determination of appropriate units for purposes of exclusive recognition demonstrate that section 10(b) does so require.

On June 22, 1961, President Kennedy designated a special task force to review and advise him concerning employee-management relations in the executive branch of the Government. In its report to the President, A Policy for Employee-Management Cooperation in the Federal Service, dated November 30, 1961, the Task Force stated, at page 15, with regard to exclusive recognition of appropriate units:

---

<sup>2/</sup> In dismissing the agency's petition, the Assistant Secretary did not make any explicit findings with regard to the appropriateness of the unit sought by the agency vis-a-vis the criteria in section 10(b) of the Order.

The Task Force accepts the view that in appropriate circumstances exclusive recognition is wholly justifiable and in such circumstances will permit the development of stable and meaningful employee-management relations based upon bilateral agreements. . . . [T]he general Federal practice should be to provide for exclusive recognition in an appropriate unit wherever a majority of employees desire it.

An appropriate unit is a grouping of employees for purposes of representation in collective dealings with management. The kind of grouping on which it is based should permit effective and rational dealing. The essential quality of such a unit is that its members should have a clear and identifiable community of interest, so that it becomes possible for them to deal collectively as a single group . . . .

The new program for employee-management cooperation in the Federal service recommended by the Task Force was established by Executive Order 10988, issued on January 17, 1962. The Preamble of the new Executive order set forth one of its underlying purposes as follows:

WHEREAS the efficient administration of the Government and the well-being of employees require that orderly and constructive relationships be maintained between employee organizations and management officials;  
. . . .

Toward that end, among others, section 6(a) of E.O. 10988 provided for exclusive recognition of appropriate units as follows:

Section 6. (a) An agency shall recognize an employee organization as the exclusive representative of the employees in an appropriate unit when such organization is eligible for formal recognition pursuant to section 5 of this order, and has been designated or selected by a majority of the employees of such unit as the representative of such employees in such unit. Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned . . . .

The 1969 Study Committee, which evaluated the experience accumulated under E.O. 10988, dealt with the subject of criteria for unit determination. The Study Committee Report and Recommendations to the President stated:

6. Criteria for Unit Determination.

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.<sup>3/</sup>

The recommendations of the Study Committee were adopted by the President. On October 29, 1969, the President issued Executive Order 11491, which, as of January 1, 1970, revoked E.O. 10988 and prescribed new and revised policies and practices to govern labor-management relations in the executive branch. Although effective dealings between management and labor organizations and efficiency of Government operations arguably were implicit policy goals to be achieved in unit determinations under section 6(a) of E.O. 10988, in addition to the express criterion of community of interest of the employees involved, E.O. 11491 explicitly mandated their consideration and accomplishment in determining appropriate units under the new Executive order. Thus, section 10(b) of E.O. 11491 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 . . . .

It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" described above, especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

This leads us to consideration of a closely related question, i.e., whether the criteria of effective dealings and efficiency of agency operations are intended to have equal status with employee community of interest in appropriate unit determinations. The question of what relative weight should be attributed to the three criteria was considered in connection with two areas focused upon by the Council in its recently completed general review of operations under E.O. 11491, as amended, i.e., Consolidation of Existing Units and Status of Negotiated Agreements during Reorganization. In its Report to the President which led to the issuance of E.O. 11838 on February 6, 1975, further amending E.O. 11491, the Council stated, in pertinent part:

---

<sup>3/</sup> Labor-Management Relations in the Federal Service, 1971, at 39.

#### IV. Consolidation of Existing Units

We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. We believe that the proposed modifications of the Order and subsequent actions of the Assistant Secretary will facilitate the consolidation of existing units, which will do much to accomplish the policy of creating more comprehensive units. We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.<sup>4/</sup>

#### X. Status of Negotiated Agreements during Reorganization

Moreover, the resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of the Order that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations. This policy requirement, in the Council's view, is sufficiently comprehensive and flexible to achieve the desirable equitable balance between the sometimes divergent and conflicting interests of agencies, labor organizations, and employees involved in any reorganization. This policy must be applied so that controlling weight is not given to any one of the criteria; equal weight must be given to each criterion in any representation case arising out of a reorganization just as it is in any other case involving a question as to the appropriateness of a unit. For example, to give controlling weight to a desire, however otherwise commendable, of maintaining the stability of an existing unit would not meet the policy requirements in section 10(b) . . . .<sup>5/</sup>

Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate. In

<sup>4/</sup> Labor-Management Relations in the Federal Service, 1975, at 29.

<sup>5/</sup> Id., at 72-73.

this case, as indicated previously, the Assistant Secretary found that the employees in the existing unit represented by the union continued to share a clear and identifiable community of interest separate and distinct from those assigned to the activity as a result of the reorganization and, thus, concluded that the existing unit continued to be an appropriate one under the Order. Further, the Assistant Secretary attributed little, if any, weight to the criteria of effective dealings and efficiency of agency operations, simply stating, in substance, that the fact that an additional unit or units might be established to cover the new employees assigned to the activity did not require any finding that the existing unit would necessarily fail to promote effective dealings and efficiency of agency operations. It is therefore apparent that the Assistant Secretary did not give equal weight to the criteria of effective dealings and efficiency of agency operations, but, rather, gave predominant weight to the criterion of community of interest of the employees concerned.

2. What is the nature of the Assistant Secretary's responsibility in unit determination proceedings with regard to the development and consideration of evidence concerning the appropriate unit criteria in section 10(b) of the Order?

We turn our attention now to the second major policy issue in this case, as described above, concerning the responsibility of the Assistant Secretary in appropriate unit determination proceedings vis-a-vis the development and consideration of evidence.

Our holding with regard to the first major policy issue presented by this case to the effect that the Assistant Secretary cannot properly find any unit appropriate unless he affirmatively determines that it satisfies each of the criteria set forth in section 10(b) of the Order, impels us to conclude as to this issue that the Assistant Secretary must first develop as complete a record as possible with regard to each of the three criteria upon which he can base his determinations, and, moreover, that he must give full and careful consideration to all relevant evidence in the record in reaching his decision.<sup>6/</sup>

The appropriate unit determination process is non-adversary in nature. It is designed to ensure that any unit found appropriate will provide a clear and identifiable community of interest among the employees involved,

---

<sup>6/</sup> This conclusion is already reflected somewhat in section 202.9(a) of the Assistant Secretary's regulations, which provides, in pertinent part:

§ 202.9 Conduct of hearing.

(a) . . . It shall be the duty of the Hearing Officer to inquire fully into all matters in issue and the Hearing Officer shall obtain a full and complete record upon which the Assistant Secretary can make an appropriate decision . . . .

and will promote effective dealings and efficiency of agency operations. Before making a final decision concerning the appropriateness of a particular unit, therefore, the Assistant Secretary must develop as complete an evidentiary record as possible regarding each of the three criteria and must carefully consider and evaluate that evidence. The integrity and fairness of the process under the Order demands no less.

The parties to a particular unit determination proceeding, of course, have a concomitant responsibility to furnish the Assistant Secretary with all evidence relevant to the appropriate unit criteria that is within their knowledge and possession in order to enable him to make a fully-informed judgment. In the usual case, the party which files a particular representation petition with the Assistant Secretary, asserting the appropriateness or inappropriateness of a unit, must attempt to support the petition and attendant assertion with all relevant evidence within its knowledge and possession. The other parties to the representation proceeding have an equal responsibility to provide the Assistant Secretary with all relevant information within their knowledge and possession whether or not the information supports their particular position. Certain essential, relevant information may well be within the special knowledge and possession of one of the parties to the proceeding.

Evidence related to efficiency of agency operations, for example, may well be within the special knowledge and possession of the agency involved. Thus, an agency may have access to documentary evidence to establish relevant facts pertaining to agency efficiency which is not readily accessible to labor organization parties. In such a case, the party with such evidence has a responsibility, to the extent legally permissible, to submit it to the Assistant Secretary whether or not the party is the petitioner in the case and whether or not the information supports that party's position. As indicated above, representation proceedings are non-adversary proceedings with one clearly defined purpose which is superior to any particular individual interest, i.e., ensuring that every unit found appropriate will provide a clear and identifiable community of interest among the employees concerned, and will promote effective dealings and efficiency of agency operations.

Where the Assistant Secretary believes that the evidence furnished by the parties is not sufficient to enable him to affirmatively determine that a particular unit will satisfy the three appropriate unit criteria of section 10(b), the Assistant Secretary must actively solicit such evidence from the parties in order to develop the requisite record. Where the parties fail or are unable to respond to the Assistant Secretary's solicitation, the Assistant Secretary will have to base his decision on the information available to him, making the best-informed judgment he can under the circumstances, keeping in mind, of course, the requirement that any unit found appropriate must meet the tests of

section 10(b) of the Order. In this regard, it should be noted that if a party fails to furnish to the Assistant Secretary all relevant evidence within its knowledge and possession, and was afforded a full and fair opportunity to do so under the Assistant Secretary's regulations, it will not later be permitted to contest the Assistant Secretary's determination before the Council based on the evidence which was within its knowledge and possession but not submitted to the Assistant Secretary.<sup>7/</sup>

When the focus is placed on the facts in this case, it appears that although the agency met its obligation to furnish evidence related to all three of the section 10(b) criteria, there is no indication that the Assistant Secretary fully met his responsibility with regard thereto in reaching his final decision in the case.

The agency contends that the Assistant Secretary ignored or failed properly to consider the testimony of the agency, particularly with respect to the criterion of efficiency of agency operations, and the record supports the agency's contention.

In its testimony before the Assistant Secretary's Hearing Officer, and in its post-hearing brief to the Assistant Secretary, the agency submitted evidence regarding efficiency of agency operations, as well as evidence regarding employee community of interest and effective dealings. The Tulsa Sector Manager testified at the hearing, among other things, in effect, that it would be more efficient for the activity to negotiate and deal with the representative of one sectorwide unit of eligible employees concerning common personnel policies and practices and matters affecting working conditions within the sector. Further in this regard, he testified, in effect, that fragmentation of the Tulsa Airway Facilities Sector into one group of approximately 31 eligible employees in Tulsa, Bartlesville and Ponca City, Oklahoma, represented by IAM&AW Local Lodge 2266, and another group of approximately 14 eligible employees in Fort Smith and Fayetteville, Arkansas, and McAlester, Oklahoma, either unrepresented or represented by another union, would impose a burden on the activity and could result in different personnel policies and practices and matters affecting working conditions within the sector. In its post-hearing brief to the Assistant Secretary, the agency argued, among other things, that the work requirements, relief patterns, training needs and manpower utilization considerations in maintaining equipment within the sector all reflect the efficiency of operations that would result from one sectorwide unit.

---

<sup>7/</sup> See Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9 (May 17, 1971), Report No. 8. In that case, the Council denied review of an agency petition, noting, among other things, that evidence relevant to effective dealings and efficiency of agency operations was within the special knowledge of, and must be submitted by, the agency involved; and that the agency failed to indicate in its petition that it was denied a full opportunity by the Assistant Secretary to introduce such evidence in the subject representation proceedings.



Thus, it is clear that the agency met its obligation to submit evidence regarding efficiency of agency operations.<sup>8/</sup> Since the agency did so, it was entitled to careful consideration of its position. The Assistant Secretary, however, as previously indicated, dismissed the agency's arguments in a footnote in his decision, stating, ". . . the fact, standing alone, that an additional unit or units subsequently may be established to cover those employees added to the Activity's jurisdiction as a result of the reorganization was not considered to require a finding that the unit represented by the IAM necessarily will fail to promote effective dealings and efficiency of agency operations." In our view, this, in effect, amounted to a dismissal of the agency's arguments without proper consideration.

In sum, we conclude that the Assistant Secretary did not give full and careful consideration to all record evidence concerning each of the three appropriate unit criteria in section 10(b) of the Order; did not affirmatively determine that the existing unit represented by the union will promote effective dealings and efficiency of agency operations; and did not give equal weight to those criteria in his deliberations. In so concluding, we do not reach any decision as to the appropriateness of the unit sought by the agency or of the existing unit supported by the union, or as to the merits of their respective positions.<sup>9/</sup> Based on the foregoing, however, we find that the Assistant Secretary's decision in this case is inconsistent with section 10(b) of the Order.

---

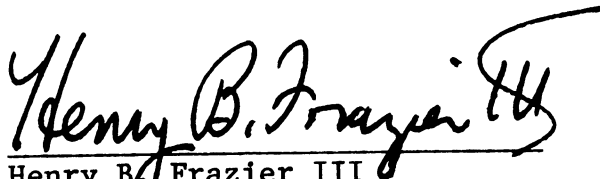
<sup>8/</sup> It is also clear from a review of the record that there is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

<sup>9/</sup> The record does not reveal whether the possibility was raised in this case of simply treating the eligible employees assigned to the Tulsa AFS as a result of the regional reorganization as having become a part of the existing unit. Nor does it appear that the possibility was raised that the considerations between the appropriateness of the broader sectorwide unit and narrower units, i.e., the existing unit and a residual unit of the newly assigned eligible employees, were so evenly balanced that the Assistant Secretary might direct a limited election among the new employees to ascertain whether they wished to be represented by the union in a sectorwide unit, or to remain unrepresented. In both of these two possible

(Continued)

Accordingly, pursuant to section 2411.17(b) of the Council's Rules and Regulations, we set aside the Assistant Secretary's decision and remand the case to him for appropriate reconsideration consistent with the principles discussed herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: May 9, 1975

---

(Continued)

situations, the union would not risk losing its status as the recognized representative of the employees in the existing exclusive unit. Such protection is consistent with the policy reflected in the recent amendments to section 10 of the Order by E.O. 11838 with regard to consolidation of units.

NFFE Local 1555 and Tobacco Division, AMS, USDA. The negotiability dispute concerned union proposals relating to: (1) Union participation in incentive awards committee activities; and (2) allocation of a certain percentage of all incentive awards within the agency to employees represented by the union.

Council action (May 9, 1975). As to proposal (1), the Council upheld the agency determination of nonnegotiability by reason of higher level agency regulation. In this regard, the Council, based on an interpretation by the Civil Service Commission of its own directives, rejected the union contention that the subject agency regulation violated the Federal Personnel Manual. Likewise, the Council found, contrary to the union's position, that the agency regulation is not violative of section 10(e) or 11(a) of the Order. With regard to proposal (2), the Council, based on an interpretation by the Civil Service Commission of the law governing incentive awards which it is authorized to implement, held that the union's proposal violates this law. Therefore, the Council sustained the agency's determination as to the nonnegotiability of the subject proposal.

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

NFFE Local 1555

and

FLRC No. 74A-31

Tobacco Division, AMS, USDA

DECISION ON NEGOTIABILITY ISSUES

Background of Case

NFFE Local 1555 represents all Tobacco Inspectors in the Tobacco Division, Agricultural Marketing Service (AMS), Department of Agriculture. During recent contract negotiations with the Division, the union offered two proposals on incentive awards (detailed hereinafter) which the Division asserted were nonnegotiable. Upon referral, AMS determined that the proposals were nonnegotiable because they, in effect, violated AMS regulations. The union petitioned the Council, under section 11(c)(4) of the Order, for review of this determination. The Department of Agriculture filed a statement of position.

Opinion

The negotiability questions relating to the respective union proposals will be considered separately below.

1. Union participation in incentive awards committee activities.

This proposal by the union reads as follows:

The Employer agrees that the Union shall have representatives at meetings of the Incentive Awards Committee. Said representatives will participate in deliberations and discussions with respect to planning the suggestion program, stimulating participation, establishing goals and targets, evaluating progress and appraising employee, supervisor, and management reactions. Said representatives shall also participate in evaluations and voting for nominees for Incentive Awards.

AMS determined that the proposal would violate the following portion of AMS Instruction 392-1 and was therefore nonnegotiable:

A C&MS [AMS] Incentive Awards Committee shall be named annually by the Administrator to advise and assist him in the administration of the Agency's Incentive Awards Program. The Committee shall consist

of a Chairman, Vice Chairman, Executive Secretary, and other members as may be deemed necessary by the Administrator to provide representation from the major program areas.

The union principally contends that this portion of AMS Instruction 392-1, asserted as a bar to the negotiability of its proposal, violates provisions of the Federal Personnel Manual and the Order.

The union's arguments with respect to these provisions will be discussed separately below.

- a. Federal Personnel Manual: The union alleges that the AMS Instruction violates Chapter 451 of the Federal Personnel Manual, citing particularly subchapters 1-2, 2-1.b(2) and 2-3. The agency in its statement of position contends that the Instruction does not violate the Federal Personnel Manual.

Since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, including the Federal Personnel Manual, that agency was requested, in accordance with Council practice, for an interpretation of Commission directives as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

With regard to the union's contention that the agency's Instruction 392-1 conflicts with Commission directives, the main issue would appear to be whether the administration of the incentive awards program may be retained at the level of the Agricultural Marketing Service, per 392-1, or whether it must be delegated to subordinate units within AMS - in this instance, the Tobacco Division. FPM Chapter 451 requires that the head of each agency establish and operate a plan for the use of incentive awards and delegate authority and responsibility in this area to bureaus, offices, or field units "to the depth consistent with sound administration and effective program leadership" (underscoring supplied). In the case under consideration, the operating characteristics of the AMS are cited as the reason for establishing the Incentive Awards Committee and retaining program administration at that level. We find no conflict between this decision or the instruction implementing it and Commission directives.

While the Commission believes (FPM Chapter 451, 2-3) that to derive maximum value from the incentive awards program, employees and supervisors must be encouraged to participate in improving Government operations, this should not be read to require the delegation of authority and the establishment of committees at the lowest organizational entities nor to require the participation of employee representatives in incentive award committee

activities. Such participation is permissible and encouraged under Commission directives, but it is not mandatory.

Based on the foregoing interpretation by the Civil Service Commission of its own issuances, we find that the AMS Instruction is not in conflict with Commission directives.

- b. The Order: The union also argues that the AMS Instruction, as interpreted by the agency head, violates sections 10(e) and 11(a) of the Order.

First, as to section 10(e), the union argues that the Instruction denies it the right guaranteed by section 10(e) of the Order to be represented at formal discussions between management and employees or employee representatives concerning matters affecting general working conditions of the employees in the unit. It asserts that incentive awards committee activities are of concern to all employees in the unit.

Section 10(e) states, in pertinent part:

. . . The labor organization [that has been accorded exclusive recognition] shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

In National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, FLRC No. 74A-20 (January 27, 1975), Report No. 62, we considered a similar argument concerning the meaning and intent of section 10(e). On page 8 of the decision we stated:

Thus, the plain language of section 10(e) grants labor organizations the right to be represented at formal discussions between management and employees or between management and employee representatives concerning matters described in the provision. However, such discussions as may occur under the regulation in question here are expressly limited to management officials. In this regard, nothing in the "legislative history" of section 10(e) suggests that the right to be represented, granted therein to labor organizations, was intended to extend to discussions among management officials, whether such discussions are formal or informal, and regardless of their subject matter.

Hence, in the Council's view, contrary to the union's contention, section 10(e) does not extend any right to labor organizations to be present at intra-management discussions, even if such discussions may be formal and pertain to grievances, personnel

policies and practices, or other matters affecting the general working conditions of the employees in the unit. [Emphasis in original.]

The reasoning contained in the above-quoted portion of the National Weather Service decision is dispositive of the arguments made by the union with respect to section 10(e) in the instant case because participation in incentive awards committee activities is, as is reflected in the membership of the AMS Incentive Awards Committee as designated by the AMS Administrator and by reason of the manner in which the language of the AMS Instruction has been interpreted by the agency head, limited to management officials of the various program areas within AMS.

Further, the union argues that the AMS Instruction violates section 11(a) of the Order, citing language in the 1969 Study Committee Report and Recommendations which led to the issuance of E.O. 11491, and the Council's decision in United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30. With respect to its reliance upon the Merchant Marine decision, the union asserts that the granting of incentive awards within the Tobacco Division is a personnel policy which is unique to that activity, and that the agency instruction, in effect, denies to employees in the unit ". . . the right to make this decision at this level. . . ."

The agency in its statement of position finds no violation of the Order and it distinguishes the applicability of the Council's decision in Merchant Marine as authority for determining that the AMS Instruction is not a bar to the negotiability of the union's proposal because "[i]n Merchant Marine the higher level regulations were applicable and specific only to the activity with which the union was negotiating."

Section 11(a), which prescribes the bargaining obligation between an agency and a labor organization that has been accorded exclusive recognition is expressly limited, among other ways, by the phrase "applicable laws and regulations, including . . . published agency policies and regulations."<sup>1/</sup>

---

<sup>1/</sup> Section 11(a) provides in relevant part:

(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 . . . .

As to the meaning of this phrase of section 11(a), the Council held in Merchant Marine that higher level agency regulations issued to achieve a desirable degree of uniformity and equality in the administration of matters common to more than one activity within the agency were completely consistent with the obligation imposed by section 11(a) and could properly limit the scope of negotiations at subordinate activities of the agency.

The record in the instant case discloses that the AMS Instruction establishes an incentive awards committee and outlines the committee's responsibilities. It was issued by AMS, an operational subdivision within the Department of Agriculture, and is applicable uniformly to the 14 subordinate elements into which AMS has been organized. One of these elements is the Tobacco Division where the union has been granted exclusive recognition. Thus, the instruction governing incentive awards establishes personnel policies which are applicable to all subordinate elements of AMS, including the Tobacco Division. The regulation does not establish personnel policies which are applicable only to the Tobacco Division.

The reason for the issuance of the regulation at the AMS level, according to the agency's statement of position, is "to assure that the conduct and application of the [incentive awards] program is carried out in a uniform and equitable manner throughout the Agricultural Marketing Service."

Based on the nature of the regulation and the circumstances surrounding its issuance, we find that it was issued to achieve a degree of uniformity and equality in the administration of a matter common to all subordinate levels of AMS, i.e., the incentive awards program, to accomplish effective direction and control and maintain efficiency in the administration of the incentive awards program at these subordinate levels. Hence, it is the type of higher level published policy or regulation that may properly bar negotiations at subordinate levels, including the Tobacco Division, under section 11(a) of the Order.<sup>2/</sup>

---

(Continued)

Although this provision of the Order was recently amended by E.O. 11838, the amendment will not go into effect until 90 days after issuance by the Council of the criteria for determining compelling need; hence, the amendment is not material to the Council's decision herein.

2/ Accord, 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; Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57 (May 9, 1973), Report No. 37; National Association of Government Employees and U.S. Department of Commerce, National

(Continued)



With regard to the union's reliance upon the language in the 1969 Study Committee Report and Recommendations which led to the issuance of E.O. 11491, the union refers to such statements as "agencies should increase, where practicable, delegations of authority on personnel policy matters to local managers to permit a wider scope for negotiation [and] agencies should not issue over-prescriptive regulations . . . ." The Council has previously considered this language in Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57 (May 9, 1973), Report No. 37 and found, notwithstanding such exhortative language, the Report as well as the Order, fully supports the authority of an agency head to issue regulations for the operation of the agency. As the Council emphasized in Merchant Marine:

[W]e 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. [Footnote omitted.]

Accordingly, we find that AMS Instruction 392-1 does not violate sections 10(e) and 11(a) of the Order and is a bar under section 11(a) to the negotiability of the union's proposal.

2. Allocation of a certain percentage of all incentive awards within the agency to employees represented by the union.

This proposal by the union reads as follows:

The number of incentive awards given to employees of the Tobacco Division of the Agricultural Marketing Service shall not vary by more than one percent less than those for employees of the other Department divisions. This provision shall in no way prevent the variation in the number of awards in an upward direction, provided such increase is justified by the quality of the employee performance in the Tobacco Division.

The agency in its statement of position principally contends that the union's proposal is nonnegotiable because it violates Chapter 451 of the Federal Personnel Manual, particularly subchapter 1-2(a)(1)-(3) and

---

(Continued)

Oceanic and Atmospheric Administration, National Weather Service, FLRC No. 74A-20 (January 27, 1975), Report No. 62; cf., Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas and American Federation of Government Employees, Local Union 1367, A/SLMR No. 322, FLRC No. 73A-64 (October 25, 1974), Report No. 58.

similar provisions contained in AMS Instruction 390-1. The union, in effect, contends that the position taken by the agency violates section 11(a) and 11(b) of the Order because the "agency has failed to quote a regulation which forbids negotiation on percentages of incentive awards for unit employees."

Because of the agency's reliance on provisions of the Federal Personnel Manual, an interpretation was sought from the Civil Service Commission. The Commission replied in relevant part as follows:

With regard to the union's second proposal and its compatibility with Title 5, U.S. Code, we direct your attention to Section 4503:

"The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of an employee who (1) by his suggestion, invention, superior accomplishment or other personal effort contributes to the efficiency, economy or other improvement of Government operations; or (2) performs a special act or service in the public interest in connection with or related to his official employment."  
(Underscoring supplied.)

We believe this section clearly requires that awards be granted solely on the basis of merit. The union's proposal--that awards given to employees in the Tobacco Division may not vary by more than one percent less than awards for employees in other Department divisions--would introduce criteria into the granting of awards that are wholly extraneous to the merit of the employee's contribution or performance. That this result is intended is apparent from a reading of the second sentence of the proposal: "This provision shall in no way prevent the variation in the number of awards in an upward direction, provided such increase is justified by the quality of the employee's performance in the Tobacco Division." Such a provision clearly indicates that awards required to meet the proposed minimum need not be justified by the quality of the employee's performance. Thus, the proposal would be incompatible with the law.

Based on the foregoing interpretation by the Civil Service Commission of the law it is authorized to implement,<sup>3/</sup> we find that the union's proposal violates the law governing incentive awards. In view of our finding that the union's proposal violates law, it is not deemed necessary to consider the union's contention concerning section 11(a) and 11(b) of the Order. Accordingly, we sustain the agency's determination as to the nonnegotiability of the union's proposal.

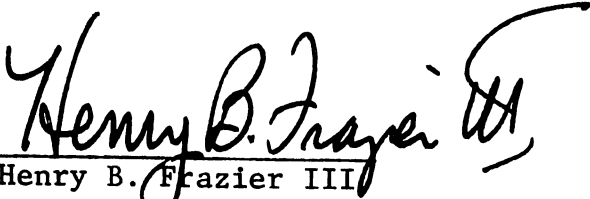
---

<sup>3/</sup> The Commission is authorized under 5 U.S.C. § 4506 to prescribe regulations governing the granting of incentive awards to civilian employees. These regulations are set forth in Chapter 451 of the Federal Personnel Manual.

Conclusion

Based upon the reasons set forth above, and pursuant to section 2411.27 of the Council's rules and regulations, we find that the agency head's determination that the union proposals here involved are nonnegotiable was proper and must, therefore, be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: May 9, 1975

Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, Assistant Secretary Case No. 50-11018 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found insufficient evidence to establish a reasonable basis for the 19(a)(1) and (2) complaint filed by the union (National Federation of Federal Employees). The union appealed to the Council, contending that major policy issues are involved in this case.

Council action (May 9, 1975). The Council held that the Assistant Secretary's decision does not present any major policy issue. Further, the Council ruled that the union does not allege, nor does it otherwise appear, that the action of the Assistant Secretary was arbitrary and capricious. Accordingly, since the union's petition for review failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the union's petition.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 9, 1975

Ms. Janet Cooper  
Staff Attorney  
National Federation of  
Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of the Army, Indiana  
Army Ammunition Plant, Charlestown,  
Indiana, Assistant Secretary Case  
No. 50-11018 (CA), FLRC No. 74A-90

Dear Ms. Cooper:

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

In agreement with the Assistant Regional Director, the Assistant Secretary found, in pertinent part, that there was insufficient evidence to establish a reasonable basis to support your complaint in which you alleged that the agency singled out a unit employee (the President of NFFE Local 1581) for job audit purposes because of her union activity in violation of subsections 19(a)(1) and (2) of the Order. These alleged violations of the Order were based on a series of five audits of the employee's job conducted by the agency during the period 1970-1973 which culminated in a complete rewriting of her position description and change in her job classification but without a change in grade.

In your petition for review you contend that there are several major policy issues involved in the case, arguing in summary: (1) that the establishment of a prima facie case should be sufficient to require the Assistant Regional Director to issue a notice of hearing, and that the facts which you alleged were sufficient to establish such a case or "cause of action" under subsections 19(a)(1) and (2) of the Order; (2) that questions concerning credibility should be resolved by Administrative Law Judges, and not by the Area or Regional Offices of the Labor-Management Services Administration, and; (3) that the Assistant Secretary erred in ruling that the audits did not discourage union membership because the employee was not downgraded as their result.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear to present a major

policy issue, and you do not allege, nor does it appear, that his action was arbitrary and capricious. Specifically, with regard to the alleged major policy issues, pursuant to the authority of the Assistant Secretary under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint," the Assistant Secretary has promulgated regulations which provide, in pertinent part, that he may cause a notice of hearing to be issued if he finds that there is a "reasonable basis" for the complaint. His decision in your case was based on the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such a regulatory requirement or that he wrongly applied these regulations to the facts and circumstances of this case. Moreover, your appeal does not demonstrate that substantial factual issues exist requiring a hearing.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's Rules and Regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "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

W. S. Schrader  
Dept. of the Army

Veterans Administration Hospital, Montrose, New York, A/SLMR No. 470.

The Assistant Secretary dismissed the petition for amendment of recognition, filed by American Federation of Government Employees, Local 2440, AFL-CIO (AFGE), in this case. In view of this action, the Assistant Secretary found it unnecessary to rule upon either the propriety of the Assistant Regional Director's denial of an intervention request filed by National Federation of Federal Employees, Local 119, Ind. (NFFE), or upon NFFE's objections made at the hearing concerning its status as a "Party-in-interest." NFFE appealed to the Council, contending that the Assistant Secretary's decision presents major policy issues. NFFE also requested a stay of the Assistant Secretary's decision.

Council action (May 9, 1975). The Council held that the major policy issues alleged by NFFE were in effect rendered moot by the Assistant Secretary's dismissal of AFGE's petition. Further, the Council ruled that NFFE did not allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious. Accordingly, without passing upon the merits of the standards promulgated by the Assistant Secretary in this case concerning procedures for effectuating a change in affiliation and an amendment of certification or recognition, the Council denied NFFE's petition for review, since it does not meet the requirements for review under section 2411.12 of the Council's rules (5 CFR 2411.12). The Council likewise denied NFFE's request for a stay, under section 2411.47 of the Council's rules (5 CFR 2411.47).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 9, 1975

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

Re: Veterans Administration Hospital,  
Montrose, New York, A/SLMR No. 470,  
FLRC No. 75A-5

Dear Mr. Helm:

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

In this case, the Assistant Secretary dismissed an AC petition filed by American Federation of Government Employees, Local 2440, AFL-CIO (AFGE), finding that the evidence failed to establish that a change in affiliation from United Brotherhood of Carpenters and Joiners, Local 2440, AFL-CIO, to AFGE took place in a manner which assured that standards promulgated by the Assistant Secretary in the case were met. National Federation of Federal Employees, Local 119, Ind. (NFFE) had sought to intervene in the proceeding for the purpose of arguing for the dismissal of AFGE's petition. The Assistant Regional Director, in effect, denied NFFE's request, designating NFFE as a "Party-in-Interest," thus permitting NFFE only to state its position with regard to the issues raised by the AC petition at the hearing. However, in view of the dismissal of the petition, the Assistant Secretary found it unnecessary to rule upon the propriety of the Assistant Regional Director's denial of NFFE's intervention request, or upon NFFE's objections made at the hearing that the limitations imposed by its designation as a "Party-in-Interest" prejudiced its position.

In your petition for review, you contend that the decision of the Assistant Secretary presents two major policy issues: the first, concerning the failure of the Assistant Secretary to correct the designation of NFFE as a Party-in-Interest; and the second, regarding the Assistant Secretary's authority to reinvest a local union (United Brotherhood of Carpenters and Joiners, Local 2440, herein) with recognition for the purpose of seeking an amendment of certification after that union has abandoned its recognition.

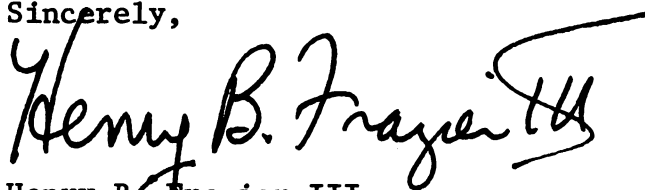


In the Council's view, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, you have not alleged and it does not appear that the decision of the Assistant Secretary is arbitrary and capricious, nor does it appear that a major policy issue is presented. Under the circumstances presented herein, where the AC petition at issue has been dismissed, such dismissal has not been challenged by any interested party, and NFFE's position has not been prejudiced in any manner, further Council consideration is unwarranted. The major policy issues which you allege are presented by the Assistant Secretary's decision were, in effect, rendered moot by his dismissal of the petition.

Accordingly, without passing upon the merits of the standards promulgated by the Assistant Secretary in this case concerning procedures for effectuating a change in affiliation and an amendment of certification or recognition, your petition for review is denied, since it does not meet the requirements of section 2411.12 of the Council's rules. Likewise, the Council has directed that your request for a stay be denied under section 2411.47 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

W. Massaro  
VA

J. D. Gleason  
AFGE

American Federation of Government Employees, Local 1857, AFL-CIO and Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California (Shepard, Arbitrator). Upon appeal from the arbitration award filed by the union, the Council advised the union that its appeal failed to comply with cited requirements of the Council's rules and provided the union with time to effect such compliance. However, the union made no submission in compliance with these requirements within the time limit provided therefor.

Council action (May 16, 1975). The Council dismissed the union's appeal for 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

May 16, 1975

Mr. J. M. Hopperstad, President  
Local 1857, American Federation  
of Government Employees  
5802 Watt Avenue  
North Highlands, California 95660

Re: American Federation of Government Employees,  
Local 1857, AFL-CIO and Headquarters, Sacramento  
Air Logistics Center, McClellan Air Force Base,  
California (Shepard, Arbitrator), FLRC No. 75A-34

Dear Mr. Hopperstad:

By Council letter of March 31, 1975, you were advised that your petition for review of the arbitration award in the above-entitled case failed to include the approval of the national president of the labor organization, as required by section 2411.42 of the Council's rules.

You were also advised in the Council's letter:

Further processing of your appeal is contingent upon your immediate compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on April 14, 1975, to take action and file additional materials in compliance with the above provision(s), along with a statement of service of your additional submission as provided in section 2411.46(b) of the rules. Failure to do so will result in the dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided therefor. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

By 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: Lt. Col. J. J. Franco, Jr.  
G. M. Loutsch  
Air Force

Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448. Upon a complaint filed by the union (National Treasury Employees Union and Chapter 070, National Treasury Employees Union), the Assistant Secretary decided, in pertinent part, that conduct complained of, arising out of events surrounding the activity's meeting with a group of its employees, did not constitute an unfair labor practice. The union appealed to the Council, contending in essence that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (May 20, 1975). The Council held that the Assistant Secretary's decision neither appears arbitrary and capricious nor presents a major policy issue. Accordingly, the Council denied the union's petition for review, since it failed to meet the requirements for review as provided by section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 20, 1975

Mr. Thomas Angelo, Assistant Counsel  
National Treasury Employees Union  
Suite 1101, 1730 K Street, NW.  
Washington, D.C. 20006

Re: Internal Revenue Service, Southeast Service  
Center, Chamblee, Georgia, A/SLMR No. 448,  
FLRC No. 75A-1

Dear Mr. Angelo:

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

With respect to the issues raised in your petition, the Assistant Secretary, adopting the findings, conclusions and recommendation of the Administrative Law Judge without comment, found that the conduct complained of, arising out of the events surrounding the activity's meeting with a group of its employees, did not constitute an unfair labor practice. The Assistant Secretary found that at such meetings, scheduled monthly, activity representatives met with a random cross section of employees, and that both parties recognized the right of the union to have a representative present and participating.

The union president, who had been the union representative at such meetings for the previous several months, received notice of the meeting scheduled for the following month, and also was selected to attend a training class to be held on the same day. When the conflict was discovered on the afternoon prior to the scheduled date of the meeting, the union president requested that her special assistant attend the meeting as her replacement. The special assistant's shift manager determined that the special assistant could not be spared to attend the meeting, an opinion with which the union president and her special assistant disagreed. The meeting on the following day was delayed almost an hour while the problem was presented to the Director of the installation, who noticed that one of the employees randomly selected to attend the meeting was an elected official of the union, and suggested that this employee might be a suitable substitute. The Assistant Secretary adopted the Administrative Law Judge's finding that, although there was no agreement on the part of the union president to this substitution, "there was some acquiescence, albeit born of resignation and frustration." The meeting then proceeded, with the substitute actively participating as the union representative.

The Assistant Secretary adopted the Administrative Law Judge's conclusion that "the right of a labor organization to 'be given the opportunity to be represented at formal discussions between management and employees' [is not] . . . so absolute as to compel management to adjust to last minute substitutions regardless of problems relating to the mission of the Agency," and that "the rule of reason must prevail" in these circumstances. This finding was based essentially on the last minute nature of the union president's request, the sincere effort on the part of the activity to accommodate to the situation, and the lack of anti-union animus on the part of the activity which has always recognized the union's right to be represented at such meetings.

In your petition for review, you contend, in essence, that the decision of the Assistant Secretary is arbitrary and capricious because it represents a departure from precedent without explanation. You also contend that the decision presents a major policy issue as to when, if ever, agency management may exercise a "retained" right under section 12(b) in such a manner as to vitiate rights which the Order grants to labor organizations.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present a major policy issue. With respect to your contention that his decision was arbitrary and capricious, it does not appear that the findings and decision of the Assistant Secretary were without reasonable justification in the particular circumstances of this case. Moreover, with respect to the alleged major policy issue, the Council is of the opinion that in the unique circumstances presented, noting particularly that the agency attempted to accommodate the union's last minute request for a substitute and the fact that a union official was present and did participate in the meeting, the Assistant Secretary's decision does not raise a major policy issue warranting Council review.

Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of the petition is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

W. Long  
IRS

American Federation of Government Employees, Local No. 2532, and Small Business Administration (Dorsey, Arbitrator). Upon the union's motion for a show-cause hearing, the Council previously directed the parties in this case: (1) To resubmit the award to the arbitrator for its clarification and interpretation with respect to one grievant (Robert H. Morgan); and (2) to file with the Council, within 15 days after the arbitrator's action, the award as clarified and interpreted and any exceptions thereto which the respective parties wished to be considered by the Council (Report No. 49). Thereafter, the parties filed with the Council the arbitrator's interpretation of his award with respect to the named grievant, and neither party took exception to the award as interpreted by the arbitrator.

Council action (May 21, 1975). The Council ruled that, since the dispute which gave rise to the union's motion for a show-cause hearing has been resolved, the union's motion has been rendered moot. Accordingly, the Council, apart from other considerations, denied the union's motion.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 21, 1975

Mr. Carl E. Grant  
Director of Personnel  
U.S. Government  
Small Business Administration  
Washington, D.C. 20416

Mr. Clyde M. Webber, National President  
American Federation of Government  
Employees  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: American Federation of Government  
Employees, Local No. 2532, and  
Small Business Administration  
(Dorsey, Arbitrator), FLRC No. 73A-4

Gentlemen:

Reference is made to the union's motion that the Council order a show-cause hearing as to why the Council should not direct implementation of the arbitration award in the above-entitled case with respect to Robert H. Morgan. The arbitrator determined that the agency had, in violation of the collective bargaining agreement, implemented a reorganization by reassigning the grievants (including Morgan) to a new function without prior notice to or consultation with the union. 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." In its opposition to the union's motion, the agency contended, in effect, that Morgan, retired prior to the arbitration hearing and was not covered by the arbitration award.

The Council, without passing upon the appropriate method for the enforcement of arbitration awards under the Order,<sup>\*/</sup> concluded that a dispute existed between the parties as to the meaning of the arbitrator's award

\*/ See the Council's subsequently issued decision in Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, A/SLMR No. 412, FLRC No. 74A-46 (April 23, 1975), Report No. 67.



with respect to Morgan. Accordingly, the Council directed that the parties: (1) resubmit the award to the arbitrator for its clarification and interpretation with respect to Morgan; and (2) file with the Council, within 15 days after the arbitrator's action, the award as clarified and interpreted and any exceptions thereto which the respective parties wished to be considered by the Council (FLRC Report of Case Decisions No. 49, February 28, 1974).

The parties have filed with the Council the arbitrator's interpretation of his award with respect to Morgan. The arbitrator found the wording of the award confines its applicability to involved agency employees on the effective date of the award; that Morgan had voluntarily terminated his employer-employee relationship with the agency and, therefore, was not an agency employee on that date; and that Morgan did not come within the ambit of the award. Neither party took exception to the award as interpreted by the arbitrator.

Since the dispute which gave rise to the union's motion has been resolved, it is clear that the union's motion has been rendered moot.

Accordingly, the Council, apart from other considerations, denies the union's motion.

By 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 flourish at the end.

Henry B. Frazier III  
Executive Director

U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, A/SLMR No. 428. Upon a clarification of unit petition filed by the agency, the Assistant Secretary issued a decision, as subsequently clarified, relating to the agency's requests for amendments of the unit definition and for exclusion of three secretarial or clerical employees as confidential employees. The agency appealed to the Council from such decision insofar as it concerned the amendments of the unit definition and the unit placement of one employee, contending that the decision is arbitrary and capricious and presents major policy issues.

Council action (May 21, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary or capricious and does not present a major policy issue. Accordingly, the Council denied the agency's petition for review, since it failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 21, 1975

Mr. August Seeger  
Assistant Director  
Office of Personnel  
U.S. Department of Agriculture  
Washington, D.C. 20250

Re: U.S. Department of Agriculture,  
Agricultural Research Service,  
Plum Island Animal Disease Center,  
A/SLMR No. 428, FLRC No. 74A-73

Dear Mr. Seeger:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the additional comments and arguments filed by you following receipt of the Assistant Secretary's clarification of his decision in the above-entitled case.

The U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center ("the activity") filed a clarification of unit petition seeking to clarify the existing unit by excluding three secretarial or clerical employees as confidential employees. Moreover, the activity sought an amendment of unit definition to reflect the non-substantive change of the name of the activity and to reflect the mandatory exclusions required by Executive Order 11491. The Assistant Secretary found that two of the employees act in confidential capacities with respect to officials who formulate or effectuate general labor relations policies and that they have regular access to confidential labor relation materials and to office and personnel files not available to other employees in the unit, and accordingly, excluded them from the bargaining unit. The Assistant Secretary further found that the third is not an employee who assists or acts in a confidential capacity to persons who formulate and effectuate policies in the field of labor relations, holding neither the incumbent's mere access to personnel or statistical information nor the incumbent's handling of correspondence which ultimately may be utilized in contract negotiations warrants her exclusion from the unit. The Assistant Secretary did not make any express disposition of the activity's request for the amendment of the unit definition to reflect the nonsubstantive change of the name of the activity (other than the name of the activity as shown in the case caption in the Assistant Secretary's decision and in his order) and to reflect the mandatory exclusions required by the Order.

Following receipt of your appeal, the Council requested clarification of the Assistant Secretary's decision, as to what disposition he had made of the activity's request for the amendment of the unit definition to

reflect the nonsubstantive change of the name of the activity and to reflect the mandatory exclusions required by the Order. In response, with regard to the activity's request for amendment of the unit definition to reflect the nonsubstantive change of the name of the activity, the Assistant Secretary stated that:

. . . in [Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri,] A/SLMR No. 160 [(May 18, 1972)], it was established, in effect, that a petition for amendment of recognition or certification is the appropriate vehicle when parties seek to conform the recognition involved to existing circumstances resulting from such nominal or technical changes as a change in the name of the exclusive representative or a change in the name or location of the agency or activity. Therefore, clearly, the [a]ctivity's petition herein seeking clarification of an existing unit was an inappropriate vehicle to change formally its designation. However, notwithstanding the inappropriateness of the [a]ctivity's petition in this regard, the subject Decision and Order Clarifying Unit, in its caption, in the description of the Petitioner at page 1, and in the Order on page 3, reflected the change in designation sought by the [a]ctivity. Under these circumstances, no further express comment on such a "nonsubstantive change" was considered necessary.

Further, with regard to the activity's request for amendment of the unit definition to reflect the mandatory exclusions required by Executive Order 11491, he stated that:

. . . it was noted that the only issue in dispute between the parties in this matter concerned the alleged confidential status of three employee job classifications. This issue was litigated at the hearing in this matter and was addressed and decided by virtue of the Decision and Order Clarifying Unit in the subject case which resulted in the inclusion in the existing exclusively recognized unit of one employee job classification and the exclusion from the existing exclusively recognized unit of two employee job classifications on the basis that the employees in such classification were "confidential" employees. As no other eligibility questions were raised, it was not considered necessary to clarify additionally the existing bargaining unit to the extent that excluded therefrom are the mandatory exclusions contained in Section 10(b) of the Order since, by operation of the Order itself, these general categories of employees - i.e., management officials, supervisors and employees engaged in Federal personnel work in other than a purely clerical capacity - are excluded from bargaining units in the Federal sector. In this regard, it should be noted additionally that the existing unit description excludes employees holding professional and managerial positions and supervisors who are responsible for determining and making performance ratings for subordinates. Further, neither the existing unit description, nor the proposed description, included or excluded guards and there was no indication

by the [a]ctivity as to this omission in both its existing and proposed unit descriptions. Nor was there an indication as to whether there were or are guards employed by the [a]ctivity.

Under all these circumstances, it was not considered necessary to specify in the Decision and Order in this case, or in any case of this nature, the mandatory exclusions required by Section 10(b).

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious, and presents major policy issues, primarily because, as you allege, it does not address itself or refer in any way to the activity's request for the amendment of the unit definition to reflect the nonsubstantive change of the name of the activity and to reflect the mandatory exclusions required by the Order. In response to the Assistant Secretary's clarification of his decision, you further contend, in reliance upon Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri,<sup>1/</sup> that although an amendment of certification (AC) petition is normally the appropriate vehicle for seeking nominal changes in the name of the activity or agency, such a constrictive finding in the instant case or similar cases will not effectuate the purpose and provisions of the Order; in reliance upon the advice of the New York Regional Office, LMSA, you filed a petition for clarification of unit (CU) to accomplish both clarification of unit and amendment of certification; although the name of the activity was correctly stated in the subject Decision and Order, in its caption, in the description of the Petitioner, and in the Order, this does not constitute a formal amendment of certification in accordance with the Assistant Secretary's Rules and Regulations and the Assistant Secretary's Report No. 54 (June 22, 1973);<sup>2/</sup> and, further, since the unit description

---

1/ Supra .

2/ Assistant Secretary's Report No. 54 (June 22, 1973) provides, in pertinent part:

While units for which exclusive recognition was granted under Executive Order 10988 continue to exist under Executive Order 11491, the only means by which such recognition now can be clarified or amended in a manner which would be binding on the Assistant Secretary or any other parties in another proceeding, is by the filing of an appropriate petition pursuant to Part 202 of the Assistant Secretary's regulations.

The agency herein contends that as the unit of representation has not been previously certified by the Assistant Secretary, but was granted by the agency under Executive Order 10988, it is essential that the Assistant Secretary issue a formal certification of representation and that such certification accurately reflect the correct name of the activity and the mandatory exclusions required by the Order.

was inaccurate and the activity sought, without objection from the union, to amend it to reflect the mandatory exclusions under the Order, such amendment of the unit description should have been made by the Assistant Secretary. You also contend that the decision failed to apply consistently the determinative criteria for confidential employees to the three disputed employee positions, since the record establishes that these positions are similar with respect to job content relating to access to, and handling and processing of, confidential labor relations material. Moreover, you contend that access to, and the handling and processing of, confidential fiscal data which substantially affects the labor-management relationship is an affirmative determinative of an employee's status as a confidential employee within the meaning of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious nor do they present a major policy issue. With regard to your contention that the Assistant Secretary did not address himself or refer in any way to the activity's request for the amendment of the unit definition to reflect the nonsubstantive change of the name of the activity, noting that the subject Decision and Order Clarifying Unit, in its caption, in the description of the Petitioner at page 1, and in the Order on page 3, reflected the change in designation sought by the activity, it does not appear that the Assistant Secretary acted without reasonable justification or that the decision presents any major policy issues.

With regard to your contention that the Assistant Secretary's decision did not address itself or refer in any way to the activity's request for the amendment of the unit definition to reflect the mandatory exclusions required by the Order, he states in his clarification that "the only issue in dispute between the parties in this matter concerned the alleged confidential status of three employee job classifications. . . . As no other eligibility questions were raised, it was not considered necessary to clarify additionally the existing bargaining unit to the extent that excluded therefrom are the mandatory exclusions contained in Section 10(b) of the Order since, by operation of the Order itself, these general categories of employees - i.e., management officials, supervisors and employees engaged in Federal personnel work in other than a purely clerical capacity - are excluded from bargaining units in the Federal sector." It does not appear from your petition that such a determination by the Assistant Secretary is without reasonable justification or presents any major policy issue warranting review.

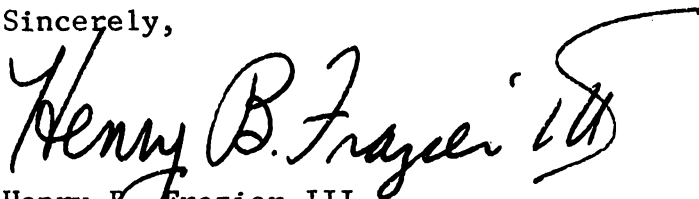
With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues because he did not consistently apply the determinative criteria for confidential

employees to disputed positions, it does not appear that the Assistant Secretary acted without reasonable justification. Instead, the Assistant Secretary relied upon his previously established test for determining confidentiality of employees as reflected in his case precedents - i.e., those who assist and act in confidential capacities to persons who formulate and effectuate management policies in the field of labor relations.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "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

P. Rose  
AFGE

Social Security Administration, Mid-America Program Center, BRSI, Kansas City, Missouri, Assistant Secretary Case No. 60-3836 (CA). The Assistant Secretary dismissed the unfair labor practice complaint filed by the union (Social Security Local 1336, AFGE, AFL-CIO), which alleged that the agency violated section 19(a)(1) and (6) of the Order. The union appealed to the Council, asserting that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

Council action (May 21, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue. Accordingly, the Council denied the union's petition, since it failed to meet the requirements for review as provided in section 2411.12 of the Council's rules (5 CFR 2411.12).





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 21, 1975

Mr. James R. Rosa, Staff Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Social Security Administration, Mid-America  
Program Center, BRSI, Kansas City, Missouri,  
Assistant Secretary Case No. 60-3836 (CA),  
FLRC No. 75A-8

Dear Mr. Rosa:

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

In this case, the union (Social Security Local 1336, AFGE, AFL-CIO) filed a complaint, alleging that the agency independently violated section 19(a)(1) and (6) of the Order by its failure to post a remedial notice in a separate unfair labor practice case (A/SLMR No. 411), involving the same parties. At the time of the union's complaint and the Assistant Secretary's decision herein, that case was pending before the Council on a timely petition for review and request for stay which had been filed by the agency (FLRC No. 74A-53).<sup>\*/</sup>

The Assistant Secretary, in substance, dismissed the union's complaint in the present case, because, as stated in his decision as clarified, "the matters or circumstances raised in the subject complaint [concern] compliance with a remedial order of the Assistant Secretary and do not involve issues which may be raised under Section 19 of the Executive Order." In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

In the Council's opinion, your petition does not meet the criteria for review set forth in section 2411.12 of the Council's rules of procedure. That is, in our view, the Assistant Secretary's decision does not appear arbitrary and capricious, nor does it present a major policy issue.

---

<sup>\*/</sup> The Council has since issued its decision in FLRC No. 74A-53, denying the agency's petition for review and request for stay (Report No. 64), and the Council is administratively advised that the agency has initiated compliance with the Assistant Secretary's order in that case.

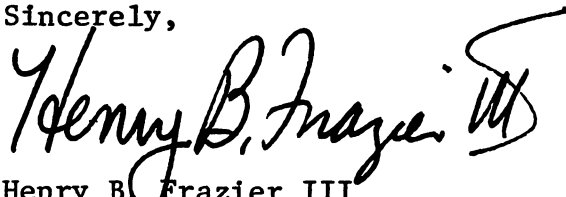
As to your contention that the decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in ruling that your complaint in this case concerned compliance with a remedial order and did not involve issues which may properly be raised in a separate complaint filed under section 19 of the Order.

As to your claim that the Assistant Secretary's decision presents major policy issues, the Council is of the opinion that no major policy issue is presented warranting review in this case. We call your attention in this regard to the proposed changes in the Council's rules of procedure, published on May 16, 1975 (40 F.R. 21488), which in part relate to requests for stays and the effect of such a request on the decision from which an appeal is taken (2411.47(d)). The Council will entertain your organization's timely submission of views as to these proposed changes.

Accordingly, since your petition in this case fails to meet the requirements for review as provided in section 2411.12 of the Council's rules, review of your appeal is hereby denied.

By 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: A/SLMR  
Dept. of Labor

I. L. Becker  
SSA

American Federation of Government Employees, AFL-CIO, Department of Labor Local 12 and U.S. Department of Labor (Harkless, Arbitrator). The Council accepted the agency's petition for review of the arbitrator's award in this case, which award ordered that the grievant be granted a retroactive promotion (Report No. 49). Consistent with its usual practice, the Council thereafter requested the Civil Service Commission, which is authorized to prescribe regulations to implement the statutes here applicable, to furnish an interpretation of these statutes and implementing CSC regulations as they pertain to the arbitrator's award. The Civil Service Commission replied that answers to three stated questions were required, in order to render a definitive response to the Council's request.

Council action<sup>\*/</sup> (May 22, 1975). The Council held that it is necessary for the parties to furnish the Council with answers to the questions posed by the Commission. Accordingly, the Council directed the parties: (1) To furnish the Council, on or before June 9, 1975, with such answers by a stipulation between the parties; or (2) to resubmit the case to the arbitrator for his answers to such questions, and, within 15 days after the arbitrator's action, file with the Council the arbitrator's supplemental award; and (3) to submit with such answers any statements of position which the respective parties wish to be considered by the Council.

---

\*/ 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

May 22, 1975

Mr. Terry R. Yellig  
Office of the Solicitor  
U.S. Department of Labor  
Room N-2414 - 200 Constitution Avenue, NW.  
Washington, D.C. 20210

Mr. Herbert Kelly  
Department of Labor Local 12  
American Federation of Government  
Employees, AFL-CIO  
Room N-2101 - 200 Constitution Avenue, NW.  
Washington, D.C. 20210

Re: American Federation of Government  
Employees, AFL-CIO, Department of  
Labor Local 12 and U.S. Department  
of Labor (Harkless, Arbitrator),  
FLRC No. 73A-56

Gentlemen:

Reference is made to the agency's petition for review of the arbitrator's award in the above-entitled case. The arbitrator determined that the agency's action did not violate the collective bargaining agreement or the Federal Personnel Manual nor did it improperly delay the grievant's promotion to Clerk-Typist, GS-4 [on or about February 1, 1973] or impair her career development. As his award, the arbitrator (1) denied the grievance, and (2) ordered the agency to make the grievant's promotion to Clerk-Typist, GS-4, effective as of July 31, 1972, because "the grievant's proposed promotion was stayed under Article VI, Section L of the Agreement pending final determination of the grievance."

In its petition for review, the agency took exception to the remedy provided by the arbitrator in the award on the ground that it violated applicable law as interpreted [and cited] by the Comptroller General. The Council accepted the agency's petition for review on that ground; the Council also granted the agency's request for a stay of the arbitrator's award pending Council determination of the agency's appeal (FLRC Report of Case Decisions No. 49, February 28, 1974).

The agency, in support of its exception, cited, inter alia, Section S2-5b(1) of FPM Supplement 990-2 which deals with the effective date of promotion under 5 U.S.C. § 5334(b); the Back Pay Act of 1966; and the Civil Rights Act of 1964. Since the Civil Service Commission is authorized to prescribe regulations to implement the above-cited statutes; that agency was requested, in accordance with Council practice, to furnish an interpretation of these statutes and implementing CSC regulations as they pertain to the arbitrator's award in this case. The Civil Service Commission replied in pertinent part as follows:

Our examination and view of the file of the written opinion and findings of the arbitrator upon which the order was based leaves unanswered substantial factual determinations which must be made prior to any finding that the arbitrator's order is, or is not, legally capable of implementation. It has been consistently deemed that after all discretionary acts that are required to effect a personnel action have been taken by an officer having the authority to take the action, and nothing remains to be done except ministerial acts, the personnel action is completed, regardless of the fact that ministerial and nondiscretionary acts remain to be done. Court decisions uniformly hold that the appointing action is completed when the last act in the exercise of the appointing power is performed (*Marbury v. Madison*, (1803), 1 Cranch 137; *U.S. v. Le Baron*, (1856), 19 How. 73; *State ex rel Coogan v. Barbour* (1885), 22 A. 686; *Witherspoon v. State* (1925), 103 So. 134; *Board of Education v. McChesney* (1930), 32 SW2d 26). The appointing power is exhausted when the last discretionary act is completed. The appointment is then irrevocable, and not subject to reconsideration. (*U.S. v. Smith*, 1932), 286 U. S. 6; *State ex rel Calderwood v. Miller*, (1900), 57 NE 227; *State ex rel Jewett v. Satti* (1947), 54 A.2d 272).

In our opinion then the following facts would have to be established before we could determine if the order is in actuality a retroactive promotion:

1. In the standard procedure for promotions in the Department of Labor, had the requisite discretionary authority for the promotion of Deborah J. Gwynne been exercised so that all remaining actions in the promotion process were classifiable as ministerial and administrative?
2. If the discretionary authority for promotion had in fact been exercised was the promotion conditioned upon the prior reclassification of the grievant's position?
3. If the promotion was conditional upon reclassification was it necessary for someone to exercise discretionary authority to effect the reclassification?

These questions are all aimed at establishing whether or not the required discretionary authority had been exercised.

Assuming that these questions are answered in a manner which shows that all discretionary authority had not been exercised to effect the promotion, then the cited authorities are clear in stating that the promotion action may not be back-dated since to do so would create a prohibited retroactive promotion. If, however, the answers to these questions indicate that the requisite discretionary authority had been exerted, then the proposed award is not recommending a retroactive promotion, but merely acknowledging an accomplished fact, and the order may be implemented.

In the meantime, the Comptroller General had ruled in decision B-180010 (October 31, 1974) that the agency in that case could process a retroactive promotion and pay the appropriate backpay as directed by an arbitrator's award, stating that his previous decisions to the contrary would no longer be followed. In view of that decision, as well as the Comptroller General's decisions B-179711 (June 25, 1974) and B-180311 (October 4, 1974), the Council requested the Civil Service Commission to reconsider the interpretation furnished in, among other cases, the instant case. The Commission replied in pertinent part as follows:

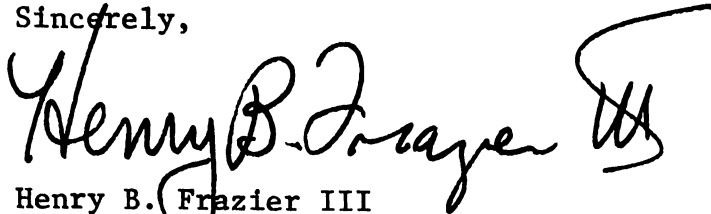
The new line of Comptroller General decisions would not necessarily alter our conclusions in this case. The new decisions do not go so far as to allow the complete substitution of an arbitrator's judgment for that of the proper agency official when there are remaining discretionary actions required by the merit promotion procedures. Therefore, in order to come to any conclusion as to the agency's authority to implement the award we must have the answers to the questions which were posed in our original reply to the Council. When we have that information we will also be able to proceed with a review of this case in light of the new Comptroller General decisions.

In the Council's opinion, it is necessary that the parties furnish the Council with answers to questions 1-3 posed in the Civil Service Commission's original reply, and quoted above. Accordingly, the parties are directed: (1) To furnish the Council, on or before June 9, 1975, with such answers by a stipulation between the parties; or (2) to resubmit the case to the arbitrator for his answers to such questions, and, within 15 days after the arbitrator's action, file with the Council the arbitrator's supplemental award limited to his answers to those questions; and (3) to submit with such answers any statements of position which the respective parties wish to be considered by the Council.

Pending receipt of answers to those questions either by stipulation or by supplemental award and any statements of position thereon by the parties, the Council will hold the instant appeal, and the Council's decision on its merits, in abeyance.

By the Council.\*/

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name.

Henry B. Frazier III  
Executive Director

---

\*/ The Secretary of Labor did not participate in this decision.

Department of Defense, State of New Jersey, A/SLMR No. 323. Pursuant to section 2411.4 of the Council's rules and section 203.25(d) of the Assistant Secretary's then current regulations, the Assistant Secretary referred the following major policy issue to the Council for decision: Whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude the Respondent (Department of Defense, State of New Jersey) from disclosing to the Complainant (National Army and Air Technicians Association, I.U.E., AFL-CIO), in the context of a grievance proceeding, certain relevant and necessary documents used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment, including the grievant.

Council action (May 22, 1975). Based on the Civil Service Commission's interpretation of its own directives and related laws pertaining to the major policy issue, the Council held that applicable laws and regulations, including policies set forth in the Federal Personnel Manual, do not specifically preclude the Respondent from disclosing to the grievant (or his representative), in the context of a grievance proceeding, certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment. Thus, the Council ruled, the agency can make such relevant information available to the grievant (or his representative) without any violation of law, rules, or Commission directive provided the manner in which the information is made available protects the privacy of the employees involved by maintaining the confidentiality of the records containing such relevant information. Further, the Council noted, disclosure to the grievant of such relevant materials (after measures are taken to protect the privacy of the employees involved by procedures such as those described in the attached NLRB decision, FLRC No. 73A-53, Report No. 59) effectuates the purposes of the Order; i.e., disclosure may enable the grievant to decide whether or not to proceed with his grievance, while the requisite anonymity protects the privacy of the Federal employee, as required by law and regulation.



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

Department of Defense,  
State of New Jersey

and

A/SLMR No. 323  
FLRC No. 73A-59

National Army and Air Technicians  
Association, I.U.E., AFL-CIO

DECISION ON REFERRAL OF A MAJOR POLICY ISSUE  
FROM ASSISTANT SECRETARY

Background of Case

This case arose as a result of a complaint filed by the labor organization (Complainant) alleging a violation of section 19(a)(1) and (6) of the Executive Order based on the activity's (Respondent) refusal to permit the labor organization, in connection with the processing of an employee grievance, access to documents which reflected an evaluation panel's assessment of "Best Qualified" candidates. The Assistant Secretary concluded that absent the Respondent's defense that the Federal Personnel Manual prohibits the disclosure of such information, he would adopt the Administrative Law Judge's recommendation that a violation of section 19(a)(1) and (6) be found. However, the Assistant Secretary found that the Respondent's defense raised a major policy issue which required resolution by the Federal Labor Relations Council. Therefore, pursuant to section 2411.4 of the Council's rules and section 203.25(d) of his regulations, the Assistant Secretary referred the following major policy issue to the Council for decision: "[W]hether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude the Respondent from disclosing to the Complainant, in the context of a grievance proceeding, certain relevant and necessary documents used by the evaluation panel in assessing the qualifications of the six 'Best Qualified' candidates for appointment, including the grievant."

Opinion

Since the issue posed by the Assistant Secretary's referral raised a question as to the effect of "applicable law and regulations, including policies set forth in the Federal Personnel Manual," the Council, in accordance with established practice, asked the Civil Service Commission for an interpretation of its directives in relation to the major policy issue.

The Commission replied, in pertinent part, as follows:\*/

[O]n August 29, 1974, we issued our advice on the matter of the availability of performance appraisals of employees to other employees and to adjudicating officials, in unfair labor practice and similar proceedings. In summary, that advice was that an employee or his representative was prohibited by Commission directive from seeing the appraisal of another employee under most circumstances, including the circumstances of casual interest or the pursuit of a complaint through grievance, unfair labor practice, or other formal or informal machinery. An employee may see his own appraisal, of course, and an adjudicating official is entitled to see appraisals of employees' performance when required in the carrying out of official duties.

Our August 29 advice has direct applicability to the instant question, in that it is apparent from the report and recommendations of the Administrative Law Judge that supervisory appraisals of performance for the six candidates under discussion were among the principal documents used by the evaluation panel in assessing qualifications. The instant case, however, raises issues that go beyond those present in the earlier case, in that documents other than supervisory performance appraisals are involved. From the ALJ report and recommendations, it seems likely that at issue are experience, training, and related records of the six candidates, plus work sheets or other files created by the promotion evaluation panel. The former presumably are in special promotion files maintained by the agency, or they could take the form of documents found in the Official Personnel Folders maintained by the agency under instructions from the Civil Service Commission. The latter reflect various aspects of the deliberations of the panel, including the transformation of the totality of applicants' qualifications into point scores which are determinative of inclusion or noninclusion on a list of "Best Qualified" candidates, from which selection for promotion is made.

First, with respect to access to an employee's Official Personnel Folder, the Civil Service Commission has dealt specifically with the question of entitlement to such material in Part 294 of the Civil Service Regulations. The applicable Federal Personnel Manual instructions, extracted from subchapter 7 of FPM Chapter 294, state:

---

\*/ It will be noted that, in its reply, the Civil Service Commission refers to an earlier reply in another case which was dated August 29, 1974. The full substance of the Civil Service Commission's earlier advice as contained in that letter of August 29, 1974, was incorporated in the Council's decision in National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, FLRC No. 73A-53 (October 31, 1974), Report No. 59, which is reproduced as an appendix to this opinion.

- "a. Action before disclosure of the Official Personnel Folder. Except as provided in paragraph b(2) of this section, before the Commission or other Government agency discloses the contents of the Official Personnel Folder, it shall remove the following information from the folder:
- (1) Medical information in accordance with subchapter 4 of this chapter.
  - (2) Test material and copies of certificates and other lists of eligibles in accordance with subchapter 5.
  - (3) Investigative reports in accordance with subchapter 6.
  - (4) Loyalty and security investigative information in accordance with subchapter 6 of this chapter and subchapter 2 of chapter 293.
  - (5) Confidential questionnaires and employment inquiries obtained in confidence in accordance with chapter 731.
- b. Persons authorized access to active folders. The Official Personnel Folder is to be disclosed by the Commission or other Government agency to the following persons:
- (1) Employee or former employee. Subject to paragraph a of this section, the Official Personnel Folder of a Government employee or former Government employee shall be disclosed to him, or to his representative designated in writing, or to any other person who has the written consent of the employee or former employee.... However, the disclosure must be in the presence of a representative of the agency having custody of the folder. When possible, the representative should be from the personnel office....
  - (2) Officials of the executive branch. An Official Personnel Folder shall be disclosed to an official of the executive branch of the Government who has a need for the information in the performance of his official duties without restriction.
  - (3) Other Federal Officials." (This provision deals with disclosure of files to members of Congress, officials of the legislative and judicial branches, and the District of Columbia.)

By way of an interpretive note, we would comment that the phrase "performance of his official duties" (paragraph b(2), above) has

approximately the same meaning as the phrase "his official responsibilities" in subchapter 5 of FPM Chapter 335, discussed in our letter of August 29. That is, it refers to those responsibilities officially assigned, supervised, etc., by or through appropriate agency authority. We would also comment that, while the Commission's instructions as quoted above deal explicitly with an Official Personnel Folder established under Part 293 of the Commission's regulations, it is the intent of the instruction to cover with equal force personnel records and files which are identical or tantamount to records in an Official Personnel Folder, but which are maintained separately or as a duplicate set for the convenience of easy reference in administering a specific personnel program, such as merit promotion.

Before analyzing the above-quoted instruction in terms of the case at hand, it is appropriate to speak to any Commission directives that pertain to the other materials in question--rating sheets, point scores, the promotion certificate itself, and any other documents produced by the evaluation panel.

Subchapter 6 of FPM Chapter 335 specifies records that must be maintained in order to assist Civil Service Commission inspectors in auditing adherence to Commission requirements. These records are to include:

"A temporary record of each promotion made under each plan.... It must contain sufficient information to allow reconstruction of the promotion action. At a minimum, the record must include...

- (e) Evaluation methods and system for combining evaluations to obtain final ratings;
- (f) Evaluations of the candidates (including supervisory appraisals, test scores, etc.);
- (g) Names of candidates as they appeared in the final ranking;.."

The instructions in subchapter 6, however, do not deal explicitly with the question of access to these records by employees or their representatives. Subchapter 5 of FPM Chapter 335 does, albeit indirectly, by specifying what information an employee is entitled to have about merit promotion. Section 5-2 of this subchapter specifies in considerable detail the information that must be made available to an employee about promotion plans, about opportunities, about qualification requirements, evaluation techniques; and ranking methods, about how vacancies may be filled, and about how questions may be surfaced and complaints resolved. With respect to specific promotion actions, this section provides that:

"The following information about specific promotion actions is available to an employee upon his request, and an agency is required to inform employees periodically of their right to this information:

- (1) Whether the employee was considered for promotion and, if so, whether he was found eligible on the basis of the minimum qualification requirements for the position;
- (2) Whether the employee was one of those in the group from which selection was made;
- (3) Who was selected for promotion; and
- (4) In what areas, if any, the employee should improve himself to increase his chances of future promotion."

It is clear from the foregoing that the Commission instructions, as set forth in the Federal Personnel Manual, do not specifically prohibit access on the part of the grievant or his representative to the materials at issue in this case. Neither do they authorize such access. In the absence of a clear prohibition or a clear entitlement, we must be guided by the principles underlying the Commission's instructions on access to personnel records, as they apply to this particular case.

The Commission's primary interest, as can be seen in the FPM's prohibition on casual access and in the distinction between an employee's access to his own records and to those of others, is to safeguard the privacy of Federal employees. It has never been the Commission's intention that information necessary to the processing of an employee grievance be withheld absolutely from the grievant or his representative. The agencies' responsibility to protect employees from invasion of privacy by limiting access to their personnel records is a very serious one. In the great majority of cases, however, we believe this responsibility is fully compatible with disclosure of sufficient information to the grievant or his representative to enable him to decide whether to proceed with his grievance and to develop his case. The methods of "sanitizing" records, such as blocking out identifying marks, and abstracting or summarizing the contents of documents, discussed in connection with the preparation of an official grievance file in our August 29 letter, are equally relevant to the case at hand.

In summary, since we find no specific prohibition in law or Commission instructions concerning access to the materials in question on the part of the grievant or his representative, and in view of the availability of methods for protecting the privacy of employees while divulging relevant information from their records, we believe the agency can make available the requested materials (including "sanitized"

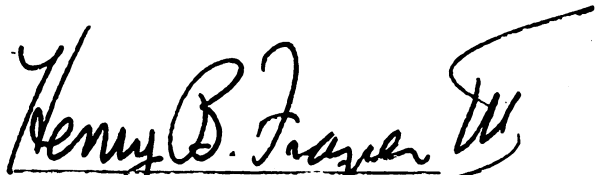
performance appraisals) to the grievant or his representative without any violation of law, rule, or Commission directive.

Conclusion

Therefore, in response to the Assistant Secretary's question, applicable laws and regulations, including policies set forth in the Federal Personnel Manual, do not specifically preclude the Respondent from disclosing to the grievant (or his representative), in the context of a grievance proceeding, certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment. Thus, the agency can make such relevant information available to the grievant (or his representative) without any violation of law, rules, or Commission directive provided the manner in which the information is made available protects the privacy of the employees involved by maintaining the confidentiality of the records containing such relevant information.

In the Council's view, disclosure to the grievant of such relevant materials (after measures are taken to protect the privacy of the employees involved by procedures such as those described in the appendix) effectuates the purposes of the Order. That is, disclosure of the materials may enable the grievant to decide whether or not to proceed with his grievance, while the requisite anonymity protects the privacy of the Federal employee, as required by law and regulation.

By the Council.

  
Henry B. Frazier III  
Executive Director

Attachment

Issued: May 22, 1975

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

National Labor Relations  
Board, Region 17, and  
National Labor Relations Board

and

Assistant Secretary  
Case No. 60-3035(CA)  
FLRC No. 73A-53

David A. Nixon

DECISION ON REFERRAL OF MAJOR POLICY  
ISSUES FROM ASSISTANT SECRETARY

Background of Case

During his consideration of a motion and a cross motion filed by the parties in connection with his Decision and Remand in A/SLMR No. 295, the Assistant Secretary found that certain major policy issues had been raised which required resolution by the Federal Labor Relations Council. Therefore, pursuant to Section 2411.4 of the Council's Rules and Section 203.25(d) of the Assistant Secretary's Regulations, he referred the following major policy issues to the Council for decision: (1) "whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding held pursuant to Section 6(a)(4) of Executive Order 11491, as amended, and (2), if an employee or his representative is so precluded from seeing and adducing evidence with respect to the appraisal of another employee, does such prohibition apply also to the Assistant Secretary, his representatives and/or Administrative Law Judges acting pursuant to their responsibilities under the Order?"

Opinion

Since the issues posed by the Assistant Secretary's referral raised a question as to the effect of "applicable law and regulations, including policies set forth in the Federal Personnel Manual," the Council asked the Civil Service Commission for an interpretation of its directives in relation to the two major policy issues.

The Commission replied as follows:

The applicable Commission policy directive is found in subchapter 5, Chapter 335 of the Federal Personnel Manual, which states in part that

" . . . an employee is not entitled to see an appraisal of another employee. Nevertheless, the representative of an employee (even though an employee himself) may see the employee's appraisal, and an employee may see the appraisal of other employees when dictated by his official responsibilities, for example, as member of a promotion board."

This directive prohibits an employee or his representative from seeing the appraisal of another employee under most circumstances, including the circumstances of casual interest or the pursuit of a complaint through grievance, unfair labor practice, or other formal or informal machinery. It, on the other hand, by its own terms clearly permits the Assistant Secretary, his representative, an Administrative Law Judge, or any other person having official responsibility in connection with the investigation, examination, or decision on matters at issue in a proceeding to see the appraisal of another employee if review of the appraisal is necessary for the execution of that responsibility. However, such person, upon gaining access to the appraisal, must carry out his responsibility (including any responsibility he may have to develop and make available a complete record or file containing all documents related to the proceeding) in such a fashion as to not compromise the fundamental requirement that, except under limited circumstances not germane here, "an employee is not entitled to see an appraisal of another employee."

Basic to the above policy is the recognition that disclosure to employees (or their representatives) of supervisory appraisals of performance of other employees, or the inclusion of such appraisals in an open file, is potentially clearly invasive of their personal privacy. The above policy, and this interpretation, also recognizes that "official responsibilities" in the context of the above cited directive refers to those responsibilities officially assigned, supervised, etc., by or through appropriate agency authority. The fact that a function may appropriately be performed on official time does not alone serve to bring it within the embrace of the term, "official responsibilities." Reasonable amounts of official time may be permitted for a number of activities that are not appropriately directed or supervised by proper agency authority and which simply could not be reasonably construed as official responsibilities of the employee involved. Examples include official time for an employee to prepare an adverse action defense, or official time to serve as a member of a union negotiating team.



The above policy of course raises the secondary question of how an employee who has access to an appraisal by virtue of his official responsibility for investigating, examining, or adjudicating a complaint can protect the privacy of employees by maintaining the confidentiality of that appraisal under circumstances where that official is required to develop and make available a complete record or file containing all documents relating to the proceeding.

Illustrations of how this may be accomplished are found in a number of proceedings for which the Commission has responsibility. For example, the grievance system established under the authority of Part 771 of the Civil Service Regulations requires, as a matter of grievance policy, that an agency grievance examiner "must establish an employee grievance file. This is an independent file, separate and distinct from the Official Personnel Folder. The grievance file is the official record of the grievance proceedings and must contain all documents related to the grievance . . ." (Subchapter 3 of Federal Personnel Manual Chapter 771)

However, with respect to matters that cannot be disclosed to the grievant, Subchapter 1 of that chapter provides, in pertinent part, that "information to which the examiner is exposed which cannot be made available to the employee in the form in which it was received must be included in the file in a form which the employee can review or must not be used." Thus, under that grievance system, an examiner may conclude that the contents of a supervisory appraisal are either not relevant or not necessary for the resolution of the matter and thus need not be made a part of the file or, if its contents are relevant and necessary, then he must include it in the file "in a form which the employee can review."

For an illustration of how this can be done, we draw from another proceeding--complaints of discrimination processed under Part 713 of the Civil Service Regulations. The Handbook for Discrimination Complaints Examiners published by the Commission in April, 1973, gives specific instructions in this area and does so with specific reference to supervisory appraisals of performance. That handbook provides as follows:

### "Supervisory Appraisals

#### 1. Disclosure -- an invasion of privacy

The disclosure of supervisory appraisals of performance and potential of employees other than the complainant, to the complainant, constitutes an unwarranted invasion of the personal privacy of the employees concerned. However, this does not preclude the investigator or Complaints Examiner from reviewing the supervisory appraisals of other employees and including information from them in the record to the extent

that this can be done without identifying a particular employee as being the subject of a particular appraisal. Witnesses may testify at a hearing to matters relevant to supervisory appraisals of performance and potential of employees.

## 2. Concealing name of person appraised

When the supervisory appraisals of several other employees are involved in a complaint, it might be possible to make them anonymous by taping over or otherwise concealing the employees' names and other identifying information. Copies of the taped-over appraisals can then be made and included in the file. If the form and content of the appraisals do not lend themselves to this kind of treatment to assure confidentiality, it may be possible to include pertinent extracts and, if so, this should be done.

## 3. Narrative statement of

If there is no way that the appraisals or extracts therefrom can be included without identifying the subject of each appraisal, the only alternative is for the investigator or Complaints Examiner to include in the record a narrative statement of the results of his review of the appraisals. This can consist of something as simple as a statement that the investigator or Examiner had found the appraisals not material to the complaint, or something as extensive as a paraphrase of each appraisal.

## 4. Challenge to accuracy of narrative statements

If the complainant challenges the accuracy of the material included by the investigator concerning other employees' appraisals, the Examiner may verify the accuracy of that material by reviewing the appraisals himself. Similarly, the deciding official can make an independent verification if he feels the need to do so. This would not be in conflict with the instructions in Appendix B of FPM Chapter 713 because the purpose of any review of the appraisals by the Examiner or the deciding official would be to assure the accuracy of the information in the record, not to acquire and consider information not in the record."

The above illustrations are cited not to suggest their specific applicability in the case at hand but rather to illustrate how the policy of nondisclosure of supervisory appraisals cited in Chapter 335 of the Federal Personnel Manual may be accommodated in open proceedings where a formal file or record is required to be established.

### Conclusion

Therefore, in response to the Assistant Secretary's questions, the Federal Personnel Manual: (1) prohibits an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding, but (2) permits the Assistant Secretary, his representative and/or the Administrative Law Judge, acting pursuant to their responsibilities in a proceeding under the Order, to see the appraisal of another employee if review of such appraisal is necessary for the execution of official responsibility, but only if done in a manner that maintains the confidentiality of that appraisal, while accommodating the need for establishment of a formal file in open proceeding by adhering to the guidelines set forth in the Civil Service Commission response.

While the Council notes that the Civil Service regulations set forth by way of example are not by their own terms applicable to the situation here presented, adoption of substantially similar procedures by the Assistant Secretary would be consistent with the purposes of the Order while still protecting the privacy of the Federal employees, as required by applicable law and regulation. That is, such procedures would enable the Assistant Secretary to carry out his responsibility of deciding unfair labor practice complaints based upon all necessary and relevant facts, and still protect the privacy of Federal employees.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: October 31, 1974

AFGE Local 2118 and Los Alamos Area Office, ERDA. The dispute in this case concerned the negotiability under the Order of union proposals which would: (1) Establish time limits for deciding whether to fill and for filling certain vacant positions, and require the temporary promotion of unit employees into such positions under certain conditions; (2) require the agency to adhere to specified fire company manning levels; and (3) require the agency to comply with various referenced safety standards.

Council action (May 22, 1975). As to (1), the Council ruled that the proposal is nonnegotiable under section 12(b)(2). With respect to (2), the Council held that the proposal is excluded from the agency's obligation to bargain by section 11(b). As to (3), the Council held that the proposal is negotiable under section 11(a) of the Order. Accordingly, the agency head's determination of nonnegotiability was sustained in part and set aside in part.

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

AFGE Local 2118

and

FLRC No. 74A-30

Los Alamos Area Office, ERDA

DECISION ON NEGOTIABILITY ISSUES

Background

AFGE Local 2118 represents a unit of firefighters at the Energy Research and Development Administration's<sup>1/</sup> Los Alamos, New Mexico, Area Office. During negotiations with the Area Office, disputes arose as to the negotiability of union proposals (1) to establish certain time limits for deciding whether to fill and for filling vacant positions and to require temporary promotions into such positions under certain conditions, (2) to require adherence by the Area Office to specified fire company manning levels, and (3) to require Area Office compliance with various referenced safety standards. Upon referral, the agency determined the proposals to be nonnegotiable under the Order. The union petitioned the Council for review of that determination under section 11(c) of the Order,<sup>2/</sup> and the agency filed a statement of position.

Opinion

Each of the three proposals will be considered separately below.

1. Establishment of time limits for deciding whether to fill and for filling vacant positions, and requirement of temporary promotions.

---

<sup>1/</sup> The name of the agency appears as officially changed during the pendency of this proceeding.

<sup>2/</sup> In its appeal the union also requested that the Council either "establish factfinding proceedings" for use in this case or permit oral argument by the parties, and moved to strike certain portions of the agency head determination, the agency statement of position, and the union's petition for review. As to the request for fact-finding or oral argument, the Council is of the opinion that no persuasive reasons have been advanced in support of such request. As to the motion to strike, those portions of the record sought to be stricken were not relied upon by the Council in reaching its decision in this case. For these reasons, and apart from other considerations, the union's request and motion are denied.

The first proposal in dispute reads as follows:

The Agency agrees that when a vacancy occurs in the position of Captain, Motor Pump Operator, or Fire Alarm Board Operator, the Agency shall make a determination within 15 calendar days of such occurrence whether or not to fill the vacancy. If the Agency determines to fill the vacancy, notice thereof shall be posted on official bulletin boards at each Fire Station within 5 calendar days of such determination, and the vacancy shall be filled within 30 calendar days of such posting.

When the Agency anticipates that a position of Captain, Motor Pump Operator, or Fire Alarm Board Operator will be vacant for 5 or more workdays, an employee within the Unit shall be temporarily promoted to the vacant position until it is permanently filled.

The agency argues that this proposal conflicts with section 12(b)(2) of the Order because its requirement that management decide within a specified time period whether or not to fill a vacancy in one of the referenced positions infringes upon the substance of management's reserved rights.<sup>3/</sup> The union maintains that the proposal sets forth only the "procedural framework within which such a decision is to be made," and in no way interferes with management's reserved authority to fill or not to fill a vacant position under section 12(b)(2).

Section 12 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--

. . . . .

---

<sup>3/</sup> The agency also contends that it is under no duty to negotiate about selection procedures and time limits for the filling of Captain positions (as it maintains the proposal would require it to do) because such positions are supervisory and are excluded from the bargaining unit by section 10(b)(1) of the Order. Section 10(b), however, concerns only the makeup of units of recognition; it does not deal with the scope of negotiations or the obligation to bargain. Because unit makeup is not at issue here, and in view of our decision with respect to the negotiability of the proposal under section 12(b)(2), we find it unnecessary to reach and do not rule upon the agency's contentions relative to section 10(b).

(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 . . . .

The language of section 12(b)(2) manifests an intent to bar from agreements provisions which infringe upon management officials' exercise of their existing authority to take the personnel actions specified therein. The section does not, however, preclude negotiation of the procedures which management will follow in exercising that reserved authority, so long as such procedures do not have the effect of negating the authority itself. Thus, in its VA Research Hospital decision,<sup>4/</sup> the Council stated:

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.

The proposal in the VA Research Hospital case would have enabled the union to obtain higher level management review of a selection for promotion before that promotion could be effected. The Council held that the proposal did not violate section 12(b)(2), because it neither directly limited management's final authority to select employees for promotion, nor infringed upon such authority by unreasonably delaying or impeding management's selection. The proposal dealt, instead, with the procedures which management would observe in deciding and acting with regard to final promotion selections--which procedures did not have the effect of negating the authority reserved to management by section 12(b)(2) and were therefore negotiable.

The question before the Council herein is, in like manner, whether the instant proposal would, as the agency contends, interfere with the agency's reserved authority under section 12(b)(2), or whether, as

---

<sup>4/</sup> Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31.

the union contends, the proposal merely would establish the procedures which the agency would observe in exercising that reserved authority.

As previously set forth herein, the first sentence of the first paragraph of the proposal in question would require that the agency commit itself to decide whether or not to fill certain vacant positions within a 15-day time limit. Apart from any other results of the proposal, such a requirement would, in effect, deny the agency any right to change its decision after the specified time limit had passed. In this respect, the proposal is manifestly inconsistent with the meaning of section 12(b)(2) as recently explained by the Council:<sup>5/</sup>

[I]mplicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2) is the authority to . . . change its decision, once made, whether or not to take such action.

Thus, the portion of the proposal which would prevent management from changing its decision, once made, whether or not to fill positions conflicts with section 12(b)(2) and is nonnegotiable.

Similarly, as regards the requirement in the second sentence of the first paragraph of the proposal that vacant positions which management determines to fill must be filled within 30 days of posting, such a provision is also inconsistent with management's right under section 12(b)(2) to decide not to fill a vacant position which, in the subsequent exercise of its discretion, it determines cannot or should not be filled within such, or any, period.

In our opinion, then, the first paragraph of this proposal, unlike the proposal in the VA Research Hospital case, so restricts the agency's authority to decide and act with respect to the filling of vacant positions as to negate the authority reserved to management by section 12(b)(2). Accordingly, we must find the first paragraph of the proposal to be nonnegotiable.<sup>6/</sup>

As concerns the second paragraph of the proposal, it would require the agency to fill, by temporary promotion, positions expected to remain vacant for 5 or more workdays. In the Council's view, this requirement likewise conflicts with rights expressly reserved to management by section 12(b)(2) to promote or assign employees to

---

<sup>5/</sup> National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61.

<sup>6/</sup> In this regard, the portion of the first paragraph requiring that notice of vacant positions be posted on official bulletin boards within 5 days was not specifically addressed by the parties and, standing alone, does not conflict with the Order.



positions within the agency. In this regard, whether the promotion involved is temporary or permanent makes no difference in terms of the reservation of decision and action authority to management under section 12(b)(2).<sup>7/</sup> In either case, except as may be provided by applicable laws or regulations, the authority to decide and act with respect to the promotion resides, by virtue of section 12(b)(2), solely with management and may in no fashion be bargained away.<sup>8/</sup> Since the second paragraph of the proposal would negate management's reserved authority to fill vacant positions by means other than the temporary promotion of unit employees, or to refrain from filling such positions as its judgment might dictate, we must find that the second paragraph of the proposal is also nonnegotiable.

Therefore, for the reasons given above, we hold that the agency head determination, that the union's first proposal is nonnegotiable under section 12(b)(2) of the Order, was proper and must be sustained.

2. Mandatory compliance with fire company manning levels.

The union's second proposal provides as follows (emphasis by union):

Section 5: The Agency shall, as a matter of safety, follow as mandatory for Fire Company Manning purposes the following:

1. NFPA No. 4-1971, Section 22.12, National Fire Codes, which reads, "The response manning of a fire company should not be less than 5 men."
2. NFPA No. 4-1971, Section 22.15, which reads, "Each company should be provided with enough officers to provide a leader of the company at time of response." Officers shall be Captain or MPO acting as Captain.
3. NFPA No. 4-1971, Section 51.23, which reads in part, "Absences require about 10% additional to the theoretical number of men available under normal workweeks in effect."

The agency asserts that the proposal would require it to maintain certain manning levels and policies and thereby relates to "patterns of staffing" which fall outside the agency's obligation to bargain

<sup>7/</sup> Local 174, International Federation of Professional and Technical Engineers, AFL-CIO, CLC, and Long Beach Naval Shipyard, FLRC No. 73A-16, note 5 (July 31, 1974), Report No. 55.

<sup>8/</sup> National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61.

under section 11(b) of the Order.<sup>9/</sup> The union contends that the proposal is negotiable "as a matter of safety," and, in effect, to the extent it may be concerned with staffing, merely seeks to incorporate into the parties' agreement standards which the union claims the agency itself has established as mandatory under agency regulations (AEC Manual Appendix 0550, Part III).

Section 11(b) of the Order excepts from an agency's obligation to negotiate matters with respect to, among other things:

the numbers of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . . .

In its Report and Recommendations to the President which accompanied E.O. 11491, the Study Committee stated that this portion of section 11(b) applies "to an agency's right to establish staffing patterns for its organization and the accomplishment of its work . . . ." <sup>10/</sup>

Significantly, all three sections of the instant proposal set expressly mandatory standards, in the proposal's own terms, "for fire company manning purposes." That is, the proposal as drawn clearly would establish manning levels which the agency would be required to maintain. Very plainly, such a requirement as to the numbers, types and/or grades of employees assigned to the Los Alamos fire company or to its work projects or tours of duty bears directly upon the staffing patterns of the agency and thereby concerns matters excluded from the bargaining obligation by section 11(b) of the Order. Further, in this regard, whether or not the agency has by internal regulations unilaterally adopted the manning standards contained in the proposal, as the union contends, does not alter the express exclusion of such matters with respect to staffing patterns from the agency's obligation to negotiate under section 11(b). As a result, we must sustain the agency head's determination that the proposal is outside the agency's obligation to bargain under section 11(b). <sup>11/</sup>

---

<sup>9/</sup> The agency's additional claim that the proposal would restrict management rights under various provisions of section 12(b) is not adequately supported in its appeal and, in view of our decision, does not warrant consideration herein.

<sup>10/</sup> Labor-Management Relations in the Federal Service, part IV, section E.1, at 42 (1971).

<sup>11/</sup> Cf. AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57, in which we held, *inter alia*, that a proposal to establish certain staffing ratios between the number of Immigration Inspectors and the number of air and sea passengers entering the country was similarly excluded from the obligation to negotiate by section 11(b).

### 3. Compliance with mandatory safety standards.

The third proposal provides as follows:

The Agency agrees, as a matter of safety and as a measure of protection to firefighting forces of the Unit, to comply with prescribed and mandatory operational safety standards set forth in AEC Manual Chapter 0550 and AEC Appendix 0550, and any other safety standards prescribed by the Director, Division of Operational Safety, Headquarters; providing, however, that such standards shall not include (1) any which are inapplicable to the Unit's operations or (2) any from which exceptions have been or may be granted by the Director, Division of Operational Safety, Headquarters.

The agency takes the position that while it is prepared to enter upon negotiations "directly related to health and safety factors," such negotiations "must be addressed to specific problems . . . ." Hence, in the agency's view, the union's proposal is nonnegotiable because it "does not speak to any specific personnel policy, practice or working condition." The agency does not, however, contend that the proposal would violate applicable law, regulation of either the agency itself or of appropriate authority outside the agency, or the Order.

In our opinion, the agency's position with respect to this proposal finds no support in the Order. Nothing in the Order dictates that proposals must achieve any particular degree of specificity to be negotiable. Parties to negotiations remain free to adopt whatever language they choose--general or specific--with respect to otherwise negotiable matters so long as that language does not conflict with applicable law, regulations, or the Order. The proposal here in dispute expressly addresses itself to matters of the safety of firefighting forces of the unit, requiring only that the agency agree to comply with "prescribed and mandatory operational safety standards" contained in certain agency directives, and prescribed by the agency Director, Division of Operational Safety. Nothing demands that the subject standards themselves be expressly stated in the parties' agreement: They may be identified by reference. Moreover, as already indicated the agency makes no showing that its agreement to this proposal, i.e., to comply with any particular safety standards which this proposal would by reference incorporate in the agreement, would in any way conflict with appropriate law, regulation, or the Order.<sup>12/</sup> Accordingly, we must hold that the proposal is negotiable.

---

<sup>12/</sup> As would be the case, for instance, if such standards involved matters excluded from the obligation to bargain under sections 11(b) or 12(b) of the Order.

## Conclusion

For the reasons discussed above, and pursuant to section 2411.27 of the Council's rules and regulations, we find that:

1. The agency head's determination as to the nonnegotiability of the first and second union proposals was valid and must be sustained; and
2. The agency head's determination as to the nonnegotiability of the third union proposal was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based upon the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: May 22, 1975

United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, A/SLMR No. 462. In this case, the Assistant Secretary dismissed a representation petition filed by International Association of Fire Fighters, Local Union F-176, Washington, D.C. (IAFF). IAFF appealed to the Council from the Assistant Secretary's decision, contending that the decision is arbitrary and capricious and presents major policy issues.

Council action (May 22, 1975). The Council held that the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present any major policy issue. Accordingly, since IAFF's petition failed to meet the requirements for review provided by section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 22, 1975

Mr. William B. Peer  
Barr & Peer  
Suite 1002  
1101 17th Street, NW.  
Washington, D.C. 20036

Re: United States Department of the Air Force,  
Davis-Monthan Air Force Base, Arizona,  
A/SLMR No. 462, FLRC No. 74A-92

Dear Mr. Peer:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case, and the Department of the Air Force's and the National Federation of Federal Employees' oppositions thereto.

In this case, you sought a representation election for a unit of civilian firefighters employed at Davis-Monthan Air Force Base. An agreement between the National Federation of Federal Employees (NFFE) and the activity, which was in effect at the time you filed your representation petition, described, in pertinent part, the unit represented by NFFE as ". . . all eligible United States Air Force Classification Act employees serviced by the Central Civilian Personnel Office (CCPO), Davis-Monthan Air Force Base (DMAFB) . . ." You asserted that the civilian firefighter classification was not part of the existing unit but was, in effect, a new, unrepresented employee classification, especially in view of the fact that the Fire Department recently had undergone a conversion from essentially a military organization to a civilian organization. The Assistant Secretary found that the requested employees are part of the existing unit at the activity covered by a negotiated agreement which constitutes a bar to the representation petition, as such petition did not meet the timeliness requirements set forth in section 202.3(c) of the Assistant Secretary's regulations. Accordingly, he dismissed your petition as untimely filed.

In your petition for review you contend, in summary, that the decision of the Assistant Secretary is arbitrary and capricious because (1) it did not address the "expanding unit" issue; (2) it gives the International Association of Fire Fighters no realistic open periods in which to file a petition for a representation election; and (3) it is not a reasoned judgment. Additionally, in effect, you contend that the Assistant Secretary's decision presents major policy issues because (1) it virtually ignores the issue of conversion of a military organization to a civilian organization, thus failing to provide a guide to agencies

and labor organizations in determining their respective positions in cases presenting the conversion issue; and (2) it is in direct conflict with the leading case of the Assistant Secretary on accretion, thus the Council should resolve this conflict and enunciate a single rule for accretion cases.

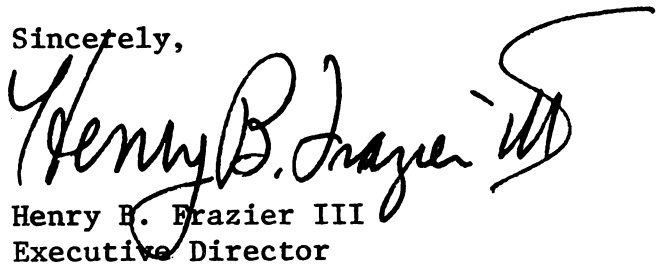
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; his findings do not appear arbitrary and capricious nor do they present a major policy issue. As to your contention that his decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his decision. The decision is based upon the evidence in the record before the Assistant Secretary, established principles reflected in previously published decisions of the Assistant Secretary, and the application of his regulations. The facts and circumstances presented offer no evidence to support the view that an "expanding unit" issue is involved.

Also, with respect to your contention that his decision presents major policy issues, the facts and circumstances presented do not offer evidence to support either the view that the Assistant Secretary's decision is inconsistent with his applicable prior decisions or with other applicable authority, or the view that accretion is involved as an issue in the case. As to the need for guidance to agencies and labor organizations regarding the conversion of a military organization to a civilian organization, there is no indication, in the circumstances herein, that the Assistant Secretary's decision presents such a major policy issue.

Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of the petition is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

C. L. Weist, Jr.  
Captain, USAF

J. Emmerling  
NFFE

Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (Di Stefano, Arbitrator). The agency excepted to the arbitrator's award on grounds, among others, relating to: (1) the allegation that the award violates applicable law and appropriate regulations; and (2) the question of whether, under law, regulations and the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position and, if so, whether such ruling conformed with applicable law and regulations.

The union opposed the agency's petition, in part on grounds of untimeliness (the agency had requested clarification of the arbitrator's award, and its appeal to the Council, while filed within 20 days after the arbitrator's action on its clarification request, was filed more than 20 days after service of the award). The union also opposed Council consideration of a letter from a regional office of the Civil Service Commission included with the agency's appeal, which letter was not presented in the proceeding before the arbitrator.

Council action (May 22, 1975). The Council determined that the agency's petition for review, insofar as it related to the exceptions noted above, met the requirements for review under section 2411.32 of the Council's rules (5 CFR 2411.32), and notified the parties of acceptance of the petition in those respects.

As to the question of timeliness, the Council determined that when a party (or the parties jointly) seek a clarification or interpretation of an award from an arbitrator following service of the award, such action does not toll the running of the time limits in the Council's rules for filing a petition for review of the award. Therefore, should a party which seeks clarification or interpretation of an award wish to preserve its right to seek review of the award, it should request an extension of time from the Council under section 2411.45(d) of the Council's rules (5 CFR 2411.45(d)) until such time as the arbitrator acts on the request for clarification or interpretation. However, since section 2411.33(b) of the Council's rules (5 CFR 2411.33(b)) is ambiguous to the extent that it does not explicitly specify that the time limits therein shall apply even though a party may deem it appropriate to seek clarification and interpretation of the award, the Council ruled that, in accordance with the initial Warner Robins decision, FLRC No. 74A-8, Report No. 53, retroactive application of this determination would not be made in this case. Instead, this determination will apply prospectively.

Finally, as to the letter included with the agency's appeal, the Council, in accordance with section 2411.51 of its rules (5 CFR 2411.51), declined to consider the letter in making its decision on acceptance and ruled that the letter or reference thereto will not be considered when the case is decided on its merits.





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 22, 1975

Mr. G. F. Brennan  
Staff Director  
Civilian Personnel  
Defense Supply Agency  
HQ Cameron Station  
Alexandria, Virginia 22314

Mr. Adam Wenckus, President  
American Federation of Government  
Employees, AFL-CIO, Local 2047  
P.O. Box 3742  
Richmond, Virginia 23234

Re: Defense General Supply Center, Richmond,  
Virginia and American Federation of  
Government Employees. Local 2047, AFL-CIO  
(Di Stefano, Arbitrator), FLRC No. 74A-99

Gentlemen:

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

In accordance with section 2411.32 of the Council's rules of procedure, you are hereby notified that the Council has accepted the petition for review with respect to: (1) the allegation that the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled; and (2) the question of whether, under law, regulations and the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position and, if so, whether such ruling conformed with applicable law and regulations. You are reminded that briefs may be filed, as provided in section 2411.36 of the Council's rules.

The Council carefully considered the union's contention that the agency's petition for review, which was filed with the Council on December 23, 1974, was not filed within the time limits prescribed by section 2411.33(b) of the Council's rules (5 CFR 2411.33(b)). Under that section the time limit for filing a petition for review of an arbitration award is 20 days from the date the award was served on the

party seeking review. In this case it is not clear precisely what day the arbitrator's award was served on the agency, but even assuming that the award (which was dated November 14, 1974) was not served on the agency until November 18, 1974 (the date the agency actually received the award), the petition for review should have been filed with the Council no later than December 9, 1974, in order to meet the time limits prescribed by section 2411.33(b).

However, the record indicates that, following receipt of the arbitrator's award, the agency sought clarification of the award from the arbitrator. (Subsequently, the arbitrator refused to clarify the award without a similar request from the union.) Both the agency, in its petition for review, and the union, in its opposition thereto, addressed the question of timeliness in terms of when the award became "final" following the agency's request to the arbitrator to clarify his award.

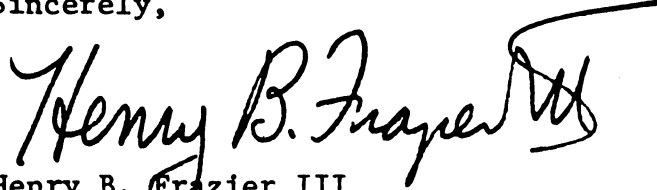
The Council has determined that when a party (or the parties jointly) seek a clarification or interpretation of an award from an arbitrator following service of the award on the parties, such action does not toll the running of the time limits in the Council's rules for filing a petition for review of the award. Therefore, should a party which seeks clarification or interpretation of an award wish to preserve its right to seek review of the award, it should request an extension of time from the Council under section 2411.45(d) of the Council's rules until such time as the arbitrator acts on the request for clarification or interpretation of the award. However, since section 2411.33(b) of the Council's rules is ambiguous to the extent that it does not explicitly specify that the time limits therein shall apply even though a party may deem it appropriate to seek clarification and interpretation of the award, it is the Council's view that, in accordance with precedent established in Warner Robins Air Materiel Area, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-4939 (GA), FLRC No. 74A-8 (May 23, 1974), Report No. 53, retroactive application of this determination should not be made in this case. Instead, this determination will apply prospectively.

The Council has determined that it was not appropriate for the agency to submit with its petition a letter from the Philadelphia Region of the Civil Service Commission responding to the agency's request for an evaluation of the qualifications of the incumbent of the position in question in this case since the arbitrator did not have the benefit of the letter and the advice of the Civil Service Commission contained therein when the matter was before him, nor does it appear from the record that the Civil Service Commission was asked to evaluate anything other than the incumbent's claimed work experience. The union has objected to the inclusion of the letter in the agency's submission to the Council,

stating that it considers the introduction of such evidence to be "highly improper since it was not a part of the arbitration." Therefore, in accordance with section 2411.51 of the Council's rules (5 CFR 2411.51), the Council did not consider the letter in making its decision on acceptance in this case and the letter or references to it will not be considered when the case is decided on the merits.

By 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

Department of Transportation, Federal Highway Administration and National Federation of Federal Employees, Local 1348, Assistant Secretary Case No. 71-3009. The Assistant Secretary, in agreement with the Assistant Regional Director, dismissed the unfair labor practice complaint filed by the union which alleged violation of section 19(a)(1) of the Order by the agency based upon the agency's action terminating dues withholding. The union appealed to the Council contending that the Assistant Secretary's decision presents major policy issues.

Council action (May 22, 1975). The Council held that the Assistant Secretary's decision does not present a major policy issue and does not appear arbitrary and capricious. Accordingly, the Council denied the union's petition for review since it failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 22, 1975

Ms. Lisa Renee Strax, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of Transportation, Federal Highway  
Administration and National Federation of  
Federal Employees, Local 1348 Assistant  
Secretary Case No. 71-3009, FLRC No. 75A-3

Dear Ms. Strax:

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

The Assistant Secretary denied your request for review seeking reversal of the Assistant Regional Director's dismissal of your complaint. In that complaint you alleged a violation of section 19(a)(1) of the Order by the Federal Highway Administration of the Department of Transportation (agency) based upon the agency's action terminating dues withholding.

The Assistant Secretary, in agreement with the Assistant Regional Director, concluded that further proceedings were unwarranted inasmuch as a reasonable basis for the complaint had not been established. He found, in this regard, that the parties had extended their negotiated agreement until the termination of the mediation phase of their negotiations held under the auspices of the Federal Mediation and Conciliation Service (FMCS) and, further, that this phase, in fact, terminated with the close of a negotiation session held on April 17, 1974. In these circumstances, and as section 21(a) of the Order provides that dues withholding is based on the existence of a withholding agreement, the Assistant Secretary found further that the expiration of the parties' basic agreement--which contained the parties' dues withholding agreement--terminated the agency's obligation to continue dues withholding.

In your petition for review you contend that the Assistant Secretary's decision presents major policy issues with regard to whether (1) the Assistant Regional Director correctly applied and interpreted Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155, to the instant case, (2) the mediation step of negotiations on the renewal agreement was completed so as to terminate the extension of the negotiated agreement and, (3) the withholding provision had a life of its own, separate and distinct from the basic bargaining agreement.

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

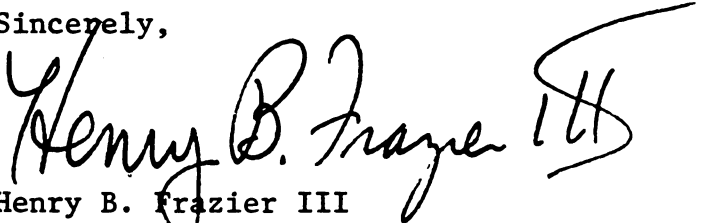
Thus, as to the first major policy issue which you assert, the Council finds that the Assistant Secretary's conclusions in the instant case, concerning the effect of the termination of the agreement on the dues withholding provision, do not appear to depart in any respect from interpretations of the Order in this regard contained in his earlier decisions.

As to the second and third alleged major policy issues, they constitute, in effect, nothing more than disagreement with the Assistant Secretary's findings "that the mediation phase of negotiations terminated with the close of the negotiations session held on April 17, 1974 . . . [and] that the expiration of the basic agreement, which contained the parties' dues withholding agreement, terminated the activity's obligation to continue the dues withholding privilege." They do not, therefore, in the circumstances of the case, present a major policy issue warranting Council review.

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither allege, nor does it appear, that the decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is denied.

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

John E. Mors  
OFHP, FHA  
Dept. of Transportation

U.S. Department of the Air Force, Westover, Massachusetts, Air Force Base, Assistant Secretary Case No. 31-8619 (RO). The Assistant Secretary denied a request for review, filed by the International Association of Fire Fighters, Local Union F-185, seeking reversal of the Assistant Regional Director's dismissal of a representation petition filed by the union. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

Council action (May 22, 1975). Based principally on the reasons fully set forth in its Davis-Monthan Air Force Base decision, FLRC No. 74A-92 (Report No. 71), the Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues. Accordingly, since the union's petition failed to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, the Council denied review of the union's petition (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 22, 1975

Mr. William B. Peer  
Barr & Peer  
Suite 1002  
1101 17th Street, NW.  
Washington, D.C. 20036

Re: U.S. Department of the Air Force, Westover, Massachusetts, Air Force Base, Assistant Secretary Case No. 31-8619 (RO), FLRC No. 75A-24

Dear Mr. Peer:

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

In this case, the International Association of Fire Fighters, Local Union F-185 filed a petition seeking a representation election in a unit consisting of all nonsupervisory, nonprofessional GS firefighters, crew chiefs and fire inspectors employed at Westover Air Force Base, Massachusetts. The Assistant Secretary found that the claimed employees have at all times material been covered by the certification of the National Association of Government Employees, Local R1-31, and are now covered by a negotiated agreement which renders the subject petition untimely. Accordingly, he denied your request for review seeking reversal of the Assistant Regional Director's dismissal of the petition.

In your petition for review you contend that the decision of the Assistant Secretary is arbitrary and capricious and that the decision presents major policy issues. Specifically, you allege the same contentions which you made in your appeal in United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, FLRC No. 74A-92. Moreover, you allege in the instant case that the Assistant Secretary should have followed the precedent of another case and ordered that a hearing be held.

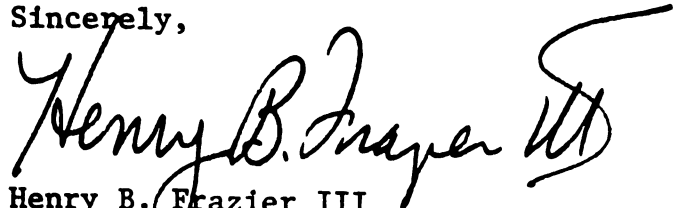
The Council has on this date issued its decision in United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, FLRC No. 74A-92, a copy of which is enclosed, wherein we denied review of the Assistant Secretary's decision. For the reasons fully set forth in that decision, it does not appear that the Assistant Secretary acted without reasonable justification in the instant case or that the Assistant Secretary's decision presents major policy issues. Moreover, your appeal does not demonstrate that substantial factual issues exist requiring a hearing.



Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of the petition is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

Enclosure

cc: A/SLMR  
Dept. of Labor

J. T. Mitchell  
Air Force

S. Q. Lyman  
NAGE

U.S. Department of the Interior, U.S. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495. The union (National Federation of Federal Employees) appealed to the Council from a Decision and Direction of Election issued by the Assistant Secretary, wherein he made certain eligibility determinations and directed the Area Director to reevaluate the showing of interest involved in view of such finding; and, if the showing of interest remained adequate, to conduct an election in the unit found appropriate. However, no final disposition in the case has been rendered by the Assistant Secretary. The union in its appeal to the Council also requested a stay of the Assistant Secretary's action pending Council decision on its appeal.

Council action (May 22, 1975). The Council, pursuant to section 2411.41 of its rules of procedure (5 CFR 2411.41), denied review of the union's interlocutory appeal, without prejudice to the union's 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

May 22, 1975

Ms. Lisa Renee Strax  
Staff Attorney, National  
Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: U.S. Department of the Interior, U.S. Geological  
Survey, Mid-Continent Mapping Center, A/SLMR  
No. 495, FLRC No. 75A-49

Dear Ms. Strax:

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

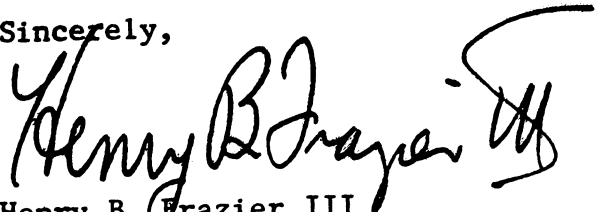
In his Decision and Direction of Election, the Assistant Secretary made certain eligibility determinations and directed that the Area Director reevaluate the showing of interest in view of such finding, and, if such showing remains adequate, that an election be conducted in the unit found appropriate. However, no final disposition in the case has been rendered.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of 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. [See U.S. Army Electronics Command, Army Aviation Detachment, Fort Monmouth, New Jersey, FLRC No. 72A-21 (May 2, 1972), Report No. 22; U.S. Army Engineer District, Mobile, Alabama, and National Federation of Federal Employees, Local 561, FLRC No. 72A-43 (November 10, 1972), Report No. 30; Department of Agriculture, Office of Information Systems, Kansas City, Missouri, FLRC No. 74A-37 (June 24, 1974), Report No. 54; Federal Deposit Insurance Corporation, FLRC No. 74A-97 (January 14, 1975), Report No. 61; and National Science Foundation, FLRC No. 75A-37 (April 4, 1975), Report No. 67.]

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. Likewise, your further request for a stay pending decision on your appeal is therefore denied.

By the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "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

H. O. Givens, Jr.  
Interior

National Federation of Federal Employees, Decision (unnumbered) of Acting Director, LMSE. The individual complainant (Shelton M. Estes) appealed to the Council from a decision of the Acting Director, Office of Labor-Management Enforcement Standards (LMSE). The decision, assumed to be "a final decision of the Assistant Secretary," was dated April 23, 1975, and, so far as the appeal indicates, was mailed on or about that date. Therefore, under the Council's rules of procedure, the complainant's appeal was due in the Council's office on or about May 16, 1975. However, the appeal was not received by the Council until May 20, 1975, and no extension of time for filing was either requested by the complainant or granted by the Council under section 2411.45(d) of the Council's rules (5 CFR 2411.45(d)).

Council action (June 4, 1975). The Council held that the complainant's appeal was untimely filed. Accordingly, 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

June 4, 1975

Mr. Shelton M. Estes  
5325 Hiawatha Lane  
Minneapolis, Minnesota 55417

Re: National Federation of Federal Employees,  
Decision (unnumbered) of Acting Director,  
LMSE, FLRC No. 75A-52

Dear Mr. Estes:

Receipt on May 20, 1975, is acknowledged of your petition for review of the decision of the Acting Director, Office of Labor-Management Standards Enforcement (LMSE) in the above-mentioned case. According to your appeal, the final decision in your case concerning section 18 of the Order was issued by the Acting Director, LMSE, as provided for in section 204.64(b) of the rules of the Assistant Secretary (29 CFR 204.64(b)). Assuming for the purposes of this case that such decision is "a final decision of the Assistant Secretary," subject to Council review within the meaning of section 2411.13(a) of the Council's rules of procedure, (5 CFR 2411.13(a)), the Council has determined, for the reasons indicated below, that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Section 2411.13(b) of the Council's rules (5 CFR 2411.13(b)) provides that an appeal must be filed within 20 days from the date of service of the Assistant Secretary's decision on the party seeking review; under section 2411.45(c) of the rules (5 CFR 2411.45(c)), three additional days are allowed when service is by mail; and under section 2411.45(a) of the rules (5 CFR 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.

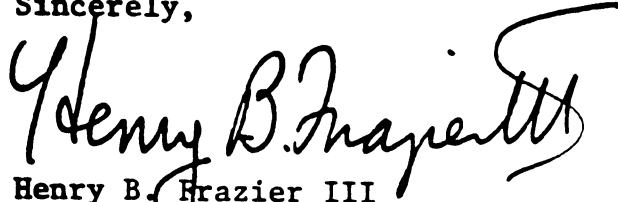
The decision of the Acting Director, LMSE, was dated April 23, 1975, and, so far as your appeal indicates, was mailed on or about that date. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the Council's office on or about May 16, 1975. However, your appeal was not received by the Council until

May 20, 1975, and no extension of time was either requested by you or granted by the Council under section 2411.45(d) of the Council's rules (5 CFR 2411.45(d)).

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

N. T. Wolkomir  
NFFE

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 Council previously ruled that the subject union proposal, concerning the days of the workweek, and the starting times of the workweek, for the agency's meat and poultry inspectors, was negotiable (Report No. 47). Thereafter, in an action contesting the Council's disposition of the matter, initiated by a number of industry associations, the Court remanded the case to the Council for reconsideration prior to final Court decision (National Broiler Council, Inc. v. Federal Labor Relations Council, 382 F. Supp. 322 (E.D. Va. 1974)).

Council action (June 10, 1975). The Council, for the reasons fully set forth in its supplemental decision and upon careful reconsideration consistent with the mandate of the Court, reaffirmed its earlier decision that the union proposal, as submitted to the Council, is valid and consequently negotiable under section 11(a) of the Order.



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

SUPPLEMENTAL DECISION ON NEGOTIABILITY ISSUES

Background

The parties to the case before the Council are American Federation of Government Employees, National Joint Council of Food Inspection Locals (union) and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture (agency).

This case was initially decided by the Council on December 27, 1973 (Report No. 47). It is now before the Council for reconsideration pursuant to remand by the Court, prior to final Court decision, in the action contesting the Council's disposition of this matter (National Broiler Council, Inc. v. Federal Labor Relations Council, 382 F. Supp. 322 (E.D. Va. 1974)).

The background of the case, including the Council's initial decision, the subsequent agreement of the parties, the Court opinion and order, and the instant remand proceedings, are summarized below.

A. Initial decision by the Council. The negotiability dispute between the parties involved the union's proposal concerning the days of the workweek, and the starting times of the workweek, for the agency's meat and poultry inspectors represented by the union in a nationwide bargaining unit. More particularly, the proposal in question provided:

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.

(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. [Underscoring reflects provisions in dispute.]

Upon appeal from the agency's determination of nonnegotiability, filed by the union under section 11(c)(4) of the Order, the Council set aside the determination, finding unsupported the agency's position that the proposal would violate applicable statutes (Poultry Products Inspection Act, 21 U.S.C. 451 et seq; Federal Meat Inspection Act, 21 U.S.C. 601 et seq; and the overtime pay code, 5 U.S.C. 5542(a)), and that bargaining on the proposal was not required by reason of sections 11(b) and 12(b)(4) and (5) of the Order.

In more detail, as to the statutes relied upon by the agency, the Council found that the proposal did not violate the Poultry and Meat Inspection Acts since, contrary to the agency's contentions, the agency's authority to specify the basic workweek and hours of work for inspectors was not shown to have been reserved solely and exclusively to agency management. Further, while the agency contended that the proposal would restrict the<sup>1/</sup> operational flexibility of the industry in conflict with those statutes, the Council held that the agency had not established that any such operational restriction would derive from the proposal; and, in any event, the agency had not only failed to show any affirmative intent by Congress to prevent such a restriction, but rather both acts expressly provided for the payment of overtime costs by the industry, thus countenancing such a restriction on operational flexibility.<sup>2/</sup> Therefore, the Council concluded that neither Inspection Act constituted a bar to negotiability.

Likewise, the Council found that the subject proposal would not violate statutory restrictions on the payment of overtime (5 U.S.C. 5542(a)), as claimed by the agency, since nothing in the proposal as submitted to the Council would require the payment of overtime to the inspectors before the statutory minimums were satisfied (i.e., work "in excess of 40 hours in an administrative workweek," or "in excess of 8 hours in a day").

As to the provisions of the Order relied upon by the agency, the Council rejected the agency's contentions relating to section 11(b), namely that the proposal included matters with respect to the agency's "mission" and "budget." The Council ruled in this regard that the agency had failed to show any connection between the proposal and the mission or budget of the agency as would exempt the proposal from the agency's obligation to bargain under this section.

---

<sup>1/</sup> The agency argued mainly that the proposal would change existing practices, under which the poultry inspectors had a Monday through Saturday workweek, the meat inspectors had a Monday through Friday workweek, and starting times were adjusted to conform to the schedules of the various plant operators, and that the proposal would thereby increase overtime costs which, as noted hereinafter, must be borne by the industry.

<sup>2/</sup> 21 U.S.C. 468, 695; see also 7 U.S.C. 394.

Further, the Council found without merit the agency's argument that the proposal would result in overtime expenses which would conflict with the agency's right to maintain efficient agency operations under section 12(b)(4). The Council adopted (and quoted at length from) the reasoning fully set forth in its earlier decisions in the Little Rock and Charleston cases,<sup>3/</sup> namely, that section 12(b)(4) requires a balancing of all the factors involved, including not only the anticipation of increased costs, but also such factors as the well-being of employees, and 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; and that, to invoke section 12(b)(4), there must be 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. The Council also held that these requirements under section 12(b)(4) were not rendered inapplicable here, as claimed by the agency, merely by reason of the source of funds involved (the payment of overtime costs by industry rather than by government), or the type of service rendered (the direct servicing of a regulated industry rather than a government facility). The Council then found that, as the agency had failed to demonstrate that the proposal would result in increased costs not offset by compensating factors, the proposal was not properly determined by the agency to be proscribed under section 12(b)(4).

Finally, the Council found the agency's reliance on section 12(b)(5) to be misplaced. The Council explained in this regard that the proposal neither addressed, nor sought to limit, management's right to choose the methods and means by which agency operations were to be conducted, and did not constrict management in its selection of personnel for overtime work, which work was at the crux of the dispute between the parties.

In conclusion, the Council set aside the agency's determination as to the nonnegotiability of the subject union proposal. However, the Council cautioned, in conformity with its usual practice in like cases, that its decision should not be construed as expressing or implying any opinion as to the merits of the proposal, but was only a decision that this proposal, as submitted by the union and based on the record then before the Council, was negotiable by the parties under section 11(a) of the Order.

In other words, the Council decided, in accordance with the authority granted under section 11(c)(4), that the subject proposal of the union was not violative of applicable law, regulation of appropriate authority outside the agency, or the Order and set aside the contrary determination of the agency that the proposal was violative of applicable law or the Order.

B. Subsequent negotiated agreement of parties. After the foregoing decision was issued by the Council the local parties resumed negotiations

<sup>3/</sup> 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), Report No. 30, at pp. 4-6 of Council decision; and 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, at pp. 3-4 of Council decision.

and, in March 1974, entered into a workweek agreement. While providing for a basic workweek of Monday through Friday, the agreement otherwise differed extensively from the proposal found to be negotiable by the Council.

More particularly, the local parties agreed that the basic workweek for all food inspectors shall consist of five consecutive 8-hour days, Monday through Friday. However, the agreement was subject to various exceptions for plants then working an approved Tuesday through Saturday schedule and for State inspected plants.

As to hours, the agreement was confined to single shift and multiple shift slaughter plants and did not extend to further processing operations. In single shift plants, the plant operating schedules were to begin not earlier than 4:00 a.m. and terminate not later than 6:00 p.m. Deviations were permitted under limited conditions, but no deviation was to result in a starting time before 4:00 a.m. In multiple shift plants, the first shift was to conform to the requirements for a single shift plant and the second shift was to start not later than 6:00 p.m. A break of not more than three hours was permitted between the first and second shifts.

Additionally, the agreement provided that assignments from one plant to another involving a change from a night shift to a day or single shift, or vice versa for relief purposes, was to be effected only in emergencies and then only with the approval of the regional director or his substitute.

Finally, as stated by an agency representative in an affidavit submitted to the Court with respect to the intent of the agreement reached between the local parties:<sup>4/</sup>

The agreement does not preclude plants from submitting other schedules for approval. If a work schedule is approved, however, which is outside the parameters (sic) established in the agreement, the plant must reimburse the Government for the time involved at overtime rates. Any time worked by the inspector which exceeds 8 hours per day, 40 hours per week, or is outside the days and times agreed upon, constitutes overtime work and the inspector is compensated at premium pay rates.

Also according to the agency affidavit, the foregoing agreement was pending approval by the personnel office of the Department of Agriculture at the time of the Court action discussed below.

C. Opinion and Order rendered by Court. On March 22, 1974, a number of industry associations, including principally the National Broiler Council,

---

<sup>4/</sup> Affidavit dated April 10, 1974, of Michael L. Huggins, Assistant to Director for Labor-Management Relations, Personnel Division, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, at p. 5.

Inc. and the National Independent Meat Packers Association filed a complaint in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, in effect seeking the review and reversal of the Council's decision.<sup>5/</sup> On April 24, 1974, the Court issued its Memorandum Opinion and Order, reversing the Council's decision, but remanding the case to the Council for reconsideration, consistent with the Court's opinion, before rendering its final decision on the associations' complaint.

In its opinion on the merits,<sup>6/</sup> the Court held, contrary to the contentions of the associations, that neither the Poultry Inspection Act, nor the Meat Inspection Act, precluded the Council from ruling on the negotiability of the union's proposal.

The Court likewise rejected an association argument that the negotiations on the union's proposal, as submitted to the Council, would be inconsistent with the statutory provisions relating to workweek and work schedules in 5 U.S.C. 6101 (which authorizes department heads to establish basic workweeks and work schedules subject to certain guidelines). The Court also noted that the specific proposal was consistent with subsection 6101(a)(3)(B). However, the Court added that this does not mean that negotiability could not result in an inconsistent proposal. And, while the Court construed the Council's decision as allowing negotiability only within the outer limits of that statute, it directed the Council, on remand, to clarify whether the Council considered 5 U.S.C. 6101 and whether this construction by the Court was that intended by the Council.

With respect to E.O. 11491, the Court agreed with the Council's decision that the union's proposal was not violative of section 12(b)(4) or 12(b)(5). The Court also rejected the association argument that negotiability here constitutes negotiations with respect to the "mission" or "budget" of the agency, which are excepted from the agency's bargaining obligation under section 11(b). However, the Court questioned whether negotiability would not constitute negotiating with respect to matters concerning "tours of duty" under 11(b), in the light of the Council's Plum Island decision,<sup>7/</sup> and while the Court did not find that the union's proposal was so excepted under 11(b), it considered the Council's decision in the present case to be a departure from its decision in Plum Island and, as discussed below, subject to remand for this reason among others.

The Court then turned to the final argument of the associations, namely that the Council's decision was arbitrary and capricious, and found merit in this position.

<sup>5/</sup> The National Turkey Federation and other poultry associations later joined in the lawsuit. For convenience, all the interested poultry associations will be referred to herein collectively as NBC, and the meat packers associations, as NIMPA.

<sup>6/</sup> The opinion of the Court on jurisdictional matters appears outside the scope of the remand and, except as incorporated by the Court in its opinion on the merits, will not be further adverted to herein.

<sup>7/</sup> AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (July 9, 1971), Report No. 11.

According to the Court, the Council's finding that the union proposal would not violate the statutory restrictions on the payment of overtime in 5 U.S.C. 5542(a), because nothing in that proposal would require the payment of overtime before the statutory minimums were met, reflects an inadequate analysis by the Council. The Court reasoned that the Council was confusing the issue of "negotiability per se" with the specific proposal submitted by the union for negotiation; and that the Council's finding conflicts with and fails to take into account the agency affidavit in the stipulated record before the Court, which indicates that overtime would be payable to inspectors (under the agreement entered into by the union and agency after the Council's decision) even if statutory minimums were not met, and which statement accords with typical practice.

Likewise, in connection with the Council's ruling that the union's proposal was not outside the agency's bargaining obligation under section 11(b) of the Order, the Court found that the Council had "inexplicably" departed from its previous policies as exemplified in the Plum Island decision, which was seemingly a weaker case for nonnegotiability than the present case and was not even cited by the Council in the decision here involved.

Finally, and of central importance in the Court's judgment, Congress, in adopting the Inspection Acts, intended that inspection costs be borne primarily by the government, with processors bearing a minimum burden; and yet the Council had failed to consider the economic impact of negotiability as exemplified by the effect of the subsequent agreement between the union and the agency, which, according to uncontradicted evidence before the Court, would increase the overtime costs to be paid by inspected establishments.<sup>8/</sup>

In more detail, the Court reasoned that, in the circumstances here involved where the industry is dependent upon the presence of the inspectors, the exigencies of the industry should be considered in determining negotiability since the fact of negotiability of the union's proposal, as here confirmed, makes it probable that there will be an impact on some processors. Further,

---

<sup>8/</sup> In the agency affidavit submitted to the Court (note 4, supra), the agency stated (at p. 6 of affidavit):

Prior to negotiations and subsequent to agreement an impact survey was conducted nationwide to ascertain the implications that various contract proposals would have on the industry. The survey was conducted by Meat and Poultry Inspection Program officials stationed in the field who have first hand knowledge of the operating practices of the industry. Their reported results indicate that nine plants out of a total of 5519 could possibly be affected to some degree. Some 257 plants currently under inspection pursuant to the Talmadge-Aiken Act (7 U.S.C. 450), are not affected since State inspectors are conducting the inspection. The negotiated agreement is applicable to Federal meat and poultry inspectors only. In fiscal year 1973 the industry reimbursed APHIS approximately \$21,000,000 for inspection overtime costs incurred. The total fiscal impact on the industry as the result of negotiations has been estimated at less than \$530,000. Copies of the impact survey, the cost involved, and a breakdown of the categories of plants under Federal inspection are attached. . . .

in applying the balancing requirements under section 12(b)(4), the Council erred in failing to consider that industry, though not a party to the negotiations, will have to bear part of the costs, and in failing properly to consider even the meager statistical data submitted by the agency. While the Court recognized that the Council, lacking the survey in evidence before the Court, really had no idea of the possible impact of its decision, and while relatively few processors may be adversely affected, the Court was of the opinion that it is the small operators who may be injured, and that such impact is significant in determining whether as a matter of policy the issues should be negotiable.

In essence, as the Court stated (382 F. Supp. at p. 328):

This is not to say that the time issues cannot be held negotiable, but only that the FLRC should seriously weigh the impact of negotiability on the interests most likely to suffer direct adverse effects before reaching its decision.

In conclusion, as already indicated, the Court reversed the Council's decision. However, before rendering a final decision in the case, the Court ruled that the Council should first reconsider its own decision, applying its special expertise in these matters, and the Court remanded the case to the Council for consideration in a manner consistent with the Court's opinion.

D. Supplemental proceedings before Council on remand. On June 17, 1974, the Council notified the parties to the case before the Council (i.e., the agency and the union) that, consistent with the opinion and order of the Court, the record was reopened, and that the record before the Court, so far as pertinent, was incorporated herein by reference. Additionally, the Council provided the parties an opportunity to file any additional data and arguments which they desired with respect to those matters directed by the Court to be further considered by the Council.

The agency thereafter filed a statement, indicating that it was resting on its previous submissions. The union filed a supplemental statement, in the nature of a brief, on various legal issues.

Also on June 17, 1974, the Council forwarded to the complainant associations in the Court action a copy of the above-mentioned letter to the parties; invited the attention of the associations to section 2411.49 of the Council's rules of procedure (5 CFR 2411.49) relating to amicus curiae submissions;<sup>9/</sup> advised the associations that the Council would entertain their petition to submit a brief as amici curiae on those matters directed by the Court to be further considered in the reopened proceedings; and provided time for the filing of such petition and brief.

<sup>9/</sup> Section 2411.49 of the Council's rules (5 CFR 2411.49) provides:

The Council, upon petition of an interested person and as it deems appropriate, may grant permission for the filing of a brief and oral argument by an amicus curiae and the parties shall be notified of such action by the Council.

NIMPA filed a petition to file a brief as amicus curiae (which was granted by the Council), along with a brief and supporting affidavits, and later filed a supplemental brief in response to the supplemental submission of the union.

NBC submitted a motion, separately concurred in by NIMPA, seeking intervention of the associations as "parties" in the reconsideration proceedings, along with supporting documents. On November 12, 1974, the Council denied the associations' motion; and, on January 15, 1975, the Council denied a request filed by NBC for reconsideration and reversal of this ruling. Copies of these rulings by the Council, fully setting forth the reasons for the actions taken, are attached hereto as Appendix I and Appendix II, respectively.

In its ruling of November 12, 1974, the Council extended the time for NBC to file a brief as amicus curiae, including any data and arguments which NBC wished the Council to consider on the matters directed by the Court to be further considered by the Council. Thereafter, NBC filed an "Economic Impact Study" as amicus curiae in the case.

Pursuant to the mandate of the Court, the Council has carefully reconsidered this case on the entire record, including the submissions by the parties in the initial proceeding, the pertinent record in the Court action, the supplemental statements by the parties, and the arguments, affidavits, and data submitted by the amici curiae, in the reopened proceedings. Based thereon,<sup>10/</sup> and applying its special knowledge in these matters as directed by the Court, the Council has reached the supplemental conclusions set forth below.

#### Supplemental Opinion

As previously indicated, the Court directed that the Council clarify or reconsider its earlier decision principally with regard to: (1) The applicability of 5 U.S.C. 6101 and 5542(a) to the negotiability dispute; (2) the apparent conflict of the initial Council decision with that in the Plum Island case, concerning section 11(b) of the Order; and (3) the propriety of a finding of negotiability on the matter here involved, particularly under section 12(b)(4) of the Order, in the light of Congressional intent and the economic impact of such negotiability on the inspected establishments.

Before discussing these questions, it would seem essential, and implemental of the Court's opinion, first to clarify the precise nature of the negotiability dispute proceeding invoked by the union in the instant case, and the constraints imposed on the Council in such a proceeding under the Order.

<sup>10/</sup> As indicated in the Council's attached ruling of November 12, 1974, NBC and NIMPA also requested oral hearing or oral argument on other issues in the case. Ruling on these requests was deferred pending completion of the written submissions. Pursuant to section 2411.49 of the Council's rules (5 CFR 2411.49), the requests by NBC and NIMPA are denied, because the issues and the positions of the participants in this case are adequately reflected in the entire record now before the Council.



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

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order. . . . [Underscoring in body supplied.]

Section 11(c) of the Order establishes the procedures available to the parties for resolving disputes as to the negotiability of any specific proposals under these provisions in section 11(a). In more detail, section 11(c) reads in relevant part:

(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;

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

(1) 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. . . . [Underscoring supplied.]

The nature of these proceedings under section 11(c) is further explicated in section E.2. of the Report which accompanied E.O. 11491, as follows:<sup>11/</sup>

. . . Where disputes develop in connection with negotiations at the local level as to whether a labor organization proposal is contrary to law or to agency regulations or regulations of other appropriate authorities and therefore not negotiable, the labor organization should have the right to refer such disputes immediately to agency headquarters for an expeditious determination. . . .

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 . . . . [Underscoring supplied.]

This authority of the Council to resolve negotiability disputes is likewise adverted to in section 4(c)(2) of the Order, which empowers the Council

<sup>11/</sup> Labor-Management Relations in the Federal Service (1971), at p. 43.

to consider, "subject to its regulations . . . appeals on negotiability issues as provided in section 11(c) of this Order." Consistent with this authority, the Council has issued detailed rules of procedure governing the conduct of a negotiability dispute proceeding (5 CFR Part 2411, Subpart C, §§ 2411.21 to 2411.27), which rules incorporate and implement the precise language of section 11(c).

While the President has amended the Order in substantial respects on a number of occasions (e.g., E.O. 11616 of August 26, 1971, and E.O. 11838 of February 6, 1975), the relevant provisions of section 11(c) have remained unchanged.

From the outset under these provisions of the Order, the Council has rejected appeals on negotiability disputes which did not arise during the course of negotiations and did not identify a contract proposal and the request for, or rendering of, an agency determination on that proposal.<sup>12/</sup> Further, in cases such as here involved, the Council has limited its decision to sustaining, setting aside, or remanding the agency head's determination on the subject proposal.<sup>13/</sup> And, where the Council has found a proposal to be negotiable, the Council has, since its inception, uniformly cautioned as it did in the instant case:

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.

Of further significance, the Council under section 2411.27 of its rules (note 13, supra) does not "enforce" its decision finding a proposal to be negotiable. Instead, if a party fails to negotiate on the proposal found to be negotiable by the Council, such failure may be subject to an unfair labor practice proceeding initiated by a party before the Assistant Secretary under section 6 of the Order;<sup>14/</sup> or, if an impasse develops and the proponent is unwilling to abandon the proposal, the mediation and impasse procedures available under sections 16 and 17 of the Order may be invoked by a party.

<sup>12/</sup> See, e.g., IAM-AW and Department of the Navy, FLRC No. 71A-6 (February 12, 1971), Report No. 4; NFFE Local 476 and Department of the Army, FLRC No. 71A-50 (January 21, 1972), Report No. 18.

<sup>13/</sup> Section 2411.27 of the Council's rules (5 CFR 2411.27) provides:

§ 2411.27 Council decision.

Subject to the requirements of this part, the Council shall issue its decision sustaining or setting aside in whole or in part, or remanding the agency head's determination.

<sup>14/</sup> See section E.2. of Report accompanying E.O. 11491, Labor-Management Relations in the Federal Service (1971), at p. 43.

Moreover, the Council does not retain jurisdiction in a negotiability case to monitor the subsequent negotiations of the parties, in order to assess the negotiability under section 11(a) of the Order of any revised proposal or any agreement reached by the parties. Rather, if a negotiability dispute arises as to any revised proposal, such dispute may be appealed to the Council under section 11(c)(4), after an agency head determination on such revised proposal. Or, if an agreement is reached on a revised proposal, the Council may be called upon to pass upon the validity of that agreement in a separate proceeding, such as following a grievability or arbitrability decision by the Assistant Secretary, or after an arbitrator's award, under section 13 of the Order.

To repeat, the Council's authority, in a case such as here involved, is limited under section 11(c)(4) to a decision as to the negotiability of a specific proposal upon which an agency head determination has been rendered, i.e., a decision on whether the "proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order." The Council, in such a case, is not empowered either to enforce its decision of negotiability or to maintain jurisdiction to monitor any revised proposal submitted or agreed to by the parties.

We turn then to consideration of the precise questions remanded by the Court for clarification or reexamination.

1. Applicability of 5 U.S.C. 6101 and 5542(a) to negotiability dispute.

(a) 5 U.S.C. 6101. As already indicated, the Court rejected the argument of the associations that negotiation on the union's proposal would violate the authority of the Secretary of Agriculture to set the basic workweek and work schedules under 5 U.S.C. 6101,<sup>15/</sup> and the Court observed that

15/ 5 U.S.C. 6101 reads in pertinent part:

§ 6101. Basic 40-hour workweek; work schedules; regulations.

(a)(1)

(2) The head of each Executive agency . . . shall -

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that --

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(Continued)

the specific proposal was consistent with subsection 6101(a)(3)(B). However, the Court directed the Council to clarify whether the Council had considered this statute, and whether the Council intended to allow negotiability only within the outer limits of 5 U.S.C. 6101.

As to whether the Council considered the subject statute, the agency did not rely on this statute as a ground for its determination of nonnegotiability and therefore no specific reference was made thereto in the Council's decision. Nevertheless the Council was well aware of 5 U.S.C. 6101 (indeed, the statute was referred to by the union in support of its appeal) and the Council, like the Court, considered the union's proposal manifestly consistent with the provisions of that statute. The Council's decision is hereby clarified to reflect such finding.

As to whether the Council intended to allow negotiability only within the outer limits of the subject statute, section 11(a) of the Order limits the scope of negotiations, in part, to "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws. . . ." The Council did not presume to grant an exception from this basic requirement of the Order in its decision in the instant case. Hence, if a negotiability dispute between these parties concerning a revised proposal were presented to the Council in a new proceeding under section 11(c), or if the parties reached agreement on a revised proposal and its validity became an issue before the Council in a separate proceeding such as under section 13 of the Order, the Council would again assess negotiability or validity in the light of applicable laws, including 5 U.S.C. 6101, as required by the Order.

Therefore, to the extent that the Council intended its decision to be fully consonant with the continuing operative requirements of section 11(a), the Council was "allowing negotiability only within the outer limits of 5 U.S.C. § 6101," and the Council's decision is so clarified.

---

(Continued)

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

(c) The Civil Service Commission may prescribe regulations, subject to the approval of the President, necessary for the administration of this section insofar as this section affects employees in or under an Executive agency.

(b) 5 U.S.C. 5542(a). The Council held that the union's proposal, as submitted to the Council, was not violative of 5 U.S.C. 5542(a), since nothing in the proposal would require overtime pay before the statutory minimums had been met.<sup>16/</sup> The Court remanded this ruling for reconsideration because (1) the Council appeared to be confusing "negotiability per se" with negotiability of the union's specific proposal before the Council; and (2) the Council failed to take into account the agency's stipulated statement before the Court, with respect to the subsequent agreement of the local parties, which statement indicated that the inspectors would be entitled to overtime even if the statutory minimums were not met and which statement, according to the Court, is in accord with typical practice.

As to (1), the Council, for reasons already fully set forth, was confined in its authority under section 11(c)(4), in pertinent part, to deciding whether the union's "proposal would violate applicable law." Consistent with these limitations on its authority, and its past practice in like cases, the Council decided only that the union's specific proposal, as submitted to the Council and on the record then before the Council, was not violative of 5 U.S.C. 5542(a).

As to (2), the statement of the agency before the Court as to the intent of the parties was limited to the revised proposal on which tentative agreement was reached after the Council's decision. The language of the union's proposal before the Council did not reflect any required payment of overtime before the statutory minimums were met; and neither the union's appeal nor the agency's submission to the Council reflected any such intent by the union in its proposal. Likewise, the Council was not informed of any established practice of violating the subject statute or of the union's intent to maintain any such unlawful practice under the proposal submitted to the Council. Therefore, the Council was compelled to find that the subject statute was not a bar to negotiation on the union's proposal. Nothing in the reopened record now before the Council requires a contrary decision with respect to the validity of that proposal under 5 U.S.C. 5542(a).<sup>17/</sup>

16/ 5 U.S.C. 5542(a) provides in relevant part:

§ 5542. Overtime rates; computation.

(a) 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. . . .

17/ If the proposal before the Council were agreed to by the parties, then of course its administration would also be required to be consistent with law. Section 12(a) of the Order provides in this regard:

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

(Continued)

In so concluding, the Council must emphasize that it is not here passing upon the validity of the revised proposal which was not disputed by the agency and is part of the subsequent agreement of the local parties described at pp. 3-4, supra. Since the agency head did not determine that the revised proposal was invalid, and since there has been no appeal by the union from such a determination, the Council is without authority to resolve the validity of the revised proposal in a proceeding under section 11(c)(4) of the Order. However, if that issue is subsequently raised before the Council in an appropriate proceeding, the Council will strictly apply the subject statute in a manner consistent with the law and with the Council's obligations under the Order. <sup>18/</sup>

Accordingly, upon careful reconsideration as directed by the Court, the Council reaffirms its earlier ruling that the union's proposal, as submitted to the Council in the instant case, was not shown to be violative of 5 U.S.C. 5542(a).

2. Applicability of Plum Island decision to present case. The Court agreed with the Council that the union's proposal did not concern the agency's "mission" or "budget," which are outside the agency's obligation to negotiate

---

(Continued)

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. . . .

18/ See, e.g., Reports and Recommendations accompanying E.O. 11838, Labor-Management Relations in the Federal Service (1975), in which it is stated with respect to section 13(a) of the Order (at p. 51):

Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. Thus, where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulation or the Order, the Council, under its rules, will grant review of the award. For example, should the Council find that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council would modify or set aside that award.

under section 11(b) of the Order. However, the Court noted other matters excepted from the agency's bargaining obligation under section 11(b), namely: "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." The Court in effect then directed the Council to explain (a) why the Plum Island decision (note 7, supra) on these provisions was not even cited by the Council; and (b) why the Council had departed from the policies exemplified in Plum Island in resolving the negotiability dispute involved in the present case.

With respect to (a), the Council did not advert to Plum Island in its decision in the instant case because the agency here (which, as in Plum Island, is part of the Department of Agriculture) relied solely on the "mission" and "budget" provisions of 11(b) in its position before the Council. The agency did not rely on the "staffing pattern" provisions of section 11(b), noted by the Court, which were central to the disposition of the negotiability dispute in the Plum Island case. In other words, the agency itself tacitly recognized that the Plum Island decision, as explicated by the Council in the Charleston case, FLRC No. 71A-52, (note 3, supra) and related decisions,<sup>19/</sup> was without controlling significance in the present case. The Council agreed with that conclusion and believed that no useful purpose would be served by raising, sua sponte, the "straw man" of Plum Island in the present decision. Therefore, the Plum Island case was not cited, and was not discussed, in this case.

With respect to (b), the Council is of the opinion that its decision here was fully consistent with its interpretation and application of the provisions of section 11(b) in the Plum Island case.

As will be recalled, the agency in Plum Island operated a research facility and, in order to provide for round-the-clock operation and maintenance, it employed four crews of 11 men each, who worked on three rotating, weekly shifts and who supplemented a regular, one-shift crew of maintenance employees. The agency had decided to eliminate the entire third shift in one of its two laboratory buildings and to establish two new fixed shifts working on a five day basis. While the total number of workers employed by the agency would not be reduced thereby, the changes in the staffing on the first and second shift resulting from the termination of the rotating third shift were intended by the agency to result in improved staffing of those two shifts. However, the union proposed that any such changes in tours of duty (and hence the staffing of the new fixed first and second shifts and the restaffing of the rotating shifts) be proscribed unless negotiated with the union.

The Council held that the union's proposal was excepted from the agency's obligation to bargain under section 11(b), and, more particularly under

<sup>19/</sup> See, e.g., Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-35 (June 29, 1973), Report No. 41; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 12, 1973), Report No. 46.

the exclusion in that section relating to "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." As observed by the Council, this language of the Order, according to section E.1. of the Report accompanying E.O. 11491, clarified the right of an agency to determine the "staffing patterns" for its organization and for accomplishing its mission. The Council found in substance that the number and duration of the work shifts, or tours of duty, as intended to be changed by the agency in that case, were integrally related to and determinative of the numbers and types of employees assigned to those tours of duty of the agency; and therefore that, under the facts of that case, the union's proposal to bargain on such changes was nonnegotiable under section 11(b).

The Plum Island decision was subsequently explained and distinguished in the Charleston case, FLRC No. 71A-52 (note 3, supra). There, the facility provided round-the-clock service to the fleet, seven days a week. The union proposed to establish a basic workweek of five (5) eight (8) hour days, Monday through Friday for employees (other than those having jobs required to be performed on a continuous basis or directly related to certain functions performed at an activity operating on a continuous basis). The agency, in addition to its contentions that the proposal would require the agency to pay avoidable overtime for Saturday and Sunday work, argued that negotiation was not required under section 11(b), based on the Plum Island case. The Council rejected this contention, stating (at pp. 4-5 of Council decision):

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 report accompanying Executive Order 11491. In the facts of that case, which deal 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. [Footnote omitted.]

The application of section 11(b), as interpreted and applied in Plum Island and Charleston, FLRC No. 71A-52, was again considered by the Council with regard to a basic workweek and work schedule proposal in another Charleston case, FLRC No. 72A-35 (note 19, supra). There, the union's proposal, covering the agency's wage system employees, read as follows:

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. . . . The Employer agrees to schedule the nonwork days of employees so assigned such that whenever practicable they will be consecutive. . . .

Once more, the agency claimed that bargaining was not required under section 11(b) and, in this instance, the Council upheld the contention in part and rejected it in part, based on an application of both the Plum Island and Charleston, FLRC No. 71A-52 decisions. After quoting at length from the earlier Charleston case, the Council said (at pp. 4-5 of Council decision):

Applying the principles enunciated in [the Charleston case, FLRC No. 71A-52] 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 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.

Shortly after the issuance of its decision in Charleston, FLRC No. 72A-35, the Council considered the negotiability of proposals concerning the basic workweek and hours of duty for a unit of physicians in the Lebanon VA

Hospital case, FLRC No. 72A-41 (note 19, supra). While the Council found that the subject tour of duty proposals were nonnegotiable under section 11(a) by reason of the conflict of the proposals with higher level agency regulations, the Council took the occasion to reaffirm Charleston, FLRC No. 71A-52, stating (at p. 3 of Council decision):

At the outset, the circumstances in the present case must be carefully distinguished from those in [Charleston, FLRC No. 71A-52], 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. . . . We adhere to that decision.

In summary, therefore, as decided by the Council in Plum Island, Charleston, FLRC No. 71A-52, and related cases, a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under section 11(b) unless, based on the special circumstances of a particular case (as in Plum Island), the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency.

Applying these principles to the union's proposal concerning the basic workweek and the starting times of that workweek for the agency's food inspectors, as submitted to the Council for resolution in this case, the proposal is clearly not excluded from the agency's obligation to negotiate under the "staffing pattern" provisions of section 11(b). For unlike in Plum Island, the union's proposal here is not shown to be integrally related to and determinative of the types of employees assigned to the proposed tours of duty of the agency: All employees on each tour in the present case would continue to be food inspectors; whereas in Plum Island the union proposal extended to changes in the types of the employees to be assigned to the new fixed shifts and the rotating shifts, which the agency intended to result in improved staffing. Also unlike in Plum Island, the subject proposal, so far as appears in the record, would not be integrally related to and determinative of the numbers of employees assigned to the proposed tours: The proposed changes here relate only to the days of the basic workweek and the range of starting times of that workweek, which would impact on overtime, but not on the numbers of employees assigned to tours; whereas in Plum Island the union's proposal would have required bargaining on the elimination of the rotating third shift in one laboratory, and the reassignment of employees to two new fixed shifts and to the rotating shifts, which of necessity involved the numbers of employees assigned to particular tours of duty.<sup>20/</sup>

<sup>20/</sup> The proposal in the instant case is also clearly distinguishable from that part of the proposal in Charleston, FLRC No. 72A-35, found to be non-negotiable, in which the union sought to limit the actual number of employees assigned to particular tours of duty.

To repeat, the Council is of the view that its decision in the present case is fully consistent with the policies exemplified in Plum Island and, upon reconsideration, the Council reaffirms its holding that the proposal here involved is not excepted from the agency's obligation to bargain under section 11(b) of the Order.

3. Negotiability of union proposal in light of Congressional intent and the economic impact of such negotiability on inspected establishments. The Court upheld the finding of the Council that the union's proposal before the Council was not rendered nonnegotiable as violative of the Meat and Poultry Inspection Acts which acts require the inspected establishments to reimburse the government for overtime pay of the inspectors.

Likewise, the Court agreed with the Council that the proposal was not violative of the literal language of section 12(b)(4) which provides that the agency retains the right, in conformity with applicable laws and regulations, "to maintain the efficiency of the Government operations entrusted to them." In the latter regard, as the Court stated, "The plaintiffs' [industry's] efficiency or economy may well be affected by overtime expenses resulting from negotiability, but it is hard to conceive of this affecting the efficiency of the USDA." [Underscoring in original.]

Nevertheless, as already indicated, the Court directed that the Council reconsider, as a matter of policy, the negotiability of the basic workweek and starting times of the inspectors, in view of the Congressional intent to minimize the burden of inspection costs on the industry, and the economic impact of negotiability particularly on small operators as exemplified by increased overtime costs which would be required under the subsequent agreement of the parties. Stated otherwise, in terms of the Order, the Court directed the Council seriously to weigh such circumstances among the factors to be balanced under the Charleston decision, FLRC No. 71A-52 (note 3, supra), in determining the applicability of section 12(b)(4) to the negotiability issue, and in weighing other policy considerations as to negotiability under the Order.

In Charleston, FLRC No. 71A-52, the Council, quoting with approval from the earlier Little Rock case (note 3, supra), stated (at pp. 3-4 of Council 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. 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 weighing economic impact, as well as Congressional intent to minimize the burden of inspection costs, in the balance of factors under section 12(b)(4),<sup>21/</sup> we note, at the outset, that nothing in the union's proposal before the Council would preclude plant operators from establishing their own working schedules during which inspectors would be provided by the agency and upon which scheduling the costs of reimbursable overtime would be determined.<sup>22/</sup> Moreover, while evidence was adduced before the Court and in the remand proceeding before the Council with regard to the economic impact of the revised proposal upon the industry, such evidence generally was not directed toward, nor explorative of, the impact of the proposal which was before the Council for decision. However, consistent with the mandate of the Court, the Council has considered this evidence as at least indicative of the economic impact of the proposal before the Council upon the industry.

As previously set forth, the agency conducted an impact survey relating to the negotiated agreement and, in summary, stated that nine plants out of a total of 5519 could possibly be affected to some degree; that in fiscal year 1973, the industry reimbursed the agency about \$21,000,000 for inspection overtime costs incurred; and that the total fiscal impact on the industry of the contract language was estimated at about \$530,000. Neither the agency's summary nor its supporting exhibits revealed the sizes of the affected establishments.

---

<sup>21/</sup> We reject the union's contentions in the remand proceedings, which dispute the propriety of the Council's interpretation of section 12(b)(4) in the Little Rock and Charleston decisions. In our opinion, those decisions properly reflect the intent and purpose of section 12(b)(4). Moreover, in the recent general review of the Order, the Council, after carefully reexamining its decisions and issuances which interpreted sections 11(b) and 12(b), recommended no changes in "the substantive limits on negotiation, as currently expressed in these sections," and the President adopted that recommendation in issuing E.O. 11838 of February 6, 1975. See Labor-Management Relations in the Federal Service (1975), at pp. 40-41.

<sup>22/</sup> See Ray Bryant Cattle Co. v. United States, 463 F. 2d 418 (5th Cir. 1972).

As to the meat packers, in which the basic workweek of the inspectors currently is Monday through Friday, NIMPA did not estimate the amount of additional overtime costs nor the total number and sizes of affected establishments which would derive from either the proposal before the Council or the agreed upon provisions in the negotiated agreement. However, the brief submitted by NIMPA asserts, among other things, that "substantial overtime expense" would be incurred, and a number of affidavits were filed to like effect.

As to the poultry industry, in which the basic workweek for inspectors is now Monday through Saturday, NBC principally relied on two broiler industry impact studies, one filed with the Council in July, and the other, in November, 1974. These studies report, among other data, that in 1973 over 3 billion broilers, or 11.2 billion pounds of young poultry meat, were produced by 175 firms operating more than 200 processing plants. Further, according to these studies, 55 firms responded to an NBC survey, which firms accounted for slightly over one-half of the inspected slaughter and the average firm responding slaughtered and processed from 300,000 to 400,000 broilers per week, with individual outputs ranging from 60,000 to 3 million birds per week. The responding firms, as reported in the studies, expended about \$1,184,000 for overtime inspection services in 1973, which, projected on an industry-wide basis, would amount to about \$4.4 million for that year. And, based on the NBC survey, firms producing over one-fifth of the total broiler output "at some time" during the year and "at one or more of their plants" operate a 5-day week that includes Saturday or a tour starting before 4 a.m. or after 6 p.m.<sup>22/</sup> However, there is no specific indication in these studies as to the total amount of additional overtime costs which would result either from the subject proposal before the Council or from the provisions in the subsequent agreement between the parties. Moreover, while the total gross production figures of responding affected establishments are shown in the NBC studies, the size range of the individual affected establishments and the estimated cost impact on each such establishment are not specified.

From the foregoing, and the entire record, it may be concluded generally that some additional overtime costs reimbursable by the industry would probably result from the subject union proposal before the Council, and that, although the additional overtime costs would appear to be relatively limited in amount, the industry would be adversely affected to that extent by adoption of the proposal.

However, even fully weighing such economic impact and the Congressional intent to minimize the burden of inspection costs on the industry in the balance, as directed by the Court, the Council is of the opinion that such circumstances do not render the union's proposal nonnegotiable under section 12(b)(4) of the Order.

22/ More specifically, the July study also states that 9 responding firms representing almost 9 million broilers weekly would be affected by second shifts starting after 6 p.m., and that 5 responding firms (including some of the same 9 firms), representing over 2.25 million broilers weekly, work Tuesday through Saturday.

It is common knowledge in the field of labor relations that the adoption of a basic workweek, the defining of the starting hours of that workweek, and the lawful payment of overtime for work performed in addition to established hours, as provided by statute, are regarded by employees as substantial improvements in their working conditions, and, for the reasons fully set forth in the Charleston and Little Rock cases, these benefits by reason of their derivative effects may well enhance the efficiency of the employing agency in performing the government operations entrusted to that agency. Certainly the agency has not established as required by section 12(b)(4), nor does it otherwise appear, that any contrary result would obtain with respect to the performance of the inspection operations of the agency in the present case.

While we recognize the unique circumstances here that the industry must pay any resultant increase in overtime costs and yet is not a direct participant in the negotiating process, such circumstances are not dispositive with respect to the impact of the proposal on the agency's efficiency in performing its operations, which is alone controlling under section 12(b)(4). Moreover, the agency retains its obligation as a responsible government organization to protect the interests of all the persons concerned, in the bargaining process, and nothing in the record shows any lack of awareness of the industry's interests by the agency in this case.

Likewise, as to the Congressional intent to minimize the burden of inspection costs on industry, such statutory purpose, as discussed below, is clearly of major significance at the bargaining table. However, section 12(b)(4) is concerned with the cost effectiveness of the agency in performing its operations, that is its efficiency, and not the policies sought to be served by those operations. And, as the Court indicated, the union's proposal is not shown to impair the efficiency of the agency's operations.

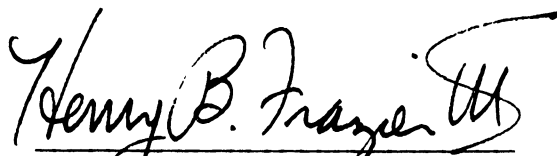
Accordingly, we reaffirm our decision that the union's proposal is not violative of section 12(b)(4) of the Order.

As to whether the unique circumstances here involved render the union's proposal otherwise nonnegotiable under the Order, we can find no underlying policy of the Order which is violated by the subject proposal. Rather, such matters as the exigencies of the industry, the intent of Congress to minimize the inspection burden on industry, and the economic impact of the proposal, particularly on small operators, directed by the Court to be reconsidered by the Council, go to the wisdom and advisability, not the negotiability, of the union's proposal, which are wholly outside the Council's authority to resolve under section 11(c) of the Order. It is for the agency fully to prepare itself on these matters before undertaking negotiations, to bargain assiduously and in good faith on the proposal in light of these highly significant considerations, and to agree on the proposal or any lawful revision thereof only if it deems such agreement will best comport with the overriding needs of its program. Failing agreement, mediation and impasse procedures are made available to the parties under sections 16 and 17 of the Order.

To repeat, the Council's authority in this proceeding is limited to deciding whether the union's proposal, as submitted to the Council, is negotiable, i.e., whether the proposal is contrary to applicable law, regulation of appropriate authority outside the agency, or the Order. For the reasons already fully set forth and upon careful reconsideration consistent with the mandate of the Court, the Council reaffirms its decision that the union proposal, as submitted to the Council, is valid and consequently is negotiable under section 11(a) of the Order.

The Court is respectfully so advised.

By the Council.

  
Henry B. Frazier III  
Executive Director

Attachments:

Appendix I  
Appendix II

Issued: June 10, 1975.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 12, 1974

Mr. John H. Young  
Collier, Shannon, Rill  
& Edwards  
1666 K Street, NW., Suite 701  
Washington, D.C. 20006

Mr. James M. Kefauver  
Glassie, Pewett, Beebe  
& Shanks  
Federal Bar Building West  
1819 H Street, NW.  
Washington, D.C. 20006

Re: American Federation of Government Employees,  
National Joint Council of Food Inspection  
Locals and Office of the Administrator,  
Animal and Plant Health Inspection Service,  
U.S. Department of Agriculture, FLRC No. 73A-36

Gentlemen:

Reference is made to (1) the request by the National Broiler Council, Inc., National Turkey Federation, Poultry and Egg Institute of America and Southeastern Poultry Association (collectively referred to herein as NBC), concurred in by the National Independent Meat Packers Association (NIMPA), that the respective associations be permitted to intervene as "parties" in the instant reconsideration proceedings; and (2) the requests of NBC and NIMPA for oral hearing or oral argument on NBC's request to intervene and on other issues in the case.

Upon careful consideration of the submissions by NBC and NIMPA, and the responses thereto filed by the agency and the union, the Council has ruled as set forth below.

(1) With respect to NBC's request that the associations be permitted to intervene as "parties," section 2411.3(c)(2) of the Council's rules of procedure defines the term "party" for purposes of a negotiability appeal as follows:

(c) 'Party' means any person, employee, labor organization, or agency that participated as a party --



(2) In a matter that was decided by an agency head under section 11(c) of the order . . . .


As recognized by the district court in the present case, only the union and the agency are "parties" herein under the Council's rules of procedure. No persuasive reason has been adduced by NBC for waiving the limitations in the Council's rules for purposes of this reconsideration proceeding since, among other things, (a) the issues to be considered on remand have been defined by the court in its memorandum opinion and order; (b) the associations were invited to submit amici curiae briefs on these issues (which submission by NIMPA has been accepted by the Council); (c) the scope of data and arguments which may be submitted in this proceeding by amici curiae is the same as that for the "parties"; and (d) no relevant facts are shown to be in dispute.

Therefore, in accordance with section 2411.3(c)(2) of the Council's rules, the request of NBC, concurred in by NIMPA, to be permitted to intervene as "parties" in the remand proceeding is denied.\*/ However, pursuant to section 2411.45(d) of the Council's rules, NBC is granted until November 29, 1974, to file a brief as amicus curiae, including any data and arguments which NBC wishes the Council to consider on the matters directed by the court to be further considered by the Council.

(2) As to the requests of NBC and NIMPA for oral hearing or oral argument on other issues in the case, ruling is deferred pending the completion of written submissions as provided above.

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: C. M. Webber  
AFGE

S. B. Pranger  
Agriculture

L. A. Denslow

\*/ The further request of NBC, in effect joined by NIMPA, for oral hearing on the motion to intervene is likewise denied, since the issues and the positions of the movants are adequately reflected in the submissions already before the Council.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

January 15, 1975

Mr. John H. Young  
Collier, Shannon, Rill & Edwards  
1666 K Street, NW., Suite 701  
Washington, D.C. 20006

Re: American Federation of Government Employees,  
National Joint Council of Food Inspection  
Locals and Office of the Administrator,  
Animal and Plant Health Inspection Service,  
U.S. Department of Agriculture, FLRC No. 73A-36

Dear Mr. Young:

Reference is made to your letter of November 19, 1974, requesting that the Council reconsider and reverse its decision of November 12, 1974, insofar as the Council denied the request of NBC for permission to intervene as a "party" in the instant remand proceeding.

The Council has carefully considered your request of November 19 and is of the opinion that no persuasive reason has been advanced for reconsidering and reversing the subject ruling of the Council.

Contrary to your specific contentions, the Council, in denying NBC's request for intervention as a "party," thoroughly considered the decision by Judge Bryan in the present case and the court decision in National Welfare Rights Organization v. Finch, 429 F. 2d 725 (D.C. Cir.1970).

In the Council's view, its action was fully consistent with, and implementive of, the decision of Judge Bryan in the instant case. More particularly, as the Council stated in its ruling:

As recognized by the district court in the present case, only the union and the agency are "parties" herein under the Council's rules of procedure. No persuasive reason has been adduced by NBC for waiving the limitations in the Council's rules for purposes of this reconsideration proceeding since, among other things, (a) the issues to be considered on remand have been defined by the court in its memorandum opinion and order; (b) the associations were invited to submit amici curiae briefs on these issues (which submission by NIMPA has been accepted by the Council); (c) the scope of data and arguments which may be submitted in this proceeding by amici curiae is the same as that for the "parties"; and (d) no relevant facts are shown to be in dispute.

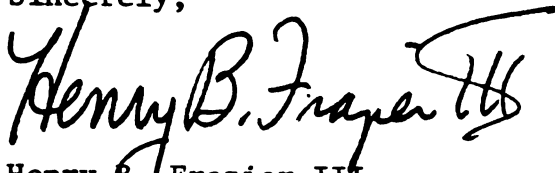
For like reasons, the court decision in the National Welfare Rights Organization case, in the Council's opinion, did not compel a different result. In that case, unlike here, the statute and agency regulations provided for a formal, adjudicative-type hearing, with the presentation of witnesses, examination and cross-examination by the parties, etc.; such hearings were already in preparation by the agency; the status of amicus curiae would not have afforded the same scope of presentation and participation by the individuals and organizations seeking intervention as by the existing "parties" to the hearings; and it did not appear that the potential facts to be adduced at the hearings were without dispute. Further, the court in the National Welfare Rights Organization case strictly limited the additional rights granted to the intervenors as "parties", to participation and presentation in any such formal hearing which was conducted by the agency in that case -- a type of hearing which is neither provided for nor indicated in negotiability disputes such as here involved under E.O. 11491, as amended, and the Council's rules and regulations issued thereunder.

Accordingly, as your request for reconsideration and reversal fails to advert to any matter not previously considered and correctly decided by the Council, your request is denied.

With further reference to your submission as amicus curiae, such submission, as you were advised on December 5, 1974, was timely received by the Council. You may be assured that the Council will carefully consider your submission in the Council's further deliberations in the present case.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: (w/c ltr of 11/19/74)

C. M. Webber  
AFGE

S. B. Pranger  
Agriculture

L. A. Denslow

E. H. Pewett

Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, 73 FSIP 27. The dispute in this case concerned the negotiability under the Order of a proposal made by the union that: "The employer agrees that those policies and regulations in Section a of the Article [essentially incorporating section 12(a) of the Order], which affect working conditions of employees in the unit, shall be applied fairly and equitably insofar as they are within the employer's discretion." The negotiability issue was referred to the Council by the Federal Service Impasses Panel, pursuant to section 2411.26 of the Council's rules of procedure (5 CFR 2411.26) and the related section of the Panel's rules of procedure.

Council action (June 10, 1975). The Council held that the union's proposal is negotiable under section 11(a) of the Order. Accordingly, the Council set aside the agency head's determination of nonnegotiability.

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

Bureau of Prisons and Federal Prison  
Industries, Inc., Washington, DC

and

73 FSIP 27  
FLRC No. 74A-24

Council of Prison Locals, AFGE

DECISION ON NEGOTIABILITY ISSUE REFERRED BY  
FEDERAL SERVICE IMPASSES PANEL

Background of Case

During consideration by the Federal Service Impasses Panel of a negotiation impasse between the Bureau of Prisons and Federal Prison Industries, Inc., of the Department of Justice (the agency) and the Council of Prison Locals of the American Federation of Government Employees (the union), the union requested that the Panel refer a negotiability issue to the Council for decision. The negotiability issue involved a proposal made by the union that Section b of Article 4 (GOVERNING REGULATIONS) would provide:

The employer agrees that those policies and regulations in Section a of the Article, which affect working conditions of employees in the unit, shall be applied fairly and equitably insofar as they are within the employer's discretion.

The referenced Section a<sup>1/</sup> states:

In the administration of all matters covered by this Agreement and subsequent supplementary agreements, 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.

A disagreement arose between the agency and the union as to the negotiability of the union's proposal and the union referred the issue for determination to the agency head. The agency head ruled that the union's

---

<sup>1/</sup> Section a of Article 4 essentially incorporates, as required by the Order, section 12(a) of the Order in the negotiated agreement.

proposal was nonnegotiable<sup>2/</sup> on the grounds that it would violate section 13(a)<sup>3/</sup> and violate sections 11(b) and 12(b) of E.O. 11491, as amended by E.O. 11616.

Under these circumstances, the Panel referred the negotiability issue to the Council for decision pursuant to section 2411.26 of the Council's rules of procedure<sup>4/</sup> and the related section of the Panel's rules of procedure.

---

2/ The determination by the agency head regarding the negotiability of the union's proposal in this case was made under E.O. 11491, as amended by E.O. 11616, and prior to amendment by E.O. 11838.

3/ Section 13(a) of the Order then provided in pertinent part:

Sec. 13. Grievance and arbitration procedures.

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure 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. . . .

4/ Section 2411.26 of the Council's rules of procedure provides:

§ 2411.26 Referral by the Federal Service Impasses Panel.

(a) Notwithstanding the procedures of this subpart, except § 2411.22, when the Panel finds that a negotiability issue is impeding the resolution of a negotiation impasse, the Panel may refer the negotiability issue to the Council for decision.

(b) A referral by the Panel shall contain:

(1) The matter proposed to be negotiated as submitted to the agency head for determination;

(2) The agency head's determination thereon;

(3) Statements of position from each party with supporting evidence and argument; and

(4) Any other appropriate documents of record.

(c) The Panel may refer a negotiability issue for decision by the Council at any time during its consideration of a negotiation impasse.

(d) The Council will give such referrals priority consideration.

## General Review of the Federal Labor-Management Relations Program

At the time of the Panel's referral of the negotiability issue, the Council was conducting, pursuant to section 4(b) of the Order, a general review of the Federal labor-management relations program. In connection with the general review, the Council was considering, inter alia, the following questions which had direct application to the negotiability issue herein:

- Does the meaning and scope of section 13 need amplification?
- Should section 13 be revised to:
  - a. Exclude from the negotiated grievance procedure grievances over agency regulations -- even if regulations are referenced or cited in the agreement? -- or
  - b. Provide that the negotiated grievance procedure is the sole procedure available for all grievances filed by or on behalf of unit employees thereby including grievances over agency regulations and policies not contained in the agreement and excluding only those issues subject to statutory appeal procedures? -- or
  - c. Permit negotiation on scope of grievance procedure, with statutory appeal procedures as the sole mandatory exclusion?<sup>5/</sup>

The Council determined that final disposition of this case should be deferred pending completion of the general review.

On February 6, 1975, E.O. 11838 was issued (40 F.R. 5743, February 7, 1975) amending E.O. 11491. Section 13(a) and (b) of the Order now provides:

### Sec. 13. Grievance and arbitration procedures.

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. 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.

<sup>5/</sup> See Council's Information Announcement of December 18, 1973, entitled "Areas to be Focused Upon During the Council's General Review of the Federal Labor-Management Relations Program," Area VI.

(b) A negotiated procedure may provide for arbitration of grievances. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

In explanation of the recommendation which led to this amendment, the Council stated in pertinent part:<sup>6/</sup>

The Council considered [during its general review] three major proposals regarding the nature and scope of negotiated grievance procedures: (1) Revise section 13 to exclude from the negotiated grievance procedure grievances over agency regulations even if those regulations are referenced or cited in the agreement. (2) Revise section 13 to require the negotiated grievance procedure to be the sole procedure available for all grievances, including grievances over agency policies and regulations not contained in the agreement, and excluding only those issues subject to statutory appeal procedures. (3) Revise section 13 to permit negotiation on the scope of the grievance procedure with statutory appeal procedures as the sole mandatory exclusion. We concluded that the first proposal would be a reversal of the basic policy reflected in the current provisions of the Order that the scope of the grievance procedure was to be negotiated rather than prescribed by law, regulation, or the Order. While the second proposal has desirable goals, we considered that it would interfere with the freedom and voluntariness of the bilateral process. We found merit in the third proposal.

The Council has concluded that the coverage and scope of the negotiated grievance procedure should be determined by the parties themselves, excluding only matters subject to statutory appeal procedures. This would permit the parties to negotiate a grievance procedure with coverage and scope as narrow as that which would be required by the first proposal, or as broad as that which would be required by the second proposal, to revise section 13. The parties could agree that the negotiated grievance procedure would be the only procedure available for all grievances, including grievances over agency policies and regulations not contained in the agreement, subject only to the explicit limitations of the Order. The parties would be free to expand the negotiated grievance procedure to cover any matters except those which are subject to resolution under statutory appeal procedures.

As a result of its first review of the Order, the Council concluded that employees were faced with complicated choices in seeking relief, the role of the exclusive labor organization was diminished and

---

<sup>6/</sup> Labor-Management Relations in the Federal Service (1975), pp. 45-51.



distorted by permitting a rival organization to represent a grievant with respect to the interpretation and application of the agreement negotiated by the exclusive representative, and the scope of negotiation for agencies and labor organizations was unnecessarily limited. In order to remedy those faults, the Order was amended to require that the negotiated agreement for an exclusive unit must include a grievance procedure and to provide that the scope of the negotiated grievance procedure and arbitration would be restricted to grievances over the interpretation or application of the agreement. . . .

However, that provision in section 13 of the Order which establishes limitations upon the scope and coverage of the negotiated grievance procedure by providing that a "negotiated grievance procedure may not cover any other matters, including matters for which statutory appeals procedures exist . . ." has created some problems in the implementation of section 13. Those matters for which statutory appeal procedures exist, while complex, are susceptible to identification and description.

The major problems which have arisen concerning the implementation of section 13 have centered on the meaning of the phrase "any other matters." Some agencies and labor organizations have sought a precise delineation of such "matters." This has not been possible. Once matters covered by statutory appeal procedures have been excluded from the coverage of all negotiated grievance procedures, those remaining "other matters" which are also excluded vary from unit to unit depending upon the scope of the grievance procedure negotiated in each unit and by the nature and scope of the remaining provisions in the negotiated agreement itself. Therefore, a general definition of "any other matters" which would be uniformly applicable throughout the program is not possible.

The Council has carefully considered whether the Order should contain any specific limitations upon the scope and coverage of negotiated grievance procedures other than the exclusion of matters covered by statutory appeal procedures. It has concluded that the Order should not contain any other specific limitations. Instead, the coverage and scope of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. This will give the parties greater flexibility at the negotiating table to fashion a negotiated grievance procedure which suits their particular needs. For example, it will permit them to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures. Moreover, it will eliminate the problems which have arisen concerning the meaning of the term "any other matters."

Thus, with this recommended change in section 13 of the Order, the parties may, through provisions in their negotiated agreement, agree to resolve grievances over matters covered by agency regulations and within the discretion of agency management through their negotiated grievance procedure. In fact, with this change, the parties may make their negotiated grievance procedure the exclusive procedure for resolving grievances of employees in the bargaining unit over agency policies and regulations not contained in the agreement. If the parties should agree to make the negotiated procedure the exclusive procedure, grievances over agency policy and regulation, to the extent covered thereby, would no longer be subject to grievance procedures established by agency regulations. In this connection, we also recommend that section 7(d)(1) of the Order be amended to reflect the possibility that the negotiated grievance procedure may replace the agency grievance procedure to the extent agreed upon by the parties.

In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation.

Under the proposed amendments, the scope and coverage of the negotiated grievance procedure would be fully negotiable so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. However, nothing in the proposed amendments of section 13 would prevent the parties from agreeing that the agency's interpretation of its regulations would be binding.

Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. Thus, where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulation, or the Order, the Council, under its rules, will grant review of the award. For example, should the Council find that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council would modify or set aside that award.

## Opinion

The union's proposal in this case provides:

Article 4, Section b. The employer agrees that those policies and regulations in section (a) of the Article, which affect working conditions of employees in the unit, shall be applied fairly and equitably insofar as they are within the employer's discretion.

The agency head determined that the proposal was nonnegotiable because it "would place policies, rules and regulations of the Civil Service Commission and the Department of Justice under the negotiated grievance procedure even though the substance of such matters is not embodied in the agreement," thereby, "extending the scope of the negotiated grievance procedure to include matters not incorporated in the agreement" and, hence, violating section 13(a) of the Order. Further, the agency determined that the proposal would also violate sections 11(b) and 12(b) of the Order because it would subject certain matters which are beyond the scope of collective bargaining "to review in a grievance and arbitration proceeding."

### 1. Section 13(a):

The agency determined that the proposal violated section 13(a) of the Order because it would extend the scope of the negotiated grievance procedure to policies, rules and regulations of the Civil Service Commission and the Department of Justice even though the substance of such matters was not incorporated in the agreement. We do not agree with this determination.

At the time the agency made its determination, section 13(a) provided, in relevant part, that: "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." While it might properly have been contended that a proposal which would subject the interpretation or application of policies and regulations to a negotiated grievance procedure even though the substance of such policies and regulations is not incorporated in the agreement was nonnegotiable under this provision of section 13(a), the recent amendments to the Order render such argument moot.

Section 13(a) now provides, in pertinent part, that the "coverage and scope of the [grievance] procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." Thus, with the recent amendments to section 13(a), the requirement that the scope of the negotiated grievance procedure be limited to grievances over the interpretation or application of the agreement has been eliminated. Based upon this

change, as explicated in the above-quoted passage from the Council's Report and Recommendations, it is clear that the parties can agree to provisions which would, in effect, extend the negotiated grievance procedure to matters such as the application of policies and regulations which are not embodied or incorporated in the agreement so long as the procedure does not extend to matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or the Order. The agency does not contend that the proposal would extend the negotiated grievance procedure to matters for which a statutory appeal procedure exists or otherwise conflicts with statute, and we do not interpret the proposal to do so.

Second, as to the agency's contention that the proposal would put "policies, rules and regulations of the Civil Service Commission and the Department of Justice under the negotiated grievance procedure," we believe that the agency has, to some extent, misinterpreted the union's proposal.

The proposal, by its terms, is limited to:

- (1) the application of those policies and regulations which are referred to in Section a of Article 4 of the agreement, and hence, in effect, those referred to in section 12(a) of the Order;<sup>7/</sup>
- (2) insofar as they are within the employer's discretion; and
- (3) which affect working conditions of employees in the unit.

7/ Section 12 provides in pertinent part:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;

. . . . .

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.

Section 12(a) of the Order and, hence, Section a of Article 4 of the agreement require that such policies and regulations referred to therein govern "the administration of all matters covered by the agreement." Hence, the proposal herein deals only with the application of those policies and regulations which govern the administration of matters covered by the agreement. That is to say, only those policies and regulations which pertain to or deal with matters otherwise covered in the negotiated agreement fall within the ambit of this proposal.

Moreover, the proposal deals only with policies and regulations which affect certain matters (i.e., "working conditions") that fall within the scope of bargaining described in section 11(a) of the Order.<sup>8/</sup> Finally, the proposal calls for the employer to apply such policies and regulations fairly and equitably to the extent that such application is within the employer's discretion. Consequently, the proposal could subject only the employer's discretionary application of such policies and regulations that affect working conditions and deal with matters otherwise covered in the negotiated agreement to the negotiated grievance procedure. Those aspects of such policies and regulations referred to in Section a of Article 4 which are not within the employer's discretion, e.g., mandatory requirements reflected in such policies and regulations established at levels above the employer, as well as those which do not affect working conditions or those which do not pertain to matters otherwise covered in the negotiated agreement, would not be covered by the proposal and hence could not, as a result of this particular provision, be subjected to the negotiated grievance procedure.

In summary, nothing in section 13(a) of the Order renders nonnegotiable a proposal which calls for the fair and equitable application of those policies and regulations that govern matters otherwise covered in the

8/ Section 11(a) provides:

Sec. 11. Negotiation of agreements.

(a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.  
[Emphasis added.]

negotiated agreement and affect working conditions of employees in the unit to the extent that such policies and regulations are within the discretion of the employer, as proposed by the union. Therefore, the agency's determination that the proposal violates section 13(a) must be rejected.

2. Sections 11(b) and 12(b):

We turn next to the agency's determination that the proposal violates sections 11(b)<sup>9/</sup> and 12(b)<sup>10/</sup> of the Order because it would subject matters which are beyond the scope of collective bargaining "to review in a grievance and arbitration proceeding." In its statement of position, the agency further explains that the proposal would violate sections 11(b) and 12(b) by contending that the proposal would subject these basic management rights to the negotiated grievance procedure by its "blanket reference to a wide range of laws, rules and regulations."

9/ Section 11(b) provides:

Sec. 11. Negotiation of agreements.

. . . . .

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to 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. 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.

10/ Section 12(b) 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—

(1) to direct employees of the agency;

(Continued)

We cannot agree with the agency. As we indicated above, we believe that the agency has, to some extent, misinterpreted the union's proposal. In our view, the proposal does not make a blanket reference to a wide range of laws, rules and regulations, thereby subjecting matters which are beyond the scope of bargaining to the negotiated grievance procedure. As we noted above, the proposal deals only with the application of those policies and regulations which pertain to matters otherwise covered in the negotiated agreement insofar as they are within the employer's discretion and which affect working conditions of employees in the unit. Thus, matters covered in those policies and regulations which are beyond the employer's discretion are not covered. Further, contrary to the agency's conclusions, the language of the proposal itself does not explicitly purport to subject the matters covered by sections 11(b) and 12(b) of the Order to the negotiated grievance procedure. Moreover, we do not interpret it as in any way extending the scope and coverage of the negotiated grievance procedure to such matters.

As we noted above, section 13(a) of the Order permits the parties to negotiate the coverage and scope of the grievance procedure "with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." [Emphasis added.] Clearly, therefore, no negotiated grievance procedure may conflict with section 11(b) or 12(b) or with any other provision of the Order. Thus, as we indicated in the above-quoted passage from the Report, section 13(a) "will permit them [the parties] to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures." [Emphasis added.]

---

(Continued)

- (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;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; . . .

We have concluded that the provision itself does not extend the scope of the negotiated grievance procedure to matters covered by sections 11(b) and 12(b). Therefore, should the agency agree to this proposal, such agreement, standing alone, could not extend the scope of the negotiated grievance procedure to matters otherwise excluded from the agency's obligation to negotiate by section 11(b). Moreover, as to section 12(b) of the Order, the Council, in its decisions, consistently has emphasized that the rights reserved to management officials under that section of the Order are mandatory and cannot be bargained away. Thus, for example, in its VA Research Hospital decision, the Council stated that 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."<sup>11/</sup> Further, as we have also indicated, "management's reserved rights under section 12(b) may not be infringed by an arbitrator's award under a negotiated grievance procedure."<sup>12/</sup>

The provisions of the negotiated agreement which establish the grievance procedure required by section 13(a) of the Order are not before us in this case. However, should management agree to the subject proposal, it is conceivable that grievances could arise thereunder in which it is alleged that the employer has not applied fairly and equitably a policy or regulation which affects working conditions of employees in the unit and which is within the employer's discretion. Should the employer believe that the application of such policy or regulation under the subject proposal involves a matter excluded by section 11(b) or section 12(b), he

<sup>11/</sup> Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31, at p. 3; accord, National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, FLRC No. 73A-67 (December 6, 1974), Report No. 61, at p. 3; Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), FLRC No. 73A-42 (July 31, 1974), Report No. 55, at pp. 8-9; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 12, 1973), Report No. 46, at pp. 5-7; 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. 4-7.

<sup>12/</sup> Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Button, Arbitrator), FLRC No. 74A-1 (June 24, 1974), Report No. 53, at p. 4; Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York, FLRC No. 73A-42 (July 31, 1974), Report No. 55, at p. 9; National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, FLRC No. 73A-67 (December 6, 1974), Report No. 61, at p. 5.



can challenge the grievability or arbitrability of the grievance. However, the mere possibility that such a grievability or arbitrability issue regarding the proposed provision might arise under section 11(b) or section 12(b) of the Order -- or under a statute -- is not sufficient reason to warrant holding the provision itself nonnegotiable.

Moreover, should the negotiated grievance procedure provide for arbitration, any arbitrator considering a grievance thereunder, including a grievance alleging a violation of the proposed provision, could not consider such a provision in a vacuum.<sup>13/</sup> As the above-quoted passage from the Report noted, "arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation." Clearly, among the "laws" that the arbitrator would consider must be the Order, including sections 11(b) and 12(b), to ensure that any finding that he might make or any award that he might fashion is consistent therewith.

Finally, arbitration awards are subject to review by the Council.<sup>14/</sup> As the Report also noted: "Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. . . . For example, should the Council find that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council would modify or set aside that award."

In summary, therefore, contrary to the agency head's determination, we must conclude that the proposal does not violate sections 11(b) and 12(b) of the Order.

### Conclusion

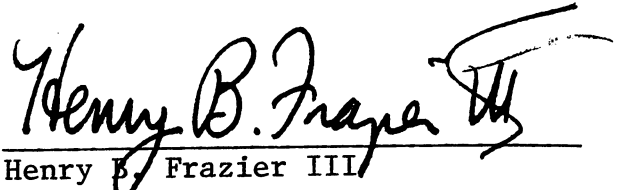
For the reasons discussed above, and pursuant to section 2411.27 of the Council's rules and regulations, we find that the agency head's determination that the union's proposal in the instant case was not negotiable,

<sup>13/</sup> Cf. Local Lodge 830, IAM and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974), Report No. 48, at pp. 6-7.

<sup>14/</sup> See section 4(c)(3) of the Order and part 2411, subpart D of the Council's rules (5 CFR 2411.31—2411.37).

was improper, and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based upon the record before the Council, the proposal is properly subject to negotiation by the parties under section 11(a) of the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: June 10, 1975

Office of Economic Opportunity, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 2677, National Council of OEO Locals, Assistant Secretary Case No. 22-5368 (AP). The Assistant Secretary upheld the dismissal by the Assistant Regional Director of the agency's application for a decision on grievability or arbitrability, because the issue involved went to the enforcement of a prior arbitration award, which was a matter outside the Assistant Secretary's authority under section 13 of the Order. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (June 10, 1975). The Council held that the Assistant Secretary's decision does not present a major policy issue and does not appear to be arbitrary and capricious, and that the union's appeal therefore fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure (5 CFR 2411.12). Accordingly, the Council denied the union's petition for review. (The union's request for a stay of the Assistant's Secretary's decision was previously denied by the Council under section 2411.47(c) of the Council's rules (5 CFR 2411.47(c)).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 10, 1975

Mr. Phillip R. Kete, President  
American Federation of Government  
Employees, AFL-CIO, Local 2677,  
National Council of OEO Locals  
1200 19th Street, NW.  
Washington, D.C. 20506

Re: Office of Economic Opportunity, Washington,  
D.C. and American Federation of Government  
Employees, AFL-CIO, Local 2677, National  
Council of OEO Locals, Assistant Secretary  
Case No. 22-5368 (AP), FLRC No. 74A-94

Dear Mr. Kete:

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

This case arose when the Office of Economic Opportunity filed an application for a decision on grievability or arbitrability. According to the findings of the Assistant Regional Director, the question sought to be arbitrated was: "May the agency implement an arbitrator's award which it questions as to its legality?" The Assistant Regional Director found that the union, in filing the grievance which gave rise to this arbitrability dispute, alleged that the agency had failed to comply with a prior arbitration award. The agency responded that it would be "inappropriate" to address the issue presented by the grievance until a ruling on the legality of implementing the prior award had been received from the Comptroller General of the United States.

The Assistant Secretary found that the issue raised by the agency's application for decision on grievability or arbitrability "is not whether a grievance is arbitrable under a negotiated agreement, but, rather, goes to the enforcement of a prior arbitration award." Having so found, the Assistant Secretary stated, ". . . [i]n my view, the enforcement of a prior arbitration award does not come within the Assistant Secretary's authority under Section 13 of the Order. Similarly, there is no authority granted in Section 13 which would enable the Assistant Secretary to enforce disciplinary action for non-compliance with an arbitrator's award." Accordingly, the Assistant Secretary denied the union's request for review of the Assistant Regional Director's Report and Findings on Grievability or Arbitrability.

In your petition for review, you contend, in essence, that the reliance of the Assistant Secretary ". . . on a question of his own authority to enforce arbitration awards or enforce disciplinary action for non-compliance with an arbitrator's award raises a major policy issue and is arbitrary and capricious." You allege that the Assistant Secretary misperceived both the issue and his own role by concerning himself with his authority to enforce arbitration awards or to order disciplinary action for non-compliance therewith. Moreover, you contend that "[t]he finding by the Assistant Secretary that a dispute over compliance with an arbitration award is not a dispute over the interpretation or application of the national AFGE-OEO contract within the meaning of section 13(b) of Executive Order 11491 raises a major policy issue. . . ."

In the Council's opinion, your petition for review does not meet the Council's rules governing review. That is, based upon the contentions described above, the Assistant Secretary's decision does not appear arbitrary and capricious and does not present major policy issues. With regard to your contention that the decision of the Assistant Secretary is arbitrary and capricious, the findings and decision of the Assistant Secretary, namely, that the issue raised by this case is not one of arbitrability but goes instead to the enforcement of a prior arbitration award, do not appear to be without reasonable justification in the circumstances of this case. With regard to the alleged major policy issues concerning "compliance with an arbitration award," in Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local 2424, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67, the Council stated:

. . . [W]here disputes arise concerning the alleged failure of a party to abide by an arbitration award, such disputes may involve factual questions which must be resolved in order to determine whether or not an award has been implemented. Such disputed issues of fact, frequently entailing credibility determinations, are best resolved through a hearing as provided under the unfair labor practice procedures of the Assistant Secretary. For this reason complaints concerning the alleged failure of a party to abide by an arbitration award, where that party has not filed with the Council a petition for review of the award under the Council's rules of procedure, can and should be resolved by the Assistant Secretary under his authority in section 6(a)(4) to decide the unfair labor practice complaints specified in section 19 of the Order. The Council is of the opinion that these procedures, as reflected in the rules, are consistent with and implementive of the language and purposes of the Order.

Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a

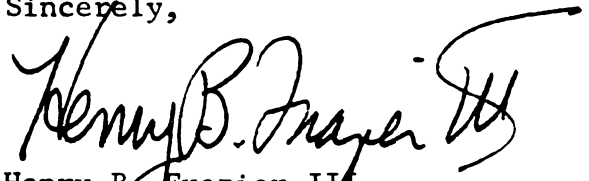
party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. The Council recognizes that this method for seeking enforcement of arbitration awards may require the initiation of separate proceedings under the Order. Therefore, the Council believes it would be appropriate for the Assistant Secretary to expedite the processing of unfair labor practice cases which pertain to the enforcement of arbitration awards. Furthermore, the Council itself will expedite the processing of any appeals which it might receive from decisions of the Assistant Secretary in such cases. [Footnote omitted.]

Based on these considerations, the Council is of the opinion that the decision of the Assistant Secretary, finding, in essence, that matters regarding compliance with an arbitration award are not within his authority under section 13 of the Order, does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

P. M. Weightman  
OEO

Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri and Kansas City, Missouri, A/SLMR No. 458. The Assistant Secretary denied the respective representation petitions filed by National Federation of Federal Employees, Local 1633 (NFFE) and American Federation of Government Employees, AFL-CIO, Local 3354. NFFE appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

Council action (June 10, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue. Accordingly, the Council denied review of the union's appeal since it failed to meet the requirements provided under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 10, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal  
Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of Agriculture, Office of  
Automated Data Systems, St. Louis,  
Missouri and Kansas City, Missouri,  
A/SLMR No. 458, FLRC No. 74A-96

Dear Ms. Cooper:

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

The National Federation of Federal Employees, Local 1633 (NFFE) sought an election in a unit of all employees employed by the Department of Agriculture, Office of Automated Data Systems (ADS), Kansas City, Missouri. The Assistant Secretary found that the evidence adduced during the first hearing did not provide a sufficient basis upon which a decision could be made regarding the appropriateness of the claimed unit and therefore remanded the case to the Assistant Regional Director to secure additional evidence.<sup>1/</sup> A subsequent hearing to obtain evidence was held, in which NFFE's case was consolidated with that of American Federation of Government Employees, AFL-CIO, Local 3354, which sought an election in a unit of all employees employed by the Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri. The activities contend that the petitioned-for units are inappropriate and that the only appropriate unit would be one which includes all eligible employees of all of the ADS computer centers throughout the country. The Assistant Secretary determined that: (1) all of the centers operate under the centralized control of the ADS Director and Assistant Director; (2) the operations of the computer centers are highly integrated, and there is substantial interchange and contact between the employees of the centers; (3) the work, skills, training and education of the ADS employees in all of the computer centers are similar; and (4) all center employees operate under the same uniform personnel procedures set up by the ADS Personnel Office which has final authority in all personnel matters. Therefore, he concluded, neither of the units is appropriate for the purpose of

1/ Department of Agriculture, Office of Information Systems, Kansas City, Missouri, A/SLMR No. 387 (May 10, 1974).



exclusive recognition because in each center the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of the ADS computer centers. Moreover, such units, if established, would artificially fragment the ADS and would not promote effective dealings and efficiency of agency operations. Therefore, the Assistant Secretary dismissed the petitions.

In your petition for review, you allege that the Assistant Secretary's findings are arbitrary and capricious because, in summary, they are contrary to the weight of the evidence presented and contrary to past precedents; and that the decision to remand the case after the first hearing was unwarranted. Further, you contend that the decision presents major policy issues concerning whether the Assistant Secretary is required to: follow his previous decisions; enforce 18 U.S.C. § 1001<sup>2/</sup> in connection with hearings held under his auspices; consider procedural motions to dismiss; decide whether the petitioned-for unit is appropriate and not which of several possible units is appropriate; declare appropriateness based on evidence presented at the time of the petition, not on evidence presented at a subsequent hearing.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious nor do they present a major policy issue. With regard to your contentions concerning the evidence and past precedents considered and relied on, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the petitioned-for units are inappropriate for the purpose of exclusive recognition, in that the decision is based upon established principles reflected in his previous published decisions and upon the record in the case.

With regard to your contention concerning the Assistant Secretary's obligation to address himself to the union's motion that alleged a violation of 18 U.S.C. § 1001 by a witness, and to consider the union's procedural motions to dismiss before considering the merits of the case, as the Assistant Secretary did consider such motions by denying them "noting the disposition" of the case and as your petition does not

---

2/ 18 U.S.C. § 1001 (1970 ed.) provides:

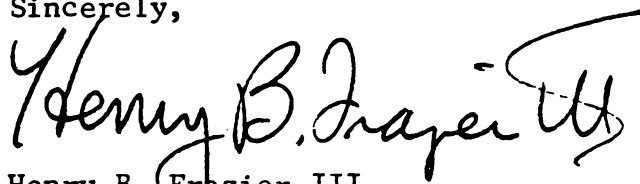
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined no more than \$10,000 or imprisoned not more than five years, or both.

support the contention that the Assistant Secretary failed to carry out any of the duties which he may have with respect to 18 U.S.C. § 1001, no major policy issue is present with respect to these contentions. As to the alleged major policy issue concerning the responsibility of the Assistant Secretary in a unit determination case, such issue is not presented by this decision herein, because he did not determine which one of several possible units was appropriate for such recognition but, pursuant to his authority under section 6(a) of the Order to decide questions as to the appropriate unit for the purpose of exclusive recognition, he decided that the petitioned-for units were inappropriate. Finally, as to your contentions concerning what evidence the Assistant Secretary may consider in determining appropriate unit questions, in the Council's view the Assistant Secretary's consideration of evidence submitted during the course of investigation of a representation petition, at a hearing, or a remanded hearing, pursuant to regulations issued by him to implement his functions under the Order does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

J. Taccino  
Agriculture

P. Kollenberg  
AFGE

Department of Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-574. The Assistant Secretary affirmed the Assistant Regional Director's dismissal of the Hawaii Federal Employees Metal Trades Council's unfair labor practice complaint, which alleged a violation of section 19(a)(1) of the Order by the agency. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (June 25, 1975). The Council held that the Assistant Secretary's determination did not appear to be without reasonable justification or in any other manner arbitrary and capricious. In addition, the Council ruled that the union does not allege, nor does it otherwise appear, that a major policy issue is presented. Consequently, since the union's petition for review failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied review of the union's appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 25, 1975

Mr. Jack L. Copess  
Hawaii Federal Employees Metal  
Trades Council  
925 Bethel Street, Room 210  
Honolulu, Hawaii 96813

Re: Department of Navy, Pearl Harbor  
Naval Shipyard, Assistant Secretary  
Case No. 73-574, FLRC No. 75A-12

Dear Mr. Copess:

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

In this case, the Assistant Secretary affirmed the Assistant Regional Director's dismissal of your unfair labor practice complaint, which alleged a violation of section 19(a)(1) of the Order. The Assistant Secretary found that during a general meeting held to discuss a pending wage schedule conversion, and after an employee had expressed his dissatisfaction with the new wage schedule, a representative of the activity responded that the employee could quit if he did not like his job. The Assistant Secretary found that this isolated statement did not constitute a violation of any employee rights assured by the Order.

In your petition for review, you contend that the decision of the Assistant Secretary was arbitrary and capricious in that he disregarded the "coercive, restraining and interfering effect" of the remark on the employees, and its "corrosive effect" on the relationship between the employees and their labor organization as well.

In the opinion of the Council, the Assistant Secretary's determination in the instant case does not appear to be without reasonable justification or in any other manner arbitrary and capricious. In addition, you have neither alleged nor does it otherwise appear that a major policy issue is presented. Consequently, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR, Dept. of Labor  
P. J. Burnsky, MTD, AFL-CIO  
A. Di Pasquale, Navy

Pennsylvania Nurses Association and Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania. The union filed a petition for review of an agency head's determination on negotiability issues, which determination was dated April 28, 1975. Under the Council's rules of procedure, the union's appeal was due in the Council's office on or about May 21, 1975. The appeal was not received by the Council, however, until June 3, 1975, and no extension of time for filing was either requested by the union or granted by the Council under section 2411.45(d) of the Council's rules (5 CFR 2411.45(d)).

Council action (June 25, 1975). The Council held that the union's appeal was untimely filed. Accordingly, 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

June 25, 1975

Mr. Steven J. Zuback  
Assistant Executive Director  
Pennsylvania Nurses Association  
2515 N. Front Street  
Harrisburg, Pennsylvania 17110

Re: Pennsylvania Nurses Association and Veterans  
Administration Hospital, Leech Farm Road,  
Pittsburgh, Pennsylvania, FLRC No. 75A-58

Dear Mr. Zuback:

Reference is made to your petition for review of an agency head's determination on negotiability issues, filed with the Council in the above-entitled case. For the reasons indicated below, the Council has decided that your petition was untimely filed and cannot be accepted for review.

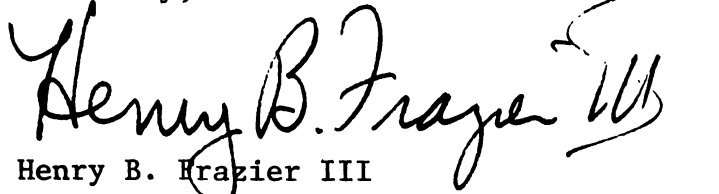
Section 2411.23(b) of the Council's rules (a copy of which is enclosed for your convenience) specifically provides that an appeal must be filed within 20 days from the date the agency head's determination was served on the labor organization. Under section 2411.45(c) of the rules, three additional days are allowed when service is by mail; and, under section 2411.45(a), such appeal must be received in the Council's office before the close of business on the last day of the prescribed time limit.

The agency head's determination here involved is dated April 28, 1975 and, so far as your appeal indicates, was mailed on or about the same date. Therefore, under the above mentioned rules, your appeal was due in the office of the Council on or about May 21, 1975. However, your appeal was not filed until June 3, 1975, and no extension of the time for filing was either requested by your organization or granted by the Council under section 2411.45(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 the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name and title.

Henry B. Frazier III  
Executive Director

Enclosure

cc: R. L. Roudebush  
VA

Immigration and Naturalization Service and American Federation of Government Employees. The dispute involved the negotiability under the Order of union proposals concerning (1) the rotation of immigration officers to vehicular inspection on a fair and equitable basis; (2) the rotation of employees through work available within job title; (3) the rotation of employees through details away from duty stations; (4) the starting of the official day when employee reports departure from home; (5) the working hours in each day of basic workweek to be the same; (6) and (7) appropriate communication equipment; (8) the assignment of immigration officers in pairs; and (9) the appropriate number of agents and vehicles to be assigned to checkpoints.

Council action (June 26, 1975). With regard to proposals (1), (2) and (5), the Council held that the proposals are negotiable under section 11(a) of the Order and that the agency head's contrary determination must be set aside. As to proposals (3), (6), (7), (8) and (9), the Council held that the proposals were excluded by section 11(b) from the agency's obligation to bargain, and that the agency head's determination of nonnegotiability must therefore be sustained. Finally, as to proposal (4), the Council held that the union's appeal failed to meet the conditions for review prescribed in section 11(c)(4) of the Order and must be denied.



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

Immigration and  
Naturalization Service

and

FLRC No. 74A-13

American Federation of  
Government Employees

DECISION ON NEGOTIABILITY ISSUES

Background

During national negotiations of a multiunit agreement between the Immigration and Naturalization Service (INS) and the American Federation of Government Employees (AFGE), disputes arose as to the negotiability of nine union proposals (set forth hereinafter). Upon referral the Department of Justice (hereinafter the "agency") determined that the proposals were nonnegotiable principally under sections 11(b) and 12(b) of the Order and published agency regulations. The union petitioned the Council for review under section 11(c)(4) of the Order,<sup>1/</sup> and the agency submitted a statement of its position.

Opinion

The proposals will be discussed separately below.

---

<sup>1/</sup> In its petition the union also requested that the Council: (1) "direct factfinding by the Federal Service Impasses Panel"; or (2) "permit oral argument" on the issues presented by this appeal. As to (1), section 17 of E.O. 11491, as amended, provides, in pertinent part, that "[w]hen voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Services Impasses Panel to consider the matter." The union does not allege, nor does it otherwise appear, that an impasse has been reached with respect to any of the issues in this case and consequently, apart from other considerations, this union request must be denied. As concerns (2), the request for oral argument, the Council is of the opinion that the record before it adequately presents the positions of the parties, and hence, pursuant to section 2411.48 of the Council's regulations, the union's request for oral argument is likewise denied.

1. Rotation to vehicular inspection on a fair and equitable basis.

The first contested proposal reads as follows:

Article 18, Section A(1):

Immigration Officers shall rotate to vehicular inspection on a fair and equitable basis. Immigration Officers shall not be prohibited from using inspection booths and/or other available shelter during inclement weather conditions while not actually engaged in the inspection. [Only the underscored portion is in dispute.]

The agency asserts that the underscored language of this proposal interferes with management's rights to "assign and direct employees in the performance of their duties," and is thus nonnegotiable because such matters are either excepted from management's obligation to bargain under section 11(b) of the Order or are prohibited from negotiation under sections 12(b)(1) and 12(b)(2). The union disagrees, arguing in effect that the proposal merely establishes a negotiable procedure (i.e., "fair and equitable rotation") which management will follow in requiring employees to perform inspections.

We consider first the effect of section 12(b). The relevant portions of that section provide as follow:

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--

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . . .

Section 12(b) establishes rights expressly reserved to management officials under any bargaining agreement. However, as the Council stated in the VA Research Hospital case, and has repeatedly emphasized in its subsequent decisions:<sup>2/</sup>

2/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31; accord, American Federation of Government Employees Local 977 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48; Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, FLRC No. 72A-18 (September 17, 1973), Report No. 44.

[T]here 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 regulation, 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.

Although the VA Research Hospital decision dealt only with the interpretation and application of section 12(b)(2), this reasoning is equally applicable to section 12(b)(1). In terms of the instant case, then, the question before the Council is whether this proposal would (as the agency contends) violate sections 12(b)(1) and (2), or whether (as the union contends) the proposal would merely establish a procedure which the agency would follow in exercising the authority reserved to it by those sections.

In our view, the union's position is the correct one. That is to say, based upon the record in this case, the essence of the union's proposal is to ensure fairness and equity in the rotation of vehicular inspection assignments--not to obligate the agency to bargain about whether Immigration Officers, individually or collectively, will or will not perform vehicle inspections. The proposal merely requires that among those Immigration Officers who management has determined will perform duties associated with vehicular inspection, management will distribute specific assignments to such duties on a fair and equitable basis. As the union in its brief points out, "[m]anagement unilaterally determines when inspections are necessary," and will then under this proposal, "implement this procedure in the terms of the labor agreement which requires a fair and equitable rotation." Thus, the proposal would not prevent agency management from determining that some or all Immigration Officers will not perform vehicular inspection duties or that only Immigration Officers of a certain grade level or of a certain organizational unit, for example, will perform such inspections.

We therefore regard the proposal, as we have indicated, to require only that such Immigration Officers as the agency in its discretion assigns to conduct vehicle inspections shall rotate through those assignments on a fair and equitable basis. And, as the agency makes no showing that the requirement for fair and equitable rotation of these assignments will to any degree restrict its ability to assign and direct employees under the rights reserved to it by section 12(b) of the Order, we must find that the agency is not relieved under section 12(b) from its obligation to bargain on the union's proposal.

As previously indicated, the agency also asserts that the proposal, even if not prohibited by section 12(b) of the Order, is nevertheless

excepted from the agency's duty to negotiate under section 11(b) because "section 11(b) reserves to management the right to assign employees to duties without an obligation to bargain."<sup>3/</sup>

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

[T]he 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 . . . .

In our view, the proposal would leave as matters for the agency to decide the "numbers, types, and grades" of employees assigned to vehicle inspections--requiring, as we have indicated, only that such employees as the agency decides to assign will be permitted to rotate, fairly and equitably, through those assignments. Contrary to the agency's assertion, nothing in this proposal would require the agency to negotiate about the nature of duties to which employees will be assigned, and we therefore must find that the proposal is not excluded from the bargaining obligation by section 11(b).

Accordingly, we hold that the union's proposal is not rendered nonnegotiable under sections 11(b) or 12(b) of the Order, and the agency head determination to the contrary was improper and must be set aside.

2. Rotation of employees through work available within job title.

The union's second proposal provides as follows:

<sup>3/</sup> The agency contends, without supporting argument, that its position is supported by the Council's decisions in International Association of Firefighters, Local F-111, and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 19, 1973), Report No. 36, and in Federal Employees Metal Trades Council of Charleston, and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-46 (December 27, 1973), Report No. 47. In Griffiss we held that the specific duties assigned to particular positions or employees, i.e. the job content, are "excluded from the obligation to bargain under the words 'organization' and 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty' in section 11(b) of the Order." We subsequently applied the principles enunciated in Griffiss in the Charleston case. Both cases involved proposals concerning matters related to the job content of positions or employees assigned to a work project or tour of duty. Thus, in view of our finding that the instant proposal does not obligate management to bargain over job content, the cited cases are inapposite here.

Article 25, Section A:

To provide for employee development the Service agrees to rotate employees through the various phases of work within their job title that is available. This training will be given consideration at appraisal time. [Only the underscored portion is in dispute.]

The agency maintains that the disputed portion of this proposal is either nonnegotiable under section 12(b)(2) of the Order or is excepted from the obligation to negotiate by section 11(b).

In particular, as to section 12(b)(2) the agency contends that the proposal would infringe upon rights reserved to management under that section "by establishing rotation as the exclusive means of assigning Service employees." According to the agency, certain job titles, such as Immigration Inspector, apply to employees in different positions, performing different combinations of duties at a number of different ports of entry. These employees, "as a matter of practice," do not now rotate from one port of entry to another, and the agency objects to the instant proposal chiefly because of its view that the proposal would require such rotation.

In this regard, the agency's interpretation of the intended meaning of the proposal is at variance with the union's explanation thereof in its petition for Council review, wherein the union stated as follows:

Once the agency has determined that certain work must be performed by specific employees, then the proposal would imply that employees would rotate through various phases of such work within their job titles when such work is available. [Emphasis by union.]

Clearly, in determining that "certain work must be performed by specific employees," the agency would be determining which employees would perform the distinctive combinations of duties required of a position at particular ports of entry. From this it follows that the phrase "various phases of work within their job titles" as used in this proposal refers only to the distinctive combinations of duties comprising such individual positions, rather than to generic classifications such as Immigration Inspector which would embrace the distinctive groups of duties of a number of positions. As a result, the proposal would require only that an employee rotate through the variety of duties contained in his or her own position description if work requiring the performance of such duties is available.

Thus, the proposal would not, contrary to the agency's contentions, establish rotation as an exclusive "means of assignment," or require that employees be assigned to positions other than their own but, as already indicated, would pertain simply to the rotation of employees to

perform duties previously assigned to them by management. Furthermore, nothing in the proposal restricts agency management in making new assignments or modifying or terminating existing ones when and if it finds necessary or desirable. Therefore, we must find that negotiation of the proposal does not conflict with rights reserved to the agency by section 12(b)(2) of the Order.

As previously indicated, the agency also asserts that the proposal concerns matters relating to the agency's staffing patterns and thus falls outside the obligation to bargain under section 11(b) of the Order. This assertion, however, rests primarily upon the same erroneous interpretation of the proposal upon which the agency relied in connection with its contentions under section 12(b)(2): that is, the agency in effect views the proposal as requiring the rotation of employees from one position, or one combination of duties, to another. However, it is our opinion, as discussed previously, that the meaning of the proposal here is quite different. As we have stated, the proposal does not limit management's authority to determine which duties will be assigned to any given position or employee and, in like manner, neither the proposal itself nor the union's explanation thereof contains language which would limit management's determinations as to the numbers, types, and grades of those positions or employees.

This being the case, we must find that the proposal is not excepted by section 11(b) from the agency's obligation to negotiate.

Accordingly, we hold that the proposal is not rendered nonnegotiable by section 11(b) or 12(b) of the Order and the agency head determination to the contrary was improper and must be set aside.

3. Rotation of employees through details away from duty stations.

The third proposal provides as follows:

Article 25, Section B:

Patrol Agents will rotate through Border Patrol details away from the duty station unless the Union and the Employer agree to a different procedure at the Sector level.

The agency contends that this proposal would, contrary to section 11(b) of the Order, "infringe upon management's right not to bargain on the numbers, types, and grades of positions or employees assigned to a work project or tour of duty." The union argues that the proposal "does not infringe upon the employer's right to establish details" but "merely establishes the procedure the employer will use when implementing [its] decision to detail employees away from the duty station."

The term "detail," as it relates to Federal employment, means the temporary assignment of an employee to a position other than the one to which he or she is regularly assigned.<sup>4/</sup> Since different positions usually will entail different duties, it is clear that generally the detail of an employee contemplates the employee's performing at least some duties unlike those which he or she regularly performs.

The union does not contend that the term "detail" as used in the instant proposal has any different meaning or that details with which the proposal is concerned would not also result in the performance by employees of duties different from those regularly assigned. The effect of this proposal, then, would be to require the agency to negotiate about matters relating to the performance of those different duties for the duration of the detail. We agree with the agency that such a requirement is excepted from the bargaining obligation by the phrase "the 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.<sup>5/</sup>

To illustrate, this proposal may be compared with the second proposal previously discussed herein, Article 25, Section A, which required the agency "to rotate employees through the various phases of work within their job title that is available." We found that the rotation required under that proposal, as explained by the union in its petition, was limited to the duties of each employee's own position. We concluded on that basis that negotiation of the proposal would not require the agency to bargain on matters with respect to staffing patterns and, thus, was not excluded from the bargaining obligation by section 11(b). In contrast, the instant proposal, through its application to "details," clearly encompasses the rotation of employees from the duties of one position to those of another. We conclude, accordingly, that the proposal is outside the bargaining obligation under section 11(b).

This is not to say that a proposal limited to the rotation of employees into details or other assignments comprising only those duties regularly assigned and merely requiring their performance in, for example, a different organizational or geographic location would necessarily lead

4/ Federal Personnel Manual chapter 300, subchapter 8-1, provides in pertinent part that:

A detail is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the period.

5/ Cf. International Association of Firefighters, Local F-111, and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 19, 1973), Report No. 36.

to the same result. We hold only that the instant proposal, which contains no such limitation, would so influence the agency's ability to exercise control over its staffing patterns as to require exclusion from the obligation to bargain under section 11(b).

4. Official day to start when employee reports departure from home.

The fourth proposal is as follows:

Article 22, Section C:

In those instances where it is determined by his supervisor that it is in the best interest of the government for the employee to leave his home to report to a distant point of duty, his official day will start when he calls his normal duty station and reports the fact that he has departed.

The agency determined that this proposal is nonnegotiable because it conflicts with published agency regulations, namely Department of Justice Order 2200.4A,<sup>6/</sup> setting forth various conditions for determining hours of employment.

The union, in turn, asserts that the proposal is negotiable both because "[i]t leaves to management sole authority to decide when the clause would be applicable," as well as because the "employee's official day would start only if he receives the approval of his supervisor . . . ."

Section 11(c)(4)(ii) of the Order states, with respect to agency regulations asserted to bar negotiation, that a union may appeal to the Council for a decision when it believes that an agency's regulations, as interpreted by the agency head, "violate applicable law, regulation

---

6/ Paragraph 8b ("Hours of Employment") of the cited regulation provides:

Time spent on official travel is deemed hours of employment when:

- (1) It is within the employee's regularly scheduled administrative workweek, including regular overtime worked; or
- (2) The travel (1) involves the performance of actual work while traveling, (2) is incident to travel that involves the performance of work while traveling, (3) is carried out under such arduous and unusual conditions that the travel is inseparable from work, or (4) results from an event which could not be scheduled or controlled administratively.



of appropriate authority outside the agency, or this Order . . . ." However, in the instant case, the union only disputes the propriety of the agency determination based on the union's interpretation, in effect, that the proposal is not inconsistent with agency regulations.<sup>7/</sup>

Therefore, because the union does not contend, nor does it otherwise appear, that the agency regulation as interpreted and relied upon by the agency head in any manner violates applicable law, regulation of appropriate authority outside the agency, or the Order, the union's appeal as to this proposal fails to meet the conditions for review prescribed in section 11(c)(4) of the Order and, accordingly, must be denied.

5. Working hours in each day of basic workweek to be the same.

The fifth proposal reads as follows:

Article 23, Section A(3):

The working hours in each day in the basic workweek shall be the same.

The agency argues that this proposal is nonnegotiable under section 12(b)(4) of the Order, claiming that it would eliminate "scheduling flexibilities" presently utilized, requiring management to rely upon scheduled overtime in instances where peak immigration inspection periods extend beyond 8 hours daily, and would thereby impose upon the agency "prohibitive" increased costs.

The union indicates that the proposal merely is "an excerpt from 5 U.S.C. § 6101(a)(3),"<sup>8/</sup> which concerns the establishment of work schedules. The union further indicates that, together with prefatory qualifying language upon which, it alleges without contradiction, the parties have already agreed, the proposal would appear in the agreement in context as follows:

7/ Cf. NAGE Local R1-34 and U.S. Army, Natick Laboratories, Massachusetts, FLRC No. 74A-69 (February 21, 1975), Report No. 64.

8/ 5 U.S.C. § 6101(a)(3) provides in relevant part:

Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that--

- . . . . .
- (C) the working hours in each day in the basic workweek are the same . . . . .

Section A. It is agreed that except where the Agency determines that it would be seriously handicapped in carrying out its functions or that the cost would be substantially increased, to provide the following:

(3) The working hours in each day in the basic workweek shall be the same.

Section 12(b)(4) of the Order reserves to agency management officials the right, in accordance with applicable law and regulations, "to maintain the efficiency of the Government operations entrusted to them." The proper invocation of this right to preclude negotiations was carefully examined by the Council in the Little Rock case.<sup>9/</sup> In that case, the agency asserted that union proposals limiting the agency's practice of assigning "swing" operators in such a way as to avoid overtime and holiday pay would constrain agency attempts to reduce premium pay costs and would thereby interfere with the agency's right to maintain the efficiency of its operations under section 12(b)(4). The Council, in the course of finding the proposal to be negotiable, explained as follows:

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 moneysaving ideas, improved health and safety, and the like, are valid considerations. 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. [Emphasis supplied.]

In the instant case, as in Little Rock, the agency bases its determination that the proposal is nonnegotiable solely upon the anticipation of increased costs for premium pay. And, as in Little Rock, the agency here fails to make any showing that (among other factors, noted in the quoted

9/ Local Union 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Arkansas, FLRC No. 71A-46 (November 20, 1972), Report No. 30.

excerpt from Little Rock, to be considered, balanced, and demonstrated before section 12(b)(4) may properly be invoked to bar negotiations) the increased costs which it claims would result from the proposal are inescapable. Moreover, in our opinion, neither can such a finding be inferred from the record before us. In this regard, the agency does not seek to controvert and thereby tacitly accedes to the union's assertion that the parties have agreed to language which qualifies the meaning of the disputed proposal so as to render it inapplicable in the event the agency itself "determines that it would be seriously handicapped in carrying out its functions or that cost would be substantially increased." (Emphasis supplied). Further, in this regard, the literal language of the disputed proposal in no way purports to limit management's authority to establish, for example, various work shifts to cope with peak workload periods, in lieu of relying solely on overtime work requiring premium pay. Thus, based on the record before us showing the qualifying context in which the disputed proposal would appear in the parties' agreement, as well as the literal meaning of the proposal itself, no basis is apparent upon which the agency might persuasively argue that it could not avoid any substantial increased costs such as it alleges might result from implementation of the proposal in question.

Accordingly, we find that the agency has not met its burden of showing the applicability of section 12(b)(4), and hold that the agency head's determination that the proposal is rendered nonnegotiable under that section of the Order was improper and must be set aside.

6. & 7. Appropriate communications equipment.

The sixth and seventh union proposals are as follows:

Article 18, Section L:

Appropriate communication equipment will be installed in all Immigration vehicles in those places where Officers are required to work in remote areas. The equipment will provide for prompt contact with local law enforcement authorities.

Article 18, Section O:

For safety considerations appropriate communication equipment will be provided for communications between all Agency vehicles and their assigned offices.

These two proposals share a common theme -- the provision of "appropriate communication equipment" -- for use between agency vehicles and local law enforcement authorities in the first instance, and between the vehicles and their assigned offices in the second. As to each proposal, the parties' positions are the same. The agency head determined that both

proposals are concerned with the technology of performing the agency's work and are thus excluded from the bargaining obligation by section 11(b) of the Order,<sup>10/</sup> while the union contends that the proposals seek only to establish standards of health and safety which it claims are negotiable under the Council's Border Patrol, Yuma decision.<sup>11/</sup>

In Border Patrol, Yuma, the union's proposal dealt with the maintenance of Border Patrol "drag roads" (surveillance devices), requiring the "regular" maintenance of such roads by the agency so that they would be in a "reasonably" level condition and free of "excessive" dust.

The Council held the proposal was not excepted from the duty to bargain as a matter of "technology" under section 11(b) because the proposal did not require the agency to bargain on the "technology" of the drag roads. Rather, it merely required that this "technology," as adopted by the agency, be implemented in a manner consistent with the health and safety of Border Patrol Officers. In other words, the union's proposal in that case did not purport to decide whether or not, or to what extent, drag roads would be used. The proposal only required that, if drag roads were used, they would be maintained by the agency to a general standard, which standard the agency did not assert would reduce the roads' effectiveness as surveillance devices.

In sharp contrast, the proposals in the instant case both would require the agency to negotiate not with respect to the maintenance of a general standard of health or safety as was proposed in Border Patrol, Yuma, but, rather, with respect to the installation or provision for use in its vehicles of communications equipment. In our opinion, the questions whether to adopt for "all Immigration vehicles" and for all "Agency" vehicles the use of vehicle-based communications equipment, as the proposals would require, are clearly questions concerning the adoption of a particular "technology" of performing the agency's work. As such, they are matters excepted from the bargaining obligation under section 11(b) of the Order.

Thus, as the union's proposals would require the adoption by the agency of a particular technology for performing its work, we must find, as determined by the agency head, that such proposals are excluded by section 11(b) from the agency's obligation to bargain. Accordingly, the agency head's determination that the proposals are nonnegotiable was proper and must be sustained.

<sup>10/</sup> Section 11(b) provides, in pertinent part, that an agency's obligation to negotiate "does not include matters with respect to . . . the technology of performing its work . . . ."

<sup>11/</sup> AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), FLRC No. 70A-10 (April 15, 1971), Report No. 6.

8. Assignment of Officers in pairs.

The eighth proposal provides:

Article 18, Section K:

Officers assigned to duties involving the apprehension and/or detention of violators including conveyance by service vehicles other than buses shall be assigned to work in pairs at all times. Exceptions to this may be made when duties require additional officers who will be assigned together.

The agency argues that this proposal "clearly attempts to dictate staffing patterns" and thus is excepted from the duty to bargain by section 11(b). The union contends that the proposal seeks to improve the safety and health of Immigration Officers, consistent with the proposal which the Council found negotiable in Border Patrol, Yuma, and does not require bargaining on the numbers, types, and grades of the agency's personnel.

Section 11(b) of the Order provides that the obligation to bargain "does not include matters with respect to . . . the number of [the agency's] employees; or the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty . . . ." The union's proposal would require that the agency assign no less than two officers, together, "at all times," to the performance of certain, specified duties. Thus, in our opinion, it is clear and undeniable that this proposal would require the agency to negotiate with respect to a particular, numerical pattern of employee assignment--the specific number of employees to be assigned to perform specific duties. It sets forth a strict rule regarding the minimum number of employees which the agency must assign to particular work projects or tours of duty, and would thereby directly impose upon the agency a particular staffing pattern.

Therefore, we find that the proposal falls squarely within the ambit of section 11(b) of the Order, which expressly excepts from the agency's bargaining obligation the "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . . ." Accordingly, the agency determination that the proposal is nonnegotiable must be sustained.

9. Appropriate number of agents and vehicles assigned to checkpoints.

The ninth union proposal reads as follows:

Article 18, Section M:

An appropriate number of Border Patrol Agents and Patrol vehicles equipped with flashing emergency lights will be assigned to traffic checkpoints. The number of employees and vehicles will be sufficient to provide adequate safety protection. [Only the underscored portions are in dispute.]

This proposal is also characterized by the union as a standard of safety, and in support of its negotiability the union again relies upon the Border Patrol, Yuma decision. The agency determined that the proposal is excepted from the duty to bargain by section 11(b) of the Order. For the reasons which follow, we agree with the agency, with respect to both the requirements as to "Border Patrol Agents" and as to "Patrol vehicles."

As to the "Agents," we are faced once again, as in regard to the previous proposal concerning the assignment of officers in pairs, with a proposal which, in our view, contemplates the negotiation of a limitation on the agency's discretion in allocating the number of employees assigned to work projects or tours of duty, here, traffic checkpoints. In this regard, the instant proposal does not prescribe the exact number of employees which the agency must assign to traffic checkpoints but requires an "appropriate" and "sufficient" number. However, in terms of the exclusion from the bargaining obligation of the agency's staffing patterns by section 11(b), no difference exists between a proposal requiring the agency to assign an "appropriate" number of employees to a given work project or tour of duty and one requiring it to assign a specific number of employees. In either instance, the proposal affects the numbers of employees that the agency might assign to particular work projects or tours of duty and, therefore, concerns a matter excepted from the bargaining obligation by section 11(b).<sup>12/</sup>

As to the requirement in the proposal for "Patrol vehicles," section 11(b) also excepts from the agency's obligation to bargain matters with respect to "the technology of performing its work . . . ." In this regard, as similarly indicated herein in connection with the union's proposals concerning communications equipment, the instant proposal would require the agency to negotiate about the use of particular equipment to perform the agency's work at traffic checkpoints. While the agency may negotiate with respect to such matters if it chooses,<sup>13/</sup> section 11(b) excepts such matters from its obligation to do so.

12/ Cf. Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-35 (June 29, 1973), Report No. 41.

13/ For example, in regard to the instant proposal, the agency is apparently willing to negotiate concerning the use of "flashing emergency lights" as proposed by the union.


In summary, while the proposal sets forth a general safety standard, i.e., "adequate safety protection," which, standing alone, does not appear to conflict with the Order, the proposal also mandates the specific manner in which such standard will be required to be achieved by the agency: The agency must assign "an appropriate number of Border Patrol Agents and Patrol vehicles" to traffic checkpoints. As indicated, such matters are excepted from the obligation to bargain by section 11(b) of the Order.

### Conclusions

For the reasons discussed above, and pursuant to sections 2411.22 and 2411.27 of the Council's Rules and Regulations, we find that:

1. The union's appeal for review of the agency head's determination as to the nonnegotiability of Article 22, Section C, fails to meet the conditions prescribed in section 11(c)(4) of the Order and must be denied; and
2. The agency's determination as to the nonnegotiability of Article 18, Sections K, L, M, and O, and of Article 25, Section B, was valid and must be sustained; and
3. The agency's determination as to the nonnegotiability of Article 18, Section A(1); of Article 23, Section A(3); and of Article 25, Section (A), was improper and must be set aside. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposals. We decide only that, as submitted by the union and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: June 26, 1975

AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland. The dispute involved the negotiability under the Order of union proposals related to (1) jurisdictional boundaries between crafts; (2) safety precautions in performing work; and (3) advance notice of temporary changes in duty stations.

Council action (June 26, 1975). As to (1), the Council held that the proposal was excepted from the agency's obligation to bargain under section 11(b) of the Order; however, since the agency, through its local bargaining representative, had negotiated and reached agreement on the proposal in dispute as permitted by the Order, the Council ruled that the agency cannot, after that fact, change its position during the section 15 review process, and the agreed upon proposal must be approved. Accordingly, the Council held that the agency's determination that the proposal is nonnegotiable was improper and must be set aside. As to (2) and (3), the Council held that (2) did not violate section 12(b) of the Order or 5 U.S.C. 7311, and (3) did not violate section 12(b) of the Order, as contended by the agency; and that the proposals were negotiable under section 11(a) of the Order. Accordingly, the Council set aside the agency head's determination of nonnegotiability.



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

AFGE Council of Locals 1497 and 2165

and

FLRC No. 74A-48

Region 3, General Services Administration,  
Baltimore, Maryland

DECISION ON NEGOTIABILITY ISSUES

Background

The AFGE Council of Locals 1497 and 2165 (referred to hereinafter as the union) is the exclusive bargaining representative for a unit of all wage employees, except custodial, of the General Services Administration, Region 3, Public Building Service, Baltimore, Maryland. Region 3 and the union reached agreement at the local level on the terms of an agreement, subject to agency approval pursuant to section 15 of the Order.<sup>1/</sup>

The General Services Administration disapproved certain portions of the agreement, namely Article VII (Assignments), Section 3; Article XX (Safety), Section 3; and Article XXXI (Normal Duty Station), Section 1. The agency determined that these provisions violate the Order and that Article XX (Safety), Section 3 also violates applicable law and therefore were nonnegotiable.

---

<sup>1/</sup> Section 15 of the Order provides, in relevant part:

Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. . . .

The quoted language of section 15 appears as set forth in E.O. 11491 as amended by E.O. 11616 and E.O. 11838. While the local agreement containing the subject provision was reviewed by the agency under section 15 of the Order prior to its recent amendment by E.O. 11838, the Order was not changed in respects which are material in the present case.

The union appealed from this determination to the Council under section 11(c)(4) of the Order and the agency filed a statement of position in support of its determination.

### Opinion

The provisions in dispute are considered separately below.

1. Article VII (Assignments), Section 3.

The provision reads as follows:

The Employer agrees that jurisdictional boundaries between and among crafts for the purpose of establishing a claim to the work is recognized as an appropriate subject for discussion with the consideration of the views of the union.

The agency contends that to agree that jurisdictional boundaries between crafts for the purpose of establishing a claim to the work is an appropriate subject for discussion would, in effect, be to agree that the assignment of duties to individual employees and groups of employees is an appropriate subject for discussion; and such assignment of duties relates to the agency's "organization," a matter excepted from the agency's obligation to negotiate under section 11(b) of the Order. The agency cites the Council's decisions in Griffiss<sup>2/</sup> and Charleston Naval Shipyard<sup>3/</sup> to support this contention and we find merit in it.<sup>4/</sup>

---

2/ International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 19, 1973), Report No. 36. In that case, the union's proposals would have prohibited the assignment of allegedly unrelated duties to positions in the unit. The Council sustained the agency's determination of nonnegotiability, because the specific duties assigned to particular jobs, including duties allegedly unrelated to the principal functions of the employees concerned, i.e. job content, are excepted from the agency's obligation to bargain under section 11(b).

3/ Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-46 (December 27, 1973), Report No. 47. In that case, the union's proposal would have limited the agency's discretion in assigning journeyman level work to apprentices. The Council, relying on the principles enunciated in Griffiss, sustained the agency's determination of nonnegotiability under section 11(b) because the proposal dealt with the job content of apprentices.

4/ The agency also contends that the proposal violates sections 12(b)(1) and 12(b)(5) of the Order. In our view, as set forth hereinafter, the proposal at issue is principally concerned with job content and section 12(b) is inapplicable.

The purpose of the proposal, as expressly stated therein, is to establish "a claim to the work" on the basis of "jurisdictional boundaries between and among crafts." Therefore, the proposal clearly relates to the establishment of restrictions on the allocation of specific duties to particular positions or employees. In its recent decision in the Wright-Patterson Air Force Base case,<sup>5/</sup> the Council considered a proposal which similarly would have restricted the assignment of specific duties by the agency to particular positions or employees. In that case, the union proposal<sup>6/</sup> would have conditioned the assignment of duties by the agency on the "scope of the classification assigned" to the respective unit employees as defined in "appropriate classification standards." The Council found that the union's proposal was excepted from the agency's obligation to negotiate under section 11(b), because it would limit the agency in the assignment of duties to unit employees unless conditions prescribed in the agreement exist--there, the conformity of the duties with the scope of the job grading standards. In so finding, the Council relied upon its earlier Immigration and Naturalization Service decision in which it considered a proposal which similarly would have prevented the agency from assigning specific duties,<sup>7/</sup> to unit employees unless conditions prescribed in the agreement existed.<sup>7/</sup>

5/ Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (December 5, 1974), Report No. 60.

6/ The disputed sections concerning work assignments in the Wright-Patterson case provided as follows:

Section 7. In the interests of maintaining morale in a good employer-employee relationship, the Employer agrees that, to the fullest extent possible in maintaining the efficiency of the Government operations, every effort will be made to assign work within the scope of the classification assigned as defined by appropriate classification standards.

Section 10. The Employer agrees that to the maximum extent possible, efforts will be made to assign work within the scope of the classification assigned to bargaining unit employees, as defined in appropriate classification standards . . . .  
[Emphasis in body supplied.]

7/ AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57. The proposal in that case read as follows:

The agency agrees to continue its current policy of not using Border Patrol Agents on alien bus movements when Detention Guards are readily available.

In the Immigration and Naturalization Service case the Council stated:

As the Council held in the Griffiss case, the specific duties assigned to particular positions or employees, i.e. the job content, are "excluded from the obligation to bargain under the words 'organization' and 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty' in section 11(b) of the Order." Such exception from the obligation to bargain under section 11(b) applies not only to a proposal which would totally proscribe the assignment of specific duties to particular types of employees, but also to a proposal which, as here, would prevent the agency from assigning such duties unless certain conditions exist.

While . . . the union claims that the condition attached to the assignment of alien bus duties to border patrol agents is merely a "procedure" which is negotiable, the subject condition (namely, when detention guards are unavailable) plainly imposes limitations on which types of positions or employees will actually perform the duties involved. Such a limitation on the agency's reserved authority to assign duties falls outside the agency's obligation to bargain under section 11(b) . . . . [Footnotes omitted.]

In the present case, the express purpose of the union proposal is to establish "a claim to the work" which would be based on "jurisdictional boundaries between and among crafts." Implicit within this purpose and essential to its attainment is restriction of agency discretion in the assignment of duties to unit employees through the establishment of such claims to the work. Therefore, the proposal here is closely akin to the proposals in Wright-Patterson and Immigration and Naturalization Service in that its expressed purpose is to seek to establish limitations on management's assignment of duties. In our opinion, to require the agency to bargain on a proposal, the purpose of which is ultimately to establish restrictions on management's discretion to determine job content, would be effectively to require the agency to negotiate on job content, itself. Accordingly, we find that the union's proposal is excepted from the agency's obligation to bargain under section 11(b) of the Order.

The case before us differs, however, in an important respect from other cases involving the assignment of duties such as Griffiss, Wright-Patterson, Immigration and Naturalization Service, and Charleston in which the Council sustained the agency head determination of non-negotiability under section 11(b). Moreover, this difference requires us to find that, with regard to the instant proposal, the agency determination, that the proposal is nonnegotiable, was improper. Here, as distinguished from the circumstances in the cited cases, the local parties agreed to the proposal in dispute and the agency disapproved

the proposal only subsequently, during the review of the agreement under section 15 of the Order. As previously noted, section 15 provides, in part, "An agreement shall be approved . . . if it conforms to applicable laws, the Order, existing published agency policies and regulations . . . and regulations of other appropriate authorities." In this connection, the Council expressly stated, in its Griffiss<sup>8/</sup> and Charleston<sup>9/</sup> decisions, that matters which are within the ambit of section 11(b), although excepted from the obligation to negotiate, may be negotiated if management chooses to negotiate over them. In other words, while there is no requirement that matters within the ambit of section 11(b) be negotiated, the Order does permit their negotiation so that an agreement which results from the negotiation of such matters does not, thereby, fail to conform to the Order. Therefore, since the agency in the instant case, through its local bargaining representative, negotiated and reached agreement on the proposal in dispute as permitted by the Order, the agency cannot, after that fact, change its position during the section 15 review process. Such agreement conforms to the Order and under section 15 it must be approved.

Accordingly, we find the agency's determination--that Article VII (Assignments), Section 3, which was agreed upon at the local level, is nonnegotiable--was improper and must be set aside.

2. Article XX (Safety), Section 3.

The provision reads as follows:

It is agreed that no employee shall be required to perform work on or about moving or operating machines without proper precaution, protective equipment and safety devices, nor shall any employee be required to work in areas where conditions are detrimental to health without proper protective equipment and safety devices.

The agency contends that the provisions would allow employees to refuse to work if the employees feel that unsafe working conditions are present; and, thus, violates section 12(b)(1), (2), (5), and (6) of the Order.<sup>10/</sup> The agency further contends that the refusal to work

---

<sup>8/</sup> Supra note 2.

<sup>9/</sup> Supra note 3.

<sup>10/</sup> Section 12(b) reads as follows:

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(1) to direct employees of the agency;

(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;

(Continued)

(if it occurred) could constitute a violation of 5 U.S.C. 7311.<sup>11/</sup>

The union asserts, however, that the proposal's " . . . sole intent is to protect and reduce the chance of injury to the employees" and that the negotiability of such a proposal, relating as it does to safety, was clarified by the Council in its Border Patrol decision.<sup>12/</sup>

Contrary to the agency's contentions, we do not view the provision involved here as, in any way, granting to the employees in the bargaining unit the right to refuse to work. There is nothing in the provision which would sanction any action which would constitute a violation of 5 U.S.C. 7311. Rather as the Council found in its Border Patrol decision:<sup>13/</sup>

. . . the union's proposal specifies only what health and safety standards shall be operative . . . . 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.

Moreover, in our view, the same rationale is dispositive of the agency's contention with respect to section 12(b)(2) and (6) of the Order relating to the assignment of employees and taking actions to accomplish the mission of the agency in emergencies.

---

(Continued)

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency . . . .

11/ 5 U.S.C. 7311 provides, in pertinent part:

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he--

. . . . .  
(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia . . . .

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

13/ Id. at p. 3 of decision.

As to the agency's contention with respect to the possible violation of 5 U.S.C. 7311, we have already indicated that we do not view the proposal as granting employees the right to refuse to work, and we reject the agency's contention on that basis.

Accordingly, we find that the proposal does not violate section 12(b) of the Order. Thus, we overrule the agency's determination that Article XX (Safety), Section 3, which was agreed upon at the local level, is nonnegotiable.

3. Article XXXI (Normal Duty Station), Section 1.

The provision reads as follows:

The Employer agrees to post temporary changes in the duty stations of employees at least 72 hours in advance. In the event that the required notice is not given, an employee may report to his normal duty station. In such cases, he will be transported to and from the temporary duty station by the Employer within the normal daily tour of duty, for a total number of days consistent with the number of days' notice not given, not to exceed three (3) days. (e.g., If the employee is given two (2) days' notice he would be supplied transportation for one (1) day).

The agency contends that the provision is nonnegotiable under section 12(b)(1), (2), (4), (5) and (6) of the Order because it so closely prescribes the steps management must take in exercising its rights under section 12(b) that it invades those rights. In the agency's view, it goes beyond the indication in Plum Island<sup>14/</sup> that advance notice in changes in tours of duty would be negotiable. Here, the agency asserts the circumstances are different from Plum Island because the instant provision contains a specific requirement for 72 hours advance notice; it would, in effect, penalize the agency for failure to give timely notice; and the agency might be precluded from assigning employees to a different duty station in a situation where such assignment is necessary in an emergency or to maintain operational efficiency.

However, the union asserts that the provision merely establishes procedures management will follow after making its decision to change the duty station and is therefore negotiable, citing VA Research Hospital<sup>15/</sup> in which the Council determined:

Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel

14/ AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (July 9, 1971), Report No. 11, at p. 4 of decision.

15/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31, at p. 3 of decision.

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. [Emphasis added.]


In our opinion, the obligation which the proposal would impose upon management--to provide 72 hours of advance notice of changes in duty station or, in the alternative, to provide transportation to such changed duty station from the employee's normal duty station--would not prevent management from deciding and acting with respect to changing employees' duty stations. Furthermore, there is no showing that the procedures which the proposal would require management to follow in exercising its retained rights under section 12(b) of the Order would have the effect of negating or interfering with such reserved authority either by causing unreasonable delay in reassigning employees under emergency or nonemergency situations, or by imposing significant and unavoidable costs upon the agency.

Accordingly, we overrule the agency's determination that Article XXXI (Normal Duty Station), Section 1, which was agreed upon at the local level, is nonnegotiable.

#### Conclusion

For the foregoing reasons, and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the agency head's determination as to the nonnegotiability of Article VII (Assignments), Section 3; Article XX (Safety), Section 3; and Article XXXI (Normal Duty Station), Section 1, of the agreement negotiated at the local level, was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions here involved. We decide only that, as submitted by the union and based on the record before the Council, the provisions were properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director



The Supervisor, New Orleans, Louisiana Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3157 (Moore, Arbitrator). The arbitrator determined that the agency did not violate the parties' agreement and therefore denied the union's grievance. The union filed exceptions to the arbitrator's award with the Council, alleging that (1) the arbitrator failed to determine all of the issues submitted to arbitration; and (2) the arbitrator, in effect, reached an incorrect result in his resolution of the grievance involved.

Council action (June 26, 1975). As to (1), the Council concluded that the union's petition does not present the facts and circumstances necessary to support its contention. As to (2), the Council decided that the union's second exception does not state a ground upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied review of the union's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1975

Mr. Clyde M. Webber  
National President  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: The Supervisor, New Orleans, Louisiana  
Commodity Inspection and Grain Inspec-  
tion Branches, Grain Division, United  
States Department of Agriculture and  
American Federation of Government  
Employees, AFL-CIO, Local 3157 (Moore,  
Arbitrator), FLRC No. 74A-75

Dear Mr. Webber:

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

According to the award, the agency proposed the issuance of an Instruction (GR Instruction 306-1 titled "First-Eight-Hour Indefinite Tour of Duty") establishing on a nationwide basis a new tour of duty for field offices, including the New Orleans field office where the employees are covered by a collective bargaining agreement with the union. In response to the agency's request for the union's comments and recommendations on the proposed Instruction, the union voiced its opposition. About 3 months later, the agency transmitted the Instruction to field office supervisors and regional directors. The new indefinite tour of duty thereafter became effective, and, further, the agency thereafter refused to pay overtime for any hours worked less than 8 in a day or 40 in a week. As a result of the new indefinite tour of duty, the working schedule of some employees at the New Orleans field office was changed from a regular to an irregular starting time. Moreover, some employees earned less overtime. The union filed a grievance which was submitted to arbitration.

There is no indication in the record before the Council that the parties entered into an agreement as to the question or questions to be decided by the arbitrator. The arbitrator in his decision formulated the question at issue as follows:

Did the Employer violate Section 13.2 or 13.3 of the Agreement<sup>1/</sup> when it implemented the "First 8-Hour Indefinite Tour of Duty and Related Work Rules?" If so, what is the proper remedy?

The arbitrator determined that the agency did not violate Section 13.2 or 13.3 of the agreement when it implemented the "First 8-Hour Indefinite Tour of Duty and Related Work Rules" and therefore denied the grievance. The arbitrator noted that he did "not pass judgement on whether the matter of a tour of duty is negotiable between the parties, only that the terms of the current agreement do not preclude the promulgation of a new tour of duty from a higher management level as was the case here."

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

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

In its first exception, the union contends that the arbitrator did not decide a "threshold question of negotiability" and thereby failed to determine all the issues submitted to arbitration. The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator did not decide the question submitted to arbitration and determined issues not included in the question, thereby exceeding his authority. Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62.

Since there is no question that the arbitrator answered the specific issue in the question formulated by the arbitrator<sup>2/</sup> in the present case

1/ Sections 13.2 and 13.3 of the agreement provide in relevant part:

13.2 Weekday Overtime: Weekday overtime shall be time worked outside the regular tour of duty which is ordered and approved between 0600 hours on Monday and 1900 hours on Friday. . . .

13.3 Weekend Overtime: Weekend overtime shall be that ordered and approved between 1900 hours on Friday and 0600 hours on Monday. . . .

2/ As the Council has indicated, where the parties do not enter into a submission agreement, the arbitrator's unchallenged formulation of the question may be regarded as the equivalent of a submission agreement. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60.

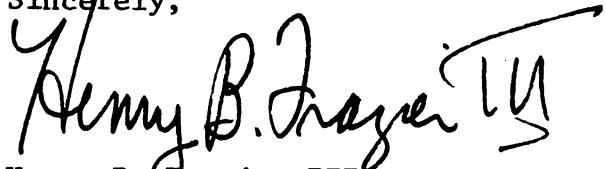
before us, we conclude that the union's petition does not present the facts and circumstances necessary to support its contention that the arbitrator failed to determine all the issues submitted to arbitration.

The union's second exception contends that the award "ignores past practice of regular hours of work, is in derogation of their fundamental bargaining rights and totally disregards previous FLRC decisions." In support of this exception, the union asserts that the agency's actions which gave rise to the grievance violated the basic terms of the contract (an argument which the union, according to the award, made to the arbitrator) and applicable Council case law on negotiability issues. Thus, when the substance of this exception is considered, the union, is, in effect, contending that the arbitrator reached an incorrect result in his resolution of the grievance. However, the Council has held, as courts consistently have with respect to arbitration in the private sector, that the interpretation of contract provisions and hence resolution of the grievance is a matter to be left to the arbitrator's judgment. See, e.g., American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61. Therefore, we conclude that the union's second exception does not, under the circumstances of this case, state a ground upon which the Council will grant a petition for review of an arbitration award.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A. M. Seeger  
USDA

Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator). The arbitrator upheld the union's grievance that an employee had been preselected for a position (since abolished) in violation of the collective bargaining agreement and, as a remedy, directed the agency to review the abolition of the subject position and make a new determination with respect thereto; select the grievant to fill the vacancy should the position be reestablished; and give priority consideration for promotion to the grievant if the position is not reestablished. The union filed an exception to the arbitrator's award, in effect challenging the arbitrator's reasoning in arriving at the remedy which failed to direct that the position be reestablished.

Council action (June 26, 1975). The Council, relying in part on its decision in the Department of Labor case, FLRC No. 72A-55 (Report No. 44), determined that the union's exception failed to state a ground upon which the Council will accept a petition for review of an arbitration award. Accordingly, the Council denied review of the union's petition under section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1975

Mr. Rudy Frank, Chief Steward  
National Council of OEO  
Locals, Local 2677  
1200 19th Street, NW.  
Washington, D.C. 20506

Re: Office of Economic Opportunity and  
American Federation of Government  
Employees Local 2677 (Matthews,  
Arbitrator), FLRC No. 74A-76

Dear Mr. Frank:

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 award shows that Mr. O. Marion Jones, an Equal Opportunity Specialist with the Office of Economic Opportunity (OEO), applied for the vacant position of Deputy Associate Director for Human Rights in OEO. Mr. Jones was determined to be eligible for the position, evaluated as one of the five best candidates, and certified for consideration. Subsequently, another employee was selected for the position and the union filed a grievance on Mr. Jones' behalf, alleging, among other things, that the selected employee had been preselected in violation of the merit promotion plan contained in the collective bargaining agreement between the parties. The grievance was ultimately submitted to arbitration under the agreement.

The issues before the arbitrator, as indicated in his decision, were:

1. Was there preselection and conversion of a Schedule C nonbargaining unit employee for the Deputy Associate Director vacancy in the Office of Human Rights in violation of Article 12, Sections 1 and 3?
2. Was Mr. Jones denied career opportunities, career development opportunities and/or appropriate supervision when a series of acting Associate Directors were appointed to the Office of Human Rights in violation of the contract; and specifically in violation of Articles 10, Sections 1, 3, and 4; Article 12, Sections 1, 2, 3, and 5; and Article 2, Section 14?

The arbitrator determined, concerning the issue of preselection,<sup>1/</sup> that a Schedule C nonbargaining unit employee had been preselected and converted to the position of Deputy Associate Director for Human Rights in violation of Article 12, Section 1 of the agreement.<sup>2/</sup> However, the arbitrator noted that the position in question had been abolished by the agency and he concluded that he was inhibited in the selection of a remedy, stating that he was precluded by a decision of the Assistant Secretary<sup>3/</sup> from directing the agency to reestablish the position that had been abolished. Therefore, he directed the agency to:

1. Review the abolition of the position of Deputy Associate Director for Human Rights, using standard agency procedure

1/ As to the second issue the arbitrator determined that the grievant was denied career development opportunities and appropriate supervision in violation of Article 10 and Article 2, Section 14 of the agreement and directed the agency to issue necessary instructions to appropriate officials to comply with the requirements of those provisions of the agreement. Neither party takes exception to that portion of the award.

2/ Section 1 of Article 12 (Merit Promotion) provides in pertinent part as follows:

The objective of this Article is to assure that OEO is staffed by the best-qualified candidates available and to assure that employees have an opportunity to develop and advance to their full potential according to their capabilities. To this end this Article is designed:

f. To avoid favoritism and pre-selection or the appearance of them; and

g. To ensure that violations of this Article do not occur either by error or design.

3/ Assistant Secretary Case Nos. 22-5178 (AP) and 22-5189 (AP). The Assistant Secretary found that the gravamen of the grievances there involved the agency's failure to post and fill certain vacancies. He further found that the filling of vacancies is a right clearly reserved to management under section 12(b) of the Order and that such right is not subject to waiver through the negotiation process. Accordingly, he concluded that those grievances, which sought to require the agency to fill certain vacancies, were outside the scope of the contractual arbitration procedure, citing several Council decisions in support of this conclusion. Subsequently, the Council denied the union's petition for review of the Assistant Secretary's decision. Local 2677, National Council of OEO Locals, American Federation of Government Employees, AFL-CIO and Office of Economic Opportunity, Assistant Secretary Case Nos. 22-5178 (AP), 22-5189 (AP), FLRC No. 74A-50 (January 15, 1975), Report No. 62.

and criteria, and make a new determination as to whether the job should remain abolished or be reestablished.

2. Select the grievant, O. Marion Jones to fill the vacancy without regard to the provisions of Article 12, should the position be reestablished.<sup>4/</sup>
3. Give priority consideration for promotion to O. Marion Jones in accordance with Article 2, Section 4c.(5) of the Contract, if the position is not reestablished.

The union excepts to the remedy fashioned by the arbitrator and requests the Council to modify the arbitrator's award to read:

OEO will select the grievant, Mr. O. Marion Jones, to fill the position of Deputy Associate Director for Human Rights (GS-15).

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 in its exception, in effect, contends that the arbitrator, in fashioning a remedy in this case and in explaining his reasoning in arriving at that remedy in lieu of another remedy, should have considered not only section 12(b) of the Order but the entirety of the Order and more specifically sections 12(b) and 19 in their relationship to each other. In support of its exception, the union argues that what clearly emerges from management testimony at the arbitration hearing is that the decision to abolish the position in question was directly related to the grievance and was, therefore, discriminatory and retaliatory within the meaning of section 19 of the Order.<sup>5/</sup> Specifically, the union states:

---

<sup>4/</sup> Neither the agency nor the union addressed the question of whether this part of the arbitrator's award might conflict with retained management rights under section 12(b)(2) of the Order. The Council does not pass on the question.

<sup>5/</sup> The union also asserts that a major policy question is presented for Council review since if the action of OEO in abolishing the position is shielded by section 12(b) of the Order, then every agency management has a weapon of enormous significance in discouraging grievances because management can withhold a meaningful remedy. However, the assertion that the award presents a major policy issue is not a ground upon which the Council will grant a petition for review of an arbitration award. (See section 2411.32 of the Council's rules.)



To ascertain whether management's intent was discriminatory or retaliatory within the meaning of Section 19, a reasonable man has only to consider the effect of management's decision.

1. In violation of Executive Order 11491, Section 19(a)(1) it interfered with Mr. Jones' rights under Section 13(b) of the order. The arbitrator, as his order states would award the promotion to Jones, if the job were not abolished.
2. By abolishing the position and thus denying the promotion to Jones, and by writing Jones and falsely asserting that the position was abolished at the request of the union (i.e. "the union sold you out") management discouraged Jones' membership in the union, in violation of Section 19(a)(2) of the Executive Order.
3. Finally, the combination of a pre-selection, or more candidly the rigging of a merit competition by management, and the snatching away of a meaningful remedy eight years after the position was established, three months after it was last advertised, and a week before the arbitration hearing on the pending grievance, constitute a discriminatory act directed against Mr. Jones and the union in retaliation for filing the grievance, in violation of Executive Order Section 19(a)(4).

Unfortunately, the arbitrator did not give consideration to these Sections of the order, which must be weighed along with Section 12(b).

In substance, the union is contending that the arbitrator's award should be set aside on the ground that, in fashioning the remedy in this case and in explaining his reasoning in arriving at that remedy, he failed to consider whether the agency had violated section 19(a) of the Order, i.e., whether the agency had committed an unfair labor practice, by abolishing the position in question. A contention that an arbitrator has failed to consider and decide, in the course of fashioning a remedy in a grievance arbitration, whether an unfair labor practice has been committed under section 19 of the Order does not state a ground upon which the Council will accept a petition for review of an arbitration award.<sup>6/</sup> The union does not assert that the remedy violates the Order but, in effect, is challenging the arbitrator's reasoning in arriving at the remedy. As

<sup>6/</sup> Section 6(a)(4) of the Order provides:

The Assistant Secretary shall decide unfair labor practice complaints . . .

Section 19(d) of the Order provides, in part:

All complaints under this section [Sec. 19. Unfair Labor Practices] that cannot be resolved by the parties shall be filed with the Assistant Secretary.


the Council stated in American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44 at p. 3:

Your final contention . . . 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).

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 the Council's rules of procedure.

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier II". The signature is written in dark ink and includes a stylized flourish at the end.

Henry B. Frazier II  
Executive Director

cc: H. Toy  
OEO

Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator). The arbitrator upheld the agency's disciplinary action against four grievants (although reducing the 2-day suspension of one grievant to a reprimand with backpay for any loss of compensation due to the suspension). The union excepted to the arbitrator's award, alleging that the arbitrator essentially rewrote the parties' agreement by devising an agreement provision that does not exist.

Council action (June 26, 1975). The Council found that the union's petition does not present facts and circumstances necessary to support its assertion that the arbitrator attempted to add to or rewrite the negotiated agreement, thereby exceeding his authority. Accordingly, the Council denied review of the union's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
**FEDERAL LABOR RELATIONS COUNCIL**

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

June 26, 1975

Mr. David G. Jennings  
 Goodstein & Jennings, PA  
 2124 Dorchester Road  
 North Charleston, South Carolina 29405

Re: Charleston Naval Shipyard and Federal Employees  
 Metal Trades Council of Charleston (Williams,  
 Arbitrator), FLRC No. 75A-7

Dear Mr. Jennings:

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

The award shows that when job ratings and pay rates at the activity were converted to those established by the Federal Wage System, the Non-Destructive Test Division (NDT) Inspectors ("inspectors") were directly affected since their new rates were comparable to mechanics' rates whereas the old rates were comparable to foremen's rates. The rules for conversion did not provide for a reduction in pay, but the rules limited pay increases until the old and new pay rates were eventually equalized. The first day of work under the new rates was informally identified by the inspectors as "Drop Dead Day" ("D" Day), and an unidentified group of them contributed money to publicize it. When "D" Day arrived, 28 of the 34 inspectors did not report for work compared with an average absence of 8 or 9 under normal circumstances. On the basis of an investigation, including visits by supervisors to the homes of some absent inspectors, the activity charged seven of the absent inspectors with a violation of Rule 5 of the "STANDARD SCHEDULE OF DISCIPLINARY OFFENSES FOR CIVIL EMPLOYEES IN THE NAVAL ESTABLISHMENT,"<sup>1/</sup> and issued letters of reprimand to six employees and a 2-day suspension to another. Of the four grievants in this case, each of whose home was visited by supervisors, one was given the 2-day suspension while the other three received letters of reprimand.

1/ Rule 5 of this schedule provides:

Unexcused or unauthorized absence on one or more scheduled days of work

RANGE OF PENALTIES

<u>Number of Offenses</u>	<u>Minimum</u>	<u>Maximum</u>
First	Reprimand	5 days
Second	3 days	10 days
Third	10 days	Removal

The issue submitted to arbitration was:

Were the grievants disciplined for just cause?<sup>2/</sup> If not, what shall be the remedy?

The arbitrator found that the "excessive absences . . . create the reasonable inference that concerted activity was involved," and that the activity proceeded with a fair investigation to determine the legitimacy of the absences.<sup>3/</sup> He further found that, given the context of the grievants' general and medically unsupported assertions of illness, the evidence established violations of Rule 5. He determined that these proven offenses warranted disciplinary action, and that the reprimands issued to the three grievants were appropriate disciplinary action. However, the 2-day suspension of the fourth grievant was reduced to a reprimand with backpay for any lost earnings due to the suspension. The union then filed a petition for review of the arbitrator's award with the Council.

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

In its petition for review, the union alleges that the arbitrator's award violated Article XIII, Section 4 of the collective bargaining agreement.<sup>4/</sup> Since the agreement does not require a medical certificate

<sup>2/</sup> Article XVI, Section 2 of the parties' collective bargaining agreement provides that disciplinary actions shall be taken only for "just cause." According to the arbitrator, "just cause" is further defined in Rule 5 of the "Standard Schedule."

<sup>3/</sup> The arbitrator, noting that employees must seek resolution of disputes through established dispute settlement systems, pointed out that new rating classifications under the Federal Wage System could be appealed under Navy and the Civil Service Commission appeal procedures.

<sup>4/</sup> Section 4 of Article XIII provides as follows:

Except as hereinafter provided, employees shall not be required to furnish a medical certificate to substantiate requests for sick leave unless such leave exceed three (3) work days continuous duration. It is agreed and understood that Management has the right to require that an employee furnish a medical certificate for each absence which he claims was due to illness, on the following basis:

for less than a 3-day absence nor were any of the employees involved requested to furnish such, the union contends that the arbitrator essentially rewrote the negotiated agreement and attempted to create a basis for the disciplinary action by devising a contract provision that does not exist.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds similar to those upon which challenges to arbitration awards are sustained by courts in the private sector. The law is well-settled in the private sector that a court will not substitute its interpretation of a collective bargaining agreement for that of an arbitrator. Thus, the fact that a court might have applied a different interpretation to the provisions in dispute is no reason to set aside an arbitrator's award.

As the Supreme Court said in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960):

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as 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.

---

(Continued)

- (a) there is sufficient reason to suspect that the employee has abused sick leave privileges during the previous twelve (12) month period;
- (b) Management has counselled the employee in respect to the use of his sick leave, a record of such counselling is on file, and the sick leave record of the employee subsequent to the counselling does not indicate improvement;
- (c) and the employee has been furnished written notice that he must furnish a medical certificate for each absence which he claims was due to illness. Such written notices will not be filed in the employee's official personnel file. It is further agreed that Management will review the sick leave record of each employee required to furnish a medical certificate for each absence which he claims was due to illness at least annually, and upon request of the employee semi-annually, and where such review reveals no sufficient reason to suspect that the employee has abused sick leave privileges during the review period, the employee will be notified in writing that a medical certificate will no longer be required for each absence which is claimed as due to illness for periods of three (3) work days or less.

This principle is likewise applicable in the Federal sector under section 2411.32 of the Council's rules of procedure. See American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44 and Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator), FLRC No. 74A-1 (June 21, 1974), Report No. 53.

The law is equally well-settled in the private sector that courts sustain challenges to arbitration awards on the grounds that the arbitrator exceeded the scope of his authority by adding to or modifying any of the terms of the agreement.

As the Supreme Court also said in Enterprise (at 597):

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Thus, courts will vacate or will refuse to enforce an arbitration award where the "award is contrary to the express language of the collective bargaining agreement" or where "the arbitrator, instead of merely interpreting the collective bargaining agreement, added terms to the agreement." Amerada Hess Corp. v. Local 22026, Federal Labor Union, AFL-CIO, 385 F. Supp. 279 (D.N.J. 1974).<sup>5/</sup> These principles are likewise applicable in the Federal sector under section 2411.32 of the Council's rules of procedure.<sup>6/</sup>

<sup>5/</sup> See also, Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1970); Local 342, UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), cert. denied, 395 U.S. 910 (1969); Torrington Co. v. Metal Prod. Workers Union Local 1645, UAW, 362 F.2d 677 (2d Cir. 1966); Graham v. Acme Mkts., Inc., 299 F. Supp. 1304 (E.D. Pa. 1969).

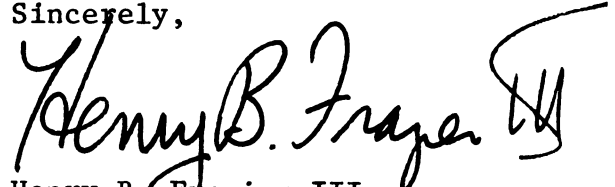
<sup>6/</sup> Of course, in the Federal sector, the negotiated grievance procedure is not necessarily limited to grievances over the interpretation and application of the agreement because the parties may, for example, agree to extend the procedure to grievances arising under agency regulations. (See Section 13 of E.O. 11491, as amended, and Section VI of the Council's 1975 Report and Recommendations on the Amendment of the Order.)

In the instant case, however, the Council finds that the union's petition does not present facts and circumstances necessary to support its assertion that the arbitrator attempted to add to or rewrite the negotiated agreement, thereby exceeding his authority. In alleging that the arbitrator required a doctor's certificate in violation of the negotiated agreement and, hence, rewrote the negotiated agreement, the union has misinterpreted the arbitrator's award. Contrary to the union's allegation, the arbitrator, in finding that the grievants were disciplined for just cause (i.e., for unexcused or unauthorized absences), simply noted that the activity had accepted excuses for absences by other employees where those excuses were corroborated by evidence from a source independent of the employees' own self-serving statements. The arbitrator pointed out that the grievants herein "made no attempt to provide evidence of medically determinable symptoms of illness" and "did not provide any evidence from an independent source to corroborate their alleged sickness." Since the resolution of the grievance by the arbitrator turned upon whether the absences were unexcused or unauthorized, evidence concerning the alleged sickness of the grievants was clearly relevant. However, there are no facts and circumstances to support the union's contention that the arbitrator required a medical certificate to substantiate the grievants' alleged illnesses, thereby rewriting Article XIII, Section 4, of the negotiated agreement. Hence, the facts and circumstances do not support the union's contention that the arbitrator exceeded his authority by rewriting the agreement.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

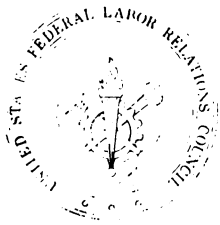
cc: Commanding Officer  
Charleston Naval Shipyard  
Charleston, S.C.



Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator). The arbitrator determined that the union's grievance concerning a terminated probationary employee was not arbitrable. The union excepted to the arbitrator's award on various grounds, including (1) in effect, that the arbitrator's opinion and award do not draw their essence from the agreement; (2) that the arbitrator's opinion and award violate the Order; and (3) that the arbitrator failed to answer all the issues presented. Separately, the grievant, Coleridge D. Miller, also filed a petition for review of the arbitrator's award.

Council actions (June 26, 1975). The Council held that the union's exceptions provide no basis for acceptance of a petition for review of an arbitration award, principally because the exceptions do not appear to be supported by facts and circumstances in the union's petition. Accordingly, the Council denied the union's petition for review since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).

As to the grievant's separate appeal, the Council ruled that, since it does not appear that the grievant participated as a "party" in the proceeding before the arbitrator, the grievant is not a "party" to the instant case before the Council, under section 2411.3(c)(3) of its rules (5 CFR 2411.3(c)(3)) and is not entitled to file a petition for review under section 2411.33(a) (5 CFR 2411.33(a)). However, under the circumstances, the Council considered the grievant's contentions as a supplement to the union's petition.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1975

Mr. Lee V. Langster  
Executive Vice President  
American Federation of Government  
Employees, AFL-CIO, Local 1395  
165 North Canal Street  
Chicago, Illinois 60606

Re: Social Security Administration, Bureau of  
Retirement and Survivors Insurance, Chicago,  
Illinois and AFGE, National Council of Social  
Security Payment Center Locals, Local 1395  
(Davis, Arbitrator), FLRC No. 75A-17

Dear Mr. Langster:

The Council has carefully considered your petition for review of an arbitration award and the supplements to your appeal made by American Federation of Government Employees and Coleridge D. Miller, and the agency's opposition thereto, in the above-entitled case.

Based on the facts described in the award, it appears that Coleridge D. Miller, a probationary employee, was told that he was responsible for SSA claims material that had fallen or been thrown from a window of the Payment Center. Miller denied this charge, and, when asked to resign, declined to do so. The following day Miller was told that, because of the incident, his termination was being recommended. The next morning Miller filed a grievance (which, according to the union, was a Type A (employee) grievance<sup>1/</sup> as distinguished from a Type B

1/ Section d of Article XXVIII (Grievance Procedure) of the agreement provides, in pertinent part:

Under this Agreement, grievances shall be divided in two categories:

Type A--Grievances initiated by individual employees or groups of employees.

Type B--Disputes initiated by the Local as Type B grievances are not grievances within the meaning of the CSC standards and such standards do not apply to them.

A Type A grievance shall be considered as any matter of concern or dissatisfaction to an employee or group of employees which is

(Continued)

(union) grievance<sup>2/</sup>), requesting "continuous employment and relief from the charges that I improperly handled SSA claims material or other Government property." Later that day Miller and the union received copies of a notice terminating Miller's employment as of the next day for "failure to carry out his work assignment, failure to make an accurate report of work accomplished, and failure to report the possible loss or destruction of official documents for which he had been assigned responsibility for filing."

The agency subsequently denied Miller's Type A grievance on the ground that, before its receipt, a request to separate Miller had been made, and his termination during his probationary period was a disciplinary action precluded from coverage under the negotiated grievance procedure. In response, the union stated that Miller's grievance was based not on the separation action, but solely on the charge, which Miller denied, that he improperly handled materials. The union later contended that Miller was further aggrieved by the agency's failure to give him 2 weeks advance notice of his termination.<sup>3/</sup> The union filed a Type B grievance on the issue of whether a probationary employee who has been terminated from the Federal service is entitled to have a grievance reviewed under the Master Agreement when that grievance preceded the termination action and arose as a result of the charge on which the termination action was based.

---

(Continued)

within the control of Bureau management. This includes, but is not limited to, grievances related to the interpretation or application of Bureau, SSA, or HEW policies or this Agreement, but does not include matters; 1) over which the Bureau, SSA, or HEW does not have authority to make final decisions as provided by law or the regulations of the Civil Service Commission . . . . Type A grievances . . . may not be initiated by the Local.

<sup>2/</sup> Article XXVIII, section h of the agreement provides, in pertinent part:

A Type B grievance is a dispute initiated by the Local over the interpretation or application of this Agreement. Type B grievance procedures shall not be used in the adjustment of individual grievances. However, arbitration decisions shall be applied to appropriate individual cases. . . .

<sup>3/</sup> Section d of Article XXVII (Disciplinary Action) of the agreement states:

Although termination of a probationary employee is not an adverse action, the Payment Center agrees that, to the extent possible, such employee will be given 2 weeks advance notice prior to the effective date of such action.

The union and the agency thereafter took the matter to arbitration, and stipulated that the arbitrator was to decide two issues: (1) a threshold issue of arbitrability, and (2) the merits of the grievant's case only if the grievance were found arbitrable. Specifically, the parties' first stipulated issue asked the arbitrator to decide:

Whether a probationary employee who has been terminated from the Federal service is entitled to have a grievance reviewed under the Master Agreement when that grievance preceded the termination and arose as a result of a charge on which the termination action was based, and whether Coleridge D. Miller was so entitled based on the grievance he filed prior to receiving notice of his termination?

As his award, the arbitrator determined that:

The answer to the questions posed in the foregoing stipulation of issue is "No" in both instances.

(As to the second stipulated issue, the arbitrator noted in the opinion accompanying his award that "Because of the finding of non-arbitrability, the Miller grievance has not been considered on its merits.") The arbitrator stated that "the evidence contained in contract Article XXVII, Section d and Administration exhibits 1, 4-10 is conclusive" that a probationary employee has no "contractual right" to grieve a termination. He further stated that the issue here was "not Miller's discharge but whether a grievance concerning the alleged offense that led to Miller's termination, being grieved just prior to the discharge, can be arbitrated." The arbitrator concluded that, for various reasons, the Miller grievance was not arbitrable. The arbitrator noted that had Miller not been terminated, and had he filed the grievance here presented, the grievance presumably could have been carried to arbitration. He stated that "It was the termination of Miller that bars from arbitration the grievance here at issue."

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

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

The union's first exception alleges, in effect, that the arbitrator's opinion and award do not draw their essence from the parties' collective bargaining agreement. The union contends that, except for the

misconstruction by the arbitrator of one section (Article XXVII, Section d) of the agreement, the arbitrator does not refer to specific articles of the agreement. The union also asserts that the arbitrator's opinion and award reflect a fundamental misunderstanding of the relationship between the agreement and the agency exhibits referred to therein.

Courts sustain challenges to arbitration awards in the private sector on the ground that the award does not draw its essence from the parties' collective bargaining agreement. See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), wherein the Court stated that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." See also the Council's decision in Picatinny Arsenal, Dept. of the Army, and Local 225, American Federation of Government Employees (Falcone, Arbitrator), FLRC No. 72A-44 (May 2, 1973), Report No. 37.

In the Council's view, the union's first exception, while it does state a ground upon which the Council will grant review of an award, does not appear to be supported by facts and circumstances described in the union's petition, as required by section 2411.32. Moreover, it appears that the union is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of Article XXVII, Section d of the agreement. The Council has consistently held, as have the courts with respect to arbitration in the private sector, that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61. Further, the fact that the arbitrator did not mention a specific agreement provision does not establish that the arbitrator did not rule upon it. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60. Therefore, this exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

The union's second exception alleges that the arbitrator's opinion and award violate sections 10(e)<sup>4/</sup> and 11(a)<sup>5/</sup> of the Order. The union

<sup>4/</sup> Section 10(e) states in pertinent part:

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

<sup>5/</sup> Section 11(a), in effect at the time the petition was filed, stated:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet

(Continued)

asserts that it had the right, under sections 10(e) and 11(a), to negotiate the scope of the grievance procedure for all employees in the unit, including probationary employees and their termination. The union further contends that the arbitrator's opinion and award denied probationary employees these rights.

In the Council's opinion, while this exception which alleges that the award violates the Order does state a ground for review, it does not appear to be supported by facts and circumstances described in the union's petition, as required by section 2411.32. The question in this case for the arbitrator was whether the grievance procedure in fact did cover Miller's grievance, not whether a negotiated grievance procedure may extend to probationary employees and their termination. The arbitrator interpreted the agreement and determined that the grievance procedure did not cover Miller's grievance, and that Miller was not entitled to have a grievance reviewed under the agreement when that grievance preceded his termination and arose as a result of a charge on which the termination action was based. Therefore, this exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

The union's third exception alleges that the arbitrator failed to answer all of the issues presented. The Council has stated that it will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator did not decide the question submitted to arbitration. Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62. In the Council's view, while this exception does state a ground for review, it does not appear to be supported by facts and circumstances described in the union's petition, as required by section 2411.32. The union contends that the arbitrator's opinion and award failed to examine the issue of whether the parties had negotiated provisions allowing probationary employees to file grievances

---

(Continued)

at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as they 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. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

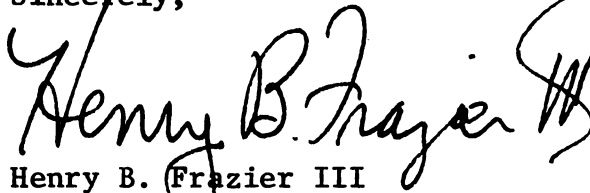
While the subject award of the arbitrator was made prior to the issuance of E.O. 11838, section 11(a) of the Order was not changed by E.O. 11838 in respects which are material in the present case.

regarding termination or a circumstance which directly led to a discharge of the probationary employee. However, as indicated in the preceding paragraph, this is the issue to which the arbitrator addressed himself. As his award, he stated the issue as stipulated by the parties and answered it. Therefore, this exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "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: I. L. Becker  
SSA

A. M. Freedman

C. M. Webber  
AFGE



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1975

Mr. Alan M. Freedman  
Woodlawn Law Office  
1105 East 63rd Street  
Chicago, Illinois 60637

Re: Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), FLRC No. 75A-17

Dear Mr. Freedman:

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

Under section 2411.33(a) of the Council's rules of procedure, a petition for review of an arbitrator's award may be filed only by the respective "parties" to the case before the Council. The term "party" is defined in section 2411.3(c)(3) of the Council's rules, as follows:

(c) "Party" means any person, employee, labor organization, or agency that participated as a party--

. . . . .

(3) In a matter where the award of an arbitrator was issued under the order.

In this case, the arbitrator's opinion and award clearly indicate that two parties (the union and the agency) participated in the arbitration proceeding. Consequently, it does not appear from the arbitrator's opinion and award that the grievant, Coleridge D. Miller, participated as a "party" in the proceeding before the arbitrator. Accordingly, the grievant is not a "party" to the instant case before the Council, under section 2411.3(c)(3) of the Council's rules, and is not entitled to file a petition for review under section 2411.33(a).

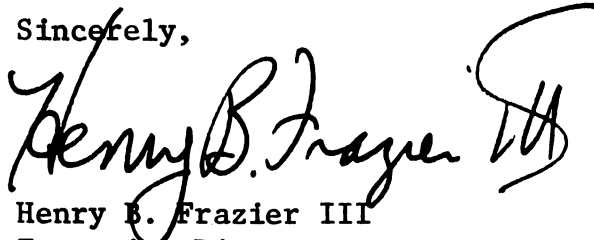
However, in view of the fact that your submission was supported by both Local No. 1395 and American Federation of Government Employees so that, in effect, it supplemented the union's petition, the Council has carefully considered the contentions contained therein as a supplement to the union's petition.



In this regard, on this same date, the parties to the above-entitled case are being notified that the Council has denied the union's petition for review. (A copy of the Council's letter in this regard is enclosed for your information.)

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

Enclosure

cc: I. L. Becker  
SSA

C. M. Webber  
L. V. Langster  
AFGE

Department of Health, Education, and Welfare, Social Security Administration, Albuquerque Data Operations Center, Albuquerque, New Mexico, Assistant Secretary Case No. 63-4833 (RO). The Assistant Secretary, in consonance with the Assistant Regional Director, found no merit to the objections filed by the National Federation of Federal Employees to conduct alleged to have improperly affected the results of a runoff election. Accordingly, the Assistant Secretary denied the union's request for review of the Assistant Regional Director's Report and Findings. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presents major policy issues.

Council action (June 26, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue. Therefore, since the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1975

Ms. Lisa Renee Strax  
Staff Attorney  
National Federation of Federal  
Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of Health, Education, and  
Welfare, Social Security Administration,  
Albuquerque Data Operations Center,  
Albuquerque, New Mexico, Assistant  
Secretary Case No. 63-4833 (RO),  
FLRC No. 75A-18

Dear Ms. Strax:

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

The case arose when the National Federation of Federal Employees filed objections to conduct alleged to have improperly affected the results of a run-off election, contending, in pertinent part, that the Center Director's presence in the cafeteria at lunch time during the campaign period improperly interfered with the employees' organizing activities; that the distribution of one "no union" handbill to one employee in a work area during duty hours without management's knowledge or consent nevertheless improperly affected the outcome of the election; that a management representative's customary salutation, "How is it going?" to "no union" campaigners constituted improper conduct; and that a leaflet distributed by "no union" campaigners 4 days prior to the election improperly affected the results thereof, and could not have been adequately rebutted, explained or clarified. In the Assistant Regional Director's Report and Findings on Objections, he found that each of the four objections taken individually or considered in their totality could not have affected the outcome of the election. The Assistant Secretary, in agreement with the Assistant Regional Director, and based on his reasoning, found no merit to the objections and denied your request for review of the Assistant Regional Director's Report and Findings.

In your appeal to the Council, you contend that the Assistant Secretary's decision presents a major policy issue as to the standard of conduct which must be followed by management representatives during an election campaign. You also allege that the decision of the Assistant Secretary

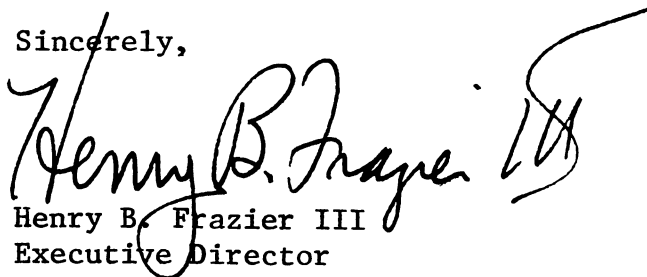
was arbitrary and capricious in that he failed to adequately investigate and consider NFFE's contentions, and to order a hearing in this case, and that his failure to order a hearing also raises a major policy issue as to what burden a complainant must meet in order to obtain a hearing on the matters charged.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary neither appears to be arbitrary and capricious nor does it present a major policy issue. With respect to the alleged major policy issue regarding the standard of conduct which management representatives should follow during an election campaign, the Council is of the opinion that, in the circumstances presented, the Assistant Secretary's conclusion that no improper conduct occurred which may have affected the outcome of the election or which would otherwise warrant setting aside the election, does not raise a major policy issue warranting Council review. As to your contention that the Assistant Secretary's decision was arbitrary and capricious in that he failed to consider your objections and to order a hearing thereon, it does not appear that the Assistant Secretary acted without reasonable justification, since your appeal does not disclose any objection which the Assistant Secretary failed to consider fully, nor does it identify any substantial factual issues which would require a hearing under the Assistant Secretary's rules. Similarly, the Assistant Secretary's failure to order a hearing does not present a major policy issue.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

I. L. Becker  
SSA

D. W. Rice  
AFGE

Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region and Weather Service Offices (Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota), A/SLMR No. 331. This appeal arose from a decision and direction of elections issued by the Assistant Secretary after a consolidated hearing held upon separate representation petitions filed by the National Association of Government Employees Council of NWS Central Region Locals (NAGE) and the American Federation of Government Employees, AFL-CIO, Local 2476 (AFGE). Upon appeal by the agency, the Council determined that the Assistant Secretary's decision presented major policy issues and accepted the agency's petition for review (Report No. 53).

Council action (July 21, 1975). The Council held that the major policy issues posed by the instant case, which concern the propriety of the Assistant Secretary's interpretation and application of the appropriate unit criteria set forth in section 10(b) of the Order in finding separate units appropriate, were essentially the same as those which the Council considered in the Tulsa Air Facilities Sector case, FLRC No. 74A-28 (Report No. 69). Applying the principles established in that case, the Council found that in the instant case the Assistant Secretary's determination satisfied the essential requirements of section 10(b). Accordingly, pursuant to section 2411.17(b) of its rules of procedure (5 CFR 2411.17(b)), the Council sustained the decision of the Assistant Secretary.

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

Department of Commerce, National Oceanic  
and Atmospheric Administration, National  
Weather Service, Central Region and  
Weather Service Offices (Bismarck, North  
Dakota; Fargo, North Dakota; St. Cloud,  
Minnesota; and International Falls,  
Minnesota)

and

National Association of Government Employees  
Council of NWS Central Region Locals

A/SLMR No. 331  
FLRC No. 74A-16

and

American Federation of Government Employees  
AFL-CIO, Local 2476

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arises from a decision and direction of elections issued by the Assistant Secretary after a consolidated hearing held upon separate representation petitions filed by the National Association of Government Employees, Council of NWS Central Region Locals (NAGE) and the American Federation of Government Employees, AFL-CIO, Local 2476 (AFGE).<sup>1/</sup>

The pertinent facts in the case as found by the Assistant Secretary are as follows: The NAGE requested a unit of all nonsupervisory professional and nonprofessional employees assigned to the Central Region,<sup>2/</sup> National

---

<sup>1/</sup> The separate petitions were filed in Assistant Secretary Case No. 60-3261 (RO) in which the NAGE sought an election in a regionwide unit and in Case Nos. 60-3262 (RO), 60-3263 (RO), 51-2501(25) and 51-2502(25) wherein AFGE respectively petitioned for separate units at the four Weather Service Offices identified in the caption.

<sup>2/</sup> The Central Region of the NWS consists of a Regional Headquarters Office and 77 field offices located throughout the 14 states comprising the Central Region.

Weather Service, Department of Commerce, including employees assigned to Central Region Headquarters, but excluding those employees in units subject to certification bars and grants of exclusive recognition held by other labor organizations. The AFGE requested four separate units of all nonprofessional General Schedule employees assigned to the Central Region and stationed respectively at the WSO's at Bismarck and Fargo, North Dakota, and St. Cloud and International Falls, Minnesota.

The Assistant Secretary found that the unit petitioned for by the NAGE, and substantially agreed to by the agency, may be appropriate for the purpose of exclusive recognition particularly because the employees of the Regional Office and the field offices worked together to accomplish the basic missions of the National Weather Service, are subject to the same promotional areas of consideration, enjoy the same fringe and other job benefits, and are in frequent contact with each other. He also noted that the Regional Director, who is responsible for the accomplishment of the overall Regional program, exercises ultimate authority and control over the operations of the Region, including the ultimate responsibility with respect to personnel matters, such as the hiring and discharging of employees, the handling of grievances, the disciplining and transfer of employees, and that the Regional Director has the authority to execute negotiated agreements within his particular Region.

The Assistant Secretary further found, contrary to the agency's position, that the separate units of employees in the individual WSO's petitioned for by the AFGE also may be appropriate for the purpose of exclusive recognition. In this connection, particular note was taken of the facts that the employees in each such station are engaged in performing a particular weather function mission; that they are under the immediate supervision of a Meteorologist-in-Charge or an Official-in-Charge located at the particular WSO involved; that these offices are physically separated from other Weather Stations in the Central Region; and that there has been little or no employee interchange. In addition, he noted that although all National Weather Service employees are covered by a centralized personnel program and all share certain working conditions, there is minimal day-to-day contact between the employees of the proposed AFGE units and other National Weather Service field office employees in the Central Region. Finally, the Assistant Secretary stated:

Under these circumstances, and noting also the fact that currently there are a number of exclusively recognized units in the Central Region, most of which are covered by negotiated agreements, and the absence of any specific countervailing evidence that units proposed by the AFGE would not promote effective dealings and efficiency of agency operations, I reject the Activity's contention that establishing such units will not promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary directed an election in the regionwide unit sought by the NAGE and self-determination elections in each of the WSO's sought by the AFGE.<sup>3/</sup>

The agency thereupon petitioned the Council for review of the decision, contending that it raised major policy issues. The Council found that major policy issues were presented by the case and accepted the agency's petition for review (Report No. 53, June 24, 1974).<sup>4/</sup>

### Opinion

The major policy issues posed by the instant case concern the propriety of the Assistant Secretary's interpretation and application of the criteria for an appropriate unit as established in section 10(b) of the Order,<sup>5/</sup> in finding separate WSO units appropriate. These issues are essentially the same as those which the Council recently considered in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa

<sup>3/</sup> That is, the employees in each of the four WSO's petitioned for by the AFGE were permitted to vote for the AFGE, the NAGE or "no union" while those in the remaining WSO's in the Region were to vote only on the NAGE or "no union." (The professional employees in the regionwide unit petitioned for by the NAGE were given the usual ballot choices dictated by section 10(b)(4) of the Order.) In the elections held pursuant to the Assistant Secretary's decision the employees of three of the four WSO's concerned chose the AFGE as their representative and the AFGE was so certified. The employees at the remaining WSO selected the NAGE as their representative and were included in the regionwide unit in which NAGE was certified.

<sup>4/</sup> The Council also determined, upon the facts and circumstances presented, that the agency's further request that the Assistant Secretary's decision be held in abeyance did not meet the criteria for granting a stay of a representation decision as set forth in section 2411.47(c) of the Council's rules.

<sup>5/</sup> Section 10(b) reads in pertinent part, as follows:

(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 solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be established if it includes. . . . [Emphasis added.]



Airways Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69, wherein we found, in pertinent part, as follows (at p. 5 of the Council's decision):<sup>6/</sup>

It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate.

Additionally, we found in connection with this obligation that (at p. 6 of the Council's decision):

. . . the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate.

We also found that (at p. 7 of the Council's decision):

Our holding with regard to the first major policy issue presented by this case to the effect that the Assistant Secretary cannot properly find any unit appropriate unless he affirmatively determines that it satisfies each of the criteria set forth in section 10(b) of the Order, impels us to conclude as to this issue that the Assistant Secretary must first develop as complete a record as possible with regard to each of the three criteria upon which he can base his determinations, and, moreover, that he must give full and careful consideration to all relevant evidence in the record in reaching his decision.

We reaffirm the principles there established. Applying these principles to the case before us, however, we find that here, in contrast to his decision in Tulsa AFS, the Assistant Secretary's determination that separate WSO units were appropriate satisfied the essential requirements of section 10(b).

More particularly, the Assistant Secretary plainly detailed facts establishing that the employees in the respective WSO's possessed a clear and identifiable community of interest. Further, while his findings as to whether these units would promote effective dealings and efficiency of agency operations were not couched in the precise language of the Order, the substance of his decision

---

<sup>6/</sup> Tulsa AFS involved a question of representation wherein the Assistant Secretary dismissed an agency petition seeking an election in a Sectorwide unit consisting of all the activity's eligible employees in its Tulsa Airways Facilities Sector, both those currently represented by the union and those placed under the activity's jurisdiction as a result of reorganization.

reflects, in contrast to his decision in Tulsa AFS, an affirmative determination in this regard and the required according of equal weight to these criteria. That is, the Assistant Secretary expressly relied in this regard: on the circumstances previously detailed in his decision; the additional fact that currently there are a number of exclusively recognized units in the Central Region, most of which are covered by negotiated agreements;<sup>7/</sup> and the lack of any specific countervailing evidence.

Likewise, we are satisfied from our examination of the entire record before us that the Assistant Secretary developed an adequate record upon which to base his determination, and that he gave full and careful consideration to all relevant evidence in the record in rendering his decision.

Accordingly, having found that the Assistant Secretary's decision met the requirements provided in section 10(b) of the Order, the Council, pursuant to section 2411.17(b) of its rules, sustains the decision of the Assistant Secretary in the present case.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: July 21, 1975

<sup>7/</sup> The agreements adverted to by the Assistant Secretary consist, as indicated in the record, of a single unit agreement covering a WSO unit represented by NFFE and multi-unit agreements covering separately recognized WSO units represented by NAGE and AFGE respectively. Further, an AFGE representative testified at the hearing in the present case that the separate WSO units requested would, if the AFGE were certified, fall under its multi-unit agreement.

AFGE Local 2456 and Region 3, General Services Administration, Baltimore, Maryland. The dispute involved the negotiability under the Order of a provision in an agreement negotiated at the local level related to health and safety standards in work areas and in the operation of equipment.

Council action (July 21, 1975). Based principally on its decision with regard to an analogous proposal in AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48, Report No. 75, the Council held that the provision here involved did not violate applicable law or the Order, as contended by the agency. Accordingly, the Council held that the provision was properly subject to negotiation by the parties under section 11(a) of the Order, and set aside the agency head's determination of nonnegotiability.

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

AFGE Local 2456

and

FLRC No. 74A-63

Region 3, General Services Administration,  
Baltimore, Maryland

DECISION ON NEGOTIABILITY ISSUE

Background

AFGE Local 2456 (hereinafter, the union) and General Services Administration, Region 3, negotiated an agreement subject to agency approval pursuant to section 15 of the Order. The General Services Administration determined that the provision in the agreement entitled Article 22, section 4 conflicts with section 12(b)(1), (2), (5) and (6) of the Order,<sup>1/</sup>

1/ Section 12 of the Order provides, in pertinent part:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

. . . . .  
(b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(1) to direct employees of the agency;

(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;

. . . . .  
(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency . . . .

sections 2(e)(2)<sup>2/</sup> and 19(b)(4)<sup>3/</sup> of the Order, and 5 U.S.C. 7311,<sup>4/</sup> and declined to approve the agreement.

2/ Section 2 of the Order provides, in relevant part:

Sec. 2. Definitions. When used in this Order, the term--

. . . . .

(e) "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which--

. . . . .

(2) assists or participates in a strike against the Government of the United States or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike. . . .

3/ Section 19 of the Order provides, in pertinent part:

Sec. 19. Unfair labor practices.

. . . . .

(b) A labor organization shall not--

. . . . .

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

4/ 5 U.S.C. 7311 provides, in pertinent part:

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he--

. . . . .

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia . . . .

The text of the disputed provision is set forth below:

An employee shall not be required to work in areas where conditions exist detrimental to health until such conditions have been removed or remedied. The Employer agrees that an employee will not be required to operate equipment that he is not qualified to operate, which by so doing, might endanger himself or other employees. The procedure in Section 2, of this article shall be the only procedure followed to resolve questions under this section.<sup>5/</sup> [Footnote supplied.]

The union appealed the agency determination to the Council under section 11(c)(4) of the Order, and the agency filed a statement of position in support of its determination.

### Opinion

The issue presented to the Council is whether the proposal is rendered nonnegotiable under the sections of the Order and the United States Code cited above.

In our view, the provision here in dispute bears no material difference from the one entitled Article XX (Safety), Section 3, which was before the Council in AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26,

5/ Section 2, establishing, in effect, an initial informal step in the grievance procedure to resolve differences which arise under the instant clause, is not in dispute. It provides as follows:

In the course of performing their normally assigned work, employees will be alert to observe unsafe practices, equipment and conditions as well as environmental conditions which represent industrial health hazards. If an unsafe or unhealthy condition is observed, the employee should report it to his immediate supervisor and, if the employee so desires, may be represented by the shop steward. If the safety question is not settled by the employee (and the shop steward) and the immediate supervisor, the matter will be referred promptly to the Buildings Manager for resolution. If the safety question is still not settled, it will be promptly referred to the Chief, Accident and Fire Prevention Branch, and by the shop steward to the Union President for resolution. If still unresolved, the safety question may be processed under the formal grievance procedures outlined in Article 14. Records concerning the safety question will be maintained by the Chief, Accident and Fire Prevention Branch and available for review by the Union.

1975), Report No. 75. In that case, the Council set aside the agency's determination that the provision there at issue<sup>6/</sup> was rendered nonnegotiable under section 12(b)(1), (2), (5), and (6) of the Order and by 5 U.S.C. 7311.

Accordingly, based on the applicable discussion and analysis in General Services Administration, FLRC No. 74A-48, the proposal in the instant case must also be held not to violate section 12 of the Order or 5 U.S.C. 7311.<sup>7/</sup>

We note that Article XX (Safety), Section 3, held to be negotiable in General Services Administration, FLRC No. 74A-48, contained no express counterpart to the second sentence of the instant provision--that "an employee will not be required to operate equipment that he is not qualified to operate, which by so doing, might endanger himself or other employees." We do not, however, find such difference between the provisions to be material or controlling in the resolution of this case. In our opinion, such assurance is encompassed within the general health and safety standard implicit in both the instant provision and the one involved in General Services Administration, FLRC No. 74A-48--that management will provide working conditions which are not detrimental to employee health and safety. Moreover, the Council finds that such reference to employee qualification to operate equipment was not intended by the union to make questions as to those qualifications negotiable, or subject to the grievance procedure. As the union states in its appeal in pertinent regard, the provision recognizes the reservation to management of:

. . . the right to determine whether a condition is detrimental and then to remove or remedy it; as a result control never leaves management. . . . [M]anagement retains all authority

<sup>6/</sup> The provision involved in General Services Administration, FLRC No. 74A-48 provided that:

It is agreed that no employee shall be required to perform work on or about moving or operating machines without proper precaution, protective equipment and safety devices, nor shall any employee be required to work in areas where conditions are detrimental to health without proper protective equipment and safety devices.

<sup>7/</sup> The agency's additional contentions in the instant case with regard to sections 2(e)(2) and 19(b)(4) of the Order were not before the Council in General Services Administration, FLRC No. 74A-48. However, in view of our determination with regard to the instant provision that, as we stated in FLRC No. 74A-48, "we do not view the provision involved here as, in any way, granting to the employees in the bargaining unit the right to refuse to work," such contentions are clearly inapplicable and lend no support to the agency's position.

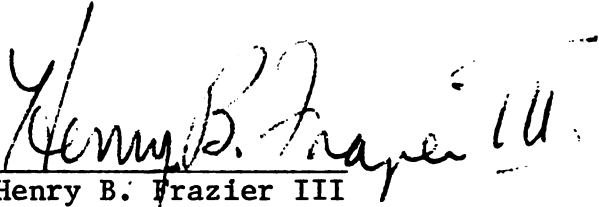
given to them under the Order. Since the employee is the person who initially would discover a condition detrimental to his health, logic dictates that he or she would then notify management who would then determine whether or not such condition did in fact exist and if so, would correct the condition.

Accordingly, we must set aside the agency's determination that Article 22, section 4 is nonnegotiable.

#### Conclusion

For the foregoing reasons and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the agency head's determination as to the nonnegotiability of Article 22, section 4 of the agreement negotiated at the local level was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as submitted by the union and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: July 21, 1975



U.S. Department of Agriculture, Agricultural Research Service, Eastern Regional Research Center (ERRC), Philadelphia, Pennsylvania, A/SLMR No. 479. The Assistant Secretary, upon a unit clarification petition filed by American Federation of Government Employees, AFL-CIO, Local 1331, determined, among other things, that employees designated as non-Project Leaders were not supervisors within the meaning of section 2(c) of the Order. The agency appealed to the Council, contending that this decision by the Assistant Secretary is arbitrary and capricious and presents a major policy issue.

Council action (July 21, 1975). The Council held that the agency's petition does not meet the requirements for review under section 2411.12 of the Council's rules (5 CFR 2411.12); that is, the findings and decision of the Assistant Secretary do not appear in any manner arbitrary and capricious nor do they present a major policy issue. Accordingly, the Council denied the agency's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 21, 1975

Mr. S. B. Pranger  
Director of Personnel  
Office of Personnel  
Office of the Secretary  
U.S. Department of Agriculture  
Washington, D.C. 20250

Re: U.S. Department of Agriculture, Agricultural  
Research Service, Eastern Regional Research  
Center (ERRC), Philadelphia, Pennsylvania,  
A/SLMR No. 479, FLRC No. 75A-20

Dear Mr. Pranger:

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

The American Federation of Government Employees, Local 1331, AFL-CIO (AFGE), the exclusive representative of employees of the Eastern Regional Research Center (the Activity), sought to clarify the existing unit to reflect a change in the designation of the Activity resulting from a reorganization, and to clarify the status of certain employees designated as Project Leaders, certain named non-Project Leaders, and certain named employees classified as Millwright, Stockhandler, and Physical Science Administrator. The Assistant Secretary determined, in pertinent part, that the Project Leaders are supervisors within the meaning of section 2(c) of the Order, relying primarily on the fact that under the parties' negotiated agreement, the Project Leaders participate in the first step of the formal grievance procedure and possess the authority to adjust grievances at that level.

However, the Assistant Secretary determined that the employees designated as non-Project Leaders are not supervisors, because they function merely as team leaders and have a senior-to-junior employee relationship with those employees assigned to them. Further, although some of the non-Project Leaders have evaluated the performance of employees assigned to them, there was no evidence indicating that the evaluations were effective or required the use of independent judgment. In this regard, the Assistant Secretary noted that although some of the non-Project Leaders have evaluated the performance of student employees assigned to them, these evaluations were utilized solely for the purpose of grading the student employees for scholastic purposes and were not related to their employment. The Assistant Secretary further determined that the Millwright and the Stockhandler are work leaders rather than supervisors, and that the Physical Science Administrator is not a management official within the meaning of the Order.

In your petition for review, you contend that the Assistant Secretary's decision that the non-Project Leaders are not supervisors is arbitrary and capricious, since: (1) Article XIX, Section 4 of the agreement provides that a grievance over the interpretation or application of the agreement may be presented verbally "to the immediate supervisor" at an informal step in the grievance procedure prior to consideration of the grievance by the Project Leader at Level 1 of the formal procedure, thus implying the existence of a level of supervision below Project Leader capable of resolving and adjusting employee grievances which can only be composed of non-Project Leaders; and (2) the Assistant Secretary did not consider all appropriate evidence and testimony in determining that non-Project Leaders do not render effective performance evaluations of employees assigned to them requiring the use of independent judgment, since the record establishes that such performance evaluations cannot be changed by higher level supervision and are based on the non-Project Leader's day-to-day direction of work assignments. Further, you contend that the Assistant Secretary's decision presents a major policy issue as to "Whether a performance evaluation which cannot be changed by higher level supervision no longer constitutes an effective performance evaluation requiring the use of independent judgment, contrary to prior findings of the Assistant Secretary that such factors would be a sufficient indicia of supervisory status."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious nor do they present a major policy issue. With regard to your contention that non-Project Leaders constitute a level of supervision below that of Project Leaders for the purpose of adjusting certain grievances under the negotiated grievance procedure, it does not appear that the Assistant Secretary acted without reasonable justification in determining that such individuals were not supervisors within the meaning of section 2(c) of the Order.

With respect to your contentions that non-Project Leaders render effective performance evaluations and the alleged major policy issue concerning whether a performance evaluation which cannot be changed by higher level supervision constitutes an effective performance evaluation, subsequent to the Assistant Secretary's decision herein, section 2(c) of the Order was amended by E.O. 11838, so as to delete performance evaluation as a sole determinant of supervisory status. In recommending this change, the Council concluded that ". . . persons who evaluate the performance of other employees will not be considered supervisors unless they otherwise qualify as supervisors under the definition." Under the circumstances, as the basis for Assistant Secretary decisions which deal with performance evaluations as a sole determinant of supervisory status has been removed from the Order, there is no major policy issue present warranting Council consideration.

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

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name.

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept of Labor

R. L. Stabile  
AFGE

Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506. On May 22, 1975, the Council granted the union's (Arkansas Association of FmHA Clerks) request for an extension of time until June 16, 1975, to file an appeal in the present case. However, the union did not file its appeal until June 17, 1975, and no further extension of time for filing was either requested by the union or granted by the Council.

Council action (July 21, 1975). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 21, 1975

Mr. Lynn Agee  
Youngdahl & Larrison  
100 North Main Building  
Memphis, Tennessee 38103

Re: Farmers Home Administration, United States  
Department of Agriculture, Little Rock,  
Arkansas, A/SLMR No. 506, FLRC No. 75A-62

Dear Mr. Agee:

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

By letter dated May 22, 1975, confirming oral advice, the Council granted an extension of time for filing an appeal in the above-entitled case until the close of business on June 16, 1975. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the office of the Council on or before the close of business on June 16, 1975. However, your appeal was not received by the Council until June 17, 1975, and no further extension of time for filing was either requested by you or granted by the Council.

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

By the Council.

Sincerely,

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

D. L. Spradlin  
Agriculture

Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator). The arbitrator determined that the agency violated the parties' negotiated agreement in the implementation of an agency order, which order was incorporated by reference in the agreement, with respect to parking accommodations provided for employees. As a remedy, the arbitrator directed that the agency offer to reserve a number of parking spaces for use by the employees. The agency filed exceptions to the award with the Council, alleging that (1) the arbitrator exceeded his authority under the agreement by the remedy which he fashioned; and (2) the arbitrator exceeded his authority by substituting his judgment for that delegated to the agency's regional director under the referenced agency order, in determining the adequacy of parking accommodations.

Council action (July 24, 1975). As to (1), the Council held principally that the agency petition does not present facts and circumstances to support the exception. As to (2), the Council held that the exception does not present a ground upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied the agency's petition for review since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). The Council also vacated the stay of the arbitrator's award which it had previously granted.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 24, 1975

Mr. R. J. Alfultis  
Director of Personnel  
and Training  
Office of the Secretary of  
Transportation  
Washington, D.C. 20590

Re: Federal Aviation Administration,  
Department of Transportation and  
Professional Air Traffic Controllers  
Organization (Schedler, Arbitrator),  
FLRC No. 74A-88

Dear Mr. Alfultis:

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.

As stated in the award, the agency operates the control tower at the Dallas-Fort Worth Regional Airport and has 20 parking spaces at the tower. The air traffic controllers (except those on the midnight shift who were allowed to park their privately owned vehicles in the spaces at the tower) parked their privately owned vehicles at a remote parking lot on the airport and used various other forms of ground transportation from there to the tower. The parties submitted to arbitration a grievance filed by the union alleging that parking accommodations for the controllers did not meet the requirements for employee parking set forth in the parties' collective bargaining agreement<sup>1/</sup> and FAA

1/ Article 47 - "Parking" - of the collective bargaining agreement provides as follows:

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.

(Continued)



Order 4665.3A,<sup>2/</sup> which is incorporated by reference in Article 47, Section 3 of the collective bargaining agreement.

The arbitrator, noting that the parties did not furnish a precise statement of the issue submitted for arbitration, framed the issue from the union's grievance form, as follows:

Did the Agency violate the Agreement or Agency Order 4665.3A with the present parking facilities furnished to Controllers at the Dallas-Fort Worth Regional Airport? If the answer is "yes" what will the remedy be?

The arbitrator determined that the agency had "violated Article 47 Section 3 in the implementation of Agency Order 4665.3A, to wit:

- (1) Under item 5 b. subsection (1) the parking accommodations of the employees are not equal to those provided to the airport owner/operator; and
- (2) under item 5 b. subsection (2) the distance from the employees work station to the parking lot is over one mile and this violates the requirement of a reasonable distance of 500 feet."

As a remedy, the arbitrator ordered the agency to "immediately offer to reserve 14 parking spaces for Controllers at the D-FW ground control tower."

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of its 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."

---

(Continued)

Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

Section 3. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A.

<sup>2/</sup> FAA Order 4665.3A is enclosed as an appendix to this decision letter.

The agency's first exception contends that the arbitrator "exceeded his authority under Article 7, Section 6<sup>3/</sup> of the negotiated agreement . . . in that he directed that parking spaces designated specifically for parking government vehicles be used to park employees' privately owned vehicles." Thus, the agency's exception, read literally, states that the arbitrator failed to confine himself to the precise issue submitted for arbitration and determined issues not so submitted to him.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator did not decide the question submitted to arbitration and determined issues not included in the question submitted to arbitration. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60. We are of the opinion, however, that the agency's petition does not present facts and circumstances to support its assertion that the arbitrator failed to confine himself to the precise issue submitted to arbitration and determined issues other than those submitted to arbitration. The issue, as formulated by the arbitrator, was whether or not the agency had violated the agreement or Agency Order 4665.3A by the parking facilities furnished to the controllers.<sup>4/</sup> Clearly, the arbitrator answered that issue; and the agency's petition furnishes no support for its allegation that the arbitrator determined other issues not submitted to him.

In support of its first exception, the agency also contends that the arbitrator exceeded his authority by his award which assigned spaces allegedly reserved for Government cars for the use of individual employee parking because "[t]he Comptroller General would have to decide whether FAA, having used its authority to obtain government parking, could then convert its use to parking private employee owned automobiles." However, the agency's petition fails to cite any Comptroller General decision or authority in support of this exception. It is, therefore, the opinion of the Council that the agency has not provided sufficient facts and circumstances to support this exception as required by section 2411.32 of the Council's rules of procedure. In the absence of any cited legal authority to support the agency's first exception, it appears that the

3/ Section 6 of Article 7 - "Dispute Settlement Procedures" - provides:

Section 6. The Arbitrator shall confine himself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him. In disciplinary cases the Arbitrator may vary the penalty to conform to his decision.

4/ In the absence of a submission agreement, as in the instant case, the arbitrator's unchallenged formulation of the question may be regarded as the equivalent of a submission agreement. See American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

agency is simply challenging the remedy as fashioned by the arbitrator. However, absent an applicable legal prohibition, the Council follows a policy, as do courts in the private sector, in favor of allowing arbitrators discretion in fashioning remedies. See Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56.

In its second exception, the agency contends that, "[t]he Arbitrator exceeded his authority by substituting his judgment for the judgment delegated to the Federal Aviation Administration's regional director." The agency maintains that the regional director made, pursuant to the agency order, a determination that parking for the controllers was adequate and that there is no basis by which the arbitrator could substitute his judgment for that of the regional director. Furthermore, the agency alleges that (1) FAA Order 4665.3A clearly delegates the authority to determine parking adequacy from the agency administrator to the regional director, not to the arbitrator, and (2) since the agency order does not convey authority to the arbitrator to make such a determination, the agency did not agree that the arbitrator was to judge the adequacy of parking. The arbitrator, the agency alleges, was limited to the interpretation and application of the agreement and, since the agency order is referred to in the agreement, the regional director's determination was binding as to the union.

We cannot agree with the agency's contentions. In this case, the agency order delegates discretionary authority to agency management to determine the adequacy of employee parking in facilities controlled by the agency. The negotiated agreement provides, in pertinent part, that, "[p]arking accommodations at FAA occupied buildings and facilities will be governed by . . . agency order 4665.3A." Where, as here, an agency validly agrees during negotiations, in effect, to incorporate such an agency policy or regulation on a matter within agency discretion in a collective bargaining agreement, which agreement includes a grievance and arbitration procedure,<sup>5/</sup> the agency has thereby agreed that the union may file a grievance in which it disputes the agency's interpretation and application of the agreement, including such agency policy or regulation, and that, if the dispute is submitted to arbitration, an arbitrator has authority under the agreement to interpret and apply its provisions,

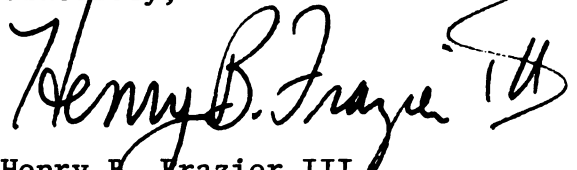
<sup>5/</sup> See American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10 (May 15, 1973), Report No. 38. See also section 13 of E.O. 11491, as amended; the "Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, As Amended," Labor-Management Relations in the Federal Service (1975), Section VI, pp. 44-53; and Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74.

including such agency policy or regulation, to the facts in a particular grievance in order to resolve the dispute. In other words, in the circumstances of this case, the arbitrator had the authority to interpret and apply the provisions of the FAA order just as if the provisions of the order were provisions of the negotiated agreement itself. The Council has held, as courts have consistently held with respect to arbitration in the private sector, that interpretation of contract provisions is a matter to be left to the judgment of the arbitrator. See American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61. This principle is likewise applicable to the interpretation of agency policies and regulations on matters within agency discretion where, as here, those policies or regulations are incorporated in a negotiated agreement. Thus, the agency's second exception does not present a ground upon which the Council will grant a petition for review of an arbitration award.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.<sup>6/</sup> Likewise, the stay previously granted is vacated.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

Enclosure:

APPENDIX

cc: W. B. Peer  
PATCO

6/ Cf. Federal Aviation Administration, U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator), FLRC No. 73A-50 (March 29, 1974), Report No. 52.

ORDER

DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION

4665.3A

14 Sep 71

---

**SUBJ: POLICY ON PARKING ACCOMMODATIONS AT FAA OCCUPIED BUILDINGS AND FACILITIES**

---

1. PURPOSE. This order announces policy on providing accommodations for official and employee parking in FAA occupied buildings and facilities.
2. CANCELLATION. Order 4665.3, Policy on Parking Accommodations at FAA Occupied Buildings and Facilities, is canceled.
3. DISTRIBUTION. Washington Headquarters to office level (minus Systems Maintenance, Air Traffic, Airports Service, Logistics Service, and Flight Standards); Systems Maintenance, Air Traffic, Airports Service, Logistics Service and Flight Standards to division level; to division level in the regions, Aeronautical Center, and National Aviation Facilities Experimental Center; and, all Field Offices and Facilities.
4. POLICY.
  - a. At FAA Technical Facilities (air navigation and air traffic control facilities).
    - (1) Official Parking.
      - (a) On Airports. New leases, Airport Development Aid Program (ADAP) agreements, or any other instrument negotiated with a non-federally owned airport sponsor or airport owner/operator shall include the provision that adequate land shall be provided, without cost, for the purpose of parking all official vehicles (FAA vehicles, and privately owned vehicles when used for FAA business) necessary for the maintenance and operation of the facility(s). The land so provided shall be adjacent to the facility(s) served.
      - (b) Off Airports. Sufficient land or space shall be obtained for official parking at all FAA technical facilities at the time the facility is acquired.
    - (2) Employee Parking. Adequate parking accommodations shall be provided for the privately owned vehicles of FAA employees engaged in the maintenance and operation of agency technical facilities.

**Distribution:** W-1 (minus SM, AT, AS, LG & FS);  
SM/AT/AS/LG/FS-2; RNCM-2; FOF-0 (normal)

**Initiated By:** LG-240

(a) On Airports. Adequate parking accommodations for FAA employees in close proximity to FAA technical facilities is considered to be an integral part of each facility.

1 Project approvals for new facilities shall be withheld and start of construction of new facilities shall be delayed until adequate employee parking arrangements are made for all FAA technical facilities located on the airport.

2 No new leases, permits or other instruments are to be executed or existing ones modified without the inclusion of specific statements assuring adequate employee parking accommodations at all technical facilities located on the airport. No new ADAP agreements will be entered into without obtaining assurances from the sponsor of adequate parking accommodations for employees at all FAA technical facilities on the airport.

(b) Off Airports. Sufficient land or space shall be obtained for employee parking at all FAA technical facilities at the time the facility or land for the facility is acquired.

b. At FAA Owned or Leased Buildings and Facilities, Except for Technical Facilities.

(1) FAA Owned. Adequate official and employee parking accommodations shall be obtained at the time the building or facility is acquired.

(2) FAA Leased. Adequate official and employee parking accommodations shall be obtained either as part of, or separate from, the lease. When justified, FAA funds may be utilized to obtain parking accommodations.

c. At GSA Controlled Buildings and Facilities. FAA shall follow GSA policies with respect to providing parking accommodations for FAA parking needs in GSA controlled buildings and facilities.

## 5. DETERMINING ADEQUACY OF PARKING.

a. Responsibility. Regional and Center Directors are responsible for determining the adequacy of parking accommodations for official and employee parking on a site-by-site basis.

b. Factors to be Considered. In pursuing the objective of providing parking accommodations close to a facility at no or very minimal cost to the employees, a firm but reasonable and responsible position must be taken. Some considerations are:

(1) Parking accommodations should be at least equal to those provided the employees of the airport owner/operator.

- (2) The distance between the parking area and facility should take into account weather conditions and personnel safety factors. A reasonable distance may be 500 feet depending on the specific circumstances at a given location. Generally, an employee should not have to resort to another means of transportation (e.g., shuttle buses) to reach the facility from the parking area. But the availability of this type transportation must be considered in arriving at a final decision on the adequacy question.
- (3) Free parking for employees is a desirable objective. A reasonable cost to employees as determined by Regional and Center Directors, may be appropriate depending on specific situations.

## 6. CORRECTION OF DEFICIENCIES.

### a. At Existing Buildings and Facilities.

- (1) GSA Controlled Space. Negotiate with local GSA officials for early improvement of parking accommodations.
- (2) FAA Controlled Space.
- (a) Official Parking. A maximum effort shall be made to negotiate for adequate official parking. In the event these efforts fail, the Regional Director may approve the expenditure of FAA funds to obtain temporary relief for the problem until such time as parking accommodations can be obtained through ADAP agreements or lease arrangements (as specified in paragraph 4) or in the case of off airport sites, until parking accommodations can be acquired.
- (b) Employee Parking at Technical Facilities. A maximum effort shall be made to negotiate for adequate employee parking. In the event these efforts fail, the Regional Director may approve the expenditure of FAA funds to obtain temporary relief for the problem until such time as parking accommodations can be obtained from the airport owner/sponsor, or, in the case of off airport sites, until parking accommodations can be acquired.
- (c) Other Employee Parking. Initiate appropriate action to obtain adequate parking accommodations:
- 1 on existing Government-owned land or in existing Government-owned buildings;
  - 2 through GSA at no cost to FAA;

3 through lease revisions at no additional costs; and,  
4 at FAA expense when justified.

7. RESPONSIBILITIES.

- a. The Region and Center Directors shall immediately implement the policy contained in paragraph 4, and initiate actions leading to correction of existing deficiencies to insure that adequate parking accommodations are provided for FAA official and employee vehicles.
- b. The Logistics Service will provide program management and direction and additional procedural guidance as required.



J. H. Shaffer  
Administrator



Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator). The arbitrator determined that the agency violated the parties' agreement, and an agency order incorporated by reference in the agreement, with respect to the adequacy of employee parking accommodations. As a remedy, the arbitrator directed that the agency obtain and provide free parking accommodations for all employees under the agreement at either of two locations at the facility involved. The agency filed exceptions to the award with the Council, alleging (1) the arbitrator exceeded his authority in determining the adequacy of parking accommodations provided for employees; and (2) the remedy fashioned by the arbitrator would require the improper use of appropriated funds.

Council action (July 24, 1975). As to (1), the Council determined that the same circumstances exist in the instant case as were present in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, [Report No. 78], and, based on its decision in that case with regard to a similar exception, held that this exception does not present a ground upon which the Council will grant a petition for review of an arbitration award. As to (2), based on its decision in Federal Aviation Administration, U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator), FLRC No. 73A-50 ( Report No. 52), the Council held that the agency did not provide sufficient facts and circumstances to support this exception. Accordingly, the Council denied the agency's petition for review since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). The Council also denied the agency's request for a stay under section 2411.47(d) of its rules (5 CFR 2411.47(d)).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 24, 1975

Mr. R. J. Alfultis  
Director of Personnel  
and Training  
Office of the Secretary of  
Transportation  
Washington, D.C. 20590

Re: Federal Aviation Administration and  
Professional Air Traffic Controllers  
Organization (MEBA, AFL-CIO) (Hanlon,  
Arbitrator), FLRC No. 75A-9

Dear Mr. Alfultis:

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 in his decision stated that, while the parties did not submit a formalized statement of the issue to be decided, based upon the evidence submitted, the issue could fairly be stated as follows:

Are the parking accommodations presently provided for the employees at the Portland, Oregon Airport in compliance with the requirements of the applicable Collective Bargaining Agreement? If the question is answered in the negative, what is the appropriate remedy?

According to the arbitrator, approximately 18 parking spaces immediately adjacent to the terminal building at the Portland Airport presently are reserved for FAA official parking or airport management parking. The employees involved in this dispute are presently furnished parking facilities free of charge in a parking lot known as the "employee parking lot." These facilities may require an employee to walk from the lot to the terminal building, distances between a minimum of approximately 1465 feet to a maximum of approximately 2065 feet, depending upon whether the employee is able to obtain a parking space at the most favorable end or the least advantageous end of the lot. Between 420 and 1020 feet of these distances is completely exposed to the weather.

The arbitrator found that, "[t]he important [agreement] provisions to be considered are the last sentence of Section 1 of Article 47<sup>1/</sup> providing that 'the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator' and Section 3 which incorporates by reference agency order 4665.3A."<sup>2/</sup> (Footnotes supplied.) The arbitrator further found that, "[t]he important provisions of the [FAA] Order in turn appear in paragraph 5 dealing with factors to be considered in determining adequacy of parking."

The first question considered by the arbitrator was "whether the parking accommodations furnished to these employees are 'at least equal to those provided the employees of the airport owner/operator.'" The arbitrator determined that, "the Administration has not met the standard required in Section 1 of Article 47 and in paragraph 5(b)(1) of the Agency Order." Turning to paragraph 5.b.(2) of the agency order, the arbitrator determined that the agency had exceeded by four times the general standard established by paragraph 5.b.(2) that a reasonable

1/ Article 47 of the parties' collective bargaining agreement reads in full as follows:

#### ARTICLE 47 -- PARKING

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.

Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

Section 3. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A.

2/ FAA Order 4665.3A in its entirety was enclosed as an appendix to the Council's decision letter in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, which was issued on this date.

distance to walk is 500 feet. As a remedy, the arbitrator ordered the agency to "promptly take steps to obtain and provide free parking accommodations to all employees working under this Agreement at the Portland Airport in either the short term parking location or the proposed rental car parking lot."

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of its 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 that the arbitrator exceeded his authority under Article 47 of the parties' negotiated agreement. The agency contends that, "[t]he arbitrator went outside the four corners of the provisions of the agreement by taking unto himself the determination of adequacy when, in fact, the parties had agreed that this responsibility rested with the Regional Director." That is, although the arbitrator may disagree with the Regional Director's determination of adequacy, he must nevertheless recognize that the agency order reserves to the Regional Director the right to make that determination. To do otherwise, the agency alleges, would violate the terms of the agreement.

On this date, the Council has denied review of the agency's petition in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88. There, as here, the arbitrator determined that the agency violated the same negotiated agreement and agency order with respect to the adequacy of employee parking. Under the circumstances of that case, the Council determined that the arbitrator has the authority to interpret and apply the provisions of FAA Order 4665.3A as if the provisions of the agency order were provisions of the negotiated agreement itself. As indicated, the same circumstances exist in the instant case. Thus, the agency's exception does not present a ground upon which the Council will grant a petition for review of an arbitration award.

The agency's second exception contends that, "[t]he remedy fashioned by the arbitrator would require the improper use of appropriated funds." In support of this exception, the agency alleges that the criteria set forth in GSA Order 7030.2C and in two decisions of the Comptroller General (43 Comp. Gen. 131 (1963) and 49 Comp. Gen. 476 (1970)) have not been met in the instant case. In an earlier case, Federal Aviation Administration,

U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator), FLRC No. 73A-50 (March 29, 1974), Report No. 52, the agency filed exceptions to the award with the Council, alleging in part, that, in effect, the remedy would require the improper use of appropriated funds in violation of the same Comptroller General decisions and GSA order. In the Council's view, the applicability of the GSA order and the various Comptroller General's decisions had not been shown by the agency in that case. The Council, therefore, determined that the exception in the earlier case had not been supported by sufficient facts and circumstances to warrant review as required by section 2411.32 of the Council's rules. Similarly, in the instant case, it is the Council's opinion that the applicability of the same GSA order and Comptroller General decisions has once again not been demonstrated by the agency in its petition for review. The Council is therefore of the opinion that the agency has not provided sufficient facts and circumstances to support this exception, as required by section 2411.32 of the Council's rules of procedure.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay is denied under section 2411.47(d) of the Council's rules.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: W. B. Peer  
PATCO

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Eigenbrod, Arbitrator). The arbitrator determined that the agency violated an agency order incorporated by reference in the parties' negotiated agreement, with respect to the adequacy of employee parking accommodations, and provided for remedial steps to be taken by the agency. The agency excepted to the award, alleging that the arbitrator exceeded his authority by substituting his judgment for that of the agency.

Council action (July 24, 1975). The Council determined that the same circumstances exist in this case as were present in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, [Report No. 78], and, based on its decision in that case with regard to a similar exception, held that the agency's exception does not present a ground upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied the agency's petition for review since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). The Council also denied the agency's request for a stay under section 2411.47(d) of the Council's rules (5 CFR 2411.47(d)).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 24, 1975

Mr. R. J. Alfultis  
Director of Personnel  
and Training  
Office of the Secretary of  
Transportation  
Washington, D.C. 20590

Re: Professional Air Traffic Controllers  
Organization and Federal Aviation  
Administration, Department of  
Transportation (Eigenbrod, Arbitrator),  
FLRC No. 75A-15

Dear Mr. Alfultis:

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.

According to the award, the parties submitted to arbitration a grievance which alleged that, "[a]dequate parking as defined in FAA Order 4665.3A and PATCO/FAA Agreement is not provided for employees parking at Birmingham Municipal Airport . . . ."

The arbitrator formulated the issue, as suggested by the agency, in two parts:

- a) Is Birmingham Tower required by the PATCO/FAA Agreement and/or FAA order 4665.3A<sup>1/</sup> to guarantee any specific parking accommodations to its employees?

---

<sup>1/</sup> FAA Order 4665.3A which is incorporated by reference in Article 47, Section 3 of the parties' collective bargaining agreement was enclosed as an appendix to the Council's decision letter in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, which was issued on this date.

- b) What obligations are imposed on the Agency with regard to parking accommodations at Birmingham Tower by Article 47<sup>2/</sup> of the FAA/PATCO Agreement and FAA Order 4665.3A, and have these obligations been met? [Footnotes added.]

The arbitrator determined that, "[t]he answer must be that those provisions of Order 4665.3A be complied with insofar as reasonably possible by the Agency and that the Agency take any and all remedial steps afforded to it by law to enable it to so comply." As a remedy, the arbitrator ordered that:

- (1) The agency provide "adequate parking within 500 feet of the work area. (Adequate parking defined as a paved area with paved or dry walkways.)"
- (2) [S]ome means of protection to those crossing the streets be afforded as can be agreed on by the Agency and the City of Birmingham.
- (3) [T]he Agency take those steps afforded by law to carry out its Order No. 4665.3A and that Agreement between the Agency and the Professional Air Traffic Control [sic] Organization.

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

2/ Article 47 of the agreement reads in full as follows:

#### ARTICLE 47 -- PARKING

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.

Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

Section 3. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A.



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."

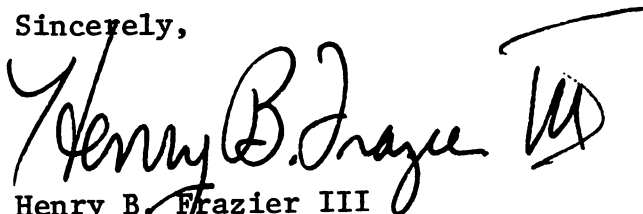
The agency's exception contends the arbitrator exceeded his authority under Article 47, Section 3 of the negotiated agreement in that he "substituted his judgment for that of the Regional Director, in both his decision and his remedy." The agency maintains that once the Regional Director had, pursuant to the responsibility reserved to him by paragraph 5 of Agency Order 4665.3A, determined that the parking accommodations at the Birmingham Airport were adequate, the requirements of the agency order and Article 47, Section 3 of the negotiated agreement had been met, and the question of adequacy was thus disposed of and not before the arbitrator. That is, the union agreed that parking accommodations would be governed by FAA Order 4665.3A, thereby agreeing to "all elements of that Order which included the stipulation that the Regional Director would be the sole determiner of adequacy."

On this date, the Council has denied review of the agency's petition in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88. There, as here, the arbitrator determined that the agency had violated the same negotiated agreement and agency order with respect to the adequacy of employee parking. Under the circumstances of that case, the Council determined that the arbitrator has the authority to interpret and apply the provisions of FAA Order 4665.3A as if the provisions of the agency order were provisions of the negotiated agreement itself. As indicated, the same circumstances exist in the instant case. Thus, the agency's exception does not present a ground upon which the Council will grant a petition for review of an arbitration award.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure. Likewise, the agency's request for a stay is denied under section 2411.47(d) of the Council's rules.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: W. B. Peer  
PATCO

Federal Aviation Administration, Kansas City, Missouri and Professional Air Traffic Controllers Organization (Yarowsky, Arbitrator). The arbitrator determined that the agency violated the parties' negotiated agreement, as amended by the agency order incorporated by reference in the agreement, with respect to the adequacy of employee parking accommodations and directed various remedial actions. The agency filed exceptions to the award with the Council, alleging that (1) the arbitrator exceeded his authority by determining the adequacy of employee parking; and (2) the remedy fashioned by the arbitrator would require the improper use of appropriated funds.

Council action (July 24, 1975). As to (1), the Council determined that the same circumstances exist in the instant case as were present in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, [Report No. 78], and, based on its decision in that case with respect to a similar exception, held that this exception does not present a ground upon which the Council will grant a petition for review of an arbitration award. As to (2), for the reasons set forth in Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator), FLRC No. 75A-9, [in Report No. 78], with regard to a similar exception, the Council held that the agency has not provided sufficient facts and circumstances to support this exception. Accordingly, the Council denied review of the agency's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). The Council also denied the agency's request for a stay under section 2411.47(d) of the Council's rules (5 CFR 2411.47(d)).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 24, 1975

Mr. R. J. Alfultis  
Director of Personnel  
and Training  
Office of the Secretary of  
Transportation  
Washington, D.C. 20590

Re: Federal Aviation Administration, Kansas  
City, Missouri and Professional Air  
Traffic Controllers Organization  
(Yarowsky, Arbitrator), FLRC No. 75A-54

Dear Mr. Alfultis:

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.

As stated in the award, air traffic controllers were provided with free parking for their privately owned vehicles at the short- and long-term parking lots immediately east of the Des Moines Air Terminal, along with regular airline customers, until the airport authority "peremptorily relocated employee parking to a more remote area . . . that was unusually makeshift . . . reserved for future construction of a cargo area." The distance from the relocated parking lot to the terminal varies between 1350 and 1850 feet, depending on which terminal entrance the air traffic controller uses. The agency delayed the actual move for several months "by remonstrating with the Authority, writing numerous letters and attending conferences but all to no avail." The agency's Regional Director made a determination that the relocated parking was "inadequate because of its poor condition and considerable distance." Various improvements were undertaken in respect to lights, fencing, patrolling, constructing a walkway, surfacing and snow removal. Also, employees on shifts beginning or ending between 10 p.m. and 9 a.m. were permitted to park their privately owned vehicles on the regular airline customer parking lots without charge. The union filed a grievance alleging that the parking facilities continued to be

"inadequate" on the basis that "Article 47<sup>1/</sup> of the current agreement provides this working condition as a prerequisite of the Air Traffic Controller's classification which Article 9 is administratively implemented by Agency policy Order 4665.3A."<sup>2/</sup> (Footnotes added.) In response to the grievance, the Regional Director made a determination that the parking facilities, as improved, were "adequate" and measured up to the requirements of the agreement and FAA Order 4665.3A. The parties ultimately submitted the grievance to arbitration. The specific relief requested from the arbitrator by the union was "authorization of the expenditure of Agency funds to pay for private vehicle parking at the regular terminal lots 'until such time as adequate parking accommodations can be obtained at the new tower presently under construction,'" estimated to be July 1, 1976.

The arbitrator determined that "the parking accommodation at the Des Moines Terminal is not in accord with the explicit contractual provisions of the Agreement as amended by FAA Order 4665.3A," and sustained

---

1/ Article 47 of the parties' collective bargaining agreement reads in full as follows:

#### ARTICLE 47 -- PARKING

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.

Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

Section 3. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A.

2/ FAA Order 4665.3A which is incorporated by reference in Article 47, Section 3 of the parties' collective bargaining agreement was enclosed as an appendix to the Council's decision letter in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88, which was issued on this date.

the grievance. As a remedy, the arbitrator directed that his award be implemented as follows:

Air Controllers working during periods when free parking at the regular airport parking lots is not available, are to be permitted on a voluntary basis, to park at the regular passenger parking lots east of the Terminal. If an employee elects to avail himself of this award, he shall notify the Agency of his election in advance of his use of the facility and he shall be required to pay an amount not to exceed \$10.00 per month for parking his private vehicle at the regular customer parking lots.

The Agency is requested to supplement this payment in whatever amount may be required to pay the operator of the parking lots for parking the employee's private vehicle.

This arrangement is to continue from month to month during the term of the current Agreement and is to cease upon the completion of the new tower presently being built at the Des Moines Air Terminal when free employee parking will be made available to grievants.

Should either party object to the suggested reasonable cost of \$10.00 per month for parking of private vehicles, the arbitrator hereby retains post-award jurisdiction to receive evidence on this issue and to render an award on this aspect of implementation. [Emphasis added by arbitrator.]

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of its 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 that the arbitrator exceeded his authority under Article 47 of the negotiated agreement. The agency maintains that once the Regional Director made a determination that parking was adequate, after considering factors contained in paragraph 5.b. of the agency order, then the order and Section 3 of Article 47 of the negotiated agreement had been complied with and the adequacy question was disposed of and not before the arbitrator. Further, according to the agency, the union, in agreeing that the agency order

would govern parking accommodations, thereby agreed to all elements of that order which included the stipulation that the Regional Director would be the sole determiner of adequacy. Hence, the agency asserts, the arbitrator went outside the provisions of the agreement by taking unto himself the determination of adequacy when, in fact, the parties had agreed that this responsibility rested with the Regional Director.

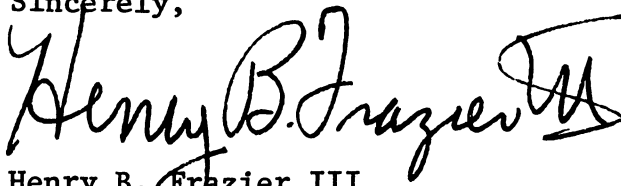
On this date, the Council has denied review of the agency's petition in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88. There, as here, the arbitrator determined that the agency had violated the same negotiated agreement and agency order with respect to the adequacy of employee parking. Under the circumstances of that case, the Council determined that the arbitrator has the authority to interpret and apply the provisions of the FAA order as if the provisions of the agency order were provisions of the negotiated agreement itself. As indicated, the same circumstances exist in the instant case. Thus, the agency's first exception does not present a ground upon which the Council will grant a petition for review of an arbitration award.

The agency's second exception contends that the remedy fashioned by the arbitrator would require the improper use of appropriated funds. In support of this exception, the agency alleges that the criteria set forth in two Comptroller General decisions (43 Comp. Gen. 131 and 49 Comp. Gen. 476) and GSA Order 7030.2C have not been met in the instant case. For reasons set forth in Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator), FLRC No. 75A-9, also decided this date, it is the Council's opinion that the applicability of the GSA order and the two cited Comptroller General decisions has not been demonstrated by the agency in its petition for review. The Council is therefore of the opinion that the agency has not provided sufficient facts and circumstances to support this exception, as required by section 2411.32 of the Council's rules of procedure.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure. Likewise, the agency's request for a stay is denied under section 2411.47(d) of the Council's rules.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: W. B. Peer  
PATCO

NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator). The arbitrator determined that the agency unreasonably required certain employees to rotate between day and night shift assignments in violation of the parties' agreement. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the arbitrator exceeded his authority. Further, the Council granted the agency's request for a stay (Report No. 56).

Council action (July 30, 1975). The Council concluded that the arbitrator's interpretation of the agreement provision in dispute draws its essence from the negotiated agreement, and held that the arbitrator did not exceed his authority in determining that the agency acted unreasonably. Accordingly, pursuant to section 2411.37(b) of its rules of procedure (5 CFR 2411.37(b)), the Council sustained the arbitrator's award. Likewise, the Council vacated the stay which it had previously granted.

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

NAGE Local R8-14

and

FLRC No. 74A-38

Federal Aviation Administration,  
Oklahoma City, Oklahoma

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's determination that the agency unreasonably required certain employees to rotate between day and night shift assignments.

Based on the findings of the arbitrator and the entire record, the circumstances of the case appear as follows:

Prior to February, 1974, the employees in the sheet metal shop at the agency's Oklahoma City Aircraft Services Base had been assigned to either the day shift (6:45 a.m. to 3:15 p.m.) or the night shift (3:00 p.m. to 11:30 p.m.). In February the agency, following discussions with the union, instituted a new policy of rotational shift assignments requiring that each shop employee alternate between the day and night shifts every 4 weeks.<sup>1/</sup>

Shortly before this policy became effective, the union filed a grievance alleging that the change in shift assignments would violate Section 2 of Article XXI of the negotiated agreement. That section, insofar as pertinent to this case, provides as follows:

The Employer will show proper regard for the dignity of employees and provide a work environment that is conducive to good worker morale.

Unable to resolve the grievance, the parties proceeded to arbitration under the terms of the negotiated agreement.

---

<sup>1/</sup> For reasons not significant to this appeal, 3 of the 21 employees then in the sheet metal shop were allowed to continue working on fixed shifts.



## The Arbitrator's Award

The record does not show whether the parties entered into a separate submission agreement or otherwise formally identified the issue presented for arbitration. In his written opinion, however, the arbitrator first characterized the issue before him as whether the agency had "violated the contract by requiring unreasonable shift rotation." Subsequently he narrowed this question to:

whether or not the employer acted unreasonably in requiring all of the employees to rotate rather than allowing those employees who prefer a night shift to remain on a permanent night shift and having the remaining employees rotate with whatever frequency the employer determined was proper to perform the mission.

The arbitrator found that "by far the majority of employees desired a permanent day shift and that only six (6) employees had requested that they be retained on a permanent night shift." Rejecting as unpersuasive the agency's arguments for "not giving consideration" to the wishes of the six employees seeking to remain on the night shift, the arbitrator determined to be unreasonable the agency's requirement that these six employees rotate shifts along with the other employees in the shop. The arbitrator thereupon found specifically as follows:

- (a) That the employer has the right to determine the number of employees who will work on the day shift and the number of employees who will work on the night shift;
- (b) That because of the obvious superiority in numbers of those employees who desire to work on the day shift that [sic] the employer must first allow those employees who wish to work on a night shift on a permanent basis to continue to do so as long as there are not more employees who desire to work on a night shift permanently than the employer determines are necessary to accomplish the mission of the unit; and
- (c) The employer has the right to continue rotating the remaining employees between the day shift and the night shift with whatever frequency is necessary to maintain the numerical complement balance between the day shift and night shift as determined solely by the employer.

The arbitrator further found that "this particular award should not be considered binding upon the employer except under the conditions prevailing at the present time," and that in the event conditions "should change to the extent that there would be a valid reason for complete rotation of both day and night shift[s] this opinion would no longer control the situation."

## Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council, alleging that the arbitrator had exceeded his authority. Pursuant to section 2411.32 of its rules and regulations the Council accepted the petition on this ground.<sup>2/</sup> The agency presented no further argument on the merits of the case, while the union filed a brief.

### Opinion

Section 2411.37(a) of the Council's rules and regulations provides, in pertinent part, that "[a]n 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." It is well established in the private sector that when an arbitrator is empowered to interpret the terms of an agreement a reviewing court may not set aside the arbitrator's award merely because the court's own interpretation of the agreement may differ. As the Supreme Court has said:<sup>3/</sup>

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as 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.

The Council, consistent with section 2411.37(a) of its rules and regulations, adheres to this principle.<sup>4/</sup>

It is equally well established in the private sector that an arbitrator may not exceed the authority granted him by the parties to the arbitration, and that a reviewing court will not enforce

---

<sup>2/</sup> The agency also requested and the Council granted, under section 2411.47(d) of the Council's rules and regulations, a stay pending the determination of the appeal.

<sup>3/</sup> United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 at 599 (1960).

<sup>4/</sup> See, e.g., American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61; American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44.

an arbitration award which fails to draw "its essence" from the collective bargaining agreement. As the Supreme Court also said in Enterprise:<sup>5/</sup>

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Thus, while courts in the private sector will review an arbitration award on the ground that the award does not draw its essence from the collective bargaining agreement, that review is necessarily a very limited one. As the Fifth Circuit has said:<sup>6/</sup>

What is the standard of judicial review at that stage? Obviously, it cannot be the ordinary one of ascertaining the correctness on usual principles of law including contract construction. For if this were permissible, arbitration as the structure for industrial peace supplanting the usual processes for court adjudication would itself be supplanted by the judicial machine at the time it would count the most--that is, at the moment an arbiter's award was sought to be enforced.

On the other hand, merely because the specific controversy forming the subject of the formal grievance is within the scope of the agreement to arbitrate or the remedy fashioned is likewise within the contractual powers of the arbiter does not insulate the award from judicial scrutiny altogether. On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the "common law of the shop." But when it reasonably satisfies these requirements we think it is not open to the court to assay

---

<sup>5/</sup> 363 U.S. at 597 (1960).

<sup>6/</sup> Safeway Stores v. Bakery Workers, Local 111, 390 F.2d 79 at 82 (5th Cir. 1968). See also IAM-AW, District 145 v. Modern Air Transport, Inc., 495 F.2d 1241 (5th Cir. 1974), cert. denied, 419 U.S. 1050 (1974); International Union of Electrical Workers v. Peerless Pressed Metal Corp., 489 F.2d 768 (1st Cir. 1973); Amalgamated Meat Cutters, Local 540 v. Neuhoff Brothers Packers, Inc., 481 F.2d 817 (5th Cir. 1973); Textile Workers Union v. Textile Paper Products, Inc., 405 F.2d 397 (5th Cir. 1968); Dallas Typographical Union v. A. H. Belo Corp., 372 F.2d 577 (5th Cir. 1967).

the legal correctness of the reasoning pursued. . . . We may assume, without here deciding, that if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the court can strike down the award. But where it is not that gross the arbiter's error--even though on an issue on which the reviewing court would have arrived at a different decision does not ipso facto make the arbiter an outlaw or his erroneous action a matter outside the scope of the agreement to arbitrate, in excess of the terms of the submission or beyond his powers as an arbiter. [Citations and footnotes omitted.]

Or, as the Third Circuit has put it:<sup>7/</sup>

Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award. [Footnote omitted.]

Or, as the Ninth Circuit has stated:<sup>8/</sup>

Therefore, if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed.

These principles are likewise applicable in the Federal sector under section 2411.37(a) of the Council's rules and regulations.<sup>9/</sup>

In asserting that the arbitrator exceeded his authority in this case by holding unreasonable the requirement that certain employees rotate between the day and night shifts, the agency relies

<sup>7/</sup> Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 at 1128 (3rd Cir. 1969).

<sup>8/</sup> Holly Sugar Corp. v. Distillery Workers Union, 412 F.2d 899 at 903 (9th Cir. 1969). See also Rossi v. Trans World Airlines, Inc., 507 F.2d 404 (9th Cir. 1974); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969); Anaconda Co. v. Great Falls Mill and Smeltermen's Union 16, 402 F.2d 749 (9th Cir. 1968).

<sup>9/</sup> Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator), FLRC No. 75A-7 (June 26, 1975), Report No. 76.

principally upon its view that the arbitrator's determination conflicts with the collective bargaining agreement because, in the agency's words, "[t]here is no test of 'reasonableness' in the contract." In our opinion, however, since the arbitrator clearly found that there is such a test of reasonableness in the parties' agreement, the agency, by contending to the contrary, in effect seeks only to dispute the arbitrator's interpretation of that agreement. For the reasons which follow, we believe the arbitrator's interpretation must be sustained.

The grievance here centered upon the agency's duty under Section 2 of Article XXI of the negotiated agreement to "show proper regard for the dignity of employees and provide a work environment that is conducive to good worker morale." The arbitrator interpreted this language to require, when applied to the facts of this case, that the agency act reasonably in assigning employees to rotating shifts--a requirement which in the arbitrator's judgment the agency failed to meet. Although the arbitrator did not detail in his opinion the reasoning upon which he relied in arriving at this interpretation of the agreement, nothing compelled him to do so.<sup>10/</sup> It is the award rather than the conclusion or the specific reasoning that is subject to challenge before the Council.<sup>11/</sup> We cannot say from the record before us that the arbitrator's award, based upon his interpretation and application of this particular provision of the parties' agreement, "is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling" or could not "in any rational way be derived from the agreement" or evidences "a manifest disregard of the agreement" or on its face represents an implausible interpretation thereof.

The parties to this case have adopted arbitration as the final stage of a negotiated procedure for resolving grievances over the interpretation of their agreement. That one of the parties may subsequently disagree with the interpretation reached by the arbitrator is beside the point; it is the arbitrator's interpretation of the agreement, and no one else's, for which the parties have bargained and by which they have agreed to be bound. And so long as it appears, as here, that the parties have obtained substantially that which they bargained for, the Council, consistent with the clear practice followed by the courts in reviewing private

---

<sup>10/</sup> See Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60.

<sup>11/</sup> See American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44.

sector arbitration awards, will not interfere with the arbitrator's award solely because our own interpretation of the agreement might have been different. As the Fifth Circuit has put it so well:<sup>12/</sup> "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."

We conclude, accordingly, that the arbitrator's interpretation of the provision in dispute draws its essence from the negotiated agreement, and we hold that the arbitrator did not exceed his authority in determining that the agency acted unreasonably.

### Conclusion

For the reasons discussed above, we find that the arbitrator did not exceed his authority. Pursuant to section 2411.37(b) of the Council's rules and regulations, we therefore sustain the arbitrator's award and vacate the stay.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: July 30, 1975

12/ Safeway Stores v. Bakery Workers, Local 111, 390 F.2d 79 at 84 (5th Cir. 1968). See generally Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427, 454 (1969).

NAGE Local 5-65 and Memphis Naval Air Station, Millington, Tennessee.  
The dispute involved the negotiability under the Order of a union proposal concerning the computation of pay for nonappropriated fund employees of the activity who are paid by commission on a percentage of sales basis.

Council action (July 30, 1975). Based on an interpretation by the Civil Service Commission of Public Law 92-392 and the Commission's own implementing issuances promulgated pursuant to that law, the Council held that the union's proposal violates such law and Commission directives. Accordingly, the Council sustained the agency head's determination of nonnegotiability.

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

NAGE Local 5-65

and

FLRC No. 74A-104

Memphis Naval Air Station,  
Millington, Tennessee

DECISION ON NEGOTIABILITY ISSUE

Background of Case

NAGE Local 5-65 represents a unit of Navy exchange employees at Memphis Naval Air Station. During the course of negotiations with the Air Station, a dispute arose concerning the negotiability of the following union proposal:

Employees paid by commission on a percentage of sales basis will be paid at least 85 percent or no less than the percentage paid to pieceworker employees of other Nonappropriated Fund establishments in the wage area.

Upon referral, the agency principally determined that the union's proposal is nonnegotiable because it conflicts with Public Law 92-392 (5 U.S.C. § 5341 et seq.) and implementing Civil Service Commission directives (particularly Federal Personnel Manual Supplement 532-2).<sup>1/</sup> The union petitioned the Council for review of this determination under section 11(c)(4) of the Order, contending that Public Law 92-392 is not applicable in the circumstances of this case and that the percentage to be paid to the employees covered by the proposal is negotiable. The agency filed a statement of its position.

Opinion

The question dispositive of the negotiability issue before the Council in this case is whether the union's proposal conflicts with Public Law 92-392 and implementing Civil Service Commission directives.

Since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, including the Federal

---

<sup>1/</sup> The agency also contends that the proposal violates section 11(b) of the Order and agency regulations. However, in view of our decision herein, it is unnecessary to reach, and we therefore make no ruling upon these contentions.



Personnel Manual, that agency was requested, in accordance with Council practice, for an interpretation of Commission directives as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

In our opinion, the proposal advanced by NAGE Local 5-65 does conflict with Public Law 92-392 and the prescribed regulations of the Commission.

We view the employees involved as prevailing rate employees subject to the Federal Wage System and, therefore, subject to the provisions of P.L. 92-392. Under that law, the Civil Service Commission is responsible for prescribing the practices and procedures governing the implementation and administration of the Federal Wage System. The organizational and functional responsibilities of the Commission, relative to the System, are provided under Subchapter S3 of Federal Personnel Manual Supplement 532-2.

We find that pay for barbers employed by the activity has been fixed in accordance with an agency practice which is used to establish special wage rates. The fact that the applicable NAF regular wage rate schedule does not list the occupation of the employees involved does not also mean that they are excluded from the Federal Wage System, nor does it alter their status as prevailing rate employees. Commission regulations do not require agencies to list occupations paid special rates on regular wage rate schedules.

The [case] papers submitted with your letter include evidence that the special pay practice existed and was used by the activity prior to implementation of the provisions of P.L. 92-392. There is no evidence that a history of bargaining wages existed with respect to the employees involved. If it can be determined that pay has been negotiated in the past,<sup>2/</sup> Section 9(b)(1) of P.L. 92-392 could have an effect on this case.

In our review for documented precedent and interpretation of P.L. 92-392, we referred to the House of Representatives' Report on the Pay System for Government Prevailing Rate Employees. A copy of the report is provided for your information. An analysis of paragraph (3) of Section 5343(c) of the bill, which covers supervisory and special schedules, is included on page 14 of the report.<sup>3/</sup> The analysis indicates that it was the intent of Congress

---

<sup>2/</sup> In this regard, the case record before the Council contains no contention nor is it otherwise apparent that pay for the employees sought to be covered by the union's proposal has been negotiated in the past.

<sup>3/</sup> The referenced analysis in the House of Representatives Report provides as follows:

(Continued)

that the Commission is to provide the regulations for the development of wage schedules and rates for prevailing rate employees paid under regular and special wage schedules.

Pursuant to the law, instructions issued by the Commission in Subchapter S10-2, FPM Supplement 532-2, concern conversion of NAF wage employees from agency NAF systems to the Federal NAF system. Paragraph b(2) of the Subchapter refers to Appendix V of the FPM Supplement which, under paragraph A(4), includes barbers employed by the Navy Resale System Office Exchanges as one of the NAF special schedule categories under coverage of the Federal Wage System. Instructions under paragraph b(2) of the Subchapter further state that NAF special schedule employees paid on other than a time-rate basis, for example, on the basis of commission, will continue to have their pay determined in accordance with existing agency practice pending further instructions to be issued by the Commission.

However, the special schedules described in the aforementioned Appendix V have been placed in a set-aside category as provided under Subchapter S2-2 of the FPM Supplement. Subchapter S2-2 provides that, as an interim measure, the special schedules are continued under the Federal NAF Wage System until they have been reviewed and decisions have been made on the recommendations of

---

(Continued)

Paragraph (3) of section 5343(c) provides that the regulations of the Commission shall include instructions governing the accomplishment of the regular and special schedule surveys which will be conducted by the lead agencies in accordance with the provisions of section 5343(a)(3). The regulations also shall contain instructions for the development of wage schedules and rates for prevailing rate employees, including (1) nonsupervisory and supervisory prevailing rate employees paid under regular or special wage schedules and (2) nonsupervisory and supervisory prevailing rate employees described under paragraphs (B) and (C) of the new section 5342(a)(2).

The "new" section 5342(a)(2) of 5 U.S.C. cited in the quoted analysis provides in pertinent part:

(2) "prevailing rate employee" means--

. . . . .

(B) an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement; . . .

the Federal Prevailing Rate Advisory Committee. It is also pertinent to note that paragraph b(2) of Subchapter S10-2 states that when the appropriate agency wage fixing authority determines, after appropriate consultation with labor organization representatives, that an earlier change in pay practices is required, such a change may be made earlier.

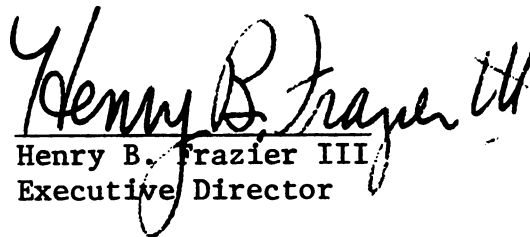
It is the opinion of the Commission that wages and commissions of barbers employed by the Memphis Naval Air Station NAF activity are properly fixed in accordance with the wage fixing procedures authorized for special schedule categories in FPM Supplement 532-2. [Footnotes supplied.]

Based on the foregoing interpretation by the Civil Service Commission of Public Law 92-392 and its own implementing issuances promulgated pursuant to that law, we find that the union's proposal violates such law and Commission directives. Accordingly, we must sustain the agency head's determination that the union's proposal violates applicable law and regulations of appropriate authority outside the agency.

#### Conclusion

Based upon the reasons set forth above, and pursuant to section 2411.27 of the Council's rules and regulations, we find that the agency head's determination that the union proposal here involved is nonnegotiable was proper and must, therefore, be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: July 30, 1975

Internal Revenue Service, Los Angeles District, Los Angeles, California, Assistant Secretary Case No. 72-4736. The Assistant Secretary, in consonance with the Assistant Regional Director, found that dismissal of objections filed by the American Federation of Government Employees, Local 2202 (AFGE) to conduct alleged to have improperly affected the results of an election was warranted. Accordingly, the Assistant Secretary denied AFGE's request for review of the Assistant Regional Director's Report and Findings on Objections. AFGE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (July 30, 1975). The Council determined that the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present a major policy issue. Accordingly, since AFGE's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

July 30, 1975

Mr. James R. Rosa, Staff Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Internal Revenue Service, Los Angeles District,  
Los Angeles, California, Assistant Secretary  
Case No. 72-4736, FLRC No. 75A-38

Dear Mr. Rosa:

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

The case arose when Local 2202, American Federation of Government Employees (AFGE) filed objections to conduct alleged to have improperly affected the results of an election, contending, in pertinent part, that a bus strike in Los Angeles on the day of the election prevented a representative turnout of voters; that the national president of a rival union made erroneous statements to unit employees concerning AFGE's position regarding the nation's 1972 presidential election, which statement improperly affected the outcome of the election; and that a luncheon sponsored by the rival union was partly held on official time, a fact which the activity condoned by allowing it to occur. The Assistant Regional Director, in his Report and Findings on Objections, found that "no objectionable conduct occurred improperly affecting the outcome of the election." The Assistant Secretary, in agreement with the Assistant Regional Director, and based on his reasoning, found that dismissal of the objections in this case was warranted and denied your request for review of the Assistant Regional Director's Report and Findings.

In your appeal to the Council, you contend that the Assistant Secretary's decision presents a major policy issue in that it reflects a deviation from established public and private sector law concerning election protests involving campaign propaganda and misrepresentations. You also contend that the decision of the Assistant Secretary is arbitrary and capricious and presents a major policy issue as to whether the Assistant Secretary may dismiss an election objection once he has found the objection supported by some evidence, without making a finding that the objectionable conduct did not materially affect the outcome of the election.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present a major policy issue. With respect to the alleged major policy issue regarding a purported deviation from applicable precedents concerning campaign propaganda and misrepresentations, there is no indication herein that the Assistant Secretary in any way departed from his previously established precedent when he ruled that five days was an adequate opportunity for AFGE to respond to the alleged misrepresentation. As to your contention that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue in that he dismissed election objections allegedly found to be supported by some evidence without specifically finding that the objectionable conduct did not materially affect the outcome of the election, it does not appear that the Assistant Secretary acted without reasonable justification in concluding that AFGE failed to sustain its required burden of proof with respect to such objections. Moreover, the Assistant Regional Director, upon whose Report and Findings the decision of the Assistant Secretary is based, found with respect to the objections as a whole "that no objectionable conduct occurred improperly affecting the outcome of the election."

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

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

R. Tobias  
NTEU

J. Stansbarger  
IRS

Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435. This appeal arose from a Decision and Order of the Assistant Secretary, who upon a complaint filed by Local Union 1001, National Federation of Federal Employees, held that the activity had violated section 19(a)(1) and (6) of the Order by unilaterally terminating the parties' regularly scheduled negotiation session. Upon appeal by the activity, the Council determined that the Assistant Secretary's decision presented a major policy issue concerning the finding of a violation of section 19(a)(1) and (6) and the issuance of a remedial order in the circumstances of this case, and accepted the activity's petition for review (Report No. 64).

Council action (August 8, 1975). The Council concluded that in the instant case, where the representatives of the activity ceased to engage in the alleged improper conduct immediately after it occurred, and where the activity at all times sought to continue the negotiations in good faith, a finding that the activity violated the Order was not warranted. Moreover, the Council concluded that litigation of this case was itself inconsistent with the purposes of the Order. Accordingly, the Council held that the finding by the Assistant Secretary of a violation of section 19(a)(1) and (6) in this case was inconsistent with the purposes of the Order. The Council, pursuant to section 2411.17(b) of its rules (5 CFR 2411.17(b)), therefore set aside the Assistant Secretary's decision and remanded the case to him for appropriate action.

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

Vandenberg Air Force Base,  
4392d Aerospace Support Group,  
Vandenberg Air Force Base,  
California

and

A/SLMR No. 435  
FLRC No. 74A-77

Local Union 1001, National  
Federation of Federal Employees,  
Vandenberg Air Force Base,  
California

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California (herein called the union), held that the 4392d Aerospace Group, Vandenberg Air Force Base, California (herein referred to as the activity), had violated section 19(a)(1) and (6) of the Order by unilaterally terminating the parties' regularly scheduled negotiating session based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

The factual background of this case, as found by the Administrative Law Judge and adopted by the Assistant Secretary, is as follows: The union is the certified representative of separate units of professional and nonprofessional employees at the activity. During the negotiation of the initial contract for the professional unit, the union proposed that the parties jointly negotiate a single agreement covering both units, since the contract covering the nonprofessional unit was about to terminate, but the first session in this format broke down. Subsequently, the activity proposed a different negotiating procedure -- joint bargaining of separate contracts -- and the union accepted the proposal as the first agenda item for the next regularly scheduled bargaining session. However, when the activity attempted to discuss the proposal at that session, the union refused to discuss the proposal and refused to let the activity explain its position. The activity's chief negotiator then stated that he considered the negotiations to be at an



impasse, and when the union negotiator attempted to begin discussion of the next agenda item, the activity's negotiator stated further that he did not intend to continue the negotiations until the impasse was resolved.<sup>1/</sup> In response, the union negotiator stated that he would file an unfair labor practice charge citing the activity's refusal to bargain. Thereupon, the activity negotiating team left the session. However, on the next day, the activity's chief negotiator communicated to his union counterpart an offer to resume negotiations and, in an informal contact with a member of the activity negotiating team, the union's chief negotiator was informed that the activity would not insist on discussing the first agenda item. This offer was reaffirmed in response to the unfair labor practice charge which the union filed 2 days later with the activity, but the union suspended negotiations pending resolution of its complaint. Subsequently, efforts by the Federal Mediation and Conciliation Service to facilitate the resumption of negotiations proved to be without effect.<sup>2/</sup>

The Administrative Law Judge found that when the activity walked out of the meeting, it had committed a technical violation of section 19(a)(6) of the Order in that it did not have a right to insist, to the point of impasse, that the union discuss its proposal for dual-simultaneous negotiations. The Administrative Law Judge then, however, reviewed the subsequent events and concluded:

However, I further find that this violation was rendered moot the following day when the Union was advised twice . . . that the Activity had receded from its position and was willing to return to the bargaining table. In these circumstances, I cannot understand why the Union refused to accept this offer by the Activity. Even if the Union had some doubt about the Activity's good faith, it could quickly test this good faith by returning to the bargaining table. Instead, the Union insisted upon filing an unfair labor practice charge to which the Activity promptly responded . . . that

<sup>1/</sup> The record indicates that the union, during the discussion of the ground rules for negotiation, had declared an impasse and refused to proceed with the agenda, and that the parties at that time requested the intervention of the Federal Mediation and Conciliation Service. Further, the record indicates that, upon declaring the impasse at the negotiation session herein, the activity's chief negotiator stated his intention to request the intervention of the Federal Mediation and Conciliation Service. Official Report of Proceedings, pp. 134-160.

<sup>2/</sup> The record indicates that the activity's chief negotiator and the union's chief negotiator for the professional unit had a small number of meetings regarding the professional unit contract subsequent to the meeting with the Federal Mediation and Conciliation Service, although no formal negotiations were held. Official Report of Proceedings, pp. 152-160.

the Activity's decision with respect to the charge was to "negotiate seriously on any appropriate matter." There is no evidence in the record to suggest that the Activity had in mind anything but to do precisely what an Assistant Secretary's order would accomplish if a violation were found, i.e., to order the Activity back to the bargaining table. I conclude that as of the date that the unfair labor practice charge was filed, the Activity was not insisting to impasse upon multi-unit bargaining as a condition precedent to bargaining. Therefore, I recommend that no violation of section 19(a) (6), (1), and (2) of the Executive Order be found.

In light of the foregoing, I further conclude that the Union's conduct in this entire matter, both at the [regularly scheduled bargaining session] and thereafter, raises a serious question as to its own genuine willingness to bargain in good faith. It is noted, however, that apparently the Activity did not file an unfair labor practice charge against the Union. Instead, the Activity has attempted to bargain with the Union, despite the Union's apparent unwillingness to do so, at the same time that it is bargaining in good faith with the same Union for a contract covering a different unit at the same location. [Emphasis in original.]

On review, the Assistant Secretary agreed with the Administrative Law Judge that, in the particular circumstances of the case, the activity violated section 19(a)(6) of the Order by unilaterally terminating the parties' negotiation session based on the alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining. The Assistant Secretary also found that such conduct constituted an improper interference with employee rights in violation of section 19(a)(1) of the Order. The Assistant Secretary then concluded:

However, I disagree with the Administrative Law Judge's conclusion that, under the circumstances of this case, the Respondent's improper conduct constituted merely a "technical violation" of the Order which did not require a remedial order. Accordingly, I shall order that the Respondent remedy its violation of Section 19(a)(1) and (6) of the Order.

The activity appealed the Assistant Secretary's decision to the Council, alleging that the decision was arbitrary and capricious and presented major policy issues. The Council accepted the activity's petition for review, concluding that a major policy issue was present concerning the finding of a violation of section 19(a)(1) and (6) and the issuance of a remedial order in the circumstances of this case. The Council also determined that the activity's request for a stay met the criteria for granting such a request as set forth in section 2411.47(c)(2) of its rules and granted the request. The activity and the union filed briefs with the Council as provided in section 2411.16 of the Council's rules.

Opinion

As indicated above, the Assistant Secretary found that the activity violated section 19(a)(1) and (6) by unilaterally terminating the parties' regularly scheduled bargaining session. In the opinion of the Council, the finding of a violation of section 19(a)(1) and (6), based on the activity's conduct in the circumstances of this case, is inconsistent with the purposes of the Order.

Section 11(a)<sup>3/</sup> of the Order imposes on an agency (or activity) and a labor organization engaged in the process of negotiating a collective bargaining agreement the duty to negotiate in good faith. Section 19(a)(6)<sup>4/</sup> provides that agency management shall not refuse to negotiate as required by the Order. Thus, the issue before the Assistant Secretary in this case was whether, based wholly on the series of events complained of herein, the activity violated the Order by failing to negotiate in good faith with the union.

While an impasse in negotiations which results from a demand that certain improper conditions be met before negotiations can continue may, under certain circumstances, constitute a refusal to negotiate in good faith, it is difficult to conclude that the circumstances of this case are an appropriate basis for the finding of such a refusal to negotiate. Though the activity's chief negotiator did refuse to negotiate regarding the second agenda item pending the mediation of the impasse over the first item on the agenda, almost as soon as that refusal was made, the activity retracted it and offered to resume negotiations. Subsequently and consistently, both in its response to the union's unfair labor practice charge and in informal contacts with the union, the activity reiterated its willingness to resume negotiations and to withdraw its insistence on negotiation of the first agenda item. However, the labor organization has consistently refused to return to the negotiating table until its complaint was resolved.

3/ Section 11(a) provides, in pertinent part, as follows:

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 . . . .

4/ Section 19(a)(6) provides, in pertinent part, as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not—  
.  
.  
.  
(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.  
.  
.  
.

What is at issue in this case is whether a violation of the Order should have been found on the basis of so brief an interruption in the negotiations. In our view, when all of the circumstances of the situation are taken into account, it is evident that the activity's conduct in this one instance was of a de minimis nature and thus is not sufficient to constitute a failure to negotiate in good faith in violation of the Order. Experience in labor relations, whether in the Federal labor-management relations program, on the state and local government level, or in the private sector, indicates that there are occasions when, during the course of negotiating an agreement, representatives of either party, management or labor organization, engage in conduct which might, standing alone, constitute the basis for an unfair labor practice complaint. However, that experience also indicates that it is not uncommon for the party quickly to cease engaging in such conduct and to continue negotiations in good faith.<sup>5/</sup> The Council feels strongly that in appropriate factual situations, such as that in this case, similarly brief interruptions of negotiations with a de minimis effect should not warrant the finding of a violation. Rather, an isolated incident which results in such a brief interruption should be examined in the context of the totality of the respondent's bargaining conduct for a determination as to whether it would effectuate the purposes of the Order to find a violation when no further benefit would accrue from that finding and from the resultant remedial order. Thus, we conclude that in the instant case, where the representatives of the activity ceased to engage in the alleged improper conduct immediately after it occurred, and where the activity at all times sought to continue the negotiations in good faith, a finding that the activity violated the Order is not warranted.<sup>6/</sup>

Moreover, in addition to our conclusion that the conduct of the activity in the circumstances herein did not constitute a violation of the Order, it is also the opinion of the Council that litigation of this case is itself inconsistent with the purposes of the Order. The negotiations between the parties to this case have been suspended since the unfair labor practice charge was originally filed. This has occurred in the face of the express offer and the continued willingness of the activity to resume bargaining. This has meant, in its most serious aspect, that

---

<sup>5/</sup> While private sector precedents are not controlling in the Federal labor-management relations program, various decisions of the National Labor Relations Board illustrate this observation. See, for example, Fred F. Knipschild, et al., d/b/a General Dehydrated Foods, 45 NLRB No. 145 (1942), Nocona Boot Company, 116 NLRB No. 273 (1956), and Whiting Milk Company, 145 NLRB No. 137 (1964).

<sup>6/</sup> The Assistant Secretary's finding that the activity violated section 19(a)(1) is based on the same conduct as that which he found to constitute a violation of section 19(a)(6). Accordingly, as there is no basis in that conduct for the finding of a violation of section 19(a)(6), there is also, and for the same reasons, no basis for the finding of a violation of section 19(a)(1).

the employees in the professional unit have been without the protection afforded by a collective bargaining agreement during the entire period in which the complaint was processed. In the opinion of the Council, litigation of this sort does not effectuate the long-term establishment of collective bargaining in the Federal program. The Preamble of Executive Order 11491, as amended, states one of the purposes of the Federal labor relations program as "the maintenance of constructive and cooperative relationships between labor organizations and management officials . . . ." <sup>7/</sup> To that end, the Order provides the means for the establishment and maintenance of such relationships. Nevertheless, the primary responsibility for maintaining cooperation between labor organizations and management lies with those parties themselves. <sup>8/</sup> Thus, it

7/ The Preamble of Executive Order 11491, as amended, reads as follows:

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees. [Executive Order 11491, As Amended, Labor-Management Relations in the Federal Service (1975), p. 7.]

8/ In the report accompanying Executive Order 11491, emphasis was placed on the informal resolution by the parties of alleged unfair labor practices prior to the filing of a complaint with the Assistant Secretary: "Alleged unfair labor practices other than those subject to an applicable grievance or appeals procedure should be investigated by the agency and labor organization involved and informal attempts to resolve the complaints should be made by the parties. If informal attempts are unsuccessful in disposing of the complaints within a reasonable period of time,

(Continued)

does not serve the purposes of the Order when the parties use the sanctions provided therein as the first, and not the last, resort for the settlement of their disputes. Cooperative labor relations are not established or maintained when a labor organization or the management of an agency establishes as its first priority, not the negotiation of a collective bargaining agreement, but the vindication of its position in an unfair labor practice proceeding.

The purposes of the Order will best be served if cases such as the one herein are screened from the unfair labor practice procedures of the Assistant Secretary. In its recent review of the Federal labor relations program under the Executive Order, the Council concluded "that the processing of unfair labor practice cases can be improved greatly if the Assistant Secretary, pursuant to his authority to prescribe regulations needed to administer his functions under the Order, modifies his procedure to permit members of his staff to conduct such independent investigation in these cases as he deems necessary in order to determine whether there is a reasonable basis for the complaint. . . . This procedure will, in our view, facilitate the informal resolution of unfair labor practice issues."<sup>9/</sup> Consistent with this recommendation, the Assistant Secretary

---

(Continued)

both parties may agree to stipulate the facts to the Assistant Secretary and request a decision. In lieu of a joint request, either party may request the Assistant Secretary to issue a decision on the matter." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section D.3., p. 69. The Assistant Secretary's regulations, as a condition precedent to the filing of a complaint, require that an attempt be made by the parties to resolve informally the alleged unfair labor practice. Rules and Regulations of the Assistant Secretary, section 203.2.

Moreover, by way of analogy, what was said in that same report pertaining to the resolution of negotiation impasses is equally applicable to the resolution of disputes between parties over unfair labor practices: "The ready availability of third-party procedures for resolution of negotiation impasses could cause the undesired escalation effect whereby the parties, instead of working out their differences by hard, earnest and serious negotiation, continually would take their problems to a third party for settlement. . . . It is generally recognized that agreements voluntarily arrived at by the parties are the hallmark of the industrial democracy enjoyed in this country." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section F, pp. 72-73.

<sup>9/</sup> Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, As Amended, Labor-Management Relations in the Federal Service (1975), Section VIII.2., p. 49.

has promulgated and published regulations which establish his authority to investigate unfair labor practice complaints.<sup>10/</sup> In the opinion of

10/ The Rules and Regulations of the Assistant Secretary, section 203.6 provide as follows:

Section 203.6 Investigation of complaints; cooperation by activities, agencies and labor organizations; official time for witnesses; burden of proof; and availability of evidence.

The Area Director shall conduct such independent investigation of the complaint as he deems necessary.

(a) A party may request the Area Director to conduct an independent investigation upon a showing:

(1) That there is sufficient information to warrant further processing of the complaint; and

(2) that there are prospective individual witnesses from whom he has been unable to obtain a signed statement because of geographic dispersion of the witnesses or because of their reluctance to provide information to a party; the request must clearly identify any such witnesses and indicate the nature of their expected testimony; or

(3) that the requesting party lacks access to pertinent documents or data; the request should clearly identify such documents or data, establish their relevance, and indicate the reason why the requesting party has been unable to obtain them.

(b) At the conclusion of any independent investigation conducted at the request of a party, to the extent legally permissible, the Assistant Regional Director shall:

(1) transmit to the requesting party any data or copies of any documents obtained as a result of such investigation, notifying all other parties so that they may be supplied copies of the same upon request;

(2) transmit to all parties copies of signed statements obtained from any witness interviewed;

(3) notify the requesting party of the names of all prospective witnesses identified by him who have been contacted and who have not signed statements.

(c) In connection with the independent investigation of complaints, activities, agencies and labor organizations are expected to cooperate fully in such investigations with the Area Director.

(d) When, during the course of an independent investigation by the Area Director, it is determined that a certain employee or certain employees should be interviewed, such employee or employees shall be granted official time for the period of such interview(s) only insofar as such interview(s) occur(s) during regular work hours and when the employee(s) would otherwise be in a work or paid leave status.

(e) The complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint, except as otherwise provided in section 203.7(b).

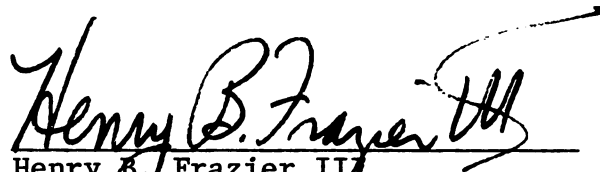
(f) A complaint alleging a violation of section 19(b)(4) of the order shall receive the highest priority investigation.

(g) A complaint alleging a violation of section 19(a)(2) of the order shall be given priority over all other complaints under section 19 except those involving section 19(b)(4) of the order.

the Council, this investigative authority of the Assistant Secretary provides a mechanism by which unnecessary litigation of this sort may be diverted from the unfair labor practice procedures. Through investigation into the circumstances of cases in which contract negotiations have broken down due to conduct alleged to constitute an unfair labor practice, the Assistant Secretary will be able to identify those in which a continued willingness to bargain exists and the effects of the alleged impropriety, if any improper conduct occurred, have been removed. Where such circumstances are found to exist, and it is clear that nothing more is to be gained by the parties, the employees, or the Federal program in the further processing of the complaint, the Assistant Secretary may properly dismiss that complaint, thereby removing it from the litigation process.<sup>11/</sup>

For the foregoing reasons, we find that the Assistant Secretary's decision that the activity violated section 19(a)(1) and (6) in the circumstances of this case is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.

  
Henry B. Frazier II  
Executive Director

Issued: August 8, 1975

<sup>11/</sup> It should be noted that this is not the only means open to the Assistant Secretary for screening unnecessary litigation from the unfair labor practice procedures. In the report and recommendations accompanying Executive Order 11491, it was stated: "If the Assistant Secretary finds . . . that a satisfactory offer of settlement has been made, he may dismiss the complaint." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section D.3., p. 69. Pursuant to this recommendation, the Assistant Secretary has provided in his regulations for such settlements. Rules and Regulations of the Assistant Secretary, section 203.7(a)(3). See also section 203.7(b)(4).



Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, A/SLMR No. 372.

This appeal arose from a Decision and Direction of Elections of the Assistant Secretary finding appropriate, and directing elections in, two units in the Cleveland, Ohio, Defense Contract Administration Services Region (DCASR), wherein the unions here involved -- Local 3426, American Federation of Government Employees, AFL-CIO and Local 73, National Federation of Federal Employees -- had filed separate petitions for recognition. Upon appeal by the agency, the Council determined that a major policy issue was presented by the decision of the Assistant Secretary, namely: Whether the Assistant Secretary correctly interpreted the Council's decision in Merchant Marine (FLRC No. 71A-15, Report No. 30) to require that "where certain labor relations and personnel policies are established by the DCASR Headquarters . . . it is the obligation of the DCASR to provide representatives with respect to the units found appropriate [in this case] 'who are empowered to negotiate and enter into an agreement on all matters within the scope of negotiations in the bargaining unit.'" (Report No. 60))

Council action (August 13, 1975). The Council concluded that the Assistant Secretary misinterpreted and misapplied the Merchant Marine decision. Accordingly, since the Assistant Secretary relied in part on an erroneous interpretation and application of Merchant Marine in finding the separate units appropriate in the present case, the Council, pursuant to section 2411.17(b) of its rules and regulations (5 CFR 2411.12 (b)), set aside the Assistant Secretary's decision and remanded the case to him for reconsideration and disposition consistent with the principles discussed in the Council's opinion.

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

Defense Supply Agency, Defense  
Contract Administration Services  
Region (DCASR), Cleveland, Ohio,  
Defense Contract Administration  
Services Offices (DCASO's),  
Akron, Ohio, and Columbus, Ohio

and

A/SLMR No. 372  
FLRC No. 74A-41

Local 3426, American Federation  
of Government Employees, AFL-CIO

and

Local 73, National Federation  
of Federal Employees

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and direction of elections of the Assistant Secretary finding appropriate, and directing elections in, two units in the Cleveland, Ohio, Defense Contract Administration Services Region (DCASR).

The Cleveland DCASR, a primary level field activity of the Defense Supply Agency, consists, in part, of several subordinate Defense Contract Administration Services Offices (DCASO's) throughout Ohio. In two of the DCASO's the unions here involved filed separate petitions for recognition: Local 3426, American Federation of Government Employees (AFGE), seeking an officewide unit in the Akron DCASO, and Local 73, National Federation of Federal Employees (NFFE), seeking a similar unit in the Columbus DCASO. Both the Akron and Columbus DCASO's contended, in opposition to the petitions, that only a single, DCASR-wide unit would be appropriate.

The Assistant Secretary determined that each of the two units sought by the unions was appropriate for the purposes of exclusive recognition under the Order. In reaching this determination, the Assistant Secretary concluded that the employees in each unit shared a clear and identifiable community of interest separate and distinct from other employees of the DCASR, Cleveland, and that the units sought would promote effective dealings and efficiency of agency operations.

With special regard to effective dealings and efficiency of agency operations, the Assistant Secretary noted that there were currently four exclusive units within DCASR, Cleveland, two of which were then covered by a negotiated agreement. Further, he rejected an agency argument that certification of less than a regionwide unit would limit the scope of negotiation solely to those matters within the delegated discretionary authority of the particular chief of the particular individual subordinate unit involved. In the latter connection, the Assistant Secretary reasoned:

As stated by the Federal Labor Relations Council (Council) in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 [(November 20, 1972), Report No. 30], "Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and to enter into agreements on all matters within the scope of negotiations in the bargaining unit." Applying the Council's rationale to the instant situation, where certain labor relations and personnel policies are established by the DCASR headquarters, in my view, it is the obligation of the DCASR to provide representatives with respect to the units found appropriate herein "who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."

Following the Assistant Secretary's decision, elections were conducted and certifications issued. Thereafter, the Assistant Secretary's decision was appealed to the Council by the Defense Supply Agency (DSA) and the Department of Defense. Upon consideration of the petition for review, and the opposition for review filed by NFFE, the Council determined that a major policy issue was presented by the decision of the Assistant Secretary, namely: Whether the Assistant Secretary correctly interpreted the Council's decision in Merchant Marine to require that "where certain labor relations and personnel policies are established by the DCASR Headquarters . . . it is the obligation of the DCASR to provide representatives with respect to the units found appropriate [in this case] 'who are empowered to negotiate and enter into an agreement on all matters within the scope of negotiations in the bargaining unit.'"

Briefs were filed by DSA, NFFE, and AFGE. Additionally, the Department of Treasury and the Department of Health, Education, and Welfare were permitted to file briefs as amicus curiae.

### Opinion

As previously indicated, the Assistant Secretary in concluding that separate DCASO units would promote effective dealings and efficiency of agency operations, relied in part on his interpretation of the Council's decision

in the Merchant Marine case. More particularly, the Assistant Secretary interpreted Merchant Marine as, in effect, requiring that even where labor relations and personnel policies are properly established on matters at the higher agency level of DCASR headquarters, DCASR must nevertheless provide representatives at the local level to negotiate and enter into agreements on those matters, provided they are not otherwise excluded from the scope of bargaining at the local level. The question accepted for review is whether such interpretation of Merchant Marine was proper.

In the Merchant Marine case, the agency contended that the union's proposals on faculty salary at the Merchant Marine Academy were nonnegotiable because they were outside the scope of bargaining by reason of various laws, outside regulations, and substantive agency directives, and because they were "outside the delegated bargaining authority of the Superintendent of the Academy" under cited higher level agency issuances. The Council ruled first that the proposals were within the scope of bargaining at the Academy level and then rejected the agency's claim that limitations on the delegated bargaining authority rendered the proposals nonnegotiable. The Council stated in the latter regard (at p. 7 of Council decision):

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.

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. [Emphasis in original, footnote omitted.]

In essence, the Council thus decided in the Merchant Marine case that, where a matter is found to be negotiable at the local level of exclusive recognition, then the agency must provide representatives who are empowered to negotiate on that matter at the local level, so as to fulfill its bargaining obligation under section 11(a) of the Order.

Turning to the instant case, it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order.<sup>1/</sup> Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.

Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.

We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need,"<sup>2/</sup> DCASR directives as such would not thereafter serve to limit the scope of bargaining at

1/ Section 11(a) of the Order, as presently effective, provides:

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, a national or other controlling agreement at a higher level in the agency, and this Order. . . .

2/ Under E.O. 11838, section 11(a) is amended to read, in pertinent part, as follows (underscoring supplied):

(Continued)

the DCASO level -- because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision."<sup>3/</sup> However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.

In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units.<sup>4/</sup> The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. In more detail, as stated in section IV. of the Report accompanying E.O. 11838:<sup>5/</sup>

Almost all agencies and labor organizations which participated in the general review expressed strong support for a policy which would facilitate the consolidation of existing exclusive recognitions. Moreover, we are convinced from our experience and analysis that the Federal labor-management relations program will be improved by a reduction in the unit fragmentation which has developed over the 12 years of labor-management relations under Executive orders.

The consolidation of units will substantially expand the scope of negotiations as exclusive representatives negotiate at higher authority levels in Federal agencies. The impact of Council decisions holding

---

(Continued)

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

These amendments to section 11(a) are to become effective 90 days after issuance by the Council of the criteria for determining compelling need.

<sup>3/</sup> See section V.1.(b). of Report accompanying E.O. 11838, Labor-Management Relations in the Federal Service (1975), at p. 39.

<sup>4/</sup> Labor-Management Relations in the Federal Service (1975), at p. 38.

<sup>5/</sup> Id. at pp. 35-37.

proposals negotiable will be expanded. In our view, the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest.

We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. We believe that the proposed modifications of the Order and subsequent actions of the Assistant Secretary will facilitate the consolidation of existing units, which will do much to accomplish the policy of creating more comprehensive units. We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units. [Emphasis supplied.]

Accordingly, pursuant to section 2411.17(b) of the Council's rules and regulations, we hereby set aside the Assistant Secretary's decision and remand the case to him for reconsideration and disposition consistent with the principles discussed herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: August 13, 1975

Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator). The arbitrator denied the union's grievance based on a determination that the parties' agreement had expired at the time of the alleged violation by the shipyard. The union filed exceptions to the arbitrator's award with the Council alleging that (1) the arbitrator, in effect, based his award on a memorandum of understanding between the parties which violated section 13(e) of the Order; (2) in effect, the arbitrator erroneously interpreted the parties' agreement; (3) the arbitrator made findings of fact not supported by the record; and (4) in effect, the arbitrator failed to find that an unfair labor practice had been committed by the shipyard.

Council action (August 14, 1975). As to (1), the Council held that this exception provides no basis for acceptance of the petition under section 2411.32 of the Council's rules (5 CFR 2411.32) and, moreover, that there is a fundamental inconsistency between this exception and the union's basic position that the agreement had been properly renewed for a 2-year period. As to (2), (3) and (4), the Council held that these exceptions did not assert a ground upon which the Council will grant a petition for review of an arbitration award under its rules. Accordingly, the Council denied review of the union's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Mr. Stephen L. Whitehead, President  
Tidewater Virginia Federal Employees  
Metal Trades Council, AFL-CIO  
Building 234, Norfolk Naval Shipyard  
Portsmouth, Virginia 23709

Re: Norfolk Naval Shipyard and Tidewater  
Virginia Federal Employees Metal  
Trades Council, AFL-CIO (Strongin,  
Arbitrator), FLRC No. 74A-85

Dear Mr. Whitehead:

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

As stated in the award, the shipyard and the union entered into a collective bargaining agreement for a 2-year period from October 1, 1971, with renewal and termination subject to the provisions of Article XXVII, Section 1 of the agreement.<sup>1/</sup> On August 20, 1973, the union gave appropriate and timely notice of its desire to renew

---

<sup>1/</sup> According to the arbitrator's award, Article XXVII, Section 1, of the agreement provides:

This agreement shall be binding upon the EMPLOYER and the Council for a period of two (2) years from the date of approval by the Office of Civilian Manpower Management unless either party shall notify the other party in writing at least sixty (60) calendar days but not more than ninety (90) calendar days prior to such date or to any subsequent anniversary date of its desire to terminate this agreement. If either party gives notice as aforesaid to the other party, then within thirty days from receipt of said notice, representatives of the EMPLOYER and the Council shall meet and consult as to further negotiations or other courses of action. It is further provided that this agreement shall

(Continued)

the agreement. The parties thereafter extended the agreement until December 31, 1973, by a Memorandum of Understanding of September 17, 1973.<sup>2/</sup> A dispute arose when, after December 31, 1973, the shipyard, taking the position that the agreement had terminated, instituted a change in the hours of work. The union adhered to the position previously taken that the agreement was still in effect because it had been automatically extended for 2 years. The dispute ultimately went to arbitration without a waiver by the agency of its position that the agreement, including its arbitration provisions, had expired.

The arbitrator formulated the basic issue submitted to arbitration as whether the October 1, 1971, agreement "had expired (as the Shipyard contends) or had been renewed and was in effect (as the Union contends) in January, 1974 when the Shipyard changed the work hours of the . . . unit, in contravention of the Agreement, if it was still in existence."

The arbitrator in his decision stated that Section 1 of Article XXVII of the agreement "contains certain obvious ambiguities which have contributed to, if indeed they have not caused" the dispute before him. After reviewing the bargaining history of Section 1, the arbitrator concluded that the parties had "deliberately rejected an automatic annual renewal in the absence of timely notice, and substituted a provision calling for repeated two-year terms if, but only if, the parties reexecuted the Agreement." The arbitrator determined that the

---

(Continued)

automatically terminate at any time it is determined by the appropriate authority under the Standards of Conduct and Code of Fair Labor Practices that the Council is no longer entitled to exclusive recognition under Executive Order 11491. This agreement may be automatically renewed for periods of two (2) years provided that the agreement is brought into conformance with published policies and regulations, is reexecuted by the parties, and approved by the Office of Civilian Manpower Management.

<sup>2/</sup> According to the arbitrator's award, the September 17, 1973, Memorandum of Understanding provides, in pertinent part:

It is agreed and understood between the parties that the provisions of the negotiated agreement . . . initially approved on 1 October 1971 will remain in full force and effect until 31 December unless terminated earlier by the approval of a new agreement . . . [and] . . . that further continuation of the agreement will be made if it is mutually agreed that negotiations are proceeding satisfactorily.

agreement, "not having been reexecuted or further extended, expired after the extension to December 31. Consequently, Article XII of the Agreement specifying hours of work was not in effect, and hence was not violated when the Shipyard changed the hours of work in January, 1974." Accordingly, the arbitrator denied the grievance.

The union requests that the Council accept its petition for review of the arbitrator's award. In its petition for review, the union appears to advance four exceptions to the 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."

One of the union's exceptions contends that the arbitrator, in effect, based his award on a Memorandum of Understanding which violated section 13(e) of the Order.<sup>3/</sup> The union asserts that the Memorandum of Understanding extended for 90 days the provisions of the agreement and, notwithstanding section 13(a) of the Order,<sup>4/</sup> left intact the optional grievance procedure specified in Article XXVI, Section 7 of

---

<sup>3/</sup> Section 13(e) of the Order, in effect at the time the union filed its petition for review, stated in pertinent part:

No agreement may be established, extended or renewed after the effective date of this Order which does not conform to this section. . . .

Section 13(e) was revoked by E.O. 11838. However, in view of the Council's disposition of the case, there is no need to determine the effect of the section's revocation on this case.

<sup>4/</sup> Section 13(a) of the Order, in effect at the time the union filed its petition for review, stated in pertinent part:

. . . A negotiated grievance procedure . . . shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances.

While the subject award of the arbitrator was made prior to the issuance of E.O. 11838, section 13(a) of the Order was not changed by E.O. 11838 in respects which are material in the present case.

the agreement.<sup>5/</sup> The Council will grant review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. However, the union has shown no nexus between the allegedly illegal provision in the agreement and the award. That is to say, there is no indication that the award gives effect to the alleged nonconforming provision. Therefore, this exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules. Moreover, there is a fundamental inconsistency between this exception and the union's basic position that the agreement had been properly renewed for a 2-year period. In asserting that the arbitrator based his award on a Memorandum of Understanding which, in effect, extended for 90 days an agreement which contained an optional grievance procedure allegedly in violation of the Order, the union is taking the position that the extension was improper. Yet this is directly contrary to the union's underlying position that the agreement had been properly extended and remained valid for 2 years after the original termination date. Thus, the union is contending, in effect, that a 90-day extension of the agreement was illegal, but that a 2-year extension of that same agreement was legal.

As a second exception the union contends, in effect, that the arbitrator, in determining that the agreement expired, erroneously interpreted the agreement. However, the Council has held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44. Therefore, this exception does not assert a ground upon which the Council will grant a petition for review of an arbitration award under its rules.

As a third exception, the union contends that the arbitrator made findings of fact not supported by the record. However, the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal. Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (December 20, 1974), Report No. 61. Thus, this exception does not assert a ground upon which the Council will grant a petition for review of an arbitration award under its rules.

---

<sup>5/</sup> According to the union's petition, Section 7 of Article XXVI (GRIEVANCE PROCEDURE) of the agreement states:

The employee must state in his written appeal his irrevocable choice of either the shipyard grievance procedure or the negotiated grievance procedure contained in this Article.

As a fourth exception the union contends, in effect, that the arbitrator, although recognizing that the shipyard misled the union on matters to be negotiated, failed to find that the shipyard engaged in bad faith consultation in violation of section 11(a) of the Order<sup>6/</sup> and, therefore, the award violates the Order. This contention in essence alleges that the arbitrator failed to find that an unfair labor practice had been committed. However, a contention that an arbitrator has failed to decide, during the course of a grievance arbitration hearing, whether an unfair labor practice has been committed under section 19 of the Order does not state a ground upon which the Council will accept a petition for review of an arbitration award.<sup>7/</sup>

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A. Di Pasquale  
Navy

6/ Section 11(a) of the Order states 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 . . . .

7/ Section 6(a)(4) of the Order provides:

The Assistant Secretary shall decide unfair labor practice complaints . . . .

Section 19(d) of the Order states in pertinent part:

All complaints under this section [Sec. 19. Unfair labor practices.] that cannot be resolved by the parties shall be filed with the Assistant Secretary.

See Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76.

Headquarters, Army and Air Force Exchange Service, Ohio Valley Exchange Region, Assistant Secretary Case No. 50-11136 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that there was insufficient evidence to establish a reasonable basis for the complaint filed by the American Federation of Government Employees, AFL-CIO, which alleged that the activity violated section 19(a)(1) and (6) of the Order by its refusal to sign a previously negotiated agreement because a decertification petition had been filed by unit employees in the period between "final negotiations" and formal execution of the contract. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and raises major policy issues.

Council action (August 14, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue. Therefore, since the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied review of the appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Mr. James R. Rosa, Staff Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Headquarters, Army and Air Force  
Exchange Service, Ohio Valley  
Exchange Region, Assistant Secretary  
Case No. 50-11136 (CA), FLRC No. 75A-35

Dear Mr. Rosa:

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

In your complaint you alleged that the Army and Air Force Exchange Service, Ohio Valley Exchange Region, Charlestown, Indiana (the activity) violated section 19(a)(1) and (6) of the Order by its refusal to sign a previously negotiated agreement because a decertification petition had been filed by unit employees in the period between "final negotiations" and formal execution of the contract. In agreement with the Assistant Regional Director (ARD), the Assistant Secretary found that there was insufficient evidence to establish a reasonable basis for the complaint, inasmuch as AFGE had presented no evidence that the agreement "was signed, or was requested to be signed, prior to the filing of the decertification petition," or that the activity "refused to sign the agreement prior to the filing of such petition." Rather, AFGE merely alleged that an initialled copy of the agreement existed which it would present at a later date, which the Assistant Secretary found did not satisfy the burden of proof imposed upon complainants by section 203.5(c) of his regulations. The Assistant Secretary concluded, therefore, that the activity was not obligated to comply with the union's request to sign the agreement during the pendency of the decertification petition. Noting also that the negotiated agreement was not ratified by the local union membership until after the filing of the decertification petition, the Assistant Secretary denied the request for reversal of the ARD's dismissal of the complaint.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and raises major policy issues, because: (1) it is based upon a misunderstanding of the facts and evidence; and (2) it is based upon improperly considered "evidence," and the Assistant Secretary's decision notes matters not relevant to the case. You further allege that additional major policy issues are presented in that: (1) the

Assistant Secretary improperly dismissed AFGE's complaint on the grounds that a reasonable basis for the complaint had not been established, since it is sufficient for a claimant at the investigational stage of an unfair labor practice proceeding to allege facts which, if proved at a hearing, would entitle the claimant to relief; and (2) the Assistant Secretary deviated from established private sector law relating to management's duty to execute a contract previously agreed upon by the parties, and deviated from established public and private sector law relating to the effect of a decertification petition upon management's duty to execute a contract previously reached by the parties.

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

You allege that the Assistant Secretary's decision presents major policy issues concerning a claimant's burden of proof at the investigational stage of an unfair labor practice proceeding, and concerning evidence considered and relied upon by the Assistant Secretary herein. The Assistant Secretary, pursuant to his authority under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, has provided in section 203.7(a) of his regulations (redesignated section 203.8(a) as of May 7, 1975):

If the Assistant Regional Director determines that . . . a reasonable basis for the complaint has not been established . . . he may dismiss the complaint.

Further, section 203.5(c) (redesignated section 203.6(e) as of May 7, 1975) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, he may dismiss the complaint." His decision in your case was based on the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such a regulatory requirement or that he wrongly applied these regulations to the facts and circumstances of this case.

With respect to your contention that the Assistant Secretary's decision presents major policy issues in that it deviates from established private



and public sector law relating to management's duty to execute a contract previously agreed upon by the parties, notwithstanding the existence of a decertification petition raising a valid question concerning representation, the Council is of the opinion that no major policy issue exists warranting review, noting particularly that the decision of the Assistant Secretary does not appear to be inconsistent with applicable precedent. See Headquarters, U.S. Army Aviation Systems Command, FLRC No. 72A-30 (July 25, 1973), Report No. 42.

Finally, with regard to your contention that the Assistant Secretary's decision is arbitrary and capricious in that it notes matters not relevant to the case, specifically that the agreement was not ratified by local union membership prior to the filing of the decertification petition, in the Council's view the Assistant Secretary merely noted this fact without relying on it in reaching his decision, and therefore we need not consider whether it would have been proper for him to have done so. Accordingly, no basis for review is presented by this contention.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

W. C. Valdes  
Dept. of Defense

Federal Deposit Insurance Corporation, A/SLMR No. 459. The Assistant Secretary, upon a representation petition filed by the American Federation of Government Employees, Local 3488, AFL-CIO, determined, in pertinent part, that commissioned bank examiners are not supervisors within the meaning of section 2(c) of the Order. The agency appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (August 14, 1975). The Council held that the agency's petition does not meet the requirements for review under section 2411.12 of the Council's rules (5 CFR 2411.12); that is, the findings and decision of the Assistant Secretary do not appear in any manner arbitrary and capricious, nor do they present any major policy issues. Accordingly, the Council denied review of the agency's appeal. The Council likewise denied the agency's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Mr. John F. Betar  
Administrative Counsel  
Office of the General Counsel  
Federal Deposit Insurance Corporation  
Washington, D.C. 20429

Re: Federal Deposit Insurance Corporation,  
A/SLMR No. 459, FLRC No. 75A-39

Dear Mr. Betar:

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

In this case, the American Federation of Government Employees, Local 3488, AFL-CIO (AFGE), sought an election in a unit of all full-time employees, including commissioned bank examiners, of the Federal Deposit Insurance Corporation, New York Region (the activity).<sup>1/</sup> The Assistant Secretary determined, in pertinent part, that commissioned bank examiners are not supervisors within the meaning of section 2(c) of the Order, because:

[T]he evidence is insufficient to establish that supervisory authority has been vested in the Activity's Commissioned Bank Examiners, inasmuch as they do not hire, discharge, or reassign employees and when they act as examiners-in-charge, which is not required on a regular and continuing basis, such direction as they give to other employees is routine in nature, is within established guidelines and is dictated by established procedures. Nor does the evidence establish that they promote or effectively evaluate other employees.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious because, in essence, it totally rejects the agency's testimony and evidence presented, and fails to answer any of the agency's arguments establishing that commissioned bank examiners perform one or more of the functions enumerated in section 2(c) of the Order when performing as Examiners-in-Charge of bank examinations, when directing subordinate employees in the examination of a branch or

---

<sup>1/</sup> Of the approximately 160 bank examiners in the 180-employee unit sought, 70-75 are commissioned bank examiners ranging in grade from GS-11 through GS-14.

department of a bank, or when acting as training/evaluation team leaders. You further contend that the Assistant Secretary's decision presents major policy issues in that it: (1) fails to recognize that several of the functions performed by the commissioned bank examiners, when acting as Examiners-in-Charge, qualify them as supervisors within the meaning of section 2(c) of the Order; and (2) appears to hold that an employee must perform supervisory functions 100 percent of the work year to qualify as a supervisor within the meaning of section 2(c), which would be a qualification of the language of that section, contrary to the decisions in China Lake<sup>2/</sup> and Mare Island,<sup>3/</sup> and would be inconsistent with other Assistant Secretary precedents.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious, nor do they present any major policy issues. With regard to your contention concerning evidence considered and relied upon, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that commissioned bank examiners are not supervisors within the meaning of section 2(c), in that such decision is based upon established principles reflected in his previous published decisions and upon the record in the case. See Arizona National Guard, Air National Guard, Sky Harbor Airport, FLRC No. 74A-78 (February 21, 1975), Report No. 64.

With regard to your contention that the Assistant Secretary's determination herein that commissioned bank examiners are not supervisors when performing as Examiners-in-Charge is inconsistent with the Council's decisions in China Lake and Mare Island, supra, in that the record establishes that Examiners-in-Charge exercise several of the supervisory functions enumerated in section 2(c), the Council is of the opinion that no major policy issue is presented, noting particularly that the Assistant Secretary found that Examiners-in-Charge do not exercise independent judgment in performing any functions enumerated in section 2(c) and only perform such functions in isolated instances.

With respect to your related contention that the Assistant Secretary's decision appears to hold that an employee must perform supervisory functions 100 percent of the work year to qualify as a supervisor, in the Council's view no major policy issue is presented by the decision herein, since the Assistant Secretary did not make such a determination but, rather, merely found that commissioned bank examiners perform Examiner-in-Charge functions on an irregular and non-continuing basis

---

2/ U.S. Naval Weapons Center, China Lake, California, FLRC No. 72A-11 (May 25, 1973), Report No. 40.

3/ Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12 (May 25, 1973), Report No. 40.

and exercise supervisory functions in that capacity only in isolated instances. As noted by the Council in Labor-Management Relations in the Federal Service (1975), p. 32:

[T]he Assistant Secretary has held, in effect, that mere intermittent and infrequent possession or assignment of supervisory functions is not a sufficient basis for a supervisory determination. Thus, the frequency and regularity with which supervisory authority is exercised has been made an element in the application of the definition.

The Council agrees with the view expressed in the review that only genuine supervisory positions should be excluded from bargaining units. The Council wishes to note that the definition in the Order was designed to do this and contains a number of qualifications to this end. For example--"in the interest of an agency", "responsibly to direct [employees]", "effectively to recommend", and "exercise of authority . . . not of a merely routine or clerical nature, but [requiring] the use of independent judgment"--are limitations which were designed to assure that persons determined to be supervisors would possess actual authority, as distinct from work leaders, and would be found to be in bona fide conflict of interest situations if not excluded from bargaining units. The Council believes that the continued careful application by the Assistant Secretary of these qualifications in the making of supervisory determinations will aid in identifying genuine supervisory positions.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

H. L. Erdwein  
AFGE

Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3246. The Assistant Secretary, in agreement with the Assistant Regional Director, dismissed the unfair labor practice complaint of the individual complainant in this case as untimely filed. The complainant appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues; and requested a stay of the Assistant Secretary's decision.

Council action (August 14, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue. Accordingly, since the complainant's petition failed to meet the requirements for review under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12), the Council denied review of the appeal. The Council likewise denied the complainant's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Mr. Richard L. Robertson  
Chief Steward, International Brotherhood  
of Electrical Workers, Local 574  
632 Fifth Street  
Bremerton, Washington 98310

Re: Puget Sound Naval Shipyard, Bremerton,  
Washington, Assistant Secretary Case  
No. 71-3246, FLRC No. 75A-47

Dear Mr. Robertson:

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

In this case, you filed a pre-complaint unfair labor practice charge and subsequent complaint against Puget Sound Naval Shipyard, Bremerton, Washington (the activity), on behalf of an employee who had received an allegedly improper "reprimand notice." In agreement with the Assistant Regional Director (ARD), the Assistant Secretary dismissed your complaint as untimely filed, since the alleged unfair labor practice occurred more than six months prior to the date on which the pre-complaint charge was filed and more than nine months prior to the date on which the complaint was filed, and therefore did not meet the timeliness requirements contained in section 203.2(a)(2)<sup>1/</sup> and 203.2(b)(3)<sup>2/</sup> of his regulations.

1/ Section 203.2(a)(2) provides, in pertinent part:

(a) Action to be taken before filing a complaint. A party desiring to file a complaint alleging an unfair labor practice under section 19 of the order, other than section 19(b)(4), must take the following action first:

(2) The charge must be filed within six (6) months of the occurrence of the alleged unfair labor practice;

2/ Section 203.2(b)(3) provides, in pertinent part:

(b) Timeliness of a complaint.

(3) A complaint must be filed within nine (9) months of the occurrence of the alleged unfair labor practice or

(Continued)

In your petition for review you contend that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues because, in summary, the decision deviates from established principles set forth in federal court decisions; section 206.8<sup>3/</sup> of the Assistant Secretary's regulations should prevail over the requirements for timely filing set forth in section 203.2 of his regulations when a valid claim or defense has been asserted and there is no showing to the contrary; and, further, the Assistant Secretary abused his discretion under section 206.8 of his regulations by dismissing the complaint without addressing the mitigating circumstances set forth in the request for review of the ARD's determination filed with the Assistant Secretary.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear arbitrary and capricious nor do they present any major policy issues. With regard to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his decision. Further, as to your contention that his decision is arbitrary and capricious and presents major policy issues, pursuant to the authority of the Assistant Secretary under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, the Assistant Secretary has promulgated regulations which provide, in pertinent part, that a pre-complaint charge and a complaint must be filed within six and nine months, respectively, of the occurrence of the alleged unfair labor practice. His decision in your case was based on the application of these regulations, and your petition presents no persuasive reasons to show that the

---

(Continued)

within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time.

3/ Section 206.8 of the Assistant Secretary's regulations (designated as section 206.9 as of May 7, 1975), provides, in pertinent part:

(a) The regulations in this chapter may be construed liberally to effectuate the purposes and provisions of the order.

(b) When an act is required or allowed to be done at or within a specified time, the Assistant Secretary may at any time order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the order.

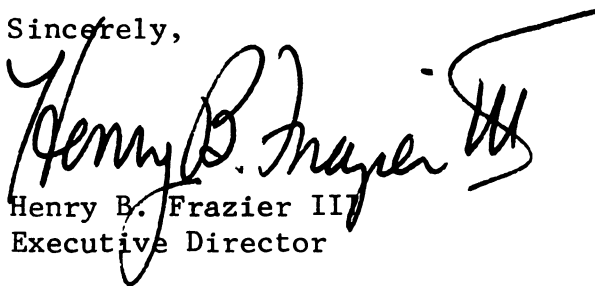


Assistant Secretary was without authority to establish such a regulatory requirement or that he wrongly applied these regulations to the facts and circumstances of this case. In this regard, we note that while you allege that the Assistant Secretary abused his discretion under section 206.8 of his regulations by dismissing the complaint as untimely filed without addressing the mitigating circumstances set forth in your request to him for review of the ARD's determination, your petition for review to the Council fails to set forth any circumstances to support this allegation or to demonstrate that his dismissal is inconsistent either with the purposes of the Order or with other applicable authority.

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

By the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry B. Frazier III", with a stylized flourish at the end.

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

A. L. McFall  
J. C. Causey  
Navy

Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2575. The Assistant Secretary, in agreement with the Acting Assistant Regional Director, found that the National Federation of Federal Employees (NFFE) did not present sufficient evidence to establish a reasonable basis for its complaint, which alleged that the activity violated section 19(a)(1) and (2) of the Order by failing to grant an employee and his representative, the president of NFFE Local 1167, either official time or an extension of time to appeal the activity's denial of the employee's grievance under the agency grievance procedure. Accordingly, the Assistant Secretary denied NFFE's request for review of the Acting ARD's dismissal of the complaint. The union appealed to the Council, contending that the Assistant Secretary's decision presents a major policy issue and was arbitrary and capricious.

Council action (August 14, 1975). The Council held that the Assistant Secretary's decision does not present a major policy issue and does not appear arbitrary and capricious. Accordingly, since the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12), the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Ms. Lisa Renee Strax, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Headquarters, 31st Combat Support  
Group (TAC), Homestead Air Force  
Base, Florida, Assistant Secretary  
Case No. 42-2575, FLRC No. 75A-51

Dear Ms. Strax:

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

The Assistant Secretary denied NFFE's request for review seeking reversal of the Acting Assistant Regional Director's dismissal of NFFE's complaint which alleged that Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida (the activity) violated section 19(a)(1) and (2) of the Order by failing to grant an employee and his representative, the president of NFFE Local 1167, either official time or an extension of time to appeal the activity's denial of the employee's grievance under the agency grievance procedure.

The Assistant Secretary, in agreement with the Acting Assistant Regional Director, found that NFFE did not present sufficient evidence to establish a reasonable basis for the complaint; specifically, NFFE failed to show in the particular circumstances of this case involving the processing of a grievance under an agency grievance procedure, that the activity's refusal to grant official time or an extension of time was motivated by antiunion considerations. The Assistant Secretary also noted, as did the Acting Assistant Regional Director, that "a violation of the agency grievance procedure would not, by itself, constitute a violation of section 19 of the Order" in any event.

In your appeal to the Council, you contend that the Assistant Secretary's decision presents a major policy issue as to whether the circumstances of the case support a violation of section 19(a)(1) and (2) of the Order. Such contention constitutes, in effect, nothing more than disagreement with the Assistant Secretary's finding that NFFE had not presented sufficient evidence to establish a reasonable basis for the complaint. It does not, therefore, present a major policy issue warranting Council

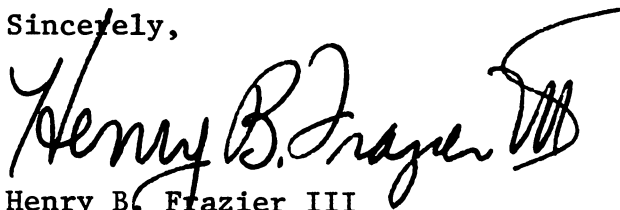
review. See Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, Assistant Secretary Case No. 50-11018 (CA), FLRC No. 74A-90.

You also contend that the Assistant Secretary was arbitrary and capricious in that he mistakenly addressed himself to inapplicable issues. Specifically, you argue that the Assistant Secretary improperly relied upon his decision in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, which you view as clearly distinguishable from the present case. In that case, the Assistant Secretary found that the agency's failure to process grievances under the agency grievance procedure, in which the grievant was represented by the union, did not violate section 19(a)(1) even assuming that the agency improperly failed to apply the provisions of its own grievance procedure, because such a failure, standing alone, does not interfere with rights assured by the Order. Further, he found that the evidence did not establish that the agency's conduct was motivated by antiunion considerations. The Council denied review of his decision in FLRC No. 74A-3 (April 29, 1974), Report No. 52, stating in pertinent part, "[I]t is clear . . . that the agency's failure to follow its own grievance procedure, standing alone, is not violative of . . . the Order. Moreover, such a failure on the part of an agency . . . does not become a violation . . . merely by reason of the representation of a particular grievant by a labor organization." In the Council's opinion, the Assistant Secretary's reference herein to the analogous case, Office of Economic Opportunity, Region V, therefore was not without reasonable justification particularly where, as noted above, the Assistant Secretary found that NFFE had presented insufficient evidence to establish any other basis for the complaint.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

M. O. Dingfield  
Air Force

Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486. The Assistant Secretary found that the activity violated section 19(a)(6) of the Order by failing to meet and confer with Local 1624, National Federation of Federal Employees regarding the procedures to be followed in implementing a decision to reassign employees to a different work shift, and the impact thereof on adversely affected employees; and issued a remedial order. The union subsequently requested that the Assistant Secretary clarify his remedial order by requiring the activity to terminate the reassignment until the parties had an opportunity to bargain concerning implementation and impact. The Assistant Secretary determined, among other things, that the union had misconstrued his remedial order and that the order requested by the union would not be warranted in this case. In the absence of any evidence of noncompliance, the Assistant Secretary therefore directed that the case be closed. The union appealed to the Council, contending that the decision of the Assistant Secretary presents a major policy issue.

Council action (August 14, 1975). The Council held that the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue. Accordingly, the Council denied the union's petition for review since it failed to meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 14, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of the Navy, Naval  
Plant Representative Office,  
Baltimore, Maryland, A/SLMR  
No. 486, FLRC No. 75A-59

Dear Ms. Cooper:

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

In this case, the Assistant Secretary found that the Naval Plant Representative Office, Baltimore, Maryland (activity), though it had no obligation to bargain regarding its decision to reassign employees to a different work shift, violated section 19(a)(6) of the Order by failing to meet and confer with Local 1624, National Federation of Federal Employees (union), regarding the procedures to be followed in implementing that reassignment and the impact thereof on adversely affected employees. The Assistant Secretary's remedial order directed the activity to cease and desist from:

Instituting a reassignment to different work shifts of employees . . . without notifying . . . [the union] . . . and affording [it] the opportunity to meet and confer . . . on the procedures which management will observe in implementing such reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

He also ordered the activity to take certain affirmative actions, including the following:

Notify [the union] . . . of any intended reassignment of employees to different work shifts and, upon request, meet and confer in good faith . . . on the procedures which management will observe in implementing such reassignment and on the impact the reassignment will have on the employees adversely affected by such action.

Subsequently, in a letter to the Assistant Secretary, the union alleged that the employees were still working on the reassigned work shifts and requested that the Assistant Secretary clarify his remedial order by requiring the activity to terminate the reassignment until the parties

had an opportunity to bargain concerning implementation and impact. In response, the Assistant Secretary stated that the union had misconstrued his remedial order, which "did not require a return to the status quo ante." He further stated that such an order would not be warranted in this case, which involved conduct occurring in 1973, since the activity was entitled under the Order to make such a reassignment, and "a status quo ante remedial order would not, after reinstatement of the old shifts, prohibit the [activity] from again changing the shifts after appropriate notification and bargaining only with respect to implementation and impact." In the Assistant Secretary's view this would be more disruptive than constructive, and, accordingly, he stated that the remedial order herein, requiring the activity to bargain over implementation and impact after an appropriate request and prohibiting a change in employee shifts in the future without appropriate notification and bargaining, was "the most satisfactory resolution of the issues" in the case. In the absence of any evidence of noncompliance with the remedial order herein, the Assistant Secretary therefore directed that the case be closed.

In your appeal to the Council, you contend that the decision of the Assistant Secretary presents a major policy issue regarding the effectiveness of remedies in unfair labor practice cases under the federal labor-management relations program. In essence, you contend that by not requiring the activity to cease and desist from its previous reassignment of employees to a different work shift without prior bargaining, the Assistant Secretary has shown that cease and desist orders are meaningless and has in effect encouraged agencies to make such changes without bargaining; and that since you lost the opportunity to negotiate regarding the problems caused by the reassignment before the decision to reassign was made herein, the only appropriate remedy is actually to be afforded that opportunity retroactively.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, you have not alleged and it does not appear that the decision of the Assistant Secretary is arbitrary and capricious, nor does it appear that a major policy issue is presented. With respect to your contention that the Assistant Secretary's clarification of his own remedial order has rendered that order meaningless, section 6(b) of the Order confers considerable discretion on the Assistant Secretary, who "may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order." The authority of the Assistant Secretary to issue remedial orders includes the authority to interpret those orders. In the Council's opinion, the Assistant Secretary's clarification of his remedial order is not without reasonable justification in the circumstances of this case. Moreover, it does not appear that the Assistant Secretary has either exceeded the scope of his authority under section 6(b) of the Order or that his clarification of the remedial order herein is inconsistent with the policies of the Order, and therefore no major policy issue is presented warranting Council review. Similarly, no major policy issue is presented with respect to your

contention that the Assistant Secretary failed to require the activity to comply with his remedial order, since the Assistant Secretary found no evidence of noncompliance with his order as interpreted, and the Council will not review such a finding unless it is arbitrary and capricious or presents an independent major policy issue.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

E. Borda  
Dept. of Navy



Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2961, AFL-CIO (Yarowsky, Arbitrator). The arbitrator denied the union's grievance and the union filed exceptions to the arbitrator's award with the Council, asserting that the arbitrator's refusal to hear evidence on the question of reformation of the parties' agreement was based on a nonfact (the belief that the union had not raised the issue of reformation prior to the arbitration hearing), and was a refusal to hear pertinent and material evidence.

Council action (August 15, 1975). The Council held that the union's petition does not present the facts and circumstances necessary to support its assertions. Accordingly, without passing on the responsibilities of arbitrators in the Federal sector to consider questions of reformation where such questions are properly and timely raised, the Council denied review of the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

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

Re: Office of Economic Opportunity, Kansas City  
Regional Office, Region VII and National  
Council of OEO Locals, Local 2691, AFL-CIO  
(Yarowsky, Arbitrator), FLRC No. 74A-102

Dear Mr. Kete:

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

The award indicates that the agency made an agencywide announcement of a vacancy in the position of Human Rights Officer, GS-14, at its Kansas City Regional Office. Four individuals were certified as highly qualified for the position, including three candidates from within the agency and one outside candidate - a former agency employee. The former employee was selected for the position and the union filed a grievance alleging that the agency's selection of an outside candidate violated the collective bargaining agreement, as amended, between the parties. The grievance was submitted to arbitration under the agreement.

According to the award, the agency contended that the position of Human Rights Officer is a top level management slot excluded from the bargaining unit by section 3 of the amendment to the agreement,<sup>1/</sup> or that the position falls within the exception for policy and supervisory positions

---

<sup>1/</sup> Section 3 of the amendment to the agreement, dated September 11, 1973, reads as follows:

Both Parties agree that all appointments made to top level management positions (office heads, directors of regional legal services, personnel directors, regional directors, and EEO officers), not subject to higher authority, will be professionally qualified, appointed in accordance with Civil Service regulations and, when possible, after consultation with the union.

incorporated in section 11 of the amendment,<sup>2/</sup> and that therefore it did not violate the agreement by selecting the outside candidate. The union, on the other hand, contended that the position is not excluded from the unit and that a version of section 11 of the amendment different from that being relied upon by the agency was applicable to the situation.

Regarding the different versions of section 11 put forth by the parties, the arbitrator pointed out that the agency was relying on section 11 as it appeared in the final amendment to the agreement executed by the parties (quoted in footnote 2), while the union was relying upon a version which the union members had been requested to ratify and which omitted the words "where possible" and had the added phrase "at the Division level - or equivalent" following the words "with the exception of policy and supervisory positions." According to the award, the union asked the arbitrator for reformation of section 11 of the amendment to conform its language with the "actual" agreement reached between the parties. However, the arbitrator concluded that he could not reform section 11. Further, he denied the union's grievance on the basis that the hiring of the candidate from outside the agency was not violative of the agreement and the amendment thereto because the candidate was hired for a management and policymaking position within the meaning of the agreement, as amended, and was thus excluded from the bargaining unit.

Thereafter, the union filed a motion with the arbitrator for an additional hearing and reconsideration of his award, requesting that he hold a hearing solely on the question of what the parties agreed to in their 1973 amendment with respect to the restriction on hiring from outside, and that he then reconsider his award in light of the facts there developed. The arbitrator, in a post-award ruling, concluded that his authority was confined to the amendments presented to him for construction, and found that the remedy of reformation was not properly before him in the "present framing of the issues" and therefore denied the union's motion for additional hearing and reconsideration of the award.

The union takes exception to the arbitrator's award on the grounds discussed below and requests the Council to remand the case to an arbitrator to be selected by the parties for a hearing on the question of reformation of the contract and modification of the original award in light of the facts there adduced.

---

2/ Section 11 of the same amendment provides as follows:

The Parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system. Whenever management determines such an emergency exists, it will notify the union of the reasons in advance. During FY'74 employees transferred from OEO will be considered in-house candidates for this purpose. Article 12, Section 4A of the contract is hereby amended.

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

In its first exception to the award, the union contends that the arbitrator's refusal to hear evidence on the question of reformation was based on a nonfact (the belief that the union had not raised the issue of reformation prior to the arbitration hearing) and cites, as a basis for remanding the case for a further hearing, a private sector case, Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 272, 492 F. 2d 1255 (1st Cir. 1974). That case stands for the proposition that where the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached, courts in the private sector will overturn the award. The Federal Labor Relations Council will grant a petition for review of arbitration awards on similar grounds under section 2411.32 of the Council's rules of procedure. However, the union in the instant case does not take exception to the award on the grounds that the central fact underlying the award itself was a nonfact, but takes exception to the award only on the grounds that the arbitrator's refusal to hear evidence and rule on the issue of reformation was based on a nonfact (the belief that the issue of reformation had not been raised by the union prior to the arbitration hearing). Thus, the Council is of the opinion that the union's reliance on Electronics Corporation is misplaced and that the union's petition does not present facts and circumstances necessary to support an assertion that the arbitrator based his award on a nonfact but for which a different result would have been reached. The arbitrator in the instant case has set forth the basis of his award as being the nature of the position under the published agreement and amendment. Thus, he concluded that the "central fact underlying the award is the existence of the Agreement and amendments as published."<sup>3/</sup>

The union also contends that the case should be remanded because the arbitrator's refusal to hear evidence on the question of reformation was a refusal to hear pertinent and material evidence. A refusal of an arbitrator to hear evidence pertinent and material to the controversy before him is a ground upon which courts in the private sector will sustain challenges to arbitration awards. Shopping Cart, Inc. v. Amalgamated Food Employees Local 196, 350 F. Supp. 1221 (E.D. Pa. 1972); Harvey Aluminum v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal. 1967). The Federal Labor Relations Council will grant a petition for review of arbitration awards on similar grounds under section 2411.32 of the Council's rules of procedure. However, in the instant case the arbitrator concluded that reformation was not part of the

---

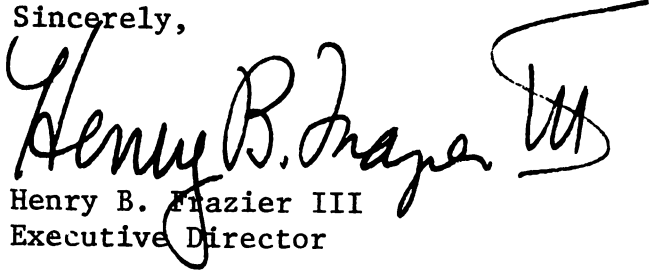
<sup>3/</sup> The arbitrator concedes that "if this is erroneous, or a non-fact, admittedly the award cannot stand."

grievance and thus not part of the controversy before him.<sup>4/</sup> We conclude, therefore, that the union's petition does not present the facts and circumstances necessary to support its assertion that the arbitrator failed to hear evidence pertinent and material to the controversy before him.

Accordingly, and without passing upon the responsibilities of arbitrators in the Federal sector to consider questions of reformation where such questions are properly and timely raised, the Council has denied review of the union's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: P. Weightman  
CSA

<sup>4/</sup> The union, in effect, disagrees with the arbitrator's conclusion that reformation was not part of the issue before him. However there is no indication that the parties entered into a submission agreement and, as the Council has previously stated, in the absence of a submission agreement the arbitrator's unchallenged formulation of the question may be regarded as the equivalent of a submission agreement American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 477. The Assistant Secretary found that the activity violated section 19(a)(1) of the Order by coercively interrogating an employee concerning the distribution of a union leaflet. The agency appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue.

Council action (August 15, 1975). The Council held that the agency's petition for review does not meet the requirements governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present a major policy issue. Accordingly, since the agency's appeal failed to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure (5 CFR 2411.12), the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

Mr. Bruce Carroll  
Community Services Administration  
300 South Wacker Drive, 26th Floor  
Chicago, Illinois 60606

Re: Office of Economic Opportunity,  
Region V, Chicago, Illinois,  
A/SLMR No. 477, FLRC No. 75A-29

Dear Mr. Carroll:

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

The complaint in this case alleged, among other things, that management at the Office of Economic Opportunity,<sup>\*/</sup> Region V (the activity), committed an unfair labor practice when it interrogated an employee regarding her involvement in the preparation and distribution of an unsigned union leaflet which criticized management for adopting a rule prohibiting AFGE Local 2816 (the union) from posting or distributing literature.

According to the Assistant Secretary's decision, OEO Instruction 711-1, dated April 1, 1970, sets forth the conditions established for the use of bulletin boards and for the distribution of materials by unions. The Instruction restricts the material posted or circulated to reports of union meetings and other specified union activities, and it declares that such material may not contain attacks upon any person, group, or organization. Commencing in late 1970, the posting of the minutes of the union meetings became a source of considerable irritation to management because the minutes contained attacks on certain management representatives.

On February 1, 1972, by memorandum, the activity prohibited AFGE Local 2816 from distributing, placing or posting literature because of the previous personal attacks upon management which conduct, allegedly, was contrary to OEO Instruction 711-1. On February 23, 1972, an unsigned leaflet on union letterhead was circulated in the Regional Office attacking the activity's February 1 memorandum

---

<sup>\*/</sup> The name of the agency was officially changed during the pendency of this proceeding to Community Services Administration.

and accusing management of hostility toward unions and minorities as well as depriving employees of free speech. On February 24, 1972, a management representative questioned the employee in the presence of a union representative as to her possible involvement in the preparation of the February 23 leaflet. The employee advised that management should inquire of the union as to the preparation of the leaflet, not of herself, because it bore the union letterhead. The management representative, however, continued to interrogate the employee as to her possible involvement in the distribution or development of the leaflet and threatened her with discipline if she refused to answer. Under protest, she answered negatively to all of his questions. In March 1972, the right of the union to post materials was reinstated.

With respect to the issues raised in your petition, the Assistant Secretary found that the activity violated section 19(a)(1) of the Order by coercively interrogating an employee concerning the distribution of a union leaflet. Adopting the finding of the Administrative Law Judge, the Assistant Secretary concluded that such interrogation "in this instance constituted an inquiry by management into Rockwell's union activities which . . . interfered with, restrained, or coerced her in the exercise of her right to join and assist a labor organization."

In your petition for review, you contend, in essence, that the Assistant Secretary's decision in this case is tantamount to a holding that interrogation of an employee about anything which involves union activity is per se violative of the Order, and, as such, is arbitrary and capricious. You also contend that the decision presents a major policy issue as to whether an agency may inquire into misconduct even if such inquiry touches upon union activity.

In the Council's view, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present a major policy issue. With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that his findings and decision were without reasonable justification in the particular circumstances of this case. In so ruling, however, we do not construe the Assistant Secretary's decision as establishing a rule that any inquiry by management into matters which may involve union-related activity is per se violative of the Order. Rather, we simply hold that the Assistant Secretary's finding of a 19(a)(1) violation in this case was not unreasonable under the facts and circumstances presented herein. Moreover, with respect to the alleged major policy issue, the Council is of the opinion that in the circumstances presented,




noting particularly, as stated above, that the Assistant Secretary's decision does not establish a per se rule that any inquiry touching upon union activity is violative of the Order, and that the Assistant Secretary found that the activity coercively interrogated the employee in violation of the Order, the subject decision does not raise a major policy issue warranting Council review.

Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of the petition is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor  
  
G. Galland, Jr.

Community Services Administration and National Council of CSA Locals (American Federation of Government Employees) (Edgett, Arbitrator). The agency filed exceptions to the arbitrator's award with the Council, alleging, among other things, that (1) the arbitrator, in determining that the agency violated the parties' agreement when it failed to consult with the union prior to appointing an individual as Regional Director, substituted his judgment for that of responsible agency officials and therefore acted arbitrarily and capriciously; and (2) the arbitrator violated section 12(b)(2) of the Order in determining that the agency's failure to post the vacancy was also violative of the agreement. In this latter regard, the agency requested that the Council review the particular agreement provision involved and make a policy determination as to its scope, effect and enforceability vis-a-vis the agency's reserved rights under section 12(b)(2) of the Order.

Council action (August 15, 1975). As to (1), the Council held that this exception, in the circumstances of this case, does not assert a ground upon which the Council will grant review of an arbitration award. As to (2), the Council held that the agency failed to provide facts and circumstances sufficient to support the exception; and, with regard to the agency's related request, which appears to be a request for an advisory opinion as to the validity of the particular agreement provision involved, the Council ruled that this request does not meet the requirements for review under section 2411.32 of the Council's rules and, further, that the Council does not issue advisory opinions. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

Mr. Philip M. Weightman  
Chief, Labor-Management Relations  
Community Services Administration  
Washington, D.C. 20506

Re: Community Services Administration  
and National Council of CSA Locals  
(American Federation of Government  
Employees) (Edgett, Arbitrator),  
FLRC No. 75A-48

Dear Mr. Weightman:

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

As stated in the arbitrator's decision, the then Regional Director of the agency's Denver Region requested reassignment. On the following day, another individual was given a 30-day emergency appointment as Regional Director. A request by the agency to the Civil Service Commission (CSC) for a 30-day extension of the appointment was subsequently rejected by the CSC which found that the appointment was not properly made under its regulations. As a result, the appointment was rescinded. The union filed a grievance alleging, in relevant part, that the agency's action violated Sections 3<sup>1/</sup> and 11<sup>2/</sup> of the Amendatory Agreement between the agency and the union, dated September 11, 1973. The grievance was ultimately submitted to arbitration.

1/ Section 3 (Key Officials) provides:

Both parties agree that all appointments made to top level management positions (office heads, directors of regional legal services, personnel directors, regional directors and OEO officers) not subject to higher authority, will be professionally qualified, appointed in accordance with Civil Service regulations and, when possible, after consultation with the union.

2/ Section 11 (Filling Vacancies) provides:

The parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level

(Continued)

As to the alleged violation of Section 3, the arbitrator in his decision concluded that the agency "had the burden of going forward with evidence that consultation was not possible and it failed to do so." He determined that the agency violated Section 3 of the Amendatory Agreement when it failed to consult with the union prior to appointing the individual as Regional Director. He also determined that the agency had failed to make that appointment in accordance with CSC regulations "inasmuch as the CSC found that . . . [the] appointment was not proper under its regulations." However, the arbitrator determined that the contractual failure was rendered moot by the CSC's action rejecting the appointment and, therefore, he awarded no remedy. The arbitrator further determined that the agency violated Section 11 of the Amendatory Agreement when it failed to post the vacancy, but awarded no remedy for the violation.<sup>3/</sup> The arbitrator determined that the union, on balance, was the winning party, and therefore assessed the cost of the arbitration to the agency.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of two exceptions discussed below.<sup>4/</sup>

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

In its first exception, the agency contends that the arbitrator, in determining that the agency failed to consult with the union in violation of Section 3 of the Amendatory Agreement, substituted his judgment for

---

(Continued)

will be filled with in-house candidates, where possible with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system. Whenever management determines such an emergency exists, it will notify the union of the reasons in advance. During FY'74 employees transferred from OEO will be considered in-house candidates for this purpose. Article 12 Section 4A of the contract is hereby amended.

<sup>3/</sup> The arbitrator denied the union's requested remedy for the violation of Section 11, an order to post the position, as beyond his authority. Neither party takes exception to the arbitrator's denial of the union's requested remedy.

<sup>4/</sup> The agency also requests that the Council assess cost of the arbitration to the union as per Article 17, Section 4, of the agreement.

that of responsible agency officials and therefore acted arbitrarily and capriciously. When the substance of this exception is considered, the Council is of the opinion that the agency disagrees with the arbitrator's interpretation of the agreement. However, the Council has consistently applied the principle,<sup>5/</sup> that when, as here, an arbitrator is empowered to interpret the terms of an agreement, the Council will not set aside the arbitrator's award merely because the Council's own interpretation of the agreement may differ. Thus, this exception, under the circumstances of this case, does not assert a ground upon which the Council will grant review of an arbitration award under section 2411.32 of its rules.

As its second exception, the agency contends that the arbitrator, in determining that the agency's failure to post the vacancy was a violation of Section 11, violated section 12(b)(2) of the Order. In support of this exception the agency asserts in effect (1) that Section 11 does not apply to the position in question, and (2) that the finding of the violation of Section 11, which section requires "that all vacancies will be posted," violates section 12(b)(2). As to the first assertion, the agency again appears to be disagreeing with the arbitrator's interpretation of the agreement. But, as indicated, this assertion does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32 of its rules. As to the second assertion, the Council will grant review of an award where it appears, based on the facts and circumstances presented, that the exception presents grounds that the award violates section 12(b)(2) of the Order. However, the agency has failed to provide facts and circumstances sufficient to support this exception. To the contrary, as stated in note 3, supra, the arbitrator denied, as beyond his authority, the union's request that he order the agency to post the notice as a remedy for the violation of Section 11. In so concluding, the arbitrator's decision was consistent with the Council's decision in National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61. Moreover, the agency appears to be seeking an advisory opinion on the validity of Section 11 under the Order. Specifically, the agency requests the Council to review Section 11 of the Amendatory Agreement and to make a policy determination on the scope, effect, and enforceability of Section 11 on the agency's reserved rights under section 12(b)(2) of the Order. This request does not meet the requirements for review under section 2411.32 of the Council's rules; further, the Council does not issue advisory opinions (see section 2411.52 of the Council's rules).

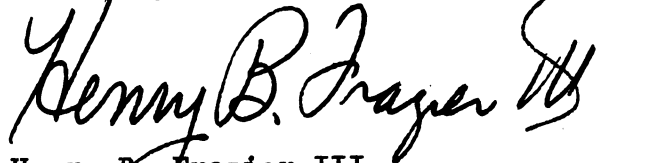
---

5/ See, e.g., American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: R. Frank  
AFGE Local 2677

Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator). The arbitrator concluded that the agency had not violated the parties' agreement in the detailing of five employees. The union filed exceptions to the arbitrator's award with the Council, contending that (1) in effect, the award violates appropriate regulations; (2) the award violates section 12 of the Order; and (3) in substance, the arbitrator reached an incorrect result in his interpretation of the parties' agreement.

Council action (August 15, 1975). With regard to (1) and (2), the Council held that although the exceptions state grounds upon which the Council will grant review of an arbitrator's award, they provide no basis for acceptance of the union's petition in this case, principally because the union did not describe facts and circumstances sufficient to support the exceptions in its petition. As to (3), the Council held that, like the other exceptions, this exception provides no basis for acceptance of the union's petition. Accordingly, the Council denied review of the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

Mr. Michael J. Riselli  
General Counsel  
National Association of  
Government Employees  
2139 Wisconsin Avenue, NW.  
Washington, D.C. 20007

Re: Airway Facilities Division, Federal  
Aviation Administration, Eastern Region  
and National Association of Government  
Employees, Local R2-10R (Kronish,  
Arbitrator), FLRC No. 75A-50

Dear Mr. Riselli:

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

Based on the facts described in the arbitrator's award, it appears that two GS-12 technicians at the agency's White Plains, New York, facility were temporarily released to attend the FAA Academy for training. To serve White Plains during the two employees' absence, the agency initially assigned five GS-11 technicians from Wilkes Barre, Pennsylvania, to work at White Plains for approximately 4 weeks each. Two weeks after these temporary assignments were made, the agency established a GS-12 temporary relief position at White Plains. None of the five Wilkes Barre employees chose to accept a temporary promotion to this position, however, and their assignments continued as originally scheduled. Shortly before these assignments were to end, the agency announced that the training of the two White Plains employees had been extended and that each of the five Wilkes Barre employees would return to White Plains for an additional 2 weeks.

The union filed a grievance, alleging that the assignments of the five Wilkes Barre employees violated Article XVI of the parties' negotiated agreement.<sup>1/</sup> Submitting the grievance to arbitration, the parties stipulated that the issue to be resolved was as follows:

---

1/ According to the union's petition, Article XVI provides as follows:

Details and Temporary Promotions

Section 1

When it is known in advance that a detail to a higher grade position will extend 60 days, the detailed employee will be temporarily promoted, subject to agency promotion restrictions. Competitive promotion procedures must be used when a temporary promotion will exceed 120 days.



Did the agency and its representatives violate Article XVI of the collective bargaining agreement with the detail of five employees to White Plains from Wilkes Barre between April and November, 1974? If so, what should the remedy be?

The arbitrator, finding that "the five employees served at least ten details, no one of which was more than thirty days in duration," concluded that the agency had not violated Article XVI.

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

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

In its first exception, the union contends, in effect, that the arbitrator's award violates appropriate regulations--specifically, Federal Personnel Manual chapter 300, subchapter 8, "Detail of Employees," and Federal Aviation Administration Order 3330.9, chapter 5, "Details." The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates appropriate regulations. Here, however, the union simply quotes at length from the cited directives, advancing no persuasive argument in support of its exception and describing no facts or circumstances sufficient to show that any basis exists for finding the award violative of appropriate regulations. The Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for

---

(Continued)

## Section 2

Details for more than 30 days shall be recorded on Standard Form 52. The Employer will notify employees in writing, of temporary duty assignments when such assignments are normally performed at a different or higher grade and this temporary duty is more than eight hours duration. Individual employees may maintain records of temporary assignments of eight hours or less and have such records initialed by their supervisor when appropriate.

## Section 3

Details in excess of 120 days must be approved by the Civil Service Commission.

the exceptions presented. See, e.g., Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodwin, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56; Picatinny Arsenal, Department of the Army, and Local 225, American Federation of Government Employees (Falcone, Arbitrator), FLRC No. 72A-44 (May 2, 1973), Report No. 37. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.<sup>2/</sup>

In its second exception, the union contends that the award violates section 12 of the Order. While this exception also states a ground upon which the Council will grant review of an arbitrator's award, the union provides no explanation as to why it considers the award violative of section 12, nor does it describe any facts or circumstances which might tend to support its exception. Again, a petition for review of an arbitrator's award will not be accepted where there appears in the petition no support for the stated exception to the award. See, e.g., American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), FLRC No. 73A-4 (April 18, 1973), Report No. 36. Therefore, this exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its third exception, the union contends that the award violates "the pertinent provisions of the controlling collective bargaining agreement in question." Thus, it appears that the union is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of Article XVI of the agreement. The Council has consistently held, as have the courts with respect to arbitration in the private sector, that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), FLRC No. 75A-17 (June 26, 1975), Report No. 76. Therefore, this exception, like the other exceptions, provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

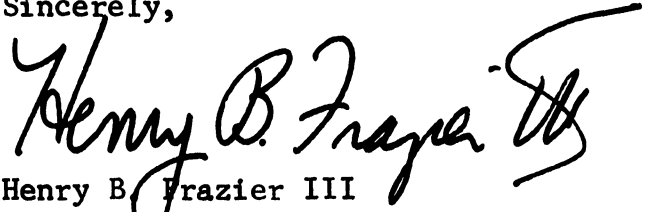
---

<sup>2/</sup> In so holding, we do not pass upon the question whether FAA Order 3330.9 constitutes an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules. Cf. American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: J. Egan  
FAA

Department of the Air Force, K. I. Sawyer Air Force Base, Michigan, Assistant Secretary Case No. 52-5862 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for the National Federation of Federal Employees' unfair labor practice complaint, which alleged a violation of section 19(a)(6) of the Order. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presents major policy issues.

Council action (August 15, 1975). The Council held that the Assistant Secretary's decision does not appear to be arbitrary and capricious and does not present a major policy issue. Accordingly, since the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations (5 CFR 2411.12), the Council denied the petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

Ms. Lisa Renee Strax  
Staff Attorney, National Federation  
of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of Air Force, K. I. Sawyer  
Air Force Base, Michigan, Assistant  
Secretary Case No. 52-5862 (CA),  
FLRC No. 75A-55

Dear Ms. Strax:

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

The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for NFFE's complaint which alleged a violation of section 19(a)(6) of the Order. On May 9, 1974, the National Federation of Federal Employees, Local 1256 (NFFE) was notified by a letter from the activity that the environmental pay differential for employees in the bargaining unit would be reduced from high degree hazard (8 percent) to low degree hazard (4 percent) effective on May 19, 1974. The complaint alleged that the activity had failed to consult, confer, or negotiate with NFFE before reaching a "final decision" to reduce environmental pay differential, and without affording NFFE an opportunity to discuss the adverse impact of that decision on unit employees before implementing the environmental pay reduction. In concluding that a reasonable basis had not been established for the complaint, the Assistant Secretary noted that "at no time before May 9, 1974, did the NFFE request to meet and confer concerning the impact such pay reductions would have on unit employees, although it is undisputed that the NFFE was notified of the planned reductions prior to that time."

In your petition for review you contend that the Assistant Secretary's decision is arbitrary and capricious because (1) he failed to acknowledge and consider the presence of unresolved questions of fact concerning the nature and extent of prior discussions between the parties on the issue of environmental pay reductions, and (2) he failed to recognize NFFE's right to a hearing to resolve the contested factual issues raised by the unsubstantiated allegations in its complaint. You further contend that several major policy issues are presented as to (1) whether the ruling of U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 ought to govern this case prior to a hearing on the issues of fact raised; (2) whether Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486 is determinative of this case; and (3) what

guidelines should be followed in determining whether to dismiss a complaint or petition prior to a hearing.

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

Section 6(d) of the Order provides: "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order," one of which is to "decide unfair labor practice complaints . . ." pursuant to section 6(a)(4) of the Order. Section 203.7(a) of the Assistant Secretary's regulations (redesignated section 203.8(a) as of May 7, 1975) provides:

If the Assistant Regional Director determines that . . . a reasonable basis for the complaint has not been established . . . he may dismiss the complaint.

Further, section 203.5(c) (redesignated section 203.6(e) as of May 7, 1975) states:

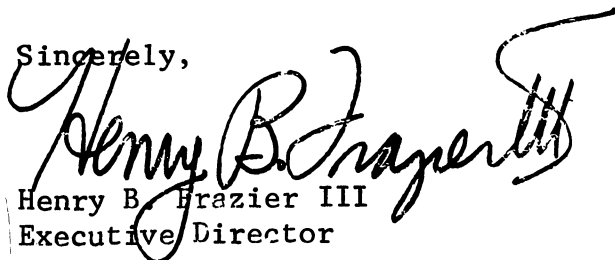
The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case.

Because the Assistant Secretary's decision does not present a major policy issue, and does not appear to be arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

Col. D. R. James  
Air Force

National Weather Service, N.O.A.A., U.S. Department of Commerce and National Association of Government Employees (Strongin, Arbitrator). The agency filed an exception to the arbitrator's award, which award decided a general question of interpretation of a provision in the parties' agreement, contending that the agency is unable "to clearly understand the [arbitrator's] decision and so provide a meaningful response to future union requests on the same matter."

Council action (August 15, 1975). The Council determined that viewed literally, the agency's exception does not state a ground upon which the Council will grant review of an arbitration award; however, viewed as a contention that the arbitrator's award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible, the exception does state a ground upon which review will be granted. The Council found, nevertheless, that even if viewed in the latter manner, the exception is not supported by facts and circumstances in the agency's petition. Accordingly, the Council denied the agency's petition for review since it failed to meet the standards for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1975

Mr. Ralph C. Reeder  
Chief, Personnel Division  
National Oceanic and Atmospheric  
Administration  
U.S. Department of Commerce  
Rockville, Maryland 20852

Re: National Weather Service, N.O.A.A.,  
U.S. Department of Commerce and  
National Association of Government  
Employees (Strongin, Arbitrator),  
FLRC No. 75A-63

Dear Mr. Reeder.

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

The arbitrator in his decision stated that the parties presented "a question of interpretation" of Article 17, Section 10<sup>1/</sup> of their 1974 collective bargaining agreement, which provides:

Any employee who has applied for promotion and who was not selected will have the right to review all the data, permissible under existing regulations relied upon in making the selection for the position. The employee may delegate this right to the Union or his representative.

The union construed this section "as entitling the non-promoted employee to all data except that which is not permissible under existing regulations." The agency, on the other hand, construed the language "as limiting the employee to the data specifically required by existing regulations." The arbitrator, speaking in "broad, general terms," concluded that he tended to agree with the union. The arbitrator determined that "[t]he grievance is sustained to the extent that the Union is held entitled to relevant data not precluded by applicable controlling regulations." However, the arbitrator noted that the case did not come

<sup>1/</sup> The arbitrator inadvertently referred to Section 10 as Paragraph 10.



before him "in terms of a specific request for, and denial of, particular data with respect to a particular promotion," and that "no 'specifics' . . . [were] either presented or decided" by him.

The agency requests that the Council accept its petition for review of the arbitrator's award and seeks a "clarified, understandable and applicable award" on the basis of one exception 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 exception contends that the agency is unable "to clearly understand the [arbitrator's] decision and so provide a meaningful response to future Union requests on the same matter." Viewed literally, this exception does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32. That is, the Council has never granted review based upon such an exception nor does the exception assert a ground similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

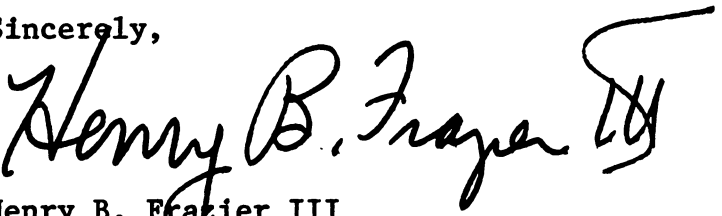
The agency's exception, however, may be viewed as a contention that the arbitrator's award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible. This is a ground for review of an award by courts in private sector cases which, if supported, necessitates remanding the award to the arbitrator for clarification and interpretation. See, e.g., Textron, Inc. v. Auto Workers, Local 516, 500 F.2d 921, 86 LRRM 3240 (2d Cir. 1974); Machinists, Lodge 917 v. Air Products & Chemicals, Inc., 341 F. Supp. 874, 80 LRRM 3204 (E.D. Pa. 1972). The Federal Labor Relations Council will grant a petition for review of arbitration awards on similar grounds under section 2411.32 of its rules. Cf., American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), FLRC No. 73A-4 (February 12, 1974), Report No. 49. Thus, an exception to an arbitration award which contends that the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible is a ground for review of the award under section 2411.32 of the Council's rules. Nevertheless, so viewed, this exception is not supported by facts and circumstances in the agency's petition as required by section 2411.32 of the Council's rules. As indicated previously, the parties requested the arbitrator to render, in effect, an advisory opinion on a general question without regard to a specific individual grievance, and it was this general question which the arbitrator decided. The agency's exception does not contend that implementation of the award in the present case is impossible. Rather, the exception is simply a prediction that the award will not

provide the agency with a meaningful response to union requests for data in future cases. Disagreements which may arise with respect to agency responses to such union requests are matters to be resolved at the time they arise under the procedures negotiated by the parties. Of course, the parties may jointly resubmit the award in this case to the arbitrator if they desire its clarification or interpretation.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: P. Collins  
NAGE

American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator). The union filed a "motion for enforcement of compliance" with the arbitrator's award. (The Council previously denied the agency's petition for review of the subject award (Report No. 52)).

Council action (August 29, 1975). Relying on its decision in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67, wherein the Council addressed the issue of enforcement of arbitration awards, the Council denied the union's "motion for enforcement of compliance" with the arbitrator's award.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 29, 1975

Mr. James R. Rosa, Staff Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: American Federation of Government  
Employees Local 2677 and Office of  
Economic Opportunity (Dougherty,  
Arbitrator), FLRC No. 74A-4

Dear Mr. Rosa:

Reference is made to your "motion for enforcement of compliance" with the arbitrator's award in the above-entitled case. In this case, the agency's petition for review of the arbitrator's award was denied by the Council as having been untimely filed. American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator), FLRC No. 74A-4 (April 29, 1974), Report No. 52.

The Council has issued its decision in Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67. In that case, the Council addressed the issue of the enforcement of arbitration awards and stated, in pertinent part:

. . . [T]he enforcement of arbitration awards was not a role contemplated for the Council in carrying out its function of considering "exceptions to arbitration awards" under section 4(c)(3) of the Order and as amplified in the Study Committee Report which led to the issuance of the Order . . . . Instead, the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order.

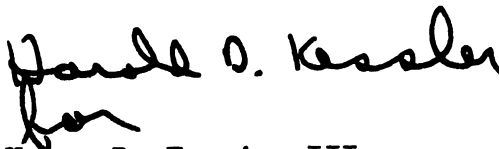
. . . . .

Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. . . . [Emphasis added.]

Accordingly, the Council must deny your "motion for enforcement of compliance" with the arbitrator's award in the above-entitled case.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: R. G. Johnson  
CSA

American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator). The union filed a "motion for enforcement of compliance" with the arbitrator's award. (The Council previously denied the agency's petition for review of the arbitrator's award as having been untimely filed (Report No. 56)). Upon opposition to the motion by the agency asserting that it had complied with certain parts of the award, the union requested that the Council remand the case to the arbitrator for clarification of the award while retaining jurisdiction on the motion.

Council action (August 29, 1975). Relying in part on its decision in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67, wherein the Council addressed the issue of the enforcement of arbitration awards, the Council held that the Assistant Secretary may consider, in processing a case of enforcement of an arbitration award through his unfair labor practice procedures, a contention that an award requires clarification; and he may direct the parties to resubmit the award to the arbitrator for clarification and interpretation. Accordingly, the Council denied the union's "motion for enforcement of compliance" and its request to remand the case to the arbitrator for clarification.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

August 29, 1975

Mr. James R. Rosa, Staff Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: American Federation of Government  
Employees, Local 2677, and Office  
of Economic Opportunity (Kleeb,  
Arbitrator), FLRC No. 74A-57

Dear Mr. Rosa:

Reference is made to your "motion for enforcement of compliance" with the arbitrator's award in the above-entitled case. In this case, the agency's petition for review of the arbitrator's award was denied by the Council as having been untimely filed. American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator), FLRC No. 74A-57 (September 20, 1974), Report No. 56.

The agency, in opposition to your motion for enforcement, asserts that the agency has complied with parts 1 through 3 of the arbitrator's award. In response, you contend that the agency's opposition reveals an ambiguity in the arbitrator's award leading to a contested issue of fact as to whether the agency has complied with parts 1-3 of the award; that, without clarification by the arbitrator, there appears to be an insufficient basis upon which to determine whether the agency's actions constitute compliance; and, therefore, you request that the Council remand this case to the arbitrator for clarification while retaining jurisdiction on your motion for enforcement.

The Council has issued its decision in Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67. In that case, the Council addressed the issue of the enforcement of arbitration awards and stated, in pertinent part:

. . . [T]he enforcement of arbitration awards was not a role contemplated for the Council in carrying out its function of considering "exceptions to arbitration awards"

under section 4(c)(3) of the Order and as amplified in the Study Committee Report which led to the issuance of the Order . . . . Instead, the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order.

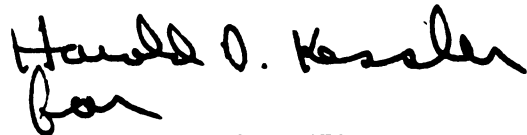
Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. . . . [Emphasis added.]

The Assistant Secretary may consider, in processing a case of enforcement of an arbitration award through his unfair labor practice procedures, a contention that an award requires clarification. Should the Assistant Secretary determine under those circumstances that a dispute exists between the parties over the meaning of an award and that clarification and interpretation of the award is necessary to resolve the dispute, he may direct the parties to resubmit the award to the arbitrator for such clarification and interpretation as does the Council when considering petitions for review of an arbitrator's award. American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), FLRC No. 73A-4 (February 12, 1974), Report No. 49.

Accordingly, the Council must deny your "motion for enforcement of compliance" with the arbitrator's award in the above-entitled case and your request to remand this case to the arbitrator for clarification.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: R. G. Johnson  
CSA



Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506. The Arkansas Association of FmHA Clerks requested reconsideration of the Council's decision of July 21, 1975, denying as untimely filed the union's petition for review of the subject decision of the Assistant Secretary (Report No. 77).

Council action (September 2, 1975). The Council found that the conditions adverted to in the request for reconsideration failed to constitute "most extraordinary circumstances" such as to warrant waiver by the Council of the timeliness requirements established in its rules. Accordingly, as no persuasive reason was advanced in support of the request for reconsideration of the Council decision, the Council denied the request.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 2, 1975

Mr. Lynn Agee  
Youngdahl and Larrison  
100 North Main Building  
Memphis, Tennessee 38103

Re: Farmers Home Administration, United  
States Department of Agriculture,  
Little Rock, Arkansas, A/SLMR No. 506,  
FLRC No. 75A-62

Dear Mr. Agee:

The Council has carefully considered your letter of July 28, 1975, requesting reconsideration of the Council's decision of July 21, 1975, denying as untimely filed the petition for review which you submitted on behalf of the Arkansas Association of FmHA Clerks in the above-entitled case.

In this case, the subject decision of the Assistant Secretary was dated April 29, 1975, and, under the Council's rules of procedure (sections 2411.13(b), 2411.45 and 2411.46(c)), your appeal was due in the office of the Council by the close of business on May 22, 1975. However, by letter of May 12, 1975, you requested an extension of time up to and including June 16, 1975, in which to file your appeal.

On May 22, 1975, the Executive Director of the Council, pursuant to section 2411.45(d) of the Council's rules, informed you in writing, as you were previously orally advised, that "an extension of time for filing an appeal . . . has been granted until the close of business on June 16, 1975." Further, as you had also requested, a copy of the Council's rules and regulations was enclosed with this written notification.

Section 2411.45(a) of the Council's rules provides that:

When a time limit for filing is established under this part, the document must be received in the office of the Council before the close of business of the last day of the time limit.

Additionally, section 2411.45(c) of the Council's rules states:

Whenever a party has the right or is required to do some act pursuant to this part within a prescribed period after service of a notice or other paper upon him and the notice or paper is served on him by mail, 3 days shall be added to the prescribed period: Provided, however, that 3 days shall not be added if any extension of time may have been granted. (Emphasis added.)

Accordingly, under section 2411.45(a) and (c) of the Council's rules, and as you were expressly informed in the above-mentioned Council letter of May 22, 1975, your appeal was due in the Council's office no later than the close of business on June 16, 1975. However, your appeal was not filed in the office of the Council until June 17, 1975, or one day late, and no further extension of the time limits for filing had either been requested by you or granted by the Council under section 2411.45(d) of the Council rules.

Therefore on July 21, 1975, the Council, consistent with established Council practice in like circumstances, denied your petition for review as untimely filed. See, e.g., American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator), FLRC No. 74A-4 (April 29, 1974), Report No. 52; and American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator), FLRC No. 74A-57 (September 20, 1974), Report No. 56.

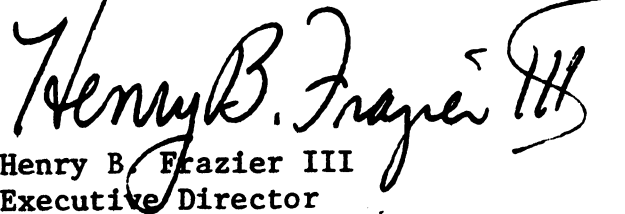
In your request for reconsideration, you argue, in effect, that the time limits provided in the Council's rules should be waived because, among other things, the untimely filing resulted from a delay of the postal service.

In its Information Announcement of September 27, 1972, the Council stated, with regard to untimely petitions that: ". . . 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." The Council has uniformly held that the late filing of an appeal as the result of a postal service delay is not such a "most extraordinary circumstance" as to warrant the waiver of the Council's timeliness requirements. See e.g. Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-573, FLRC No. 75A-11 (April 16, 1975), denying request for reconsideration of denial of appeal (February 14, 1975), Report No. 63. Likewise in the context of the present case, the Council finds that the conditions adverted to in your request for reconsideration fail to constitute "most extraordinary circumstances" such as to warrant waiver by the Council of the timeliness requirements established in its rules.

Accordingly, as your letter of July 28, 1975, advances no persuasive reason in support of your request for reconsideration of the Council decision in the instant case, your request is denied.

By 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/SLMR  
Dept. of Labor

D. L. Spradlin  
Agriculture Dept.

Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator). The union filed exceptions to the arbitrator's award with the Council, contending, in essence, (1) that the arbitrator's award contains a number of erroneous findings of fact; and (2) the arbitrator reached an incorrect result in his interpretation of the agreement.

Council action\* (September 9, 1975). As to (1), the Council held that this exception does not assert a ground upon which the Council will grant a petition for review of an arbitration award. As to (2), the Council held that this exception provides no basis for acceptance of the union's petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32).

---

\*/ 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 9, 1975

Mr. Douglas Cook  
8122 Patrick Henry Building  
601 D Street, NW.  
Washington, D.C. 20013

Re: Labor Local 12, AFGE (AFL-CIO) and U.S.  
Department of Labor (Mallet-Prevost,  
Arbitrator), FLRC No. 75A-36

Dear Mr. Cook:

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.

Based on the facts described in the award, it appears that the grievant, Earl M. Sizemore, was a GS-12 Supervisory Occupational Analyst in the Division of Occupational Analysis, U.S. Employment Service (a unit of the Department of Labor). As a result of a reorganization, certain position classification changes were made, including the deletion of the title "Supervisory" from the GS-12 and GS-13 Supervisory Occupational Analyst positions so that these positions became Occupational Analysts, and Sizemore was reclassified as a GS-12 Occupational Analyst. (Later, for budgetary reasons, an employment ceiling was imposed on the Division which prevented management from activating two additional GS-13 Occupational Analyst positions which had been planned.) Also, as a result of the reorganization, a GS-13 Technical Information Officer job was announced as a vacancy for which qualified candidates might apply. Sizemore, Patricia King (an employee in the Division), and a third candidate who applied were rated "highly qualified" for a vacancy in the newly approved position of GS-13 Technical Information Officer. Leon Lewis, the selecting official, selected King for the position. Sizemore filed a grievance which presented two questions:

- (1) Whether the application of Sizemore for the position of Technical Information Officer GS-13, was improperly denied because another employee applicant had been preselected for the position.
- (2) Whether Sizemore was improperly denied a recommended promotion to GS-13 Occupational Analyst, and also improperly deprived of his classification as a "Supervisory" Occupational Analyst.

As to (1), the arbitrator determined that Lewis did not engage in favoritism and did not preselect King. The arbitrator found that the underlying facts did not support the "point most consistently stressed by the Union . . . that . . . the staff in general had the 'feeling' that King would be the one to get [the job], no matter who applied." As to (2), the arbitrator, noting the "conflict in the testimony," determined that the "record does not sustain the claim that Sizemore was promised a promotion to GS-13, or unfairly denied one." The arbitrator also found that Sizemore's claim that he was improperly deprived of his classification as a supervisor is without merit. The arbitrator accordingly denied both grievances.

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

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

The union's first exception alleges that the arbitrator made incorrect determinations unfavorable to the union's position by accepting false and misleading testimony given by a principal witness for the agency. The union cites several instances which it feels demonstrate that the conclusions of the arbitrator were based upon false testimony. However, it is for the arbitrator to determine the credibility of witnesses and the weight to be given their testimony, and such determinations are not to be reviewed by the courts. International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local Union No. 874 v. St. Regis Paper Company, 362 F.2d 711, 714 (5th Cir. 1966). Similarly, the Council will not review such determinations under section 2411.32 of its rules of procedure. In essence, the union appears to be contending that the arbitrator's award contains a number of erroneous findings of fact. But, the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned by the Council. Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (December 20, 1974), Report No. 61; Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), FLRC No. 73A-20 (September 17, 1973), Report No. 44. Therefore, the union's first exception does not assert a ground upon which the Council will grant a petition for review of an arbitration award.

The union's second exception alleges that "application of the award made is improper according to the contract between the parties under which the grievances were filed." The union provides no further explanation regarding this exception nor does it offer facts and circumstances in support thereof. It appears that the union is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of the agreement. The Council has consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61. Therefore, this exception provides no basis for acceptance of the union's petition under 2411.32 of the Council's rules of procedure.

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

By the Council.\*/

Sincerely,

A handwritten signature in dark ink, appearing to read "Henry B. Frazier III". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

Henry B. Frazier III  
Executive Director

cc: L. B. Fort  
Dept. of Labor

\*/ The Secretary of Labor did not participate in this decision.



AFGE Local 2028 (Professional Staff Nurses Unit "PNSU") and Veterans Administration Hospital, University Drive, Pittsburgh, Pennsylvania (Oakland)(Tive, Arbitrator). The agency excepted to that part of the arbitrator's award ordering the agency to return the grievant to the coronary care unit, contending (1) that the arbitrator's determination that the grievant's transfer out of the coronary care unit was grievable and arbitrable, violated section 13(a) and (b) of the Order, and (2) that the arbitrator violated section 12(b) of the Order by ordering the hospital to return the grievant to duty in the coronary care unit. The agency also requested a stay of the arbitrator's award.

Council action (September 12, 1975). The Council found that the agency's petition does not present facts and circumstances necessary to support its contentions. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32), and therefore vacated the stay of the arbitrator's award which it had previously granted.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 12, 1975

Mr. Robert E. Coy  
Assistant General Counsel  
Office of General Counsel  
Veterans Administration  
Washington, D.C. 20420

Re: AFGE Local 2028 (Professional Staff Nurses Unit "PNSU") and Veterans Administration Hospital, University Drive, Pittsburgh, Pennsylvania (Oakland) (Tive, Arbitrator), FLRC No. 75A-21

Dear Mr. Coy:

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

According to the arbitrator's award, the hospital notified the grievant, a nurse on the day shift in the coronary care unit, that she was being transferred to its evening shift. The grievant accepted the transfer, apparently concluding, on the basis of the hospital's explanation, that the reason for her transfer was the illness of another nurse whom she was replacing. Actually, the hospital had transferred the other nurse from the evening shift to the day shift of the coronary care unit in order to give her more supervision. Upon the grievant's discovery that the other nurse was not ill but had replaced her on the day shift, the grievant indicated to a supervisor her dissatisfaction with the prior explanation, failed to report to work the next 2 days, and upon her return, reported to the day instead of the evening shift. The hospital then told the grievant that she was transferred out of the coronary care unit to the urological section. The hospital issued a reprimand for the grievant's 2-day AWOL that was to be placed in her personnel file for 2 years. A grievance was filed, which ultimately was submitted to arbitration.

The parties did not submit an agreed-upon statement of the issues to be decided by the arbitrator. However, the union and the hospital submitted their respective versions of the issues, and the arbitrator concluded therefrom that the parties "seemed to be in substantial agreement as to

what the issues are." The arbitrator accepted and considered, inter alia, the following issue substantially as framed by the hospital:

[W]hether the reassignment of the Grievant from the Coronary Care Unit is grievable or arbitrable? If so, was it carried out for good reason?<sup>1/</sup>

The arbitrator determined that the reassignment of the grievant was grievable and arbitrable. The arbitrator further determined that, based on his conclusion that there was an element of punishment present, the grievant's reassignment from the coronary care unit was not proper. As a remedy, he ordered the hospital to return the grievant to the coronary care unit, but denied the grievant's request to be made whole for any loss of pay.<sup>2/</sup>

The agency appeals to the Council from that part of the arbitrator's award ordering the agency to return the grievant to the coronary care unit, on the basis of the two exceptions discussed below.

Section 2411.32 of the Council's rules of procedure provides in pertinent part, that review of an arbitration award will be granted "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 . . . the order . . . ."

The agency's first exception contends that the arbitrator's determination that the grievant's transfer out of the coronary care unit was grievable and arbitrable, violated section 13(a) and (b) of the Order. In support of this exception, the agency relies on the requirement in

---

<sup>1/</sup> Specifically, the issue proposed by the hospital stated in pertinent part:

Is the reassignment of . . . [the grievant] from the Coronary Care Unit grievable or arbitrable? If so, was it carried out for good reason?

<sup>2/</sup> The arbitrator also decided three other issues. He determined (1) that the hospital's action in changing the grievant's tour of duty was not in violation of the collective bargaining agreement; (2) that the grievant was properly represented by an employee (a non-nurse) elected as the chief union steward; and (3) that the reprimand remain in her file for only 1 year. No party takes exception to these portions of the arbitrator's award.

section 13(a) and (b) of the Order,<sup>3/</sup> in effect prior to the amendments made by E.O. 11838, which limited the scope of the negotiated grievance and arbitration procedures to "the consideration of grievances over the interpretation or application of the agreement." The agency points out that the arbitrator did not cite any contractual provisions in concluding that the reassignment was improper. Thus, the agency concludes that "[i]n view of the limits of Section 13(a) and (b), the Arbitrator's failure to cite any contractual provisions in support of his ruling evidences the lack of contractual support for his conclusion." In effect, the agency alleges that because the arbitrator did not cite a specific contract provision in the reasoning which he employed, it must necessarily follow that he was not relying upon any specific contract provision and hence the award is contrary to section 13 of the Order. However, it does not necessarily follow that because the arbitrator did not cite a contract provision, his award was not based upon the provisions of the negotiated agreement. Indeed, the Council has indicated that the "arbitrator is not required to discuss the specific agreement provision involved." Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60. Therefore, the Council is of the opinion that the agency's first exception does not appear to be supported by facts and circumstances described in the petition as required by section 2411.32 of the Council's rules.<sup>4/</sup>

---

<sup>3/</sup> Section 13(a) and (b) of E.O. 11491 stated, in pertinent part, as follows:

(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 . . . .

(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 . . . .

<sup>4/</sup> It should be noted that after the agency's petition was filed, the President amended E.O. 11491 to eliminate the requirement in section 13(a) that the scope of the negotiated grievance procedure must be limited to grievances over the interpretation or application of the agreement. The amendments made by E.O. 11838 (40 FR 5743, February 7, 1975) became effective on May 7, 1975. Section 13(a) and (b) of the Order, as amended, states in pertinent part:

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the

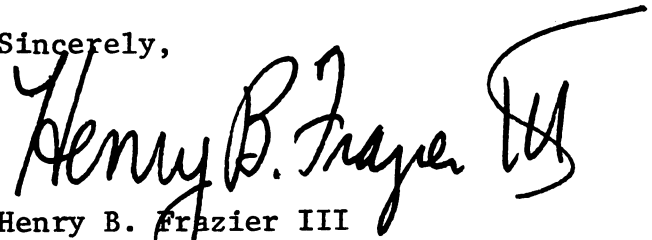
(Continued)

As its second exception, the agency contends that the arbitrator violated section 12(b) of the Order by ordering the hospital to return the grievant to duty in the coronary care unit. In the present case, the Council finds that the agency's petition does not present facts and circumstances necessary to support its contention that the award violates section 12(b) of the Order. In alleging that the arbitrator substituted "his judgment in overruling management's reserved right to determine the best way in which to ensure quality and reliable patient care, as protected by Section 12(b)," the agency has misinterpreted the arbitrator's award. The issue--whether or not the reassignment was "carried out for good reason"--was framed by the hospital itself and makes it clear that the parties, as well as the arbitrator, viewed the case as a disciplinary matter. The parties authorized the arbitrator to decide the propriety of the disciplinary transfer, and the arbitrator decided that good reason did not exist for the hospital's discipline and merely ordered a return to the status quo. Thus, the resolution of the grievance by the arbitrator was not a judgment concerning the best way to ensure quality and reliable patient care and does not serve to indicate any limitations on management's retained rights to transfer or assign employees or to set any policy on the assignment or transfer of employees under section 12(b) of the Order. Rather, it represents a determination on a disciplinary matter.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of its rules of procedure and therefore vacates its earlier stay of the arbitrator's award.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: J. Mulholland  
AFGE

---

(Continued)

consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee . . . .

(b) A negotiated procedure may provide for arbitration of grievances. Arbitration may be invoked . . . .

Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator). The arbitrator determined, among other things, that the agency had not complied with certain parts of a stipulation (to which the parties had agreed during the arbitration hearing) concerning agency recruitment of minority group people and women for noncompetitive positions and the accounting to the union of the procedures adopted by the agency for such recruitment. The Council accepted the agency's petition for review because it appeared, based upon the facts and circumstances described in the petition, that the exceptions to two paragraphs of the award presented grounds that those paragraphs of the award violate applicable law and appropriate regulation, including the Federal Personnel Manual (Report No. 70). The agency's request for a stay of the award was previously granted by the Council as to the two paragraphs of the award in question.

Council action (September 17, 1975). Based on an interpretation by the Civil Service Commission, the Council found that certain portions of the arbitrator's award were in violation of applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure (5 CFR 2411.37(b)), the Council modified the award by striking the violative portions. As so modified, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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

Office of Economic Opportunity

and

FLRC No. 75A-26

Local 2677, American Federation  
of Government Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he determined that the Office of Economic Opportunity (the agency) had failed to comply with certain paragraphs of a stipulation to which the agency and Local 2677, American Federation of Government Employees, AFL-CIO (the union) had agreed. Based on the findings of the arbitrator and the entire record, it appears that the union had filed a grievance alleging, among other things, that the agency had failed to establish an affirmative action plan for equal opportunity and had discriminated against women and minority group members in filling excepted service positions. Arbitration was invoked by the union. During the arbitration hearing, the parties agreed upon a stipulation as a means of resolving the issues in dispute. The arbitrator retained jurisdiction to ensure compliance with the stipulation. The arbitration hearing was adjourned subject to call by either party. In the following year the arbitrator reopened the hearing at the request of the union, which alleged that the agency had failed to comply with the terms of the stipulation.

The Arbitrator's Award

The arbitrator determined, among other things, that the agency had not complied with the portions of the stipulation concerning agency recruitment of minority group people and women for noncompetitive positions and the accounting to the union of the procedures adopted by the agency for such recruitment. As a remedy, the arbitrator ordered the agency to take, among other actions, those set forth in paragraphs 4 and 5 of his award:

4. The Agency shall actively recruit from minority group people and women for non-competitive positions as such positions become available. If two or more applicants are equally qualified, the Agency shall give priority treatment to minority group and women applicants until the percentage of each grade category reaches the goal established pursuant to Article VII of the contract in

the Director's memorandum of August 9, 1972. After each goal is reached, hiring during each month shall be consistent with maintaining this percentage.

5. The Agency shall present to the Union at the end of each 60-day period an accounting of the procedures, formal or informal, it has followed for the recruitment of minority employees and women in non-competitive positions and the percentage of such employees hired during that period. In addition, the Agency shall furnish the Union with the names and addresses of applicants interviewed for such positions. In no event shall the Agency indicate the sex, race, creed or national origin of such applicants.

#### Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review because it appeared that the exceptions to paragraphs 4 and 5 of the award present grounds that those paragraphs of the award violate applicable law and appropriate regulation, including the Federal Personnel Manual.<sup>1/</sup> The union filed a brief.<sup>2/</sup>

#### Opinion

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

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

As previously stated, the Council accepted the agency's petition for review because it appeared that the exceptions to paragraphs 4 and 5 of the award present grounds that those paragraphs of the award violate applicable law and appropriate regulation, including the Federal Personnel Manual. In accordance with established Council practice,

---

<sup>1/</sup> The agency requested and the Council granted, pursuant to section 2411.47(d) of the Council's rules of procedure, a stay of paragraphs 4 and 5 of the award pending the determination of the appeal.

<sup>2/</sup> The union requested that the Council hold public hearings in this case. Pursuant to section 2411.48 of the Council's rules (5 CFR 2411.48), the union's request is denied because the issues and the positions of the parties in this case are adequately reflected in the entire record now before the Council.



the Civil Service Commission was requested for an interpretation of the statutes and the implementing regulations of the Commission as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

With regard to [paragraph 4 of the arbitrator's award] . . . we vigorously support the recruitment of minority group and women applicants for Federal employment. We believe that implementation of the remainder of this provision, however, would involve a violation not only of Commission regulations (Part 713, Code of Federal Regulations), but of the EEO Act of 1972. Both the law and the regulations prohibit discrimination in personnel actions based on race, color, religion, sex, or national origin, and this prohibition applies equally to competitive and non-competitive appointments. The award would have the effect of requiring the agency to consider race, ethnic origin or sex as a positive selection factor. It would be necessary to screen out (i.e., discriminate against) "equally well-qualified" non-minority male candidates in favor of female and minority applicants in order to reach certain minority and female employment goals or levels and thereafter, perhaps, to discriminate against equally qualified female and minority applicants in order to maintain those levels. In this context the goals are no more than quotas, and the prescribed means of attaining the "goals" amount to preferential treatment because of race, ethnic origin, or sex.

The subjects of "quotas" "preference" have been addressed in a number of widely circulated policy directives to Federal agencies. The Commission's Memorandum for Heads of Departments and Agencies of May 11, 1971 . . . points out clearly the incompatibility of quotas with merit principles. The 4-Agency Agreement of March 23, 1973 . . . signed by four of the members of the EEO Coordinating Council, distinguishes between legitimate, realistic targets or goals, based on anticipated vacancies and the availability of skills in the market place, and quota systems which require that a positive preference be given to women and minority group members in order to achieve and maintain certain pre-established, inflexible employment levels. Finally, President Ford's Memorandum for Heads of Departments and Agencies of March 6, 1975 . . . reiterates that "decisions motivated by factors not related to the requirements of a job have no place in the employment system of any employer and particularly the Federal Government." We conclude, therefore, that that portion of the arbitrator's award which would give priority treatment to minority groups and women until they constitute a certain percentage of each grade category would violate law, Commission regulations, and well-established Administration policy.

That part of [paragraph 5 of the arbitrator's award] . . . that requires the agency to report to the union every 60 days on the procedures it has used to recruit minority group members and women and the percentages of such persons hired does not conflict with Commission regulations or directives. The requirement that the agency furnish the union with the names and addresses of applicants interviewed, however, would involve a breach of Commission policy and instructions.

Two provisions of the Federal Personnel Manual are relevant here, Subchapter 5-1(b) of Chapter 294 and Appendix C of the same chapter. Subchapter 5-1(b) provides that "the names of applicants for civil service positions or eligibles on civil service registers, certificates, employment lists, or other lists of eligibles, or their ratings or relative standings on registers are not information available to the public." With specific reference to information which may be released to unions, Appendix C permits the disclosure of names, position titles, grades, salaries, and duty stations of Federal employees for the purpose of membership solicitation. Beyond this, the release of information to unions is not authorized.

In summary, we find that the two provisions of the arbitrator's award you asked us to review both contain elements which, if implemented, would violate applicable law and Commission regulations and policy.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that certain portions of the arbitrator's award are in violation of applicable law and appropriate regulation. We believe that the award must therefore be modified as described below.

#### Conclusion

For the foregoing reasons, we find that certain portions of the arbitrator's award are in violation of applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the award of the arbitrator by striking the following sentences from paragraphs 4 and 5 of the award:

4. . . . If two or more applicants are equally qualified, the Agency shall give priority treatment to minority group and women applicants until the percentage of each grade category reaches the goal established pursuant to Article VII of the contract in the Director's memorandum of August 9, 1972. After each goal is reached, hiring during each month shall be consistent with maintaining this percentage.

5. . . . In addition, the Agency shall furnish the Union with the names and addresses of applicants interviewed for such positions. In no event shall the Agency indicate the sex, race, creed or national origin of such applicants.

As so modified, the award is sustained and the stay of paragraphs 4 and 5 of the award is vacated.

By the Council.



---

Harold D. Kessler  
Acting Executive Director

Issued: September 17, 1975

Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case Nos. 63-5349 (CA) and 63-5357 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that there were insufficient grounds to establish a reasonable basis for the two related unfair labor practice complaints of the National Federation of Federal Employees, which alleged that the activity violated section 19(a)(2) of the Order. The union appealed to the Council, contending that the decision of the Assistant Secretary presents a major policy issue.

Council action (September 17, 1975). The Council held that because the Assistant Secretary's decision does not present a major policy issue, and since the union neither alleges, nor does it appear, that the decision is arbitrary and capricious, the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 17, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation  
of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Veterans Administration, Veterans  
Administration Data Processing  
Center, Austin, Texas, Assistant  
Secretary Case Nos. 63-5349 (CA)  
and 63-5357 (CA), FLRC No. 75A-73

Dear Ms. Cooper:

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

In two related complaints, NFFE alleged that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, had violated section 19(a)(2) of the Order by promoting, upgrading or otherwise rewarding certain managers and employees who either had unfair labor practice charges or equal employment opportunity charges filed against them or who had engaged in anti-union conduct, including decertification activities. The Assistant Secretary, in agreement with the Assistant Regional Director, found that there was insufficient evidence to establish a reasonable basis for the complaints. Relying on section 203.6(e) of his regulations, which places the burden of proof at all stages of the proceeding regarding matters alleged in the complaint upon the complainant, the Assistant Secretary concluded that no evidence was presented to support the complaints other than undocumented allegations of a cause-and-effect relationship leading to the promotion of a number of individuals as a result of their alleged activities on behalf of a decertification effort.

In your petition for review you contend a major policy issue is presented, namely, whether when allegations of a reward system of promotions for anti-union attitudes and conduct by management officials and for unit employees' decertification efforts are made against an activity, the activity must show from its personnel files that such is not true before a complaint is dismissed.

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

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

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

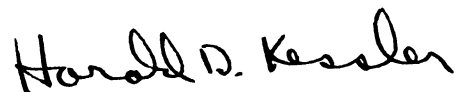
Further, section 203.6(e) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case. Rather, your contentions are essentially nothing more than disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a hearing order.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. L. Shochet  
VA

Local Lodge 2331, IAM&AW and 2750th Air Base Wing, Wright-Patterson Air Force Base. The dispute involved two union proposals concerning (1) overtime assignments and (2) reduction in bargaining unit staffing.

Council action (September 18, 1975). As to (1), the Council held that further clarification of the union's proposal is indicated so as to reflect more specifically its stated objective (which objective the agency indicated is negotiable), and that unless and until the agency head then determines that such clarified proposal is not negotiable, the conditions for Council review have not been met. Accordingly, without passing on the merits, the Council denied the union's appeal with respect to this proposal. As to (2), the Council held that since the union did not assert, nor can it be inferred from the appeal, that the agency regulations, as interpreted by the agency head (upon which the determination of nonnegotiability was based), violate any applicable law, outside regulation, or the Order, the appeal is not reviewable under section 11(c)(4) (ii) of the Order. Accordingly, the Council also denied the union's appeal as to this proposal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Mr. William C. Valdes  
Staff Director  
Office of Civilian Personnel  
Policy - OASD (M&RA)  
The Pentagon, Room 3D281  
Washington, D.C. 20301

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

Re: Local Lodge 2331, IAM&AW and 2750th  
Air Base Wing, Wright-Patterson Air  
Force Base, FLRC No. 75A-40

Gentlemen:

Reference is made to the union's petition for review and the agency's statement of position in the above-entitled case. The negotiability dispute involves two union proposals which are discussed, separately, below.

The first proposal (Article 10, Section 7) reads as follows:

No employee in one classification shall be assigned to work on a scheduled overtime basis in another classification as long as employees in the classification which normally perform the work are available.

In its request for an agency head determination and, by reference, in its appeal to the Council, the union expressly indicated that its sole objective in proposing the quoted language is to negotiate a proposal "concerned with the way which overtime assignments are made," similar to the proposal which the Council held to be negotiable in Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, FLRC No. 72A-40 (June 29, 1973), Report No. 41.<sup>1/</sup>

1/ In that case the proposal in question provided that:

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.



More particularly, the union stated that:

The rationale advanced by FLRC in FLRC No. 72A-40, 29 June 73, appears to us to apply directly to this dispute. As in the instant case, there, also, the sole object is to control the conditions under which overtime is assigned. Management has already made the decision that overtime work is necessary to accomplish certain tasks that are normally performed by unit employees. The intent of the language there, and in the instant case, is to assure that the employees normally assigned such work will not be denied the opportunity to work based on the mere fact of their status as employees in the exclusive bargaining unit.

The agency takes issue with the negotiability of particular language used by the union in seeking to accomplish this purpose. However, the agency does not dispute the negotiability of the union's objective. In this regard the agency noted, in its determination of nonnegotiability, that, while local management is willing to negotiate a provision "predicated on the Philadelphia [note 1, supra] proposal," the union's proposal, as submitted for determination "does not relate solely to nondenial of overtime on the mere fact of an employee's status in the unit."

Thus, it is clear from the documents submitted to the Council in this case that the union wishes to negotiate a proposal with the objective that unit employees will not be denied overtime solely because of their status as members of the bargaining unit, and that the agency does not dispute the negotiability of such objective. Under these circumstances we believe that further clarification of its proposal by the union is indicated so as to reflect more specifically its intent. Unless and until the agency head then determines that such clarified proposal is not negotiable, the conditions for Council review, as 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, the Council is of the view that the union's appeal with respect to its proposal concerning overtime assignments is prematurely filed, and the petition for review, insofar as it adverts to that proposal is denied on that ground.<sup>2/</sup>

As to the second proposal (Article 30, Section 5), which concerns reduction in bargaining unit staffing, after careful consideration of the union's appeal and the agency's statement of position, the Council has concluded that review of the appeal must be denied.

<sup>2/</sup> See National Federation of Federal Employees, Local No. 75, and Defense Contract Administration Services District, Cincinnati, Ohio, FLRC No. 72A-51 (August 7, 1973), Report No. 42; NFFE Local 997 and Ames Research Center, National Aeronautics and Space Administration, FLRC No. 73A-12 (August 7, 1973), Report No. 42.

Section 11(c)(4) of the Order, incorporated by reference in section 2411.22 of the Council's rules, 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.

The Department of Defense determined that the union's proposal was not negotiable principally because it contravenes published agency regulations, specifically paragraphs 1-8F(3) and (4) and 4-7h of Air Force Regulation 40-7, "Nonappropriated Funds Personnel Management and Administration," July 1, 1974. The union, in its appeal, contended that its proposal is consistent with the Order and therefore negotiable.

However, since the agency's determination of nonnegotiability was based primarily on an assertion that the proposal violates agency regulations, section 11(c)(4)(i) is not the sole or determinative condition for review applicable in this appeal. Moreover, the union does not assert, nor can it be inferred from the appeal, that the agency's regulations, as interpreted by the agency head, violate any applicable law, outside regulation, or the Order. Hence, the appeal is not reviewable by the Council under the provisions of section 11(c)(4)(ii) of the Order.

Accordingly, since the union's appeal with respect to Article 10, Section 7 and Article 30, Section 5 fails to meet the conditions for review set forth in section 11(c)(4) of the Order, pursuant to section 2411.22 of the Council's rules, the union's appeal is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

Internal Revenue Service, Omaha District Office, Assistant Secretary Case No. 60-3722 (G&A). The Assistant Secretary, in agreement with the Assistant Regional Director, found that the National Treasury Employees Union's grievances involved matters concerning the interpretation and application of the parties' agreement and were therefore arbitrable. In this regard, the Assistant Secretary rejected the contention of the agency that the Budget and Accounting Act constituted a statutory appeals procedure within the meaning of section 13(a) of the Order which would preclude a finding of arbitrability in the matter. The agency appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues, and requested a stay of that decision.

Council action (September 18, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues. Accordingly, since the agency's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12), the Council denied review of the appeal. Likewise, the Council denied the agency's request for a stay of the Assistant Secretary's decision.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Mr. Thomas J. O'Rourke, Staff Assistant  
Office of the Regional Counsel  
Internal Revenue Service  
Room 1682  
35 East Wacker Drive  
Chicago, Illinois 60601

Re: Internal Revenue Service, Omaha  
District Office, Assistant  
Secretary Case No. 60-3722 (G&A),  
FLRC No. 75A-43

Dear Mr. O'Rourke:

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

According to the Report and Findings of the Assistant Regional Director, the Internal Revenue Service, Omaha District Office, Omaha, Nebraska (the activity), denied claims for payment of per diem and travel expenses submitted by two newly hired employees for the period of several months preceding their assignment to a permanent duty post. Thereafter, the employees initiated grievances requesting reimbursement in accordance with the travel vouchers previously submitted, citing Article 27, Section 3 of the parties' Multi-District Agreement (the agreement)<sup>1/</sup> as the basis for their claims. After the dispute had been processed through the initial steps of the grievance procedure without resolution and arbitration was requested by the union, the activity maintained that the grievances were not arbitrable because section 305 of the Budget and Accounting Act (31 U.S.C. 71)<sup>2/</sup> and implementing regulations of the

1/ Article 27, Section 3 provides, in pertinent part:

The Employer agrees to reimburse employees when in a travel status for per diem and mileage expenses incurred by them in the discharge of their official duties. . . .

2/ 31 U.S.C. 71 (1970 ed.) provides:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall, be settled and adjusted in the General Accounting Office.

General Accounting Office (GAO) provide a statutory appeals procedure which would preclude arbitration by virtue of section 13(a) of the Order. Subsequently, the National Treasury Employees Union (the union) requested a determination as to the arbitrability of the grievances at issue.

In agreement with the Assistant Regional Director, the Assistant Secretary found that the grievances involved matters concerning the interpretation and application of the agreement and, therefore, were arbitrable. In this regard, the Assistant Secretary rejected the contention that the Budget and Accounting Act constituted a statutory appeals procedure within the meaning of section 13(a) of the Order which would preclude a finding of arbitrability in the matter.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues, because, in summary: (1) the Budget and Accounting Act provides an exclusive statutory appeals procedure within the meaning of section 13(a) of the Order for resolving disputes involving travel and per diem claims, and thus precludes the arbitration of such disputes; (2) the Assistant Secretary's interpretation and application of the term statutory appeals procedure is not supported by the language or the "legislative history" of the Order, or the rules and regulations of the Council and the Assistant Secretary; and (3) the Assistant Secretary erroneously relied on the Comptroller General's ruling in 54 Comp. Gen. 312, supra, in reaching his decision, since the facts and legal principles set forth in that case are irrelevant to the disposition of the present case.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present any major policy issues. With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that his findings and decision were without reasonable justification in the particular circumstances of this case. With respect to your contention that the Assistant Secretary's decision presents a major policy issue, without passing upon the Assistant Secretary's reasoning, the Council is of the opinion that in the circumstances of the case the Assistant Secretary's determination that the Budget and Accounting Act does not constitute a statutory appeals procedure within the meaning of section 13(a) of the Order does not warrant review. Moreover, there is no indication that the negotiated procedure herein would prevent the agency from seeking a ruling from the Comptroller General under the Budget and Accounting Act. Furthermore, as the Council stated in its Report and Recommendations on the Amendment of Executive Order 11491, as Amended,<sup>3/</sup> ". . . where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which

---

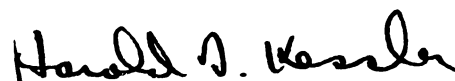
<sup>3/</sup> Labor-Management Relations in the Federal Service (1975), Section VI, p. 44.

violates applicable law, appropriate regulations or the Order, the Council, under its rules, will grant review of the award."<sup>4/</sup> As to the allegation concerning a ruling of the Comptroller General, as the Assistant Secretary merely noted the decision, rather than relied upon it as alleged, no major policy issue is presented warranting review.

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

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

R. J. Bucholtz  
NTEU

---

<sup>4/</sup> It should be noted, as the Council pointed out in its decision in Department of the Army, Aberdeen Proving Ground, FLRC No. 74A-46 (April 23, 1975), Report No. 67, "the fact that an agency has sought a ruling directly from the Comptroller General does not relieve the agency of its obligations under the Order and, hence, is not a defense to an unfair labor practice complaint." Thus, if an agency chooses not to implement an award and instead, to seek a ruling from the Comptroller General concerning that award, it can meet its obligations under the Order and thereby protect itself from an unfair labor practice by filing an exception with the Council.

Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-587 (CA). The Assistant Secretary, noting that section 19(d) of the Order prohibits consideration of the allegations raised in the Hawaii Federal Employees Metal Trades Council's 19(a)(1) and (2) unfair labor practice complaint, since the evidence established that the allegations had been raised previously under a negotiated grievance procedure, and that matters raised for the first time in a request for review cannot be considered by the Assistant Secretary, denied the union's request for review seeking reversal of the Assistant Regional Director's dismissal of the complaint. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious.

Council action (September 18, 1975). The Council found that the union's petition for review does not meet the requirements for review set forth in section 2411.12 of the Council's rules (5 CFR 2411.12); that is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious, and the union does not allege, nor does it otherwise appear, that a major policy issue is presented. Accordingly, since the union's appeal failed to meet the requirements for review in the Council's rules of procedure, the Council denied review of the appeal.

on in  
(April  
ng dis  
obligat  
practice  
d and  
g that  
protect  
the Co



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Mr. Jack L. Copess  
Hawaii Federal Employees Metal  
Trades Council  
925 Bethel Street, Room 210  
Honolulu, Hawaii 96813

Re: Department of the Navy, Pearl  
Harbor Naval Shipyard, Assistant  
Secretary Case No. 73-587 (CA),  
FLRC No. 75A-57

Dear Mr. Copess:

The Council has carefully considered your petition for review in the above-entitled case.

In this case, the Chief Steward of the Hawaii Federal Employees Metal Trades Council, AFL-CIO (the union) filed a grievance protesting a 5-day suspension that he had received for allegedly refusing to obey a supervisor's order. Thereafter, the union filed an unfair labor practice complaint alleging that the Department of the Navy, Pearl Harbor Naval Shipyard (the activity) violated section 19(a)(1) and (2) of the Order by its suspension of the Chief Steward. The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found that further proceedings in the matter were not warranted. The Assistant Secretary, noting the conclusion that section 19(d) of the Order prohibits the consideration of the allegations raised in the complaint as the evidence establishes that such allegations have been raised previously under a negotiated grievance procedure, and that matters raised for the first time in a request for review cannot be considered by the Assistant Secretary, denied your request for review seeking reversal of the Assistant Regional Director's dismissal of the complaint.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious because the Assistant Secretary "improperly and illogically" concluded, on the basis of the evidence presented, that further consideration of the complaint was prohibited by section 19(d). In this connection, you allege that the grievance filed by the Chief Steward neither mentioned nor sought redress for the denial of his rights under the Order, and that the discussions which occurred at the third step of the grievance procedure therefore did not involve the same issues raised in the unfair labor practice complaint. You further contend that the Assistant Secretary's decision herein is inconsistent with his ruling in a prior case involving the same parties. Finally, you



assert that the Assistant Secretary was arbitrary and capricious in ambiguously stating that he could not consider matters raised for the first time in a request for review without specifying the matters to which he referred.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious, and you do not allege, nor does it otherwise appear, that a major policy issue is presented. With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in reaching the conclusion that further consideration of the union's complaint was barred by section 19(d) of the Order, nor is such determination inconsistent with his previous decisions. Furthermore, your contention that the Assistant Secretary "improperly and illogically" concluded that section 19(d) of the Order precluded further consideration of the complaint constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings made in connection with his application of section 19(d) herein, and therefore does not present a basis for Council review. Further, the Assistant Secretary's determination with respect to matters raised for the first time in your request for review is consistent with his regulations and past decisions.

Accordingly, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. M. Foss  
Navy

Department of Commerce, U.S. Merchant Marine Academy, Assistant Secretary Case No. 30-5585 (CA). The Assistant Secretary denied the request of the individual complainant (Donald R. Paquette) for reversal of the Acting Assistant Regional Director's dismissal of the unfair labor practice complaint, which alleged that the activity violated section 19(a)(1) and (6) of the Order in unilaterally promulgating revised Qualification Standards for faculty promotion in 1969 to supersede 1966 Qualification Standards. The complainant appealed to the Council, contending that the Assistant Secretary's decision presents a major policy issue and is arbitrary and capricious.

Council action (September 18, 1975). The Council held that the complainant's petition for review does not meet the requirements of the Council's rules governing review; that is, in the circumstances presented, the decision of the Assistant Secretary does not present a major policy issue nor does it appear arbitrary and capricious. Accordingly, the Council denied review of the complainant's appeal since it failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12).



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Mr. Donald R. Paquette  
9 Flo Drive  
Syosset, New York 11791

Re: Department of Commerce, U.S. Merchant  
Marine Academy, Assistant Secretary  
Case No. 30-5585 (CA), FLRC No. 75A-60

Dear Mr. Paquette:

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

According to your petition for review filed with the Council, your complaint in this case alleged that the U.S. Merchant Marine Academy (the activity) violated section 19(a)(1) and (6) of Executive Order 11491. Specifically, you allege that the activity unilaterally promulgated revised Qualification Standards for faculty promotion in 1969 to supersede 1966 Qualification Standards. You contend that the 1966 Standards were in effect and referred to "by inference" in the negotiated agreement executed in 1968 between the activity and USMA Chapter, United Federation of College Teachers, Local 1460, AFT, AFL-CIO (the union) and that the revised standards were applied to reject your "application for promotion" in 1974 on the ground that you were ineligible for consideration thereunder. According to the findings of the Assistant Secretary, had the 1966 Standards been applied, you would have qualified for promotion to professor.

The Assistant Secretary denied your request for reversal of the Acting Assistant Regional Director's dismissal of your complaint. In so doing, he found that the 1969 Qualification Standards were formulated in accordance with Maritime Administrator's Order No. 181(A) and superseded the 1966 Qualification Standards. The Assistant Secretary further stated that, even assuming the 1969 revisions were adopted unilaterally, no finding of a violation could be made since your charge and complaint were untimely filed in relation to such conduct under section 203.2 of his regulations.

In your petition for review, you contend that the Assistant Secretary's decision presents a major policy issue as to what constitutes "terms of a negotiated agreement," and that it was erroneously concluded that the 1966 Qualification Standards were not part of the 1968 negotiated agreement between the activity and the union. You also contend, in essence, that the decision of the Assistant Secretary that the 1969 Qualification Standards were properly adopted is arbitrary and inconsistent with the

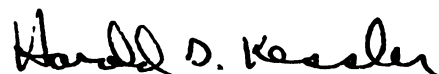
purposes of sections 11 and 12 of the Order. Finally you allege that the finding of the Assistant Secretary that the complaint was untimely filed is arbitrary and capricious since the unfair labor practice occurred in 1974 when your rights were violated by the activity's refusal to apply the 1966 Qualification Standards to your application for promotion.

In the Council's view, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue nor does it appear arbitrary and capricious. With respect to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting your statement that the Qualification Standards at issue here are only referred to (by inference) in the negotiated procedures for promotion, and the Assistant Secretary's finding that these standards had not been made part of the agreed upon promotion procedures when the parties executed the contract and therefore had not become a subject for negotiation or part of the labor agreement at that time, the subject decision does not raise a major policy issue warranting Council review. Moreover, with respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that his conclusion that the 1969 standards were properly adopted was without reasonable justification, particularly in light of his findings that there is no evidence that the union ever sought to negotiate the procedure by which qualification standards are formulated; that all that the union ever requested was "appropriate consultation and discussion" of the proposed changes; and that there is evidence that union proposals were solicited and considered at various times before the revised standards were issued.

Accordingly, without considering whether the 1969 Qualification Standards were promulgated pursuant to Executive Order 10988, which was in effect at that time, and without reaching or passing upon the Assistant Secretary's finding concerning the timeliness of your charge and complaint, review of your appeal is hereby denied since it fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

E. Bee  
Commerce

Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5288 (CA). In agreement with the Assistant Regional Director, the Assistant Secretary found that a reasonable basis had not been established for the National Federation of Federal Employees' unfair labor practice complaint, which alleged that the activity violated section 19(a)(6) of the Order, and upheld the ARD's dismissal of the complaint. The union appealed to the Council, contending that the Assistant Secretary's decision presents major policy issues.

Council action (September 18, 1975). The Council held that because the Assistant Secretary's decision does not present a major policy issue, and the union neither alleges, nor does it appear, that the decision is arbitrary and capricious, the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations (5 CFR 2411.12). Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Veterans Administration, Veterans  
Administration Data Processing Center,  
Austin, Texas, Assistant Secretary  
Case No. 63-5288 (CA), FLRC No. 75A-67

Dear Ms. Cooper:

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

In agreement with the Assistant Regional Director, the Assistant Secretary found that a reasonable basis had not been established for NFFE's complaint which alleged that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas (the activity) violated section 19(a)(6) of the Order. NFFE's complaint was based upon its allegations that a manager at the activity posted a unilateral communication concerning "39-hour employees" despite a previous oral agreement with NFFE that there would be a joint communication; unilaterally changed a previously prepared joint communication before posting it; and falsely stated publicly to the employees that NFFE had agreed to the manager's "newly conceived" policy concerning the method of filling new positions at the activity. In rejecting NFFE's assertion that the allegations contained in the complaint established prima facie violations of the Order, and that the activity's denials created credibility issues warranting a hearing, the Assistant Secretary stated:

[T]he bare allegations contained in the instant complaint are devoid of any supporting evidence such as signed statements by alleged discriminatees or by witnesses. . . . It has long been established policy that to warrant further proceedings a complaint must be supported by evidence, and that the burden of proof is borne by the Complainant at all stages of the unfair labor practice proceeding. In this latter regard, see Section 203.6(e) of the Assistant Secretary's Regulations.

In your petition for review, you contend that the dismissal of NFFE's complaint raises three major policy issues: (1) Must agreements arrived at during daily union-management consultation sessions be reduced to writing to be enforceable under the Order? (2) Are unilateral communications with employees on personnel policies violative of the Order? (3) Does a manager have the duty to act expeditiously and to make consistent statements during his dealings with the union?

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

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

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

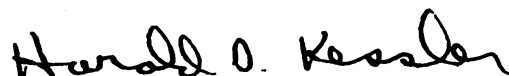
Further, section 203.6(e) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case. Rather, your contentions are essentially nothing more than disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a hearing order.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. L. Shochet  
VA

Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5276 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for the National Federation of Federal Employees' unfair labor practice complaint, which alleged that the activity violated section 19(a)(1) and (2) of the Order, and upheld the ARD's dismissal of the complaint. The union appealed to the Council, contending that the decision of the Assistant Secretary presents a major policy issue.

Council action (September 18, 1975). The Council held that because the Assistant Secretary's decision does not present a major policy issue, and since the union neither alleges, nor does it appear, that the decision is arbitrary and capricious, the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations (5 CFR 2411.12).





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Veterans Administration, Veterans  
Administration Data Processing Center,  
Austin, Texas, Assistant Secretary  
Case No. 63-5276 (CA), FLRC No. 75A-68

Dear Ms. Cooper:

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

The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for NFFE's complaint which alleged that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas (the activity) violated section 19(a)(1) and (2) of the Order. NFFE's complaint was based upon its allegations that a division supervisor harassed a union steward by engaging in disparate treatment consisting of "cold shoulder" treatment and the keeping of records as to what time the union official came to work, and the amount of time spent at lunch and on the telephone, when no such records were kept for other division employees. In rejecting NFFE's assertion that the allegations contained in the complaint established prima facie violations of the Order, and that the activity's denials created credibility issues warranting a hearing, the Assistant Secretary stated:

[T]he bare allegations contained in the instant complaint are devoid of any supporting evidence such as signed statements by alleged discriminatees or by witnesses. . . . It has long been established policy that to warrant further proceedings a complaint must be supported by evidence, and that the burden of proof is borne by the Complainant at all stages of the unfair labor practice proceeding. In this latter regard, see Section 203.6(e) of the Assistant Secretary's Regulations.

In your petition for review you contend that the dismissal of NFFE's complaint presents a major policy issue as to, "Whether in the absence of agency evidence that other employees were treated in the same manner as the division [union] steward, union allegations that the treatment was disparate for her are a sufficient basis for the complaint?" In support for this contention, you assert that the very specific allegations of the complaint required management to come forward with evidence from its records to prove that other employees were treated in the same manner as the union steward, and that a simple denial of wrongdoing is not "a sufficient basis for the dismissal of the complaint."

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

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

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

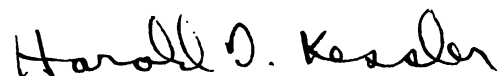
Further, section 203.6(e) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case. Rather, your contentions are essentially nothing more than disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a hearing order.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. L. Shochet  
VA

Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5278 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for the National Federation of Federal Employees' unfair labor practice complaint, which alleged that the activity violated section 19(a)(1) and (2) of the Order, and upheld the ARD's dismissal of the complaint. The union appealed to the Council, contending that major policy issues are presented by the decision of the Assistant Secretary.

Council action (September 18, 1975). The Council held that because the Assistant Secretary's decision does not present a major policy issue, and since the union neither alleges, nor does it appear, that the decision is arbitrary and capricious, the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure (5 CFR 2411.12). Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Veterans Administration, Veterans  
Administration Data Processing Center  
Austin, Texas, Assistant Secretary  
Case No. 63-5278 (CA), FLRC No. 75A-69

Dear Ms. Cooper:

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

The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for NFFE's complaint which alleged that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas (the activity) violated section 19(a)(1) and (2) of the Order. NFFE's complaint was based upon its allegations that management had engaged in selective treatment of a unit employee because of his union activities, such treatment consisting of verbal reprimands concerning the employee's use of the telephone, and by its interference with the employee's attempt to discuss the matter with his union representative. In rejecting NFFE's assertion that the allegations contained in the complaint established prima facie violations of the Order, and that the activity's denials created credibility issues warranting a hearing, the Assistant Secretary stated:

[T]he bare allegations contained in the instant complaint are devoid of any supporting evidence such as signed statements by alleged discriminatees or by witnesses. . . . It has long been established policy that to warrant further proceedings a complaint must be supported by evidence, and that the burden of proof is borne by the Complainant at all stages of the unfair labor practice proceeding. In this latter regard, see Section 203.6(e) of the Assistant Secretary's Regulations.

In your petition for review, you contend that two major policy issues are presented by the decision of the Assistant Secretary: (1) Whether in the absence of agency evidence to prove similar treatment an allegation of disparate treatment is sufficient as a reasonable basis for the complaint; and (2) whether the supervisor's statement about an employee and himself "being smart enough to handle this without going to the union" constitutes interference and provides a reasonable basis for a complaint.

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

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

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

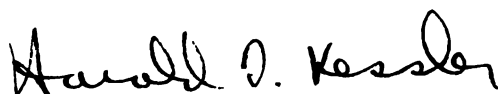
Further, section 203.6(e) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case. Rather, your contentions are essentially nothing more than disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a hearing order.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

Sincerely,



Harold D. Kessler  
Acting Executive Director

A/SLMR  
Dept. of Labor  
S. L. Shochet  
VA

Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-5277 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for the National Federation of Federal Employees' unfair labor practice complaint, which alleged that the activity violated section 19(a)(1), (2) and (6) of the Order, and upheld the ARD's dismissal of the complaint. The union appealed to the Council, contending that major policy issues are presented by the decision of the Assistant Secretary.

Council action (September 18, 1975). The Council held that because the Assistant Secretary's decision does not present a major policy issue, and since the union neither alleges nor does it appear, that the decision is arbitrary and capricious, the union's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations (5 CFR 2411.12). Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 18, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Veterans Administration, Veterans  
Administration Data Processing Center,  
Austin, Texas, Assistant Secretary  
Case No. 63-5277 (CA), FLRC No. 75A-70

Dear Ms. Cooper:

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

In this case, NFFE's complaint alleged that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas (the activity) violated section 19(a)(1) and (2) of the Order by interfering with a unit employee's right to discuss a problem with the union president during the employee's coffee break, and by referring the employee to her area union steward instead. NFFE's complaint further alleged that the activity's division chief refused to meet and confer with the union steward concerning 39-hour positions and had given erroneous information on these positions to the union at previous meetings, in violation of section 19(a)(1) and (6) of the Order. The Assistant Secretary, in agreement with the Assistant Regional Director, found that a reasonable basis had not been established for NFFE's complaint. In rejecting NFFE's assertion that the allegations contained in the complaint established prima facie violations of the Order, and that the activity's denials created credibility issues warranting a hearing, the Assistant Secretary stated:

[T]he bare allegations contained in the instant complaint are devoid of any supporting evidence such as signed statements by alleged discriminatees or by witnesses. . . . It has long been established policy that to warrant further proceedings a complaint must be supported by evidence, and that the burden of proof is borne by the Complainant at all stages of the unfair labor practice proceeding. In this latter regard, see Section 203.6(e) of the Assistant Secretary's Regulations.

In your petition for review you contend that four major policy issues are presented by the decision of the Assistant Secretary: (1) Whether the interference of a supervisor in an employee's seeking of help from the union violated section 19(a)(1) and 19(a)(2) of the Order and whether a supervisor may forbid an employee to speak with a particular union officer during the employee's coffee break; (2) whether giving the union incorrect information on 39-hour employees violates the Order and whether refusing to meet and correct this information at a later date violates the Order; (3) whether a

reasonable basis was established for the complaint; and (4) whether the area office and/or regional office of the Department of Labor must allow time for amendment or withdrawal of a complaint before it is dismissed by the Assistant Secretary.

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

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

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

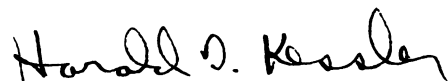
Further, section 203.6(e) states:

The complainant shall bear the burden of proof at all stages of the proceedings, regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he wrongly applied these regulations to the facts and circumstances of this case. Rather, your contentions are essentially nothing more than disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a hearing order.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. L. Shochet  
VA



Department of Transportation, Federal Aviation Administration, A/SLMR No. 517. The Assistant Secretary, upon a complaint filed by the National Association of Air Traffic Specialists, found that the agency's refusal to comply with an arbitration award violated section 19(a)(1) and (6) of the Order. (The Council had previously denied the agency's petition for review of the subject arbitration award. Federal Aviation Administration, U.S. Department of Transportation and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator), FLRC No. 73A-50 (March 29, 1974), Report No. 52.) The agency appealed to the Council contending that the decision of the Assistant Secretary presents major policy issues and is arbitrary and capricious. The agency also requested a stay of the Assistant Secretary's decision.

Council action (September 23, 1975). The Council held that the agency's petition for review failed to meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision does not appear in any manner arbitrary and capricious, nor does it present a major policy issue. Accordingly, the Council denied review of the agency's petition. The Council also denied the agency's request for a stay under section 2411.47(c)(2) of the Council's then current rules.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 23, 1975

Mr. R. J. Alfultis  
Director of Personnel and Training  
Office of the Secretary  
Department of Transportation  
Washington, D.C. 20590

Re: Department of Transportation,  
Federal Aviation Administration,  
A/SLMR No. 517, FLRC No. 75A-66

Dear Mr. Alfultis:

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

The case arose as a result of a complaint filed by the National Association of Air Traffic Specialists (NAATS) alleging that the Department of Transportation, Federal Aviation Administration (FAA) had violated section 19(a)(1) and (6) of the Order by failing and refusing to comply with an arbitration award wherein the arbitrator determined that the agency had failed to provide "adequate" parking because the new parking area did not meet the adequacy requirements in the FAA Order and had thus violated Article VIII of the agreement and FAA Order 4665.3A.<sup>1/</sup>

The NAATS contended that the award became final and binding when the FAA's petition for review of the award was denied by the Council. Federal Aviation Administration, U.S. Department of Transportation and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator), FLRC No. 73A-50 (March 29, 1974), Report No. 52. The Assistant Secretary, relying on the Council's decision in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1975), Report No. 67, rejected the agency's contention that questions arising from an arbitration award are not appropriate matters for enforcement by him within the framework of the unfair labor

<sup>1/</sup> Federal Aviation Administration, infra, FLRC No. 73A-50.

practice procedures and found that FAA's refusal to comply with the arbitration award violated section 19(a)(1) and (6) of the Order. In response to the FAA's contention that because a new agreement executed by the parties subsequent to the disputed award was silent on all subjects of parking, "the instant grievance was rendered moot and all contractual obligations to effect this award were likewise nullified," the Assistant Secretary found, in pertinent part, "the arbitration award established a term and condition of employment for unit employees" upon which the parties "were obligated to meet and confer if either desired a modification." The Assistant Secretary concluded, however, that the evidence was insufficient to establish that the union waived the arbitration award,

as a result of the execution of the parties' most recent negotiated agreement. Nor, under the circumstances herein, do I believe that the Respondent can now achieve, by merely declaring that the issue is moot as a result of a new negotiated bargaining agreement, which is silent on the subject of parking, what it failed to achieve through the grievance-arbitration machinery and review by the Council.

In your petition for review you contend, in summary, that the decision of the Assistant Secretary raises major policy issues in that the net effect of the Assistant Secretary's decision is that all arbitrators' awards continue indefinitely and this result has the effect of having the provision upon which the award was based survive the agreement absent a finding by the arbitrator that such survivability is based on his construction of the agreement. You also contend that it was arbitrary and capricious for the Assistant Secretary to place on FAA the burden of proof that there was no affirmative evidence that the parties mutually agreed not to be bound by the arbitrator's award.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision does not appear in any manner arbitrary and capricious, nor does it present a major policy issue. As to your contentions with respect to major policy issues, the Council is of the opinion that in the circumstances of the case the Assistant Secretary's determination as to the continuing effect of the arbitrator's award does not warrant review, noting particularly the Assistant Secretary's finding that there was no affirmative evidence that the parties mutually agreed not to be bound by the arbitration award when they renegotiated their agreement. Furthermore, the Council concludes that the Assistant Secretary, in determining that the award was still viable, was simply carrying out his function of determining whether the FAA had failed to abide by the arbitrator's award, as required by the Council in Aberdeen Proving Ground, supra.<sup>2/</sup> As to your contention that the Assistant Secretary's decision

---

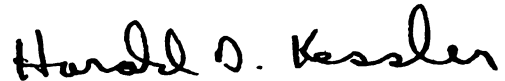
<sup>2/</sup> In so concluding, we do not interpret the decision of the Assistant Secretary as establishing an obligation on a party to negotiate prior to making changes in personnel policies and practices and matters affecting working conditions established in a prior agreement but not contained in a subsequent agreement.

is arbitrary and capricious, it does not appear that the Assistant Secretary's determination as to the submission of evidence was without reasonable justification.

Accordingly, your petition for review is denied, since it does not meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Likewise, the Council has directed that your request for a stay be denied under section 2411.47(c)(2) of the Council's rules of procedure.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

R. E. Nagle

National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457.

This appeal arose from a decision of the Assistant Secretary who, upon a complaint by the American Federation of Government Employees, Local 2284, AFL-CIO, found that the agency violated section 19(a)(1) of the Order. The Council accepted the petition for review on the ground, among others, that a major policy issue was presented by the decision of the Assistant Secretary as to whether agency headquarters-level representatives conducting meetings or interviews with activity-level employees for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are required by the Order to permit the exclusive representative of such employees, upon request, to participate in such discussions or interviews (Report No. 65).

Council action (September 26, 1975). The Council concluded that agency headquarters-level representatives conducting meetings or interviews with activity-level employees merely for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are not required by the Order to permit the exclusive representative of such employees, either on the agency's own initiative or upon request, to participate in such discussions or interviews. More particularly in this case, the Council found that the conduct of the agency in evaluating the effectiveness of an agency-wide program which existed totally apart from the collective bargaining relationship did not violate section 19(a)(1) of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with the Council's decision.

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

National Aeronautics and Space  
Administration (NASA),  
Washington, D.C.

and

Lyndon B. Johnson Space Center  
(NASA), Houston, Texas

and

American Federation of Government  
Employees, Local Union 2284,  
AFL-CIO

A/SLMR No. 457  
FLRC No. 74A-95

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary who, upon complaint by the American Federation of Government Employees, Local Union 2284, AFL-CIO (Union), against the National Aeronautics and Space Administration (NASA), Washington, D.C. (Agency), and the Lyndon B. Johnson Space Center (NASA), Houston, Texas (Activity), alleging violations of section 19(a)(1) and (6) of the Order, found that the Activity did not violate section 19(a)(1) and (6), and that while the Agency did not violate section 19(a)(6) of the Order, it did commit a 19(a)(1) violation.

The pertinent facts in the case, as stipulated by the parties and found by the Assistant Secretary, are as follows:<sup>1/</sup> Shortly after appointment to his position, the Assistant Administrator for Equal Opportunity Programs of the Agency decided that it was necessary to visit various NASA Centers, including the Activity herein concerned, in order to assess the state of the Agency's Equal Employment Opportunity (EEO) program.

At his request, the Activity arranged three meetings or interviews between the Assistant Administrator and various employees or employee groups without regard as to whether they were members of bargaining units. These meetings or interviews were held with black, Spanish surname and women

---

<sup>1/</sup> The case was transferred to the Assistant Secretary pursuant to section 206.5(a) of his regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director.

employees of the Activity. All the employees with whom meetings or interviews were arranged were in one of the bargaining units for which the union had been accorded exclusive recognition. In addition to the above meetings, separate meetings or interviews were held with members of community groups and representatives of the Union. No management official of the Activity attended these meetings, nor did the Activity exercise any supervision or control over the Assistant Administrator. At these meetings, the Assistant Administrator solicited the opinions of the employees with respect to the EEO program of the Agency and listened to their suggestions for EEO program additions and modifications. No commitments were made to the employees.

Upon learning of the scheduled meetings, the Union requested that it be allowed to have an observer present at each of the meetings of employee groups and that it be granted a separate meeting with the Administrator in order to give its "thoughts" relative to the EEO program. The Activity's Personnel Officer, pursuant to directions from the Agency, granted the Union's request to meet separately, but denied the specific request for Union participation in the meetings with the employees.

As a result of this action a complaint was filed by the Union against the Agency and the Activity alleging that they violated section 19(a)(1) and (6) by holding "official meetings" with several groups of employees represented by the Union without giving notification to their exclusive representative and denying the Union the right to have observers present at these meetings.

The Assistant Secretary found that the Union's rights as exclusive representative were based on the exclusive recognition accorded it by the Activity, and that under these circumstances, the Agency was not obligated to meet and confer with the Union pursuant to section 11(a) of the Order. Thus, according to the Assistant Secretary, the obligation to meet and confer under the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition. Further, he concluded that the Activity did not act in derogation of its bargaining obligations under the Order. In this regard, he noted that the evidence established that no management official of the Activity exercised any supervision or control over the Agency's representative who conducted the meetings in question and, further, that there was no evidence that the Activity had refused to meet and confer with the Union concerning any matters involving personnel policies or practices under its control or direction including matters relating to the EEO program. Based on these considerations, the Assistant Secretary found that the Activity did not violate section 19(a)(1) and (6) of the Order. Moreover, he found that, because the Agency was not a party to a bargaining relationship with the Union, it could not be in violation of section 19(a)(6) of the Order, based upon the Assistant Administrator's meetings with employees.

However, the Assistant Secretary concluded that while the Agency could not be found to be in violation of section 19(a)(6), this circumstance did not preclude his finding of an independent 19(a)(1) violation by the Agency

which was not premised on the existence of a bargaining relationship between the Agency and the Union. Thus, the Assistant Secretary found that the Agency's action in conducting meetings or interviews with unit employees in which their "terms and conditions of employment" were discussed, while refusing the request of the exclusive representative of these employees to participate in such "discussions," ran counter to the purposes and policies of the Order with regard to the obligation owed to an exclusive representative as the spokesman of the employees it represents. Further, the Assistant Secretary found such conduct to be inconsistent with the policy set forth in section 1(a) of the Order concerning an agency head's obligation to assure that employees' rights are protected.

Under all the circumstances, the Assistant Secretary found that the Agency's conduct constituted an undermining of the status of the exclusive representative selected by the employees of the Activity. Accordingly, he concluded that the Agency's conduct resulted in improper interference with, restraint, or coercion of unit employees in the exercise of rights assured by the Order in violation of section 19(a)(1).

Thereafter, the Assistant Secretary's decision was appealed to the Council both by the Agency and the Union. Upon consideration of the petitions for review, the Council determined that major policy issues were presented by the decision of the Assistant Secretary,<sup>2/</sup> namely:

- I. Whether agency headquarters-level representatives conducting meetings or interviews with activity-level employees for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are required by the Order to permit the exclusive representative of such employees, upon request, to participate in such discussions or interviews; and
- II. Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) of the Order by lower level management in the same agency who have a bargaining relationship with an exclusive representative.

Briefs were filed by the Agency (on behalf of the Activity, as well as itself) and by the Union. Additionally, the Department of the Treasury and the Department of Health, Education, and Welfare were permitted to file briefs as amici curiae.

### Opinion

#### ISSUE I

the nature and scope of management's obligation with regard to the participation of an exclusive representative in management's discussions or interviews

---

<sup>2/</sup> The Council earlier approved the Agency's request for a stay of the Assistant Secretary's decision.



with unit employees are set out in section 10(e) of the Order. That is, an exclusive representative --

. . . shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. [Emphasis supplied.]

The question, therefore, as to the right of the exclusive representative to have an opportunity to participate in discussions or interviews between agency headquarters-level representatives conducting meetings or interviews with activity-level employees for the purpose of soliciting opinions with respect to such matters as the EEO program of the Agency necessarily turns on whether such discussions or interviews are "formal discussions between management and employees . . . concerning grievances, personnel policies and practices, or other matters affecting general working conditions. . . ." In the Council's view, the meetings at issue in the instant case were not "formal discussions" between management and employees as that phrase is used in section 10(e). Therefore, management was not required to give the exclusive representative an opportunity to participate in the meetings or interviews involved herein.

The language of the pertinent portion of section 10(e) quoted above makes clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. Rather, such a right exists only when the discussions are determined to be formal discussions and concern grievances, personnel policies and practices, or other matters affecting the general working conditions of unit employees.<sup>3/</sup> In the situation at issue in the instant case, agency headquarters-level representatives met with activity-level employees for the purpose of soliciting opinions with respect to the EEO program of the Agency. More particularly, as stipulated by the parties, the Assistant Administrator merely:

. . . solicited the opinions of the employees with respect to the EEO Program of the . . . Agency and listened to their suggestions for EEO Program additions and modifications. No commitments were made to the employees. [Emphasis supplied.]

Further, the stipulated record contains no indication that the Assistant Administrator attempted to resolve the issues raised at the meetings through

<sup>3/</sup> See, for example, Department of Defense, National Guard Bureau, Texas Air National Guard, A/SIMR No. 336, FLRC No. 74A-11 (June 18, 1974), Report No. 54, and Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056 (CA), FLRC No. 74A-23 (October 22, 1974), Report No. 58, wherein the Council denied review of the Assistant Secretary's determinations that certain discussions between management and employees were not "formal discussions" within the meaning of section 10(e) of the Order.

agreement with assembled employees, individually or collectively, nor did he make "counterproposals" to the suggestions offered. There is no indication that the Assistant Administrator either expressly or impliedly suggested to the employees during such solicitations that their opinions and criticisms would govern future modifications of the Agency's (or the Activity's) conduct and/or regulations concerning the operation of its EEO program, or that he indicated that their answers would have an effect on the employees' status. Similarly, there was no evidence adduced that the discussions dealt with specific employee grievances or other matters cognizable under an existing agreement between the Activity and the local Union, or that the Assistant Administrator was gathering the information for the purpose of using it subsequently to persuade the Union to abandon a position taken during negotiations regarding the operation of the EEO program.

In our view, discussions such as those described herein were not "formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Rather, they were a mechanism whereby agency headquarters-level management sought to evaluate the effectiveness of an agencywide program which existed totally apart from the collective bargaining relationship at the level of the exclusive recognition. Indeed, without the benefit of such information-gathering mechanisms, agency management would be seriously impeded in effectively carrying out its responsibility--often mandated by statute, as in the instant case--to conduct periodic evaluations of the effectiveness of such agencywide programs. (While mechanisms of this sort are not discussions wherein management is obligated to give the exclusive representative the opportunity to be represented, management may well consider it desirable to give the exclusive representative the opportunity to be present at meetings such as those conducted by the Agency in the instant case. Clearly such representation is not prohibited by the Order.)

We must emphasize that our views, as expressed above, pertain only to information-gathering devices such as the meetings involved in this case. That is, they apply only in circumstances such as those mentioned above where management does not, in the course of information gathering: seek to make commitments or counterproposals regarding employee opinions or complaints solicited by means of such devices; indicate that the employees' comments on such matters might have an effect on the employees' status; deal with specific employee grievances or other matters cognizable under an existing agreement; or gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned.

Turning to the reasoning of the Assistant Secretary, his finding of a violation in the instant case was based on the conclusion that the Agency's conduct undermined the status of the exclusive representative selected by

the employees and that such conduct resulted in improper interference with, restraint, or coercion of unit employees by the Agency in the exercise of their rights assured under the Order in violation of section 19(a)(1). If the Council were to sustain the Assistant Secretary's conclusions in this regard, we would, in effect, be construing the Order so as to find that any meeting between agency management and unit employees wherein discussions of personnel policies and practices, or other matters affecting general working conditions took place would be a per se violation of the Order, regardless of the circumstances involved, the content of the discussion, or the actual conduct of agency management. We do not believe that the Order requires such a result. As stated above, the critical issue was the right of the exclusive representative to be represented at the meeting pursuant to the provisions of section 10(e). Since, as we have concluded, the Union had no right to be represented at the meeting, the Union's status as bargaining representative could not be undermined by denying its request to participate at such meetings.<sup>4/</sup>

We conclude, therefore, as to Issue I, that agency headquarters-level representatives conducting meetings or interviews with activity-level employees merely for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are not required by the Order to permit the exclusive representative of such employees, either on the agency's own initiative or upon request, to participate in such discussions or interviews. More particularly in this case, we find that the conduct of the Agency in evaluating the effectiveness of an agency-wide program which existed totally apart from the collective bargaining relationship did not violate section 19(a)(1) of the Order.<sup>5/</sup>

---

<sup>4/</sup> The right of the union to be represented at a meeting with employees must, of course, be distinguished from the right of employees to union representation under certain circumstances. The Council is currently considering, pursuant to section 4(b) of the Order and section 2410.3 of its rules, as a major policy issue which has general application to the Federal labor-management relations program, the following question:

Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personnel representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

<sup>5/</sup> As we have concluded that the acts and conduct at issue do not violate the Order, it is unnecessary to pass upon the Assistant Secretary's finding that:

. . . the Respondent Agency, which was not a party to a bargaining relationship with the [Union], could not be in violation of Section 19(a)(6) of the Order based on Dr. McConnell's meetings with such employees.

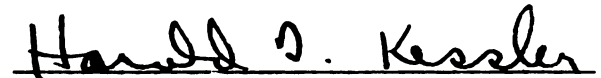
## ISSUE II

Having concluded above that the acts and conduct of Agency management were not violative of the Order, it is unnecessary for the resolution of this case to determine whether acts and conduct of agency management at a higher level of an agency's organization (the Assistant Administrator in this case), if violative of the Order, would have been a basis for finding a violation of section 19(a) of the Order by lower-level management who had a bargaining relationship with the Union. Accordingly, we do not pass upon that issue.

### Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision that the Agency violated section 19(a)(1) is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.



Harold D. Kessler  
Acting Executive Director

Issued: September 26, 1975

American Federation of Government Employees, AFL-CIO (Veterans Administration Hospital, New Orleans, Louisiana), Assistant Secretary Case No. 64-2513 (CO). The Assistant Secretary, in agreement with the Assistant Regional Director and based upon the ARD's reasoning, found that dismissal of the unfair labor practice complaint of the National Federation of Federal Employees (NFFE), which alleged that the American Federation of Government Employees had violated section 19(b)(1) and (2) of the Order, was warranted in that a reasonable basis for the complaint had not been established. Accordingly, the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary is arbitrary and capricious and presents a major policy issue.

Council action (September 30, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue. Accordingly, since NFFE's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council denied review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 30, 1975

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

Re: American Federation of Government Employees,  
AFL-CIO (Veterans Administration Hospital,  
New Orleans, Louisiana), Assistant Secretary  
Case No. 64-2513 (CO), FLRC No. 75A-64

Dear Mr. Helm:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the American Federation of Government Employees, AFL-CIO (AFGE), in the above-entitled case.

In this case, the National Federation of Federal Employees (NFFE) filed a complaint alleging that AFGE violated section 19(b)(1) and (2) of the Order. NFFE alleged that AFGE had violated the Order by authorizing its nonemployee representatives to conduct an organizational drive among employees of the Veterans Administration Hospital, New Orleans, Louisiana (the activity), at a time when the employees' exclusive representative, NFFE Local 169, had a contract with the activity and no question concerning representation had been raised. It was also alleged that the organizational drive was conducted on the activity premises contrary to the express instruction of management. The Assistant Regional Director (ARD), found that, assuming the above allegations to be true, there could be no violation of section 19(b)(1) and (2) of the Order. He, therefore, dismissed the complaint. The Assistant Secretary, in agreement with the ARD and based on his reasoning, found that dismissal of the complaint was warranted in that a reasonable basis for the complaint had not been established. Accordingly, the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint.

In your petition for review, you contend that the decision of the Assistant Secretary is arbitrary and capricious since it does not contain a reasoned discussion of the basis for the dismissal of the complaint. You further contend that the Assistant Secretary's decision presents a major policy issue of whether a contract bar excludes

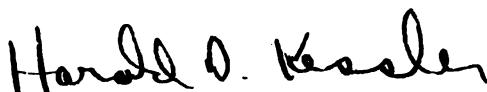
nonemployee representatives of a union other than the incumbent from conducting an organizational drive on activity premises during working hours. In this connection, you contend that the Assistant Secretary's decision is inconsistent with prior decisions concerning an agency granting "services and facilities" to a labor organization which has not raised a question concerning representation and which does not have equivalent status with an incumbent exclusively recognized representative.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear to be arbitrary and capricious or to present a major policy issue. With respect to your contention that the Assistant Secretary's decision did not contain a reasoned discussion of the basis for the dismissal of the complaint, it does not appear that the Assistant Secretary acted without reasonable justification in his decision, wherein he agreed with the ARD and based his decision on the ARD's reasoning. As to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting particularly that the cited Assistant Secretary's decisions all involved an allegation and a finding that an agency had violated section 19(a) when it granted organizational rights to a labor organization (which were not present in the instant case), the decision of the Assistant Secretary does not appear inconsistent with prior decisions and does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

R. J. Malloy  
AFGE

Arizona National Guard, Air National Guard, Sky Harbor Airport, Phoenix, Arizona, Assistant Secretary Case No. 72-4777. The Assistant Secretary upheld the Assistant Regional Director's approval of a settlement of an unfair labor practice complaint filed against the activity by the union (American Federation of Government Employees, AFL-CIO), which settlement was opposed by the union. The union appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious and raises a major policy issue.

Council action (September 30, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues. Accordingly, since the union's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council denied review.





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 30, 1975

Mr. Leo M. Pellerzi, General Counsel  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: Arizona National Guard, Air National  
Guard, Sky Harbor Airport, Phoenix,  
Arizona, Assistant Secretary Case  
No. 72-4777, FLRC No. 75A-76

Dear Mr. Pellerzi:

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

In your complaint you alleged, in substance, that the Arizona National Guard, Air National Guard, Sky Harbor Airport, Phoenix, Arizona (the Activity), violated the Order by refusing to recognize Mr. Robert Deyerberg as union president on the ground that he was a supervisor. After the complaint was filed, the Assistant Secretary did conclude, in a separate unit clarification proceeding, that Mr. Deyerberg was not a supervisor within the meaning of section 2(c) of the Order (Arizona, National Guard, Air National Guard, Sky Harbor Airport, A/SLMR No. 436 (September 30, 1974)), and the Council denied review of that decision (FLRC No. 74A-78 (February 21, 1975), Report No. 64). The Activity subsequently proposed to settle the outstanding unfair labor practice complaint against it by agreeing to confer and negotiate in good faith with the union and its representative, Robert Deyerberg, and not restrain, coerce or interfere with its employees' rights. Thereafter, the Assistant Regional Director declined to issue a notice of hearing and approved a settlement agreement which included the posting of a notice indicating that the Activity would recognize Mr. Deyerberg as the local union's designated representative. The Assistant Secretary upheld the Acting Regional Director's approval of that settlement "[i]n view of the resolution of the supervisory status of Deyerberg, and the Respondent's agreement to post a notice indicating its recognition of his status as the union's designated representative . . . ."

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and raises a major policy issue as to ". . . whether or not the Settlement Agreement imposed by the Assistant Regional Director and affirmed by the Assistant Secretary is reasonable and whether that Settlement Agreement is germane to the issues raised in

the Unfair Labor Practice Complaint." You contend, in addition, that ". . . an issue is presented here which asks the question whether or not the Department of Labor can impose a settlement upon a complaining labor organization where the language in the Settlement Agreement contains nothing more than those rights which the labor organization already enjoys under the Executive Order and which have been admittedly violated by management."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious, nor do they represent a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. Consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds . . . that a satisfactory offer of settlement has been made, he may dismiss the complaint," the Assistant Secretary provides in section 203.6(a)(3) of his regulations (now redesignated and reworded in section 203.7(a)(3) of the regulations as of May 7, 1975):

The Assistant Regional Director shall take action which may consist of the following, as appropriate:

. . . . .

(3) Approve a written settlement agreement between the parties or a written offer of settlement by the respondent, made any time prior to the close of a hearing, if any . . . .

Further, section 203.7(a) of the regulations in effect at the time the complaint was filed (now redesignated and enlarged in section 203.8(d) on May 7, 1975), states:

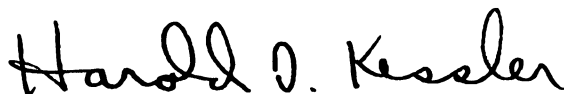
If the Assistant Regional Director determines . . . that a satisfactory written settlement agreement or written offer of settlement by the respondent has been made . . . he may dismiss the complaint.

The Assistant Secretary's decision in your case was based on the application of these regulations, and your petition presents no persuasive reason to show that he was without authority to establish such regulatory requirements or that he wrongly applied these regulations to the facts and circumstances of this case. The Assistant Secretary has wide discretion to approve settlement agreements which, in his view, effectuate the policy of the Order, and your petition for review makes no showing that his refusal to set aside the Assistant Regional Director's approval of the settlement agreement was without reasonable justification in the facts of the case.

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

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Harold D. Kessler".

Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

Col. E. M. Fender  
Air National Guard

Veterans Administration Hospital, New Orleans, Louisiana, Assistant Secretary Case No. 64-2464 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that there was insufficient evidence to establish a reasonable basis for the unfair labor practice complaint of the National Federation of Federal Employees (NFFE) which alleged that the activity violated section 19(a)(1), (2), (3) and (5) of the Order in permitting or allowing nonemployee representatives of the American Federation of Government Employees to conduct organizational drives on the premises of the activity among employees exclusively represented by NFFE. NFFE appealed to the Council, contending that the decision of the Assistant Secretary presents a major policy issue.

Council action (September 30, 1975). The Council held that NFFE's petition failed to meet the requirements of section 2411.12 of the Council's rules; that is, the decision does not present any major policy issue and NFFE neither alleges, nor does it otherwise appear, that the decision is in any manner arbitrary and capricious. Accordingly, the Council denied review of NFFE's appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

September 30, 1975

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

Re: Veterans Administration Hospital,  
New Orleans, Louisiana, Assistant  
Secretary Case No. 64-2464 (CA),  
FLRC No. 75A-83

Dear Mr. Helm:

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

In this case, the National Federation of Federal Employees (NFFE) filed an unfair labor practice complaint alleging that the Veterans Administration Hospital, New Orleans, Louisiana (the activity) violated section 19(a) (1), (2), (3) and (5) of the Order by permitting or allowing nonemployee representatives of the American Federation of Government Employees (AFGE) to conduct organizational drives on the premises of the hospital among employees exclusively represented by Local 169, National Federation of Federal Employees. The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), noting that there was insufficient evidence to establish a reasonable basis for the allegation that the activity assisted or encouraged AFGE in its organizing efforts or that the activity acquiesced in or approved AFGE's alleged improper conduct, denied NFFE's request for review, seeking reversal of the ARD's dismissal of the complaint.

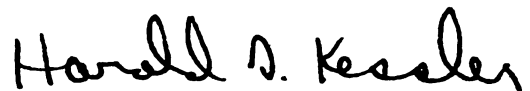
In your petition for review, you contend that the decision of the Assistant Secretary presents as a major policy issue: "Whether the failure of management to take forceful affirmative action to prohibit the organizing activities of nonemployee representatives of a nonincumbent labor organization on the activity premises during duty hours where there is a recognized exclusive representative and the two unions are not in equivalent status constitutes a violation of section 19(a)(1), (2), (3) and (5) of Executive Order 11491, as amended." In this connection, you assert that the Assistant Secretary's decision is inconsistent with his decisions in prior cases wherein an agency had granted "services and facilities" to a labor organization which had not raised a question concerning representation and which did not have equivalent status with an incumbent exclusively recognized representative.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present any major policy issue and you do not allege, nor does it otherwise appear, that the decision is in any manner arbitrary and capricious. With regard to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting particularly the determination that a reasonable basis for the allegation that the activity assisted or encouraged AFGE in its organizing efforts had not been established, the decision of the Assistant Secretary does not appear inconsistent with prior decisions and does not raise a major policy issue warranting review.

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

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

S. Shochet  
VA

Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20. The dispute concerned the negotiability under the Order of a union proposal related to production goals for patent examiners. The negotiability issue was referred to the Council by the Federal Service Impasses Panel under section 2411.26 of the then current rules of procedure of the Council and the related section of the Panel's rules of procedure.

Council action (October 3, 1975). The Council held, contrary to the agency head's determination, that negotiation of the union's proposal was not precluded by the Order or various regulations of the agency or of appropriate authorities outside the agency, and was, therefore, properly subject to negotiation by the parties concerned under section 11(a) of the Order. Accordingly, the Council set aside the agency head's determination of nonnegotiability.

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

Patent Office Professional Association

and

74 FSIP 20  
FLRC No. 75A-13

U.S. Patent Office, Washington, D.C.

DECISION ON NEGOTIABILITY ISSUE REFERRED BY

FEDERAL SERVICE IMPASSES PANEL

Background of Case

During consideration by the Federal Service Impasses Panel of a negotiation impasse between the U.S. Patent Office (the agency) and the Patent Office Professional Association (the union), the union requested that the Panel refer a negotiability issue to the Council for decision. The issue arose from a multipart proposal by the union (reproduced as an Appendix to this decision) relating to production goals for patent examiners. A disagreement arose between the agency and the union as to the negotiability of the union's proposal and the union referred the issue for determination to the agency head. The Department of Commerce ruled that the union's proposal (with the exception of part "i" which is not in dispute) is nonnegotiable on the grounds that it would violate section 12(b) of E.O. 11491 as amended by E.O. 11616, and applicable regulations of the agency and of appropriate authority outside the agency.<sup>1/</sup>

Under these circumstances, the Panel referred the negotiability issue to the Council for decision pursuant to section 2411.26 of the Council's rules of procedure<sup>2/</sup> and the related section of the Panel's rules of procedure. The union filed a supplemental submission with the Council.

---

<sup>1/</sup> While the agency head's determination in this case was made under E.O. 11491, as amended by E.O. 11616 and prior to the recent amendment by E.O. 11838, the Order was not changed in respects which are material to the present case.

<sup>2/</sup> Section 2411.26 of the Council's rules of procedure then in effect provided (subsequent changes are not material in the present case):

§ 2411.26 Referral by the Federal Service Impasses Panel.

(a) Notwithstanding the procedures of this subpart, except § 2411.22, when the Panel finds that a negotiability issue is impeding the resolution of a negotiation impasse, the Panel may refer the negotiability issue to the Council for decision.

(Continued)



The basic circumstances surrounding the negotiability dispute, substantially as stated by the union in its appeal and, except where indicated, without contradiction by the agency, are as follows. The union represents patent examiners at the U.S. Patent Office. Patent examiners research previously issued patents and other sources to determine whether inventions which are the subject of pending patent applications are patentable and, if so, to what extent patent protection can be granted.

Examiners are assigned to work in various "examining groups" or "art units," each of which is concerned with particular related areas of technology or "arts." Examiners in each of the respective groups examine patent applications involving the arts with which their assigned group is concerned.

Currently, examining groups are subject to production "goals" or "expectancies," assigned by the Patent Office, which establish the average times which examiners should take to process a patent application in each of the various arts. Individual goals are also assigned to the examiners within each group based upon experience, grade level and other factors reflecting individual capabilities.

In this regard, while the union and the agency apparently agree that arts vary as to their relative complexity and that the goals assigned should therefore also vary from art to art, they disagree with respect to the accuracy and equity of the particular goals which are assigned to groups and individuals as a result of the application of the currently effective goal assignment process. Further, in this regard, the union claims in effect that, while the existing system for allocating goals to examining groups is based upon management's determination of relative complexity among the various arts, this determination is "inaccurate" and results in "severe inequities"; and that "widely different goals are assigned to examiners who work in closely related arts yet are assigned to different groups."

---

(Continued)

(b) A referral by the Panel shall contain:

(1) The matter proposed to be negotiated as submitted to the agency head for determination;

(2) The agency head's determination thereon;

(3) Statements of position from each party with supporting evidence and argument; and

(4) Any other appropriate documents of record.

(c) The Panel may refer a negotiability issue for decision by the Council at any time during its consideration of a negotiation impasse.

(d) The Council will give such referrals priority consideration.

Thus, the stated objective of the union in proposing the provisions here in dispute is to bring "equity and reasonableness" to the process of setting and applying group and individual production goals because, in its view, "the achieved production of an examiner in relation to [his] assigned goal is the all-pervasive determinant that is used [by management] for making all judgments relating to the merits of an examiner."

### Opinion

This case involves, in essence, the extent of the agency's obligation to bargain with the union concerning (1) the method of setting production goals to be used in connection with evaluating the performance of the agency's patent examiners and, (2) the designation of various particular levels of individual production achieved in relation to such goals as prima facie evidence that an individual patent examiner has met a standard of productivity sufficient, in regard to that aspect of performance, to warrant, respectively; a promotion, a within-grade increase, retention in grade or the grant of a special achievement award or quality step increase.

As to (1) above, the agency determined principally that parts "a" through "h" of the union's proposal set out a formula for determining group and individual examiner production goals which, if given effect, would violate section 12(b)(1), (2), (4) and (5) of the Order; and that part "k" would violate section 12(b)(2).

As to (2), the agency determined, in effect, that part "j.1-4" of the proposal "equates achievement" of the particular levels of production therein specified with "satisfactory," "sufficiently exceptional" or "outstanding" performance for purposes of promotions, within-grade salary increases, job retention, special achievement awards and quality salary increases, and thereby conflicts with various published agency regulations and a provision of the Federal Personnel Manual.

The grounds upon which the agency based its determination of nonnegotiability will be considered separately below.

1. Are parts "a" through "h" or part "k" of the union's proposal nonnegotiable under section 12(b) of the Order?<sup>3/</sup> As already indicated, the agency head

3/ In its statement of position, the agency also contended that the proposal would in effect require the agency to negotiate "appropriate arrangements for employees adversely affected by the impact of . . . technological change," a matter claimed by the agency to be excepted from its bargaining obligation by section 11(b) of the Order. However, the provision of section 11(b) in question does not except such "appropriate arrangements" from the obligation to bargain; see Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 37. Moreover, the agency head did not rely on these grounds in his determination.

determined that parts "a" through "h" of the proposal conflict with rights expressly reserved to management under section 12(b)(1), (2), (4) and (5) of the Order. With respect to these provisions of section 12(b) upon which it relies the agency claims that an "inherent and necessary part of each of these rights respectively and all of them collectively is to determine how much work is to be assigned to and expected of employees."

In this regard, the agency principally argues that parts "a" through "h" of the proposal are concerned with and would improperly limit management's discretion as to "what work will be done, how it will be done, and by whom it will be done . . ."; and, would "effectively prevent management from making meaningful changes in work assignment procedures and processes," as well as changes in examining practices to increase productivity. Further in this regard, the agency argues that application of the proposed formula would set an "absolute limit or ceiling on productivity within the Examining Group," thereby, in effect, improperly negating management's discretion in the exercise of its "right to assign work to employees."

The union, on the other hand, contends principally that parts "a" through "h" of its proposal merely provide a "uniform procedure for assigning goals" throughout the examining corps; and, are not intended to limit in any manner the "type or amount of work which will be assigned" to employees; "what work will be done, how it will be or by whom it will be done"; or the "procedures and processes that may be used in distributing work among those available to perform it."

Section 12(b) of the Order provides in relevant part 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--

- (1) to direct employees of the agency;
- (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;

. . . . .

(4) to maintain the efficiency of the Government operations entrusted to them;

- (5) to determine the methods, means, and personnel by which such operations are to be conducted . . . .

The rights established by section 12(b) expressly are reserved to management officials under any bargaining agreement. With regard to

parts "a" through "h" of the union's proposals, then, the question before us is whether they violate rights reserved to management officials under section 12(b) as contended by the agency and are therefore nonnegotiable. In our opinion the provisions in question do not violate management's reserved authority to decide and act with respect to matters covered under section 12(b) of the Order.

Parts "a" through "h" of the union's proposal set out a formula using historical and current data with regard to assigned "supervisory factors,"<sup>4/</sup> balanced case disposals, the total number of examining hours actually worked by each examining group and assigned goals (individual and group expressed as hours per balanced case disposal) to arrive at an "average historical complexity factor"<sup>5/</sup> and an "average individual [current] complexity factor"<sup>6/</sup> for each examining group. Part "h" then directs that adjustments be made in each examiner's currently assigned goals so that the recomputed "average individual complexity factor" for each examining group will equal or exceed the "average historical complexity factor" for each such group; or, in other words, so that the examiners in the group

---

<sup>4/</sup> "Supervisory factors" are numerical ratings assigned to each patent examiner which reflect the percentage of the agency's norm of production which the examiner is expected to reach given his experience and grade level. They range from .55 for a GS-5 to 1.50 for a GS-15 (who has been assigned "personal signatory authority" and categorized as an expert). Thus the GS-15 assigned the 1.50 supervisory factor would be expected to dispose of patent applications at a rate almost three times that of a newly hired GS-5 examiner. The factors are considered supervisory guides only and may be adjusted upward or downward for particular examiners depending on such factors as the difficulty level of his application docket, changes in examining techniques, etc.

<sup>5/</sup> The "average historical complexity factor" ("K") for each examining group is the average number of hours actually taken by the examiners assigned to the group to dispose of a typical patent application, adjusted for the average level of experience and expertise of the examiners assigned to the group during the base period concerned (as reflected by the average of their assigned "supervisory factors" during the same period) and for an asserted increase in complexity of current patent applications compared to applications processed during the base period.

<sup>6/</sup> The "individual complexity factor" ("C") reflects the average number of hours that an examiner in the group is currently expected to take to dispose of a typical patent application, adjusted for his level of experience and expertise (as reflected in his currently assigned "supervisory factor"). The "average individual complexity factor" ("C") for an examining group is merely the sum of the "individual complexity factors" in that group divided by the number of patent examiners assigned to it.

will not be assigned (on the average) hour goals which would require them to complete the examination of a typical patent application in fewer hours than were taken to complete similar applications in the base period.

The purpose of these proposed provisions according to the union, as already indicated, is to remedy alleged unreasonableness and inequities under the presently existing goal assignment process, in connection with the use of these goals by management to evaluate individual examiners for purposes of deciding which employees to retain, promote, detail, reward, etc.

In our view, the language of the proposed provisions "a" through "h", as well as the union's indication as to the intent and purpose of those provisions, do not support the agency's contentions that the provisions violate management's reserved rights under section 12(b) of the Order. That is to say, based upon the record in this case, the essence of the proposed parts "a" through "h" merely is to ensure that the production goals against which management will evaluate individual productivity (as one factor in assessing overall performance of patent examiners) will be assigned in a manner consistent with what is, in the union's view, a statistically reliable calculation (based upon historical production data adjusted for changed current conditions) which indicates how much production can reasonably and equitably be expected to be achieved. On the other hand, it is clear that these proposed provisions do not require and are not intended to require the agency to bargain with respect to directing its employees, assigning them to positions within the agency, maintaining the efficiency of its operations, or determining the methods, means and personnel by which such operations are to be conducted, within the meaning of section 12(b) of the Order.

Thus, the Council finds that the provisions of the proposal in question neither purport by their language to limit, nor are intended to limit, the amount or type of work which management might assign to individual examiners or examining groups. Likewise, neither the language nor intent of the provisions prescribe how such work will be distributed by management among those individuals or groups which management determines are available to perform it. Further, the provisions do not by their language or intent relate in any way to management's determination of the methods or means by which its directions and the operations of the agency will be carried out. Rather, the provisions are concerned with production expectations insofar as they may ultimately relate to the performance evaluation of individual examiners, i.e., the individual's prospects for being favorably evaluated in relation to his assigned production goal.

Moreover, in our opinion, the agency has failed to demonstrate that these proposed provisions would necessarily prevent management, as it alleges, from making "meaningful changes in work assignment procedures and processes" to increase efficiency or, as a general matter, to maintain the efficiency of its operations under section 12(b)(4) of the Order. In this regard, management's concern that productivity goals which would be established by the proposed provisions would tend to limit the

effective implementation of hypothetical, prospective changes in patent examination procedures and processes, while conceivably a valid concern, is not a reason which would prevent negotiation of the provisions under the Order. The obligation to negotiate does not imply a concomitant obligation to agree to a proposal. Furthermore, if the agency anticipates a situation arising where future changes in circumstances during the term of the agreement may render inappropriate any of the provisions thereof, it can seek, for example, to negotiate the right to make adjustments during the term of the agreement or to negotiate a reopener clause with respect to such provisions. However, as we stated in our Little Rock decision,<sup>7/</sup> "section 12(b)(4) may not be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits."

Finally, we find no merit in the agency's argument equating the production goals which are the subject of parts "a" through "h" of the proposal with "an absolute limit or ceiling on productivity . . . ." In our view it is quite clear that such a meaning cannot fairly be ascribed either to the literal meaning of the language of the proposed provisions or to the stated intent of the union as to their meaning (which, as previously indicated is to provide in effect a "yard stick" for work measurement, not a limitation on production).

Accordingly, based on the foregoing, the Council concludes, contrary to the agency determination, that section 12(b) does not bar negotiation of parts "a" through "h" of the proposal.

As to part "k" of the proposal, it provides that, "No examiner shall be assigned a goal that is unrelated to his actual examining time." As already indicated, the agency determined that part "k" violates section 12(b)(2) of the Order by, in effect, removing management's right "to assign duties and work to employees to accomplish these duties." The union contends that the proposed provision, itself, contains no limitation on what duties or work may be assigned to an examiner; and that the intended effect of the provision merely is that "an examiner will not be rated unsatisfactory for failing to achieve an examining goal when the examiner is directed or authorized to spend his time performing nonexamining duties."

Without passing on whether section 12(b)(2) reserves to management a right "to assign duties and work to employees" as claimed by the agency, in our view, part "k" of the union's proposal does not in any way limit the assignment of duties or of work. On its face, it concerns only the relationship between the assignment of goals (not of duties or work) and actual examining time. Taken in the context of the entire proposal, and as explained by the union, it simply would preclude management from rating an examiner's productivity in connection with the examination of

7/ Local Union 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, 1973), Report No. 30.

patent applications without taking into consideration the amount of time afforded to the examiner by management, out of his total work time, in which to engage in such production. Thus, under part "k" management would not be prevented from assigning examination, or any other, duties or work to patent examiners. Part "k" would only require that, e.g., if management should direct or authorize an examiner to spend less than full-time examining patent applications, the examiner's production in this regard will not be evaluated in relation to a goal which presupposes full-time performance of patent examination duties.

Accordingly, we find the agency contention that section 12(b)(2) bars negotiation on part "k" of the union's proposal to be without merit.

2. Is part "j" of the union's proposal rendered nonnegotiable under section 11(a) of the Order by applicable regulations? As previously indicated the agency determined that part "j" of the proposal is nonnegotiable because it conflicts with applicable regulations, in particular, various published Department of Commerce directives<sup>8/</sup> and a provision of the Federal Personnel Manual (FPM).<sup>9/</sup>

In determining that part "j" violates agency regulations and the FPM, the agency head stated that the proposal:

. . . equates achievement of the statistically arrived at goal with "satisfactory performance" for purposes of promotion . . . the grant of a within-grade salary increase . . . job retention . . . [and] equates 110 percent of goal achievement for a six (6) months period with "sufficiently exceptional performance" to justify a special achievement award, and for 12 months . . . of outstanding performance warranting the award of a quality step increase. [Emphasis supplied.]

In his determination, quoted in part above, the agency head states in substance that part "j" of the union's proposal defines "performance" solely in terms of productivity and thus makes productivity the sole, determinative factor with regard to promotions, within grade salary increases, job retention, special achievement awards and quality salary increases. This characterization is amplified by such additional statements in the determination with regard to part "j" as that it: "[I]gnores those factors, other than productivity" which are contemplated in agency regulations concerning promotion actions; "equates productivity with the totality of evaluating candidates for promotion" in conflict with the FPM; conflicts with agency regulations which define performance "to include not only requirements relating to performance of specific operational duties and responsibilities of the position but also requirements as to job related conduct and character"; conflicts with agency

<sup>8/</sup> DAO 202-250, Appendix A; DAO 202-335 Section 3.02.d.3; DAO 202-531 Sections 7.02.b.1.(c)(1), 7.02.b.2.(a)(1) and (3), 7.02.b.2.(b)(1), and 7.02.c.; DAO 220-430 Section 5.02.

<sup>9/</sup> FPM Chapter 335, Subchapter 2, Requirement 4 and Subchapter 3-6.d., f. and g.

regulations "wherein quality of work is an element to be considered in determining acceptable level of competence"; and conflicts with agency regulations making the supervisor of an employee responsible for determining the "pertinent and important elements for each kind and factor of work under his jurisdiction" because the proposal would negate this authority by "defining 'satisfactory performance' as nothing more nor less than achieving the statistical goal arrived at by application of the proposed formula."

Section 11(c)(3) of the Order provides that, "An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final. . . ." Hence, the Council may not substitute its interpretation of such regulations for the interpretation of the agency head. However, the union in effect argues, among other things, that the agency misinterpreted the proposal and, therefore, that the agency regulations, as interpreted by the agency head, do not bar negotiations under section 11(a) of the Order.<sup>10/</sup> In the circumstances of this case, we find this union argument to be persuasive.

Hence, from the above-quoted language of the agency determination that part "j" violates agency regulations and the FPM, it is clear that the agency head relied on a characterization of part "j" which would require management, when evaluating the performance of patent examiners, to ignore factors other than "productivity" or "achieving the statistical goal." Further, under the agency's characterization of part "j", management evidently would be required to carry out the personnel actions mentioned in the proposal solely based upon an examiner's having achieved the quantitative level of production specified in the proposal.

However, we do not find these characteristics to be present in part "j". The record establishes in this regard that part "j" merely relates to the quantitative aspect of overall performance. That is, as expressly indicated by the union, the proposal is concerned only with "how much production is sufficient for various purposes . . . not . . . with any other aspects of performance such as the quality of work produced or the personal conduct of employees." Moreover, part "j" would require only that attainment of the particular levels of production specified in the proposed provisions, relative to the assigned goal, be deemed "prima facie evidence," i.e., evidence sufficient unless rebutted, of "satisfactory," "sufficiently exceptional," or "outstanding" performance with respect to the "production" aspect of overall performance for purposes of the personnel action involved.

Thus, nothing in the language of part "j", or in the interpretation of that language by the union, would require management to promote or grant

---

<sup>10/</sup> Section 11(a) provides in pertinent part that the bargaining obligation with respect to personnel policies and practices and matters affecting working conditions is limited to "so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; [and] published agency policies and regulations . . . ."



a within-grade increase to an examiner, or to retain him on the job simply because the examiner achieves the levels of production which part "j" designates as "prima facie evidence of satisfactory performance for the purposes" of such actions. Likewise, achievement by an examiner of the levels of production which part "j" designates as "prima facie evidence of sufficiently exceptional performance to warrant the grant of a special achievement award," or "sufficiently outstanding performance to warrant the grant of a quality step increase" would not, in itself, mandate the granting of such awards by management. On the contrary, management would retain full discretion with regard to its evaluation of all facets of examiner performance other than quantity produced, as well as to rebut, where appropriate, what the proposal would require to be deemed "prima facie evidence" based on quantity.<sup>11/</sup>

Accordingly, in view of the erroneous characterization by the agency of part "j" of the union's proposal, and under the particular circumstances of this case, the agency in our opinion has failed to establish that its regulations or the FPM are applicable so as to preclude negotiation of part "j" under section 11(a) of the Order.<sup>12/</sup>

### Conclusion

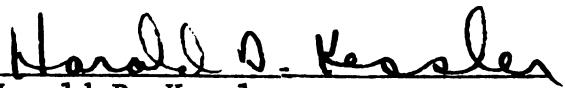
For the foregoing reasons, and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the agency head's determination that the union proposal here involved is nonnegotiable was improper and must be set aside. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union proposal. We

<sup>11/</sup> In its statement of position the agency contended that the proposal in effect makes the union "a partner with management in evaluating employee performance" and, thereby, violates certain rights claimed to be reserved to management under section 12(b) of the Order. However, in view of the agency's erroneous interpretation of the proposal and our finding herein to the effect that the proposal, properly characterized, merely relates in an essentially noncontrolling manner to one aspect of the overall process by which management evaluates employee performance, we find this contention to be without merit. Cf. American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48.

<sup>12/</sup> Cf. Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 27, 1972), Report No. 31.

decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

  
Harold D. Kessler  
Acting Executive Director

Attachment:

APPENDIX

Issued: October 3, 1975

Text of the Patent Office Professional Association's Proposal

Add the following to Article XII, Section 2 of our agreement:

Individual goals shall be determined by the following method:

a. Define a supervisory factor  $S$  in accordance with the chart in the October 11, 1972 memorandum of William Feldman entitled "Individual Examiner Expectancies."

b. Determine the individual supervisory factor  $S_i$  for each individual that was on board in each examining group as of the last day of each of the forty quarters for fiscal years 1963 through 1972.

c. Calculate an average historical supervisory factor  $S_j$  for each group for each quarter  $j$  by summing the individual supervisory factors  $S_{ij}$  during the quarter  $j$  and dividing by the number  $N_j$  of nonsupervisory examiners in the group during the quarter  $j$ , i.e.

$$S = \frac{1}{N_j} \sum_{i=1}^{N_j} S_{ij}$$

In those groups that have undergone reorganization since the beginning of fiscal year 1963, the determinations to be made for this section and the following sections should be made on an art unit basis with the supervisory factors determined for each art unit over the forty quarter period being ascribed to the group in which the art unit was assigned at the end of fiscal year 1972.

d. Determine the total number of balanced disposals  $D_j$  and the total number of examining hours  $H_j$  actually achieved for each group during each quarter  $j$  during said forty quarter period.

e. Calculate for each group the average historical complexity factor  $K$  which is the actually achieved hours per balanced disposal adjusted by the supervisory factor and adjusted by the factor 0.9:

$$K = \sum_{j=1}^{40} \frac{H_j S_j}{0.9 D_j}$$

f. Determine the assigned goal  $G_i$  and the supervisory factor  $S_i$  for each of the  $N$  examiners in each group as of a date one month from the effective date of this agreement.

g. Define an individual's complexity factor  $C_i$  to be the product of his assigned goal and his supervisory factor

$$C_i = G_i S_i$$

and define the average individual complexity factor  $C_G$  for a group of  $N$  examiners to be

$$C = \frac{1}{N} \sum_{i=1}^N C_i$$

h. In any group where the average individual complexity factor  $C_G$  is not greater than or equal to the group's average historical complexity factor  $K$ , the assigned goals of individual examiners are to be adjusted until

$$C_G \geq K$$

These goal adjustments are to be made by the Supervisory Primary Examiners in the group in consultation with the group's Director and the individual examiners involved. The objective of the goal adjustments should be to make the goal distribution within the group more equitable by providing more time for the examination of patent applications in the more complex arts. The amount of time in which it is desired that an examiner complete the examination of an average application in his docket shall not be decreased as a result of this agreement.

i. The raw data that has been used, the intermediate and final results of the calculations that have been made, and the results of the goal determinations made in accordance with this section are to be reported to the Association within two months of the date of this agreement.

j. A goal shall have the following meaning and effect:

1. An achievement of approximately 100% of a goal shall be deemed prima facie evidence of satisfactory performance for the purposes of promotion and the signatory authority program;
2. An achievement of approximately 75% of a goal shall be deemed prima facie evidence of satisfactory performance for the grant of a within grade increase;
3. An achievement of approximately 50% of a goal shall be deemed prima facie evidence of sufficiently satisfactory performance for the purposes of retention on the job at the same grade level;

4. An achievement of approximately 110% of a goal for six months shall be deemed prima facie evidence of sufficiently exceptional performance to warrant the grant of a special achievement award and for twelve months shall be deemed prima facie evidence of sufficiently outstanding performance to warrant the grant of a quality step increase.

k. No examiner shall be assigned a goal that is unrelated to his actual examining time.

Internal Revenue Service (Ogden Service Center) and National Association of Internal Revenue Service Employees, Chapter 67 (Gorsuch, Arbitrator). The arbitrator determined, as here relevant, that the use of selection techniques, including interviews, which had not been announced in the vacancy announcement was violative of the parties' agreement. The agency filed exceptions to this aspect of the arbitrator's award with the Council, contending that (1) the award violates Civil Service Commission regulations; and (2) the arbitrator imposed an obligation on management which is not found in the parties' agreement and thereby, in effect, exceeded the scope of his authority.

Council action (October 3, 1975). The Council found that the agency's petition did not provide sufficient facts and circumstances to support its contentions. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

October 3, 1975

Mr. Thomas J. O'Rourke  
Staff Assistant to the  
Regional Counsel  
Office of the Regional Counsel  
219 South Dearborn Street  
Chicago, Illinois 60604

Re: Internal Revenue Service (Ogden Service Center) and National Association of Internal Revenue Service Employees, Chapter 67 (Gorsuch, Arbitrator), FLRC No. 75A-56

Dear Mr. O'Rourke:

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

According to the arbitrator's award, the parties submitted four issues<sup>1/</sup> to arbitration including the following:

Can the selection official use selection techniques, including interviews, which have not been announced on the vacancy announcement?

The arbitrator's answer to this question was "No." In setting forth his reasoning, the arbitrator stated in pertinent part:

What is really at issue here is just what materials the selecting official is entitled to use when making his choice of the person ultimately selected by him. . . .

. . . . .

1/ No exceptions were filed with respect to the other three issues.

To the arbitrator it would seem that when the underlying language of F.P.M., 335, 3-4(b)<sup>2/</sup> makes it clear that the vacancy announcement must contain "the evaluation methods to be used" and then the parties by M.C.A., Article 6, 4.A.9<sup>3/</sup> reiterated this, any employee would be entitled to know what methods are to be used in evaluating all candidates. . . .

. . . . .  
The basic question is whether the selecting official may use information or data not disclosed in the vacancy announcement in making his ultimate choice. . . .

. . . . .  
It is therefore incumbent upon the Agency to see to it that there is described in the vacancy announcement any evaluation methods as well as any selective placement factors which are to be used in the ultimate selection of who is to get the vacancy and to see to it that the selection official is furnished with enough information about the various applicants to make a sound choice. . . . Certainly nothing herein as the

2/ FPM, chapter 335, subchapter 3-4b(2), provides in pertinent part:

b. Vacancy announcements.

. . . . .  
(2) Vacancy announcements are to be clearly written, with sufficient information for the employee to understand what the area of consideration is, what the duties of the job are, what qualifications (including selective placement factors) are required, what evaluation methods are to be used, and what the employee has to do in order to apply. . . .

3/ Article 6, Section 4A of the parties' Multi-Center Agreement (M.C.A.), provides in pertinent part:

A. Vacancy announcements will be published prior to filling any position covered by this Article. The vacancy announcement will be posted for a minimum of ten (10) working days on all official bulletin boards and will contain, at a minimum, the following:

. . . . .  
8. Selective placement factors, if any;

9. Evaluation methods to be used;  
. . . . .



Union agrees, limits the right for the supervisory official to make his selection as provided in F.P.M. 335-3-7-C.<sup>4/</sup> [Footnotes added.]

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

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

In its first exception, the agency contends that the arbitrator's award violated the regulations of the Civil Service Commission as stated in chapter 335, subchapters 5-1d(3), 5-3a, and 3-7c of the Federal Personnel Manual (FPM).<sup>5/</sup>

In support of its first exception, the agency contends that the arbitrator "erroneously equated the terms 'evaluation methods to be used' and 'selective placement factors' with the term 'selection techniques.'" The agency argued to the arbitrator, and asserts in its petition for review to the Council, that the term "selection techniques" means something quite different from "selective placement factors" and "evaluation methods." Thus, the essence of the agency's contention is that this

---

<sup>4/</sup> FPM, chapter 335, subchapter 3-7c, provides in pertinent part:

c. Action by the selecting official.

The selecting official is entitled to make his selection from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on his judgment of how well the candidates will perform in the particular job being filled and, when relevant, what their potential is for future advancement. . . .

<sup>5/</sup> FPM, chapter 335, subchapter 5-1d(3), provides in pertinent part:

d. Matters not appropriate for consultation or negotiation.

There are three broad categories of matters that are not within the scope of consultation or negotiation:

. . . . .  
(Continued)

erroneous equation of terms by the arbitrator, which, in effect, results in the requirement that "selection techniques" be contained in vacancy announcements, "places a limitation on the discretion of the selecting official which is expressly contrary to the provisions of Chapter 335 of the Federal Personnel Manual." In the Council's opinion, while this exception which alleges that the award violates the FPM does state a ground for review, it does not appear to be supported by facts and circumstances described in the agency's petition, as required by section 2411.32 of the Council's rules.

In response to the question submitted by the parties, the arbitrator decided that Article 6, Section 4A9 of the M.C.A., reiterating FPM, chapter 335, subchapter 3-4b, makes it "incumbent upon the Agency to see to it that there is described in the vacancy announcement any evaluation methods as well as any selective placement factors which are to be used in the ultimate selection of who is to get the vacancy . . . ." Hence, the arbitrator did not define "selection techniques" to include anything more than "evaluation methods" and "selective placement factors." Indeed, as indicated above, the agency concedes in its first exception that the arbitrator "equated the terms 'evaluation methods to be used' and 'selective placement factors' with the term 'selection techniques.'" The union also concedes that the "essence of the Arbitrator's decision is that, pursuant to F.P.M. 335.3-4(b) and Article 6, Section 4(A)(9) of the M.C.A., the vacancy announcement must contain the evaluation methods to be used. In addition, the Arbitrator concluded that selective placement factors should also be included in the vacancy announcement." (Footnotes eliminated.) The term "selection techniques" which is used in the submission agreement is not defined therein; further, the term apparently is not used in the M.C.A. or relevant portions of the FPM. Thus, the arbitrator, in resolving the grievance, had to determine what the term meant. In so doing he did not adopt the agency's definition of the term which, according to the decision and award of the arbitrator,

---

(Continued)

(3) Reserved management rights identified in Executive Order 10988. For example, how agency work is organized; what duties are assigned to individual positions; and which candidate among the best-qualified is selected for promotion.

FPM, chapter 335, subchapter 5-3a, provides in pertinent part:

a. Agency handling of complaints.

. . . The only matters not a basis for a formal complaint are (1) failure to be selected for promotion when proper promotion procedures are used, that is, nonselection from a group of properly ranked and certified candidates, . . . .

FPM, chapter 335, subchapter 3-7c, is set forth in footnote 4, supra.

appears to be "'methods used by the selecting official to choose a candidate to fill a vacancy [sic] position, . . . ." Instead, the arbitrator equated the term to "evaluation methods" and "selective placement factors" and thereby concluded that such methods and factors must be included in the vacancy announcement. As noted above, Article 6, Section 4A of the Multi-Center Agreement (set forth in footnote 3, supra) expressly requires "selective placement factors" and "evaluation methods" to be included in vacancy announcements. Further, as the union points out in its opposition to the agency's petition for review: The parties stipulated in the submission agreement that an interview is a "selection technique." FPM supplement 335, subchapter S4-1<sup>6/</sup> establishes that an interview is an "evaluation method." Therefore, it would appear to follow that "evaluation methods" could be equated with "selection techniques" for the purposes of resolving this grievance. Finally, the arbitrator reassured the parties that his award was only intended to enforce the provisions of the M.C.A. as agreed to by the parties, was consistent with the FPM, and did not limit "the right for the supervisory official to make his selection . . . ." Accordingly, based on the foregoing, the agency's petition for review does not furnish sufficient facts and circumstances to support the assertion in its first exception, as required by section 2411.32 of the Council's rules of procedure.<sup>7/</sup>

In its second exception, the agency contends that "by requiring the announcement of selection techniques in the vacancy announcement, . . . [the arbitrator] has imposed an additional obligation on management which is not found in the agreement." The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded the scope of his authority by fashioning an award which does not draw its essence from the agreement. See NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, this exception appears to be based upon an implicit assumption that the award requires the agency to include in the vacancy announcement something more than "evaluation

<sup>6/</sup> FPM supplement 335, subchapter S4-1, provides in pertinent part:

A variety of methods are available for evaluating qualifications. Among these are evaluation of training and experience, tests, interviews, and performance appraisals. Within each of these broad types of evaluation methods, there are various specific measuring instruments and procedures that may be applied. The principles for selecting any of the following types of methods are discussed in subchapter S5.

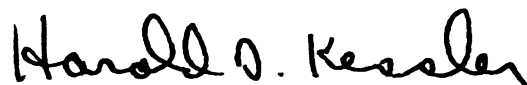
<sup>7/</sup> Cf. Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56.

methods" and "selective placement factors." As we pointed out with respect to the first exception, there is no basis in the award for the agency's apparent assumption in this regard. Therefore it appears to the Council that the agency has not provided sufficient facts and circumstances to support its second exception that the award is, in effect, "'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling' or could not 'in any rational way be derived from the agreement' or evidences 'a manifest disregard of the agreement' or on its face represents an implausible interpretation thereof."

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

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: F. D'Orazio  
NTEU

Naval Rework Facility, Naval Air Station, Jacksonville, Florida and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator). The arbitrator determined that the agency violated the parties' agreement by the manner in which it scheduled work to avoid overtime, and directed the agency to compensate the grievants for the four hours additional overtime they would have received if they had worked such overtime. Upon appeal by the union and based on the advice of the Civil Service Commission which, relying on then applicable decisions of the Comptroller General, concluded that the remedy portion of the award violated applicable law and appropriate regulation, the Council issued its initial decision striking so much of the award as directed the payment of additional compensation to the grievants (September 24, 1974, Report No. 56). Subsequently, the union requested that the Council reopen, reconsider and modify the decision in light of Comptroller General decisions issued after September 24, 1974. Because the union made its request for reconsideration and modification on the basis of a decision of the Comptroller General, the Council requested from him a decision as to the application of that decision, and subsequent decisions of his Office, to the facts of this case, especially as to whether payment of the arbitrator's award of overtime pay may now legally be made.

Council action (October 8, 1975). Based upon a decision of the Comptroller General in response to the Council's request, the Council issued a revised decision finding that the arbitrator's award does not violate the relevant statute and implementing regulations. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, the Council reversed its prior decision in the case and sustained the arbitrator's award.

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

Naval Rework Facility, Naval Air Station,  
Jacksonville, Florida

and

FLRC No. 73A-46

National Association of Government  
Employees, Local R5-82

REVISED DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose by reason of the remedy awarded by the arbitrator as a result of his finding that the agency had violated Article XII, Section 4, of the parties' negotiated agreement.

Article XII, Section 4, provides:

Employees will be required to work on a holiday if necessary in order to effectively accomplish the mission of the facility; however, such holiday work will not be scheduled to avoid overtime.

The arbitrator found that employees of certain repair shops at the Naval Air Rework Facility had been scheduled to work on an overtime basis on Saturday, January 27, 1973, in addition to the normal Monday through Friday workweek. Due to the death of former President Lyndon B. Johnson, the President declared Thursday, January 25, a national holiday.<sup>1/</sup>

Following the designation of the national holiday, 56 employees were ordered to work on the holiday (January 25) and only 28 on the following Saturday (January 27).

---

<sup>1/</sup> Article XII, Section 1, of the negotiated agreement provides:

Employees shall be entitled to holiday benefits consistent with applicable regulations, in connection with all federal holidays now prescribed by law and any that may be added by law. Holidays designated by Executive Order shall be observed as legal holidays.

The union grieved, contending that management's action by working certain employees on the holiday but not on the following Saturday was in violation of Article XII, Section 4, of the agreement, which, as already indicated, provides that "holiday work will not be scheduled to avoid overtime." The activity responded that 56 employees had been scheduled to work on both dates, that all 56 worked on Thursday as scheduled, but that Saturday overtime work for 28 of these employees was cancelled on Friday, January 26, because of materiel shortages.

The dispute ultimately went to arbitration. The arbitrator found that while "there does not appear to be an absolutely clear indication of Navy intent on this matter . . . the acts of the Navy did, in fact, avoid overtime pay." Consequently, he sustained the union's grievance. As a remedy, he directed that, as requested by the union, "all personnel who worked on Thursday, January 25, 1973, and were not allowed to work on Saturday, January 27, 1973, are to be paid for four additional hours."<sup>2/</sup>

#### Agency's Appeal to the Council

The agency filed a petition for review of the remedy portion of the arbitrator's award.<sup>3/</sup> Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review of one of the agency's exceptions, namely, that the arbitrator's award, which directs compensation be paid to employees for overtime which they had not actually worked, would be unlawful under applicable pay statutes as interpreted [and cited] by the Comptroller General.<sup>4/</sup> The Council also granted the agency's request for a stay pending the Council's determination of the instant appeal.

---

<sup>2/</sup> The 28 employees who worked on the holiday but not on Saturday had received 48 hours pay (i.e., 5 days of work plus 8 hours of holiday pay at straight time) as compared with the 52 hours pay they would have received under the cancelled schedule (i.e., 4 days of work and 8 hours of holiday pay at straight time plus 8 hours of Saturday work at the overtime rate of time and one-half.)

<sup>3/</sup> The agency indicated that it accepted the arbitrator's conclusion that it had, in fact, acted to avoid overtime pay. It also admitted that had the 28 employees been properly scheduled, they would have received 52 hours pay for 40 hours of work instead of 48 hours pay for the 40 hours actually worked.

<sup>4/</sup> The agency relied upon the following decisions of the Comptroller General as standing for the proposition that employees may not be compensated for overtime work where they do not actually perform the work during the overtime period: 42 Comp. Gen. 195; 45 Comp. Gen. 710; 46 Comp. Gen. 217; and B-175867 of June 19, 1972.

The union filed a brief; the agency relied on the reasoning set forth in its 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 that the award violates applicable law, appropriate regulation . . . ."

The question before the Council is whether the remedy portion of the arbitrator's award, which grants 4 hours' pay to personnel who worked on Thursday and were not allowed to work on Saturday, to compensate for the difference between the 48 hours' pay they received for 40 hours of work (i.e., 5 days of work plus 8 hours' holiday pay at straight time) and 52 hours' pay they would have received for 40 hours of work under the cancelled schedule (i.e., 4 days of work and 8 hours' holiday pay at straight time, plus 8 hours of work on Saturday at the overtime rate of time and one-half), violates applicable law or implementing regulations.

Since the United States Civil Service Commission is authorized, under 5 U.S.C. § 5548 to prescribe regulations to implement statutory provisions relating to premium pay, including holiday and overtime pay, that agency was requested for an interpretation of the relevant statutes and implementing CSC regulations as they pertain to the arbitrator's award of overtime pay in this case. Relying on applicable decisions of the Comptroller General, the Civil Service Commission concluded that the remedy portion of the arbitrator's award was in violation of applicable law and appropriate regulations, and, accordingly, the Council modified the award of the arbitrator by striking that portion which awarded 4 additional hours' pay to certain personnel.<sup>5/</sup>

The matter is now before the Council on a motion filed by the union to reopen, reconsider and modify the decision in light of subsequent Comptroller General decisions. Because the union made its request for reconsideration and modification on the basis of a decision of the Comptroller General, the Council requested from him a decision as to the application of that decision, and subsequent decisions of his Office, to the facts of this case, especially as to whether payment of the arbitrator's award of overtime pay may now legally be made. The Comptroller General's decision in the matter, B-180010, August 25, 1975, is set forth in relevant part as follows:

The arbitration award resulted from a grievance filed by the employees of certain repair shops at the Naval Rework Facility concerning the number of employees scheduled to work on Thursday,

5/ Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator), FLRC No. 73A-46 (September 24, 1974), Report No. 56.



January 25, 1973, and on Saturday, January 27, 1973. It had apparently been the practice of certain repair shops at the Facility to schedule overtime on Saturday in addition to the normal Monday through Friday administrative workweek. Thursday, January 25, 1973, was a national holiday declared by President Nixon to mourn the death of former President Lyndon B. Johnson.

The arbitrator found that the agency, in scheduling work during the days in question, had violated Article XII, section 4, of the parties' negotiated agreement. The aforementioned section provides:

"Employees will be required to work on a holiday if necessary in order to effectively accomplish the mission of the facility; however, such holiday work will not be scheduled to avoid overtime."

The arbitrator determined that 56 employees were ordered to work on the national holiday, January 25, 1973, and that only 28 employees were ordered to work on the following Saturday, January 27, 1973. He found that, although there was no indication in the evidence as to the agency's intent on the matter of scheduling, the acts of the agency did, in fact, avoid overtime pay. Hence, the arbitrator sustained the union's grievance and ordered that "all personnel who worked on Thursday, January 25, 1973, and were not allowed to work on Saturday, January 27, 1973, are to be paid for four additional hours." The rationale for this award was that the employees who worked on the holiday but not on Saturday had received 48 hours of pay, consisting of compensation for the basic 40-hour week plus 8 hours of holiday pay, as compared to the 52 hours of pay received by the employees who worked on Saturday, consisting of compensation for the basic 40-hour week plus 8 hours of Saturday work at the overtime rate of time and one-half.

The agency apparently agreed with the findings and conclusions of the arbitrator, but believed that the payments awarded would be improper under the decisions of our Office. Therefore, the agency filed an exception to the payment portion of the award, relying on the rule stated in several of our decisions that employees may not be compensated for overtime work when they do not actually perform work during the overtime period. See, for example, 42 Comp. Gen. 195 (1962); 45 *id.* 710 (1966); 46 *id.* 217 (1966); and B-175867, June 19, 1972. The Federal Labor Relations Council upheld the exception in its decision of September 24, 1974, on the basis of the Comptroller General's decisions.

With respect to the "no work, no pay" policy, we had held in those decisions that the "withdrawal or reduction" in pay referred to in the Back Pay Act, now codified in 5 U.S.C. § 5596 (1970), meant only the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to. These holdings were followed in B-175867, June 19, 1972, where an employee was deprived of the opportunity to work overtime by the agency's failure to comply with its agreement with the union. We stated therein that the improper denial of the opportunity to perform overtime to the aggrieved employee was not an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, and the implementing Civil Service Commission regulation, 5 C.F.R. § 550.803. We also held that the statute authorizing overtime, 5 U.S.C. § 5542(a), clearly contemplated the actual performance of overtime duty, citing the above-mentioned decisions. Accordingly, we concluded that, although the union-management agreement had been violated, there was no authority for overtime pay since no overtime work had been performed.

In our earlier decisions, we had also construed the Back Pay Act of 1966 as requiring positive or affirmative action by an agency official, rather than an omission or failure to take action for an improper reason, in order to provide a remedy in the form of back-pay. For example, we held an employee was not entitled to backpay, where his agency had improperly failed to promote him. See 48 Comp. Gen. 502 (1969).

In our more recent decisions, however, we have held that the violation of a mandatory provision of a negotiated agreement resulting in the loss or reduction of an employee's pay, allowances or differentials, is an unjustified or unwarranted personnel action, provided that the mandatory provision was properly included in the agreement. Hence, we now believe that such violations are subject to the Back Pay Act, 5 U.S.C. § 5596, and that the Act is the appropriate statutory authority to compensate an employee for pay, allowances, and differentials he would have received but for the violation of the mandatory provision in the negotiated agreement. 54 Comp. Gen. 312 (1974), and 54 *id.* 403 (1974). Our present position is stated at 54 Comp. Gen. 312, 318 as follows:

"We believe that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate

statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In that regard, to the extent that previous decisions of this Office may have been interpreted as holding to the contrary, such decisions will no longer be followed."

We have also recently held that a finding by an appropriate authority, such as the Assistant Secretary of Labor for Labor-Management Relations, that an employee has undergone an unjustified or unwarranted personnel action as a result of an unfair labor practice which directly caused the employee to be deprived of pay, allowances or differentials he would otherwise have received but for such action, would entitle the employee to backpay. 54 Comp. Gen. 760 (1975).

Finally, we ruled in B-175275, June 20, 1975, 54 Comp. Gen. \_\_\_\_, that an employee deprived of overtime pay in violation of a labor-management agreement may be awarded backpay under the Back Pay Act for the overtime lost. In that decision, we expressly set aside the distinction between commission and omission in connection with improper personnel actions.

In view of the foregoing, our present position is that an unjustified or unwarranted personnel action may involve acts of omission as well as acts of commission. Such improper action may involve the failure to promote an employee in a timely manner when there is a mandatory requirement to do so or the failure to afford an employee an opportunity for overtime work in accordance with mandatory requirements of agency regulations or a negotiated agreement. Thus, an agency may retroactively grant backpay, allowances and differentials under the provisions of the Back Pay Act to an employee who has undergone an unjustified or unwarranted personnel action, without regard for whether such action was one of omission or commission.

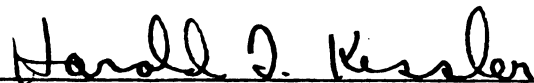
The arbitrator concluded in the present case that 28 employees had been deprived of overtime work in violation of a provision of the negotiated agreement. The arbitrator also concluded, and the agency admitted, that had the 28 employees been properly scheduled, they would have received 52 hours of pay for 40 hours of work instead of 48 hours of pay for the 40 hours actually worked. Therefore, in accordance with B-175275, June 20, 1975, 54 Comp. Gen. \_\_\_\_, supra, we hold that the arbitrator's award of backpay for employees deprived of overtime work in this case may be implemented by the agency in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

Based upon the foregoing decision by the Comptroller General, we must conclude that the arbitrator's award does not violate the Back Pay Act (5 U.S.C. § 5596) and implementing regulations.

Conclusion

For the foregoing reasons, we find that the award does not violate the Back Pay Act (5 U.S.C. § 5596) and implementing regulations. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we reverse our prior decision in this case dated September 24, 1974, and sustain the arbitrator's award.

By the Council.



Harold D. Kessler  
Acting Executive Director

Issued: October 8, 1975

AFGE Local 3157 and Supervisor, New Orleans, La., Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture. The agency determined that certain union proposals were nonnegotiable because they violate the Order. The union appealed to the Council and sought to introduce revised proposals "as the proposals in dispute."

Council action (October 8, 1975). Since the revised proposals sought to be introduced before the Council by the union had not been advanced in negotiations and, moreover, had not been referred to the agency head for a negotiability determination pursuant to section 11(c) of the Order, the Council ruled that the conditions prescribed for review in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure had not been met. Accordingly, the Council denied review of the union's appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

October 8, 1975

Mr. Clyde M. Webber, National President  
American Federation of Government  
Employees, AFL-CIO  
1325 Massachusetts Avenue, NW.  
Washington, D.C. 20005

Re: AFGE Local 3157 and Supervisor, New Orleans, La., Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture, FLRC No. 75A-6

Dear Mr. Webber:

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

The Council carefully considered your appeal, the statement of position filed by the agency, the supplemental submissions filed by each party and the comments thereon filed by the other party and has decided that review of your appeal must be denied for the following reasons.

Section 11(c) of the Order, which is incorporated by reference in section 2411.22 of the Council's rules of procedure, provides in relevant part:

(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:

. . . . .  
(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;

. . . . .  
(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 . . . . [Underscoring supplied.]

In the present case, the American Federation of Government Employees appealed from a determination by the Department of Agriculture that certain proposals presented in negotiations between AFGE Local 3157 and the Supervisor, New Orleans, La., Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture are nonnegotiable because they violate the Order. Subsequently, AFGE sought to introduce before the Council revised proposals "as the proposals in dispute." In this regard, AFGE states that its revisions were submitted in view of "the discovery of additional information directly relevant to our position in this case."

However, since the revised proposals concerning which a Council ruling is sought have not been advanced in negotiations and, moreover, have not been referred to the agency head for a negotiability determination pursuant to section 11(c) of the Order, 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.<sup>1/</sup>

Accordingly, without passing on the merits, since your appeal fails to meet the conditions prescribed for review in section 11(c)(4) of the Order, in accordance with section 2411.22 of the Council's rules, review of your appeal is hereby denied.<sup>2/</sup>

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: M. A. Simms  
Agriculture Dept.

<sup>1/</sup> Cf. AFGE Local 2151 and General Services Administration, Region 3, FLRC No. 75A-28 (October 8, 1975), Report No. 86 ; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 at nn. 11 and 12, aff'd, National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D.Va., September 5, 1975).

<sup>2/</sup> In view of our decision herein, AFGE's "Motion for Factfinding" is also premature and is, therefore, denied.

AFGE Local 2151 and General Services Administration, Region 3. The dispute involved the negotiability of three union proposals concerning (1) the provision of office space and furnishings to the union in the agency's regional headquarters; (2) uniform allowances; and (3) issuance of rainwear -- each of which the agency determined to be nonnegotiable under internal agency regulations. In its appeal to the Council, the union contended as to (1) that the agency regulations were contrary to the Order and Council decisions. As to (2) and (3), the union presented for the first time revised proposals and moved that the Council remand the revised proposals to the agency for negotiability determinations.

Council action (October 8, 1975). As to (1), the Council found that the agency's regulations were not inconsistent with the Order and the Council's decisions, and sustained the agency's determination of non-negotiability. With respect to (2) and (3), the Council concluded that the conditions for Council review prescribed in section 11(c) of the Order and section 2411.22 of the Council's rules of procedure had not been met as to these proposals. Accordingly, without passing on their negotiability, the Council held that the union's appeal with respect to the revised proposals was prematurely filed and must therefore be denied. In this regard, the Council further held that the union's motion requesting the Council to "remand" such revised proposals to the agency head is without basis in the Order or the Council's rules and must also be denied.



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

AFGE Local 2151

and

FLRC No. 75A-28

General Services Administration,  
Region 3

DECISION ON NEGOTIABILITY ISSUES

Background of Case

AFGE Local 2151 is the exclusive bargaining agent for four units within General Services Administration, Region 3. During negotiations between the parties, disputes arose as to the negotiability of three union proposals concerning the provision of office space and furnishings to the union in the agency's regional headquarters; uniform allowances; and issuance of rainwear.

Upon referral under the provisions of section 11(c)(2) of the Order, the General Services Administration determined that agency-wide regulations bar negotiations on the three proposals under section 11(a) of the Order.

The union appealed to the Council under section 11(c)(4) of the Order from the agency's determination that the office space and equipment proposal is nonnegotiable. However, with respect to the uniform allowances and the issuance of rainwear proposals, the union's petition presents revised proposals to replace those which had been determined to be non-negotiable by the agency. The union, in its petition, "moves" that the Council "remand" these two revised proposals to the agency for new negotiability determinations.

Opinion

1. As to the union's motion for "remand" of the two revised proposals to the agency for negotiability determinations, the Council is of the opinion that such request must be denied. While the union contends that its request is based upon section 2411.23 of the Council's rules of procedure, we think reliance on that section is misplaced.

Section 2411.23, in effect when this appeal was filed provided as follows (subsequent changes in the Council's rules are not material to the instant case):

(a) A petition for review of a negotiability issue may be filed by a labor organization which is a party to the negotiations.

(b) The time limit for filing is 20 days from the date the agency head's determination was served on the labor organization. However, review of a negotiability issue may be requested by a labor organization under this subpart without a prior determination by the agency head, if the agency head has not made a decision--

(1) Within 45 days after a party to the negotiations initiates referral of the issue for determination, in writing, through prescribed agency channels; or

(2) Within 15 days after receipt by the agency head of a written request for such determination following referral through prescribed agency channels, or following direct submission if no agency channels are prescribed.

(c) A copy of the petition shall be served simultaneously on the other party.

Plainly, the Council's rules do not provide in any manner for the Council to "remand" revised proposals which have never been referred by a party to the agency for negotiability determinations, as the union requests here. The cited section only indicates who may file a negotiability appeal, the time limits for such appeal, and the requirement of service. Moreover, it implicitly requires, as a condition precedent to appeal to the Council, that a party to the negotiations refer the issue to the agency head for a determination.

Furthermore, section 4(c)(2) of the Order empowers the Council, subject to its regulations, to consider "appeals on negotiability issues as provided in section 11(c)" of the Order. Section 11(c) provides as follows:

(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:

(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;

(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.

Thus, by its language, section 11(c) of the Order, incorporated in section 2411.22 of the Council's rules of procedure, provides expressly for the Council to resolve only issues concerning the propriety of an agency head's determination that a proposal, developed in connection with negotiations, is not negotiable because it violates applicable law, regulation, or the Order. It is likewise clear that section 11(c)(4)(i) and (ii) provide the only bases upon which a union may invoke the Council's jurisdiction in a negotiability dispute (other than those involving a determination of negotiability by the Assistant Secretary under sections 6(a)(4) and 11(d) of the Order), and that such bases are predicated upon the proposal's first having been referred to the agency head for a determination.

Similarly, as regards the "legislative history" of the procedures governing resolution of negotiability disputes, the 1969 Study Committee Report and Recommendations, which led to the issuance of E.O. 11491,<sup>1/</sup> states an intent that:<sup>2/</sup>

Where disputes develop in connection with negotiations at the local level as to whether a labor organization proposal is contrary to law or agency regulations or regulations of other appropriate authorities and therefore not negotiable, the labor organization should have the right to refer such disputes immediately to agency headquarters for an expeditious determination.

. . . . .

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.

. . . . .

<sup>1/</sup> Subsequent amendments have not modified provisions of the Order in any respect material to this case.

<sup>2/</sup> Labor-Management Relations in the Federal Service (1975), at 71.

. . . The procedures recommended would give exclusively recognized organizations a way of resolving, during negotiations, questions as to whether a matter proposed for negotiation is in conflict with law, applicable regulations or a controlling agreement.

In the instant case, the union's petition to the Council clearly reveals that the revised proposals, which are the subject of this appeal and which the union requests the Council to remand to the agency head, are not the product of, and were not considered in, local negotiations as required by the Order. In fact, the union expressly states that it has not presented the proposals to Region 3 management because of a desire to avoid "meaningless negotiations." Similarly, the union has chosen not to submit the revisions to the agency head for determinations.

Under these circumstances, we must conclude that the conditions for Council review prescribed in section 11(c) of the Order and section 2411.22 of the Council's rules of procedure have not been met. Accordingly, without passing on the negotiability of the revised proposals, the Council finds that: The union's appeal with respect to its revised proposals concerning uniform allowances and issuance of rainwear is prematurely filed and must therefore be denied; and, the union's motion that the Council "remand" such revised proposals to the agency head is without basis in the Order or the Council's rules and, likewise, must be denied.

2. The union's proposal concerning office space and equipment reads as follows:

Article XVI - For the convenience and efficient serving of employees in the Units, the Employer agrees to furnish office space and office furniture for use of the Union in the Regional Office Building.

As previously indicated, the agency determined that the proposal is nonnegotiable under section 11(a) of the Order because of its conflict with General Services Administration internal regulations. The regulation relied upon by the agency is OAD 6250.1A, "Labor-Management Relations in GSA," April 21, 1972, which provides:

On the premises. Subject to safety and security regulations and where appropriate facilities are available on GSA premises, labor organizations will be granted permission to use such facilities for business meetings provided that meetings do not interfere with the regular functioning of GSA activities. The use of GSA premises, office space, or other facilities will not be assigned on a continuing basis. Ordinarily, meetings held on GSA premises may be attended and conducted by non-employees as well as GSA employees; however, when GSA officials determine that security considerations are involved, permission to attend and conduct meetings on GSA premises may be restricted to GSA employees.

The union contends that this agency regulation is inconsistent with the Order and Council precedent. In particular, it asserts principally that the regulation violates sections 19(a)(3) and 23 of the Order; and is inconsistent with prior Council decisions.

The matter of union use of agency facilities is specifically mentioned only in sections 19(a)(3) and 23 of the Order. Section 23, which requires that agencies promulgate regulations and policies implementing the Order, expressly includes, among the matters to be addressed in such issuances, ". . . policies with respect to the use of agency facilities by labor organizations. . . ." While section 23 mandates the issuance of regulations, it does not grant any rights or set forth any limitations on the substance of the issuances required by it, except that such regulations and policies must be clear and must be consistent with the Order. Hence, while section 23 does not preclude an agency from negotiating with respect to the use of agency facilities by labor organizations, it similarly does not bar the issuance of an agency regulation which may restrict the scope of negotiation under section 11(a) of the Order.

Section 19(a)(3), which concerns management unfair labor practices, provides as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not--

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status. . . .

The union argues that "the specific exception in section 19(a)(3) shows a clear intent to permit agencies to agree to furnish office space where circumstances warrant it." Thus, the union concedes, correctly in our view, that this section of the Order is merely permissive. That is, it grants no rights to the union and imposes no obligation upon the agency with respect to whether or not agency services and facilities will be furnished to the exclusive representative. The section merely states that, as an exception to the general requirement that an agency refrain from assisting a labor organization, management "may furnish" such services and facilities upon request, without committing an unfair labor practice, if they are furnished impartially to organizations having equivalent status.

Thus, in our view, the union's contention that the agency regulation in question violates sections 19(a)(3) and 23 of the Order is without merit. Neither section requires the agency to furnish facilities and/or services for union use; nor does either section mandate that whether they will be furnished is a question to be resolved by the parties at the bargaining table. Accordingly, a regulation which places a restriction on the extent to which parties may negotiate over the furnishing of facilities does not violate these provisions of the Order.

As previously stated, the union also contends that the regulation in question may not properly bar negotiations under the principles enunciated in our Ft. Monmouth<sup>3/</sup> and Elmendorf<sup>4/</sup> decisions.<sup>5/</sup> Again, we must disagree. In both of those cases the Council set aside agency determinations that agency regulations barred negotiations on proposals formulated by the unions involved. The Council based its ruling in Ft. Monmouth on a finding that, under section 21 of the Order "the substance and the form of dues withholding arrangements were to be left to determination by the parties at the bargaining table." In Elmendorf the decision was based on a finding that, under section 13 of the Order, "the nature and scope of the negotiated grievance procedure were to be negotiated by the parties subject only to the explicit limitations prescribed by the Order itself." In both cases the regulation relied upon by the agency to restrict negotiations was determined to be inconsistent with the Order, thereby eliminating it as an applicable regulation under section 11(a). In the instant case, however, the matter which is the subject of the union's proposal and the agency's regulation is, as we have indicated, one concerning which the Order does not bar the issuance of agency regulations which may restrict the scope of negotiation under section 11(a). Accordingly, our holdings in the two earlier cases are inapplicable and lend no support to this appeal.

Based on the foregoing, we find that the agency regulations in question are not inconsistent with the Order. Accordingly, we must sustain the agency head's determination that Article XVI is nonnegotiable in the circumstances of this case.

3/ National Federation of Federal Employees, Local 476 and Joint Tactical Communications Office, Ft. Monmouth, New Jersey, FLRC No. 72A-42 (August 31, 1973), Report No. 43.

4/ American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10 (May 12, 1973), Report No. 38.

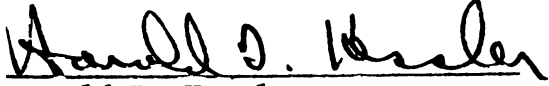
5/ The union also asserts that the regulation (1) violates the preamble and sections 1, 11(b), and 19(a)(1) of the Order; and (2) is "discriminatory on its face and in its application." But, as to (1), the union advances no persuasive reasons to support its assertions. Hence, we find these unsupported claims to be without merit. As to (2), this bare assertion does not state a ground for setting aside an agency determination of nonnegotiability. Rather, it appears to conjecture an unfair labor practice by agency management. The proper vehicle for raising such an issue is not a negotiability appeal to the Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case.

Conclusion

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

1. The union's appeal with respect to its revised proposals concerning uniform allowances and the issuance of rainwear fails to meet the conditions for review prescribed in section 11(c) of the Order and must be denied; and
2. The agency's determination as to the nonnegotiability of the proposal regarding the furnishing of office space and furniture, Article XVI, was valid and must be sustained.

By the Council.

  
Harold D. Kessler  
Acting Executive Director

Issued: October 8, 1975

Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan, Assistant Secretary Case No. 52-5817 (CA). The Assistant Secretary denied the request of the National Federation of Federal Employees (NFFE) for review of the Acting Assistant Regional Director's dismissal of NFFE's unfair labor practice complaint, which alleged that the activity violated section 19(a)(1) and (6) of the Order by failing to properly consult, confer or negotiate with the union over the revocation of parking permits issued to certain activity employees. The union appealed to the Council, contending that the Assistant Secretary's decision presents major policy issues.

Council action (October 8, 1975). The Council held that the union's petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and the union does not allege, nor does it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied review of the union's petition.





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

October 8, 1975

Ms. Janet Cooper  
Staff Attorney, National Federation  
of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of Housing and Urban  
Development, Detroit Area Office,  
Detroit, Michigan, Assistant  
Secretary Case No. 52-5817 (CA),  
FLRC No. 75A-72

Dear Ms. Cooper:

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

In this case Local 1804, National Federation of Federal Employees (NFFE), filed a complaint against the Detroit Area Office of the Department of Housing and Urban Development (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by failing to properly consult, confer, or negotiate with NFFE over the revocation of parking permits issued to certain activity employees.

The Assistant Secretary denied the request for review of the Acting Assistant Regional Director's dismissal of the complaint. The Assistant Secretary found that as the parking permits were issued and subsequently revoked by the General Services Administration and as the activity had no control over the parking permits or involvement in the decision to revoke them, it had no obligation to meet and confer with NFFE in this regard. The Assistant Secretary noted that "NFFE did not request to meet and confer concerning the revocation" and that the activity "offered to meet and confer with NFFE with regard to the impact of the revocation of the parking permits on adversely affected employees."

In your petition for review you contend that the Assistant Secretary's decision presents several major policy issues:

1. Whether an offer to meet and confer made after the filing of a pre-complaint charge letter for failing to do so can be the basis for dismissing a complaint on the same subject?
2. Whether determinations as to what the bargaining duties in a particular situation are can be made by an Assistant Regional Director or must be reserved for an Administrative Law Judge to decide?

3. Whether the duty of a union to request bargaining on the impact of a change in working conditions exists if the union has no proper notice that the change is about to take place?
4. Whether [the activity] must notify the union of cancellation of parking permits if permits were issued directly to unit employees rather than to the union?

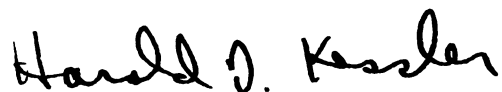
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious.

As to your contention concerning what evidence the Assistant Secretary may consider as a basis for dismissing a complaint, in the Council's view the Assistant Secretary may consider evidence of all relevant events whether they occurred prior to the filing of the precomplaint charge, after the charge but prior to the complaint, or subsequent to the complaint. See, in this regard, the Council's decision in Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77 (August 8, 1975), Report No. 79. As to your second alleged major policy issue, concerning the need for a formal hearing before an Administrative Law Judge, nothing in your appeal indicates that substantial factual issues exist which would require a hearing. With respect to your third and fourth alleged major policy issues, rather than constituting policy questions, they appear to be essentially a disagreement with the Assistant Secretary over whether the alleged facts warrant the issuance of a notice of hearing.

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: A/SLMR  
Dept. of Labor

E. Binford  
HUD

National Archives and Records Service and American Federation of Government Employees, Local 2578 (Strongin, Arbitrator). The arbitrator found, among other things, that the grievant's termination by the activity was not effectuated in accordance with the provision in the parties' negotiated agreement pertaining to termination of probationary employees and directed the grievant's reinstatement with back pay. The arbitrator also assessed 60 percent of the costs of the arbitration to the activity pursuant to the collective bargaining agreement which provided that the costs of arbitration were to be assessed inversely to the merits of each party's position. The agency filed exceptions to the arbitrator's award with the Council contending that (1) the arbitrator's finding regarding the termination action was contrary to law; (2) the award of back pay was violative of applicable law and appropriate regulation; and (3) the arbitrator's assessment of the costs of the arbitration required payment outside the authority of the activity to make and was contrary to law. The agency also requested a stay of the arbitrator's award.

Council action (October 10, 1975). The Council held that the agency's petition did not present facts and circumstances necessary to support its exceptions. Accordingly, the Council denied the agency's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, under section 2411.47(d) of its rules, the Council denied the agency's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

October 10, 1975

Mr. G. C. Gardner  
Assistant Administrator for Administration  
General Services Administration  
1800 F Street, NW.  
Washington, D.C. 20405

Re: National Archives and Records Service  
and American Federation of Government  
Employees, Local 2578 (Strongin, Arbitrator)  
FLRC No. 75A-74

Dear Mr. Gardner:

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

As stated in the arbitration award, the grievance involved the termination of grievant's employment with the activity. Grievant commenced employment with the activity as a Summer Aid on June 25, 1973, and was later appointed as a Student Aid on October 1, 1973. On December 23, 1973, grievant received a career conditional appointment. On July 5, 1974, the activity terminated him for poor attendance. After grievant's termination but prior to the arbitration hearing, the Civil Service Commission ruled that grievant's probationary period commenced October 1, 1973, overruling the activity's probationary period commencement date of December 23, 1973.

The arbitrator found, notwithstanding his acceptance of the activity's position that the appraisal report need not be provided to employees employed less than eight months, that grievant's termination was not effectuated in accordance with the negotiated agreement in that the activity had failed to accord grievant the protection to which he was entitled under Article XI, Section 2 of the agreement.<sup>1/</sup> In this regard, the arbitrator conclusively found that there had been no attempt to prepare or furnish grievant with Form 496, as required by Article XI, Section 2 of the agreement, even though over eight months of grievant's probationary

---

<sup>1/</sup> According to the award, Article XI, Section 2 of the collective bargaining agreement provides in pertinent part:

Prior to terminating a probationary employee, Management will ensure that every reasonable effort has been made adequately to counsel and/or train the employee and to devise a plan for

period had elapsed according to the Civil Service Commission's determination respecting the commencement date of that period. Consequently, the arbitrator directed grievant's reinstatement with backpay.

Pursuant to the collective bargaining agreement which directed that the costs of arbitration were to be assessed inversely to the merits of each party's position, the arbitrator assessed 60 percent of the costs to the activity.

The agency requests that the Council accept its petition for review of the arbitrator's award based on its three exceptions discussed below.<sup>2/</sup>

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

In its first exception, the agency contends that the determination by the arbitrator that the activity violated Article XI, Section 2 of the collective bargaining agreement violates applicable law. The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law. Here, however, the agency cites no "applicable law" to support its exception. It merely asserts that the activity's interpretation and application of the agency's regulations should have been deemed controlling as a matter

---

(Continued)

remediating any performance deficiencies, in accord with GSA Administrative Manual, DOA [sic] 5410.1, chap. 3-28, except that the appraisal by chap. 3-28(a) shall be made not later than the end of the eighth month of such period. The employee shall be given the opportunity to read and initial the GSA Form 496, Probationary or Trial Period Appraisal Report.

<sup>2/</sup> The petition for review also included a request pursuant to section 2410.4(a) of the Council's rules of procedure for a statement on major policy issues assertedly presented by the arbitration award. The Council is of the opinion that this request is without merit. All alleged major policy issues are simultaneously asserted as grounds, or in support of grounds, for review of the arbitration award. The Council has carefully considered the request pursuant to the provisions of section 2410.3 of its rules and, noting particularly that all alleged major policy issues are before the Council for resolution pursuant to its authority to review arbitration awards, concludes that the issuance of an interpretation of the Order and statement on major policy issue would not be appropriate. Moreover, the allegation or existence of a major policy issue is not a ground for review of an arbitration award under the Council's rules.

of law by the arbitrator. Again, the agency fails to be specific. It does not identify either the regulations or the activity interpretation and application thereof which it contends should have been deemed controlling. The agency is apparently maintaining that since the activity was of the opinion that grievant had been employed less than eight months when he was terminated, that his termination was in conformance with the activity's consistent interpretation and application of GSA Administrative Manual, OAD 5410.1, chapter 3-28 which is incorporated by reference in Article XI, Section 2 of the collective bargaining agreement.

However, as the Council held in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator) FLRC No. 74A-88 (July 24, 1975), Report No. 78:

[When] an agency validly agrees during negotiations . . . to incorporate . . . [a] regulation on a matter within agency discretion in a collective bargaining agreement, which agreement includes a grievance and arbitration procedure, the agency has thereby agreed that the union may file a grievance in which it disputes the agency's interpretation and application of the agreement, including such agency . . . regulation, and that, if the dispute is submitted to arbitration, an arbitrator has authority under the agreement to interpret and apply its provisions, including such agency . . . regulation, to the facts in a particular grievance in order to resolve the dispute.  
[Footnote omitted.]

In the instant case the agency goes further, however, and disputes the arbitrator's cognizance of the Civil Service Commission ruling and his retroactive application thereof. The agency essentially asserts that the activity's own determination of the date grievant's probationary period commenced, made contemporaneously with his termination, should be controlling and that the arbitrator, accordingly, unreasonably assessed responsibility for the error in computing the date upon the activity. The Council, however, will not review the merits of an arbitration award. Indeed, the Council has consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment in resolving the grievance. American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61. Furthermore, the Council has indicated that it is the award rather than the conclusion or the specific reasoning employed that is reviewed. Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76. It does not thus appear that the arbitrator's finding in this regard violates applicable law. Moreover, the agency readily conceded that the activity was bound by the ruling of the Civil Service Commission. Therefore, the agency's petition does not present facts and circumstances necessary to support this exception that the arbitrator's award violates applicable law.

In its second exception, the agency contends that the arbitrator's award of backpay violates applicable law and appropriate regulation. While this exception also states a ground upon which the Council will grant review of an arbitration award, the agency fails to specify the applicable law and appropriate regulation violated by the award of backpay. The Council assumes that the agency contends that the backpay award is contrary to the Back Pay Act of 1966<sup>3/</sup> and its implementing regulations<sup>4/</sup> since these constitute the controlling statute and regulations in matters of backpay.

<sup>3/</sup> 5 U.S.C. § 5596 (1970) which pertinently provides:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . .

<sup>4/</sup> 5 C.F.R. Chapter I, Part 550, Subpart H. The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. §§ 550.803(d)-(e) (1974) which provide:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of any agency which results in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

With respect to the authority of an agency to comply with a binding arbitration award involving payments to be made by the agency, the Comptroller General announced in 54 Comp. Gen. 312 (1974):

[O]nce an agreement with a labor organization is approved under section 15 of Executive Order 11491, and the provisions of the agreement are consistent with laws and regulations and within the guidelines of sections 11, 12 and 13 of the Executive order, then, unless otherwise specifically provided in the agreement, such provisions become nondiscretionary agency policies. Further, we believe that when an agency, in its discretion, chooses to agree to binding arbitration, than a decision of an arbitrator, if otherwise proper, becomes, in effect, the decision of the head of the agency involved. Therefore, regarding the weight which this Office should give to binding arbitration awards, absent a finding that an arbitration award is contrary to applicable law, appropriate regulation, Executive Order 11491, or decisions of this Office if the award involves payments to be made by the agency involved, we believe that a binding arbitration award must be given the same weight as any other exercise of administrative discretion, i.e., the authority to implement the award should be refused only if the agency head's own decision to take the same action would be disallowed by this Office. 54 Comp. Gen. at 316. [Emphasis original.]

With respect to the status of an arbitration award finding of a violation of a collective bargaining agreement, the Comptroller General further declared that:

[A] violation of a provision in a collective bargaining agreement, so long as that a provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. Id. at 318.

The Comptroller General concluded that an arbitration award of backpay predicated on a violation of a collective bargaining agreement which resulted in an unjustified personnel action may be properly implemented if consistent with law, regulation and the decisions of the Comptroller General. Accord, 54 Comp. Gen. 435 (1974) and B-175275 (June 20, 1975).

In the present case, the arbitrator found that the activity failed to afford grievant the protection extended to him by the collective bargaining agreement. The agency has provided no facts or circumstances to demonstrate that the award is inconsistent with law, regulation or the decisions



of the Comptroller General. Since the agency's petition fails to present any facts and circumstances to support this exception that the arbitrator's award of backpay violates applicable law and appropriate regulation, no basis is provided by this exception for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its third exception, the agency contends that the arbitrator's assessment of arbitration costs requires payments outside the authority of the activity to make and is contrary to law. This exception states a ground upon which the Council will grant review of an arbitrator's award, but the agency again fails to specify the applicable law violated by the assessment of the arbitration costs pursuant to the direction of the collective bargaining agreement. The agency does maintain that the cost assessment was based on the purported lack of merit of the activity's position which it believes has been vindicated by its petition for review, hence this portion of the arbitrator's award must be reversed.

In National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61, the arbitrator sustained the union grievance and pursuant to the collective bargaining agreement assessed all costs to the agency as the losing party. Before the Council, the agency successfully excepted to part of the arbitrator's award, yet the cost assessment was left undisturbed. The Council concluded in this regard that:

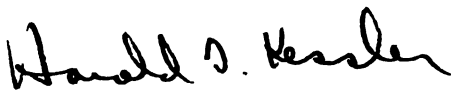
[N]o independent grounds are established by the agency or otherwise apparent which would warrant the Council's disturbing in any way the arbitrator's assessment of costs . . . .

The grounds now asserted by the agency were implicitly rejected in National Council of OEO Locals as unapparent and unsubstantiated and we now explicitly reject them here as unsupported. Therefore, the agency's petition does not present facts and circumstances necessary to support this exception that the arbitrator's assessment of arbitration costs is beyond the payment authority of the agency and is contrary to law.

Accordingly, the agency's petition is denied because it fails to meet the requirements for review, set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay is denied under section 2411.47(d) of the Council's rules.

By the Council.

Sincerely,



Harold D. Kessler  
Acting Executive Director

cc: C. M. Webber  
AFGE

United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400. This appeal arose from a Decision and Order of the Assistant Secretary who found, among other things, that the activity was in violation of section 19(a)(1) and (6) of the Order by refusing to allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO to represent the interests of an employee in the bargaining unit in an adverse action proceeding until the employee has chosen a representative. Upon appeal by the agency, the Council accepted the case for review on two major policy issues presented by the Assistant Secretary's decision, namely:

1. Whether section 10(e) of the Order imposes upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. Whether an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order.

Council action (October 23, 1975). The Council concluded that:

1. Section 10(e) does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. An agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice.

Therefore, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's unfair labor practice finding and remanded the matter to the Assistant Secretary for appropriate action consistent with the Council's decision.

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

United States Department of the Navy,  
Naval Ordnance Station,  
Louisville, Kentucky

and

A/SLMR No. 400  
FLRC No. 74A-54

International Association of  
Machinists and Aerospace Workers,  
AFL-CIO, Local Lodge 830

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who found, among other things, that the Naval Ordnance Station, Louisville, Kentucky (the activity) was in violation of section 19(a)(1) and (6) of the Order by failing to recognize Local Lodge 830, International Association of Machinists and Aerospace Workers (the union) as the representative of a unit employee who was involved in an adverse action proceeding.

The relevant facts, as found by the Administrative Law Judge (ALJ) and adopted by the Assistant Secretary, are as follows: The activity served upon an employee who was a member of the union's exclusive bargaining unit a notice of proposed removal, which provided, in pertinent part, that:

You may reply to this notice personally or in writing, or both . . . .  
You will be allowed ten (10) calendar days from receipt of this notice to reply . . . . Consideration will be given to extending this period if you submit a request stating your reasons for needing more time. If you reply personally, you may be accompanied by any one person of your choice who is willing to represent you . . . .

Near the end of the period provided for response in the notice, the employee became ill and was hospitalized. Upon hearing of the employee's condition, the union's chief steward, purporting to act for the employee, sought an extension of the time limit specified for reply to the notice of proposed removal. The request was denied by the activity on the ground that the employee involved had not designated the chief steward as his representative as required by the notice of proposed removal and by pertinent Navy regulations.<sup>1/</sup> After expiration of the originally specified

<sup>1/</sup> The Navy regulation, CMMI 752, paragraph 2-5(b)(3) provides that ". . . in making an oral reply, an employee may elect to be accompanied

(Continued)

notice period, the activity advised the employee of its decision to remove him. The employee subsequently appealed the decision to remove him to the Civil Service Commission under the appropriate adverse action appeals procedures, and the activity's action was sustained by both the Commission's Atlanta Regional Office and the Board of Appeals and Review. During the pendency of the proceedings before the Civil Service Commission, the union initiated the unfair labor practice proceedings which are the subject of this appeal.

In deciding that the activity had violated section 19(a)(1) and (6) of the Order,<sup>2/</sup> the Assistant Secretary found, in pertinent part:

---

(Continued)

by a representative. Since the opportunity for a hearing is accorded only in the appellate process under Navy procedure, a formal hearing will not be held." It is also apparently Navy policy (according to the agency's petition for review) to extend the right of representation to employees wishing to make a written response to the notice of proposed adverse action.

Further, Article 14 (Adverse Actions and Disciplinary Actions) of the negotiated agreement between the parties provides, in relevant part:

Section 2. When the employer contemplates disciplinary or adverse action against an employee, the employee will be notified, in writing, of the proposed action and the reasons therefor. Such actions must be for just cause and the employee shall have the opportunity to reply to the charges, personally and/or in writing, to the appropriate management official. In making his reply, the employee may be represented by his Union representative or any person of his choice who is willing to represent him. . . .

Section 3. When a notice of decision to effect a disciplinary or adverse action is issued to the employee, and the employee appeals the action, but does not select a Union representative, the Union shall have the right to have an observer present at the hearing and to make the views of the Union known under the conditions set forth in applicable regulations.

2/ Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

Section 10(e) of the Order clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees. Under the particular circumstances of this case, involving a unit employee who is subject to an adverse action proceeding, I find that the Complainant (the employee's exclusive representative) had an ongoing obligation under Section 10(e) of the Order to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to Section 7(d)(1) of the Order. [Footnotes omitted.]

He further found that:

. . . the Respondent's failure to recognize the Complainant as the representative of the unit employee involved in the adverse action proceeding was in derogation of the Complainant's exclusive representative status and, thereby, violated Section 19(a)(6) of the Order. Moreover, in my view, such conduct had a concomitant coercive effect upon the rights of unit employees assured by the Order in violation of Section 19(a)(1) of the Order.

The Council, in response to the agency's petition for review, granted a stay of pertinent portions of the Assistant Secretary's Decision and Order and accepted the case for review on two major policy issues as set forth below. The agency chose to stand on the views set forth in its petition for review. The union filed a brief on the merits.

### Opinion

The two major policy issues presented in this case are as follows:

1. Whether section 10(e) of the Order imposes upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. Whether an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order.

Each of these issues will be considered separately below.

Issue 1. The Assistant Secretary found that section 10(e) of the Order "clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees" and hence, imposes upon the union in the circumstances of this case "an ongoing obligation under section 10(e) of the Order to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to section 7(d)(1) of the Order."

In so finding, the Assistant Secretary cited, with emphasis, certain portions of section 10(e) of the Order, as follows:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. . . .

The Council has concluded that this reliance upon the first and second sentences of section 10(e) is misplaced and constitutes a misinterpretation of section 10(e). The first sentence of section 10(e) is a statement of certain rights of representation which must be accorded a labor organization which has acquired exclusive recognition in a bargaining unit. That is, the first sentence provides that an exclusive representative is entitled to act for and to negotiate agreements covering all employees in the unit. The second sentence imposes certain obligations upon a labor organization when it acquires the rights of an exclusive representative. That is: "It [the exclusive representative] is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership." (Emphasis added.) In relying upon only that portion of the second sentence which is not underscored here, the Assistant Secretary erroneously found an obligation imposed on the exclusive representative beyond that which was intended by the Order. Taken as a whole, this second sentence does not obligate the exclusive bargaining agent to represent the interests of unit employees in all circumstances. Rather, as may be seen from that part of the second sentence which we have underscored, the exclusive representative is enjoined to act without discrimination and without regard to union membership when representing or negotiating an agreement on behalf of unit employees within the scope of its authority under the Order. In summary, the second sentence of section 10(e) does not impose an affirmative duty on the exclusive representative to act for unit employees whenever it is empowered to do so under the Order, but only prescribes the manner in which the exclusive representative must provide its services to unit employees when acting within its scope of authority established by other provisions of the Order.

In conclusion, with respect to the first issue raised, section 10(e) of the Order does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.<sup>3/</sup>

---

<sup>3/</sup> Having determined that section 10(e) of the Order does not impose upon an exclusive representative an obligation to represent unit employees in an adverse action proceeding, it is unnecessary to pass on the Assistant Secretary's further conclusion that such obligation continues until the employee chooses his own representative in a grievance or appellate action pursuant to section 7(d)(1).

Issue 2. We have concluded above that an exclusive representative has no obligation under the Order to represent unit employees in an adverse action proceeding. However, we also noted that the first sentence of section 10(e) accords such exclusive representative the right to act for and to negotiate agreements covering all employees in the unit. We next consider whether those rights may extend to the representation of an individual bargaining unit employee in an adverse action proceeding, and if so, whether the union had such rights in the circumstances of this case. Only if we are able to answer both questions in the affirmative may we conclude that an agency's failure to recognize a labor organization's status as an employee representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order and, hence, sustain the Assistant Secretary's finding that the agency violated section 19(a)(1) and (6) of the Order.

Clearly, the express language of the first sentence of section 10(e) accords the exclusive representative the right to negotiate an agreement covering all unit employees, which right to negotiate may not be preconditioned upon the desires of any individual member of the bargaining unit. By negotiating such an agreement, the exclusive representative is exercising its right "to act for . . . all employees in the unit." Similarly, an exclusive representative, in the administration of a negotiated agreement, must be able to act for all unit employees where necessary to preserve and effectuate rights secured for all unit employees through the collective bargaining process. In short, whenever an exclusive representative is representing all unit employees within the scope of its authority under the agreement and/or the Order, its right to act for such unit employees is not contingent upon the prior designation of one or more individual employees in the unit.

In our opinion, the first sentence of section 10(e) which empowers an exclusive representative to act for all unit employees as noted above also authorizes it to act for or on behalf of an individual unit employee. However, as we interpret the first sentence of section 10(e), the exclusive representative's right to act for or represent an individual unit employee, as distinguished from its right to act for all unit employees, is not without limitation. That is, while a labor organization may on its own initiative act on behalf of a unit employee pursuant to its authority under contract or the Order, such a right is not inherent where, as here, it concerns an employee's adverse action proceeding, which is a procedure established pursuant to law and regulation rather than by agreement or the Order. Such matters, which are fundamentally personal to the individual and only remotely related to the rights of the other unit employees, are not automatically within the scope of the exclusive representative's 10(e) rights, which are protected by the Order. This is not to say, however, that a right could not be accorded to the exclusive representative to act on behalf of individual unit employees. Certainly the parties to an exclusive relationship could negotiate rights to be accorded the exclusive representative related to individual employee adverse actions so long as they were otherwise consistent with applicable law and regulations. However, it should be noted here that the parties, in negotiating the agreement which was effective when

the events involved herein arose had provided only that "the employee may be represented by his Union representative or any person of his choice who is willing to represent him. . . ."4/ Thus, it was recognized that before the exclusive representative had the right to act for the individual, there had to be a prior choice by the employee to that effect.

In the instant case the union had no contractual right to act upon its own initiative and attempt to serve as the employee's representative in an adverse action proceeding.5/ Moreover, as found by the Assistant Secretary, the individual employee had not selected the union as his representative and so advised agency management.

Therefore, with respect to the second issue raised, the agency's failure to recognize the labor organization's status as an employee's representative in an adverse action proceeding, did not constitute an unfair labor practice under the Order.6/

---

4/ See footnote 1, supra.

5/ We do not here find that such a right could be negotiated in conformity with law and regulation.

6/ In reaching the above conclusion, we have addressed only the question of the union's rights under the Order to represent a unit employee in an adverse action proceeding prior to the agency's imposition of disciplinary action. No issue was presented concerning the individual employee's rights under the Order, and that question has not been considered by the Council.

As previously noted, however, after the agency took adverse action against the individual employee herein, he appealed such action pursuant to part 772 of the Civil Service Commission Rules and Regulations, wherein the employee duly requested and was accorded the right to be represented by his union representative, and wherein the Commission's Atlanta Regional Office and the Board of Appeals and Review both addressed the issue of whether the employee's right to representation in the earlier stage of the adverse action proceeding was denied. In this regard, the ALJ's Report and Recommendation on pages 22, 23 and 24 quotes directly from the Commission decisions to show that the employee's claim of denial of representation had been reviewed and considered, with particular reference to the FPM and the provisions of the negotiated agreement applicable to the employee. The Commission decision found that there was no evidence to show the employee's rights had been violated, that he had been extended his rights, and that his removal was not procedurally defective. Of course, the union's unfair labor practice claims against the agency under the Order were declared "not at issue" in the foregoing proceeding, which concerned only the employee's rights under the adverse action appeals procedure.



## Conclusion

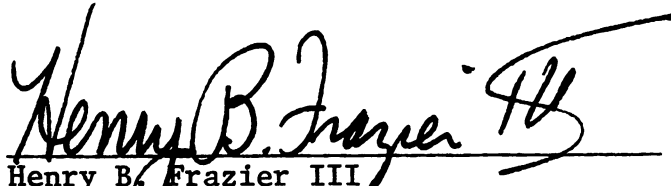
In summary, for the reasons discussed above, the Council's conclusions are:

1. Section 10(e) does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. An agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice.

Therefore, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's finding that the United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, violated section 19(a)(1) and (6) of the Order by refusing to allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the complainant, to represent the interests of an employee in the bargaining unit in an adverse action proceeding until the employee has chosen a representative.

Pursuant to section 2411.18(c) of the Council's rules of procedure, we hereby remand this matter to the Assistant Secretary for appropriate action consistent with this decision.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: October 23, 1975

U.S. Department of the Interior, U.S. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495. In a prior appeal involving this representation case, and before an election was conducted, the National Federation of Federal Employees (NFFE) filed a petition for review and request for a stay of the Assistant Secretary's decision and direction of election. Noting that no final disposition of the case had been rendered, the Council denied the petition and stay request under section 2411.41 of its rules of procedure which prohibits interlocutory appeals (May 22, 1975, Report No. 72). Subsequently, the Assistant Regional Director dismissed NFFE's petition for an election because of NFFE's failure to cooperate with the Assistant Secretary's processes and informed NFFE of its right to appeal his action to the Assistant Secretary. NFFE took no appeal to the Assistant Secretary, but resubmitted to the Council its previously denied appeal from the Assistant Secretary's original decision and direction of election.

Council action (October 23, 1975). The Council held that when there has been a failure to cooperate, as in this case, and when because of that failure the Assistant Regional Director has dismissed a petition for election, the intent of the Council's rules precludes the non-cooperating party from relying upon that dismissal to obtain Council review of the Assistant Secretary's original decision. Accordingly, as NFFE's appeal failed to meet the requirements of the Council's rules, the Council denied NFFE's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

October 23, 1975

Ms. Lisa Renee Strax, Legal Department  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: U.S. Department of the Interior, U.S.  
Geological Survey, Mid-Continent Mapping  
Center, A/SLMR No. 495, FLRC No. 75A-75

Dear Ms. Strax:

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

Your appeal is based upon events which arose when the National Federation of Federal Employees (the union) sought an election in a unit of all non-supervisory, field-based Cartographic Technicians and Survey Technicians assigned to the Branch of Field Surveys of the U.S. Geological Survey's Mid-Continent Mapping Center (the activity). The Assistant Secretary determined, in pertinent part that, with the exception of Cartographic Technicians engaged primarily in "elevation meter operations," all other Technicians in the union's proposed unit were supervisors under section 2(c) of the Order. Accordingly, the Assistant Secretary found appropriate a unit comprising only field-based Cartographic Technicians engaged in elevation meter operations and directed that, if warranted by the union's showing of interest, an election be held within that unit.

Prior to election, the union filed with the Council a petition for review of the Assistant Secretary's decision and a request for a stay thereof.\*/ Noting that no final disposition of the case had been rendered, the Council denied that petition and request under section 2411.41 of its rules. In so doing, the Council stated:

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. [Emphasis supplied.]

\*/ U.S. Department of the Interior, U.S. Geological Survey, Mid-Continent Mapping Center, A/SLMR No. 495, FLRC No. 75A-49 (May 22, 1975), Report No. 72.

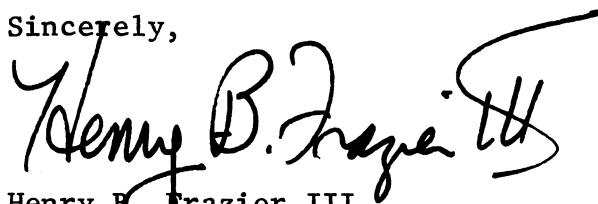
Subsequently, the Assistant Regional Director (ARD), finding that the union had "failed to cooperate with the Assistant Secretary in arranging a pre-election conference to obtain a directed election agreement," dismissed the union's petition for election. In his letter of dismissal, the ARD informed the union of its right, pursuant to section 202.6(d) of the Assistant Secretary's regulations, to "appeal this action by filing a request for review with the Assistant Secretary . . . ." No such request for review was filed. Instead, the union resubmitted to the Council its previously denied appeal from the Assistant Secretary's original decision and direction of election--asserting in effect that its appeal therefrom was no longer interlocutory in view of the ARD's dismissal of the union's petition for election because of its failure to cooperate.

In the Council's opinion, your petition for review fails to meet the requirements of the Council's rules as applied in a case such as here involved. That is, because of the union's failure to cooperate with the processes of the Assistant Secretary, no election has been held as provided for in the circumstances of this case and, accordingly, no "certification of representation or of the results of the election has issued." Likewise, when the Assistant Secretary has determined that an election is appropriate to resolve a given question concerning representation and has made available to the parties procedures for obtaining that election, the phrase "final disposition . . . of the entire representation matter" clearly contemplates that the election be held or, as a minimum, that it not be foreclosed merely because the party seeking to challenge the Assistant Secretary's decision has failed to cooperate in permitting it to be held. When there has been such a failure to cooperate, as in this case, and when because of that failure the Assistant Regional Director has dismissed the petition for election, the intent of the Council's rules precludes the noncooperating party from relying upon that dismissal to obtain Council review of the Assistant Secretary's original decision. Cf. Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21, FLRC No. 71A-17 (June 11, 1971), Report No. 11.

Accordingly, as your appeal fails to meet the requirements of the Council's rules, your petition for review is denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

H. D. Jascourt  
Dept. of Interior

Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432. This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by American Federation of Government Employees, Local 1841, found that the activity violated section 19(a)(1) and (6) of the Order. The Council accepted the agency's petition for review of this decision, holding that a major policy issued was presented concerning the propriety of the Assistant Secretary's finding that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications (such as those here involved) necessarily tend to undermine the status of the exclusive representative, in violation of the Order. (Report No. 62.)

Council action (October 24, 1975). The Council held that in determining whether a specific communication is violative of the Order, that communication must be judged independently and a determination made as to whether it constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees, or to threaten, or promise benefits to employees, which would be violative of the Order. In other words, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative of the Order, and to the extent that communication is permissible, it is immaterial whether such communication was previously agreed upon by the exclusive representative and the agency or activity concerning the latter's right to engage in such communication. Turning to the specific communications here involved, the Council further held that such communications (which can be equated with an attempt to bargain directly with employees, and to urge them to put pressure on the union to take certain actions) were in violation of section 19(a)(1) and (6) of the Order and upheld the Assistant Secretary's finding in this regard as consistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules and regulations, the Council sustained the Assistant Secretary's decision and vacated its earlier stay of that decision.

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

Department of the Navy, Naval  
Air Station, Fallon, Nevada

and

A/SLMR No. 432  
FLRC No. 74A-80

American Federation of Government  
Employees, Local 1841

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal from a Decision and Order of the Assistant Secretary originates from an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1841 (union), contending, in pertinent part, that the Department of the Navy, Naval Air Station, Fallon, Nevada (activity), had violated section 19(a)(1) and (6) of the Order by posting a letter, without prior union approval, allegedly containing threats and demonstrating that the activity held the union in disdain. The letter was a communication from the activity's commanding officer to the union's president which reflected events occurring at a special meeting between the union's president and the activity's executive officer held to solve a negotiating problem and an unfair labor practice charge. The letter stated that: (1) it had been brought to the attention of the activity's commanding officer that the union's president had been involved in "highly irregular tactics and procedures" and had been "quoted as making highly suspicious statements, concerning management, which . . . [prompted questioning of] certain loyalties and integrities . . . in exercising the calling of . . . [her union] office"; (2) the executive officer "would not be intimidated by any 'blackmail' tactics on the part of the Union"; and (3) "any further tactics . . . to convey threats, intimidations or otherwise seek to hamper the collective bargaining process [would result in the activity's charging the union with] . . . failing to negotiate in good faith," since such actions "are clearly recognizable as violations under the Executive Order 11491, as amended, and if continued will result in formal charges."

The Assistant Secretary found first,

. . . absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters

relating to the collective bargaining relationship, direct communications such as that involved in this situation necessarily tend to undermine the status of the exclusive bargaining representative.

The Assistant Secretary reasoned that,

. . . by directly reporting to unit employees matters which have arisen in the context of the collective bargaining relationship, an agency or activity necessarily undermines an exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Any lesser standard clearly would be in derogation of the collective bargaining relationship.

The Assistant Secretary, after concluding that the need for such a policy was clearly demonstrated in this case where the activity's "communication to unit employees created an unfavorable impression with respect to the actions of the Complainant's [union's] President," and, in his view, "necessarily tended to undermine the Complainant's exclusive bargaining status," found that the agency's posting of the letter at issue was "inconsistent with its obligation under the Order to deal exclusively with the exclusive representative of its employees in violation of Section 19(a)(6)" and moreover, "such conduct necessarily interfered with the rights of unit employees in violation of Section 19(a)(1)."

As a remedy, the Assistant Secretary ordered the activity to cease and desist from such posting of letters and to post a notice to that effect.

Thereafter, the Assistant Secretary's decision was appealed to the Council by the agency. Upon consideration of the petition for review, and the opposition for review filed by the union, the Council determined that a major policy issue was presented by the decision of the Assistant Secretary, namely:

The propriety of the finding of the Assistant Secretary that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications (such as those involved in the instant case) necessarily tend to undermine the status of the exclusive representative, in violation of the Order.

The Council also determined that the agency's request for a stay met the criteria for granting such a request as set forth in section 2411.47(c) of its rules, and granted the request. Only the union filed a brief on the merits as provided for in section 2411.16 of the Council's rules.

## Opinion

Section 10(e) of the Order provides, in pertinent part, that:

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

This concept of "exclusive recognition" in the Federal service, first provided for under Executive Order 10988, was carried over and strengthened under Executive Order 11491, as amended. In describing the obligation owed to an exclusive representative, the Report of the President's Task Force on Employee-Management Relations in the Federal Service, which led to the issuance of E.O. 10988, stated:

. . . if an employee organization is chosen by the majority of the employees in an appropriate unit it becomes the only formal recognized representative for the unit. In its dealings with management officials it is considered to speak for all of the employees of the unit, a responsibility which it must, of course, meet.<sup>1/</sup> [Emphasis deleted.]

Thus, when a labor organization has been selected as the exclusive representative of employees in an appropriate unit, agency management must deal with it only, to the exclusion of other labor organizations and without engaging in direct negotiations with unit employees over matters within the scope of the collective bargaining relationship. To permit otherwise would allow agency management to avoid the responsibility owed to the exclusive representative to treat it as the only formal representative who speaks for all unit employees.

While the obligation to deal only with the exclusive representative over matters relating to the collective bargaining relationship is clear, this does not mean that all communication with unit employees over such matters is prohibited. Indeed, under certain circumstances agency management is obligated to engage in communications with bargaining unit employees regarding the collective bargaining relationship. For example, section 1(a) of the Order requires that "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section . . . ." [Emphasis supplied.] In determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for

---

<sup>1/</sup> Report of the President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service (1961), at 14.



example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered.<sup>2/</sup> More specifically, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative. Rather communications which, for example, amount to an attempt to bypass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. To the extent that communication is permissible, it is immaterial whether such communication was previously agreed upon by the exclusive representative and the agency or activity concerning the latter's right to engage in such communication.

Regarding the instant case, the Assistant Secretary found that agency management posted the contents of a letter to the union president reflecting the events which occurred at a special meeting between the executive officer and the union president held to solve a negotiating problem and an unfair labor practice charge. This, then, poses the question whether, in the circumstances of the case, agency management's actions constituted an effort to impair the status of the exclusive representative by attempting to convey to employees that they should bypass the union and deal directly with management or to solicit employees to cause their representative to take some particular course of action. The Assistant Secretary, stating ". . . it is improper for agencies or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship," found that management had violated the Order. Applying our views on the differences between permissible and prohibited communications, we find no basis for overturning the Assistant Secretary's findings insofar as the specific communications here involved. That is, the content, intent and effect of the letter can reasonably be equated with an attempt to bargain directly with employees and to urge them to put pressure on the union to take certain actions.

For the foregoing reasons, while determining that the Order does not provide that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to


---

<sup>2/</sup> An analogous distinction is that drawn in the Council's recent decision in National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, FLRC No. 74A-95 (September 26, 1975), Report No. 84, wherein certain "information gathering" meetings between management and unit employees were found not to be "formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit," and, accordingly, management was not required to permit the union to be present at such meetings.

communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications necessarily tend to undermine the status of the exclusive representative in violation of the Order, we find that the Assistant Secretary's decision that the communications involved in the instant case violated section 19(a)(1) and (6) is consistent with the purposes of the Order.

Accordingly, pursuant to section 2411.18(b) of the Council's Rules and Regulations, we sustain the Assistant Secretary's decision and vacate our earlier stay of that decision.

By the Council.

  
Henry B. Brazier III  
Executive Director

Issued: October 24, 1975

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Portland, Maine, Air Traffic Control Tower (Gregory, Arbitrator). The arbitrator determined that the parties' agreement guaranteed 2 hours of productive work to any employee held beyond his regular shift and that this guarantee was tantamount to a guarantee of 2 hours of additional pay at the appropriate overtime rate under the circumstances giving rise to this grievance. As a remedy, the arbitrator awarded the grievant, who had been held on duty beyond his regular shift but was paid only 1 hour of overtime, an additional hour of pay at the appropriate overtime rate. The Council accepted the agency's petition for review insofar as it alleged that the arbitrator's award conflicted with applicable law and appropriate regulations (Report No. 53).

Council action (November 7, 1975). Based upon a decision of the Comptroller General, the Council found that the arbitrator's award does not violate applicable law and appropriate implementing regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award.

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

Professional Air Traffic  
Controllers Organization

and

FLRC No. 74A-15

Federal Aviation Administration  
Portland, Maine, Air Traffic  
Control Tower

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based on the entire record in the case, the circumstances of the case appear as follows:

Normal operating hours of the Air Traffic Control Tower at the Portland International Jetport in Portland, Maine, are from 7 a.m. to 11 p.m. daily. However, when a flight arrives after 11 p.m., the air traffic controller is required to remain on duty past his normal quitting time to service the flight. The negotiated agreement between the Professional Air Traffic Controllers Organization (PATCO) and the Federal Aviation Administration (FAA) provides in Article 40, Section 5:

Whenever an employee is held on duty beyond his regular shift, he shall be guaranteed a minimum of two hours productive work.

Notwithstanding the above provision, a memorandum issued by the chief controller at Portland provided that the control tower would be closed once it has serviced the late night flight; if this occurred before midnight, 1 hour of overtime would be credited; if after midnight, 2 overtime hours would be allowed.

The instant grievance arose when a flight departed Portland between 11 p.m. and 12 midnight, and the grievant air controller who was in charge of the control tower closed the tower at midnight. He was credited with 1 hour of overtime pursuant to the chief controller's memorandum. The grievance alleged that the policy memorandum was a violation of the PATCO/FAA agreement and requested (1) rescission of the memorandum, (2) payment for an extra hour of overtime, (3) a guarantee of 2 hours' productive work to a controller when held over in the future, and, if no such work is available, a payment for 2 hours of overtime in any event, and (4) a requirement that the airline reimburse FAA for such overtime pay. The grievance was ultimately submitted to arbitration.

## The Arbitrator's Award

The arbitrator determined that Article 40, Section 5, guarantees 2 hours of productive work to any employee held beyond his regular shift and that this guarantee is tantamount to a guarantee of 2 hours of additional pay at the appropriate overtime rate under the circumstances giving rise to this grievance. Since the grievant had received 1 hour of overtime pay for productive work, the arbitrator awarded him an additional hour's pay at the appropriate overtime rate as the remedy in this case.

## Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council, alleging, among other grounds, that the award, in effect, conflicts with Civil Service Commission directives, and applicable law as interpreted by the Comptroller General. The Council accepted the agency's petition for review and granted the agency's request for a stay pending the determination of the instant appeal. Briefs were submitted by both parties.

## 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 . . . on the grounds that the award violates applicable law, appropriate regulation . . . ."

As previously stated, the agency contends that the arbitrator's award of additional overtime pay would violate Civil Service Commission directives and applicable law as interpreted by the Comptroller General. Since the case involves issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to the applicability of prior decisions of his Office to the facts of this case, especially as to whether payment of the additional hour's pay at the appropriate overtime rate ordered by the arbitrator in this case may now legally be made. The Comptroller General's decision in the matter, B-180010, October 29, 1975, is set forth in relevant part as follows:

The Portland, Maine, Air Traffic Control Tower is operated by air traffic controllers employed by the Federal Aviation Administration (FAA). The control tower normally operates between 7 a.m. and 11 p.m. daily; however, occasionally an evening flight of Delta Airlines arrives in Portland considerably later than its scheduled time. Whenever this flight arrives late, the air traffic controller on duty is

required to remain at work after his regular quitting time of 11 p.m. The chief controller had established work guidelines for controllers required to stay beyond their normal quitting time that allowed 1 hour of overtime pay for any time worked after 11 p.m. and terminated before midnight and 2 hours of overtime pay if the work time extended beyond midnight.

On June 21, 1973, the evening Delta flight arrived late at the Portland Airport and did not depart until 11:26 p.m. Mr. Richard A. Fournier was the air controller on duty at the time. He remained beyond his normal quitting time and closed the control tower at midnight. He was paid for 1 hour of overtime at the appropriate rate pursuant to the work guides established by the chief controller.

Mr. Fournier and his labor organization, the Professional Air Traffic Controllers Organization (PATCO), filed a grievance on June 22, 1973, alleging that the work guidelines established by the chief controller violated article 40, section 5, of the negotiated agreement then in force, which reads as follows:

#### ARTICLE 40 -- OVERTIME

Section 5. Whenever an employee is held on duty beyond his regular shift, he shall be guaranteed a minimum of two hours of productive work.

The employee's grievance was denied by the agency on the basis that the facility could not provide productive work after assistance to Delta Airlines had been completed. The disputed matter was submitted to arbitration. The arbitrator made the following finding and conclusion:

. . . it is my opinion that the grievant's and PATCO's interpretation of Article 40, Section 5, with reference to the present case, is correct. My conclusion, therefore, is that under Article 40, Section 5 of the agreement the grievant was entitled to two hours of overtime pay at the appropriate overtime rate when he was held over on the evening of June 21, 1973.

Accordingly, the arbitrator allowed the grievance of Richard A. Fournier and awarded him another hour's pay at the appropriate overtime rate, in addition to what he has already received, for having been held over beyond his regular shift on June 21, 1973.

The FAA petitioned the FLRC for review of the above-quoted award alleging that the award directing payment for an additional hour of overtime conflicts with applicable law, regulations, and decisions of our Office.

Under the provisions of 5 U.S.C. § 5542(a) (1970) and the regulations implementing the statute contained in 5 C.F.R. § 550.111, an agency has authority to order or approve overtime work which is defined as each hour of work in excess of 8 hours in a day. The statute and regulation also require that such work must be performed by the employee in order for him to receive overtime pay. The FAA, in its agreement with PATCO, exercised its statutory authority and, in effect, authorized overtime work of at least 2 hours for employees held over beyond their regular shifts since it agreed to provide productive work for such overtime period. During the proceedings, the agency argued that no work was available for the overtime added to the tour; however, this was effectively countered by the union in pointing out that many administrative, operational, and training tasks could have been assigned to a controller who was held over on duty beyond his regular tour. Such tasks include resetting runway lights, securing the recording equipment, securing the facility logs, determining the traffic count for the daily operations survey for the tower, securing the tower upon his departure, training with operational manuals, and familiarization with operating procedures.

The arbitrator found that the FAA violated the terms of the negotiated agreement by failing to fulfill its commitment of providing the required 2 hours of productive overtime work for the employee.

We have held that where an arbitrator has made a finding that an agency has violated a mandatory provision of a negotiated agreement which causes the employee to lose pay, allowances or differentials, such violation is as much an unjustified or unwarranted personnel action as is an improper separation, suspension, furlough without pay, demotion or reduction in pay, as long as the provision was properly included in the agreement. Accordingly, the Back Pay Act, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances or differentials he would have received but for the violation of the negotiated agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), and 54 id. 538 (1974).

Section 5596 of title 5, United States Code, the authority under which an agency may retroactively adjust an employee's compensation, provides, in part, as follows:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period . . . . (Emphasis supplied.)

The implementing regulations for the above-quoted statute concerning the recomputation of pay for employees who have undergone an unjustified or unwarranted personnel action specifically provide for the payment of premium pay. In this regard section 550.804 of title 5, Code of Federal Regulations, provides as follows:

(b) In recomputing the pay, allowances, differentials, and leave account of an employee under paragraph (a) of this section, the agency shall include the following:

(1) Premium pay which the employee would have received had it not been for the unjustified or unwarranted personnel action . . . .

In B-175275.14, June 20, 1975, 54 Comp. Gen. \_\_\_\_, we held that where an employee was deprived of overtime work in violation of a negotiated agreement, the employee may be awarded backpay for the overtime lost under the provisions of the Back Pay Act. Accordingly, we have no objection to the implementation of the




arbitration award requiring the payment of an additional hour of overtime to the grievant for overtime work that the FAA authorized and failed to provide as it had obligated itself to do under the agreement. The amount of the payment must be determined by the FAA and made in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

Based upon the foregoing decision by the Comptroller General, we must conclude that the arbitrator's award does not violate applicable law and appropriate implementing regulations.

#### Conclusion

For the foregoing reasons, we find that the award of an additional hour's overtime compensation does not violate applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: November 7, 1975

Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3253. The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found that a reasonable basis had not been established for the complaint of the National Federation of Federal Employees (NFFE), which alleged that the activity had violated section 19(a)(3) and (6) of the Order; and the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary is arbitrary and capricious and presents a major policy issue.

Council action (November 12, 1975). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious and, under the circumstances of this case, does not present a major policy issue warranting Council review. Accordingly, since NFFE's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure, the Council denied review of the appeal.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 12, 1975

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

Re: Veterans Administration Center, Bath,  
New York, Assistant Secretary Case  
No. 35-3253, FLRC No. 75A-92

Dear Mr. Tobin:

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

In this case, the National Federation of Federal Employees (NFFE) filed a complaint alleging that the Veterans Administration Center, Bath, New York (the activity) violated section 19(a)(3) and (6) of the Order. NFFE alleged that the activity had violated the Order by unilaterally altering the composition of the certified bargaining unit by adding two positions of Administrative Coordinator for Nursing to a list of supervisory positions excluded from the unit, and in so doing demeaned NFFE and provided support for a challenging labor organization. The Assistant Regional Director (ARD) dismissed the complaint, finding that NFFE had failed to submit evidence in support of either allegation. The Assistant Secretary, in agreement with the ARD, found that under the circumstances of the case, a reasonable basis for the complaint had not been established, since "the primary issue involved herein is whether or not the position of Administrative Coordinator for Nursing is supervisory within the meaning of the Order," a dispute which "should be resolved through the processing of a petition for clarification of unit rather than under the unfair labor practice procedures." Accordingly, the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint.

In your petition for review, you contend that the decision of the Assistant Secretary is arbitrary and capricious since the Assistant Secretary considered only the activity's factual allegations and ignored the evidence submitted by NFFE. In this regard, you assert that NFFE presented sufficient evidence to support its allegations that the activity unilaterally excluded the previously included position of Administrative Coordinator for Nursing from the bargaining unit. You further contend that the Assistant Secretary's decision presents a major policy issue as to "whether the action by an activity of unilaterally . . . revising, by creating additional supervisors where there was no previous notice that such positions were supervisory, the number of persons to be included and excluded from a representational

unit, can be the proper subject of an unfair labor practice proceeding in lieu of a clarification of unit petition." In this connection, you allege that the failure of the activity to consult, confer, or negotiate on the inclusion or exclusion from the unit of certain positions may be grounds for an unfair labor practice where, as here, evidence of anti-union animus is presented.

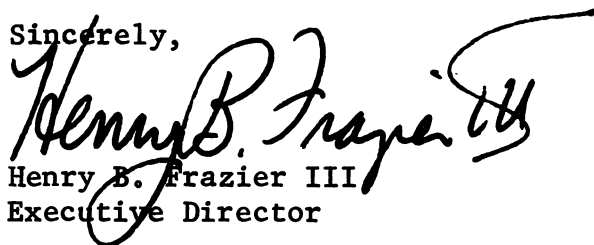
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear to be arbitrary and capricious or to present a major policy issue. With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, your appeal does not disclose any evidence which the Assistant Secretary failed to consider. Rather, you actually only contest his conclusion that the proper vehicle to resolve the exclusion issue is a unit clarification petition.

As to the alleged major policy issue, the Council is of the opinion that, under the circumstances of this case, the Assistant Secretary's determination that "the primary issue involved herein is whether or not the position . . . is supervisory within the meaning of the Order," a dispute which "should be resolved through the processing of a petition for clarification of unit rather than under the unfair labor practice procedures," does not raise a major policy issue warranting Council review.\*

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

S. Shochet  
VA

\*/ In so ruling, however, we do not interpret the Assistant Secretary's dismissal of NFFE's complaint herein as foreclosing the resolution of disputes involving the inclusion or exclusion of positions from a bargaining unit through the use of unfair labor practice procedures under all circumstances. Rather, we decide only that his determination in this regard, based upon the particular facts and circumstances of this case, raises no major policy issue.

Frances N. Kenny and National Weather Service (Lubow, Arbitrator). The arbitrator, in his award, determined that the agency did not violate its collective bargaining agreement with the National Association of Government Employees in the holiday scheduling of the individual grievant. The union filed exceptions to the award, contending, in effect, that (1) the arbitrator deprived the union of due process; and (2) the arbitrator's award fails to draw its essence from the parties' agreement and the arbitrator exceeded the scope of his authority.

Council action (November 14, 1975). The Council held that the union's petition did not present facts and circumstances necessary to support its exceptions. Accordingly, the Council denied review of the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 14, 1975

Mr. Philip Collins, Counsel  
National Association of Government  
Employees  
285 Dorchester Avenue  
Boston, Massachusetts 02127

Re: Frances N. Kenny and National Weather  
Service (Lubow, Arbitrator), FLRC  
No. 75A-30

Dear Mr. Collins:

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

The award shows that in the Pittsburgh Office of the Eastern Region of the National Weather Service, the officer in charge ("OIC") arranges the employee work schedules pursuant to Article XV of the parties' agreement<sup>1/</sup>

1/ Article XV provides in pertinent part:

Section 3. Work schedules and Overtime:

a. An official work schedule shall be developed and posted after review by the Union no later than the end of each pay period to cover no more than the following two (2) pay periods (four week period). The time of posting shall be determined by a majority vote of the employees at the local facility. The unexpired portions of these schedules will remain unchanged in subsequent official schedules.

b. Guidance schedules for long term planning purposes each covering a maximum of six (6) months shall be prepared and posted quarterly and will be used as a basis for preparing the official schedule.

c. Preparation of work schedules and payment of overtime will conform to the following general provisions:

1. The guidance schedule will show the hours of duty and the cycling sequences anticipated for each 6-month period. It will assure the proper utilization of available personnel, equitable scheduling of annual leave, and a reasonably balanced distribution of holiday and Sunday work as well as equitable

(Continued)

by first preparing a long-term guidance schedule, from which a short-term work schedule is then arranged. As circumstances change, however, variances might occur between the long-term guidance schedule and the short-term work schedule.

---

(Continued)

rotation of shifts and scheduled days off. Every effort will be made to leave unchanged the unexpired portion of the guidance schedule. Normally, the reasons for any change will be limited to in-house training, formal schooling, unscheduled leave (civil disturbances requiring military leave, court leave), the occurrence and filling of bona fide vacancies, and the consolidation or restoration of shifts.

. . . . .

#### Section 4. Holidays

When a holiday or a day observed as a holiday falls on a regularly scheduled non-workday of employees whose basic work-week is other than Monday through Friday, his holidays will be determined in accordance with applicable laws and regulations. If the employee is required to work on a day designated as his holiday, he shall be paid in accordance with holiday pay provisions.

Supplement to Article XV of the basic agreement provides in pertinent part:

#### Section 3. Work schedules and Overtime - paragraph a. Add:

1. An official work schedule shall be developed and submitted to a local union representative for review prior to posting. If comments are not received within three (3) calendar days, the work schedule will be considered acceptable and posted by the station official in accordance with Article XV, Section 3 of the Multi-Unit Agreement. Comments received will be considered prior to posting. Complaints which arise later will not be considered grievable matters.

#### Section 3. Work schedules and Overtime - paragraph b. Add:

1. In multi-shift operations, shift types, scheduled days off, holidays, Sunday and night work should be equitably shared by employees over long periods of time. To achieve this a rotation will be developed for local consultation. The guidance schedule will show, in general terms, the hours of duty and cycling sequencies [sic] anticipated for the guidance period. Exception to this policy can be a subject for local consultation only where there is unanimous agreement of affected employees. . . .

Two disputes over holiday scheduling for Ms. Kenny, the grievant, led to the instant arbitration proceeding. Since the grievant was scheduled to work both Thanksgiving and Christmas 1972, the OIC suggested an "employee swap" by which another employee who was scheduled to be off both holidays might agree to replace the grievant on Christmas. When the schedule appeared, however, the grievant noted that she was to work Christmas and to be off on Thanksgiving. After the other employee refused to work Christmas and the "employee swap" could not be accomplished, the OIC held to the posted schedule. The second dispute concerned whether the grievant was scheduled to be off on October 8, 1973, or October 22, 1973.

Since the parties did not submit a precisely worded issue, the arbitrator framed six issues and answered them as follows:<sup>2/</sup>

1. Article XV, Section 3.b. and c. of the basic agreement and the supplement thereto mandate no submission of the guidance schedule for union approval or veto.
2. Pursuant to the applicable provisions of the parties' agreement (Article XV, Section 3.a.), no requirement exists for union approval or veto of the work schedule.
3. Since Article XV leaves basically intact the right of management to schedule, the OIC was not precluded from changing a guidance schedule adopted in May 1971 which provided for the placing of supernumerary or H shift employees on holidays. Furthermore, only if all affected employees protest a change in the policy of equitable sharing of holidays over long periods of time can the matter be subject to local consultation under the supplement to Article XV.
4. The OIC must seek holiday equitability over extended periods of time, but no requirement exists that the number of days of holiday be identical among all employees in any given calendar year.
5. The OIC did not violate any contractual requirement by reverting to his original schedule when the 1972 Christmas-Thanksgiving swap did not work out. The gratuitous suggestion by the OIC about exchanging holidays was not, as alleged by the union, an agreement in any legal sense.

---

<sup>2/</sup> The Council has previously stated that, in the absence of a submission agreement, the arbitrator's unchallenged formulation of the questions may be regarded as the equivalent of a submission agreement. American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.



6. No contractual violation occurred when the OIC failed to agree with the grievant's request concerning the October 8, 1973 holiday.

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

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

In its first exception, the union contends that the arbitrator in his award contravened the fundamental requirement of due process that "he who decides must hear" and did not accord the union proper consideration by rendering his decision within a few days of receiving the union's brief. The failure of an arbitrator to accord a party the fundamental requirements of "due process" (such as where the award was procured by corruption, fraud, or undue means; where the arbitrator exhibited partiality or corruption; or where the arbitrator refused to postpone the hearing upon sufficient cause or to hear evidence pertinent and material) is a ground upon which courts in the private sector will sustain challenges to arbitration awards.<sup>3/</sup> The Council will grant a petition for review of an arbitration award on similar grounds under section 2411.32 of the Council's rules of procedure.<sup>4/</sup> However, the union's petition does not present facts and circumstances necessary to support its assertion of violation of due process by the arbitrator. The union's unsupported allegations that the arbitrator paid "little or no attention to the union's brief, either in fashioning or resolving the issues presented" and its charge that the arbitrator referred but once to the "union's comprehensive memorandum" in his decision do not establish that he deprived the union of due process. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure.

<sup>3/</sup> E.g., Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) and Bieski v. Eastern Auto. Forwarding Co., 396 F.2d 32 (3d Cir. 1968) (partiality of decision makers or arbitrator); Harvey Aluminum, Inc. v. United Steelworkers, 263 F. Supp. 488 (C.D.Cal. 1967) (exclusion of pertinent and material evidence). See also Dunau, "Scope of Judicial Review of Labor Arbitration Awards," N.Y.U. Conference on Labor (1971) and Wirtz, "Due Process of Arbitration," Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators (1958).

<sup>4/</sup> Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OFO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (August 15, 1975), Report No. 81 (alleged failure of arbitrator to hear pertinent and material evidence).

In its second exception, the union contends that the arbitrator unreasonably construed and exceeded the scope of his powers and authority to decide the issues presented and, therefore, his award does not draw its essence from the collective bargaining agreement. The union further alleges that the arbitrator searched "for issues never raised by the grievant or the agency" and that since he failed to refer to the key contractual language relied upon by the union, the award draws its essence from his fears of managerial chaos, not the collective bargaining agreement.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement (NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79) or that the arbitrator exceeded his authority by determining issues not included in the questions submitted to arbitration (Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62).

The Council, however, has concluded that the union's petition does not present facts and circumstances necessary to support its assertion that the arbitrator exceeded his authority by determining issues not included in the grievance submitted to arbitration. As previously noted, in the absence of a submission agreement by the parties, the arbitrator's unchallenged formulation of the issues may be regarded as an equivalent. In the present case, the Council finds that the arbitrator of necessity formulated, considered, and decided all six issues. The final two issues answered by the arbitrator were specifically the two holiday scheduling disputes which the grievant raised; the issues of placing supernumerary employees on holidays and the holiday equitability over extended periods of time appear to have arisen from the two disputes and were indeed raised by the union in its memorandum which was submitted to the arbitrator and that was incorporated by reference in its petition for review; and the issues of the submission of the work and guidance schedules to the union for approval or veto not only were also raised by the union itself in its memorandum, but appear to be clearly related to the resolution of the two disputes.

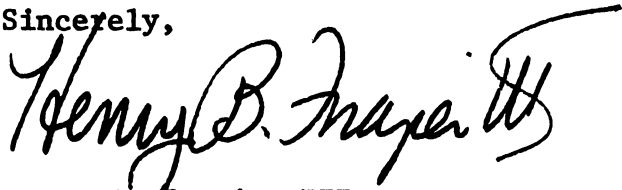
In regard to the union's allegation that the arbitrator failed to refer to the "key language relied upon by the union," the Council is of the opinion that the arbitrator, as noted in a prior Council case, is not required to discuss the specific agreement provision involved; nor does the fact that he did not mention the provision establish that he did not rule upon it. Moreover, as likewise noted in the prior case, it is the award rather than the conclusion or the specific reasoning employed that is subject to challenge. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60.

Thus, no facts and circumstances are presented that the arbitrator's award fails to draw its essence from the collective bargaining agreement or that the arbitrator exceeded his authority by determining issues not included in the questions submitted to arbitration. Therefore, the union's second exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By 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, stylized initial "H" and "F".

Henry B. Frazier III  
Executive Director

cc: N. E. Rizzo  
NWS

Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator). The arbitrator determined that the agency's failure to act on recommended promotions of the grievants within the time provided in the agency's regulations violated the parties' agreement. As a remedy, the arbitrator, in effect, ordered the retroactive promotion of the grievants to the positions involved (which were later affected by an agency reorganization) with backpay to the time the promotions would have been effective under the agency's regulations. The Council accepted the agency's petition for review insofar as it alleged that the award, in effect, violates the Back Pay Act (5 U.S.C. § 5596) and implementing regulations. (Report No. 57.)

Council action (November 18, 1975). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council found that the award, to the extent that the arbitrator determined that the grievants were entitled to retroactive promotions, did not itself violate applicable law or appropriate regulation. However, the Council further found that the award of backpay to the grievants for the period after the date set by the arbitrator may be violative of applicable law or appropriate regulation depending upon whether and when the grievants would have been properly demoted by the agency by reason of subsequent events, particularly the reorganization of the agency. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the award as modified by a provision that the award cannot be implemented unless and until the termination dates, if any, of the grievants' entitlements first be determined.

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

Community Services Administration

and

FLRC No. 74A-29

American Federation of Government  
Employees, Local Union No. 2649

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the entire record, the circumstances of the case appear as follows:

On September 12, 1973, recommendations for the promotion of Mr. Frank Gallardo and Mr. Roy Brooks to GS-13 were transmitted, following procedural clearance by the Regional Personnel Office, to the Director of Region VI of the Community Services Administration (the agency).<sup>1/</sup> When the Regional Director took no further action on the recommendations, the American Federation of Government Employees, Local No. 2649 (the union), on September 27, 1973, filed a grievance. On October 28, 1973, while this grievance was pending, Region VI was reorganized. Simultaneously, the two grievants, whose positions and duties were abolished in the reorganization, were reassigned to other positions at their same grade levels and the recommendations for their promotions were withdrawn. The grievance itself proceeded to arbitration.

The Arbitrator's Award

The arbitrator concluded that the Regional Director's failure to act on the promotion recommendations during the 45 days prior to the reorganization contravened the requirements of the agency's own regulations<sup>2/</sup> (incorporated by reference in the negotiated agreement) and, therefore, constituted a violation of Article 2, Section 2, of the parties' negotiated agreement, which provides as follows:

The parties agree that they will proceed in accordance with and abide by all Federal laws, applicable state laws, regulations of the Employer, and this Agreement, in matters relating to the employment of employees covered by this Agreement.

---

<sup>1/</sup> The name of the agency appears as officially changed during the pendency of this proceeding.

<sup>2/</sup> In his opinion, the arbitrator identifies the specific regulation involved as "OEO Staff Manual 250-2," and finds that this regulation imposed upon the Regional Director a time limit of 8 days within which to process the grievants' recommendations for promotion.

the arbitrator sustained the grievance and, in so doing, appears to have adopted the remedy sought by the union: i.e., the promotion of both grievants to GS-13 with backpay retroactive to September 23, 1973.

### Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council, alleging, among other grounds, that the award in effect violates the Back Pay Act (5 U.S.C. § 5596) and implementing regulations. The Council accepted the agency's petition for review and granted the agency's request for a stay pending determination of the appeal. Neither party filed a brief.

### Opinion

Section 2411.37(a) of the Council's rules of procedure provides, in pertinent part, that "[a]n award of an arbitrator shall be modified, set aside in whole or in part, or remanded . . . on grounds that the award violates applicable law [or] appropriate regulation . . . ."

As previously noted, the agency contends that the arbitrator's award of retroactive promotion and backpay in effect violates the Back Pay Act and implementing regulations. Since this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to the applicability of prior Comptroller General decisions to the facts of this case, especially as to whether the arbitrator's award of backpay may legally be implemented. The Comptroller General's decision in the matter, B-180010, November 4, 1975, is set forth in relevant part as follows:

This action involves a request for an advance decision from the Federal Labor Relations Council (FLRC) as to the legality of two retroactive promotions with backpay awarded by an arbitrator in the matter of Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations. The name of the agency was officially changed from the Office of Economic Opportunity (OEO) to the Community Services Administration during the pendency of the proceedings in this case.

On September 12, 1973, recommendations for promotion to grade GS-13 of Mr. Frank Gallardo and Mr. Roy Brooks, the grievants in this case, were submitted by proper authority to the regional personnel office of the agency. That office reviewed the recommendations to discover whether the grievants satisfied the criteria for promotion to the higher grade and determined that both men fulfilled the eligibility requirements. The recommendations were then forwarded to the regional director for approval. No action was taken by the regional

director and the two grievants were not promoted. On September 27, 1973, the union filed a grievance on behalf of numerous employees alleging that the agency had violated various sections of the collective-bargaining agreement. Many of the differences were settled by the parties, but the grievances of Messrs. Gallardo and Brooks proceeded to arbitration.

The arbitrator, on April 3, 1974, found that the agency's failure to comply with its own regulation (incorporated by reference into the negotiated agreement) requiring an 8-day time frame for processing promotion recommendations, was a violation of the negotiated agreement. He, therefore, sustained the grievance and ordered retroactive promotions and retroactive pay for both grievants from September 23, 1973.

In 54 Comp. Gen. 403 (1974) this Office considered a request from the Office of Economic Opportunity involving the same agreement, and the same regulation. We there stated our view that the arbitrator's authority to interpret the provisions of a collective-bargaining agreement under section 13 of Executive Order No. 11491, 3 C.F.R. p. 254, extends to the interpretation of the agency's regulations when they have been incorporated by reference into the agreement. We added, however, that the arbitrator's views did not necessarily take precedence over the agency's own interpretation which generally should be accorded great deference. Nevertheless, since OEO had not taken an exception to the arbitrator's interpretation to the Federal Labor Relations Council under Executive Order No. 11491, we presumed its acquiescence with the arbitrator's findings and interpretations. And for the three employees involved therein, we held that OEO could legally implement the arbitrator's award of backpay.

In the present case, the OEO, now the Community Services Administration, filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The Council has accepted the petition and is considering the issue raised prior to rendering a decision on the award.

Article 2, section 2, of the collective bargaining agreement provides that the parties will abide by: "all Federal laws, applicable state laws, regulations of the Employer, and this agreement, in matters relating to the employment of employees covered by this agreement." Hence, the negotiated agreement incorporated by reference the existing agency regulations, including OEO Staff Manual 250-2, which set forth the time frames for personnel actions as follows:

"To expedite the processing of Standard Form 52 through the various steps, the following time frames have been established. They are applicable only if the request follows a routine schedule. This means that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request and that no changes be made by the requesting office."

The various kinds of routine personnel actions are allotted specific time frames in which they are to be processed. Recommendations for promotions are to be processed in 8 days. The union's grievance is predicated upon the failure of the agency to abide by the aforementioned time frame.

The agency contended at the arbitration proceeding and in its review petition that the above-quoted regulation by its terms applied only to routine personnel actions. It argued that the October 1973 reorganization and the study that preceded it served to remove the promotion actions here in question from the routine category.

The issue involved in this case, then, is whether these promotion actions were routine within the meaning of the regulation.

It is a general principle of administrative law that an agency's construction and interpretation of its own regulations will generally be accorded great deference by a court or reviewing authority. Udall v. Tallman, 380 U.S. 1 (1964); Bowles v. Seminole Rock Co., 325 U.S. 410 (1944). Accordingly, we think that arbitrators must accord great weight to an agency's interpretation of its own regulations, notwithstanding the fact that such regulations have been incorporated by reference in a negotiated agreement. However, it is also a general principle of law that where the language of a statute or a regulation is plain on its face and its meaning is clear, there is no room for interpretation or construction by the reviewing authority. Shea v. Vialpando, 416 U.S. 251 (1974); Lewis, Trustee v. United States, 92 U.S. 618 (1875); United States v. Turner, 246 F.2d 228 (1957).

In the present case, the arbitrator found that the above-quoted regulation regarding time frames for personnel actions was plain on its face. He points out that the sentence, "[t]hey are applicable only if the request follows a routine schedule" is followed by a clear and explicit definition of what "routine schedule" means, to wit: "that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request." We agree with the arbitrator that the regulation in question is plain on its face and does not require interpretation or construction as to the meaning of "routine schedule"; such meaning having been already supplied by the self-contained definition. Thus, the agency's attempt to give the term "routine schedule" a meaning at variance with the definition in the regulation must necessarily fail.

In our recent cases we have held that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974),



54 id. 435 (1974), and 54 id. 538 (1974). Thus the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement.

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

In light of the foregoing, it is the obligation of the arbitrator not only to find that the negotiated agreement has been violated by agency action or inaction and that thereby the grievants underwent an unjustified personnel action, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

In the present case, the arbitrator has found that the grievant's promotion recommendations were not processed within the required time frame. The arbitrator stated on the record that "[t]he Employer concedes that the promotions would have taken effect \* \* \*." Also, the arbitrator found that this improper personnel action violated the negotiated collective-bargaining agreement.

Although the award states only that the grievance is sustained, we assume that the arbitrator intended to incorporate by reference in his award the second paragraph of page 2 of his decision, which reads as follows:

"In the event the grievance is sustained, the remedy as requested by the Union should provide for retroactive promotion for both grievants, as well as retroactive pay from September 23, 1973."

From the foregoing it appears that the arbitrator intended to award the grievants retroactive promotions to grade GS-13 with an effective date of September 23, 1973. In the usual case such an award would be sufficiently definite to permit its implementation, inasmuch as the entitlement to a promotion is deemed to continue in the absence of evidence to the contrary. However, in the present case we find substantial evidence to show that the two employees' entitlement to their

grade GS-13 promotions would have been terminated shortly after they were received as a result of a reorganization in the regional office. The arbitrator expressed recognition of this fact on page 10 of his decision when he stated:

"The fact that the reorganization determined that vacancies no longer existed at the higher grade level is a condition subsequent which did not affect the processing of the recommendations within the eight day time frame."

The agency's petition to the Federal Labor Relations Council for review of the arbitration award states, at page 4, that the reorganization became effective October 28, 1973, and the positions held by the two grievants were abolished. Accordingly, the agency concludes that if the arbitrator's award is allowed to stand and the agency is required to effect promotions as of September 23, 1973, it would also be required by the Position Classification Act to take simultaneous action demoting them as of October 27, 1973.

The record before us does not contain evidence as to what rights, if any, these two employees may have had to retain their higher grades beyond the date on which the positions to which they should have been promoted were abolished as a result of the reorganization. Reduction-in-force procedures contained in 5 C.F.R., Part 351 (1972), are applicable to demotions that are required because of reorganizations. The application of these procedures to the employees here involved might have permitted them to have retained their higher grades beyond the October 27, 1973 date and might have allowed them to avoid demotion altogether. Therefore, the evidence in the present record is insufficient to show if and when such demotions would have occurred.

Hence, we are of the opinion that the arbitrator's award is too indefinite to permit implementation, inasmuch as the record contains substantial evidence that the grievants may have been demoted. Where an award is too indefinite to implement, such as here, the reviewing authority should, if feasible, resubmit the defective award to the arbitrator for appropriate corrective action. Enterprize Wheel and Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959), approved in part 363 U.S. 593 (1960), National Brotherhood Packinghouse and Dairy Workers Local No. 52 v. Western Iowa Pork Company Inc., 247 F. Supp. 663 (1965), affirmed 366 F.2d 275 (8th Cir. 1966).

In view of these facts, the arbitrator has an obligation to establish a termination date, as well as an effective date, of the grievants' entitlement to grade GS-13 pay. We are of the opinion that the arbitrator's award must conform to the evidence in the record as to what the grievants' entitlements should have been, but for the unjustified and unwarranted personnel actions. Therefore, the award should be remanded to the arbitrator for further proceedings with instructions that he hear evidence on whether the grievants would have been demoted and if so, to fashion an award setting a definite date of demotion.

Based upon the foregoing decision by the Comptroller General, we sustain the arbitrator's award, finding that the grievants were entitled to retroactive promotion to GS-13 effective September 23, 1973. However, implementation of the award, which provides for backpay on and after that date, may be violative of applicable law and regulations contingent on whether and when the grievants would have been demoted by reason of subsequent events, particularly the reorganization of the agency on October 28, 1973. Accordingly, we shall order that the subject award be sustained in part and modified in part.

### Conclusion


For the reasons discussed above, and pursuant to section 2411.37(b) of the Council's rules of procedure, we find that the arbitrator's award, insofar as it determined that the grievants in this case were entitled to retroactive promotion to GS-13, effective on September 23, 1973, does not itself violate applicable law or appropriate regulation, and is hereby sustained.

However, we further find that the arbitrator's award of backpay to the grievants from September 23, 1973, may be violative of applicable law or appropriate regulation depending upon whether and when the grievants would have been properly demoted by the agency.<sup>3/</sup> Accordingly, the award is modified by adding to it the following sentence:

However, this award cannot be implemented unless and until the termination dates, if any, of the grievants' entitlements to the GS-13 pay which they would have received but for the agency's unjustified and unwarranted personnel actions first be determined.

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

By the Council.

  
Henry B. Frazier II  
Executive Director

Issued: November 18, 1975

<sup>3/</sup> If the parties cannot agree on the termination dates, if any, of the grievants' entitlements, they are directed to resubmit the matter to the arbitrator for disposition consistent with this decision. It is understood, however, that if in the process of reconstructing the impact of the 1973 reorganization on the grievants' entitlements to GS-13 pay, it is determined that they were affected by a reduction-in-force action, their rights, if any, to retain their higher grades would be subject to determination through the appeals procedures contained in 5 CFR 351.901 and would not be subject to resubmission to the arbitrator, for section 13(a) of the Order provides, in effect, that the negotiated grievance procedure, including arbitration thereunder, "may not cover matters for which a statutory appeals procedure exists."

Social Security Administration and American Federation of Government Employees, AFL-CIO, SSA Local 1923 (Strongin, Arbitrator). The arbitrator determined that the agency violated the parties' agreement by failing to repromote the grievant under the agency promotion plan incorporated in the agreement. As a remedy, the arbitrator ordered the grievant promoted retroactively to GS-13 on the effective date of the agreement, and to GS-14 on the anniversary date of the agreement, with backpay to those respective dates. The Council accepted the agency's petition for review insofar as it alleged, in effect, that the award of retroactive promotion and backpay violates the Back Pay Act (5 U.S.C. § 5596) and implementing regulations prescribed by the Civil Service Commission. (Report No. 60.)

Council action (November 18, 1975). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council found that, while the arbitrator did not exceed his authority by directing retroactive promotion with backpay, implementation of the award, insofar as it directed the retroactive promotion with backpay to the specific dates chosen by the arbitrator may be violative of applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the award, as modified by a provision that the award cannot be implemented unless and until the effective dates for the retroactive promotions with backpay are tied to the filling of specific positions for which the grievant was entitled to priority noncompetitive consideration and would have been selected but for the violation of that entitlement.

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

Social Security Administration

and

FLRC No. 74A-51

American Federation of Government  
Employees, AFL-CIO, SSA Local 1923

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he determined that the Social Security Administration (the agency) failed to comply with an agency promotion plan<sup>1/</sup> incorporated by reference in the labor agreement which the agency entered into with the American Federation of Government Employees, AFL-CIO, SSA Local 1923 (the

---

<sup>1/</sup> According to the award, the promotion plan provides in pertinent part:

Repromotion of an employee to a grade or position which he occupied on a nontemporary basis and from which he was downgraded in the Federal service without personal cause (i.e. without misconduct or inefficiency on the part of the employee) and not at his request. Although such an employee is not guaranteed repromotion, he should ordinarily be repromoted when a vacancy occurs in a position at his former grade or at any intervening grade for which he has demonstrated that he is well qualified, unless there are persuasive reasons for not doing so. Consideration of an employee eligible for repromotion under these conditions must precede efforts to fill the vacancy by other means, including competitive promotion procedures. The Employment Branch will maintain a list of SSA employees who have been downgraded in the Federal Service and who are eligible for repromotion, and will consider them non-competitively for promotion before announcing any position vacancy for which they qualify.

union). Based on the findings of the arbitrator and the entire record, it appears that the grievant was a GS-14 at the National Aeronautics and Space Administration when he was reduced in force on September 30, 1970. He was reinstated at the agency as a GS-11 on October 19, 1970. Subsequently, the agency promoted him to a GS-12 position. A grievance was filed alleging that the agency had failed to accord the grievant noncompetitive consideration for repromotion to GS-13 and GS-14 vacancies occurring in the agency under the promotion plan as a Federal employee reduced in grade without personal cause.

Arbitration was invoked by the union. As a remedy, the union requested that the grievant be retroactively promoted with backpay to a GS-14 position, but urged that, if the arbitrator ruled adversely with respect to that request, the grievant should at least be awarded a promotion to a GS-13 position at the appropriate step.

#### The Arbitrator's Award

The arbitrator determined that grievant was entitled to a GS-13 position at least by the effective date of the agreement, which was six months after the announcement of the promotion plan, based upon the provision in the promotion plan which indicated that, although an employee reduced in grade is not guaranteed repromotion, he should ordinarily be repromoted when a vacancy occurs for which he is qualified unless there are persuasive reasons for not doing so. He further determined that, taking the record as a whole, at the very least grievant would have been promoted to a GS-14 position within the twelve months following his attainment of the GS-13 position. As his remedy, the arbitrator ordered that the grievant be promoted to a GS-13 and GS-14 positions effective retroactively to September 1, 1972, and September 1, 1973, respectively. The arbitrator additionally ordered a backpay award consistent with the foregoing promotions.

#### Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council alleging, in effect, that the award of retroactive promotion and backpay violates the Back Pay Act (5 U.S.C. § 5596) and implementing regulations prescribed by the Civil Service Commission.<sup>2/</sup> Under section 2411.32 of the Council's rules of procedure, the Council accepted the agency's petition for review insofar as it related to that exception. The parties filed briefs.

---

<sup>2/</sup> The agency requested and the Council granted a stay of the award pending the determination of the appeal pursuant to section 2411.47(d) of the Council's rules of procedure which governed the granting of stays of arbitrator's awards when the stay was acted upon.

## Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to the exception alleging, in effect, that the arbitrator's award of retroactive promotion and backpay violates the Back Pay Act (5 U.S.C. § 5596) and implementing regulations prescribed by the Civil Service Commission. In accordance with established Council practice, the Council requested an interpretation from the Civil Service Commission of the relevant statute and implementing regulations as they pertain to the questions raised in the instant case. The Commission replied in relevant part as follows:

It is our opinion that within the context of the series of Comptroller General decisions, all numbered B-180010, issued since October 1974, permitting arbitration awards for retroactive promotion with back pay to be processed under 5 U.S.C. 5596, the award made in the instant case does not violate the law or implementing regulations. We believe, however, that the award is technically defective with regard to the dates the arbitrator has established for the retroactive promotions. Since the principle that governs the setting of effective dates for retroactive promotions with back pay is enunciated in CG Decision B-180010, dated December 2, 1974, a decision with particular relevance for the facts of this case and the nature of the award, we do not believe that there is any point at issue which needs to be referred to the Comptroller General for resolution.

It is pertinent at this point to enumerate and comment upon facts drawn from the file transmitted with your letter, which have a bearing on our conclusions. It is noted, for example, that the agency submitted its final brief on the case to the Council on November 26, 1974. This brief therefore antedates the particularly relevant Comp. Gen. Decision rendered December 2, 1974, cited above.

The agency based its exception to the award in that brief in large part on two points:

1. the Council's decision, after its review of the arbitrator's award in FLRC No. 73A-51, that retroactive promotion and back pay are not authorized under current law and regulations where an agency fails to afford priority consideration

(It should be noted that the Council relied in large part upon the advice of this office, but that both our advice and the Council's decision were rendered prior to the Comp. Gen. Decision, B-180010 of October 31, 1974. It was this decision which reversed the general prohibition on retroactive promotion, promulgated and reinforced over many years by prior Comp. Gen. decisions.); and

2. Comp. Gen. Decision B-180010 of October 31, 1974, itself; for while this decision approved a retroactive promotion awarded by an arbitrator, it did not deal with the failure of the agency, as in the instant case, to consider the grievant noncompetitively.

It is also noted that the agency does not contest that part of the arbitration award which orders that the grievant be promoted, to the extent that such promotion is prospective and not retroactive. In this connection, the agency has conceded that it did not grant the grievant the priority, noncompetitive consideration which it was obligated to grant under its regulation, issued on March 3, 1972, and under the negotiated agreement in which the relevant regulation was subsequently incorporated.

In the decisions cited collectively as B-180010, the Comptroller General has established the "but for" test for determining the entitlement of a grievant to retroactive promotion under arbitration awards. The "but for" test is intended to establish a clear causal relationship between the agency violation and the entitlement of the grievant to retroactive promotion and back pay under applicable law. It is our opinion that this test has been met in the instant case. According to the arbitrator, the agency concedes that the grievant would have been promoted to a GS-13 position but for the errors which it committed. However, it is also noted from the arbitration award narrative that the agency did not concede before the arbitrator that the grievant would necessarily have been promoted to a GS-14, under the referenced agency regulation. Nevertheless, we believe the "but for" test has been met for GS-14 as well, by virtue of the agency's statements in its original petition to the Council of July 22, 1974, that it was complying with that part of the award which directed promotion to GS-14, although not that part dealing with back pay. By thus agreeing to the order to promote to GS-14, albeit prospectively, the agency in effect agreed that the employee would have been promoted to GS-14, but for its unwarranted personnel action (i.e., its failure to grant the grievant priority consideration for promotion to that grade).

In this connection, it is pertinent to quote from Decision B-180010, dated December 2, 1974. That decision involves an arbitration award with regard to a grievance similar in a fundamental way to the case



at hand, i.e., the basic issue was over the failure of the agency to give priority consideration for promotion to the grievant under a nondiscretionary provision of the agreement. The Comptroller General noted that the arbitrator found that, had the grievant been afforded such priority consideration, he would have been promoted. On this point, the Comptroller General said:

We have some question as to whether the finding by the arbitrator that Mr. Mikel would have been promoted is properly within his authority under Executive order. However, of prime importance in that regard is the fact that the agency did not take an exception to the arbitrator's finding that Mr. Mikel "would have been promoted," questioning only their authority to grant the ordered retroactive promotion and back pay. We believe that the fact that the agency chose not to take an exception to the finding that Mr. Mikel would have been promoted but for its denial of priority consideration was tantamount to an agency determination that but for their violation of the agreement in not giving Mr. Mikel priority consideration after they had ordered he be given it, he would have been promoted.

In another part of that decision, the Comptroller General took issue with a part of the award which has particular significance for the case under consideration. The issue was the effective date of the retroactive promotion. The Comptroller General said: "We are aware of no legal basis under which Mr. Mikel could be retroactively promoted back to the specific date selected by the arbitrator." He also noted that there was no clear indication from the record as to the reason for the arbitrator's choosing the date in question. The Comptroller General selected another date, and in this connection enunciated a principle regarding appropriate effective dates for implementing retroactive promotion arbitration awards.

The principle may be stated thusly: When an arbitrator's award is based on a finding that the agency had not afforded the employee priority consideration for promotion, which it was obligated to do either under the Federal Personnel Manual, the agency's regulations or a nondiscretionary provision of the negotiated agreement, the effective date of the retroactive promotion must conform with one of the dates on which a position was filled for which the employee was entitled to such priority consideration, but did not receive it. In this connection it must also be clearly established that, but for the wrongful denial of priority consideration, the employee in question would, in fact, have been promoted to that position.

In the instant case, the arbitrator selected two effective dates, one for retroactive promotion to GS-13 and another for retroactive promotion to GS-14. The first date coincides with the effective date of the negotiated agreement. (In so far as redress was sought for any period preceding the effective date of the agreement, the

grievance was specifically denied.) The second date is merely the anniversary of the first. We cannot concur in either of these dates, because the rationale used by the arbitrator is apparently unrelated to the filling of specific vacancies for which the grievant would have been selected but for the agency's violation of its regulations as incorporated in the negotiated agreement. It is our opinion that the award, while proper in all other respects, cannot be implemented until and unless the effective dates for the retroactive promotions with back pay are tied to the filling of specific positions for which the employee was entitled to priority noncompetitive consideration and would have been selected but for the violation of that entitlement.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that implementation of the arbitrator's award, insofar as it directs the retroactive promotion with backpay of the grievant to those specific dates chosen, a GS-13 position effective September 1, 1972, and a GS-14 position effective September 1, 1973, may be violative of applicable law and appropriate regulation and, therefore, must be modified.

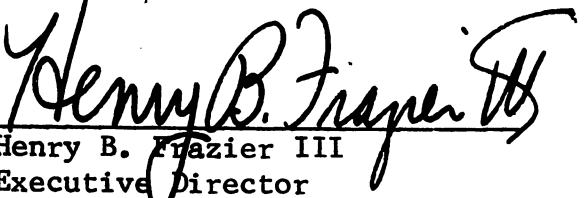
#### Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we: (1) find that the arbitrator did not exceed his authority insofar as directing retroactive promotion with backpay and (2) modify the award by adding the following sentence:

However, this award cannot be implemented until and unless the effective dates for the retroactive promotions with backpay are tied to the filling of specific positions for which the employee was entitled to priority noncompetitive consideration and would have been selected but for violation of that entitlement.

As so modified,<sup>3/</sup> the award is sustained and the stay of the award is vacated.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: November 18, 1975

---

<sup>3/</sup> It is of course the joint responsibility of the parties to determine proper effective dates of the retroactive promotions in order to further implement the award as modified.

NFFE Local 943 and Keesler Air Force Base, Mississippi. The dispute involved the negotiability of union proposals concerning (1) management's filling of vacant positions; and (2) the allocation of supervisory positions to be filled by civilian employees.

Council action (November 18, 1975). As to (1) the Council determined that the union's proposal, which reasonably is subject to alternative interpretations is either excluded from the agency's bargaining obligation under section 12(b) of the Order, or is excepted from the agency's obligation to bargain under section 11(b). Accordingly, under either interpretation, the Council concluded that the agency's determination that the proposal is nonnegotiable was proper and must be sustained. As to (2), the Council concluded that, apart from other considerations, the proposal contravenes section 12(b)(5) of the Order and thus is nonnegotiable. The Council therefore sustained the agency head's determination of non-negotiability.

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

NFFE Local 943

and

FLRC No. 74A-66

Keesler Air Force Base,  
Mississippi

DECISION ON NEGOTIABILITY ISSUES

Background

In connection with negotiations between NFFE Local 943 (hereinafter the "union") and Keesler Air Force Base, Mississippi a dispute arose concerning the negotiability of two union proposals (section 7 and section 9 of the article on promotions, set forth hereinafter). Upon referral, the Department of Defense (hereinafter the "agency") determined that both proposals are nonnegotiable under sections 11(b) and 12(b) of the Order. The union petitioned the Council for review under section 11(c)(4) of the Order, disagreeing with the agency determination, and the agency filed a statement of its position.

Opinion

The proposals will be discussed separately below.

1. "Union Article, Section 7, PROMOTION," provides as follows:

Management agrees to adopt a policy of filling vacancies where they organizationally and functionally exist. Exceptions to this policy will be provided in those cases where management has an overriding mission requirement that can only be met through rotation of the vacancy to another organizational or functional level. Exceptions to this policy will not take place until management has consulted with the Union.

The agency contends that this proposal would limit management's rights under section 12(b) of the Order. It further asserts that the proposal concerns matters with respect to the numbers, types and grades of positions assigned to an organizational unit, i.e., the agency's staffing pattern, and is therefore excepted from the obligation to bargain under section 11(b) of the Order. The union argues to the contrary that the proposal merely provides a negotiable procedure which management would observe in exercising its rights under section 12(b); and that the proposal does not in

any manner limit management's discretion concerning the numbers, types and grades of positions assigned to an organizational unit and, thus, does not concern a matter excluded from the agency's obligation to bargain under section 11(b).

Section 12 of the Order provides in pertinent 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 . . . .

With regard to the meaning of this section, the Council has frequently emphasized in its decisions that the language of section 12(b)(2) manifests an intent to bar from agreements provisions which infringe upon management officials' exercise of their existing authority to take the personnel actions specified therein. The section does not, however, preclude negotiation of the procedures which management will follow in exercising that reserved authority, so long as such procedures do not have the effect of negating the authority itself. Thus, in its VA Research Hospital decision<sup>1/</sup> concerning a proposal which would have enabled the union to obtain higher level management review of a selection for promotion before that promotion could be effected, the Council stated:

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,

<sup>1/</sup> Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31 (proposal dealing with procedures which did not have effect of negating authority reserved by section 12(b)(2)); accord, e.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75 (procedure which did not have effect of negating authority reserved by section 12(b)(1) and (2)); Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington, FLRC No. 74A-33 (January 8, 1975), Report No. 61 (procedure violative of authority reserved by section 12(b)(2) because of potential unreasonable delay).

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.

Section 11(b) of the Order, also relied upon by the agency herein, excepts from the obligation to negotiate matters with respect to, among other things:

. . . the numbers of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . . .

In its Report and Recommendations to the President which accompanied E.O. 11491, the Study Committee stated that this portion of section 11(b) applies "to an agency's right to establish staffing patterns for its organization and the accomplishment of its work . . . ." <sup>2/</sup>

In the Council's view, the proposal presently before us would require either, (1) that management must fill all vacant positions, in accordance with the conditions set forth in the proposal, or (2) that management must fill, in accordance with the proposal's conditions, only those vacant positions which it determines should be filled.

The ambiguity in the language of the proposal which gives rise to these alternative interpretations is not resolved by the record before the Council. However, for the reasons which follow, under either reading of the proposal, we must find it to be nonnegotiable in the circumstances of this case.

As to (1), if the proposal requires the filling of all vacancies (either "where they organizationally and functionally exist" or at "another organizational or functional level"), it categorically negates the decision and action authority expressly reserved to management officials under section 12(b)(2) of the Order (i.e., to "hire, promote, transfer, assign, and retain employees in positions within the agency") as previously explained herein, as well as the "implicit and coextensive" authority, under section 12(b)(2), to decide not to take such action. <sup>3/</sup> Therefore, under this interpretation of the proposal we must find that it violates section 12(b)(2) of the Order.

<sup>2/</sup> Labor-Management Relations in the Federal Service (1975), section E.1, at 70.

<sup>3/</sup> See AFGE Local 2118 and Los Alamos Area Office, ERDA, FLRC No. 74A-30 (May 22, 1975), Report No. 71; and National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity, FLRC No. 73A-67 (December 6, 1974), Report No. 61.

Alternatively, as to (2), if the proposal does not require management to fill all vacancies and hence does not limit management's reserved authority with respect to determining which vacancies it will fill, it would not violate section 12(b)(2) of the Order. However, even so interpreted, the proposal expressly would restrict the movement of vacant positions from one organizational unit to another. That is, by its own terms, the proposal would make "rotation of the vacancy to another organizational or functional level" contingent upon the existence of an "overriding mission requirement." Hence, contrary to the union's contentions, the proposal clearly concerns the agency's staffing patterns and would require the agency to bargain on a matter with respect to "the numbers, types, and grades of positions or employees assigned to an organizational unit . . . ." As previously indicated, this matter is expressly excepted from the obligation to bargain by section 11(b) of the Order.

In summary, the proposal, which reasonably is subject to alternative interpretations, is either excluded from the bargaining obligation under section 12(b) of the Order; or is excepted from the obligation to bargain under section 11(b). Accordingly, under either interpretation, we must conclude that the agency's determination that the proposal is nonnegotiable was proper and must be sustained.

2. "Union Article, Section 9, PROMOTION," provides as follows:

A reasonable allocation of supervisory positions will be filled by civilian employees at the Branch, School, Department and Division levels so as to provide for a logical career progression, and in conformity with Air Force policy.

Branch, School, Department and Division supervisory staffing up to and including the Department Chief level shall provide civilian supervisory positions in reasonable relationship with military supervision.

The agency determined principally that this proposal would limit management's reserved right under section 12(b)(5) of the Order to determine the personnel by which its operations are to be conducted; more particularly, "to determine whether supervisory positions are to be filled by military or civilian incumbents."<sup>4/</sup> The union contends, however, that the proposal does not limit management's right to determine the personnel by which its operations are to be conducted. Rather, the union claims that the proposal merely seeks "to extend coverage of the merit promotion plan" to a "reasonable allocation of supervisory positions," at the organizational levels specified in the proposal, in a manner allegedly consistent with

<sup>4/</sup> The agency also asserted that the proposal is outside the bargaining obligation under sections 11(b) and 10(b)(1) of the Order. However, in view of our decision herein under section 12(b)(5) of the Order, we find it unnecessary to reach and make no ruling as to these contentions.

Chapter 335, Subchapter 5-1c(2) of the Federal Personnel Manual (FPM).<sup>5/</sup> In this latter regard, the union argues that to "effectively establish such coverage it is necessarily implied from the FPM that a reasonable number of positions for civilians must be established otherwise the right to negotiate the extension of coverage is a hollow right." Finally, the union argues that management retains its right to determine the structure of its organization since the proposal does not require that any particular number of supervisory positions be filled by civilians, but only specifies "a reasonable allocation" of such positions must be so filled.

Section 12(b)(5) provides in pertinent 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—

. . . . .  
(5) to determine the . . . personnel by which . . . [agency] operations are to be conducted . . . .

It is well established since the Council's Tidewater decision that the above quoted language of section 12(b)(5) of the Order relates to "who" will conduct agency operations or, in greater particularity:<sup>6/</sup>

. . . as used in [section 12(b)(5) of] 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). [Emphasis supplied.]

<sup>5/</sup> FPM 335.5-1 provides, in pertinent part:

c. Examples of matters appropriate for consultation or negotiation. . . .

(2) Coverage of a promotion plan, such as what occupations, grade levels, organizational subdivisions, and geographical location will be included. . . .

<sup>6/</sup> Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41.



Turning to the present proposal, it would require that a "reasonable allocation of [certain] supervisory positions will be filled by civilian employees. . . ." Such a requirement, in essence, would limit management's authority to fill certain supervisory positions with military personnel. Plainly, the imposition of this requirement would restrict management's reserved authority under section 12(b)(5) to determine the composition, in terms of civilian and military incumbents, of the total body of persons engaged in the performance of such supervisory functions within the agency. However, the rights reserved by section 12(b)(5) are "mandatory and may not be relinquished or diluted."<sup>7/</sup>

Further, in our opinion, the union's reliance on the provisions of FPM 335.5-1 [note 5, supra] is misplaced. Those provisions do not in any manner relate to the subject upon which the language of the proposal at issue focuses, i.e., who will perform particular agency functions. Therefore, the FPM provisions relied upon are inapposite and do not lend support to the union's claim.

Accordingly, apart from other considerations, we must conclude that the proposal contravenes section 12(b)(5) of the Order and thus is nonnegotiable.

#### Conclusion

For the reasons discussed above and pursuant to 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination as to the nonnegotiability of sections 7 and 9 of the union's article concerning promotions was valid and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: November 18, 1975

<sup>7/</sup> E.g., id.

Community Services Administration and American Federation of Government Employees (AFL-CIO), Local 2677 (Dorsey, Arbitrator). The arbitrator dismissed the grievance here involved for lack of adequate proof. The union excepted to the arbitrator's award, contending, in essence, that the arbitrator refused to hear evidence pertinent and material to the controversy before him.

Council action (November 18, 1975). The Council held that the union's petition did not describe facts and circumstances necessary to support its exception. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 18, 1975

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

Re: Community Services Administration  
and American Federation of Government  
Employees (AFL-CIO), Local 2677  
(Dorsey, Arbitrator), FLRC No. 75A-71

Dear Mr. Kete:

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

According to the award, Ms. Theresa Williams, the grievant, was a Senior Accounting Assistant with career training to qualify her for Accounting Assistant, GS-7. On August 5, 1974, Ms. Williams filed a grievance alleging that "Section 8<sup>1/</sup> of the contract amendments has been violated in that I meet the criteria set by that section for a career promotion yet I have not been promoted. . . ."2/ This grievance was submitted to arbitration. According to the record of the

---

<sup>1/</sup> According to the award, Section 8 of the contract amendments states as follows:

SECTION 8. CAREER PROMOTIONS.

Each employee serving below the journeyman level in a career ladder will be promoted to the next grade level when he has: [1] met the qualification requirements of the position, [2] demonstrated ability to perform at the higher level, and [3] if there is enough work at the full performance level for all employees in the career ladder group. . . . [numbers inserted for identification].

<sup>2/</sup> The union enlarged the grievance to include alleged violations of the grievant's rights under Article 7, Section 6, and Article 10, Sections 1, 3 and 4 of the parties' agreement. The arbitrator

(Continued)

proceedings, on December 30, 1974, the first day of the arbitration hearing, the parties entered into an agreement to postpone the hearing in order, as the arbitrator stated, to "bargain in good faith and take whatever action is necessary to settle the dispute without continuing this hearing."<sup>3/</sup> The arbitrator resumed the hearing on March 3, 1975, after the parties did not settle the dispute.

The arbitrator framed the issue as "whether Grievant is contractually entitled--by interpretation and application of the aforesaid Section 8--to a career promotion." He found that:

The criterion "that there is enough work at the full performance level for all employees in the career ladder group" was not proven by substantial material and relevant evidence of probative value. . . . Further, no evidence was adduced to give specific meaning to the phrase "career ladder groups."

The arbitrator determined that he was compelled to dismiss the grievance for lack of proof of the existence of an indispensable condition mandated in Section 8 of the amendments of the agreement.

---

(Continued)

found that "[n]o evidence of probative value was adduced during the course of the arbitration hearing to support these added allegations. They are dismissed for lack of proof." Neither party challenges this part of the award.

<sup>3/</sup> At p. 7 of the record of the proceedings. The parties' agreement, marked and received as Joint Exhibit No. 2, states in pertinent part:

The parties have agreed to postpone the hearing in the Theresa Williams case for three weeks in order that the facts concerning grade levels supportable in the Finance and Grants Management Division of the Office of the Controller can be examined and determined.

During the three week period line management, with the advice and assistance of a classification specialist and a management analyst, will develop a distribution of work among the positions allotted to the division so as to maximize the journeyman level of those positions. The union will have an observer in these discussions.

On the basis of this new allocation of duties the parties believe they will be able to resolve the Williams grievance.

. . . . .

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below.<sup>4/</sup> The agency filed an opposition.

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

The union contends that "at the hearing the arbitrator rejected and in his opinion he apparently did not consider relevant evidence on this point [whether there was enough work at the full performance level for all employees in Ms. Williams' career ladder group], by doing so depriving the union of a fair hearing in this matter." The petition states that "the evidence offered by the union and rejected by the arbitrator was material and pertinent." According to the petition, "the evidence rejected consisted of a document . . . and the testimony of Mr. R. G. White concerning the amount of work available at the various grade levels in his unit."

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator refused to hear evidence pertinent and material to the controversy before him. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (August 15, 1975), Report No. 81. However, the Council is of the opinion that the union's petition does not describe facts and circumstances to support its exception that the evidence rejected by the arbitrator was pertinent and material to the grievance before him. The record of the proceedings before the arbitrator shows that the arbitrator rejected the document in question after he learned that it concerned proposed staffing which was developed after the grievance was filed and which was never effectuated.<sup>5/</sup> The record also indicates that the

---

<sup>4/</sup> In its petition, the union requests that the Council ". . . vacate the award . . . and remand it to the arbitrator for a decision based on the complete record offered at the hearing in the case."

<sup>5/</sup> The record of the proceedings states, at pp. 97-98:

THE ARBITRATOR: . . . Mr. Witness, I notice this is a proposed staffing, dated 1-3-75.

THE WITNESS [Mr. R. White, Chief of the Finance and Grants Management Division]: Yes, sir.

(Continued)

arbitrator sustained an objection by the agency to testimony on the same matter by Mr. White.<sup>6/</sup> These rulings by the arbitrator are consistent with his view, expressed elsewhere in the record, that "we are interested in what the situation was as of the date the grievance was filed, not what happened after that."<sup>7/</sup>

---

(Continued)

THE ARBITRATOR: Was this ever effectuated?

THE WITNESS: No, sir.

THE ARBITRATOR: Union Exhibit 16 is not admitted and will be placed in the record as a rejected exhibit.

6/ The record of the proceedings states, at pp. 100-101:

THE WITNESS [Mr. White]: . . . My proposal was originally to strengthen the voucher examinations, Voucher Examiners, we gave them accounting duties. My only proposal now would be that we take the accounting duties away from Voucher Examiners, make them pure Voucher Examiners and have pure Accounting Technicians, thereby being able to support a higher grade level there.

MR. KETE [Union Representative]: You feel from a Management standpoint this is a feasible thing to do?

THE ARBITRATOR: We are getting off in the never-never land now.

MR. KETE: When you say you proposed this, when did you propose it and to whom?

MS. POGAR [Agency Representative]: Objection. We objected to the document that dealt with that. It was part of an attempted resolution of this matter. It goes back to this document here, Joint Exhibit No. 2. Those documents were exchanged between the parties, they attempted to reach a resolution, they did not, and that is why we are here today.

THE ARBITRATOR: Objection sustained.

7/ At p. 84 of the record of the proceedings.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: R. G. Johnson  
CSA

New York Army and Air National Guard, Albany, New York, A/SLMR No. 441. The Assistant Secretary, upon a complaint filed by the Association of Civilian Technicians (ACT), found that the activity violated section 19(a)(1) and (6) of the Order, and ordered the activity to cease and desist from, among other things, refusing to meet and confer with ACT regarding exceptions to a regulatory requirement that uniforms be worn by technicians. Thereafter, upon advice that the currently controlling regulation does not give the activity authority to negotiate the matter of exceptions to the uniform wearing requirement, the Assistant Secretary ruled that the activity (which had complied with the posting requirement of the Assistant Secretary's order) was not in noncompliance by refusing to negotiate the matter of exceptions. The Assistant Secretary also noted that his decision would not prevent ACT from exercising its rights under section 11(c) of the Order concerning the current regulation. ACT appealed to the Council, contending, in essence, that the Assistant Secretary's decision with regard to his remedy and the activity's compliance therewith is arbitrary and capricious and presents major policy issues.

Council action (November 18, 1975). The Council held that ACT's petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious and presents no major policy issue warranting review. Accordingly, the Council denied ACT's petition for review.





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 18, 1975

Mr. Vincent J. Paterno, President  
Association of Civilian Technicians  
348A Hungerford Court  
Rockville, Maryland 20850

Re: New York Army and Air National Guard,  
Albany, New York, A/SLMR No. 441, FLRC  
No. 75A-79

Dear Mr. Paterno:

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

In this case, the Association of Civilian Technicians (ACT) filed an unfair labor practice complaint which alleged, essentially, that the New York Army and Air National Guard (the activity) had not fulfilled its obligation under the Order to meet and confer with the union about a number of items, including the wearing of uniforms. At the time that the events complained of occurred, it appears that a National Guard Bureau (NGB) regulation was in effect which gave the heads of individual state units the prerogative to make exceptions to the general uniform wearing requirement. The Assistant Secretary, in agreement with the Administrative Law Judge, found that the activity had violated section 19(a)(1) and (6) of the Order, and ordered the activity to cease and desist from, among other things, "[r]efusing to meet and confer with Association of Civilian Technicians . . . with respect to exceptions to the requirement that uniforms will be worn by affected employees by limiting discussions to its unilaterally established criteria for such exceptions."

After the issuance of this remedial order, the activity and the NGB notified the Assistant Secretary that his remedial order was based upon an NGB regulation which had been changed so that heads of individual units no longer had any discretion in excusing technicians from the uniform wearing requirement. The NGB further notified the Assistant Secretary that it was complying with the requirement that notices be posted at the activity. ACT then questioned the activity's compliance with the above-quoted provision of the Assistant Secretary's remedial order, contending that the activity was not only required to post a notice, but also to negotiate the uniform wearing issue notwithstanding the changed regulation.

In response, the Assistant Secretary noted that the impact of the changed regulation had not been litigated, and that his decision dealt only with the bargaining obligation relating to the previously existing regulation.

Based upon the fact that the currently controlling regulation does not give the activity authority to negotiate the matter of exceptions to the uniform wearing requirements, the Assistant Secretary concluded that the activity's refusal to negotiate the matter did not constitute an act of noncompliance. He additionally noted that his decision on the compliance issue "would not preclude [ACT from] exercising [its] rights under section 11(c) of the Order with respect to the current regulation regarding uniform wearing by civilian technicians."

In your petition for review, you contend, in essence, that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue because the Assistant Secretary relied upon subsequent events and materials outside the record in making his determination that the activity's refusal to negotiate did not constitute noncompliance. You further contend that the decision presents a major policy issue as to the "intent of remedy." In this regard, you allege essentially that a remedy must be applied to repair the harm evidenced at the time, and that the unfair labor practice in this case can only be remedied by returning to conditions as they existed at the time the complaint was filed. Finally, you contend that the decision raises as a major policy issue whether the Assistant Secretary's compliance determination is tantamount to a negotiability determination which would, therefore, be directly appealable to the Council under E. O. 11491, as amended by E. O. 11838.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary presents no major policy issues nor does it appear arbitrary and capricious. With respect to your related contentions that the Assistant Secretary relied upon subsequent events and material which should not have been considered and that his remedy did not accomplish the result intended by the Order, section 6(b) of the Order confers considerable discretion on the Assistant Secretary, who "may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order." The authority of the Assistant Secretary to issue remedial orders clearly includes the authority to determine whether a party has complied therewith. In the Council's opinion, the Assistant Secretary's determination in this regard is not without reasonable justification in the particular circumstances of this case, and his consideration of "subsequent events and materials" does not raise a major policy issue warranting review. Moreover, it does not appear that the Assistant Secretary has either exceeded the scope of his authority under section 6(b) of the Order or that his compliance determination is inconsistent with the policies of the Order, and therefore no major policy issues are presented warranting Council review. Finally, no major policy issue is presented with respect to your contention that the Assistant Secretary made a negotiability determination appealable to the Council, noting particularly that the Assistant Secretary dealt only with the matter of alleged noncompliance raised before him, was not faced with the resolution of an issue arising under section 11(d) of the Order, and specifically

indicated that his decision on the compliance issue would not preclude institution of an 11(c) proceeding with respect to the current regulation.

Accordingly, since your petition fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, review of the petition is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "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

B. W. Hurlock  
National Guard

U.S. Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2649 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director, found that further proceedings on the complaint of Local 1167, National Federation of Federal Employees (NFFE), which alleged that the activity violated section 19(a)(1), (2), (5) and (6) of the Order, were not warranted, as a reasonable basis for the complaint had not been established. The Assistant Secretary also rejected a procedural claim by NFFE, finding no prejudice had resulted to the union. NFFE appealed to the Council, contending that the decision of the Assistant Secretary presents major policy issues.

Council action (November 18, 1975). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present major policy issues and NFFE neither alleges, nor does it appear, that his decision is arbitrary and capricious. Accordingly, the Council denied review of NFFE's petition.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 18, 1975

Ms. Lisa Renee Strax, Legal Department  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: U.S. Air Force, Headquarters, 31st  
Combat Support Group (TAC), Homestead  
Air Force Base, Florida, Assistant  
Secretary Case No. 42-2649 (CA),  
FLRC No. 75A-82

Dear Ms. Strax:

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

In this case you filed, on behalf of Local 1167 of the National Federation of Federal Employees (the union) an unfair labor practice complaint against Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida (the activity) alleging violations of section 19(a)(1), (2), (5) and (6) of the Order.

In May 1974, an employee of the activity invoked the grievance procedure negotiated by the activity and the union by filing an oral grievance. At the second step of the procedure the activity contended that the grievance concerned the violation of an agency regulation and that its resolution through the negotiated grievance procedure would violate the parties' agreement which precluded the use of the negotiated grievance procedure to resolve questions involving interpretation of agency regulations. The union responded that the grievance involved the application, not the interpretation of the regulation, and hence the negotiated procedure was applicable. The activity maintained its position and advised that the union could either utilize the agency procedure or petition the Assistant Secretary for a grievability determination. The union then filed an unfair labor practice complaint, alleging, in essence, that the activity had refused to proceed with the resolution of the grievance under the negotiated grievance procedure and by so doing it had violated section 19(a)(1), (2), (5) and (6) of the Order.

In agreement with the Assistant Regional Director, the Assistant Secretary found that further proceedings on the complaint were not warranted, as a reasonable basis for the complaint had not been established. The Assistant Secretary stated that "in the absence of bad faith, grievability and arbitrability questions . . . are not matters to be resolved under Section 19

[unfair labor practice procedures] of the Order." Pointing out that section 13(d) provides a procedure for the referral of grievability and arbitrability questions, the Assistant Secretary further stated: "[A] party may, in good faith, assert that a matter is not grievable or arbitrable under a negotiated agreement. Thereafter, pursuant to Part 205 of the Assistant Secretary's Regulations, a determination may be obtained from the Assistant Secretary as to whether the matter involved is grievable or arbitrable." Noting that there was insufficient evidence to establish "bad faith" in the instant case, the Assistant Secretary concluded that denial of the union's request for review was warranted. The Assistant Secretary also rejected a procedural claim by the union, concluding that there was insufficient evidence to establish that the union was prejudiced by the activity's receiving an extension of time in which to answer or its alleged failure below to serve the union with a copy of the request for an extension.

In your request for review you contend that the Assistant Secretary's decision presents four major policy issues: (1) whether the presence or absence of bad faith in the instant case should have been determined by a hearing; (2) whether the proper action for the activity in the instant case would have been to petition the Assistant Secretary for a grievability determination, regardless of whether it had acted in bad faith; (3) whether the Assistant Secretary's decision in Department of Defense, Publication Center, St. Louis, Missouri, A/SLMR No. 455, is applicable to the instant case; and (4) whether the time limitations set forth in the Assistant Secretary's rules and regulations may be disregarded in the absence of convincing and countervailing reasons therefor.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not present major policy issues and you neither allege, nor does it appear, that his decision is arbitrary and capricious. As to the alleged major policy issue regarding the need for a hearing, in the Council's view, for the reasons set forth by the Council in Department of the Army, Indiana Army Ammunition Plant, Charleston, Indiana, A/SLMR No. 50-11018 (CA), FLRC No. 74A-90 (May 9, 1975), Report No. 69, no major policy issue warranting review is presented. The Assistant Secretary's decision in this case was based on the application of his regulations and your petition presents no persuasive reason to show that the Assistant Secretary was without the authority to establish such regulations or that he wrongly applied the regulations to the facts and circumstances of this case. Moreover, your appeal does not demonstrate that substantial factual issues existed requiring a hearing. As to the alleged major policy issue concerning the obligation of the activity to file for a grievability determination, in the Council's view, noting that the 1971 Report and Recommendations on the Amendment of Executive Order 11491 indicated that section 6(a)(5) is intended "to provide for the resolution of disagreements that may arise between the parties as to whether a matter is grievable or arbitrable under the negotiated procedure," no major policy issue warranting review is raised by the Assistant Secretary's

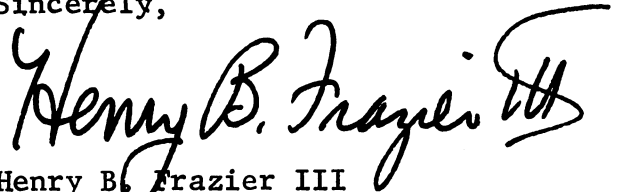
determination that in the absence of bad faith, grievability and arbitrability questions, such as those involved in your case, are not matters to be resolved under section 19, but rather as grievability and arbitrability questions. See also U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., A/SLMR No. 22-3617 (CA), FLRC No. 73A-8 (July 23, 1973), Report No. 42.

As regards application of Publication Center, supra, or, as you specifically allege, the misapplication of that decision, in the Council's view, no major policy issue is presented. It should be noted that the Assistant Secretary did not rely on Publication Center in deciding the instant case. As regards your fourth alleged major policy issue, in the Council's view, noting that the Assistant Secretary has determined that the union's case was not prejudiced by acceptance of the activity's petition and no evidence of prejudice is presented in your petition, no major policy issue warranting review is presented.

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

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

Col. D. L. Stanford  
Air Force

Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 537. The Assistant Secretary dismissed the complaints respectively filed by Marie Brogan, president of Local 1001, National Federation of Federal Employees (NFFE), which alleged that the activity violated section 19(a)(1) and (6) of the Order, and by NFFE, which alleged that the activity violated section 19(a)(1), (2) and (4) of the Order. NFFE appealed to the Council, contending that the decision of the Assistant Secretary is arbitrary and capricious and presents major policy issues.

Council action (November 18, 1975). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of NFFE's appeal.





UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 18, 1975

Ms. Lisa Renee Strax, Legal Department  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Department of the Air Force, 4392d  
Aerospace Support Group, Vandenberg  
Air Force Base, California, A/SLMR  
No. 537, FLRC No. 75A-89

Dear Ms. Strax:

The Council has carefully considered your petition for review in the above-entitled case.

This case arose upon the filing of separate unfair labor practice complaints by Marie Brogan, president of Local 1001, National Federation of Federal Employees (NFFE) and by NFFE. Brogan's complaint alleged that the Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California (the activity) violated section 19(a)(1) and (6) of the Order. Such allegation was based upon statements purportedly made by the Chief of Base Procurement, at a meeting held to discuss Brogan's equal employment opportunity complaint, that some action should be taken by an arbitrator who could stop Brogan from filing charges against the activity. NFFE's complaint alleged that the activity violated section 19(a)(1), (2) and (4) of the Order by detailing and then permanently reassigning Brogan to another position because she had filed complaints against the activity. It was further alleged that the reassignment was to a position with no possibility of promotion and which was vulnerable to a reduction-in-force.

The Assistant Secretary, in adopting the findings of the Administrative Law Judge (ALJ), found that the statements made by the Chief of Base Procurement were not violative of section 19(a)(1) and (6) of the Order. The Assistant Secretary also found that the detailing and permanent reassignment of Brogan were not violative of section 19(a)(1), (2) and (4) of the Order. The Assistant Secretary noted, in this latter regard, that Brogan's substandard work performance, which included substantial delays in her completion of assigned work, repeated tardiness for work, and, contrary to her supervisors' requests, leaving her office to attend to union activities or other matters without informing them, was the motivating factor in her reassignment and not anti-union animus. He further found that there had been no showing that the reassignment would prevent Brogan from being considered for promotion or would make her more vulnerable to a reduction-in-force, or that she was unqualified to handle the new job. Moreover, the Assistant Secretary found that the evidence established that

the reassignment was not motivated by anti-union animus; rather, the transfer would allow Brogan more time to devote to union representational duties without disruption of her job performance, since the new position was less demanding than the one formerly held. Accordingly, the Assistant Secretary dismissed both complaints.

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious because he relied on the ALJ's erroneous decision and order which was contrary to the evidence presented, and to private sector law. You also contend that the Assistant Secretary's decision was contrary to previous Assistant Secretary decisions in which he found conduct similar to that alleged in the present complaint to be violative of the Order. You further assert that the Assistant Secretary's decision presents major policy issues as to "whether the legitimate exercise of management rights includes the compilation and maintenance of a special personnel folder on the President of a Union local or the requirement that she notify her supervisor each time she desires to leave the office to attend to Union matters"; "whether the conduct on the part of Management in this case amounts to a restraining influence having a 'chilling effect' upon the employees' exercise of the rights assured them" by the Order; "whether the Assistant Secretary was correct in following the ALJ's presumption that 'Management is exercising a legal right when it affects the status of an employee'"; and "whether the conditions under which Marie Brogan worked can be altered as a result of her exercising prerogatives bargained-for in the negotiated agreement."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present any major policy issues. As to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in reaching his decision. In this connection, your appeal neither discloses any probative evidence presented, which the Assistant Secretary failed to consider, nor establishes that such decision is inconsistent with his previously published decisions. Furthermore, no basis is presented for Council review with respect to your contention that the Assistant Secretary improperly relied on the ALJ's decision and order which was allegedly contrary to private sector law, noting particularly that the Assistant Secretary did not cite or specifically rely on private sector law in reaching his decision.

As to your contentions with respect to whether the conduct of management created a "chilling effect" on protected employee rights or otherwise constituted a violation of the Order, such assertions constitute, in effect, nothing more than disagreement with the Assistant Secretary's conclusion that the facts presented did not constitute a violation of the Order. Such contentions, in the facts of the case, therefore do not present a major policy issue warranting review. Nor is a major policy issue presented with respect to your contention that the Assistant Secretary erroneously followed

the ALJ's application of the "presumption" that "management is exercising a legal right when it affects the status of an employee" by restricting union activities of a union representative during work hours. It should be noted in this regard that the Assistant Secretary did not rely on such a presumption in reaching his decision, but merely determined that Brogan's substandard work performance and not anti-union animus was the motivating factor in her reassignment. Similarly, as to your contention that the conditions under which Brogan worked were illegally altered as a result of her exercise of her right under the parties' negotiated agreement, the Assistant Secretary determined, on the facts presented, that "Brogan's work performance was substandard and that this was the factor which was determinative in making her reassignment." As stated earlier, your disagreement with the Assistant Secretary's findings in this regard does not present a major policy issue warranting Council review.

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

By the Council.

Sincerely,

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

F. Sprague  
Air Force

Department of the Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 532. The Assistant Secretary affirmed the recommendation of the Administrative Law Judge (ALJ) that the complaint filed by Local 225, American Federation of Government Employees, AFL-CIO, alleging the activity violated section 19(a)(1) and (4) of the Order, be dismissed. In so ruling, the Assistant Secretary rejected the union's contention that its right to a fair and impartial hearing was impaired by reason of the assignment of the particular ALJ to this case. The union appealed to the Council, contending that the Assistant Secretary's decision presents a major policy issue.

Council action (November 19, 1975). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue and the union does not allege, nor does it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 19, 1975

Ms. G. Nancy McAleney, President  
Local 225, American Federation of  
Government Employees, AFL-CIO  
Building 1610, Picatinny Arsenal  
Dover, New Jersey 07801

Re: Department of the Army, Picatinny  
Arsenal, Dover, New Jersey, A/SLMR  
No. 532, FLRC No. 75A-86

Dear Ms. McAleney:

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

In a previous case involving the same parties, Local 225, American Federation of Government Employees, AFL-CIO (the union), filed a complaint alleging that the Department of the Army, Picatinny Arsenal, Dover, New Jersey (the activity), violated section 19(a)(1) and (2) of the Order by a supervisor's discriminatory handling of an employee's request for training under the Upward Mobility Program. The Administrative Law Judge (ALJ) recommended that the complaint be dismissed. The union appealed the case to the Assistant Secretary who subsequently affirmed the dismissal of the 19(a)(2) allegation, but reversed as to the 19(a)(1) violation, and issued a remedial order (A/SLMR No. 512).

While that prior case was on appeal to the Assistant Secretary, and yet undecided by him, the same ALJ heard and recommended dismissal of the complaint leading to the present appeal before the Council. In this complaint, the union alleged that the activity violated section 19(a)(1) and (4) of the Order by the same supervisor's handling of the same employee's subsequent request for additional training. The ALJ's recommendation that this complaint be dismissed was affirmed by the Assistant Secretary in its entirety (A/SLMR No. 532). In so ruling, the Assistant Secretary rejected the union's exception that its right to a fair and impartial hearing was impaired by the assignment herein of the same ALJ who had heard the previous case involving the same parties while that case was still pending for review before the Assistant Secretary, noting particularly ". . . the [union's] failure to raise such objection at the hearing and, thus, affording the Administrative Law Judge the opportunity to withdraw if he considered such action necessary, and the lack of any record evidence that a fair and impartial hearing was not conducted in this matter. . . ." The union then petitioned the Council for review of the Assistant Secretary's decision.

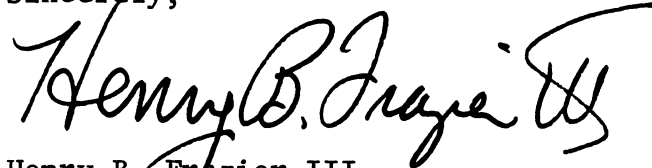
In your petition for review filed on behalf of the union, you contend that the Assistant Secretary's decision presents a major policy issue with regard to ". . . whether an Administrative Law Judge should be assigned to hear a case involving two parties who were involved in a previous case before the same ALJ on a similar issue while the previous case [is] still under appeal to the Assistant Secretary." In this regard, you assert that the union did in fact take issue with the assignment of the same Judge to the second complaint. Moreover, you contend that there is evidence that such an assignment in this case prevented a fair and impartial hearing.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious. With respect to the alleged major policy issue, in the Council's view and without passing on the timeliness of your objection, the assignment of the same ALJ to hear a case involving the same parties who were involved in a previous case on a similar issue while the previous case is still under appeal to the Assistant Secretary does not raise a major policy issue warranting review. Moreover, your petition for review presents no persuasive basis to support the contention that the assignment of the same ALJ prevented a fair and impartial hearing.

Since the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive, flowing style with a large, prominent "H" and "F".

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

D. A. Dresser  
Dept. of Army

Department of the Navy and U.S. Civil Service Commission and Federal Employees Metal Trades Council, Long Beach, California, A/SLMR No. 529. The Assistant Secretary dismissed a complaint filed by the Federal Employees Metal Trades Council, Long Beach, California, which alleged that the Department of the Navy and the U.S. Civil Service Commission had violated section 19(a)(1), (2) and (6) of the Order, based on the asserted conduct of an Equal Employment Opportunity (EEO) Complaints Examiner who was appointed by the CSC at the request of the Shipyard to hear an EEO complaint of a Shipyard employee. The union appealed to the Council, asserting that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action<sup>\*/</sup> (November 26, 1975). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, or present a major policy issue. Accordingly, the Council denied the union's petition for review.

---

<sup>\*/</sup> The Chairman of the Civil Service Commission did not participate in this decision.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 26, 1975

Mr. Thomas Martin  
19626 1/2 So. Normandie  
Torrance, California 90502

Re: Department of the Navy and U.S.  
Civil Service Commission and  
Federal Employees Metal Trades  
Council, Long Beach, California,  
A/SLMR No. 529, FLRC No. 75A-88

Dear Mr. Martin:

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

In this case the Federal Employees Metal Trades Council, Long Beach, California (the union), filed a complaint against the Department of the Navy (Navy) and the U.S. Civil Service Commission (CSC) asserting violations of section 19(a)(1), (2) and (6) of the Order. The complaint was based upon the asserted conduct of an Equal Employment Opportunity (EEO) Complaints Examiner appointed by the CSC at the request of the Long Beach Naval Shipyard (Shipyard) to hear an EEO complaint filed by an employee of the Shipyard. A union steward appeared at the request of, and as the personal representative for, the employee making the complaint. The attendance of this union official at the hearing in his capacity as a personal representative of the complainant was not challenged and is not at issue in this case. The complaint alleged that the EEO Complaints Examiner's action in refusing to allow another official of the union to attend the hearing as an observer contravened the union's rights as an exclusive representative under section 10(e) of the Order.

The Assistant Secretary found, in pertinent part, that under the particular circumstances of this case, the CSC owed no obligation to meet and confer with the union under section 11(a) of the Order, and that its conduct was not in derogation of the exclusive bargaining relationship between the Shipyard and the union. He noted particularly, in this regard, that the CSC was acting under authority granted by various statutes and executive orders relating to EEO matters and pursuant to Part 713 of the Federal Personnel Manual, which was promulgated by the CSC to implement and effectuate such statutes and executive orders; and, further, that neither the CSC nor its Complaints Examiner was subject to the jurisdiction or authority of either the Navy or the Shipyard. Accordingly, he found that, under the particular circumstances of the instant case, the CSC did not meet the



definition of "Agency management" set forth in section 2(f) of the Order. The Assistant Secretary additionally adopted the finding of the Administrative Law Judge that the Navy had not violated the Order.

In your petition for review you assert that the Assistant Secretary's decision is arbitrary and capricious and that it raises major policy issues "affecting the rights and duties of Complainant under Executive Order 11491, as Amended." You contend, in substance, that the EEO hearing in question was a "formal discussion" between agency management and an employee within the meaning of section 10(e); that the action of the Complaints Examiner in ejecting the union's designated observer from the EEO hearing therefore violated section 19(a)(1), (2) and (6); and, that the CSC was responsible for the Examiner's alleged wrongful conduct in this regard under the general rules of agency and because, pursuant to section 1(a), the CSC's agency head was obligated to take positive action to assure that CSC employees refrained from conduct which would encourage or discourage membership in a labor organization and failed to do so in this instance. You also assert that the CSC regulations concerning the conduct of EEO hearings in effect at the time of the hearing in this case were, in themselves, discriminatory in that they gave the Complaints Examiner the option to allow a union observer to be present only where there had been prior agreement to permit such an observer between the parties to the complaint.

Similarly, with respect to the Navy, you contend that the Examiner was serving in a dual capacity as an employee of the CSC and as an agent of the Navy--in that the Navy initiated the proceeding and was responsible for paying the CSC for the Examiner's services--and therefore, that the Navy was as responsible as the CSC for the Examiner's conduct.

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

With regard to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his decision. Further, as to your contention that the EEO hearing was a "formal discussion" within the meaning of section 10(e) and that the CSC was, as a result of the conduct of the Complaints Examiner, in violation of section 19(a)(1), (2) and (6) of the Order, the Council finds--noting particularly that the CSC was acting under authority granted by various statutes and executive orders relating to EEO matters and pursuant to Part 713 of the Federal Personnel Manual promulgated to implement such statutes and orders--that the Assistant Secretary's conclusion (that under the particular circumstances of this case the CSC did not meet the definition of "Agency management" set forth in section 2(f) of the Order) does not raise a major policy issue. Similarly, with regard to your contention that the Navy, having contracted and paid for the Examiner's services, was in violation of the Order as a result of the Examiner's conduct, the Council is of the opinion, noting again as

above that the proceeding concerned was convened pursuant to regulations promulgated to implement various statutes and executive orders relating to EEO matters, that no major policy issues are presented which warrant review in the particular circumstances of this case.

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

By the Council.<sup>\*/</sup>

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

L. Aronin  
CSC

S. M. Foss  
Navy

---

<sup>\*/</sup> The Chairman of the Civil Service Commission did not participate in this decision.

American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado. The dispute involved the negotiability under the Order of union proposals concerning (1) grievance procedures; and (2) assignment of work.

Council action (November 28, 1975). As to (1), the Council found, contrary to the union's contention, that the agency regulation, which was relied upon by the agency head to limit negotiation on the union's proposal, properly limits the bargaining obligation under the Order. As to (2), the Council concluded that the proposal is outside the agency's bargaining obligation under section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of the Council's rules, the Council found that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

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

American Federation of Government  
Employees Local 2241

and

FLRC No. 74A-67

Veterans Administration Hospital,  
Denver, Colorado

DECISION ON NEGOTIABILITY ISSUES

Background of Case

Local 2241 is the recognized bargaining agent for a unit of all nonprofessional employees (with the usual exceptions) assigned to the Denver Veterans Administration Hospital. Included in the unit are employees of the Veterans Canteen Service (VCS), a nonappropriated fund activity of the Veterans Administration. In the course of collective bargaining, the union submitted two proposals (set forth hereinafter) concerning "Grievance Procedures" and "Assignment of Work."

Upon referral by the union, the Veterans Administration determined that the proposal on grievance procedures, insofar as it applies to the disposition of reprimands and suspensions of 30 days or less involving VCS employees, is not negotiable under agency regulations; and that negotiation on the "assignment of work" proposal is precluded by sections 11(b) and 12(b) of the Order. The union appealed this determination to the Council under section 11(c)(4) of the Order and the agency filed a statement of position.

Opinion

The union proposals will be discussed separately.

1. Grievance Procedures. The proposed procedures, in section 1, state:

This article provides for a mutually acceptable method for the prompt and equitable settlement of grievances over the interpretation or application of this agreement. These negotiated procedures shall be the exclusive procedures available to the Union, the Hospital, and the employees in the bargaining unit for resolving such grievances and involving arbitration. Questions that cannot be resolved as to whether a matter is subject to grievance and/or arbitration under this agreement will be referred to the Assistant Secretary of Labor for

decision before processing the matter further. All other matters are excluded, including those for which statutory appeal procedures exist. These procedures are applied to timely grievance appeals concerning admonishments, reprimands, and suspensions of 30 days or less. These actions will only be taken for just and sufficient cause and such grievances will be initiated at step 2 of the Informal Procedures. Grievances other than those dealing with the interpretation or application of the agreement will be processed under the VA grievance procedure.

The agency determined that the proposed procedure, although negotiable in all other respects, is violative of agency regulations insofar as it applies to reprimands and suspensions for 30 days or less of VCS employees. More particularly, the agency determined that published Veterans Administration regulations, predating the current negotiations, vest authority concerning such disciplinary actions in the VCS Field Director, an official above the organizational level of the activity involved in the negotiations leading to the current dispute.<sup>1/</sup> In this regard, the agency asserts that the regulations constitute a proper exercise of its authority under the Order and were promulgated to assure an even-handed administration of discipline among VCS workers, agency-wide. Therefore, the agency further asserts, the local activity director does not have the authority to negotiate a contractual provision concerning the disposition of reprimands and suspensions affecting employees of the VCS, as provided in the proposal in dispute.

The union principally contends that the agency's regulations, as interpreted and applied by the agency head, improperly limit the bargaining obligation under the Order. In particular, the union argues that the regulations (1) improperly limit the bargaining obligation under section 11(a), as that section was interpreted and applied by the Council in its Merchant Marine Academy<sup>2/</sup> decision; and (2) improperly limit the scope of the grievance

---

<sup>1/</sup> Veterans Canteen Service Operating Procedures, Chapter 541, Procedure 04 provides, inter alia, that:

The Field Director will consider all the facts, including any statement made by the employee. If he determines that a reprimand is justified, he will issue the reprimand to the employee stating the reasons for the action, that a copy of the reprimand will be placed in his official personnel folder, and his right to appeal the reprimand. . . . If he determines that a reprimand is not justified, he will inform the employee of the reasons in writing through the supervisor.

Section 05, read in conjunction with section 10 of the cited regulation, similarly vests decisional authority concerning suspensions of 30 days or less in the Field Director.

<sup>2/</sup> United Federation of College Teachers and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30.

procedure under the principles set forth by the Council in its Elmendorf<sup>3/</sup> decision. Additionally, the union contends that the agency has approved, at other activities, at least three contracts containing clauses similar to the one at issue in this case; and that, if the Council sustains the agency's determination of nonnegotiability here, it "will leave in doubt the status of these [other] agreements as they apply to Canteen employees."

Section 11(a) of the Order as currently effective and as effective at the time of the Merchant Marine decision, establishes a bargaining obligation limited, among other ways, by the phrase "so far as may be appropriate under applicable laws and regulations, including . . . published agency policies and regulations. . . ."4/ The Council has stated in prior decisions that this section of the Order as well as the 1969 Report<sup>5/</sup>, by reference to such policies and regulations as an appropriate limitation on the scope of negotiations, fully supports the statutory authority of an agency head to issue regulations governing the operation of his agency and the conduct of his employees.<sup>6/</sup>

In its Merchant Marine decision, relied upon by the union in this case, the Council was concerned with a higher level agency regulation which dealt only with terms and conditions of employment unique to a particular bargaining unit. As the Council explained in that decision, the "applicable

---

3/ American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10 (May 12, 1973), Report No. 38.

4/ More fully, section 11(a) provides, in relevant part, that:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations . . . and this Order.

5/ Labor-Management Relations in the Federal Service (1975), section E.2., at 71.

6/ See, e.g., National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, FLRC No. 74A-20 (February 21, 1975), Report No. 62; IAM&AW Lodge 2424 and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 18, 1973), Report No. 44; Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57 (May 16, 1973), Report No. 37; and National Federation of Federal Employees Local 779 and Department of Air Force, Sheppard Air Force Base, FLRC No. 71A-60 (April 27, 1973), Report No. 36.

laws and regulations, including . . . published agency policies and regulations" which, under section 11(a), may properly limit 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 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. [Emphasis in the original.]

Therefore, since the Council found that the agency regulation at issue in Merchant Marine was not an "applicable regulation" within the meaning of section 11(a) of the Order because it dealt with terms and conditions of employment unique to a particular bargaining unit, the Council held that the regulation could not properly limit the bargaining obligation of section 11(a).

The union, seeking to support its position in this case by reliance on the Merchant Marine decision, imprecisely paraphrases in its petition for review the above-quoted language, as follows:

The policies and regulations referred to in Section 11(a) of the Order as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equity in the administration of matters common to all employees. Any other interpretation of the phrase "published agency policies and regulations" in the context of the Order would permit ad hoc limitations on the scope of bargaining for a class of employees within a particular bargaining unit and make a mockery of the bargaining obligation. It would mean that the Administrator, Canteen Service, could unilaterally dictate the limits on the scope of negotiations for Canteen employees in bargaining units that include other VA employees. He would do this by merely publishing instructions to the head of the bargaining unit with respect to personnel policies and working conditions unique to Canteen employees. [Emphasis in the original.]

Manifestly, the union's language does not accurately reflect the principles of the Merchant Marine decision. Specifically, the union's argument fails to consider that the regulation involved here, unlike the one in dispute in the Merchant Marine case which applied to a single bargaining unit, is applicable uniformly to all VCS employees, nationwide, wherever located, whether comprising a discrete bargaining unit, included in a unit with other employees, or without representation. That is, the Veterans Administration

regulation is not concerned with terms and conditions of employment unique to a particular bargaining unit, as distinguished from the regulation in the Merchant Marine case. Further, in this regard, the regulation here was issued to achieve, in effect, a desirable degree of uniformity and equality in the administration of particular disciplinary matters for all VCS employees. Thus the regulation here in question, by its scope and coverage, could not serve as the basis for "ad hoc limitations on the scope of bargaining for a class of employees within a particular bargaining unit" as claimed by the union. Accordingly, we must find that the agency regulation here at issue is an "applicable regulation," within the meaning of section 11(a) of the Order, which may properly limit the scope of negotiation, consistent with the Merchant Marine decision.

As to the union's claim that the agency regulation is inconsistent with the principles upon which the Council's Elmendorf decision is based, we find such claim, also, to be without merit. Elmendorf involved two provisions of a higher level agency directive which purported to (1) require that any agreement negotiated with a labor organization contain a statement that questions as to the interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency would not be resolved through the grievance procedure negotiated by the parties, regardless of whether such policies, laws, or regulations were incorporated or referenced in the agreement; and (2) establish an alternative agency procedure for resolution of such questions. The Council held that the disputed provisions of the directive were violative of section 13 of E.O. 11491, as amended by E.O. 11616 and in discord with the concluding requirement of E.O. 11616 that, "Each agency shall issue appropriate policies and regulations consistent with this Order for its implementation."

In contrast with the circumstances of the Elmendorf case, the Veterans Administration regulation presently before us is not concerned with the form and scope of grievance procedures under section 13 of the Order, nor does it deal with implementation of the Order or its amendments. Rather, it reflects a higher-level agency decision specifically with respect to the delegation, within the agency's management hierarchy, of certain disciplinary authority over VCS employees. That is, the regulation here in question prescribes that the final authority to decide and act on reprimands or suspensions for 30 days or less of VCS workers will be exercised by a management official at a level in the agency's structure to which the negotiating activity in this case is subordinate. And, as already mentioned, the agency indicates that its determination to withhold such authority from the activity level is intended to achieve, in effect, uniformity and equality in the administration of such discipline among all VCS employees. In this regard, as already indicated, the regulation operates without reference to activity or bargaining unit lines and has equal effect on both represented and unrepresented employees of the VCS. Hence, we must find that the regulation in question is not one which improperly limits the scope of the grievance procedure under the principles enunciated in the Elmendorf decision, since such principles are inapposite in the circumstances of the present case.



Finally, with regard to the union's contentions concerning provisions in other approved agreements which allegedly are similar to the one proposed here, such bargaining history is without controlling significance where, as here, applicable published agency regulations limit the scope of bargaining under section 11(a) of the Order. As the Council first stated in its Kirk Army Hospital decision:<sup>7/</sup>

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.

Moreover, in the Council's opinion, whether the decision herein, as claimed by the union, leaves in doubt the "status" of such other agency agreements as may contain provisions similar to the proposal in dispute, is not a question properly before the Council in this appeal. Therefore, we make no ruling in the instant case with respect to such other agreements.

In summary, therefore, we find, contrary to the union's contention, that the agency regulation relied upon to limit negotiation on the union's proposal properly limits the bargaining obligation under the Order.<sup>8/</sup>

2. Assignment of Work. The second disputed proposal reads as follows:

Employer agrees that the assignment of duties will be consistent and related to the employee's position and his qualifications. Other duties as assigned means other related duties. This does not change the employer's right to assign duties — consistent with the spirit and intent of this agreement.

The agency's position, based principally on the Council's Griffiss decision,<sup>9/</sup> is that this proposal would improperly restrict management in

<sup>7/</sup> International Association of Machinists and Aerospace Workers and U.S. Kirk Army Hospital, Aberdeen, Md., FLRC No. 70A-11 (March 10, 1971), Report No. 5; accord, American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 14, 1973), Report No. 46.

<sup>8/</sup> In this regard, we do not, of course, pass on whether the agency regulation would properly limit negotiations under section 11(a) and (c) of E.O. 11491 as recently amended by E.O. 11838. That is, we do not pass upon whether there would be a "compelling need" for the regulation under Part 2413 of the Council's Rules and Regulations (40 FR 43884) which becomes effective December 23, 1975.

<sup>9/</sup> International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, New York, FLRC No. 71A-30 (April 27, 1973), Report No. 36.

the assignment of duties to positions and employees, i.e., in its determination of job content. Therefore, the agency contends, the proposal is outside the bargaining obligation under section 11(b) of the Order.<sup>10/</sup>

The union, on the other hand, based on the Council's Louisville Ordnance Station decision,<sup>11/</sup> contends, in effect, that the proposal is directed at the precision and completeness of position descriptions and not at the content of jobs themselves.

In the Griffiss case, relied upon by the agency, the Council considered a union proposal which would have prohibited the assignment of functions, claimed by the union to be "totally unrelated to the normal, expected, and widely understood duties of fire fighters," to positions in a fire fighting unit. [Emphasis in original.] The Council ruled that the specific duties assigned to particular jobs, including tasks allegedly unrelated to the primary functions of the employees concerned, are excepted from the agency's obligation to bargain under section 11(b) and, thus, sustained the agency's determination of nonnegotiability.

In contrast, the proposal involved in the Louisville case, relied upon by the union, herein, was expressly directed at the meaning of language in position descriptions, which descriptions do not determine but, rather, merely reflect the assignment of duties.<sup>12/</sup> Hence, in that case, the Council noted that:

<sup>10/</sup> The agency also contends that the proposal violates section 12(b)(2) of the Order. In our view, as set forth herein, the proposal at issue is principally concerned with job content and section 12(b) is inapplicable.

<sup>11/</sup> Local Lodge 830, International Association of Machinists and Aerospace Workers, and Louisville Ordnance Station, Department of the Navy, FLRC No. 73A-21 (February 5, 1974), Report No. 48.

<sup>12/</sup> In Louisville, the pertinent union proposal provided as follows:

Article 18, Section 6

a. When the term, "such other duties as may be assigned" or its equivalent is used in a position description, the term is mutually understood to mean "tasks that are normally related to the position and are of an incidental nature."

b. It is understood that the language of (a) above does not preclude the Employer from assigning unrelated work to employees when:

- (1) a general plant cleanup is required;
- (2) work as defined in an employee's position description is not available.

Also see, American Federation of Government Employees, Local 53, and Navy Regional Finance Center, Norfolk, Virginia, FLRC No. 73A-48 (February 28, 1974), Report No. 49.

The union's proposal thus would not restrict the agency's right to prescribe specifically in the job description any duties which it wishes to assign to an employee or position and to change the job description without limitation to reflect such changes in assignments. [Emphasis in the original.]

Accordingly, the Council held in Louisville that the union's proposal, which required the mere definition and clarification of general terms in position descriptions, was not excepted from the obligation to bargain under section 11(b) of the Order.

Turning to the instant proposal, as previously set forth, it is clear from the express language thereof, that the proposal would constrict actual assignment of duties by the agency as in the Griffiss case, rather than merely define and clarify general terms in position descriptions as in Louisville. More particularly, the first sentence of the instant proposal would condition the assignment of duties on whether they are "consistent and related to the employee's position and his qualifications." In this specific regard, the Council considered similar language in the VA Hospital, Lebanon, Pennsylvania case.<sup>13/</sup> In that case the union argued that nothing in the Order proscribes negotiation of a proposal which would prevent assigning autopsy duties to staff physicians when there is a pathologist employed by the hospital because, as the union there claimed, such duties are not reasonably related to the "qualifications and position" of staff physicians. Rejecting the union's argument, the Council found that the proposal dealt with job content and, under Griffiss, was therefore outside the obligation to bargain under section 11(b) of the Order.

In our opinion, the proposal in the present case, which similarly seeks to require management to assign duties "consistent and related to the employee's position and his qualifications," also would interfere with management's determination of job content and therefore compels the same conclusion on the part of the Council: The instant proposal is outside the agency's bargaining obligation under section 11(b) of the Order based on the decisions and analyses in Griffiss and subsequent, related Council cases.<sup>14/</sup>


<sup>13/</sup> American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 14, 1973), Report No. 46.

<sup>14/</sup> See, Local Lodge 2333, International Association of Machinists and Aerospace Workers, and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (December 16, 1974), Report No. 60, at part 2 of opinion; and AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (October 15, 1974), Report No. 57, at part 3 of opinion; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, FLRC No. 72A-41 (December 14, 1973), Report No. 46, at part 3 of opinion.

Conclusion

For the reasons set forth above, and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: November 28, 1975

Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator). The arbitrator, in his award, determined that the activity did not violate the parties' agreement by directing activity employees to take annual leave or leave without pay on holidays and summer shutdowns of the private contractor operating the Indiana Army Ammunition Plant. The union filed exceptions to the award, alleging that the award violates (1) section 19(a)(1) and (6) of the Order and (2) appropriate regulations.

Council action (November 28, 1975). As to (1), the Council held that the exception does not assert a ground upon which the Council will grant review of an arbitrator's award. With regard to (2), the Council held that the union had not advanced any persuasive reason or facts and circumstances in support of its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

November 28, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: Indiana Army Ammunition Plant,  
Charlestown, Indiana and National  
Federation of Federal Employees  
Local 1581 (Render, Arbitrator),  
FLRC No. 75A-84

Dear Ms. Cooper:

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

According to the arbitrator's award, the Indiana Army Ammunition Plant ("plant") is owned by the Federal Government, but operated by a private contractor. The 16 grievants are Federal employees at the plant who perform an inspection function by monitoring "the product produced by the operating contractor to assure that it conforms to the Government's specifications."

The employees of the private contractor have been granted several holidays and a summer vacation period which do not necessarily coincide with Federal holidays.

Prior to November 1974, the Federal employees at the plant were encouraged to take annual leave on the contractor holidays and summer shutdowns. They were not required to take annual leave since those who did not voluntarily elect to take annual leave were assigned to inspect returned defective products and to perform "other nonrecurring work" and to attend needed training programs during these periods. However, with memoranda dated November 1974 and February 1975, the Commander at the plant set forth his plans for reduced staffing of Federal employees on contractor holidays and during the summer plant shutdown and required submission of annual leave slips and requests for advance annual leave and leave without pay for these periods. By the terms of the collective bargaining agreement between the plant and the National Federation of Federal Employees ("union"), a

grievance culminating in arbitration was filed concerning the matter of the required reduced staffing. Before the arbitrator the union argued, inter alia, that the policy of forced use of leave violated section 16.4<sup>1/</sup> of the parties' collective bargaining agreement.

The issue formulated by the arbitrator was "whether the Employer violated the collective bargaining agreement by issuing a directive ordering employees to take annual leave or leave without pay . . . [on several contractor holidays and the contractor's summer shutdown] because the operating contractor of the Indiana Army Ammunition Plant would not be operating the plant on those days."

The arbitrator denied the grievances. He found that section 16.4 of the parties' agreement, as explained by FPM chapter 610, subchapter 3<sup>2/</sup>

1/ According to the award, section 16.4 provides as follows:

WORK INTERRUPTIONS: Employees who are prevented from working due to interruptions or suspension of normal work operations will be assigned to other reasonable work or comprehensive training programs. Administrative leave will be granted when other work or training is unavailable in accordance with appropriate regulations.

2/ FPM chapter 610, subchapter 3 states, in pertinent part:

#### 3-1. GENERAL AUTHORITY

a. Closing an activity. The closing of an activity for brief periods is within the administrative authority of an agency. The head of an agency may wish to delegate this authority to close Federal installations or offices to managers within the agency. Examples of reasons for closing are:

(1) Interruption of normal operations of an establishment by events beyond the control of management or employees, such as emergency conditions due to extreme weather conditions, fires, floods, or serious interruption to public transportation services.

(2) For managerial reasons when the closing of an establishment or portions thereof is required for short periods of time; the reasons may include such matters as rebuilding, breakdown of machines, or power failure.

(3) For a local holiday when Federal work may not properly be performed. In determining when Federal work may not be properly performed, agencies may wish to consider adopting the following

(Continued)

(made binding on the parties by section 3.1<sup>3/</sup> of their agreement) did not "cover the kinds of plant closures involved in these grievances." The arbitrator also stated that even if the "situations of forced annual leave during the contractor holidays and summer plant shutdown are thought to be within the article on work interruptions [section 16.4], the Commander's authority to do anything other than he did is severely circumscribed by Civilian Personnel Manual 990.2, Chapter 610.S3, S3-3C."<sup>4/</sup> Under this regulation, the arbitrator determined that "the only course of action open" to the Commander at the plant was to do as

---

(Continued)

standard (which has been adopted by agencies for observing local holidays in Puerto Rico and the Virgin Islands): Employees of the office must be actually prevented from working by one of the following circumstances:

- (a) The building or office in which the employees work is physically closed; or building services essential to proper performance of work are not operating.
- (b) Local transportation services are discontinued or interrupted to the point where employees are prevented from reporting to their work location.
- (c) The duties of the employees consist largely or entirely of dealing directly with employees and officials of business or industrial establishments or local government offices, and all such establishments are closed in observance of the holiday, and there are no other duties (consistent with their normal duties) to which the employees can be assigned on the holiday.

<sup>3/</sup> According to the award, section 3.1 provides in pertinent part:

BASIC PROVISIONS: 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 . . . .

<sup>4/</sup> According to the award, Civilian Personnel Manual 990.2, Chapter 610.S3, S3-3C states:

The authority to excuse employees administratively is not to be used in instances where the period of interrupted or suspended operations can be anticipated sufficiently in advance to permit arranging for assignment to other work or scheduling of annual leave. Normally, where 24 hours' advance notice can be given, employees who cannot be assigned to other work must be placed on annual leave with or without their consent.



he had since he did not have the authority under the collective bargaining agreement (as supplemented by the regulation) to permit employees to report to work if there was no work to be performed and no legitimate need for training. Further, the arbitrator concluded "that the collective bargaining agreement gives management the authority to require annual leave on contractor holidays and during the summer shutdown" since section 16.5<sup>5/</sup> of the agreement provides that "[a]nnual leave may be scheduled so as to accommodate special fluctuations of work of the activity" and FPM chapter 630, subchapter 3-4b<sup>6/</sup> gives supervisors the responsibility to decide when annual leave may be taken, for which the criteria are the "needs of the service rather than solely . . . desires of the employees."

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

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

---

5/ According to the award, section 16.5 provides in pertinent part as follows:

ANNUAL LEAVE: Annual leave may be scheduled so as to accommodate special fluctuations of work of the activity. Each employee is encouraged to take at least one 80 hour period for vacation purposes. However, special employee needs should be considered where lesser amounts of time are desirable. In arranging vacation schedules, effort will be made to grant employees their desired schedule. In the event that there is a conflict with regard to vacation schedules which cannot be resolved otherwise, entered on duty will be the first determining factor . . . .

6/ FPM chapter 630, subchapter 3-4b provides:

(1) General. Annual leave provided by law is a benefit and accrues automatically. However, supervisors have the responsibility to decide when the leave may be taken. This decision will generally be made in the light of the needs of the service rather than solely on the desires of the employee. Supervisors should insure that annual leave is scheduled for use so as to prevent any unintended loss at the end of the leave year.

In its first exception, the union contends that the arbitrator's award violates section 19(a)(1) and (6) of the Order, since a past practice has been changed by the activity without regard for the bargaining duties imposed by the Order. In support of this exception, the union maintains that "[t]o declare this not to be a violation of the contract is contrary to the Order." The union's first exception, on its face, appears to allege that the award violates the Order. Nevertheless, when the substance of this exception and its supporting contentions is considered, the union is, in effect, alleging that the activity's conduct violated section 19(a)(1) and (6) of the Order and that the arbitrator reached an incorrect result in his interpretation of the collective bargaining agreement since he failed to find such action to be in violation of the agreement. However, the Council has previously held that a contention that an arbitrator has failed to decide, during the course of a grievance arbitration hearing, whether an unfair labor practice has been committed under section 19 of the Order does not state a ground upon which the Council will accept a petition for review of an arbitration award. Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (August 14, 1975), Report No. 81 and Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76. Moreover, the Council likewise has held that interpretation of contract provisions is a matter to be left to the arbitrator's judgment and does not assert a ground upon which the Council will grant review of an arbitration award under section 2411.32 of its rules. See, e.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44; NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79; and Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (August 14, 1975), Report No. 81.

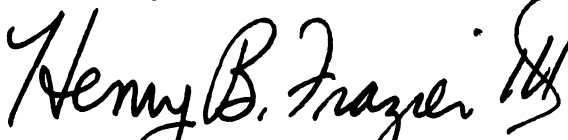
In its second exception, the union contends that the award violates appropriate regulations -- specifically Federal Personnel Manual chapter 630, subchapter 11 and some Civil Service Commission recently proposed "guidances for agencies during closedown periods." The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates appropriate regulations. Here, however, the union simply paraphrases the cited directive (FPM chapter 630, subchapter 11), advancing no persuasive arguments in support of this exception and describing no facts and circumstances sufficient to show that any basis exists for granting review of the award under this exception. Further, in regard to the proposed new "guidances," the union fails to advert to any specific Civil Service Commission issuance to support this contention

and it is noted that, in any event, the issuance is apparently not binding upon agencies. Hence, it would not constitute an appropriate regulation within the meaning of section 2411.32 of the Council's rules. Therefore, this exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III  
Executive Director

cc: C. E. Thomas  
Army

General Services Administration, Federal Supply Service, Assistant Secretary Case No. 22-5725 (CA). The Assistant Secretary denied the request of the National Federation of Federal Employees for reversal of the Assistant Regional Director's dismissal of the complaint of NFFE Local 1642, which alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order. NFFE appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues.

Council action (December 2, 1975). The Council found that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue, and NFFE neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 2, 1975

Ms. Janet Cooper, Staff Attorney  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: General Services Administration, Federal Supply Service, Assistant Secretary Case No. 22-5725 (CA), FLRC No. 75A-78

Dear Ms. Cooper:

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

In this case, Local 1642, National Federation of Federal Employees (the union), filed a complaint against the General Services Administration, Federal Supply Agency (the activity). According to the Assistant Regional Director's letter of dismissal, the complaint alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order by commissioning a study as to the feasibility of combining all Federal Supply Service Quality Control Laboratories into one without consulting the union about the study, even though transfers, reassignments and general chaos about duties assertedly resulted in the unit.

The Assistant Secretary, in agreement with the ARD and based on his reasoning, found that the activity was not obligated to meet and confer with the union with respect to the study in question. Moreover, the Assistant Secretary found that the union had failed to establish a reasonable basis for its allegation that personnel reassignments and transfers resulted from the instant study. Accordingly, the Assistant Secretary denied the union's request for reversal of the ARD's dismissal of the complaint, whereupon the union filed the instant appeal.

In your petition for review on behalf of the union, you allege, insofar as is pertinent to the findings of the Assistant Secretary, that the Assistant Secretary's decision presents major policy issues relating to (1) the activity's obligation to bargain on the commissioning of the study and the Assistant Secretary's failure to conduct a hearing in this regard, and (2), in effect, the alleged adverse impact of the subject study.\*

\*/ You also take issue in your appeal with references in the ARD's letter to such matters as the limitation on the scope of the complaint under the Assistant Secretary's rules; prior consultations by the parties on reorganization proposals; timeliness of the charge regarding the study; and

(Continued)


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

Specifically, with regard to the activity's alleged obligation to negotiate and the Assistant Secretary's failure to conduct a hearing thereon, you fail to cite any basis, and none appears, for your claim that the Order imposes an obligation on the activity to negotiate concerning the commissioning of a feasibility study on the reorganization of its Quality Control Laboratories. Moreover, no persuasive reason was advanced in your appeal to support your assertion that a hearing was required on this matter. As to the alleged adverse impact of the study, your appeal fails to advert to any evidence whatsoever of such impact or to any other reasonable basis for the union's complaint in this regard. Accordingly, without adopting the precise reasoning of the Assistant Secretary, the Council finds that no major policy issue is presented by his decision.

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

A. Whelihan  
GSA

---

(Continued)

management's consultations or assurances of future consultation if the results of the study were implemented. However, these matters were not relied upon by the Assistant Secretary in his decision and, apart from other considerations, they therefore provide no basis for your appeal.

Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SIMR No. 360. This appeal arose from a decision and order of the Assistant Secretary, who, upon a complaint filed by Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), found that the agency (DSA) violated section 19(a)(5) and (1) of the Order by its conduct following the transfer to DSA of a number of employees from a more comprehensive unit represented by IAM at Army's Aberdeen Proving Ground Command, in the course of a bona fide reorganization of the property disposal functions of the Department of Defense. Specifically, the Assistant Secretary found that DSA violated section 19(a)(5) by failing to accord appropriate recognition to IAM and failing to honor an existing negotiated agreement between IAM and Army; and that by such conduct, and by threatening to revoke dues withholding authorizations, DSA also violated section 19(a)(1). Further, the Assistant Secretary issued a broad remedial order, extending benefits not only to IAM but also to "similarly situated" labor organizations. Upon appeal by DSA, the Council accepted the petition for review, on the grounds that major policy issues were presented by the decision of the Assistant Secretary, including: (1) The applicability of the Council's decision in the AVSCOM case, FLRC No. 72A-30 (Report No. 42); (2) the propriety of the co-employer doctrine as established by the Assistant Secretary; (3) the conformity of the Assistant Secretary's decision to the requirements of section 10(b) of the Order; (4) the impact of "successorship" criteria; (5) the effect of Civil Service Commission regulations concerning dues withholding; and (6) the propriety of the Assistant Secretary's extending his decision and order to "similarly situated" labor organizations. (Report No. 53.)

Council action (December 9, 1975). As to (1), the Council held that the Assistant Secretary misconceived, and thereby failed properly to apply, the meaning and import of the Council's AVSCOM decision. With regard to (2), the Council held that the co-employer doctrine, as fashioned and applied by the Assistant Secretary in the present case, is wholly inconsistent with the language and purposes of the Order and must be rejected. As to (3), the Council, relying on its decision in the Tulsa AFS case, FLRC No. 74A-28, (Report No. 69), ruled that the Assistant Secretary failed to make the required determinations and to accord the necessary equal weight to each of the criteria for an appropriate unit, as compelled by section 10(b) of the Order. Regarding (4), the Council set forth the criteria for determining "successorship," the consequences of such relationship, and the relevant procedures provided for or available under the Order, as applicable in circumstances such as those involved in the instant case. As to (5), the Council held that DSA complied with the applicable Civil Service Commission regulations concerning dues withholding as required by section 21 of the Order. Finally,

with regard to (6), the Council held that the Assistant Secretary improperly extended his decision and order to "similarly situated" labor organizations in this case. Accordingly, the Council set aside the Assistant Secretary's decision and order and remanded the case to him for appropriate action in a manner consistent with the Council's decision.



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

Defense Supply Agency,  
Defense Property Disposal Office,  
Aberdeen Proving Ground,  
Aberdeen, Maryland

and

Local Lodge 2424, International  
Association of Machinists and  
Aerospace Workers, AFL-CIO

A/SLMR No. 360  
FLRC No. 74A-22

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary, upon a complaint filed by Local Lodge 2424 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as IAM). The Assistant Secretary found that the Defense Supply Agency (hereinafter referred to as DSA), Defense Property Disposal Office at Aberdeen Proving Ground, Aberdeen, Maryland, violated section 19(a)(5) of the Order by failing to accord appropriate recognition to a labor organization qualified for such recognition and failing to honor an existing negotiated agreement; and by such conduct, and by threatening to revoke dues withholding authorizations, also violated section 19(a)(1) of the Order.<sup>1/</sup> The pertinent facts as found by the Assistant Secretary are set forth below.

On July 29, 1970, IAM was certified as the exclusive representative for a unit of approximately 1620 employees of the Department of the Army's

1/ Section 19(a)(1) and (5) of the Order provides as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

. . . . .

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition. . . .

Aberdeen Proving Ground Command (APGC), at Aberdeen Proving Ground, Aberdeen, Maryland. On August 9, 1972, the union entered into a negotiated agreement with APGC covering the employees in the unit. Shortly thereafter, under the authority granted by the Department of Defense (DOD), a Defense Property Disposal Service (DPDS) was established under DSA, composed basically of Defense Property Disposal Offices (DPDO's). To staff these offices, DOD decided that employees performing surplus personal property disposal functions in the Departments of the Army, Navy and Air Force, and in DSA, were all to be transferred to the new DPDS within DSA. Under this "transfer-in-place," the transferred employees would be under the command of DSA but continue at the same duty stations performing essentially the same duties as before the transfer, with no changes in job descriptions, classifications and grades. One of these offices was established at Aberdeen Proving Ground, consisting of 27 employees, 15 of whom were members of IAM's collective bargaining unit at APGC.

Upon learning of the proposed transfer, IAM took the position with DSA that its agreement with APGC continued to cover the 15 employees to be transferred to DSA from Army. DSA, however, notified IAM, as well as other labor organizations with agreements covering other property disposal employees transferred to DSA, that "the dues withholding privileges of those employees would be extended for a six month period . . . to allow for the resolution of such representation and successorship issues as may arise incident to this reorganization." On April 22, 1973, the 15 unit employees performing property disposal functions at APGC were administratively transferred to DSA, and thereafter DSA rejected further IAM requests that DSA continue dues withholding for the 15 transferred employees beyond the 6-month period. DSA took the position that the Aberdeen agreement was between IAM and Army, and that the transferred employees were no longer part of the APGC unit, but were DPDS employees. DSA offered, alternatively, to recognize any union which was certified by the Department of Labor "as the duly elected representative of the employees of DPDS or of any appropriate bargaining unit made up of DPDS employees."

IAM thereupon filed a complaint, alleging that DSA had violated section 19(a)(1), (2), (5) and (6) of the Order by refusing to recognize IAM as the representative of the 15 transferred employees, by refusing to apply the terms of the IAM-APGC agreement and by improperly threatening to revoke the dues withholding authorizations of its employees. In response, DSA took the position that IAM should not be permitted to gain certification and recognition as the exclusive bargaining representative of any bargaining unit in DPDS without filing a representation petition and winning an election. Additionally, in its response to the IAM complaint, DSA relied on the Council's decision in the AVSCOM case,<sup>2/</sup> as protecting it from any unfair labor practice finding.

---

<sup>2/</sup> Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30 (July 25, 1973), Report No. 42.

The Assistant Secretary concluded that DSA had violated section 19(a)(1) and (5) of the Order. He found, among other things, that, as the 15 unit employees performed the same duties under the same immediate supervision after the reorganization and their administrative transfer-in-place into the DPDO under the command of DSA as before, they retained a community of interest with the Army's employees in the APGC bargaining unit.<sup>3/</sup> He further stated that while DSA and Army were separate employing agencies with different specific missions and functions, they were both DOD components and, under the circumstances, must be viewed as "co-employers" of all the employees in the unit "with common responsibilities for maintaining the present terms and conditions of employment . . . including any negotiated agreement that is in existence." Accordingly, the Assistant Secretary found that DSA had improperly withdrawn recognition from the union which was "qualified for such recognition" in violation of section 19(a)(5), and by such conduct had also violated section 19(a)(1). He further found that the threat to terminate dues withholding 6 months after the employees' administrative transfer to DPDS, if no representation petition was filed, constituted an additional violation of section 19(a)(1).

In so finding, the Assistant Secretary rejected DSA's reliance on AVSCOM, since he viewed that decision as requiring the agency to initiate appropriate representation proceedings to resolve the legitimate questions raised as a result of the reorganization, rather than unilaterally terminating the union's recognition and setting its own rules as to how new recognition would be obtained.

As a remedy, in view of "the broad scope of the reorganization . . . affecting the major components of the Department of Defense and its implementation on a nationwide basis by DSA," the Assistant Secretary determined that a "broad cease and desist order" was warranted. He therefore issued an order requiring DSA, among other things, to cease and desist from refusing to accord appropriate recognition to IAM "and similarly situated labor organizations," and from refusing to honor the existing negotiated agreement as it pertains to DPDO employees at Aberdeen as well as "existing negotiated agreements of similarly situated labor organizations as they pertain to other [DPDO] employees." IAM's allegations of section 19(a)(2) and (6) violations by DSA were dismissed and are not at issue here.

DSA appealed to the Council alleging that the Assistant Secretary's decision presented major policy issues and was arbitrary and capricious. The Council accepted the petition for review, having determined that major policy issues were presented by the subject decision of the Assistant Secretary, including: (1) The applicability of the Council's decision in the AVSCOM case; (2) the

---

<sup>3/</sup> The Assistant Secretary also found that "[t]o upset these existing units based solely on such an administrative reorganization clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations."

propriety of the doctrine of "co-employers" as established by the Assistant Secretary; (3) the conformity of the decision to the requirements of section 10(b) of the Order; (4) the impact of "successorship" criteria in this case; (5) the effect of Civil Service Commission regulations concerning dues withholding in the circumstances here involved; and (6) the propriety of extending the decision and order to labor organizations "similarly situated" to IAM, which organizations were not "parties" to the proceeding before the Assistant Secretary.

DSA also requested a stay of the decision pending Council resolution of the appeal. The Council determined that issuance of a stay was warranted in this case and granted the agency request.<sup>4/</sup>

Briefs were filed by DSA and IAM. Additionally, the Council granted a number of requests from interested agencies and labor organizations, filed pursuant to section 2411.49 of the Council's rules, for permission to file amicus curiae briefs. General Services Administration, Department of Health, Education, and Welfare, and Department of the Treasury filed briefs with the Council as amici curiae urging, in effect, that the subject decision of the Assistant Secretary be set aside; and American Federation of Government Employees (AFGE) and Metal Trades Department of the AFL-CIO, and National Association of Government Employees, filed briefs as amici curiae urging, in effect, that the decision be sustained. AFGE also requested oral argument.<sup>5/</sup>

Subsequent to acceptance of the instant case, the Council commenced its general review of E.O. 11491, as amended. Among the areas focused upon during the review was the status of negotiated agreements during reorganization. The Council determined that this area of the general review was directly applicable to the issues raised in this case; and, therefore, that the final disposition of the appeal should be deferred pending completion of the general review. On February 6, 1975, the President signed E.O. 11838, amending E.O. 11491, effective on or after May 7, 1975.

#### OPINION

As detailed above, the Assistant Secretary found, in essence, that DSA violated section 19(a)(5) and (1) of the Order by its conduct following the transfer to DSA of 15 employees from a unit of about 1620 employees

---

<sup>4/</sup> The Council, in granting the stay, added that: "This is not to be interpreted as permitting the agency to cease giving effect to valid dues withholding agreements as they apply to affected employees prior to the issuance of a final decision on the request for review."

<sup>5/</sup> Pursuant to section 2411.49 of the Council's rules, the request by AFGE is denied, because the positions of the participants in this case are adequately reflected in the entire record now before the Council.

represented by IAM at Army's Aberdeen Proving Ground Command, in the course of a bona fide reorganization of DOD's property disposal functions. More particularly, the Assistant Secretary held that DSA violated 19(a)(5) by failing to accord appropriate recognition to IAM and failing to honor an existing negotiated agreement previously entered into between IAM and the Army Command; that by such action, and by threatening to revoke dues withholding authorizations of the transferred employees, DSA further violated 19(a)(1); and that a broad remedial order should issue extending benefits not only to IAM but also to "similarly situated labor organizations" affected by the entire reorganization.

The Council accepted DSA's petition for review on the ground that major policy issues were presented by the subject decision of the Assistant Secretary. We turn now to the consideration of these major policy issues and the principles which properly control the determination of a reorganization case such as here involved under the Order.

ISSUE 1. Applicability of Council's Decision in AVSCOM Case.

In the AVSCOM case, note 2, supra, the situation was essentially as follows: On July 1, 1971, a reorganization was effected within the Army Aviation Systems Command (AVSCOM), whereby 49 of 53 Headquarters employees represented in a separate unit by AFGE were combined with 35 employees from a nearby inactivated Depot unit represented by the Operating Engineers, into a newly formed subordinate element of AVSCOM Headquarters. This reorganization occurred while negotiations between AVSCOM and AFGE were in progress; and its anticipation prompted Army to file a petition with the Assistant Secretary in which Army contended that a single overall unit was now appropriate and requested an election to determine which of the two unions represented that unit.<sup>6/</sup> During the pendency of that petition, AFGE and AVSCOM continued to negotiate and in October 1971 reached full accord. However, AVSCOM refused to sign the agreement until the Assistant Secretary resolved the representation issue. AFGE thereupon filed a 19(a)(6) complaint by reason of AVSCOM's refusal to sign the agreement.

In May 1972, the Assistant Secretary issued his decision in the representation case, dismissing the petition on the ground that there was insufficient basis for the activity's claim that separate units were no longer appropriate. (No appeal was taken to the Council from that decision.) Thereafter, in June 1972, the Assistant Secretary issued his decision in the unfair labor practice case, finding that, because the existing units remained viable, Army's refusal to sign the October 1971 agreement violated 19(a)(6). As a remedy, the Assistant Secretary ordered Army to sign the agreement upon request and to post the customary notice. Army appealed to the Council, objecting not to the 19(a)(6) finding or the required signing of the agreement, but to the posting requirement.

---

<sup>6/</sup> The petition filed by Army was a "clarification of unit" petition which the Assistant Secretary later found improper, but which he treated for purposes of decision as a "representation (agency)" petition.

In its AVSCOM decision, issued in July 1973, the Council upheld the posting requirement in the circumstances of that appeal. However, the Council also addressed the underlying dilemma faced by agency management in the course of such a reorganization, and the derivative responsibilities of the Assistant Secretary under the Order. In more detail, the Council stated at pp. 5-6 of its decision:

. . . [W]e recognize the serious dilemma which agency management is in when faced with circumstances such as those present in this case. That is, as a result of the reorganization of AVSCOM, the Army had a doubt as to the continued appropriateness of the existing units, and sought to resolve that doubt by the filing of a petition with the Assistant Secretary. As stated above, if the existing units had been found to be inappropriate due to the reorganization of AVSCOM, the Army would not have been obligated to sign the contract. In fact, to have signed it could, at least potentially, have subjected it to a charge that it had violated section 19(a)(3) of the Order. Yet, because the existing units were subsequently found to be appropriate, the Assistant Secretary held that the Army was obligated to sign the negotiated agreement. Since there were no other allegations of misconduct involved in this case, the disposition of the representation issue was determinative of the disposition of the 19(a)(6) complaint.

In our view, this type of a dilemma or risk places an undue burden on an agency. That is, where an agency has acted in apparent good faith and availed itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit, and where no other evidence of misconduct is involved, an agency should not be forced to assume the risk of violating either section 19(a)(3) or section 19(a)(6) during the period in which the underlying representation issue is still pending before the Assistant Secretary.

Rather, we believe that procedures can and must be devised which will permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from the representation decision, before that agency incurs the risk of an unfair labor practice finding. Since it does not violate the Order to raise a question concerning representation in good faith, the procedures employed to effectuate the purposes of the Order must permit an agency to do so without risking an unfair labor practice finding.

. . . . .

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary the determination as to the precise procedures which will best accomplish this result, we direct that his procedures be reviewed and revised so that, in the future, agencies will be permitted to await his decision on a representation petition without incurring the risk of an unfair labor practice finding. [Underscoring in part supplied.]

As previously mentioned, DSA here relied on the Council's AVSCOM decision in defense of its conduct after the April 1973 reorganization in refusing in good faith to recognize IAM until that union was certified as the duly elected representative of the DPDS employees or of any appropriate unit made up of DPDS employees, and in stating that it would terminate dues withholding provided for under the IAM-APGC agreement after 6 months if no representation petition covering the employees was filed. However, the Assistant Secretary ruled that AVSCOM was not dispositive because:

. . . In the instant case, it is clear that [DSA] did not "avail itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit" but, rather, it unilaterally terminated recognition and set its own rules for how a new recognition would be obtained.

In our opinion, the Assistant Secretary has misconceived, and thereby failed properly to apply, the meaning and import of the Council's AVSCOM decision.

As indicated in AVSCOM, the Council was of the view that where an agency, as a result of a reorganization, has good faith doubts concerning the status of a union as the exclusive representative of its employees in an appropriate unit, the Order requires (1) that the agency be enabled to initiate a representation proceeding which would resolve these doubts; and (2) that the procedures of the Assistant Secretary must precisely implement this right of an agency to initiate such a representation proceeding and thereby to avert the risk of an unfair labor practice finding.

While the Assistant Secretary sought to distinguish the instant case from AVSCOM because DSA did not invoke a representation proceeding, he failed specifically to address the first question, namely: Whether the "representation proceedings offered" by the Assistant Secretary would have led to the Assistant Secretary's resolution of IAM's representative status, upon a representation petition filed by DSA.<sup>7/</sup> For IAM was not the currently recognized or certified representative of a separate unit of these DSA employees; DSA was not questioning IAM's representative status in the APGC unit; and IAM, at the time the reorganization was effected, apparently was not claiming to represent the 15 transferred employees in a separate appropriate unit of DSA employees, but was claiming instead that the agreement with Army covering that unit continued to apply to the transferred employees, and that DSA was bound by that agreement. Moreover, the Assistant Secretary did not either advert to or consider the second question, that

<sup>7/</sup> Section 202.2(b)(1) of the Assistant Secretary's regulations, at the time here involved, reads as follows:

(b) Petition for an election to determine if a labor organization should cease to be the exclusive representative.

(1) A petition by an agency shall contain . . . a statement that the agency or activity has a good faith doubt that the currently recognized or certified labor organization represents a majority of the employees in an appropriate unit. . . .

is, whether his procedures at the critical times in this case, which antedated AVSCOM, clearly provided DSA with access to representation proceedings which would resolve the legitimate doubts of DSA arising from the subject reorganization.<sup>8/</sup>

Therefore, upon the remand to be ordered by the Council, the Assistant Secretary should reconsider and pass upon the applicability of AVSCOM as properly interpreted and applied in the instant case.<sup>9/</sup>

Further, if upon remand, the Assistant Secretary concludes that his procedures failed to satisfy the requirements of AVSCOM at times relevant to this case and if these procedures remain substantially unchanged, the Assistant Secretary is directed to take action consistent with AVSCOM. That is, the Assistant Secretary shall develop new procedures, or clarify existing procedures, to enable an agency to raise questions such as here presented subsequent to a reorganization concerning the appropriateness of units of employees involved in the reorganization and the qualification of labor organizations to be accorded exclusive recognition as the representatives of the employees in those units, without incurring the risk of an unfair labor practice finding.

#### ISSUE 2. Propriety of Co-Employer Doctrine Established by Assistant Secretary.

The Assistant Secretary also predicated his decision that DSA violated section 19(a)(5) and (1) of the Order in part on his conclusion that:

. . . [DSA] and the Department of the Army are co-employers vis-a-vis the existing unit at Aberdeen represented by the [IAM] and, as such, [DSA] and the Department of the Army are responsible for maintaining the present terms and conditions of employment of all employees in the unit including those contained in the existing negotiated agreement. [Footnote omitted.]

While the Assistant Secretary tacitly acknowledged that the employing entity bears the obligation of recognition imposed under section 10 of the Order, he relied in reaching the above-quoted conclusion principally on his finding that DSA and Army are both components of DOD which was

---

<sup>8/</sup> The Council's direction in AVSCOM as to future corrective action to be taken by the Assistant Secretary did not mean that the requirements concerning the availability of procedures to avert an unfair labor practice finding, which derived from the Order itself, were only prospective in nature.

<sup>9/</sup> Assuming the requirements detailed in AVSCOM were satisfied, DSA would, of course, be deemed to have accepted the risk of an unfair labor practice finding by failing to file a representation petition, and the legality of its conduct must then be assessed under the principles discussed hereinafter.



the moving force behind the reorganization, and his belief that the co-employer doctrine would avert the "chaotic labor-management relations situation" which assertedly obtained from the "administrative reorganization" of property disposal functions within DOD.

In our opinion, the co-employer doctrine as thus fashioned and applied by the Assistant Secretary in the present case is wholly inconsistent with the language and purposes of the Order and must be rejected.

Under section 10 of the Order, it is the employing entity which is intended and required to accord exclusive recognition to the labor organization duly selected by its employees as their representative. Although in this case both DSA and Army are components of DOD, and DOD may have been the progenitor of the reorganization, DSA and Army have separate missions, functions, regulations, administrations, and commands; and there is no indication in the record that DSA and Army either before or after the reorganization shared any common control or direction whatsoever over either the 15 employees transferred to DSA or the remaining approximately 1600 employees in the Army unit. In other words, DSA and Army retained their separate employing identities over their respective employees before and after the reorganization and each component thus remained a separate employing "agency" for the purposes of according exclusive recognition to the labor organization representing its employees in an appropriate unit under section 10 of the Order. Contrary to the position of the Assistant Secretary, the overall responsibilities and initiative of DOD with respect to the various components of DOD neither destroyed nor diminished in any manner the separate identity of the respective components from each other as employing entities and therefore each component continued to constitute a separate employing "agency" for the purposes of exclusive recognition under section 10 of the Order.<sup>10/</sup>

As to the "chaotic" situation sought to be averted by the Assistant Secretary, we share the concern of the Assistant Secretary over the numerous problems, especially the multiplicity of representation petitions, which may result from a comprehensive reorganization such as here involved. However, the resolution of these problems obviously must be consistent with the provisions and intent of the Order. In our view, the co-employer doctrine which would artificially impose a single employment relationship on diverse employing entities with different missions, regulations and organizational frameworks, and sharing no common control or direction over the subject employees would seriously disrupt the operating capabilities of those agencies and, as already mentioned, would conflict with the meaning and purposes of the Order. Moreover, the administrative difficulties of particular concern to the Assistant Secretary may be readily resolved by established adjudicative techniques, such as consolidated proceedings,

<sup>10/</sup> Cf. IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Md., FLRC No. 70A-9 (March 9, 1971), Report No. 5.

multi-party stipulations, expedited hearings and the like, and by prompt resort to procedures already provided for or available under the Order. Therefore, no overriding exigency is presented to justify the co-employer doctrine here conceived and applied by the Assistant Secretary.

Accordingly, we hold that the co-employer doctrine, as fashioned and applied by the Assistant Secretary in the circumstances of this case, was improper and may not be relied upon by him in his reconsideration upon remand of the instant case.

ISSUE 3. Conformity of Assistant Secretary's Decision to Requirements of Section 10(b) of the Order.

Section 10(b) of the Order provides in relevant part as follows:

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.

In his conclusion that DSA violated section 19(a)(5) and (1) of the Order in the present case, the Assistant Secretary ruled, in substance, that the combined unit of the 15 employees transferred to DSA and the remaining approximately 1600 APGC employees continued to be appropriate under section 10(b).

The Assistant Secretary reasoned in the above regard that, after the reorganization and administrative "transfer-in-place," the DSA employees retained their same job descriptions and classifications, continued to work in the same locations, performed the same duties and functions, and, while Commands differed, worked under the same immediate supervision, as before the reorganization. Based thereon, the Assistant Secretary found that the DSA employees "continue[d] to share a community of interest" with the APGC unit employees and in effect remained in that unit. Further, after adverting to the substantial number of representation petitions which were filed seeking to separate employees from their historical units, the Assistant Secretary found:

To upset these units, based solely on such an administrative reorganization clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations.

This finding by the Assistant Secretary as to effective dealings and efficiency of agency operations plainly falls far short of the requirements

of section 10(b) as recently explicated by the Council in the Tulsa AFS case.<sup>11/</sup>

Tulsa AFS involved an agency reorganization, in which the activity, Tulsa Airway Facilities Sector (Tulsa AFS), was enlarged by the transfer of various field offices to the activity's jurisdiction. The activity thereafter sought an election in a sectorwide unit including the employees in Tulsa AFS already represented by IAM and those newly placed under the activity's jurisdiction as a result of the reorganization. The Assistant Secretary dismissed the activity's representation petition because, based on a detailed consideration of employment conditions before and after the reorganization, the Assistant Secretary found that the employees in the existing unit represented by IAM continued to share a separate clear and identifiable community of interest. The Assistant Secretary also stated:

Noting the established bargaining history with respect to the unit represented by the IAM, the fact, standing alone, that an additional unit or units subsequently may be established to cover those employees added to the activity's jurisdiction as a result of the reorganization was not considered to require a finding that the unit represented by the IAM necessarily will fail to promote effective dealings and efficiency of agency operations.

The Council, upon appeal by the agency, held that the Assistant Secretary's decision failed to meet the requirements of section 10(b) of the Order.

As to the meaning of section 10(b), the Council stated (at p. 5 of its decision):

It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . , especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

The Council also noted the Report accompanying E.O. 11838, which reads in part as follows:<sup>12/</sup>

<sup>11/</sup> Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

<sup>12/</sup> Labor-Management Relations in the Federal Service (1975), at p. 51.

X. Status of Negotiated Agreements during Reorganization.

Moreover, the resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of the Order that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations. This policy requirement, in the Council's view, is sufficiently comprehensive and flexible to achieve the desirable equitable balance between the sometimes divergent and conflicting interests of agencies, labor organizations, and employees involved in any reorganization. This policy must be applied so that controlling weight is not given to any one of the criteria; equal weight must be given to each criterion in any representation case arising out of a reorganization just as it is in any other case involving a question as to the appropriateness of a unit. For example, to give controlling weight to a desire, however otherwise commendable, of maintaining the stability of an existing unit would not meet the policy requirements in section 10(b). . . .

The Council concluded as to the required findings under section 10(b) of the Order (at pp. 6-7 of decision):

Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate. In this case . . . the Assistant Secretary found that the employees in the existing unit represented by the union continued to share a clear and identifiable community of interest separate and distinct from those assigned to the activity as a result of the reorganization and, thus, concluded that the existing unit continued to be an appropriate one under the Order. Further, the Assistant Secretary attributed little, if any, weight to the criteria of effective dealings and efficiency of agency operations. . . . It is therefore apparent that the Assistant Secretary did not give equal weight to the criteria of effective dealings and efficiency of agency operations, but, rather, gave predominant weight to the criterion of community of interest of the employees concerned.

Obviously, the required affirmative determinations and according of equal weight to each criterion under section 10(b), as discussed in the Tulsa AFS case, are apposite whether the appropriate unit question is raised, as in that case, in a representation proceeding or, as here, in an unfair labor practice proceeding.

As already indicated, the Assistant Secretary, in our opinion, failed to meet those requirements in the present case. Here, the Assistant Secretary found affirmatively, with detailed supporting reasons, that the employees transferred to DSA and the remaining Army employees in the APGC unit continued to share a community of interest. However, as to the remaining criteria in section 10(b), the Assistant Secretary limited his determination essentially to a statement that upsetting the various historical bargaining units in DOD by reason of the subject reorganization would not have the effect of promoting effective dealings and efficiency of agency operations. Thus, the Assistant Secretary failed to make the required determinations that the APGC unit, including the employees transferred to DSA, would promote effective dealings and efficiency of agency operations. Moreover, the Assistant Secretary, insofar as this particular unit is concerned, manifestly did not give equal weight to the criteria of effective dealings and efficiency of agency operations. Instead, he gave predominant and almost exclusive weight to the criterion of the community of interest of the employees involved.<sup>13/</sup>

Accordingly, if upon remand the question of appropriate unit is reached by the Assistant Secretary, he is directed to make the required determinations and to accord the necessary equal weight to each criterion, as compelled by section 10(b) of the Order.<sup>14/</sup>

#### ISSUE 4. Impact of "Successorship" Criteria.

As we observed in our rejection of the Assistant Secretary's "co-employer" doctrine under Issue 2, supra, the administrative difficulties of particular concern to the Assistant Secretary may be readily resolved in part by prompt resort to procedures already provided for or available under the Order. Among others, these procedures obtain following a reorganization, when an agency or employing entity becomes the "successor" to another

<sup>13/</sup> For example, the Assistant Secretary did not even consider the impact on "efficiency of agency operations," of a combined unit of employees of different components having different missions, regulations, and organizations. Nor did he consider such impact on "effective dealings," except in a later footnote when he in effect simply characterized this problem as "the responsibility of management" to resolve.

<sup>14/</sup> The instant case is clearly distinguishable from National Weather Service, A/SLMR No. 331, FLRC No. 74A-16 (July 21, 1975), Report No. 77, in which the Council upheld the unit findings of the Assistant Secretary although such findings were not couched in the precise language of the Order. In that case, unlike here, there was no countervailing evidence that the units would not promote effective dealings and efficiency of agency operations. Moreover, the substance of the Assistant Secretary's decision in that case reflected affirmative determinations and the according of equal weight required under 10(b).

agency or employing entity which had granted exclusive recognition to a labor organization in an appropriate unit under section 10(a) of the Order.<sup>15/</sup> We now consider the criteria for determining "successorship," the consequences of such relationship, and the relevant procedures provided for or available under the Order.<sup>16/</sup>

In our view, an agency or employing entity is a "successor," i.e., stands in the stead, of another agency or employing entity for purposes of according exclusive recognition under 10(a) when: (1) the recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization.

Stated otherwise, the gaining employer (whether by inter or intra agency transfer) takes the place of the losing agency or employing entity as a "successor" under 10(a) when the substantive elements of recognition continue without material change after the subject reorganization. In these circumstances, there is no requirement that a new secret ballot election be conducted, since the election requirement in 10(a) was already satisfied at the time the previous recognition was accorded.<sup>17/</sup> If these criteria of "successorship" are fully met, the gaining employer bears the same obligation to grant recognition to the incumbent union as that borne by the losing entity, under section 10(a) of the Order.

The existence of a "successor" relationship may, under rules which may be established by the Assistant Secretary,<sup>18/</sup> be: (1) voluntarily acknowledged

15/ Section 10(a) provides:

Sec. 10. Exclusive recognition. (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative. . . .

16/ Of course, the principles here discussed do not apply if the reorganization does not involve different gaining and losing employing entities.

17/ If after a reorganization a question concerning representation is duly raised by the employees or a rival labor organization, then, as provided in the Order, a new secret ballot election would be required.

18/ Section 6(d) of the Order provides:

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.

. . . . .

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

by the agency; or (2) properly determined and so certified by the Assistant Secretary, either in a representation proceeding or, if such proceeding is not initiated, in the context of an unfair labor practice complaint. However, as discussed under Issue 1, supra, the Assistant Secretary's rules must enable the gaining employer to initiate a representation proceeding in order to resolve its good faith doubts as to the representative status of the incumbent, without incurring the risk of an unfair labor practice finding. Moreover, in deciding "successorship," the Assistant Secretary must continue to apply the pertinent provisions of the Order, such as the criteria in 10(b) for determining the appropriate unit, in the manner considered at length under Issue 3, supra.

To repeat, the gaining employer as a "successor" assumes the same duty as the losing employer to grant recognition to the incumbent labor organization under section 10(a) of the Order. This does not mean that the "successor" is required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union. To hold otherwise would, as in instances such as here involved, impose upon the gaining employer an agreement entered into with a different employing entity having different objectives and different organizational and regulatory policies and would frequently, as here, disrupt the operating capabilities of the gaining employer and the accomplishment of its assigned mission. Moreover, to require maintenance of the agreement entered into with the predecessor would subject the labor organization and employees to terms and conditions of employment negotiated under a different work situation with, for example, a different and possibly more restrictive regulatory framework. Consequently, a required adoption of the earlier agreement would plainly conflict with the interests of the agency, the labor organization and the employees, and with the paramount need to protect the public interest and would be contrary to the underlying purposes of the Order.

While the gaining employer which is established as a "successor" is thus not required to adopt and be bound by the agreement of its predecessor, it is nevertheless enjoined under the Order to adhere so far as practicable to the personnel policies and practices and matters affecting working conditions, including dues withholding, provided in the earlier agreement, until the "successor" has fulfilled its bargaining obligation under the Order with the incumbent union. Moreover, until the question of "successorship" is resolved or until any other issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the like), the gaining employer is likewise enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible.<sup>19/</sup> As stated in this

---

<sup>19/</sup> If as a result of a reorganization a determination is made that the gaining employer is not a "successor," then of course such employer owes

(Continued)

regard in the Report accompanying E.O. 11838 concerning the status of negotiated agreements pending proceedings on issues raised by reorganizations:<sup>20/</sup>

. . . [E]xisting recognitions, agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final decisions on issues raised by reorganizations. . . .

Accordingly, in his disposition of the instant case upon remand, the Assistant Secretary is directed to apply the foregoing principles to relevant issues which may be reached with respect to the subject reorganization.

ISSUE 5. Effect of Civil Service Commission Regulations Concerning Dues Withholding.

Section 21 of the Order provides with respect to dues withholding as follows:

Sec. 21. Allotment of dues. (a) When a labor organization holds exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when--

- (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or
- (2) the employee has been suspended or expelled from the labor organization. [Underscoring supplied.]

---

(Continued)

no duty to bargain with the labor organization which previously represented the affected employees. While we appreciate that there is an impact on employees in such a situation, exclusive recognition is dependent on meeting the requirements of sections 10(a) and 10(b) of the Order and these requirements have been carefully designed to foster the development of a sound Federal labor-management relations program. Moreover, employees and labor organizations are not precluded thereafter from exercising their rights under the Order to organize and seek to establish appropriate units under section 10.

<sup>20/</sup> Labor-Management Relations in the Federal Service (1975), at p. 51.



On February 15, 1972, the Civil Service Commission (CSC) issued implementing regulations (5 CFR 550.301, et seq.), which read in pertinent part as follows:

§ 550.322. Limitation and discontinuance of allotment.

(c) Except as provided in paragraph (d) of this section, an agency shall discontinue paying an allotment when the allotter . . . transfers between agencies, moves or is reassigned . . . within the agency outside the unit for which the labor organization has been accorded exclusive recognition; . . . or when the dues withholding agreement between the agency and the labor organization is terminated, suspended, or ceases to be applicable to the allotter.

(d) An agency may permit an employee, transferring in from another agency, or transferring within the same agency, to continue on a temporary basis to make an allotment for dues to a labor organization under the following conditions:

(1) The transfer of the employee is in connection with a transfer of function or reorganization; and

(2) The employee was in a unit of recognition, which unit was transferred in whole or part to another agency, or different organizational group within the same agency.

(3) A substantial question of successorship exists, that is, a question as to whether the union which held exclusive recognition for the unit is eligible to retain the recognition previously granted to it by the losing agency; and

(4) The continuation of dues allotment is on a temporary basis until such time as the recognition status of the unit is clarified.

The agreement between IAM and APGC in the present case provided for dues withholding when authorized by employees in the APGC unit. The Assistant Secretary, as already mentioned, found that DSA violated section 19(a)(5) and (1) of the Order by refusing to maintain this agreement, and that DSA additionally violated 19(a)(1) by threatening to terminate the dues withholding authorized under this agreement 6 months after the 15 unit employees were transferred to DSA, if no representation petition was filed. Since these findings as to the illegality of DSA's conduct relating to the termination of dues withholding were predicated on the conclusion that DSA was bound by the IAM-APGC agreement, he did not reach the question as to whether DSA's conduct was consistent with the above-quoted CSC regulations, as required under section 21 of the Order.

We have previously rejected the co-employer doctrine upon which the Assistant Secretary based DSA's liability under the agreement; and, for reasons indicated under Issue 4, supra, even if DSA were a "successor" to APGC with respect to the transferred employees, DSA would not be bound by the APGC

agreement. Accordingly, we turn to the question of whether DSA's conduct conformed with the applicable CSC regulations.

The regulations issued by CSC, sanctioning the temporary extension of dues withholding arrangements following an agency reorganization, are plainly consistent with and implementive of the language and purposes of the Order.<sup>21/</sup>

Further, without passing upon whether section 550.322(d) of the CSC regulations is mandatory in nature, we find that DSA completely satisfied the policies set forth therein. More fully in this regard, the stipulated record shows that DSA, by letter of March 21, 1973, requested an interpretation by CSC of section 550.322(d), questioning particularly whether it would be consistent with that regulation to extend dues allotments of employees transferred during this reorganization "for six months plus whatever additional time is required to process any petition filed during that period through the Labor Department." On March 23, 1973, CSC provided such interpretation, which among other things, set forth the underlying intent of the regulations<sup>22/</sup> and answered in the affirmative the question as to the consistency of the continued dues withholding with the subject regulations.

In accordance with established Council practice, we hold that the interpretation by CSC of its own regulations is binding upon the Council.<sup>23/</sup> And as it is clear that DSA, in its conduct with respect to terminating dues withholding in the instant case, strictly adhered to CSC's interpretation of section 550.322(d), we find that such conduct complied with CSC regulations as required under section 21 of the Order and was not thereby violative of section 19(a)(5) or section 19(a)(1) of the Order.

---

21/ Ibid.

22/ According to CSC:

The intent of Section 550.322(d) of the Commission's regulations is to reduce, to the extent possible, any adverse impact relating to dues withholding as a result of agency reorganizations and transfers of functions. To this end, the provisions of this regulation should be given a liberal interpretation in their application. Such interpretation allows the continued administration of existing dues withholding agreements pending the resolution of representation and successorship issues incident to agency reorganization.

23/ For application of this policy in an unfair labor practice case, see National Labor Relations Board, Region 17, and National Labor Relations Board, Assistant Secretary Case No. 60-3035 (CA), FLRC No. 73A-53 (October 31, 1974), Report No. 59.

ISSUE 6. Propriety of Extending Decision and Order to "Similarly Situated" Labor Organizations.

As previously stated, the Assistant Secretary found that, in view of the scope of the subject reorganization, a broad cease and desist order was warranted in the instant case. Thus, in addition to ordering DSA to cease and desist from refusing to recognize IAM and refusing to honor the IAM-APGC agreement, the Assistant Secretary also directed DSA to cease and desist from refusing to recognize "similarly situated labor organizations," and refusing to honor existing negotiated agreements of such organizations at other DPDO's.

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 to require such affirmative action to be taken as he deems appropriate to effectuate the policies of the Order. While we reaffirm the Assistant Secretary's authority to fashion appropriate remedies, we also reaffirm the Council's authority to review such remedial orders under section 4(c) of the Order.<sup>24/</sup> Based upon such review herein, while we do not rule that broad cease and desist orders may not be appropriate in any instance, we find that such broad remedial action would not effectuate the purposes of the Order in circumstances such as here presented.

Few problem areas in Federal labor-management relations may involve a greater variety of facts and circumstances or greater potential for different results than issues arising out of agency reorganizations. As pointed out in the Report accompanying E.O. 11838 concerning the status of negotiated agreements during reorganizations:<sup>25/</sup>

Each reorganization presents distinct labor-management relations problems when it affects employees in units of exclusive recognition and the problems are compounded when the affected units are covered

24/ As the Council stated in the AVSCOM case, note 2, supra, at p. 5 of Council decision in AVSCOM:

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.

25/ Labor-Management Relations in the Federal Service (1975), at p. 50.

by negotiated agreements or dues withholding arrangements. Reorganization situations can give rise to a number of appropriate unit, recognition and agreement status questions. Additionally, those questions can involve myriad combinations of variable factors.

The Council has concluded that in view of the wide variety of representation questions that can emerge from the diverse factual configurations of the agency reorganization situations that have been experienced, or that can be envisioned, a contextual approach to resolution of those problems is required. The need to ensure an equitable balancing of the legitimate interests of the agencies, labor organizations and employees involved in reorganizations, as well as the paramount need to ensure the protection of the public interest in all instances, counseled this course of action.

Accordingly, the Report recommended (and the President adopted this recommendation) that:

Each reorganization-related problem should be dealt with on a case-by-case basis within the particular factual context in which it has arisen. Any policies, principles or standards deemed necessary in this area of the program should be formulated and declared in the context of a case decision on the basis of the policies contained in the existing provisions of the Order rather than through amendment of the Order.

In the instant case, the Assistant Secretary was called upon to determine the respective rights and obligations of IAM and DSA with respect to DPDO employees at Aberdeen Proving Ground who were transferred to DSA from the APGC unit. The resolution of these matters, as discussed hereinbefore, requires determinations as to unit appropriateness, substantiality of transfers, existence of questions concerning representation, bona fides of the agency, and the like. No other labor organization was a party to the proceeding and the critical circumstances necessary to the disposition of these questions in the context of other units and other components were not stipulated or developed in the record.

Thus, a broad cease and desist order not only conflicts with the case-by-case requirement in the Order for resolving reorganization-related problems, but also the essential facts upon which to predicate the necessary findings and determinations by the Assistant Secretary, for purposes of deciding compliance with his broad order, are not even presently available. As a consequence, substantial expenditures of time and funds would be required by the labor organizations, DSA and the Assistant Secretary to conduct extensive proceedings relating to compliance. Moreover, additional expenditures would be required in those instances where the labor organizations were found not to be "similarly situated" and where separate representation or unfair labor proceedings were thereafter initiated.

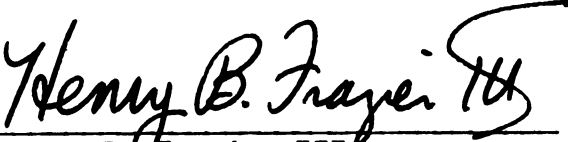
In summary, while we commend the apparent objective of the Assistant Secretary to reduce the multiplicity of proceedings deriving from the subject reorganization, we repeat, as stated in our discussion of Issue 2, supra, that the resolution of such problems must be consistent with the purposes of the Order and such problems may be averted by established adjudicative techniques. Here, the broad cease and desist order of the Assistant Secretary would be contrary to the contextual approach to reorganization situations required by the Order. Moreover, such a broad order would be counter-productive and inappropriate, since it would potentially enhance the multiplicity of proceedings and would impose unnecessary expenditures of time and money upon labor organizations and agencies, contrary to the public interest.

Accordingly, we find that the Assistant Secretary improperly extended his decision and order to "similarly situated labor organizations" and we set aside his decision and order in that respect.

#### CONCLUSION

For the foregoing reasons and pursuant to section 2411.18(b) of the Council's Rules and Regulations, we set aside the Assistant Secretary's decision and order and remand the case to him for appropriate action in a manner consistent with our decision herein.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: December 9, 1975

NUCO Ind. and Labor Management Services Administration (U.S. Department of Labor). The dispute involved the negotiability under the Order of a union proposal concerning "flexitime" for unit employees.

Council action<sup>\*\*/</sup> (December 22, 1975). The Council found, contrary to the union's contentions, that the agency regulation, as interpreted by the agency head, upon which his determination of nonnegotiability was based, was a proper limitation on the scope of negotiations under section 11(a) of the Order, as then currently effective. Accordingly, the Council found that the agency head's determination as to the nonnegotiability of the union's proposal was proper and must be sustained.

\*\*/ The Secretary of Labor did not participate in this decision.

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

NUCO Ind.

and

FLRC No. 75A-27

Labor Management Services  
Administration (U.S. Department  
of Labor)

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During the course of negotiations between the National Union of Compliance Officers (the union) and the Labor Management Services Administration, U.S. Department of Labor (LMSA), a dispute arose concerning the negotiability of the following union proposal concerning "Flexitime" for unit employees:

ARTICLE \_\_\_\_\_

HOURS OF WORK

SECTION 1:

The normal work day shall be the regularly established work hours for each Area office, Monday through Friday, consisting of eight (8) hours per day, and forty (40) hours per week.

SECTION 2:

Unit employees may establish a Flexitime working schedule consistent with the enunciated principles listed below:

- A. Core Time: All employees will be present and on duty status from 9:30 A.M. until 3 P.M., excluding lunch periods, during each work day.
- B. Flexible Time: Employees may chose [sic] to schedule work days beginning at any time between the hours of 6 A.M. and 9:30 A.M. and ending the work day between 3 P.M. and 6 P.M.
- C. The total number of such scheduled hours of work will not exceed eight (8) hours per day.

- D. Each Area Office will be adequately staffed to handle telephone inquiries and visitors during the regularly established hours of work.
- E. Conflicts between employees competing for the same duty hours will be resolved on the basis of seniority.
- F. Flextime working schedules apply only while the employees are located at their regular duty stations.

SECTION 3:

All work performed outside of established work schedules shall be compensated for by paid overtime or compensatory leave, computed at the rate of one and one half (1 1/2) hours of compensatory leave for each hour of overtime work at the option of the employee.

SECTION 4:

Accrued compensatory leave may be used by employees subject to the approval of the Area Director. Such approval cannot be withheld unless it can be demonstrated that the granting of such leave would seriously impair the efficiency of the Area Office.

SECTION 5:

Employees will not be required to take compensatory time off when away from their official duty station.

Upon referral, the Department of Labor determined, in effect, that negotiation on the union's proposal is barred under the Order by published Department of Labor regulations.<sup>1/</sup> 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.<sup>2/</sup>

1/ The regulations relied on (Department of Labor Supplement (DLS) 610) provide in pertinent part:

SUBCHAPTER 1. WEEKLY AND DAILY SCHEDULING OF WORK

1-1. GENERAL PROVISIONS

a. Authority of departments. The authority within the Department of Labor to establish hours of duty rests with the Director of Personnel.

2/ In its statement of position, the agency requested the Council to dismiss the union's appeal as moot, on the grounds that the parties reached agreement on a contract which deals with the disputed matter otherwise

(Continued)



## Opinion

The issue in this case is whether the agency's regulations, as interpreted by the agency head, may properly bar negotiation of the union's proposal under section 11(a) of the Order.<sup>3/</sup> The agency contends that the proposal conflicts with agency regulations established at an organizational level of the agency above the LMSA level, which regulations establish a national agency policy beyond the authority of LMSA to modify through negotiations. The union claims, without supporting citations, that "flexitime" is "allowable" under law and Civil Service Commission issuances and that, therefore, the agency regulations, interpreted and applied by the agency head to bar negotiations, in effect improperly limit the bargaining obligation under section 11(a) of the Order.

Assuming without the necessity of passing on the matter that "flexitime" is "allowable" under law and Civil Service Commission issuances as the union asserts,<sup>4/</sup> in our view the union's contention that the agency regulations in question are improper as a bar to negotiations under section 11(a) is without merit.

Section 11(a) of the Order, as currently effective, establishes a bargaining obligation limited, among other ways, by the phrase "so far as may be

---

(Continued)

subject to Council review, and which contains neither a saving clause nor operative reopening clause. In support the agency cited AFGE Local 1960 and Naval Air Rework Facility, Naval Air Station, Pensacola, Florida, FLRC No. 70A-6 (January 7, 1971), Report No. 2, Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 73A-10 (May 23, 1973), Report No. 39 and AFGE Local 1199 and Commander 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, FLRC No. 73A-47 (December 12, 1973), Report No. 46. We adhere to the principle established by the cited cases. However, we find such principle inapplicable in the present case since the agency did not establish that the collective bargaining agreement, upon which its claim was based, had been executed.

<sup>3/</sup> The agency, in its statement of position, also contended that the union's proposal is excluded from the bargaining obligation by section 12(b) of the Order. In view of our decision herein, we find it unnecessary to reach and, therefore, make no ruling as to this contention.

<sup>4/</sup> As indicated, the union cites no specific provisions of law or CSC issuances to support its assertion. Moreover, such a claim that "flexitime" is "allowable," i.e., that it is neither prohibited nor required, under law and CSC issuances does not in any manner raise an issue before us as to whether the agency regulations involved themselves violate such law and CSC issuances.

appropriate under . . . published agency policies and regulations . . . ."5/  
As to the meaning of this language in section 11(a), the Council has indicated in previous decisions that this section of the Order, as well as section E.1. of the 1969 Report to the President,6/ by reference to such policies and regulations as an appropriate limitation on the scope of negotiations, fully supports the authority of the agency head to issue regulations governing the operation of his agency and the conduct of his employees.7/ Further, in this regard, the Council has held that the "applicable . . . published agency policies and regulations" which may properly limit negotiations under section 11(a) are those "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." [Emphasis in original.]8/

5/ More fully, section 11(a) provides, in pertinent part, that:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, . . . shall meet . . . and confer . . . 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.

6/ Labor-Management Relations in the Federal Service (1969), p. 38.

7/ See, e.g., American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, FLRC No. 74A-67 (November 28, 1975), Report No. 92; National Association of Government Employees and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, FLRC No. 74A-20 (January 27, 1975), Report No. 62; Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 17, 1973), Report No. 44; Seattle Center Controller's Union and Federal Aviation Administration, FLRC No. 71A-57 (May 9, 1973), Report No. 37; 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.

8/ United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30; accord, cases cited note 7 supra.

Turning to the record in this case, the agency indicates that DLS Supplement 610 [note 1, supra] which prescribes that "only the Agency Director of Personnel is authorized to establish hours of duty of agency employees," applies uniformly and equally to all subordinate activities of the agency. The agency further states that "the reason for retaining this authority at the agency level is to achieve some degree of uniformity between the hours of work of the subordinate activities in the field offices served by the Department." Finally, the agency indicates this uniformity is necessary "to achieve effective communication between the various subordinate activities" and "to accomplish effective direction and control over the activities in order to maintain efficiency in the administration and coordination of Departmental programs."

The record further indicates, with respect to the union's proposal, as previously set forth herein, that it would grant discretion to individual employees to set, within stated limits, the times when they would begin and end their workdays, i.e., their hours of duty, in conflict with the intended purposes and effect of the agency regulation as above stated.

In these circumstances, we find that DLS Supplement 610 was issued to achieve a desirable degree of uniformity and equality in the administration of the hours of duty at all subordinate activities of the agency. No factors or circumstances are before us which indicate that this agency regulation violates any law or regulation of appropriate authority outside the agency. Nor do we find anything in the regulation itself or in the circumstances surrounding its issuance which improperly limits the bargaining obligation imposed by section 11(a) of the Order as currently effective. Therefore, consistent with the Order and prior Council decisions,<sup>9/</sup> the regulation is 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 organizational levels of the agency under section 11(a) of the Order.

Accordingly, we must find the agency regulation, as interpreted by the agency head, to be a proper limitation on the scope of negotiations under section 11(a), as currently effective.<sup>10/</sup> Therefore, the agency head's

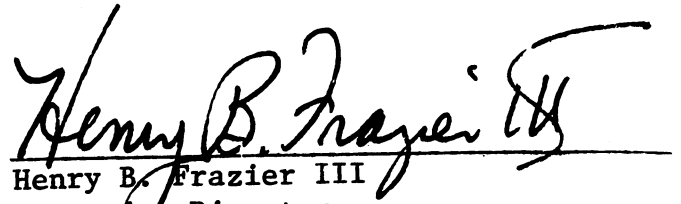
---

<sup>9/</sup> Cases cited notes 7 and 8 supra.

<sup>10/</sup> In this regard we do not, of course, pass on whether the agency regulation would properly limit negotiations under section 11(a) and (c) of E.O. 11491 as recently amended by E.O. 11838. That is, we do not pass upon whether there is a "compelling need" for the regulation under Part 2413 of the Council's Rules and Regulations (40 FR 43884).

determination as to the nonnegotiability of the proposal was proper and, pursuant to section 2411.28 of the Council's rules of procedure, that determination must be sustained.<sup>11/</sup>

By the Council.<sup>12/</sup>

  
Henry B. Frazier III  
Executive Director

Issued: December 22, 1975

<sup>11/</sup> The union's request for oral argument is also denied since the issues and the positions of the parties in this case are adequately reflected in the record before the Council.

<sup>12/</sup> The Secretary of Labor did not participate in this decision.

National Federation of Federal Employees Local 405 and U.S. Army Troop Support Command, St. Louis, Missouri. The dispute involved the propriety of the agency's action under section 15 of the Order, in withholding approval of a provision of the local parties' agreement on the ground that the provision conflicted with agency regulations.

Council action (December 22, 1975). The Council held that the agency's disapproval of the disputed provision under section 15 of the Order, based on its determination that the provision conflicted with agency regulations and was nonnegotiable, was proper and must be sustained

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

National Federation of  
Federal Employees Local 405

and

FLRC No. 75A-111

U.S. Army Troop Support Command,  
St. Louis, Missouri

DECISION ON NEGOTIABILITY ISSUE

Background

National Federation of Federal Employees Local 405 (the union) negotiated with the U.S. Army Troop Support Command an agreement, subject to agency approval under section 15 of the Order, containing the following provision:

Members of locally constituted rating panels will be of the same grade or higher and qualified in the series and grade of the vacancy under consideration, except the President and 1st Vice President may be the Union member of any panel.

The U.S. Army Materiel Command reviewed the agreement, pursuant to section 15, and disapproved the above-quoted provision on the ground that it violates Department of the Army regulations (specifically Department of the Army Civilian Personnel Regulation (CPR) 335.3-6h).<sup>1/</sup> Upon referral, the Department of the Army similarly determined that the provision violates CPR 335.3-6h and denied the union's request for an exception to the regulation. The union thereupon filed with the Council a petition for review of the agency's determination and the agency submitted a statement of its position.

1/ CPR 335.3-6h provides:

h. Rating procedures.

(1) The screening of candidates to determine basic eligibility normally will be a function of the servicing civilian personnel office.

(2) When multiple rating is used, there should be three raters, who will be Army personnel, military and/or civilian. In any case:

(a) For key managerial positions, including all those with supervisory responsibilities, raters will occupy positions which are (organizationally or by grade) at least equal to the position to be filled, and will be thoroughly familiar with the kind and level of responsibilities involved.

## Opinion

The dispute involves the propriety of the agency's withholding approval, under section 15 of the Order, of a provision of the local parties' agreement on the ground that the provision conflicts with agency regulations.

Section 15 of the Order provides that:

An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. . . . [Emphasis supplied.]

The agency contends that the provision in question is nonnegotiable because it conflicts with CPR 335.3-6h and, hence, was properly disapproved under section 15.

The union contends in substance that the agency acted improperly by invoking agency regulations to deny approval of the provision once it had been agreed upon by the local parties. In support of this contention the union relies upon our decision in the recent GSA Region 3 case,<sup>2/</sup> which also involved agency disapproval, pursuant to section 15 review, of a locally agreed-upon provision. As explained below, however, the circumstances in the GSA case were significantly different from those of the instant case and, thus, the principle there established is inapplicable to the present dispute.

In GSA Region 3 the agency contended and the Council found that the disputed provision, to which the local parties had already agreed prior to agency review, concerned matters which were excepted by section 11(b) of the Order from the agency's obligation to bargain. The Council further found, however, that section 15 of the Order required agency approval of the provision at issue. In this regard, the Council reasoned as follows:

[W]hile there is no requirement that matters within the ambit of section 11(b) be negotiated, the Order does permit their negotiation

---

(Continued)

(b) For all other positions, raters will occupy positions at a level no lower than that of the position being filled, and will be capable of making informed decisions regarding criteria and qualification in the occupational field.

(3) Staffing specialists will serve as advisers to the raters, and assure that raters are trained in evaluation methods.

2/ AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75, at part 1 of the decision.

so that an agreement which results from the negotiation of such matters does not, thereby, fail to conform to the Order. Therefore, since the agency in the instant case, through its local bargaining representative, negotiated and reached agreement on the proposal in dispute as permitted by the Order, the agency cannot, after that fact, change its position during the section 15 review process. Such agreement conforms to the Order and under section 15 it must be approved.

Accordingly, the Council set aside the agency's determination that the disputed proposal was nonnegotiable and could not be approved.

Turning to the present case, the union, relying on the GSA Region 3 decision, argues that:

[I]f a local bargaining representative of an agency can bind Management to an agreement including matters about which Management is not obligated to negotiate pursuant to section 11(b), it can also bind Management to an agreement which conflicts with an agency regulation.

The union's argument is without merit. The GSA case involved matters which were within the agency's option to bargain under section 11(b) of the Order, and the question presented was whether, after the agency's local bargaining representative had exercised that option by agreeing to the disputed provision, the agency had authority under section 15 to disapprove the provision. The Council found that no such authority was reserved to the agency under section 15. In contrast, the instant case involves a provision determined to be violative of agency regulations, and section 15 in effect reserves authority to an agency head (or his designee) to disapprove an agreement if it does not conform to existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation).<sup>3/</sup>

Accordingly, as the agency here determined that the disputed provision conflicts with agency regulations, we must conclude, apart from other considerations, that disapproval of the provision pursuant to section 15 of the Order was proper.<sup>4/</sup>

---

3/ Cf. 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), Report No. 41. In the instant case no exception to agency regulations was granted.

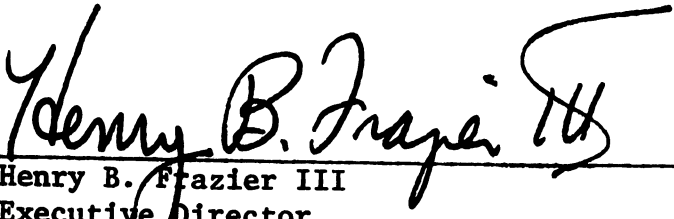
4/ In this regard we do not, of course, pass on whether the agency regulation would properly limit negotiations under sections 11(a) and 11(c) of E.O. 11491 as recently amended by E.O. 11838. That is, we do not pass upon whether there would be a "compelling need" for the regulation under Part 2413 of the Council's Rules and Regulations (40 Fed. Reg. 43884 (1975)).



Conclusion

Based on the foregoing, and pursuant to section 2411.28 of the Council's rules of procedure, we hold that the agency's disapproval of the instant provision under section 15 of the Order, based on its determination that the provision conflicts with agency regulations and is nonnegotiable, was proper and must be sustained.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: December 22, 1975

American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator). The arbitrator determined that the agency had cause to discipline the grievant, but concluded that the penalty, a written reprimand which was to be retained in the grievant's official personnel folder for a period of 2 years, was too severe; and directed that retention of the reprimand be reduced to 1 year. The agency filed exceptions to the award with the Council, principally contending that the award violated an agency regulation. The agency also requested a stay of the arbitrator's award.

Council action (December 24, 1975). The Council concluded that, under the facts of this case and the relevant scope of the term "appropriate regulation" in section 2411.32 of the Council's rules, the agency's exceptions did not present a ground upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 24, 1975

Mr. Robert T. McLean, Chief  
Labor & Employee Relations Division  
Directorate of Civilian Personnel  
Headquarters U.S. Air Force  
Department of the Air Force  
Washington, D.C. 20314

Re: American Federation of Government  
Employees, Local 2612 and Department  
of the Air Force, Headquarters 416th  
Combat Support Group (SAC), Griffiss  
Air Force Base (Gross, Arbitrator),  
FLRC No. 75A-45

Dear Mr. McLean:

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

As stated in the award, the agency issued a written reprimand to the grievant for failing, for the second time within 6 weeks, to use proper eye protection devices while operating a grinding machine as required by the agency's safety regulations in Air Force Manual 127-101. The grievant had been counseled regarding proper eye protection following the first incident. The written reprimand was to be recorded in the grievant's official personnel folder for a period of 2 years. Thereafter, the employee filed a grievance seeking to have the reprimand rescinded. The grievance was ultimately submitted to arbitration.

The parties submitted the following issue to the arbitrator:

Was the reprimand given the Grievant, Dante Di Pietra, for just cause and administered in a fair and equitable manner under Article 25, Section 1.<sup>1/</sup> If not, what should the remedy be?  
[Footnote added.]

1/ Section 1 of Article 25 (DISCIPLINARY ACTIONS) of the parties' collective bargaining agreement provides as follows:

Disciplinary actions will be based on just cause, initiated promptly and administered in a fair and equitable manner.

The arbitrator determined that the agency had cause to discipline the grievant for his second violation of safety regulations. However, the arbitrator concluded that the penalty was too severe for two reasons. First, the grievant's initial violation of the safety regulations was the result of an unintentional mental lapse, the nature of which management itself recognized as slight. Second, the subsequent violation alone did not constitute sufficient grounds to warrant a written reprimand of 2 years' duration "as defined in Air Force Regulation 40-750," which agency regulation had been introduced as a joint exhibit in the arbitration proceeding. Therefore, the arbitrator ordered the duration of the written reprimand reduced to 1 year.

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

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

The agency's first exception contends that the arbitrator's award, by reducing the duration of the reprimand to 1 year, violates "applicable regulation,"<sup>2/</sup> specifically paragraphs 15(b)<sup>3/</sup> and 19(b)<sup>4/</sup> of Air Force Regulation (AFR) 40-750 which provide that the retention period for a reprimand is 2 years.

2/ The Council's rules concerning review of arbitration awards provide for the granting of review on grounds that the award violates "appropriate regulation." The Council has construed the agency's petition as alleging a violation of an "appropriate regulation."

3/ Paragraph 15b of AFR 40-750 provides as follows:

b. Reprimands are temporary records whose retention period is 2 years from the date of the notice of decision to reprimand. Expired reprimands are screened from official personnel folders and are destroyed. References to expired reprimands are deleted from AF Forms 971. The notice of decision to reprimand informs the employee of the expiration date of the reprimand and that the reprimand will be destroyed upon expiration.

4/ Paragraph 19b of AFR 40-750 provides in pertinent part as follows:

b. Reprimand. A reprimand is a disciplinary action which is temporarily recorded in the employee's Official Personnel Folder for 2 years.

(1) It is used for significant misconduct and repeated lesser infractions and to motivate improved performance when the cause of the inadequate performance is within the employee's control.

The agency asserts that the reprimand of the grievant was issued under the policy and provisions of AFR 40-750, paragraph 19 of which defines the agency disciplinary structure; that agency policies and requirements must be applied unless waived in the agreement but there was no waiver in the case herein; and that paragraph 19(b)(3) of AFR 40-750 provides for making a reprimand more but not less severe. The agency argues that the arbitrator by reducing the retention period to 1 year substituted his personal belief as to what constitutes an appropriate retention period for the 2-year period defined in paragraphs 15b and 19b of AFR 40-750 and, therefore, his award violates those paragraphs of AFR 40-750.

In its second exception the agency contends that the award is not based on provisions of the agreement which make it clear that "Air Force policies and requirements must be applied unless they are waived in the agreement." In support of this exception the agency points out that although the arbitrator had a copy of AFR 40-750 before him and, in fact, quoted paragraph 19b(2) of that regulation, he cited neither an agreement provision nor a regulatory provision giving him authority to render an award reducing the period of the reprimand and no such authority exists in the agreement. Thus, in effect, the agency contends that the arbitrator exceeded his authority by fashioning a remedy contrary to AFR 40-750.

The agency's third exception is that the arbitrator exceeded his authority by, in effect, altering the agreement. The agency contends that the arbitrator's award effectively alters the provisions of Article 3, Section 1

---

(Continued)

(2) The reprimand is a severe disciplinary action which should be adequate for most disciplinary situations which require an action more stringent than an oral admonishment. For purposes of determining the existence of a prior offense in support of the penalty to be established for a subsequent offense, a reprimand has the same weight as a suspension.

(3) A reprimand may be made more "severe" in the sense of establishing a progression of penalties by including reference to previous offenses, indication of the seriousness of management's concern with the continued misconduct or delinquency, and progressively more rigorous statements that a future offense could result in a more severe penalty. A reprimand may be the last step in a progression before removal if it gives clear warning that a further offense could lead to removal.

and Article 25, Section 1 of the agreement.<sup>5/</sup> If the award is sustained, the agency contends, Article 3, Section 1 will effectively read ". . . by published agency policies and regulations in existence at the time the agreement was approved except when an arbitrator chooses otherwise . . .," and Article 25, Section 1 will effectively read "[d]isciplinary actions as defined by the arbitrator after the fact. . . ."

In essence, each of the agency's three separately stated exceptions are based upon the contention that the award violates an agency regulation by reducing the letter of reprimand from 2 to 1 year's duration.<sup>6/</sup> The predicate of the agency's exceptions is that, in the circumstances of this case, AFR 40-750 — an agency regulation — is an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules; hence, an award inconsistent with the agency regulation herein is violative of an appropriate regulation and, therefore, should be set aside.

As previously indicated, the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates an appropriate regulation. Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (May 19, 1975), Report No. 70 at p. 4 of the digest. The question, then, is whether or not the Air Force regulation at issue is, in the circumstances of this case, an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules such that the Council will, if the facts and circumstances described in the petition warrant it, grant a petition for review of the award.

5/ Article 3, Section 1 of the agreement provides as follows:

Section 1. In the administration of all matters covered by this agreement, officials and employees are governed by the provisions of any existing or future laws and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

Article 25, Section 1 provides:

Section 1. Disciplinary actions will be based on just cause, initiated promptly and administered in a fair and equitable manner.

6/ In the alternative, the second and third exceptions could be read as challenging the award on the ground that the arbitrator exceeded his authority in fashioning his remedy. See note 12, infra.

in cases to date in which the Council has accepted and subsequently modified an arbitrator's award based in part on a violation of an "appropriate regulation," the regulations at issue were Civil Service Commission regulations implementing specific provisions of title 5, United States Code.<sup>7/</sup> In American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61, the union contended in its petition for Council review that the award violated an agency staff manual and therefore violated an "appropriate regulation." However, the Council, without passing on whether the agency staff manual is an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules, concluded that the union's exception did not appear to be supported by the facts and circumstances described in the petition. (In other cases<sup>8/</sup> the Council has held that the interpretation of contract provisions, including the interpretation of agency policies and regulations on matters within agency discretion where those policies or regulations are specifically incorporated in a negotiated agreement, are matters to be left to the judgment of the arbitrator. Hence, a challenge to the arbitrator's interpretation of such agency policies or regulations on the ground that the arbitrator misinterpreted and therefore violated such regulations, does not present a ground upon which the Council will grant a petition for review of an arbitration award.)

Thus, where the Council has accepted a petition for review of an arbitrator's award on the ground that it violates an appropriate regulation, the appeal has involved a regulation issued by an authority outside the agency. The question in this case, on the other hand,

7/ E.g., American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator), FLRC No. 73A-51 (September 24, 1974), Report No. 57, wherein the Council found, based upon the advice of the Civil Service Commission, that the award, to the extent that it directed a retroactive promotion and backpay, violated applicable law and appropriate regulation.

8/ Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78; Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator), FLRC No. 75A-9 (July 24, 1975), Report No. 78; Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Eigenbrod, Arbitrator), FLRC No. 75A-15 (July 24, 1975), Report No. 78; Federal Aviation Administration, Kansas City, Missouri and Professional Air Traffic Controllers Organization (Yarowsky, Arbitrator), FLRC No. 75A-54 (July 24, 1975), Report No. 78.

involves circumstances where an arbitrator, in interpreting and applying a contract provision, renders an award which the agency says is in violation of an agency regulation which deals with the same subject and which was submitted by the parties for consideration by the arbitrator in fashioning his award. While it is recognized that under section 12(a) of the Order an agency's regulations are binding in the administration of a negotiated agreement,<sup>9/</sup> the Council is of the opinion that where, as in this case, an arbitrator, in the course of rendering his award, considers an agency regulation which deals with the same subject matter as the provision in the negotiated agreement and which was introduced by the parties to the dispute, and thereafter considers and applies that regulation in reaching his judgment in the case, the agency may not challenge the application of that regulation before the Council.<sup>10/</sup>

---

9/ Section 12(a) provides:

(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;

In Bureau of Prisons and Federal Prison Industries, Inc., Washington, D.C. and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74, the Council cited from the Report accompanying the 1975 amendments to E.O. 11491 as follows:

. . . arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation. [Report No. 74 at p. 13.]

10/ This conclusion is consistent with the recent amendments made to section 13 of the Order by Executive Order 11838, February 6, 1975. Under the provisions of that section the parties to an agreement may now agree to resolve grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, through their negotiated grievance procedure.



As to the facts of this particular case, the arbitrator was empowered by the parties to determine whether or not the reprimand was for just cause and administered in a fair and equitable manner, and, if not, what the remedy should be. As the Council has indicated, an arbitrator derives his authority from both the collective bargaining agreement and the submission agreement.<sup>11/</sup> Here, the award shows that the issue submitted by the parties authorized the arbitrator to decide "what should the remedy be" if he determined that the reprimand was not for "just cause and administered in a fair and equitable manner" under Article 25, Section 1 of the agreement. The arbitrator determined in essence that while the reprimand was for cause, the reprimand was not administered in a fair and equitable manner and he ordered the penalty reduced to be commensurate with the offense. In so doing, the arbitrator did precisely what the parties commissioned him to do. That is, he answered the question submitted: "What should the remedy be?"

In finding that the penalty did not "fit the offense committed," the arbitrator specifically mentioned and quoted from AFR 40-750, submitted by the parties as a joint exhibit, and stated that the violation did not warrant a written reprimand of 2 year's duration as defined therein. In reducing the reprimand to 1 year's duration the arbitrator was, under the provisions of Section 1 of Article 25 of the collective bargaining agreement and the submission agreement, in effect, considering and applying the agency's regulations and imposing the penalty of reprimand in a manner which he deemed appropriate for the offense committed. In conclusion, under the facts of this case and in accordance with the discussion herein regarding the scope of the term "appropriate regulation" in the Council's rules, the agency's exceptions that the arbitrator's award violates an agency regulation do not present a ground upon which the Council will grant a petition for review of an arbitration award.<sup>12/</sup>

---

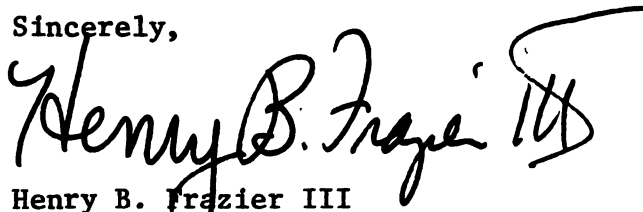
11/ See American Federation of Government Employees, Local 12 (AFGE), and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42, n. 12 and accompanying text.

12/ Likewise, should the second and third exceptions be viewed as challenging the award on the ground that the arbitrator exceeded his authority in fashioning his remedy, the Council must conclude, for the reasons discussed above concerning the facts of this particular case, that the agency's exceptions are not supported by facts and circumstances as required by section 2411.32 of the Council's rules of procedure. See Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator). FLRC No. 74A-88 (July 24, 1975), Report No. 78, citing Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56. See note 6, supra.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "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. W. Mulholland  
AFGE

James A. Gross

Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida, A/SLMR No. 514. The Assistant Secretary, upon a complaint filed by Local 2624, American Federation of Government Employees (AFGE), found that the agency violated section 19(a)(1) and (5) of the Order. The agency appealed to the Council, contending that the Assistant Secretary acted arbitrarily and capriciously and that his decision raised major policy issues.

Council action (December 24, 1975). The Council held that the agency's petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue or appear in any manner arbitrary and capricious. Accordingly, the Council denied the agency's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 24, 1975

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

Re: Army and Air Force Exchange Service,  
MacDill Air Force Base Exchange,  
MacDill Air Force Base, Florida,  
A/SLMR No. 514, FLRC No. 75A-61

Dear Mr. Edwards:

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

In this case, Local 2624, American Federation of Government Employees (AFGE), filed a complaint against the Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida (the activity). The complaint alleged that the activity violated section 19(a)(1) and (5) of the Order by its unilateral decision to revoke dues authorizations for three employees who had been members of a 300-employee unit represented exclusively by AFGE at the activity prior to being administratively transferred to a newly created organizational entity, the Central Florida Area Exchange (Area Exchange) within the Southeast Exchange Region of AAFES-CONUS.

The Assistant Secretary, in agreement with the Administrative Law Judge, found that the activity violated section 19(a)(1) and (5) of the Order. The Assistant Secretary found that the three maintenance employees who were the subject of the complaint remained within the unit exclusively represented by AFGE, and that, accordingly, they continued to be represented by AFGE in the exclusively recognized bargaining unit subsequent to the establishment of the Area Exchange. He found, therefore, that the activity's conduct constituted an improper withdrawal of recognition from the union in derogation of the activity's obligation "to accord appropriate recognition to a labor organization qualified for such recognition" and thus constituted a violation of section 19(a)(5) of the Order. Moreover, the Assistant Secretary found that such conduct interfered with, restrained, or coerced employees in the exercise of their rights assured by the Order in violation of section 19(a)(1).

In your petition for review on behalf of the activity, you contend that the Assistant Secretary acted arbitrarily and capriciously by giving precedential value to his decision in the DSA case<sup>1/</sup> which the Federal Labor Relations Council had accepted for review on the grounds that it presented certain major policy issues, which major policy issues are substantially identical to the controlling issues in the instant case. You contend further that the Assistant Secretary's decision raises a major policy issue in that he applied the "co-employer" principle herein, a principle which the Council has already described as presenting major policy issues. Finally, you contend that a major policy issue is raised in that the instant decision addresses, by indirect reference, the application of the Council's decision in the AVSCOM case,<sup>2/</sup> a point under review by the Council in connection with the DSA case.

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

Each of your contentions is grounded, either expressly or impliedly, on the premise that the Assistant Secretary "adopted without change" the recommended decision and order of the ALJ in the present case. Based upon this premise, you contend that the Assistant Secretary endorsed the ALJ's application, in the instant case, of the principles established in the Assistant Secretary's decision in DSA (and, hence by indirect reference, by his application of the Council's decision in AVSCOM therein). However, the Assistant Secretary adopted the ALJ's findings, conclusions and recommendations only to the extent that they were consistent with his own conclusions. The findings and conclusions of the Assistant Secretary are not based on either the "co-employer" principle set forth in his decision in the DSA case or upon an improper application of the Council's decision in the AVSCOM case. In fact, the Assistant Secretary did not rely upon or cite either case in his decision herein. Rather, as stated above, the Assistant Secretary concluded, based on the facts, that the disputed employees remained in an existing unit of employees of the Army Air Force Exchange Service.<sup>3/</sup> Moreover, the Assistant Secretary clearly possesses discretionary authority to decide a case before him even though it arguably raises issues similar to those posed by an earlier decision currently before the Council on appeal. Accordingly, no major policy issue is presented warranting Council review. Moreover, the Assistant Secretary's decision is not without reasonable justification in the circumstances of the case.

1/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360.

2/ Headquarters, United States Army Aviation Systems Command, FLRC No. 72A-30 (July 25, 1973), Report No. 42.

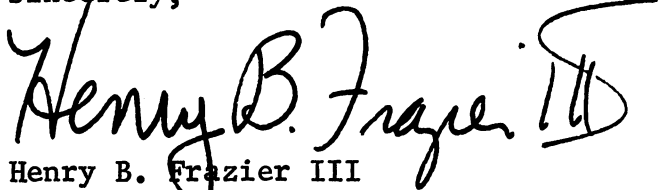
3/ On December 9, 1975, the Council issued its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen,

(Continued)

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

By the Council.

Sincerely,

  
Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

W. Mudgett  
AFGE

---

(Continued)

Maryland, A/SLMR No. 360, FLRC No. 74A-22, concluding, in pertinent part, that the co-employer doctrine, as fashioned and applied by the Assistant Secretary in the circumstances of that case, was improper and may not be relied upon by him in his reconsideration upon remand of the case; and further concluded that the Assistant Secretary did not make the required affirmative determinations and did not accord equal weight to each criterion under section 10(b) of the Order, citing Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69. The activity in the instant case did not raise issue with the continued appropriateness of the existing unit and the Assistant Secretary's findings in this regard therefore are not at issue herein.

United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519. The Assistant Secretary, upon a complaint filed by National Federation of Federal Employees, Local 1552, found, in pertinent part, that the Agricultural Research Service's conduct in disapproving an agreement of the local parties was violative of section 19(a)(6) of the Order. The agency appealed to the Council, contending essentially that the Assistant Secretary's decision appeared arbitrary and capricious and presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (December 24, 1975). The Council held that the agency's petition did not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present major policy issues. Accordingly, since the agency's petition failed to meet the requirements for review provided in section 2411.12 of the Council's rules of procedure, the Council denied review of the petition. The Council likewise denied the agency's request for a stay of the Assistant Secretary's decision.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 24, 1975

Mr. S. B. Pranger  
Director of Personnel  
Office of the Secretary  
U.S. Department of Agriculture  
Washington, D.C. 20250

Re: United States Department of  
Agriculture and Agricultural  
Research Service, A/SLMR  
No. 519, FLRC No. 75A-65

Dear Mr. Pranger:

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

The National Federation of Federal Employees, Local 1552 (the union) filed a complaint in this case alleging a violation of section 19(a)(6) of the Order by the Director of Personnel of the Agricultural Research Service (ARS). The complaint alleged, in pertinent part, that the Director of Personnel of ARS had disapproved an agreement negotiated by the union and a local activity under ARS even though no authority to approve or disapprove such agreements under section 15 of the Order had been delegated to him. According to the findings of fact of the Administrative Law Judge, as adopted by the Assistant Secretary, the local parties signed an agreement and transmitted it to ARS Headquarters on October 13, 1972. The Director of the Personnel Division of ARS returned the agreement to the local parties on November 10, 1972, with some nineteen required changes. A revised agreement incorporating the changes was signed by the local parties on May 25, 1973, and transmitted by ARS to the Department for approval on June 11, 1973. On July 23, 1973, the Assistant Director of Personnel advised ARS that further revisions would be required and the local parties were so advised on August 3, 1973. The ALJ further found that the designated officer for section 15 review of agreements is the Department's Director of Personnel and that ARS has not been delegated any authority to approve agreements under section 15 of the Executive Order.

The Assistant Secretary, in agreement with the ALJ, found, in pertinent part, that the ARS' conduct was violative of section 19(a)(6) of the Order. In so doing, he rejected the ARS' contention that the ARS' Personnel Director was acting as an appropriate approval authority under section 15 of the Order when he returned the locally signed agreement to the parties. He found that the interpretation and application of the Department Personnel



Manual by the ARS to establish a dual level of approval for executed negotiated agreements and ARS' returning the agreement to the local parties was inconsistent with the intent of section 15 and with the ARS' obligation under section 11(a) to meet at reasonable times and confer in good faith. The Assistant Secretary concluded that the establishment of intermediate, independent approval authorities is inconsistent with the intent of section 15. However, he noted that an agency may choose to delegate its approval authority to an intermediate level, or, in the alternative, to provide that an intermediate official review the executed agreement and forward it, with any comment, to the designated section 15 approval authority.

In your petition for review, you contend essentially that the Assistant Secretary's decision in this case appears arbitrary and capricious and presents major policy issues with respect to: (1) whether the ARS has agency status within the meaning of the Order, and specifically, in this regard, whether the Assistant Secretary's finding that it does not is contrary to previous rulings of the Council; (2) whether section 15 of the Order prohibits more than one level of review of negotiated agreements, and specifically, whether the Assistant Secretary's finding in this regard is founded upon any previous case law or legitimate rationale; and (3) whether the Assistant Secretary has the authority to determine that agency regulations are contrary to the Order or, alternatively, to require that they be interpreted in a particular way when the question of their interpretation or application is not raised in connection with an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, and whether the Assistant Secretary exceeded his authority in so finding.

In the Council's view, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present major policy issues.

With respect to your first contention, the Council is of the opinion that in the circumstances presented, noting particularly that the Assistant Secretary was merely observing that the agency's use of the term "agency" differs from the definition of "agency" contained in section 2(a) of the Order, the subject decision does not raise a major policy issue warranting Council review. Moreover, it does not appear that the Assistant Secretary's observation in this regard conflicts with Council precedent or that his decision is in any other manner arbitrary and capricious.

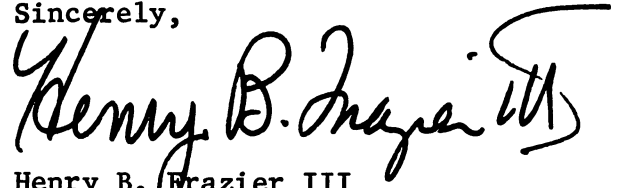
As to your second contention, in our view the Assistant Secretary's conclusion that ARS violated section 19(a)(6) of the Order by requiring two levels of approval of negotiated agreements with each level having the authority to return such agreements for conformance with applicable laws, the Order, existing published agency policies and regulations and regulations of other appropriate authorities is not without reasonable justification and presents no major policy issue. In so ruling, we construe the Assistant

Secretary's decision as providing that an agency may establish as many intermediate levels of review as desired, under the amended Order, as long as (1) the entire review process is completed within a single 45 day period as provided in section 15 and (2) such intermediate levels of review defer final action on the agreement to the single designated section 15 review authority. (In this regard, while such intermediate level review official may send an advisory opinion to the local level while forwarding his comments to the appropriate section 15 authority, the parties to an agreement in such a situation would have no obligation to renew negotiations until a final review is accomplished and the agreement remanded to them by the designated section 15 review authority.)

Finally, with respect to your third contention that the Assistant Secretary exceeded his authority by interpreting agency regulations in the context of the instant proceeding, in the Council's view, noting particularly that the Assistant Secretary is clearly authorized under sections 6 and 19(a) of the Order to decide whether agency management has violated the Order, including deciding whether, in appropriate circumstances, the issuance, interpretation or application of agency regulations constitutes an unfair labor practice, the Assistant Secretary's decision in this regard does not appear arbitrary and capricious nor present a major policy issue warranting Council review.

Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of your petition is hereby denied. The request for a stay of the Assistant Secretary's decision is likewise denied.

Sincerely,



Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

J. Cooper  
NFFE

Federal Employees Metal Trades Council of Vallejo, California and Mare Island Naval Shipyard. The union filed a petition for review of a negotiability dispute. It appeared from the record that the parties had entered into a written agreement containing a provision identical to that alleged by the petition to be in dispute; the agreement expires on July 25, 1977; and, insofar as here pertinent, is subject to reopening only upon mutual consent of the parties.

Council action (December 24, 1975). Relying on its decision in AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, FLRC No. 73A-47 (Report No. 46), and the cases cited therein, the Council found that the issues raised in the union's appeal had been rendered moot by the agreement between the parties and dismissed the union's petition.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 24, 1975

Mr. Billy B. Sweigart  
President, Federal Employees  
Metal Trades Council  
P.O. Box 2195  
Vallejo, California 94592

Re: Federal Employees Metal Trades  
Council of Vallejo, California  
and Mare Island Naval Shipyard,  
FLRC No. 75A-97

Dear Mr. Sweigart:

The Council has carefully considered your petition for review of a negotiability dispute, and your submission supplementing that petition, in the above-entitled case. You note that while you believe the dispute has been mooted, your appeal is intended to protect your interests and to prevent an agency ruling of nonnegotiability from going unchallenged.

It appears from the entire record that the parties to this case have entered into a written collective bargaining agreement containing a provision identical to that alleged by your petition to be in dispute. That agreement expires on July 25, 1977, and, insofar as here pertinent, is subject to reopening only upon mutual consent of the parties.

The Council has indicated in previous decisions that a negotiability dispute is rendered moot when the parties execute a collective bargaining agreement which deals with the disputed matter otherwise subject to Council review and the agreement contains neither a saving nor an operative reopening clause. See AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, FLRC No. 73A-47 (December 12, 1973), Report No. 46, and cases cited therein. Those cases are considered controlling over the instant dispute.

Accordingly, as the Council finds that the issues raised in your appeal have been rendered moot by the agreement between the parties, your petition is hereby dismissed.

By the Council.

Sincerely,

Henry B. Frazier III  
Executive Director

cc: S. M. Foss  
Navy

U.S. Department of Health, Education and Welfare, Social Security Administration, Grand Rapids, Michigan, Assistant Secretary Case No. 52-5578 (RO). This appeal arose from a decision of the Assistant Secretary upholding the denial by the Acting Assistant Regional Director (ARD) of a request by the National Federation of Federal Employees (NFFE) to intervene in a representation proceeding on a petition filed by the American Federation of Government Employees seeking certification as the exclusive representative of the employees in the unit involved. The Assistant Secretary denied NFFE's request for review of the Acting ARD's decision on the grounds that it was untimely filed under the Assistant Secretary's regulations. The Council accepted NFFE's petition for review on the grounds that the decision of the Assistant Secretary raised a major policy issue, namely: The procedural responsibilities of the Assistant Secretary under the Order, in the processing of matters brought before him pursuant to his regulations, to assure that the respective rights of the affected agencies, labor organizations and employees are protected. (Report No. 72.)

Council action (December 31, 1975). The Council determined that the Assistant Secretary's denial of NFFE's intervention request as untimely filed was not inconsistent with the purposes of the Order and that he met his procedural responsibilities under the Order to assure that the respective rights of the agency, labor organizations and employees were protected in processing the instant representation matter brought before him pursuant to his regulations. Accordingly, the Council sustained the decision of the Assistant Secretary.

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

U.S. Department of Health, Education and  
Welfare, Social Security Administration,  
Grand Rapids, Michigan

and

American Federation of Government Employees

and

National Federation of Federal Employees

Assistant Secretary  
Case No. 52-5578 (RO)  
FLRC No. 75A-19

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This is an appeal from a decision of the Assistant Secretary upholding the Acting Assistant Regional Director's denial of a request by the National Federation of Federal Employees (NFFE) to intervene in a representation proceeding. The Assistant Secretary denied NFFE's request for review of the Acting Assistant Regional Director's decision on the grounds that it was untimely filed under Section 202.5(c) of the Assistant Secretary's regulations, and that NFFE's contentions did not constitute good cause for extending the time period within which intervention must be filed.<sup>1/</sup>

Based upon the entire record in this case, the facts and circumstances are as follows: Since 1968, NFFE Local 143 had been the exclusive representative of the nonprofessional employees of the U.S. Department of Health,

---

<sup>1/</sup> Section 202.5(c) of the Assistant Secretary's regulations provides in pertinent part: "No labor organization may participate to any extent in any representation proceeding unless it has notified the Area Director in writing, . . . of its desire to intervene within ten (10) days after the initial date of posting of the notice of petition . . . unless good cause is shown for extending the period."

The Assistant Secretary issued revised rules and regulations on May 7, 1975. Since the amended regulations were issued subsequent to this appeal, they have no applicability herein; however, Section 202.5(e) has been amended to provide that ". . . an incumbent exclusive representative shall be deemed to be an intervenor in the proceeding. . . ."

Education and Welfare, Social Security Administration, Grand Rapids District (the activity). Its agreement with the activity was due to expire on October 4, 1974.<sup>2/</sup> On August 8, the American Federation of Government Employees, Local 3272, AFL-CIO (AFGE), filed a petition seeking certification as the exclusive representative for the above-described unit. The petition failed to name NFFE as the incumbent exclusive representative, instead showing AFGE as the incumbent and naming NFFE (with address "unknown") as an interested party. It also showed "10-5-72" as the date for the expiration of the current agreement.<sup>3/</sup> In addition, according to NFFE's uncontroverted contention and the absence of any statement of service, the petition was not served on NFFE pursuant to Section 202.2(e)(4) of the Assistant Secretary's regulations.<sup>4/</sup> Nevertheless, officers of NFFE Local 143 were notified immediately by the Detroit Area Office-LMSA of the filing of the petition.<sup>5/</sup>

Thereafter, by letter dated August 14, NFFE's Director of Field Operations at NFFE national headquarters requested a copy of the AFGE petition. His letter of request stated:

---

2/ Unless otherwise indicated, all of the events set forth herein occurred in 1974.

3/ Section 202.2(a) of the Assistant Secretary's regulations provides in pertinent part: "A petition by a labor organization for exclusive recognition . . . shall contain the following:

. . . . .

(3) Name, address, and telephone number of the recognized or certified representative, if any, and the date of such recognition or certification and the expiration date of any applicable agreement, if known to petitioner . . . ."

4/ Section 202.2(e)(4) of the Assistant Secretary's regulations, at that time, provided:

Simultaneously with the filing of a petition, copies of the petition . . . shall be served by the petitioner on all known interested parties, and a written statement of such service shall be filed with the Area Administrator. . . .

5/ In a letter dated September 13, to Irving I. Geller, NFFE's General Counsel, the Area Director for the Detroit Area Office-LMSA, stated: ". . . I would like to point out that Mr. Arthur Newell, President of NFFE, Local Union 143, and Ms. Dorothy Allen, Fifth Vice President of the Local, were notified immediately by telephone of our receipt of AFGE's petition."

It is my understanding that AFGE has petitioned for a Social Security unit located in Grand Rapids, Michigan.

This office would appreciate receiving a copy of the [petition] . . . since we were not served any paperwork by the petitioner.

NFFE Headquarters lists NFFE Local 143 as the exclusive representative for the referenced unit.

Although the request was inappropriately addressed to the Chicago Area Office, the Chicago Area Director forwarded it to the Detroit Area Office which has jurisdiction over the Grand Rapids, Michigan area, and simultaneously notified NFFE headquarters that he had done so. The Area Director in Detroit sent a copy of the petition to NFFE headquarters without delay.<sup>6/</sup> NFFE national headquarters received the requested petition on August 26.

A notice to all employees that the AFGE petition had been filed was posted at the activity from August 16 through August 26, in accordance with Section 202.4 of the Assistant Secretary's regulations.<sup>7/</sup> The Notice of Petition expressly stated that "any labor organization, including any incumbent labor organization, having an interest in representing the employees being sought and desiring to intervene in this proceeding MUST submit to the Area Administrator [redesignated Area Director], within 10 days from the posting of this notice . . . evidence that it is the currently recognized or certified exclusive representative of any of the employees involved."

6/ The Chicago Area Office received the NFFE request on August 16 and sent it to Detroit on August 20. NFFE received notice thereof on August 21. The Detroit Area Office received and complied with the request on August 22.

7/ Section 202.4 provides, in pertinent part:

Investigation of petition and posting of notice of petition; action by Assistant Regional Director.

(a) Upon the request of the Area Director, after the filing of a petition, the activity shall post copies of a notice to all employees in places where notices are normally posted affecting the employees in the unit involved in the proceeding.

(b) Such notice shall set forth:

(1) The name of the petitioner;

(2) The description of the unit involved;

(3) If appropriate, the proposed clarification of unit or the proposed amendment of certification or recognition; and

(4) A statement that all interested parties are to advise the Area Director in writing of their interest or position within ten (10) days from the date of posting of such notice.

(c) The notice shall remain posted for a period of ten (10) days. The notice shall be posted conspicuously and shall not be covered by other material, altered, or defaced.



On August 27, the day following its receipt of the AFGE petition from the Detroit Area Office and the end of the 10-day posting period, NFFE headquarters dispatched a telegram requesting intervention along with a letter of confirmation and a second letter amending the first.<sup>8/</sup> The Detroit Area Director received NFFE's telegram on August 28.

The Acting Assistant Regional Director denied NFFE's request for intervention as untimely filed. NFFE appealed to the Assistant Secretary, contending that the AFGE petition failed to name NFFE as the incumbent exclusive representative; that the petition was not served on NFFE; that NFFE sought information from the Department of Labor as soon as it became aware of the AFGE petition; that NFFE did not receive a copy of the petition until August 26, 1974; and that the posting of the Notice of Petition should not be held to constitute notice to NFFE because of collusion between the president of NFFE Local 143 and AFGE.

The Assistant Secretary found that:

[NFFE's contentions] do not constitute good cause for extending the time period within which intervention must be filed. Rather, in agreement with the Acting Assistant Regional Director, I find that the posting of the prescribed Notice of Petition constituted sufficient notice to afford all interested parties the opportunity to intervene timely in this matter. Moreover, . . . the evidence establishes that the NFFE was aware of the filing of the instant petition prior to the posting of the Notice of Petition. Thus, the NFFE, by letter dated August 14, 1974, made a request for a copy of the instant petition to the Chicago Area Office but made no mention in its letter of any intention regarding intervention. Under these circumstances, and as it is clear that the NFFE did not timely intervene during the prescribed 10-day posting period, it is concluded that [its] request for intervention was untimely.

Accordingly, he denied NFFE's request for review. NFFE then appealed to the Council, alleging that the Assistant Secretary's decision is arbitrary and capricious and that it presents a major policy issue, and requesting that a stay be granted.

The Council accepted NFFE's petition for review on the grounds that the decision of the Assistant Secretary raises a major policy issue, namely: The procedural responsibilities of the Assistant Secretary under the Order, in the processing of matters brought before him pursuant to his regulations, to assure that the respective rights of the affected agencies, labor organizations and employees are protected.<sup>9/</sup> NFFE and AFGE filed briefs on the issue; the agency took no position in the matter.

---

<sup>8/</sup> The second letter asserted that the AFGE petition should be dismissed as untimely filed on the basis of an agreement bar.

<sup>9/</sup> However, the Council denied NFFE's request for a stay as unwarranted under section 2411.47(c)(1) of its rules, based upon the facts and circumstances presented.

## Opinion

As noted above, the question for Council consideration is whether the Assistant Secretary, in denying NFFE's intervention request as untimely filed, has met his procedural responsibilities under the Order to assure that the respective rights of the agency, labor organizations and employees are protected in processing the representation matter brought before him pursuant to his regulations. For the reasons set forth below, we answer in the affirmative and therefore sustain the Assistant Secretary's determination.

In prior cases, the Council has stated that, "The Assistant Secretary must insure that, in the exercise of [his] responsibilities, the rights guaranteed Federal employees under section 1(a) are preserved."<sup>10/</sup> Where it has been determined that the Assistant Secretary's application of his regulations did not assure the protection of the rights of the agency, labor organizations or employees involved, the Council has set aside his decision and remanded the matter to him for appropriate action. Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412 (RO), FLRC No. 73A-60 (October 30, 1974), Report No. 59.<sup>11/</sup>

10/ Illinois Air National Guard, 182nd Tactical Air Support Group, A/SLMR No. 105, FLRC No. 71A-59 (November 17, 1972), Report No. 30; and Veterans Administration Hospital, Brecksville, Ohio, Assistant Secretary Case No. 53-4156, FLRC No. 72A-9 (April 17, 1973), Report No. 36, both involving --as here--Assistant Secretary determinations in representation proceedings pursuant to his responsibilities under section 6 of the Order.

11/ Compare Veterans Administration Hospital, Butler, Pa., Assistant Secretary Case No. 21-3923 (RO), FLRC No. 74A-5 (June 18, 1974), Report No. 54, wherein the Council denied an incumbent union's appeal from a decision of the Assistant Secretary that its untimely request to intervene in a representation proceeding should be rejected, finding that such decision did not appear arbitrary and capricious and did not present a major policy issue. The Assistant Secretary found that good cause had not been shown for extending the period for timely intervention, noting that the labor organization seeking exclusive recognition had served the incumbent union with a copy of its petition simultaneously with the filing thereof; that the Area Director had sent a letter notifying both the activity and the incumbent union of the petition; and that the official Notice of Petition had been posted at the activity as required by the Department of Labor, such Notice advising any incumbent union to file a request to intervene within 10 days of the posting. The Council found that the incumbent union's appeal "presents no persuasive reasons for overturning the Assistant Secretary's well-established policy that incumbent unions must timely intervene in representation elections pursuant to the requirements of the rules of the Assistant Secretary." (As previously noted, supra note 1, this policy has recently been changed so that an incumbent exclusive representative is deemed to be an intervenor in the proceeding.)

In Ellsworth, the Area Director notified an incumbent exclusive representative that a petition seeking exclusive recognition in that unit had been filed by a rival union, and gave written instructions to the incumbent as to the requirements for requesting intervention in the representation proceeding under Section 202.5 of the Assistant Secretary's regulations. The instructions failed to mention that simultaneous service of the intervention request on all interested parties was required. The incumbent union filed a timely request to intervene, and the Area Director (during the 10-day intervention period) notified the other parties that the request had been granted. However, after the close of the intervention period, the activity filed a motion to dismiss the intervention request on the ground that the incumbent union had failed to serve the request simultaneously on all interested parties. The Assistant Regional Director granted the motion to dismiss, and the Assistant Secretary thereafter upheld the Assistant Regional Director's denial of the request to intervene.

On appeal to the Council, we reaffirmed the Assistant Secretary's authority under section 6(d) of the Order to prescribe, interpret and apply regulations (specifically section 202.5(c)) in carrying out his functions and responsibilities enumerated in section 6(a) of the Order. We further stated, however, that

. . . the Assistant Secretary must apply his regulations in such a manner as to reasonably assure that the rights of affected agencies, labor organizations and employees under the Order are protected. This responsibility is particularly critical where, as here, the right of employees to select their exclusive representative may be abridged.

In applying the foregoing standard to the facts and circumstances of that case, we noted particularly that the Area Director had provided the incumbent union with what appeared to be a complete statement of the requirements for intervention but which did not mention the requirement for simultaneous service, and that the Area Director had subsequently informed all interested parties, including the incumbent union--while there was still time for the incumbent union to correct any deficiencies in its intervention request--that the incumbent was in compliance with the Assistant Secretary's regulations and had been permitted to intervene. We concluded that, in the circumstances presented, the Assistant Secretary had not applied his regulations so as to assure that the incumbent union's right to participate in the proceeding and the affected employees' right to select the exclusive representative of their choice were protected.

By contrast, in the instant case there is no basis for concluding that the Assistant Secretary applied his regulations so that the rights of the incumbent union or the unit employees were not protected. As previously noted, the Detroit Area Office immediately notified the president and another official of NFFE Local 143, the incumbent certified bargaining representative for the unit involved, that AFGE had filed a petition seeking certification therein.<sup>12/</sup> Further, while NFFE national headquarters

<sup>12/</sup> NFFE does not dispute that such notice was provided, but contends that it was ineffective since the president of NFFE Local 143 was in collusion

(Continued)

did not receive a copy of AFGE's petition until August 26, the last day for timely intervention, the Assistant Secretary did not fail to meet his responsibilities properly. Thus, as previously noted (supra page 3), while NFFE's letter of August 14 requesting a copy of the petition was misdirected to the Chicago Area Office, which thereby created a delay unattributable to the Assistant Secretary, the Chicago Area Director promptly forwarded the letter to the Detroit Area Office and notified NFFE that he had done so, such notice having been received at NFFE national headquarters on August 21. Thereafter, NFFE neither contacted the Detroit Area Office nor filed a request to intervene until after the August 26 deadline. For his part, the Detroit Area Director created no delay, since he sent NFFE a copy of AFGE's petition on August 22, the same day that he received the request. In addition, the Detroit Area Director insured that, consistent with Section 202.4 of the Assistant Secretary's regulations (supra note 7), the required notice of AFGE's petition was posted at the activity for 10 consecutive days. Such posting constituted constructive notice to NFFE and, as the Assistant Secretary concluded, provided "sufficient notice to afford all interested parties the opportunity to intervene timely in this matter."<sup>13/</sup>

While it might be contended that the Assistant Secretary's field personnel could have voluntarily taken additional steps to maximize the potential for NFFE's intervention, or that, under the total circumstances of the case, an extension of time to intervene should have been granted, we conclude that the Assistant Secretary, in the processing of this matter brought before him pursuant to his regulations, fulfilled his procedural responsibilities under the Order to assure that the respective rights of the affected agency, labor organizations, and employees were protected and that no prejudice resulted from the manner in which the Assistant Secretary processed this case.<sup>14/</sup> Thus, in this regard we note in particular that NFFE was provided

---

(Continued)

with AFGE's attempt to represent the unit employees. However, any such internal union difficulties which may have resulted in a breakdown of communications between NFFE Local 143 and NFFE national headquarters cannot be attributable to the Assistant Secretary, whose personnel properly provided prompt actual notice of AFGE's petition to the certified bargaining representative.

<sup>13/</sup> Moreover, apart from the actual notice received by NFFE Local 143, NFFE national headquarters had actual notice of AFGE's petition even before the Notice of Petition was posted at the activity on August 16, since it requested a copy of the petition by letter dated August 14. Yet, NFFE's letter made no mention of any intention to intervene.

<sup>14/</sup> We do not pass upon NFFE's contention, which was neither timely raised before the Assistant Secretary nor considered by him, that AFGE's petition herein was untimely filed by virtue of an agreement bar.

actual and constructive notice sufficient to permit intervention before the end of the prescribed 10-day period. Therefore, we find that the Assistant Secretary's denial of NFFE's intervention request was not inconsistent with the purposes of the Order.<sup>15/</sup>

For the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we sustain the decision of the Assistant Secretary.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: December 31, 1975

<sup>15/</sup> Under the Assistant Secretary's revised regulations (supra note 1) making incumbent exclusive representatives "automatic" intervenors in representation proceedings, it is unlikely that a situation such as this one will arise in the future.

Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Doherty, Arbitrator). The Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged, in effect, that the arbitrator was without authority to fashion an award directing the agency to pay money, which was in the nature of punitive damages, to the union and that the award violated applicable law (Report No. 70).

Council action (December 31, 1975). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council found that because it is not legally permissible for the agency to pay to the union money which has been awarded in the nature of punitive damages, the arbitrator's award violates applicable law and may not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Office of Economic Opportunity

and

FLRC No. 75A-23

American Federation of Government  
Employees, Local 2677

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the remedy, in which the agency was directed to pay over money to the union, awarded by the arbitrator for the agency's admitted violation of the collective bargaining agreement, as found by the arbitrator.

Based on the findings of the arbitrator and the entire record, it appears that in July 1973, J. L. McCarty was employed by the agency as a \$100-a-day consultant for a period not to exceed 100 working days. The agency and the union amended their national agreement on September 11, 1973. The union filed a grievance in December 1973, alleging that McCarty's continued employment as a paid consultant violated Section 4 of the September 11, 1973, amendment.<sup>1/</sup> In January 1974, the agency refused the union's request for arbitration of the grievance and shortly thereafter filed an application for a decision as to arbitrability with the Assistant Secretary, who found the matter to be arbitrable. In February 1974, the Civil Service Commission (CSC) informed the agency that it was reviewing the duties performed by McCarty and would notify the agency if any corrective action were required. McCarty resigned on March 15, 1974. The arbitration hearing was held on April 10, 1974. On April 11, 1974, the CSC directed the termination of McCarty's appointment because two of the three types of duties he was performing were inappropriate to his appointment.

---

1/ Section 4 provides:

Consultants and experts will not be used to perform work that could be performed by OEO employees, and prior to any such employment, the union will be apprised as to the person, his qualifications for the position and the role this person is to perform.

During the arbitration hearing the agency stipulated that McCarty had performed work that could have been performed by regular career employees of the agency, in violation of Section 4 of the September 11, 1973, amendment.

#### The Arbitrator's Award

The arbitrator determined that, although neither the union nor any employee in the bargaining unit could show any direct damage as a result of the admitted violation by the agency of the agreement, a remedy would be designed "to ensure that future grievances of this type will be speedily and fairly resolved in a way which will encourage the harmonious relationships which collective bargaining agreements are supposed to establish." As a remedy, the arbitrator ordered the agency to "pay over to the Union an amount equal to five consulting days at the rate paid to McCarty." He directed that "[s]uch funds may be used by the Union for any purpose which is of direct benefit to all employees in the bargaining unit regardless of their membership in the Union." He further directed that "the Agency shall have a report on how these funds are spent so that they may assure compliance with this award."

#### Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions which allege, in effect, that the arbitrator was without authority to fashion an award directing the agency to pay over money to the union and that the award violates applicable law.<sup>2/</sup> The union filed a brief.

#### Opinion

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

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

The question before the Council is whether the arbitrator was without legal authority to fashion an award directing the agency to pay over money to the union, and, therefore, whether the award violates applicable law. Because this case concerns an issue within the jurisdiction

---

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



of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions, he was requested to decide whether the arbitrator's award violates applicable law. The Comptroller General's decision in the matter, B-180010, December 11, 1975, is set forth in relevant part as follows:

This decision is in response to a request from the Director of the Community Services Administration (hereinafter referred to as the "agency") as to whether it may disburse appropriated funds to implement an arbitrator's award of punitive damages to be paid by the agency to the union local (FMCS Case #74K07852, J. Lawrence McCarty Grievance). The Federal Labor Relations Council has also requested a decision whether the arbitrator's award (Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Doherty, Arbitrator), FLRC No. 75-A-23) violates applicable law.

The facts in this case, which for the most part are not in dispute, are as follows. On July 28, 1973, Mr. J. Lawrence McCarty was employed by the Office of Economic Opportunity (now the Community Services Administration) as a consultant. On December 7, 1973, Local 2677 of the National Council of OEO Locals, American Federation of Government Employees (hereinafter the "union"), filed a grievance with the agency alleging that Mr. McCarty's employment was in violation of section 4 of the September 11, 1973 Amendment to the National Agreement between the agency and AFGE which provides:

#### SECTION 4. CONSULTANTS AND EXPERTS

Consultants and experts will not be used to perform work that could be performed by OEO employees, and prior to any such employment, the union will be appraised [sic] as to the person, his qualifications for the position and the role this person is to perform.

The union sought Mr. McCarty's immediate removal, reimbursement of his salary to the U.S. Treasury, and an assurance that the agency would not hire any other consultants in violation of this provision.

The agency refused the union's request for arbitration and sought a decision from the Labor-Management Services Administration (Department of Labor) as to whether the matter was arbitrable. The parties were advised on February 14, 1974, that the matter was arbitrable, and an arbitration hearing was held on April 10, 1974. The agency stipulated that it had violated section 4 of the National Agreement, but it noted that Mr. McCarty had resigned from the agency on March 15, 1974. The

record also indicates that the Civil Service Commission directed the agency on April 11, 1974, to terminate Mr. McCarty's appointment on the ground that he was not performing proper consultant work.

The arbitrator's opinion and award, dated January 22, 1975, stated that neither the union nor any employee in the bargaining unit could show any direct damage as a result of the agency's admitted violation of the collective bargaining agreement. Nevertheless, the arbitrator concluded that the agency had not complied with the letter or the spirit of the agreement, and he, therefore, sought to fashion a remedy to undo any harm done and to ensure speedy and fair resolutions of future grievances of this type. After rejecting several suggested remedies, he directed the agency to pay the union a penalty payment, as follows (Opinion and Award, p. 7):

It is my decision that the Agency pay over to the Union an amount equal to five consulting days at the rate paid to McCarty. Such funds may be used by the Union for any purpose which is of direct benefit to all employees in bargaining unit regardless of their membership in the Union. I further direct that the Agency shall have a report on how these funds are spent so that they may assure compliance with this award.

The arbitrator stated that such an award was "consonant with the guidelines set by arbitrators in the non federal sector" and was not strange to the Federal sector in that:

The applicable agreement in this case providing as it does for assessment of the Arbitrator's fee is a direct monetary payment on the employee's behalf by the Agency as a form of penalty, and such payment inures directly to the Union for the benefit of all employees.

The Community Services Administration filed a petition for review with the Federal Labor Relations Council which was accepted, and the Council issued a stay of the arbitrator's award on April 16, 1975.

Executive Order 11491, as amended, 3 C.F.R. 254 (1974), governs labor-management relations between agencies of the executive branch and Federal employees and organizations representing those employees. Section 12 provides, in pertinent part:

SEC. 12 Basic provisions of agreements. Each agreement between an agency and 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 . . . .

The arbitrator in his opinion and award states that the payment of damages is consonant with the guidelines set by arbitrators in the non-Federal sector. However, there are fundamental differences between the objectives of and the authorities governing collective bargaining in the private and Federal sectors. See 54 Comp. Gen. 921 (1975). As noted above, under Executive Order No. 11491 all Federal sector collective bargaining agreements are subject to existing or future laws and regulations. Therefore, where an arbitrator's award is not authorized under such laws or regulations, it may not be implemented.

In the absence of any finding of direct damage to the union or any employee as a result of the agency's violation, we believe the award must be characterized as a penalty or punitive damages. We find no authority for awarding punitive damages against the United States or one of its agencies. Missouri Pacific Railroad Co. et al. v. Ault, 256 U.S. 554 (1921); Painter v. Tennessee Valley Authority, 476 F. 2d 943 (5th Cir. 1973); Littleton v. Vitro Corporation of America, 130 F. Supp. 774 (N.D. Ala. 1955); Wilscam v. United States, 76 F. Supp. 581 (D. Hi. 1948). In addition, the Federal Tort Claims Act specifically excludes recovery for punitive damages. 28 U.S.C. § 2674 (1970). It is, therefore, not legally permissible for the agency to pay to the union a sum amounting to \$500 which has been awarded in the nature of punitive damages. Nor can the award be sustained as an assessment of the arbitrator's fee because it is clearly intended as a penalty, entirely separate from the arbitrator's fees and expenses.

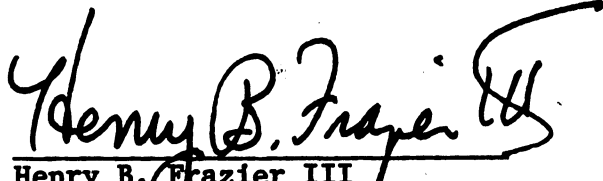
Accordingly, it is our decision that the arbitrator in this case exceeded his authority in ordering the agency to pay the union for five days of consultant's pay, and the award may not be implemented.

Based upon the foregoing decision by the Comptroller General, we must conclude that, because it is not legally permissible for the agency to pay to the union money which has been awarded in the nature of punitive damages, the arbitration award herein violates applicable law, and the award may not be implemented.

Conclusion

For the foregoing reasons, we find that, because it is not legally permissible for the agency to pay to the union money which has been awarded in the nature of punitive damages, the arbitration award herein violates applicable law, and the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award in its entirety.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: December 31, 1975

Federal Aviation Administration, Department of Transportation, Fort Worth Air Route Traffic Control Center and Professional Air Traffic Controllers Organization (Jenkins, Arbitrator). The arbitrator determined that the grievant was entitled to sick leave under the parties' collective bargaining agreement and ordered the agency to change the designation of the grievant's absence from annual leave to sick leave. The Council accepted the agency's petition for review insofar as it related to the agency's exception that the award violates law and applicable Civil Service Commission regulations (Report No. 82).

Council action (December 31, 1975). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council found that the arbitrator's award, insofar as it ordered the agency to change the designation of the grievant's absence from annual leave to sick leave, violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Federal Aviation Administration,  
Department of Transportation,  
Fort Worth Air Route Traffic  
Control Center

and

FLRC No. 75A-31

Professional Air Traffic Controllers  
Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from an award issued by the arbitrator, wherein he determined that the Federal Aviation Administration (the agency) violated Article 29, Section 2 of the negotiated agreement<sup>1/</sup> which the agency had entered into with the Professional Air Traffic Controllers Organization (the union). Based on the findings of the arbitrator and the entire record, the background of the case is as follows: The grievant was employed by the agency at the Fort Worth Air Route Traffic Control Center as an air traffic control specialist. On January 2, 1974, the grievant was awake most of the night attending sick members of his family. The next morning, the grievant called the acting assistant chief of the activity to inform him that he would not be in that day and to request leave. The specific type of leave requested and granted was not discussed. The grievance arose out of the fact that the activity designated grievant's 8-hour absence as annual leave rather than sick leave.

The dispute ultimately went to arbitration. The arbitrator concluded that an "upset father who has been up most of the night could not devote to the job the proper concentration and alertness that is required," and, therefore, grievant was incapacitated within the meaning of Article 29, Section 2 of the agreement. The arbitrator, determining that the incapacity in the instant case was caused through no fault of the grievant, found that the contract allowed the granting of sick leave under the circumstances and ordered the agency to change the annual leave to sick leave.

<sup>1/</sup> According to the award, Article 29, Section 2 of the agreement states, in pertinent part:

Approval of sick leave shall be granted to an employee who is incapacitated for the performance of his duties. Under certain circumstances involving contagious diseases as set forth in applicable statutes and regulations, sick leave shall be approved. . . .

## Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council alleging, among other things, that the award violates law and applicable Civil Service Commission regulations.<sup>2/</sup> Under section 2411.32 of the Council's rules of procedure, the Council accepted the agency's petition for review insofar as it related to that exception. Neither party filed a brief in the case.

### 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 that the award violates applicable law, appropriate regulation . . . ."

The question before the Council is whether the award ordering the agency to change the designation of the grievant's absence from annual leave to sick leave violates law and appropriate regulation. Since the Civil Service Commission has primary responsibility under 5 U.S.C. § 6311 for the issuance and interpretation of regulations governing the granting of sick leave, that agency was requested for an interpretation of the applicable regulations as they pertain to the questions raised in the instant case. The Commission replied in relevant part as follows:

In this case, the arbitrator determined that the agency's refusal to grant the grievant sick leave for incapacitation due to fatigue from caring for his sick children constituted a violation of the collective bargaining agreement. As a remedy, he ordered the agency to change the designation of the employee's absence from annual leave to sick leave.

The case in question is almost identical to one on which the Comptroller General ruled on September 2 of this year (decision no. B-181686) in response to a request from the Federal Aviation Administration concerning the implementability of an arbitrator's award. Based on an interpretation of Civil Service Commission regulations that we provided, the Comptroller General ruled that "the arbitrator's award granting sick leave to an employee who attended a sick member of his family not afflicted with a contagious disease, who as a result was not able to perform his duties, may not be implemented by the agency since there is no legal authority to grant sick leave in the circumstances."

---

<sup>2/</sup> The agency requested and the Council granted a stay of the award pending the determination of the appeal pursuant to section 2411.47(d) of the Council's rules of procedure which governed the granting of stays of arbitrator's awards when the stay was acted upon.

In our letter to the Comptroller General, we stated that although the employee may have been incapacitated to perform his duties as an Air Traffic Controller, he was not incapacitated for any of the reasons set forth in Civil Service Commission regulation 630.401 (5 Code of Federal Regulations) which provides for granting sick leave when the employee:

- "(b) Is incapacitated for the performance of duties by sickness, injury or pregnancy and confinement;
- (c) Is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; . . ."

We also informed the Comptroller General that Section 630.401 has always been strictly interpreted to mean that sick leave is appropriate only under circumstances that literally meet the requirements of the regulation. Further, we pointed out that the generous amounts of annual leave granted to Federal employees were authorized by law with the understanding that they were meant for more than vacations. Annual leave is to be used for a variety of personal and emergency reasons, e.g., transporting a member of the family who is ill, but not with a contagious disease; or being tired or fatigued because of loss of sleep due to any one of a number of causes, ranging from care of an ill member of the family to worry over family problems.

In light of the Comptroller General's acceptance of and concurrence in our long-standing interpretation of the cited regulation, we conclude that the arbitrator's award in the case described in paragraph one of this letter is in conflict with applicable law and Commission instructions.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the arbitrator's award, insofar as it orders the agency to change the designation of the grievant's absence from annual leave to sick leave, violates applicable law and appropriate regulation and, therefore, must be set aside.

#### Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: December 31, 1975



United States Department of Army, Headquarters, Army Materiel Command, Alexandria, Virginia, Assistant Secretary Case No. 22-5819. The Assistant Secretary denied the request of the National Federation of Federal Employees (NFFE), filed on behalf of NFFE Local 1332, seeking reversal of the Acting Assistant Regional Director's dismissal of the union's 19(a)(1) and (6) complaint, finding that the union did not present sufficient evidence to establish a reasonable basis for its contentions, and determining that further proceedings on the complaint were therefore unwarranted. NFFE appealed to the Council, alleging, insofar as pertinent to the findings of the Assistant Secretary, that his decision presented a major policy issue.

Council action (December 31, 1975). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue, and NFFE neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

December 31, 1975

Ms. Lisa Renee Strax, Legal Department  
National Federation of Federal Employees  
1737 H Street, NW.  
Washington, D.C. 20006

Re: United States Department of Army,  
Headquarters, Army Materiel Command,  
Alexandria, Virginia, Assistant  
Secretary Case No. 22-5819, FLRC  
No. 75A-99

Dear Ms. Strax:

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

In this case, you filed a complaint on behalf of Local 1332, National Federation of Federal Employees (the union), against United States Department of Army, Headquarters, Army Materiel Command, Alexandria, Virginia (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order by disregarding Civil Service Commission regulations and the agency's own merit promotion plan in filling position vacancies. The union further alleged that such conduct constituted a unilateral change in the policies and procedures under which the activity is to operate, since the union was given no opportunity for prior consultation or negotiation on such matters.

The Assistant Secretary, in agreement with the Acting Assistant Regional Director (ARD), decided that further proceedings were unwarranted. In reaching this determination, the Assistant Secretary stated:

. . . I find that the Complainant did not present sufficient evidence to establish a reasonable basis for its contention that the Activity changed its merit promotion policies subsequent to recognizing the Complainant as the exclusive representative of certain of its employees. Further, I find that the Complainant did not present sufficient evidence to establish a reasonable basis for its allegation that the Activity refused to meet and confer with the Complainant with regard to its merit promotion policies and procedures. See, in this regard, Section 203.6(e) of the Assistant Secretary's Regulations.

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

In your petition for review on behalf of the union, you allege, insofar as is pertinent to the findings of the Assistant Secretary, that the Assistant Secretary's decision presents a major policy issue as to "whether Section 203.6(e) of the Assistant Secretary's Rules requires a complainant to bear the burden of proving every element of the case at the time an unfair labor practice complaint is filed."<sup>\*</sup> In this connection, you assert that the burden of proof imposed by Section 203.6(e) of the Assistant Secretary's regulations merely requires the union to properly state a cause of action recognizable under the Order, and that further proceedings are required to fully resolve the contested factual issues.

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

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

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

Further, section 203.6(e) states:

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

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant

---

<sup>\*</sup>/ You also take issue in your appeal, essentially, with the Acting ARD's determination that the alleged unilateral changes, even if true, did not constitute violations of section 19(a)(1) and (6) of the Order. However, this determination was not relied upon by the Assistant Secretary in his decision and, apart from other considerations, it therefore provides no basis for your appeal.

Secretary was without authority to establish the above regulations, or that he applied these regulations in a manner inconsistent with the Order in the circumstances of this case.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "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

W. J. Schrader  
Army

INTERPRETATIONS AND POLICY STATEMENTS

---

January 1, 1975 through December 31, 1975



Several agencies jointly asked the Council to issue a policy statement to resolve a question as to whether Executive Order 11491, as amended, allows the Assistant Secretary of Labor for Labor-Management Relations to hear and rule on negotiability disputes in the context of unfair labor practice proceedings. The Council determined that the issue raised by their request had general application to the Federal labor-management relations program and included it among those to be considered in the recent general review of the program. Thus, the Council announcement dated December 18, 1973, which listed the areas to be focused upon during the review, included the following issue:

"Should the Assistant Secretary of Labor hear and rule on negotiability disputes that arise in the context of unfair labor practice proceedings under the Order?"

As a result of the review, the Council recommended that: "Sections 6(a) and 11 should be amended to assign to the Assistant Secretary express authority to resolve those negotiability issues which have arisen not in connection with negotiations, but rather in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions. In addition, sections 4(c) and 11 should be amended to permit a party adversely affected by such a determination to exercise a right to have the negotiability determination reviewed on appeal by the Council." The President subsequently approved amendments to the Order which, in pertinent part, added paragraph (d) to section 11.\*/ It provides that,

"If, as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal to consult, confer or negotiate as required under this Order, the Assistant Secretary may, in the exercise of his authority under section 6(a)(4) of the Order, make those determinations of negotiability as may be necessary to resolve the merits of the alleged unfair labor practice. In such cases the party subject to an adverse ruling may appeal the Assistant Secretary's negotiability determination to the Council."

Therefore, the Council, by reason of and to the extent of the amendments to the Order described above, determined that the Assistant Secretary of Labor does have authority to hear and rule on negotiability disputes in the context of unfair labor practice proceedings.

---

\*/ Corresponding amendments to sections 6(a) and 4(c) were also approved.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

March 3, 1975

Mr. William M. Russell  
Deputy Assistant Secretary  
for Personnel and Training  
Department of Health, Education,  
and Welfare  
330 Independence Avenue, SW.  
Washington, D.C. 20201

Mr. Arch S. Ramsay  
Director of Personnel  
Department of the Treasury  
15th and Pennsylvania Avenue, NW.  
Washington, D.C. 20220

Mr. S. B. Pranger  
Director of Personnel  
Office of the Secretary  
Department of Agriculture  
Washington, D.C. 20250

Mr. William C. Valdes  
Staff Director, Office of Civilian  
Personnel Policy - OASD (M&RA)  
Department of Defense  
The Pentagon, Room 3D281  
Washington, D.C. 20301

Mr. Wade B. Ropp  
Director of Personnel  
Department of Commerce  
Washington, D.C. 20230

Mr. Robert J. Alfultis  
Acting Director of Personnel  
and Training  
Department of Transportation  
400 7th Street, SW.  
Washington, D.C. 20590

Re: FLRC No. 73P-1

Gentlemen:

This is in further reply to your letter of March 14, 1973, requesting the Council to issue a policy statement concerning whether Executive Order 11491, as amended, allows the Assistant Secretary of Labor for Labor-Management Relations to hear and rule on negotiability disputes in the unfair labor practice proceedings before him.

The Council determined that the issue raised in your request had general application to the Federal labor-management relations program. The issue was included in the Council's recent general review of the labor-management relations program. Specifically, interested parties were asked:

Should the Assistant Secretary of Labor hear and rule on negotiability disputes that arise in the context of unfair labor practice proceedings under the Order?



Following the completion of its general review of the program, the Council made the following recommendation to the President:

Sections 6(a) and 11 should be amended to assign to the Assistant Secretary express authority to resolve those negotiability issues which have arisen not in connection with negotiations, but rather in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions. In addition, sections 4(c) and 11 should be amended to permit a party adversely affected by such a determination to exercise a right to have the negotiability determination reviewed on appeal by the Council.

In explanation of this recommendation the Council stated:

Executive Order 11491 established special procedures to resolve disputes over negotiability questions. Section 4(c)(2) gives the Council authority to consider "appeals on negotiability issues as provided in section 11(c) of [the] Order;" which section stipulates that "[i]f, 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: . . . (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, violates applicable law, regulation of appropriate authority outside the agency, or this Order."

Thus, if in connection with negotiations, a dispute arises over the negotiability of a proposal and that dispute meets the conditions prescribed in section 11(c) of the Order, it shall be resolved by the Council. The Study Committee Report and Recommendations of August 1969 which led to the issuance of Executive Order 11491 stated that a "labor organization should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the processes described . . . [in section 11(c) of the Order]."

Section 6(a)(4) of the Order, as currently formulated, gives the Assistant Secretary authority to "decide unfair labor practice complaints," including complaints under sections 19(a)(6) or 19(b)(6) that a party has "refused to . . . negotiate . . . ." The Assistant Secretary has consistently ruled that a party may not utilize the unfair labor practice provisions set forth in

section 19(a) of the Order as a means for resolving negotiability disputes which arise in connection with negotiations. Consistent with the Study Committee Report, the Assistant Secretary has held that section 19 provides a party in such circumstances the opportunity to file an unfair labor practice complaint alleging a refusal to negotiate only where the matter excluded from negotiation has already been determined to be negotiable through the procedures set forth in section 11(c) of the Order. In other words, the Assistant Secretary has declined to consider "refusal-to-negotiate" unfair labor practice complaints arising in connection with negotiations and posing negotiability issues unless there exists applicable Council precedent on which he can rely to resolve the negotiability issues.

We support the Assistant Secretary's position on this matter. Thus, the changes which we here propose would not affect the existing authority of the Council to resolve, under the section 11(c) procedures, negotiability disputes which arise in connection with negotiations nor would these changes affect the existing responsibility of the Assistant Secretary to rely upon Council precedent to resolve negotiability issues that arise in unfair labor practice cases.

The amendments which we propose would affirm the authority of the Assistant Secretary, in the context of certain unfair labor practice cases, to resolve negotiability issues, even though there is no existing Council precedent to guide him, so long as these issues do not arise in connection with negotiations between the parties but rather as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established personnel policy or practice, or matter affecting working conditions.

The principal argument set forth during the review by those opposed to the Assistant Secretary's exercise of such authority was that it would result in a bifurcation in the jurisdiction to make negotiability determinations (with the Council retaining the authority to determine negotiability questions raised in connection with negotiations); it was contended that this would lead to conflicting lines of precedential case authority. Furthermore, it was argued that in the absence of an aggrieved party's ability to have such determinations reviewed by the Council as a matter of right, these conflicts would tend to persist.

While this argument is not without merit, we are of the opinion that the purposes of the Order would be better served, on balance, by permitting the Assistant Secretary to exercise the authority to hear and rule on negotiability questions which arise in the

context of an unfair labor practice proceeding, resulting from a unilateral change in established personnel policies and practices and matters affecting working conditions rather than requiring such cases to come first to the Council.

Unnecessary additional steps in the adjudicatory process would be required if such negotiability issues were brought to the Council for initial adjudication. In those cases which involved alleged unfair labor practices, the Council, following its decision on the negotiability issue, would have to remand the matter to the Assistant Secretary for further action because section 6 of the Order charges the Assistant Secretary with responsibility for issuing decisions in unfair labor practice cases.

Moreover, as experience under the Order continues to grow, an increasing number of Council negotiability decisions will provide the Assistant Secretary with an ever-expanding body of authority upon which to draw in resolving cases where a unilateral action by one of the parties has given rise to an unfair labor practice complaint involving negotiability issues. As a result, instances in which he will be called upon to pass judgment on such issues on a first impression basis will tend to decline, thus reducing the opportunities for decisions to be made which would produce divergent precedents.

The Council also considered and rejected the alternative of requiring the Assistant Secretary to forward negotiability issues to the Council for determination when they appeared in the course of an unfair labor practice proceeding thus deferring his decision in the interim until the Council could resolve the issues concerned. Where negotiability issues arise in the context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such disputed issues of fact are best resolved through the adversary process of a formal hearing. For this reason, and because of the delays attendant in such a referral procedure, the Council does not believe that such an alternative is feasible or appropriate.

As a result of the foregoing considerations, we recommend that the Order be amended to provide the Assistant Secretary with express authority to resolve those negotiability issues which arise in the context of certain unfair labor practice proceedings--that is, those where a unilateral change in an established personnel policy or practice, or matter affecting working conditions, leads to a complaint that the acting

party has refused, thereby, to negotiate. The Council recognizes that negotiability issues decided by the Assistant Secretary under such circumstances may involve matters of critical importance to one of the parties concerned where an expeditious resolution of the negotiability issue is particularly desirable. Equally important is the need to reduce any divergence between Assistant Secretary decisions and Council determinations of negotiability to the absolute minimum. Thus, the Council recommends, in addition, that the Order be revised to provide that a party adversely affected by an Assistant Secretary negotiability determination will have a right to have such a determination reviewed on appeal by the Council. In such an appeal, the parties would be permitted to raise any pertinent issues and arguments with respect to the negotiability dispute and the Council would revise its rules so to provide. Further, the Council would revise its rules so that appeals of this type will receive priority consideration. (Footnote omitted.)

Following the submission of the Council's Report and Recommendations to the President, the Order was amended on February 6, 1975. In accordance with the Council's recommendations, paragraph (d) was added to section 11 of the amended Order. It provides that,

(d) If, as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal to consult, confer or negotiate as required under this Order, the Assistant Secretary may, in the exercise of his authority under section 6(a)(4) of the Order, make those determinations of negotiability as may be necessary to resolve the merits of the alleged unfair labor practice. In such cases the party subject to an adverse ruling may appeal the Assistant Secretary's negotiability determination to the Council.

Paragraph (1) of section 4(c) and paragraph (4) of section 6(a) were also amended in pertinent part to make them conform to the amendments to section 11 described above.<sup>1/</sup>

1/ Section 4(c)(1), as amended, reads: "(1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order, except where, in carrying out his authority under section 11(d), he makes a negotiability determination, in which instance the party adversely affected shall have a right of appeal;" (New language is underlined.)

Section 6(a)(4), as amended, reads: "(4) decide unfair labor practice complaints (including those when an alleged unilateral act by one of the parties requires an initial negotiability determination) and alleged violations of the standards of conduct for labor organizations;" (New language is underlined.)

Therefore, the Council has, by reason of and to the extent of the action described above, ~~determined~~ that the Assistant Secretary of Labor does have authority to hear and rule on negotiability disputes in the unfair labor practice proceedings before him.

By 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 flourish at the end.

Henry B. Frazier III  
Executive Director

cc: A/SLMR  
Dept. of Labor

The General Accounting Office, in the course of considering a request for a decision presented to it by the Acting Assistant Secretary of the Army (Financial Management), requested a Council statement and interpretation of Executive Order 11491, as amended, concerning the validity of the following agreement provision:

In recognition of the special circumstances currently in existence and the responsibilities involved in carrying out an effective labor-management program, it is agreed that the State Union Representative (SUR) will be administratively excused for half of each day of the school year and granted Leave Without Pay for the other half of each day to allow the necessary time to accomplish labor-management related activities.

Pursuant to section 4(b) of the Order and Part 2410 of the Council's rules and regulations (5 CFR 2410), the Council considered the matter and, in accordance with section 2410.6 of its rules of procedure (5 CFR 2410.6), solicited the views of interested parties.

The Council found that the only provision of the Order dealing specifically with the use of official time is section 20 and that the restrictions contained therein are specific rather than all-inclusive. The prohibitions contained in the first part of section 20 concerning the use of official time for internal union business are directed towards restricting to nonduty hours activities which are of primary concern and benefit only to the labor organization. The second part of section 20 prohibits employees who represent a labor organization from being on official time when negotiating an agreement, except to the extent that the negotiating parties agree otherwise within certain specified limits. Therefore, with respect to the issue presented, the Council determined that nothing in the Order prohibits an agency and labor organization from negotiating provisions which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.

Further, the Council indicated that the types of representational activities agreed to in this case, when the agency determines that such activities are related to the performance of union-management functions contributing to the efficient administration of the agency, would appear to be consistent with the stated purposes of the Order and noted that the agreement provision at issue pertaining to the use of official time for contract administration purposes is concordant with similar negotiated provisions currently of wide application throughout the Federal sector.



UNITED STATES  
FEDERAL LABOR RELATIONS COUNCIL

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

May 23, 1975

Mrs. Rollee Lowenstein  
Assistant General Counsel  
General Accounting Office  
441 G Street, NW.  
Washington, D.C. 20548

Re: Matter of GAO No. B-156287,  
FLRC No. 75P-1

Dear Mrs. Lowenstein:

This is in further reply to your letter of January 22, 1975, requesting a Council statement and interpretation of Executive Order 11491, as amended, concerning the validity of the following agreement provision:

In recognition of the special circumstances currently in existence and the responsibilities involved in carrying out an effective labor-management program, it is agreed that the State Union Representative (SUR) will be administratively excused for half of each day of the school year and granted Leave Without Pay for the other half of each day to allow the necessary time to accomplish labor-management related activities.

That provision is part of an agreement negotiated between the United States Dependents Schools, European Area (USDESEA) and the Overseas Federation of Teachers (OFT), American Federation of Teachers, AFL-CIO. The matter is before your Office as the result of a request submitted by the Acting Assistant Secretary of the Army (Financial Management) for an opinion from the Comptroller General as to the "legality or propriety of the agreement provision." In his request, the Acting Assistant Secretary states that the effect of this provision would be to "allow the Government employee - a mathematics teacher - to serve full time as a union official on union business for the three-year term of the labor agreement and receive one-half of his Government salary. Such a provision, if permitted to stand, would establish negotiation precedent for hundreds of Government employees who are union representatives." Therefore, the Acting Assistant Secretary states that the "Department of the Army . . . is concerned not only about the reasonableness of the negotiated provision but also its legality in view of the language in 31 U.S.C. 628" concerning

the expenditure of appropriated funds.<sup>1/</sup> Because the Department of the Army (Army) questioned both the propriety and the legality of the agreement provision in the light of certain provisions of Executive Order 11491 and its predecessor, Executive Order 10988, you requested a Council statement in order to assist you in your consideration of the matter. Pursuant to section 4(b) of Executive Order 11491, as amended, and Part 2410 of the Council's rules and regulations (5 CFR 2410), the Council has considered the matter.

Because determinations as to the granting of leave without pay appear to be solely within the discretion of the agency concerned,<sup>2/</sup> the Council has limited its consideration of the matter to that portion of the agreement provision which provides for the State Union Representative to be administratively excused for half of each day of the school year to accomplish labor-management related activities.

Following receipt of your request the Council, in accordance with section 2410.6 of its rules of procedure (5 CFR 2410.6), solicited the views of the parties to the agreement. The Department of Defense (DOD), in its response, pointed out that when Army reviewed the OFT-USDESEA agreement and reached a tentative conclusion that the provision in question could not be approved under section 15 of the Order, the matter was referred by Army to DOD for an agency head determination pursuant to section 11(c)(2)<sup>3/</sup>

1/ 31 U.S.C. 628 provides:

Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

2/ Section 12-2a of Subchapter 12 of Chapter 630 of the Federal Personnel Manual provides, in part:

The authorization of leave without pay is a matter of administrative discretion.

Section 12-3a of subchapter 12 provides:

There is no maximum prescribed by law or general regulation on the amount of leave without pay which can be granted.

3/ Section 11(c)(2) of the Order provides:

(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:

(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;



of the Order and applicable DOD regulations. On November 20, 1974, DOD made a negotiability determination that there was no conflict between the negotiated provision and the Order or other law, published policy or regulation, and that there was therefore no basis for disapproving the agreement under section 15 of the Order.<sup>4/</sup> In this regard DOD notes that the submission letter from the Acting Assistant Secretary expressed doubts not only about the legality of the agreement provision but also about its reasonableness. DOD points out that its negotiability determination was confined to the question of whether there was a conflict between the provision and law or regulation and that such determination was not based on an evaluation of the merits of the provision. The determination of the "reasonableness" of the provision, a determination not reviewable under section 15 of the Order, was made by USDESEA management on the basis of information and considerations which it believed pertinent at the time it agreed to the provision at the bargaining table.

Further, DOD notes that the submission letter from the Acting Assistant Secretary uses the general term "union business" to describe the activities of the OFT official to whom the agreement provision applies. DOD points out that it is essential to distinguish between those types of activities for which official time may be granted and those types for which the use of official time is prohibited. In the first category are activities having to do with the labor-management relationship in which the Government and the union share an interest. In the second category are such activities as the solicitation of union membership or dues, campaigning for union office, conduct of other "internal business" of a union, which are prohibited by section 20 of the Order, and participation in negotiations on official time beyond the amount permitted under section 20 of the Order. DOD states that the administrative excusal provided for in the disputed OFT-USDESEA agreement clause is intended to cover only the first type of activities, those involving labor-management matters, and not those activities which fall under the heading of union "internal business."

The position of DOD regarding the types of activities which the agreement clause was intended to cover is supported by OFT in its response to the Council. OFT states that the details concerning the use of official time by the State Union Representative under the agreement provision in question were set out in a separate memorandum of understanding. OFT quotes the first section of that memorandum of understanding as follows:

4/ Section 15 of the Order provides:

An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

1. Necessary duty time as specified in this agreement will be permitted the State Union Representative for performance of such duties as:

- a. Discussing grievances, appeals or discrimination complaints with employees;
- b. Preparing (including making inquiries) and presenting identifiable grievances, appeals, or discrimination complaints;
- c. Attending meetings with supervisors and other management officials
- d. Considering and preparing responses to proposed Employer directives when the union has been specifically requested to do so by the Employer.

OFT states that the clear intent under the memorandum of understanding was that the union representative would be carrying out the precepts stated in the Preamble to the Order. OFT further states that a number of important considerations were involved in negotiating the provision, including the dispersal and extent of the bargaining unit which extends from the Persian Gulf to Great Britain and from southern Italy to the North Sea, over two and one-half times the land area of the United States. Also considered was the fact that all three military services are involved in day-to-day dealings in the unit. Almost 1000 teachers whose duties range from kindergarten to a twelfth grade curriculum are in the unit and it includes from three to six levels of administrative control.

In addition OFT points out that concerns were expressed at the outset of negotiations over the provision that it would be used to assist the union in conducting internal union business. However, during the negotiations it was agreed that only activities that normally are conducted on official time, i.e., representation, consultation, third party proceedings, responses to management directives and requests, etc., would be conducted during official time and that internal union business, if any, would be conducted at other times.

The Council has carefully considered the matter and has concluded that the issue presented has general applicability to the overall labor-management relations program in the Federal service and otherwise meets the requirements of § 2410.3 of the Council's rules (5 CFR 2410.3). With respect to the issue presented, the Council has determined that nothing in the Order prohibits an agency and a labor organization from negotiating provisions, such as in this case, which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal

grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.

The only provision of the Order dealing specifically with the use of official time is section 20, which provides as follows:

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.

In interpreting that section of the Order in terms of the agreement provision at issue in this case, it is significant to note that the restrictions contained in section 20 are specific rather than all-inclusive. The first part of section 20 prohibits the solicitation of membership or dues and the conduct of "other internal business" of a labor organization while on official time. It is evident from the wording of this part that the prohibitions contained therein concerning the use of official time for internal union business are directed towards restricting to nonduty hours activities which are of primary concern and benefit only to the labor organization. The second part of section 20 prohibits employees who represent a labor organization from being on official time when negotiating an agreement, except to the extent that the negotiating parties agree otherwise within certain specified limits. But while these types of activities are restricted under section 20, there is nothing in that section or elsewhere in the Order which prohibits the use of official time, when the agency agrees, by union representatives in certain other instances.<sup>5/</sup>

The activities of the State Union Representative under the agreement provision in this case, such as the investigation and attempted informal resolution of employee grievances, participation in formal grievance discussions or third-party proceedings, attending or preparing for meetings of committees on which the union is represented and discussing problems in agreement administration with management officials, are not matters of "internal" union business, but instead are matters relating

<sup>5/</sup> This interpretation of section 20 is consistent with the statutory construction maxim expressio unius est exclusio alterius. That maxim holds that as a general rule the mention of one thing implies the exclusion of another. Thus, the use of the qualifying words "Solicitation of membership or dues" in connection with "and other internal business" implies an intent to limit the prohibition in section 20 only to matters relating solely to the union and not to all matters in which a union representative might participate.

primarily to contract administration and are activities which are of mutual concern to both the union and the agency and which go to the heart of the labor-management relationship.<sup>6/</sup> Accordingly, we find that these types of activities do not fall within the scope of section 20 and the specific prohibitions therein.

Moreover, an agreement by an agency to allow an employee to perform, on official time, the types of representational activities agreed to in this case, when the agency determines that such activities are related to the performance of union-management functions contributing to the efficient administration of the agency, would appear to be consistent with the purposes of the Order. In this regard it is noted that the Preamble to the Order sets forth certain stated purposes as follows:

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; . . . .

6/ It is noted that these types of representational activities are somewhat analogous to those performed by employees who represent fellow employees in presenting a grievance under an agency grievance system or an appeal under an agency appeals system or in processing equal employment opportunity complaints, activities for which the use of official time has been recognized as proper. In this regard, section 771.105(b)(2) of title 5, Code of Federal Regulations (CFR), provides, concerning the presentation of a grievance:

When an employee designates another employee of the agency as his representative, the representative, in presenting a grievance under an agency grievance system, shall:

. . . . .

Be assured a reasonable amount of official time if he is otherwise in an active duty status.

Prior to the recent abolition of the agency adverse action appeals system and reorganization of the Civil Service Commission's appellate organization, section 771.206 of 5 CFR provided, concerning the use of official time to prepare an administrative appeal from an adverse action:

An employee is entitled to a reasonable amount of official time to prepare his appeal if he is otherwise in an active duty status. If

(Continued)

The maintenance of a constructive and cooperative relationship between labor organizations and management officials involves more than the successful negotiation of a collective bargaining agreement because the labor-management relationship does not end with the negotiation process. Following the negotiation of an agreement, the parties must direct their efforts toward satisfactorily administering that agreement. It is the Council's opinion that, where the agency and the union have agreed, the granting of official time for contract administration purposes, such as those set forth in the above-mentioned memorandum of understanding between OFT and USDESEA, is of benefit to both the agency and the labor organization and is in keeping with the stated purposes of the Order.

However, while nothing in the Order prohibits an agency from negotiating a provision such as at issue in this case, at the same time nothing in the Order requires an agency to agree to such a provision. But where the agency and the union recognize that, when circumstances warrant, a responsive and progressive labor-management relations program beneficial to all parties concerned could best be administered through the granting of official time for contract administration purposes and thereafter agree to such a grant, that agreement promotes the purposes of the Order.<sup>7/</sup> Further,

---

(Continued)

the employee's representative is an employee of the agency, he is also entitled to a reasonable amount of official time to prepare the appeal if he is otherwise in an active duty status.

Currently, section 713.214(b) of 5 CFR provides, concerning the processing of equal employment opportunity complaints:

At any stage in the presentation of a complaint, including the counseling stage . . . the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency and he designates another employee of the agency as his representative, the representative shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

<sup>7/</sup> As previously pointed out, DOD notes that the submission letter from the Acting Assistant Secretary expressed doubts not only about the legality of the agreement provision but also about its reasonableness. We agree with DOD that only the legality of the agreement provision is properly at issue within DOD and Army at this point. Further, while the Council has often passed upon the legality of a bargaining proposal, it has specifically indicated that any decision that a proposal is negotiable should not be construed as expressing or implying any opinion as to the merits of the proposal.

(Continued)

it is noted that such agreements are not at all uncommon in the Federal sector. A study of agreements throughout the Federal sector published in August 1974 by the Civil Service Commission's Office of Labor-Management Relations, using its Labor Agreement Information Retrieval System (LAIRS), showed that a variety of official time clauses had been negotiated between agencies and labor organizations providing for a range of from less than one hour per week to as much as three-fourths of the employee's workweek on official time. These clauses, which at the time of the study were in over 450 agreements involving 11 different agencies, provided for official time to perform a variety of functions including many identical to those provided for under the OFT-USDESEA agreement. Therefore such a provision, so far as it pertains to the use of official time for contract administration purposes, would not, as suggested in the submission letter from the Acting Assistant Secretary of the Army, "establish negotiation precedent for hundreds of Government employees who are union representatives," but instead would be concordant with similar provisions of wide application currently throughout the Federal sector.

---

(Continued)

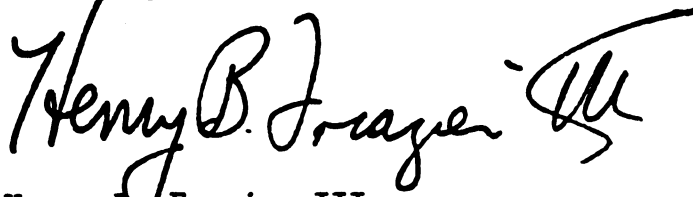
The reasonableness of the provision in this case was determined by the representatives of agency management at the bargaining table during the course of negotiations. Under section 15 of the Order, an agreement with a labor organization is subject to the approval of the head of the agency or an official designated by him. However, section 15 further provides that an agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations and regulations of other appropriate authorities. By limiting approval or disapproval solely to the basis of whether the agreement conforms with laws, policies and regulations, rather than to the reasonableness of the agreement, or specific provisions thereof, there is a recognition that agency management at the level of the exclusive recognition has the best knowledge of prevailing conditions and can thus best judge the "reasonableness" of the negotiated provision. The record before the Council indicates that the decision by USDESEA to agree to the provision was based on considerations as to the complexities involved in performing representational activities with respect to the bargaining unit in this case and in part on calculations that the amount of official time specified in the agreement for the State Union Representative would be effective in holding to a minimum the use of official time and resultant absence from the classroom on the part of other OFT representatives during the term of the agreement.

Negotiations in the Federal sector are conducted by agency representatives under guidance issued by higher agency headquarters as well as under policy guidance provided by the Civil Service Commission, in conjunction with the Office of Management and Budget, pursuant to section 25 of the Order. To subject such negotiations to a subsequent, unilateral modification of a bilaterally arrived at agreement on the basis of a question as to the reasonableness of the negotiated provision, would in the Council's view be contrary to the fundamental concepts of collective bargaining and would constitute undue interference with the conduct of labor-management relations.

We hope the foregoing will be of benefit to you in your consideration of this matter.

By 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: W. Valdes, DOD

O. Thomas, OFT

E. J. Lehmann  
Verona Elementary School





SELECTED INFORMATION ANNOUNCEMENT\*

---

January 1, 1975 through December 31, 1975

\*The following information announcement has been edited to delete references to an attachment to the announcement containing Parts 2411 and 2413 of the Council's rules, 5 C.F.R. §§ 2411 and 2413. The attachment has likewise been omitted.





UNITED STATES

# FEDERAL LABOR RELATIONS COUNCIL

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

INFORMATION ANNOUNCEMENT

September 24, 1975

To Heads of Agencies and Presidents of Labor Organizations:

## REVISION OF COUNCIL RULES

On May 16, 1975, the Council published in the Federal Register (40 FR 21488) a proposed revision of Part 2411 and a proposed Part 2413 of its rules. The Council, after considering the views and suggestions of interested persons, has adopted the proposed revision of Part 2411 and the proposed Part 2413 with [certain] additional changes . . . . These changes include:

- Retention of the Council's present procedure in Part 2411 of its rules starting the running of time limits for the submission of documents from the date of service of a decision or document. The Council had proposed to start time limits running from the date of a decision or document instead of from the date of its service. Parties commenting were virtually unanimous in recommending retention of the present procedure. Note: The date of service as defined in the Council's rules remains unchanged; that is, the date of service is ". . . the day when the matter served is deposited in the U.S. mail or is delivered in person, as the case may be."
- A revision of § 2411.17(a) to clarify that the Council will, upon an appeal by a party, review a decision of the Assistant Secretary wherein it was necessary for him to make a negotiability determination. An appeal by a party adversely affected must be filed in order to effect review. The Council will not, on its own motion, review the Assistant Secretary's determinations of negotiability. But, in contrast with other decisions of the Assistant Secretary where review is discretionary with

the Council, once an adversely affected party files an appeal of an Assistant Secretary decision wherein he made a negotiability determination, that party will have a right to have such a determination reviewed on appeal by the Council as provided in Executive Order 11838 and the Council's accompanying Report.

- A revision of § 2411.24 to make it explicit that a request for an exception to an agency regulation under § 2411.22(b) can be made at the same time an agency head negotiability determination is sought. If the request is made at the same time, the additional time periods provided in this section for requesting and acting upon the exception would not apply.
- A revision to clarify § 2411.43(c) regarding the acknowledgment of documents filed with the Council. A party filing documents with the Council may furnish an extra copy of its transmittal letter alone, or an extra copy of the document filed, to be date stamped and returned by the Council as an acknowledgment of receipt.
- An increase from 3 to 5 days in the provision in § 2411.45(c) of the present rules for added time when service is by mail. The Council had proposed to delete altogether the provision for such added time. However, in response to the views of those who commented, it has decided not only to retain the provision for such added time, but to increase the time allowed from 3 to 5 days.
- A revision of § 2411.45(e) to require that extension requests be filed in writing no later than 3 days before the expiration of time limits. The Council had proposed that extensions be requested 5 days in advance. Because many requests for extensions are the result of unforeseen events occurring shortly before a filing is due, the Council decided that a 5-day requirement might be unreasonable and perhaps result in unnecessary requests. A 3-day requirement is a reasonable requirement to impose on the parties and will provide sufficient time to consider and act on requests for extensions of time limits.
- A revision of § 2413.2(e), one of five illustrative criteria for determining when a compelling need exists for an agency policy or regulation concerning personnel policies and practices and matters affecting working conditions, within the meaning of section 11(a) of the Order. This criterion has been revised to substitute the effectuation of the public interest for the concept of equitable treatment as a justification for uniformity. Thus, a compelling need will be found for a policy or regulation which establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest.

As a result of the review of comments concerning the rule revisions and the Council's own case handling experience, the Council has identified several matters which require some explanation or clarification. The Council has concluded that these matters do not require changes in the rules, but instead, some further discussion in this announcement is sufficient to provide the needed explanation or clarification. These include:

- The meaning of the phrase "adverse ruling" to which a party must be subject in order to file a petition for review of a decision wherein a negotiability determination is made by the Assistant Secretary (§ 2411.17(b)). The Council's rule in § 2411.17(b) describing who may appeal a decision by the Assistant Secretary wherein he made a negotiability determination uses language virtually identical to that in section 11(d) of the Order--"the party subject to an adverse ruling may appeal." Therefore, any party may appeal if it disagrees with aspects of the Assistant Secretary's decision wherein he made a negotiability determination. In a given case, more than one party may be "subject to an adverse ruling" and consequently, more than one appeal may be filed.
  
- Specificity in agency head determinations that matters are not negotiable. Agency heads, in making a determination that a matter is not negotiable, sometimes fail to state with sufficient specificity the grounds for that determination. The labor organization is then required, in its appeal to the Council, to anticipate the full and detailed reasons which the agency may set forth in its statement of position. Such a practice unnecessarily complicates the preparation of an appeal by a labor organization and requires the Council to grant leave to file supplemental documents in order for the labor organization to respond to arguments made for the first time in the agency's statement of position. As a result, the consideration of the matter by the Council may be unduly prolonged.

Further, the Council has previously urged the parties to negotiations to seek feasible, acceptable alternatives to proposals which are allegedly nonnegotiable before appealing the matter to the Council. It is elementary that understanding why a given proposal was considered nonnegotiable is a prerequisite to a successful search for a proposal which is negotiable. A detailed statement of the specific grounds and reasoning upon which the agency head relies would aid the parties in this search. The Council is concerned that the consequence of cutting short the search for acceptable, negotiable alternatives is the filing of premature or unnecessary appeals to the Council.

The Council, therefore, admonishes agency heads to provide full and specific grounds for determinations that a matter is not negotiable. Determinations should specify applicable sections, subsections and subparts of laws, regulations, or the Order upon which the agency head relies to support his decision and should explain in detail the relevance of previous Council decisions or other precedents where such precedents are relied upon.

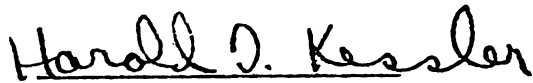
- Designation of officials for purposes of filing an appeal challenging an agency regulation on grounds of level of issuance or failure to meet compelling need criteria (§ 2411.23(b)). The Council's rule § 2411.23(b) provides that an appeal challenging an agency regulation on grounds of level of issuance or failure to meet compelling need criteria may be filed only by the national president of a labor organization (or his designee) or the president of a labor organization not affiliated with a national organization (or his designee). The manner of designating an official other than the president is strictly within the purview of the labor organization; the Council does not intend that the rule restrict the manner of designation to an action which can only be taken by a labor organization president. For example, the designation could be provided for in the labor organization's bylaws or constitution.
- Benefits to parties from the rule change which enables agency and union headquarters to obtain service by entering appearances in lower proceedings (§ 2411.46(a)). The Council's rule § 2411.46(a) provides, in part, for service of a copy of any document filed with the Council under Part 2411 on all representatives of other parties who entered appearances in prior proceedings before the Assistant Secretary, agency head, or arbitrator involving the same matter. The purpose of this rule is to enable agency and union headquarters to obtain service of such documents merely by entering appearances in a proceeding involving parties at lower levels within the agency or union and without further participation in that proceeding. This provision should help alleviate the coordination problems between the headquarters and the local level experienced by some agencies and unions in filing appeals with and responding to appeals before the Council.
- When the compelling need criteria are applicable (§ 2413.2). As indicated in section V.1.(a) and (b) of the Council's Report accompanying Executive Order 11838, any negotiation proposal is subject to the negotiability limitations of sections 11(a), 11(b) and 12(b) of the Order and these limitations are unchanged by the "compelling need" amendments to

the Order. Thus, if a proposal which conflicts with a regulation issued at the agency headquarters level or at the level of a primary national subdivision is found to be nonnegotiable under sections 11(b) or 12(b) of the Order, the question of compelling need for the regulation would not be reached. Conversely, if the proposal which conflicts with a regulation issued at the agency headquarters level or at the level of a primary national subdivision is found to be negotiable under sections 11(b) and 12(b), the question of the compelling need for the regulation would be reached and if no compelling need is found to exist, the regulation would not serve to bar negotiation on the proposal.

- The kind of agency regulations to which the compelling need criteria apply (§ 2413.2). Section V.1.(a) and (b) of the Council's Report accompanying Executive Order 11838 indicates and § 2411.22(b) of the Council's rules confirms that the compelling need test for challenging an agency policy or regulation is confined to "internal" policies and regulations--that is, those policies and regulations issued by the agency and intended solely for application within that agency. Policies and regulations issued by an agency which are applicable to other agencies are not subject to a compelling need challenge. Any dispute which may arise as to whether a regulation is an internal regulation will be resolved by the Council on a case-by-case basis in appeals filed under section 11(c) of the Order.
  
- The meaning of the phrase "basic merit principles" in compelling need illustrative criterion (c) (§ 2413.2(c)). Section 2413.2(c) provides as an illustrative criterion for determining compelling need: "The policy or regulation is necessary to insure the maintenance of basic merit principles." It is the intention of the Council that the phrase "basic merit principles" embrace any statutorily authorized personnel system within the executive branch which is, in fact, based on "basic merit principles" as determined by the Council on a case-by-case basis in appeals filed under section 11(c) of the Order.
  
- The meaning of the phrase "substantial segment" in compelling need illustrative criterion (e) (§ 2413.2(e)). The criterion in § 2413.2(e) states: "The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest." Nothing in compelling need criterion (e) was intended to modify the principle enunciated by the Council in United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30: ". . . policies and regulations referred to in section 11(a) [of the Order] as an appropriate limitation on the scope of negotiations

are ones issued to achieve a desirable degree of uniformity . . . in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity." The Council intends that the number of employees alone will not be determinative of whether a "substantial segment" of employees is covered by a regulation but will inquire into the breadth of the group within the agency or primary national subdivision and determine the issue on a case-by-case basis in appeals filed under section 11(c) of the Order.

The [subject] regulations were published in the Federal Register on September 24, 1975, and became effective on that date; except that, the rules in the [subject] regulations which derive from the recent amendments to sections 11(a) and 11(c) of the Order (that is, the amendments pertaining to internal agency policies and regulations which may bar negotiations) shall become effective December 23, 1975.



Harold D. Kessler  
Acting Executive Director



PART III.

SUBJECT MATTER INDEX

---

January 1, 1975 through December 31, 1975

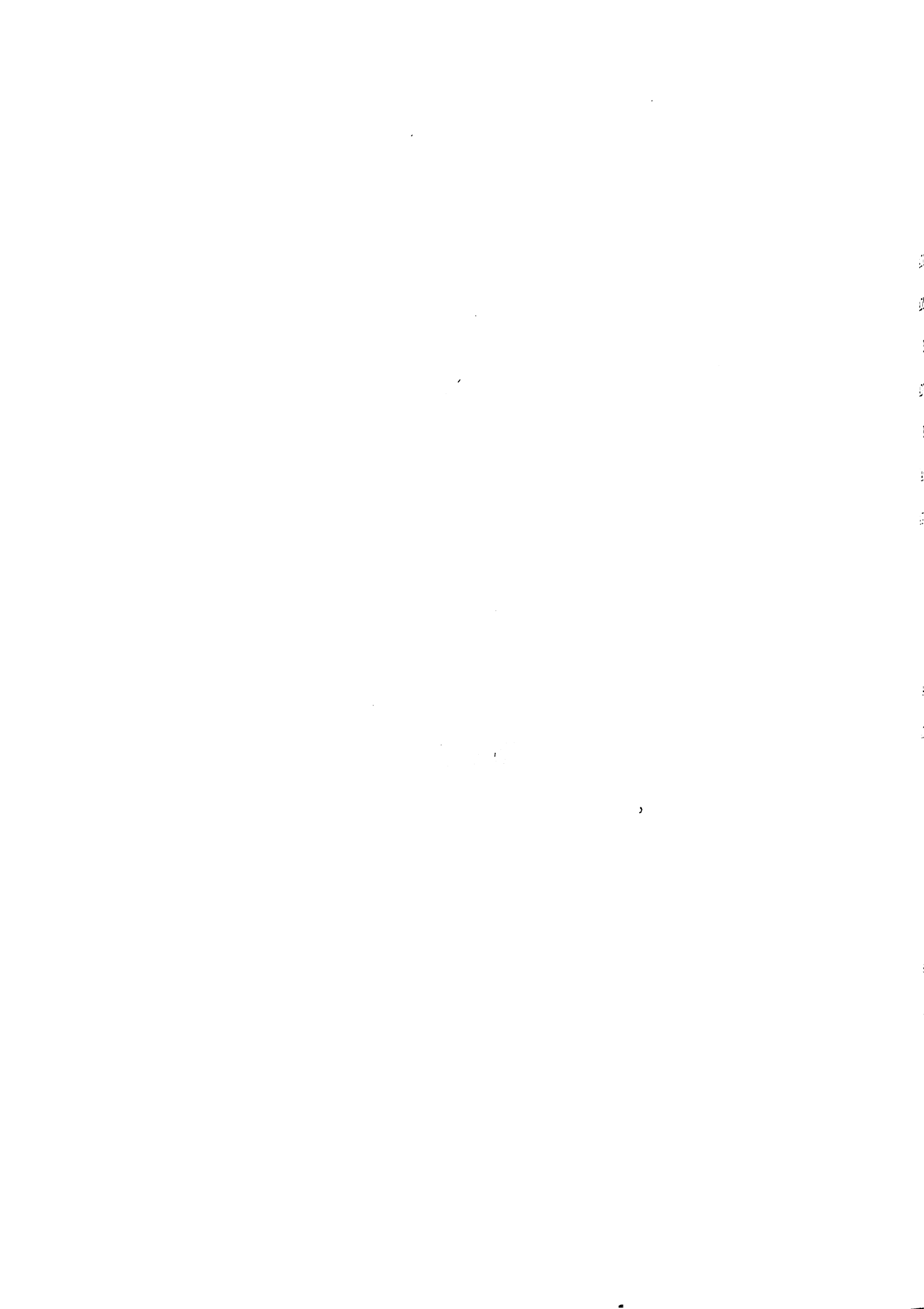


SUBJECT MATTER INDEX\*

---

January 1, 1975 through December 31, 1975

\*COUNCIL PRACTICE AND PROCEDURE separately indexed beginning at 940.



SUBJECT MATTER INDEX

FLRC NO(s).

A

ACCRETION TO UNIT; ABSENCE OF .....	74A-92, 75A-24
ADMINISTRATIVE LAW JUDGE	
Bias; assignment to similar case .....	75A-86
ADVERSE ACTION PROCEEDING	
Representation by exclusive representative .....	74A-54
"AGENCY" .....	75A-65
AGENCY GRIEVANCE PROCEDURE	
Agency's obligation to follow .....	75A-51
Employee choice of own representative .....	74A-65
Extension of time to file grievance .....	75A-51
"AGENCY MANAGEMENT" .....	75A-88
AGENCY REGULATIONS	
Affecting compliance with unfair labor practice order .....	75A-79
"Compelling need"; application .....	I.A.* 9-24-75
<u>see also</u> ARBITRATION	
ARBITRATION AWARDS	
Exceptions asserted in appeals	
NEGOTIABILITY APPEALS	
AGENCY REORGANIZATION; BARGAINING UNIT IMPACT .....	74A-22, 74A-28
AGREEMENT	
<u>see</u> COLLECTIVE BARGAINING AGREEMENT	

---

\*Information Announcement



FLRC NO(s).

Submission agreements ..... 74A-75, 74A-88, 75A-30

see also ARBITRATION AWARDS

COUNCIL PRACTICE AND PROCEDURE

GRIEVABILITY/ARBITRABILITY (SECTION 13(d))

#### ARBITRATION AWARDS

Annual leave; plant shutdown ..... 75A-84

Backpay ..... 73A-46,  
73A-56, 74A-15, 74A-29,  
74A-51, 75A-74

Discipline ..... 75A-7, 75A-21, 75A-45

Equal opportunity ..... 75A-26

Exceptions asserted in appeals

- arbitrator('s)

-- accepted false testimony ..... 75A-36

-- arbitrary and capricious; substituting  
for judgment of agency officials ..... 75A-48

-- awarded punitive damages without authority ..... 75A-23

-- exceeded authority by

--- adding to, modifying or rewriting  
agreement ..... 75A-7

--- altering agreement ..... 75A-45

--- deciding issue not submitted ..... 74A-40, 74A-88, 75A-30

--- fashioning remedy contrary to  
agency regulations ..... 75A-45

--- imposing obligation on management  
not found in agreement ..... 75A-56

--- not deciding question submitted ..... 74A-75, 74A-88, 75A-17

--- substituting for management's  
judgment ..... 74A-88,  
75A-9, 75A-15, 75A-54

- failed to
  - cite contractual support ..... 75A-17, 75A-21, 75A-30
  - find unfair labor practice ..... 74A-76, 74A-85, 75A-84
- findings of fact erroneous ..... 75A-36
- findings of fact not supported ..... 74A-85
- misinterpreted agreement ..... 74A-85, 75A-48, 75A-50
- reached incorrect result ..... 74A-75,  
75A-17, 75A-36, 75A-50,  
75A-84
- reasoning was wrong ..... 74A-76
- refused to hear evidence; refusal  
based on nonfact ..... 74A-102
- refused to hear pertinent evidence ..... 74A-102, 75A-71
- award
  - ambiguous, incomplete or contradictory;  
implementation impossible ..... 75A-63
  - fails to draw essence from  
agreement ..... 74A-38,  
75A-17, 75A-30, 75A-56
  - presents major policy issue ..... 74A-76, 75A-74
  - requires improper use of appropriated  
funds ..... 75A-9, 75A-54
  - violates applicable law
    - [law not cited] ..... 74A-15,  
75A-23, 75A-26, 75A-31,  
75A-74
    - Back Pay Act [5 U.S.C. § 5596] ..... 73A-56,  
74A-29, 74A-51, 75A-74
    - Civil Rights Act of 1964 ..... 73A-56



FLRC NO(s).

--- Comptroller General decisions .....	73A-46, 73A-56, 74A-15, 74A-88, 75A-74
- B-175867 (6/19/72) .....	73A-46
- 42 Comp. Gen. 195 (1962) .....	73A-46
- 43 Comp. Gen. 131 (1963) .....	75A-9, 75A-54
- 45 Comp. Gen. 710 (1966) .....	73A-46
- 46 Comp. Gen. 217 (1966) .....	73A-46
- 49 Comp. Gen. 476 (1970) .....	75A-9, 75A-54
--- 5 U.S.C. § 5334(b) .....	73A-56
-- violates appropriate regulations	
--- [regulation not cited] .....	74A-29, 74A-51, 75A-26, 75A-74
--- Air Force regulation 40-750 .....	75A-45
--- Civil Service regulations .....	74A-15, 74A-51, 75A-31
--- Federal Personnel Manual .....	75A-26
- chap. 300, subchap. 8 .....	75A-50
- chap. 335, subchap. 3-7c .....	75A-56
- chap. 335, subchap. 5-1d(3) .....	75A-56
- chap. 335, subchap. 5-3a .....	75A-56
- chap. 630, subchap. 11 .....	75A-84
--- Federal Personnel Manual Supplement; 990-2, § S2-5b(1) .....	73A-56
--- FAA order	
- 3330.9, chap. 5 .....	75A-50
- 4665.3A .....	74A-88, 75A-9, 75A-15, 75A-54

--- GSA order; 7030.2C ..... 75A-9, 75A-54

-- violates the Order

--- sec. 10(e) ..... 75A-17

--- sec. 11(a) ..... 75A-17

--- sec. 12 ..... 75A-50

--- sec. 12(b) ..... 75A-21

--- sec. 12(b)(2) ..... 75A-48

--- sec. 13(a) ..... 75A-21

--- sec. 13(b) ..... 75A-21

--- sec. 13(e) ..... 74A-85

Information in award; adequacy ..... 73A-56, 74A-29

Overtime pay ..... 73A-46, 74A-15

Pay rates ..... 75A-7

Position appointments; emergency ..... 75A-48

Promotion

- career ladder ..... 75A-71

- preselection ..... 74A-76, 75A-36

- retroactive ..... 73A-56, 74A-29, 74A-51

Shifts ..... 74A-38, 74A-75, 75A-30

Sick leave ..... 75A-31

Vacancy announcement ..... 75A-56

A/SLMR PROCEEDINGS

see GRIEVABILITY/ARBITRABILITY (SECTION 13(d))  
 REPRESENTATION PROCEEDINGS  
 UNFAIR LABOR PRACTICE CASES

ASSIGNMENT OF PERSONNEL  
see NEGOTIABILITY APPEALS

B

BACKPAY IN ARBITRATION AWARDS ..... 73A-46,  
73A-56, 74A-15, 74A-29,  
74A-51, 75A-74

C

CAMPAIGNS  
see REPRESENTATION PROCEEDINGS, Elections

CIVIL SERVICE DIRECTIVES

Code of Federal Regulations

- part 713 ..... 75A-26
- 5 C.F.R. §§ 550.111, .804 ..... 74A-15
- 5 C.F.R. §§ 550.803(d)-(e) ..... 75A-74
- 5 C.F.R. § 630.401 ..... 75A-31
- 5 C.F.R. §§ 771.105(b)(2), .206, .214(b) ..... 75P-1

Federal Personnel Manual

- chap. 294
  - subchap. 5-1(b), appendix C ..... 75A-26
  - subchap. 7 ..... 73A-59
- chap. 300, subchap. 8 ..... 74A-13, 75A-50
- chap. 335
  - subchap. 2 ..... 75A-13
  - subchap. 3-4b(2) ..... 75A-56

-- subchap. 3-6 .....	75A-13
-- subchap. 3-7c .....	75A-56
-- subchap. 5-1d(3), -3a .....	75A-56
-- subchap. 6 .....	73A-59
--- sec. 4c .....	74A-66
- chap. 451 .....	74A-31
- chap. 531, subchap. 4 .....	74A-19
- chap. 630	
-- subchap. 11 .....	75A-84
-- subchap. 12-2a, -3a .....	75P-1
- chap. 713 .....	75A-88
- suppl.	
-- 335, subchap. S4-1 .....	75A-56
-- 532-2, subchap. 5-3 .....	74A-104
-- 990-2, sec. S2-5b(1) .....	73A-56
"CO-EMPLOYER" DOCTRINE .....	74A-22, 75A-61

COERCION

see UNFAIR LABOR PRACTICE CASES

COLLECTIVE BARGAINING AGREEMENT

Agency reorganization and preexisting agreement .....	74A-22
Approval by agency .....	74A-48, 75A-65, 75A-111
- effect of local agreement on sec. 11(b) subject matter .....	74A-48
Decertification petition and preexisting agreement .....	75A-35

FLRC NO(s).

Midcontract negotiation obligation; matter not made a part of preexisting agreement .....	75A-60
"Reasonableness" of agreement provision under sec. 15 of the Order .....	75P-1
Reformation by arbitrator .....	74A-102
Refusal to sign .....	75A-35
Review by agency; intermediate levels of .....	75A-65
Validity; Council advisory opinion .....	75A-48
COLLECTIVE BARGAINING UNITS	
<u>see</u> REPRESENTATION PROCEEDINGS	
COMMUNICATION WITH EMPLOYEES	
<u>see</u> REPRESENTATION PROCEEDINGS, Elections	
UNFAIR LABOR PRACTICE CASES	
COMPELLING NEED DETERMINATIONS	
<u>see</u> NEGOTIABILITY APPEALS	
COMPENSATION	
<u>see</u> BACKPAY	
NEGOTIABILITY APPEALS	
COMPLIANCE; UNFAIR LABOR PRACTICE REMEDIES	
Council review of .....	75A-59
Evidence concerning .....	75A-79
Under sec. 19 of the Order .....	75A-8
COMPROLLER GENERAL DECISIONS	
B-175867 (6/19/72) .....	73A-46
42 Comp. Gen. 195 (1962) .....	73A-46
43 Comp. Gen. 131 (1963) .....	75A-9, 75A-54
45 Comp. Gen. 710 (1966) .....	73A-46
46 Comp. Gen. 217 (1966) .....	73A-46

49 Comp. Gen. 476 (1970) ..... 75A-9, 75A-54

55 Comp. Gen. 171 (1975) ..... 73A-46

55 Comp. Gen. 183 (1975) ..... 75A-31

55 Comp. Gen. 405 (1975) ..... 74A-15

55 Comp. Gen. 427 (1975) ..... 74A-29

55 Comp. Gen. 564 (1975) ..... 75A-23

CONSOLIDATION OF BARGAINING UNITS ..... 73A-9, 74A-41

D

DECERTIFICATION

Preexisting collective bargaining agreement ..... 75A-35

DE MINIMIS CONDUCT ..... 74A-90

DETAILS AND TEMPORARY ASSIGNMENTS

Rotation of employees ..... 74A-13

DISCIPLINE

Arbitration ..... 75A-7, 75A-21, 75A-45

DISCRIMINATORY TREATMENT

see UNFAIR LABOR PRACTICE CASES

DISCUSSIONS ..... 74A-20, 74A-31, 74A-36

Formal/informal ..... 74A-95, 75A-88

DUES WITHHOLDING

Revocation ..... 74A-22, 74A-60, 75A-61

Termination ..... 75A-3

DUTY TO BARGAIN

see UNFAIR LABOR PRACTICE CASES

## E

## ELECTIONS

see REPRESENTATION PROCEEDINGS

EQUAL OPPORTUNITY ACT (1972) ..... 75A-26

## EQUIPMENT, FURNITURE, ETC.

Negotiability ..... 74A-13, 75A-28

## EVIDENCE

see ARBITRATION

COUNCIL PRACTICE AND PROCEDURE

REPRESENTATION PROCEEDINGS

UNFAIR LABOR PRACTICE CASES

## EXECUTIVE ORDER 11491

Preamble ..... 74A-77, 75A-28

Sec. 1 ..... 75A-28

Sec. 1(a) ..... 75A-19

- "employee . . . right . . . to form, join, and assist a labor organization or to refrain from any such activity," "and that no interference, restraint, coercion, or discrimination is practiced . . . to encourage or discourage membership in a labor organization." ..... 74A-60

Sec. 1(b) "participation in the management of a labor organization or acting as a representative of such an organization by a supervisor" ..... 74A-78

Sec. 2(a) ..... 75A-65

Sec. 2(c) ..... 74A-78,  
75A-20, 75A-39, 75A-47

Sec. 2(d) [revoked] ..... 74A-47

Sec. 2(e)(2) ..... 74A-63

Sec. 2(f) ..... 75A-88

Sec. 4(a) ..... 74A-98

Sec. 4(c)(1) .....	73P-1
Sec. 4(c)(2) .....	73A-36
Sec. 6(a) .....	74A-96
Sec. 6(a)(4) .....	73P-1, 74A-46
Sec. 6(a)(5) .....	74A-8, 74A-19, 75A-82
Sec. 6(b) .....	74A-22, 74A-46, 75A-59, 75A-79
Sec. 6(d) .....	74A-72, 74A-90, 75A-35, 75A-47, 75A-55, 75A-67, 75A-68, 75A-69, 75A-70, 75A-73, 75A-76, 75A-99
Sec. 7(a)-(d)(3) .....	74A-65
Sec. 10(a) .....	74A-22
- "consolidation of existing . . . units" .....	73A-9
Sec. 10(b) .....	73A-9, 74A-41, 75A-61
- "community of interest" .....	74A-16, 74A-22, 74A-28
- "will promote effective dealings and efficiency of agency operations" .....	74A-16, 74A-22, 74A-28, 74A-41, 74A-96
Sec. 10(b)(1) .....	74A-30, 74A-66
Sec. 10(b)(3) [revoked] .....	74A-47
Sec. 10(c) [revoked] .....	74A-47
Sec. 10(e) .....	74A-31, 75A-17
- "employees in the unit" .....	74A-54
- "discussions between management and employees . . ."	74A-20, 74A-31, 74A-36
- "formal discussions" .....	74A-95, 75A-88



FLRC NO(s).

- "is responsible for representing the interests of all employees in the unit without discrimination" ..... 74A-54, 74A-80
- Sec. 11(a) ..... 73A-36, 74A-41, 75A-17, I.A.\* 9-24-75
- "agency policies and regulations to which compelling need criteria apply" ..... I.A.\* 9-24-75
- "and this Order" [see specific Order section]
- "applicable laws and regulations" ..... 73A-36, 74A-31, 74A-48, 74A-63, 74A-104
- "compelling need . . . criteria" ..... I.A.\* 9-24-75
- "including policies set forth in the Federal Personnel Manual" ..... 74A-31, 74A-104, 75A-13
- "meet at reasonable times and confer" ..... 74A-87
- "personnel policies and practices and matters affecting working conditions" ..... 74A-24, 75A-13
- "published agency policies and regulations" ..... 74A-13, 74A-20, 74A-31, 74A-36, 74A-67, 75A-13, 75A-27, 75A-28
- Sec. 11(b) ..... 74A-24, I.A.\* 9-24-75
- "budget" ..... 74A-36
- "its organization . . . numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty" ..... 73A-36, 74A-13, 74A-30, 74A-48, 74A-66, 74A-67
- "mission" ..... 74A-36
- "the technology of performing its work" ..... 74A-13

---

\*Information Announcement

- "appropriate arrangements" ..... 75A-13

Sec. 11(c) ..... 73A-36, 75A-28, 75A-79

- "in connection with negotiations" ..... 75A-6, 75A-28

- "a proposal" ..... 73A-36

Sec. 11(c)(2) ..... 75A-6, 75A-28, 75P-1

Sec. 11(c)(3) ..... 75A-13

Sec. 11(c)(4) ..... 75A-6, 75A-28, 75A-40,  
I.A.\* 9-24-75

- (i) ..... 73A-36,  
74A-69, 74A-101, 75A-40

- (ii) ..... 73A-36,  
74A-13, 74A-69, 74A-101,  
75A-40, I.A.\* 9-24-75

Sec. 11(d) ..... 73P-1

- "party subject to an adverse ruling" ..... I.A.\* 9-24-75

Sec. 12 ..... 75A-50

Sec. 12(a) ..... 73A-36,  
74A-19, 74A-24, 74A-50

Sec. 12(b) ..... 74A-24,  
74A-50, 74A-59, 75A-21,  
I.A.\* 9-24-75

Sec. 12(b)(1) ..... 74A-13,  
74A-32, 74A-48, 74A-63,  
75A-1, 75A-13

Sec. 12(b)(2) ..... 74A-33,  
74A-48, 74A-63, 75A-48

- "to assign" ..... 74A-13,  
74A-30, 74A-32, 74A-48

- "to promote" ..... 74A-30

---

\*Information Announcement

FLRC NO(s).

Sec. 12(b)(4) .....	73A-36, 74A-13, 74A-33, 74A-48, 74A-63, 75A-13
Sec. 12(b)(5) .....	74A-48, 74A-63, 75A-13
- "to determine methods, means" .....	73A-36
- "to determine . . . personnel" .....	73A-36, 74A-66
Sec. 12(b)(6) .....	74A-48, 74A-63
Sec. 13 [prior to amendment] .....	74A-9
Sec. 13(a) [prior to amendment] .....	74A-8, 74A-24, 75A-21, 75A-43
Sec. 13(a) "does not otherwise conflict with statute" .....	74A-24
Sec. 13(a) "including matters for which statutory appeal procedures exist" .....	74A-19
Sec. 13(b) [prior to amendment] .....	74A-50, 75A-21
Sec. 13(b) "Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions[.]" .....	74A-94
Sec. 13(d) [prior to amendment] .....	74A-8, 74A-19
Sec. 13(e) [prior to amendment] .....	74A-8
Sec. 13(e) .....	74A-85
Sec. 15 .....	75A-65, 75P-1
- "approval of the head of the agency" .....	74A-48, 75A-65, 75A-111
Sec. 18 .....	74A-100, 75A-52
Sec. 19 .....	74A-76, 74A-85
- arbitration awards .....	74A-46
- grievability and arbitrability matters .....	75A-82

Sec. 19(a)(1) .....	74A-22, 74A-53, 74A-54, 74A-77, 74A-80, 74A-82, 74A-90, 74A-95, 75A-6, 75A-10, 75A-28, 75A-29, 75A-66, 75A-72, 75A-78, 75A-84, 75A-88, 75A-89
Sec. 19(a)(2) .....	74A-90, 75A-88, 75A-89
Sec. 19(a)(3) .....	75A-28
Sec. 19(a)(4) .....	75A-89
Sec. 19(a)(5) .....	74A-22, 75A-61
Sec. 19(a)(6) .....	73P-1, 74A-53, 74A-54, 74A-77, 74A-80, 74A-82, 75A-65, 75A-66, 75A-72, 75A-78, 75A-84, 75A-88, 75A-89
Sec. 19(b)(1) .....	74A-60, 75A-64
Sec. 19(b)(2) .....	75A-64
Sec. 19(b)(4) .....	74A-63
Sec. 19(b)(6) .....	73P-1
Sec. 19(c) .....	74A-60
Sec. 19(d) .....	74A-53, 75A-57
Sec. 20 .....	75P-1
- "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." .....	74A-60, 75P-1
Sec. 21 .....	74A-22, 75A-3
Sec. 23 .....	75A-28
Sec. 25 .....	75P-1

EQUIPMENT, FURNITURE, ETC.

Negotiability ..... 74A-13, 75A-28

F

FACILITIES AND SERVICES

Office space; negotiability ..... 75A-28

FAIR HEARING

By Administrative Law Judge ..... 75A-86

FEDERAL PERSONNEL MANUAL  
see CIVIL SERVICE DIRECTIVES

FORMAL DISCUSSIONS ..... 74A-95, 75A-88

FRIVOLOUS LITIGATION

Before A/SLMR ..... 74A-77

G

GENERAL REVIEW OF THE FEDERAL LABOR-MANAGEMENT  
RELATIONS PROGRAM

Effect on negotiability case ..... 74A-24

GRIEVABILITY/ARBITRABILITY (SECTION 13(d))

Appeals to the Council

- grounds asserted [selected]

-- agreement violates the Order,  
applicable law or regulation ..... 74A-8

-- arbitration award violates Order,  
applicable law or regulation ..... 75A-43

-- A/SLMR exceeded authority ..... 74A-50

-- A/SLMR failed to decide question presented ..... 74A-19

A/SLMR proceedings

- A/SLMR responsibility under sec. 13(d) ..... 74A-8, 74A-19, 74A-44

-- where agreement provision asserted to be in violation of the Order, applicable law or regulation ..... 74A-8, 74A-50

- parties' responsibilities; contentions regarding law and/or regulations ..... 74A-19

- mootness of dispute ..... 74A-91

Staffing information ..... 74A-59

Statutory appeal procedures

- application; A/SLMR responsibility to determine ..... 74A-19

- specific laws

-- Budget and Accounting Act (31 U.S.C. § 71) ..... 75A-43

Vacancies

- posting and filling of vacancies ..... 74A-50, 74A-59

see also ARBITRATION

GRIEVANCE PROCEDURES

see AGENCY GRIEVANCE PROCEDURES

ARBITRATION

GRIEVABILITY/ARBITRABILITY (SECTION 13(d))

NEGOTIABILITY APPEALS

H

HEALTH AND SAFETY

Negotiability ..... 74A-13, 74A-30, 74A-48, 74A-63

HEARINGS

see COUNCIL PRACTICE AND PROCEDURE  
REPRESENTATION PROCEEDINGS  
UNFAIR LABOR PRACTICE CASES

HOLIDAYS

see NEGOTIABILITY APPEALS  
Compensation  
Work schedules

HOURS OF WORK

see NEGOTIABILITY APPEALS, Work schedules

I

IMPASSE ..... 74A-77

INCENTIVE AWARDS

Negotiability ..... 74A-31

INFORMAL RESOLUTION OF UNFAIR LABOR PRACTICE COMPLAINT ..... 74A-77

INTERFERENCE

see UNFAIR LABOR PRACTICE CASES

INTERROGATION CONCERNING UNION ACTIVITIES ..... 75A-29

INTERVENTION

see COUNCIL PRACTICE AND PROCEDURE  
REPRESENTATION PROCEEDINGS

J-K-L

JOB CONTENT

see NEGOTIABILITY APPEALS

M

MANAGEMENT MEETINGS

Designation of attendee for exclusive representative ..... 74A-54

Proposals on; negotiability ..... 74A-20, 74A-36

MANAGEMENT RIGHTS

Procedures for exercise of 12(b) rights ..... 74A-13,  
74A-30, 74A-33, 74A-48,  
74A-66

see also EXECUTIVE ORDER 11491, Secs.  
12(b)(1)-(6); and specific  
subject matter headings

"MEET AND CONFER" ..... 74A-84

MEMBERSHIP, UNION

Reinstatement ..... 74A-60

N

NATIONAL GUARD TECHNICIANS

Uniform requirements ..... 75A-79

NEGOTIABILITY APPEALS

Agency head nonnegotiability  
determination; specificity ..... I.A.\* 9-24-75

Agency regulations

- applicable uniformly to more than  
one subordinate activity ..... 74A-20,  
74A-31, 74A-36, 74A-67,  
75A-27, 75A-28, 75A-111

- constitute bar to negotiability  
of conflicting union proposals ..... 74A-20,  
74A-31, 74A-36, 74A-67,  
75A-27, 75A-28, 75A-111

---

\*Information Announcement



- "fair and equitable application";  
negotiability of ..... 74A-24
- interpretation by agency head
  - finality ..... 75A-13

Assignment of personnel

- on a particular date (seasonal employees) ..... 74A-32
- relationship to numbers, types and  
grades assigned ..... 74A-13, 74A-30
- to work site/duty station
  - after notice ..... 74A-48

Civil Service Commission interpretation

of Civil Service directives ..... 74A-31, 74A-104

Collective bargaining agreement

- approval by agency ..... 74A-48, 75A-111
  - effect of local agreement on  
sec. 11(b) subject matter ..... 74A-48

Compelling need determinations

- agency policies and regulations ..... I.A.\* 9-24-75
- criteria for ..... I.A.\* 9-24-75
- negotiability limitations of secs. 11(a),  
11(b) and 12(b) of the Order ..... I.A.\* 9-24-75

Compensation

- nonappropriated fund (NAF) wage employees ..... 74A-104
- overtime; reimbursable by private industry ..... 73A-36

Details and temporary assignments

---

\*Information Announcement

- rotation of employees ..... 74A-13

Employee categories and classifications

- nonappropriated fund personnel ..... 74A-104

- seasonal employees ..... 74A-32

Equipment, furniture, etc. .... 74A-13, 75A-28

Executive Order 11491

- Preamble ..... 75A-28

- sec. 1 ..... 75A-28

- sec. 2(e)(2) ..... 74A-63

- sec. 4(c)(2) ..... 73A-36

- sec. 10(b)(1) ..... 74A-30, 74A-66

- sec. 10(e) ..... 74A-31

-- "discussions between management and employees" ..... 74A-20, 74A-31, 74A-36

- sec. 11(a) ..... 73A-36

-- "and this Order"  
see specific Order sections under  
 NEGOTIABILITY APPEALS

-- "applicable laws and regulations" ..... 73A-36,  
 74A-31, 74A-48, 74A-63,  
 74A-104

-- "including policies set forth in the Federal Personnel Manual" ..... 74A-31, 74A-104, 75A-13

-- "personnel policies and practices and matters affecting working conditions" ..... 74A-24, 75A-13

-- "published agency policies and regulations" ..... 74A-13,  
 74A-20, 74A-31, 74A-36,  
 74A-67, 75A-13, 75A-27,  
 75A-28

- sec. 11(b) ..... 74A-24

-- "budget" ..... 73A-36

-- "its organization . . . numbers, types,  
and grades of positions or employees  
assigned to an organizational unit,  
work project, or tour of duty" ..... 73A-36,  
74A-13, 74A-30, 74A-48,  
74A-66, 74A-67

-- "mission" ..... 73A-36

-- "the technology of performing  
its work" ..... 74A-13

-- "appropriate arrangements" ..... 75A-13

- sec. 11(c) ..... 73A-36, 75A-28

-- "in connection with negotiations" ..... 75A-6, 75A-28

-- "a proposal" ..... 73A-36

- sec. 11(c)(2) ..... 75A-6, 75A-28

- sec. 11(c)(3) ..... 75A-13

- sec. 11(c)(4) ..... 75A-6, 75A-28, 75A-40

- sec. 11(c)(4)(i) ..... 73A-36,  
74A-69, 74A-101, 75A-40

- sec. 11(c)(4)(ii) ..... 73A-36,  
74A-13, 74A-69, 74A-101,  
75A-40

- sec. 12(a) ..... 73A-36, 74A-24

- sec. 12(b) ..... 74A-24

- sec. 12(b)(1) ..... 74A-13,  
74A-32, 74A-48, 74A-63,  
75A-13

- sec. 12(b)(2) ..... 74A-33,  
74A-48, 74A-63, 74A-66,  
75A-13

-- "to assign" .....	74A-13, 74A-30, 74A-32, 74A-48
-- "to promote" .....	74A-30
- sec. 12(b)(4) .....	73A-36, 74A-13, 74A-33, 74A-48, 74A-63, 75A-13
- sec. 12(b)(5) .....	74A-48, 74A-63, 75A-13
-- "to determine methods, means" .....	73A-36
-- "to determine . . . personnel" .....	73A-36, 74A-66
- sec. 12(b)(6) .....	74A-48, 74A-63
- sec. 13(a) [prior to amendment] .....	74A-24
- sec. 13(a) "does not otherwise conflict with statute" .....	74A-24
- sec. 15 .....	74A-48, 75A-111
- sec. 19(a)(1) .....	75A-28
- sec. 19(a)(3) .....	75A-28
- sec. 19(b)(4) .....	74A-63
- sec. 23 .....	75A-28
Equipment, furniture, etc. ....	74A-13, 75A-28
<b>Facilities and services</b>	
- office space .....	75A-28
<b>Federal Personnel Manual</b>	
- chap. 335	
-- subchaps. 2, 3-6 .....	75A-13
-- subchap. 6-4(c) .....	74A-66
- chap. 451 .....	74A-31

- suppl. 532-2, subchap. 5-3 .....	74A-104
General review of the Federal labor-management relations program	
- effect on final disposition of case .....	74A-24
Grievance procedures	
- negotiated procedure; nature and scope	
-- matters for which statutory appeal procedures exist .....	74A-24
-- scope; in general .....	74A-24, 74A-67
-- subject only to express limitations prescribed by the Order .....	74A-24
Health and safety .....	74A-13, 74A-30, 74A-48, 74A-63
Holidays	
<u>see</u> NEGOTIABILITY APPEALS	
Compensation	
Work schedules	
Hours of work	
<u>see</u> NEGOTIABILITY APPEALS	
Compensation	
Work schedules	
Incentive awards .....	74A-31
Job content	
- assignment of specific duties to particular types of positions or employees .....	74A-13, 74A-48, 74A-67
- consistent with employee's position and qualifications .....	74A-67
- fair and equitable rotation of specific duties among particular types of positions or employees .....	74A-13

- integral relationship to numbers, types and grades of employees assigned to an organizational unit, work project or tour of duty ..... 74A-13, 74A-48, 74A-67
- jurisdictional boundaries among crafts as controlling ..... 74A-48
- on details ..... 74A-13
- rotation of duties assigned within work title ..... 74A-13

Management meetings ..... 74A-20, 74A-36

Management rights

- procedures for the exercise of sec. 12(b) rights ..... 74A-13, 74A-30, 74A-33, 74A-48, 74A-66

see also EXECUTIVE ORDER 11491, Secs. 12(b)(1)-(6); and specific subject matter headings

Mootness of proposal

- effect of subsequent agreement ..... 75A-27, 75A-97

Nonappropriated fund personnel; compensation ..... 74A-104

Overtime  
see NEGOTIABILITY APPEALS  
 Compensation

Position vacancies  
see NEGOTIABILITY APPEALS  
 Vacancies

Premium pay  
see NEGOTIABILITY APPEALS  
 Compensation

Production goals

- in performance evaluation ..... 75A-13

## Promotions

- procedures for ..... 74A-33
- temporary; conditions requiring ..... 74A-30

## Proposals in general

- agency review of agreements under sec. 15  
of the Order ..... 74A-48, 75A-111
- ambiguity ..... 74A-66
- conditions for review ..... 74A-13,  
74A-69, 74A-101, 75A-6,  
75A-28, 75A-40
- contained in other agreements;  
significance of ..... 74A-67
- contained in subsequent agreement; effect ..... 75A-27, 75A-97
- intent; clarification ..... 75A-40
- misinterpretation ..... 74A-13, 74A-24, 75A-13
- revised from those submitted to agency head ..... 75A-6, 75A-28
- specificity ..... 74A-30

## Shifts

see NEGOTIABILITY APPEALS  
Work schedules

## Staffing patterns

see EXECUTIVE ORDER 11491  
Sec. 11(b) "its organization . . ."

## Tours of duty

see EXECUTIVE ORDER 11491  
Sec. 11(b) "its organization . . ."  
NEGOTIABILITY APPEALS  
Work schedules

## Travel time

see NEGOTIABILITY APPEALS  
Work schedules

## United States Code

- 5 U.S.C. § 4503 .....	74A-31
- 5 U.S.C. § 4506 .....	74A-31
- 5 U.S.C. § 5341 <u>et seq.</u> .....	74A-104
- 5 U.S.C. § 5542(a) .....	73A-36
- 5 U.S.C. § 6101 .....	74A-36
-- (a)(3) .....	74A-13
- 5 U.S.C. § 7311 .....	74A-48, 74A-63
- 7 U.S.C. § 511 .....	74A-32
- 21 U.S.C. § 451 <u>et seq.</u> .....	73A-36
- 21 U.S.C. § 601 <u>et seq.</u> .....	73A-36

## Vacancies

- allocation/rotation .....	74A-66
- procedures for filling .....	74A-33, 74A-66
- supervisory; eligible employees .....	74A-66
- time limits on decision/action to fill .....	74A-30

## Work assignment

see NEGOTIABILITY APPEALS

  Job content

## Work schedules

- days of workweek .....	73A-36
- hours of duty .....	73A-36, 74A-13, 75A-27
-- travel time .....	74A-13
- recall to duty .....	74A-32
- shifts; changes .....	73A-36



- tours of duty

-- numbers of employees assigned ..... 74A-13

"NEGOTIATE" ..... 74A-84

NEGOTIATIONS

Authority to negotiate ..... 74A-86

Postponement of ..... 74A-87

Providing requested data ..... 74A-53

Termination of ..... 74A-77

Union failure to request negotiations ..... 74A-84, 75A-55, 75A-60

0

OBLIGATION TO BARGAIN

see UNFAIR LABOR PRACTICE CASES

OFFICIAL TIME

Representational activities; validity of agreement providing for ..... 75P-1

OVERTIME

Arbitration award ..... 73A-56, 74A-15

Negotiability; reimbursable by private industry ..... 73A-36

P-Q

"PARTY" ..... 75A-17

PAY RATES

Arbitration awards ..... 75A-7

see also NEGOTIABILITY APPEALS, Compensation

POSITION VACANCIES

see NEGOTIABILITY APPEALS, Vacancies

PRECEDENT, A/SLMR ASSERTED FAILURE TO ADHERE TO ..... 74A-72,  
74A-96, 75A-3, 75A-35,  
75A-39, 75A-65, 75A-89

PRIVATE SECTOR EXPERIENCE, SIGNIFICANCE ..... 74A-77, 75A-35, 75A-89

PRODUCTION GOALS

In performance evaluations; negotiability ..... 75A-13

PROMOTIONS

see ARBITRATION AWARDS  
NEGOTIABILITY APPEALS

PROSPECTIVE ACTION

Stay ..... 74A-8

R

REDUCTION-IN-FORCE ..... 74A-86

REFUSAL TO BARGAIN

see UNFAIR LABOR PRACTICE CASES

REINSTATEMENT TO UNION MEMBERSHIP ..... 74A-60

REMEDIES

A/SLMR

- adequacy of A/SLMR remedies ..... 75A-59

- clarification of remedial order ..... 75A-59

see also ARBITRATION  
COUNCIL PRACTICE AND PROCEDURE  
GRIEVABILITY/ARBITRABILITY  
(SECTION 13(d))  
REPRESENTATION PROCEEDINGS  
UNFAIR LABOR PRACTICE CASES

REORGANIZATION (AGENCY)

Appropriate unit criteria following reorganization..... 74A-28

"Co-employer" doctrine ..... 74A-22

Successorship ..... 74A-22

REPRESENTATION PETITIONS

see REPRESENTATION PROCEEDINGS, Petitions

REPRESENTATION PROCEEDINGS

Amicus curiae ..... 73A-9, 74A-22, 74A-41

A/SLMR proceedings

- burden of proof ..... 74A-70, 75A-38
- cooperation of petitioner ..... 74A-75
- evidence considered ..... 74A-28, 74A-96
- hearings
  - false testimony ..... 74A-96
  - substantial factual issues and requirements for ..... 75A-18, 75A-24

A/SLMR regulations

- A/SLMR interpretation and implementation ..... 75A-19
- correction ..... 74A-22

A/SLMR role

- guaranteeing rights under sec. 1(a) of the Order ..... 74A-22, 75A-19
- procedures for testing doubt concerning union support ..... 74A-22

Collective bargaining units

- accretion; absence of ..... 74A-92, 75A-24

- appropriate unit criteria
  - community of interest ..... 74A-16, 74A-22, 74A-28
  - effective dealings ..... 74A-16,  
74A-22, 74A-28, 74A-41,  
74A-96
  - efficiency of agency operations ..... 74A-16,  
74A-22, 74A-28, 74A-41,  
74A-96
- consolidation of units ..... 73A-9, 74A-41
- conversion of units; military to civilian ..... 74A-92, 75A-24
- employee exclusions
  - confidential employees ..... 74A-73
  - supervisors
    - defined ..... 75A-20, 75A-39
    - independent judgment ..... 74A-78, 75A-20, 75A-39
    - intermittent exercise of  
supervisory functions ..... 75A-39
    - performance evaluation functions ..... 75A-20
- expanding unit ..... 74A-92
- fragmentation ..... 74A-41, 74A-92
- reorganization of agencies;  
bargaining unit impact
  - application of appropriate  
unit criteria ..... 74A-22, 74A-28
  - "co-employer" doctrine ..... 74A-22
  - successorship ..... 74A-22
- special employee units
  - guards ..... 74A-9

- types of units
  - officewide ..... 74A-41
  - regionwide ..... 74A-16, 74A-41
  - sectorwide ..... 74A-28

Elections

- campaigns
  - rival union misrepresentation ..... 75A-38
- interference
  - by agency/activity
    - antiunion handbill ..... 75A-18
    - expressing union preference ..... 74A-70
    - preference of representative during campaign ..... 75A-18
    - statements ..... 75A-18
  - by rival union; misrepresentation ..... 75A-38
- misrepresentation
  - by agency/activity ..... 75A-18
  - by rival union ..... 75A-38
- objections to election
  - burden of proof ..... 74A-70
- speeches
  - by agency/activity representatives ..... 74A-70

Good faith doubt concerning union support

- testing procedures; avoiding unfair labor practice ..... 74A-22

Interlocutory appeals to Council ..... 74A-97,  
75A-37, 75A-49, 75A-75

Intervention, requests for ..... 74A-83, 75A-19

- "party-in-interest" ..... 75A-5

Mootness ..... 75A-5

- due to change in the Order ..... 74A-9

Petitions

- amendment of certification (AC)

-- necessity for ..... 74A-73

-- reflecting mandatory exclusion of  
certain employees ..... 74A-73

- decertification (DR) ..... 75A-35

- representation (RO, RA)

-- filing

--- bars to petition

- agreement bar ..... 74A-9, 74A-92

- where agreement not in conformance  
with Order ..... 74A-9

-- intervention

--- A/SLMR's responsibility ..... 75A-19

--- incumbent ..... 74A-9

--- timeliness of request ..... 74A-83, 75A-19

-- hearing

--- witnesses; false testimony ..... 74A-96

Remands

- to A/SLMR ..... 74A-73

- to Assistant Regional Director ..... 74A-22

Retroactive application of Council decision ..... 74A-22

Stay by Council of A/SLMR decision

- denied ..... 74A-9,  
74A-16, 74A-83, 74A-97,  
75A-5, 75A-19, 75A-39,  
75A-49

- granted ..... 74A-22

RETROACTIVE APPLICATION OF COUNCIL DECISION ..... 74A-22

S

SETTLEMENT AGREEMENT OFFER

Unfair labor practice complaint ..... 75A-76

SHIFTS

Arbitration awards ..... 74A-38, 74A-75, 75A-30

see also EXECUTIVE ORDER 11491, Sec. 11(b)  
"its organization . . ."  
NEGOTIABILITY APPEALS  
Work schedules

SICK LEAVE

Arbitration award ..... 75A-31

STAFFING PATTERNS

see EXECUTIVE ORDER 11491, Sec. 11(b)  
"its organization . . ."

SUPERVISORS

see REPRESENTATION PROCEEDINGS  
Collective bargaining units  
- employee exclusions  
UNFAIR LABOR PRACTICE CASES

T

THREATS

By activity ..... 75A-80

By union ..... 74A-60

TOURS OF DUTY

see EXECUTIVE ORDER 11491, Sec. 11(b)  
 "its organization . . ."  
 NEGOTIABILITY APPEALS, Work schedules

TRAVEL TIME

see NEGOTIABILITY APPEALS, Work schedules

U

UNDERMINING UNION

see UNFAIR LABOR PRACTICE CASES

UNFAIR LABOR PRACTICE CASES

Agency unfair labor practices

- discrimination

-- agency grievance procedure

--- agency's obligation to follow ..... 75A-51

--- employee choice of own representative ..... 74A-65

--- extensions of time to file grievance ..... 75A-51

-- union official

--- substandard employee performance ..... 75A-89

-- union representative

--- right of exclusive representative to  
 designate representative at meetings ..... 75A-1

- interference, restraint, coercion



- "adverse action" proceeding
  - exclusive representative's right to act for individual ..... 74A-54
- agency grievance procedure
  - see discrimination
- antiunion animus ..... 75A-89
- bypassing union ..... 74A-80
- communications with employees
  - content and circumstances of communication ..... 74A-80
  - informal discussions ..... 74A-95
  - information purpose ..... 74A-95
  - interrogation; union activities ..... 75A-29
  - isolated statement ..... 75A-12
  - per se violations ..... 74A-80, 74A-95, 75A-29
  - threat ..... 74A-80
- consultation; change in personnel practice
  - authority of activity ..... 74A-86
- derivative sec. 19(a)(1) complaint ..... 74A-77, 74A-82
- disparagement
  - requiring union president to log union activities ..... 74A-82
- dues
  - revocation ..... 74A-22, 75A-61
  - withholding termination ..... 75A-3
- negotiated agreement

---	reorganization and preexisting agreement .....	74A-22
---	obligation to negotiate; midcontract .....	75A-60
---	obligation to sign .....	75A-35
--	negotiations	
---	data requested .....	74A-53
---	termination of session .....	74A-77
-	refusal to accord recognition	
--	negotiated agreement	
---	reorganization and preexisting agreement .....	74A-22
---	dues revocation .....	74A-22, 75A-61
-	refusal to consult, confer, negotiate	
--	adverse action proceeding; exclusive representative's right to act for individual .....	74A-54
--	antiunion animus .....	75A-89
--	authority to consult, confer, negotiate .....	74A-86
--	bypassing union .....	74A-80
--	feasibility study .....	75A-88
--	grievance processing; supplying information .....	73A-59
--	impasse .....	74A-77
--	negotiate; agency/activity's obligation	
---	authority to negotiate .....	74A-86
---	union's obligation to request negotiations .....	74A-84, 75A-55, 75A-60

FLRC NO(s).

-- negotiated agreement	
--- approval; agency's obligation .....	75A-65
--- change in personnel practice; matter not made a part of preexisting agreement .....	75A-60
--- decertification petition; effect .....	75A-35
--- obligation to sign .....	75A-35
--- review; intermediate levels .....	75A-65
-- negotiations	
--- data requested .....	74A-53
--- postponement .....	74A-87
--- termination of session .....	74A-77
-- unilateral change in personnel practice .....	73P-1
-- union representative	
--- "adverse action" proceedings .....	74A-54
--- substitute .....	75A-1

## Alternative forum

- "appeals procedure" (sec. 19(d)) .....	75A-57
-- raised by A/SLMR .....	74A-53
- grievability matter (sec. 13(d))	
-- absent bad faith .....	75A-82
- representation petition .....	75A-92

## Appeals to Council

- grounds asserted [selected]	
-- conflict of interest of Council members .....	74A-98
-- credibility determination .....	74A-90

-- de minimis conduct .....	74A-77
-- extraordinary circumstances, .....	74A-87
-- fair hearing .....	75A-86
-- prima facie case made below .....	74A-90, 75A-35
-- similar issues on appeal to Council in another case .....	75A-61
- procedure	
-- mootness; due to amendment of the Order .....	74A-47
-- untimely petition .....	74A-100, 75A-11, 75A-52
--- postal delay .....	75A-62
A/SLMR proceedings	
- complaint	
-- dismissal	
--- alternative forum <u>see</u> Alternative forum	
--- sufficiency of evidence .....	74A-74, 74A-86, 74A-87, 74A-90, 75A-35, 75A-51, 75A-55, 75A-64, 75A-67, 75A-68, 75A-69, 75A-70, 75A-73, 75A-83, 75A-99
-- parties to complaint .....	74A-86
-- service .....	74A-72
-- timeliness .....	74A-72, 75A-47
- evidence	
-- concerning compliance .....	75A-79
-- prior to and subsequent to complaint .....	75A-72
-- refusal to consider .....	74A-98

- hearing not required ..... 74A-90, 75A-82
- negotiability determinations ..... 73P-1
  - "party subject to an adverse ruling" ..... I.A.\* 9-24-75

## A/SLMR remedial order

- authority of A/SLMR ..... 74A-22, 75A-59
- broad orders ..... 74A-22

## Compliance

- Council review of ..... 75A-59
- evidence concerning ..... 75A-79
- under sec. 19 of the Order ..... 75A-8

## Enforcement of arbitration awards

see ARBITRATION

## Informal resolution of charge; prior to

formal complaint ..... 74A-77

## Settlement agreement

- A/SLMR discretion ..... 75A-76

## Union unfair labor practices

- discrimination
  - reinstatement of membership ..... 74A-60
  - organizing currently represented employees ..... 75A-64
  - threat
    - request for discontinuance of checkoff revocation ..... 74A-60

## UNION BUSINESS

---

\*Information Announcement

"Internal"; "representational activities" .....	75P-1
UNION DEMOCRACY .....	74A-98
UNITED STATES CODE	
5 U.S.C. § 4503 .....	74A-31
5 U.S.C. § 4506 .....	74A-31
5 U.S.C. § 5341 <u>et seq.</u> .....	74A-104
5 U.S.C. § 5542(a) .....	73A-36, 73A-46, 74A-15
5 U.S.C. § 5548 .....	73A-46
5 U.S.C. § 5596 .....	73A-46, 73A-56, 74A-15, 74A-29, 74A-51, 75A-74
5 U.S.C. § 6101 .....	73A-36
- (a)(3) .....	74A-13
5 U.S.C. § 6311 .....	75A-31
5 U.S.C. § 7311 .....	74A-48, 74A-63
7 U.S.C. § 511 .....	74A-32
18 U.S.C. § 1001 .....	74A-96
21 U.S.C. § 451 <u>et seq.</u> .....	73A-36
21 U.S.C. § 601 <u>et seq.</u> .....	73A-36
28 U.S.C. § 2674 .....	75A-23
31 U.S.C. § 71 .....	75A-3
31 U.S.C. § 628 .....	75P-1
UNNECESSARY LITIGATION	
A/SLMR disposition .....	74A-77

V

VACANCIES

see ARBITRATION AWARDS  
NEGOTIABILITY APPEALS

VACANCY ANNOUNCEMENTS

Arbitration award ..... 75A-56

W-X-Y-Z

WORK ASSIGNMENT

see NEGOTIABILITY APPEALS, Job content

WORK SCHEDULES

see NEGOTIABILITY APPEALS

**COUNCIL PRACTICE AND PROCEDURE**

Advisory opinions ..... 74A-91, 75A-48, 75A-63

Amicus curiae ..... 73A-9,  
73A-36, 74A-22, 74A-41,  
74A-95

Approval of submission to the Council  
by agency head or labor organization  
president ..... 74A-89, 74A-103, 75A-34,  
I.A.\* 9-24-75

A/SLMR referral of major policy issue  
to the Council ..... 73A-59, 74A-46

Compliance with Council's procedural  
requirements; effect of failure to comply  
within time limits provided in notifica-  
tion of deficiencies ..... 74A-89, 74A-103, 75A-34

Cooperation with processes of A/SLMR;  
effect of failure to cooperate on  
appeal to the Council ..... 75A-75

Designation of labor organization  
official for appeals under sec. 11  
(c)(4)(ii) of the Order ..... I.A.\* 9-24-75

**Enforcement**

- Council negotiability decisions ..... 73A-36
- arbitration awards ..... 74A-4, 74A-46, 74A-57

**Evidence**

- material submitted in appeal to the  
Council which was not submitted to or  
considered by arbitrator ..... 74A-99
- submission of revised proposals to the  
Council which were not advanced in  
negotiations or referred to the agency  
head for a negotiability determination ..... 75A-6, 75A-28

---

\*Information Announcement



Factfinding requests .....	74A-13, 74A-30, 74A-33, 75A-6
FSIP referral of negotiability issue to Council .....	74A-24, 75A-13
General Accounting Office request for a statement and interpretation .....	75P-1
Hearing requests .....	73A-4, 74A-33, 75A-26
Interlocutory appeals .....	74A-97, 75A-37, 75A-49
Intervention	
- request to intervene as a party in proceedings before the Council .....	73A-36
Mootness; petitions for review of	
- A/SLMR decisions .....	74A-47, 75A-5
- negotiability issues .....	75A-27, 75A-97
- arbitration awards .....	73A-4
Motions and like requests	
- for enforcement of arbitration awards .....	74A-4, 74A-57
- for factfinding .....	74A-13, 74A-30, 74A-33, 75A-6
- for hearing .....	73A-4, 75A-26
- to dismiss appeal as moot .....	75A-27
- to intervene as a party in proceedings before Council .....	73A-36
- to reconsider prior decision .....	73A-46, 75A-62
- to remand revised proposals submitted to Council to the agency for new negotiability determination .....	75A-28
- to remand to arbitrator .....	74A-57, 75A-71

- to strike portions of agency head  
negotiability determination ..... 74A-30, 74A-33
- to strike portions of submissions to  
the Council ..... 74A-30
- Oral argument requests ..... 73A-36,  
74A-13, 74A-22, 74A-30,  
74A-53, 75A-27
- Party ..... 73A-36, 75A-17
- Premature filing
  - negotiability issues ..... 75A-28, 75A-40
- Prospective application of interpretation  
of Council rules ..... 74A-99
- Reconsideration requests ..... 73A-46, 75A-62
- Request for statement on major policy  
issue in arbitration case ..... 75A-74
- Service
  - simultaneous service and statement of  
service requirements ..... 74A-103
  - to parties who entered appearances in  
prior proceedings ..... I.A.\* 9-24-75
- Third-party referrals to the Council
  - of negotiability issue by FSIP ..... 74A-24, 75A-13
  - of major policy issue by A/SLMR ..... 73A-59, 74A-46
- Time limits for filing petitions for review of
  - A/SLMR decisions ..... 74A-100,  
75A-11, 75A-52, 75A-62
  - negotiability issues ..... 75A-58

---

\*Information Announcement

- arbitration awards ..... 74A-99, 75A-10, 75A-16

Unfair labor practice allegation in  
negotiability case ..... 75A-28



