

DECISIONS AND
INTERPRETATIONS
OF THE
FEDERAL
LABOR RELATIONS
COUNCIL

Volume 2



**DECISIONS AND INTERPRETATIONS
OF THE
FEDERAL LABOR RELATIONS COUNCIL**

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

Volume 2

(Cite as: 2 FLRC—)

January 1, 1974 through December 31, 1974

**U.S. Government Printing Office
Washington, D.C. 1976**

FLRC-76-1

MEMBERS OF THE FEDERAL LABOR RELATIONS COUNCIL

**During the period January 1, 1974 through
December 31, 1974**

CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION

**Honorable Robert E. Hampton
Chairman of the Council
Jan. 1, 1974-**

SECRETARY OF LABOR

**Honorable Peter J. Brennan
Jan. 1, 1974-**

DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

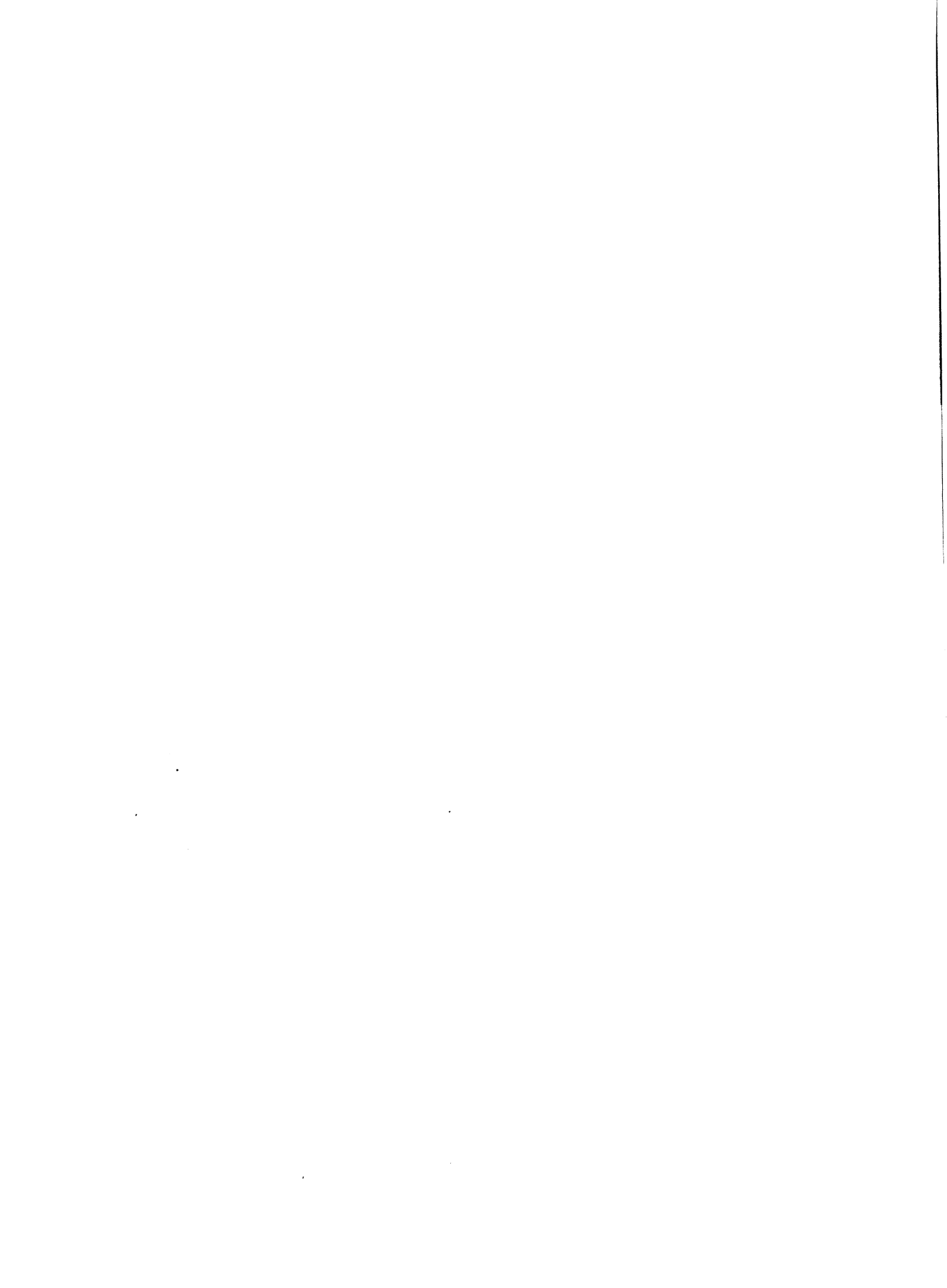
**Honorable Roy L. Ash
Jan. 1, 1974-**

EXECUTIVE DIRECTOR

**Henry B. Frazier III
Jan. 1, 1974-
1900 E Street, NW.
Washington, D.C. 20415**

CONTENTS

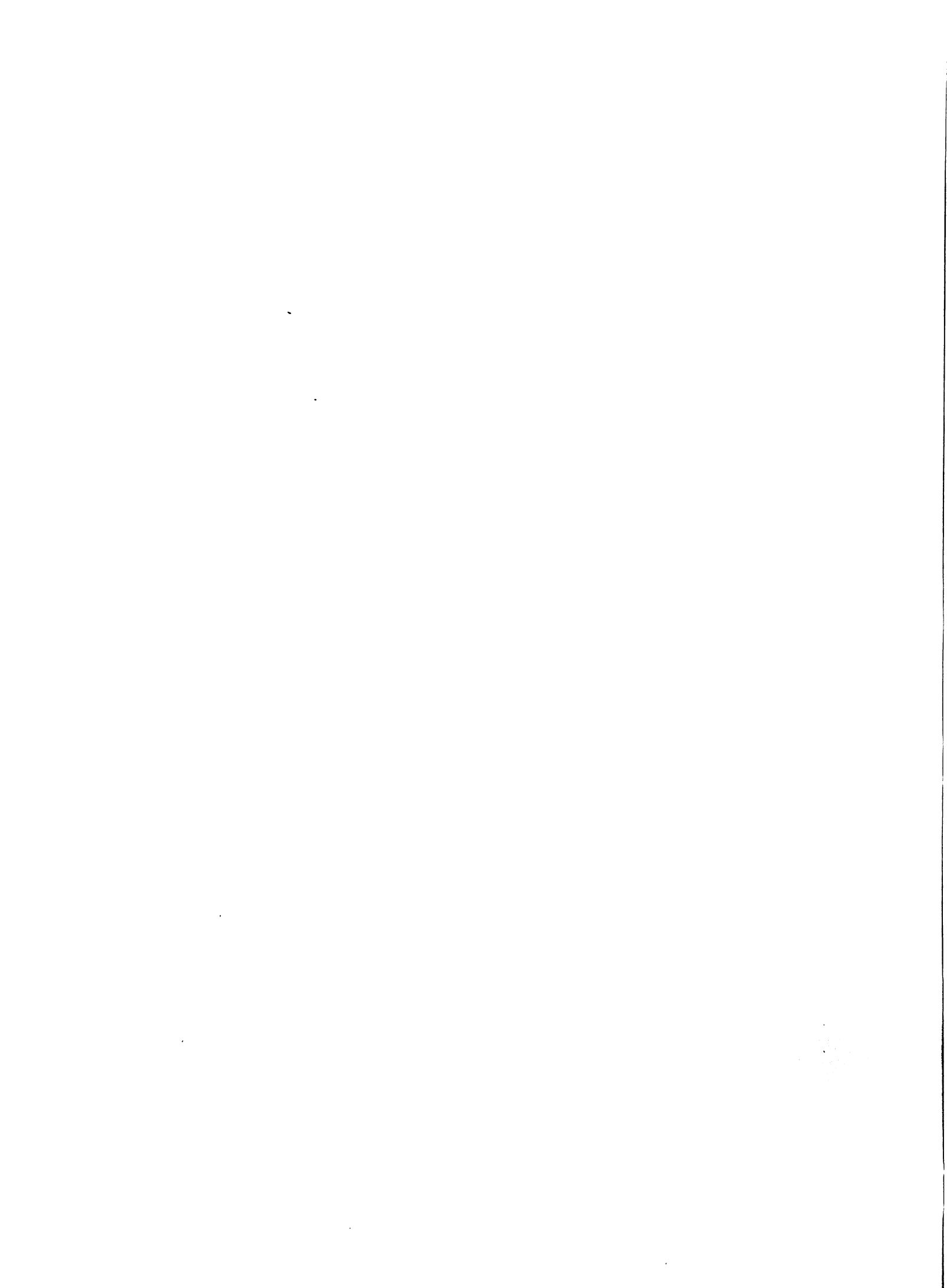
	Page
Part I. Tables of Decisions and Interpretations	
Appeals Decisions by Docket Numbers	7
Appeals Decisions by Agencies	15
Appeals Decisions by Labor Organizations	25
Appeals Decisions by Individuals	31
Interpretations and Policy Statements by Docket Numbers and Titles.....	35
Part II. Texts of Decisions and Interpretations	
Appeals Decisions.....	41
Interpretations and Policy Statements.....	305
Part III. Subject Matter Index	
Subject Matter Index.....	315



PART I.

TABLES OF DECISIONS AND INTERPRETATIONS

January 1, 1974 through December 31, 1974



APPEALS DECISIONS BY DOCKET NUMBERS

January 1, 1974 through December 31, 1974

APPEALS WITHDRAWN

FLRC NUMBER

DATE

72A-38

January 30, 1974

74A-7

March 7, 1974

74A-42

December 18, 1974

74A-43

December 9, 1974

74A-45

December 9, 1974

APPEALS DECISIONS BY DOCKET NUMBERS

FLRC Number	Type	Case Title	Pa
72A-50	A/S	Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida, A/SLMR No. 214	10
73A-1	<u>NEG</u>	Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina	4
73A-4	ARB	AFGE, Local 2532 and Small Business Administration (Dorsey, Arbitrator)	8
✓ 73A-6	<u>NEG</u>	Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina	13
73A-16	<u>NEG</u>	Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California	15
73A-21	<u>NEG</u>	Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy	5
✓ 73A-22	<u>NEG</u>	American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama	6
73A-25	<u>NEG</u>	AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service	20
73A-32	A/S	Internal Revenue Service, Chicago District, A/SLMR No. 279	22

FLRC Number	Type	Case Title	Page
73A-33	A/S	Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280	221
73A-42	ARB	Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator)	164
73A-43	A/S	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	232
73A-44	ARB	Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator)	262
73A-45	A/S	Department of Health, Education, and Welfare, Bureau of Retirement and Survivors Insurance Payment Center, Birmingham, Alabama, Assistant Secretary Case No. 40-4708 (CA)	85
73A-46	ARB	Naval Rework Facility, Naval Air Station, Jacksonville, Florida and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator)	195
√ 73A-48	NEG	American Federation of Government Employees, Local 53 and Navy Regional Finance Center, Norfolk, Virginia	88
73A-50	ARB	Federal Aviation Administration, U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator)	111
73A-51	ARB	American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator)	200

FLRC Number	Type	Case Title	Pa
73A-52	A/S	Military Ocean Terminal, Bayonne, New Jersey, Assistant Secretary Case No. 32-3101	7
73A-53	A/S	National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, Assistant Secretary Case No. 60-3035 (CA)	25
73A-54	A/S	Veterans Administration Hospital, Portland, Oregon, A/SLMR No. 308	9
73A-55	A/S	Department of Justice, U.S. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania, Assistant Secretary Case No. 20-4035 (AP)	9
73A-58	A/S	United States Air Force 321st Combat Support Group, Grand Forks Air Force Base, North Dakota, A/SLMR No. 319	9
73A-60	A/S	Department of the Air Force, Ellsworth Air Force Base, South Dakota and National Federation of Federal Employees, Local No. 179, Assistant Secretary Case No. 60-3412 (RO)	246
73A-61	A/S	Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 330	45
73A-62	A/S	National Association of Government Employees, Local R14-32 (Fort Leonard Wood), Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-3712 (CO)	100
73A-63	A/S	Department of the Army, United States Army Base Command, Okinawa, A/SLMR No. 243	103
73A-64	A/S	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	238

FLRC Number	Type	Case Title	Page
73A-65	A/S	General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333	43
73A-66	A/S	U.S. Air Force, Andrews Air Force Base, Base Fire Department, Assistant Secretary Case No. 22-3954 (CA)	116
√ 73A-67	ARB	National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator)	293
74A-1	ARB	Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator)	145
74A-2	<u>NEG</u>	Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio	280
74A-3	A/S	Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334	119
74A-4	ARB	American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator)	122
74A-5	A/S	Veterans Administration Hospital, Butler, Pa., Assistant Secretary Case No. 21-3923 (RO)	127
74A-6	A/S	Northwest Area Exchange (AAFES), A/SLMR No. 338	79
74A-10	A/S	Department of Health, Education, and Welfare, Social Security Administration, New York Payment Center, Flushing, New York, Assistant Secretary Case No. 30-5150 (GP)	154

FLRC Number	Type	Case Title	Page
74A-11	A/S	Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336	15
74A-12	ARB	Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator)	18
74A-14	A/S	Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 344	21
74A-17	ARB	American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator)	28
74A-18	ARB	Defense Contract Administration Services Region, St. Louis, Missouri, and American Federation of Government Employees, Local 1711 (Madden, Arbitrator)	12
74A-21	A/S	U.S. Army Electronics Command, Ft. Monmouth, New Jersey, Assistant Secretary Case No. 32-3329 (CA)	18
74A-23	A/S	Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056 (CA)	22
74A-26	A/S	Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4067	17
74A-27	A/S	Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4068	17

FLRC Number	Type	Case Title	Page
74A-34	A/S	Department of Health, Education, and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey, A/SLMR No. 361	274
74A-35	A/S	U.S. Marshals Service, District of Columbia, Assistant Secretary Case No. 22-5174 (RO)	250
74A-37	A/S	Department of Agriculture, Office of Information Systems, Kansas City, Missouri, A/SLMR No. 387	151
74A-39	A/S	Internal Revenue Service, Chamblee Service Center, Chamblee, Georgia, Assistant Secretary Case No. 40-5246 (CA)	277
74A-49	ARB	Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator)	300
74A-55	<u>NEG</u>	NFFE Local 997 and Ames Research Center, National Aeronautics and Space Administration, Moffett Field, California	259
74A-56	A/S	Air Engineering Center, Naval Air Support Activity, Philadelphia, Pa., Assistant Secretary Case No. 20-4311	180
74A-57	ARB	American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator)	192
74A-62	ARB	Mid-America Program Center, Social Security Administration and Local 1336, American Federation of Government Employees (Yarowsky, Arbitrator)	271

APPEALS DECISIONS BY AGENCIES

January 1, 1974 through December 31, 1974

APPEALS DECISIONS BY AGENCIES

Agency	FLRC Number	Page
A		
Agriculture, Dept. of		
-- Office of Information Systems, Kansas City, Missouri	74A-37	151
Air Force, Dept. of		
-- Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas	73A-64	238
-- Army-Air Force Exchange Service, Northwest Area Exchange	74A-6	79
-- Base Fire Department, Andrews Air Force Base, Maryland	73A-66	116
-- Ellsworth Air Force Base, South Dakota	73A-60	246
-- U.S.A.F. 321st Combat Support Group, Grand Forks Air Force Base, North Dakota	73A-58	97
-- Wright-Patterson Air Force Base, Ohio	74A-2	280
Ames Research Center	74A-55	259
Andrews Air Force Base, Base Fire Department	73A-66	116
Army, Dept. of		
-- Fort Leonard Wood, Missouri	73A-62	100

Agency	FLRC Number	Page
-- Military Ocean Terminal, Bayonne, New Jersey	73A-52	76
-- Army Electronics Command, Fort Monmouth, New Jersey	74A-21	183
-- Army Base Command, Okinawa	73A-63	103
Army-Air Force Exchange Service	74A-6	79
Army Base Command, Okinawa	73A-63	103
Army Electronics Command, Fort Monmouth, New Jersey	74A-21	183

B-C

Charleston Naval Shipyard	73A-1	48
	73A-6	137
Civil Service Commission	72A-50	106

D

Defense, Dept. of

-- Defense Supply Agency and DSA Field Activities, Headquarters, Cameron Station, Alexandria, Virginia	73A-51	200
-- Defense Contract Administration, Service Region, St. Louis, Missouri	74A-18	124
-- National Guard Bureau, Texas Air National Guard	74A-11	130

E

Ellsworth Air Force Base	73A-60	246
--------------------------	--------	-----

Executive Branch

-- Office of Economic Opportunity

-- Region V, Chicago, Illinois	74A-3	119
-- Dallas, Texas	74A-17	288
-- Washington, D.C.	73A-67	293
	74A-57	192
	74A-4	122

F

Federal Aviation Administration

-- Flight Service Station, Des Moines, Iowa	73A-50	111
-- Washington, D.C.	74A-1	145
-- Western Region, San Francisco, California	74A-26	174
	74A-27	177
Food and Drug Administration, Newark District, Newark, New Jersey	74A-34	274
Fort Leonard Wood, Missouri	73A-62	100
Fort Monmouth, New Jersey, Army Electronics Command	74A-21	183

G

General Services Administration, Region 9, San Francisco, California	73A-65	43
--	--------	----

Agency	FLRC Number	Page
Grand Forks Air Force Base	73A-58	97
H		
Health, Education, and Welfare, Dept. of		
-- Public Health Service, Food and Drug Administration, Newark District, Newark, New Jersey	74A-34	274
-- Social Security Administration		
-- Bureau of District Office Opera- tions, Boston Region, Massachusetts	74A-49	300
-- Bureau of Retirement and Survivors Insurance, Payment Center, Birmingham, Alabama	73A-45	85
-- Mid-America Program Center, Kansas City, Missouri	74A-62	271
-- New York Payment Center, Flushing, New York	74A-10	154
I		
Immigration and Naturalization Service	73A-25	207
Internal Revenue Service		
-- Chamblee Service Center, Chamblee, Georgia	74A-39	277
-- Chicago District, Chicago, Illinois	73A-22	65
-- Office of the District Director, Jacksonville District, Jacksonville, Florida	72A-50	106

Agency	FLRC Number	Page
-- Western Service Center, Ogden, Utah	73A-33	221
-- Washington, D.C.	74A-23	229
J		
Jacksonville Naval Air Rework Facility	74A-14	217
Jacksonville Naval Rework Facility	73A-46	195
Justice, Dept. of		
-- Immigration and Naturalization Service	73A-25	207
-- U.S. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania	73A-55	94
-- U.S. Marshals Service, Washington, D.C.	74A-35	250
K-L		
Lackland Air Force Base, Air Force Defense Language Institute	73A-64	238
Long Beach Naval Shipyard	73A-16	157
Louisville Naval Ordnance Station	73A-21	55
M		
Military Ocean Terminal, Bayonne, New Jersey	73A-52	76
N		
National Aeronautics and Space Administration, Ames Research Center, Moffett Field, California	74A-55	259

Agency	FLRC Number	Page
National Guard Bureau, Texas Air National Guard	74A-11	130
National Labor Relations Board, Region 17, Kansas City, Missouri	73A-53	253
Navy, Dept. of		
-- Charleston Naval Shipyard, Charleston, South Carolina	73A-1 73A-6	48 137
-- Long Beach Naval Shipyard, Long Beach, California	73A-16	157
-- Louisville Naval Ordnance Station, Louisville, Kentucky	73A-21	55
-- Naval Regional Finance Center, Norfolk, Virginia	73A-48	88
-- Naval Air Rework Facility, Jacksonville, Florida	74A-14	217
-- Naval Air Rework Facility, Pensacola, Florida	74A-12	185
-- Naval Rework Facility, Jacksonville, Florida	73A-46	195
Norfolk Naval Regional Finance Center	73A-48	88

0-P-Q

Office of Economic Opportunity

-- Region V, Chicago, Illinois	74A-3	119
-- Dallas, Texas	74A-17	288

Agency	FLRC Number	Page
-- Washington, D.C.	73A-67	293
	74A-4	122
	74A-57	192
Pensacola Naval Rework Facility	74A-12	185

R-S

Small Business Administration

-- Washington, D.C.	73A-4	82
	73A-44	262

Social Security Administration

-- Bureau of District Operations, Boston Region, Massachusetts	74A-49	300
-- Bureau of Retirement and Survivors Insurance, Payment Center, Birmingham, Alabama	73A-45	85
-- Mid-America Program Center, Kansas City, Missouri	74A-62	271
-- New York City Payment Center, Flushing, New York	74A-10	154

T

Texas Air National Guard	74A-11	130
--------------------------	--------	-----

Treasury, Dept. of

-- Internal Revenue Service		
-- Chamblee Service Center, Chamblee, Georgia	74A-39	277
-- Chicago District, Chicago, Illinois	73A-22	65

Agency	FLRC Number	Page
-- Office of the District Director, Jacksonville District, Jacksonville, Florida	72A-50	106
-- Western Service Center, Ogden, Utah	73A-33	221
-- Washington, D.C.	74A-23	229

Transportation, Dept. of

-- Federal Aviation Administration		
-- Flight Service Station, Des Moines, Iowa	73A-50	111
-- Washington, D.C.	74A-1	145
-- Western Region, San Francisco, California	74A-26 74A-27	174 177

U-V

Veterans Administration Hospital

-- Butler, Pennsylvania	74A-5	127
-- Canandaigua, New York	73A-42	164
-- Montgomery, Alabama	73A-22	65
-- Portland, Oregon	73A-54	91
-- Tampa, Florida	73A-61	45

W-X-Y-Z

Wright-Patterson Air Force Base	74A-2	280
---------------------------------	-------	-----

APPEALS DECISIONS BY LABOR ORGANIZATIONS

January 1, 1974 through December 31, 1974

APPEAL DECISIONS BY LABOR ORGANIZATIONS

Labor Organization	FLRC Number	Page
A-B-C-D-E		
American Federation of Government Employees, AFL-CIO	73A-43	232
-- Local 53	73A-48	88
-- Local 148	73A-55	94
-- Local 997	73A-22	65
-- Local 1164	74A-49	300
-- Local 1336	74A-62	271
-- Local 1367	73A-64	238
-- Local 1650	73A-43	232
-- Local 1678	73A-63	103
-- Local 1711	74A-18	124
-- Local 1760	74A-10	154
-- Local 2449	73A-51	200
-- Local 2532	73A-4	82
	73A-44	262
-- Local 2649	74A-17	288
-- Local 2677	73A-67	293
	74A-4	122
	74A-57	192
-- Local 2816	74A-3	119
-- Local 3000	74A-11	130
-- Local 3379	73A-58	97
-- Local 3445	74A-34	274

Labor Organization	FLRC Number	Page
-- Lodge No. 1960	74A-12	185
-- National Border Patrol Council	73A-25	207
F-G-H		
Federal Employees Metal Trades Council, Charleston, South Carolina	73A-1 73A-6	48 137
I-J-K		
International Association of Machinists and Aerospace Workers, AFL-CIO		
-- Local Lodge No. 830	73A-21	55
-- Local Lodge No. 2333	74A-2	280
International Federation of Professional and Technical Engineers, AFL-CIO, CLC, Local 174	73A-16	157
L		
Licensed Practical Nurses Association of Florida	73A-61	45
M		
Metal Trades Council, Charleston, South Carolina	73A-1 73A-6	48 137
Marshals Association, U.S.	74A-35	250
N		
National Association of Air Traffic Specialists, Flight Service Station, Des Moines, Iowa	73A-50	111

Labor Organization	FLRC Number	Page
National Association of Government Employees		
-- Local R5-82	73A-46	195
-- Local R14-32	73A-62	100
National Association of Government Inspectors	74A-14	217
National Federation of Federal Employees		
-- Local 179	73A-60	246
-- Local 476	74A-21	183
-- Local 997	74A-55	259
-- Local 1615	73A-66	116
-- Local 1633	74A-37	151
National Treasury Employees Union	74A-11	130
	74A-23	229
-- Chapter No. 10	73A-32	221
-- Chapter No. 67	73A-33	221
-- Chapter No. 070	74A-39	277
-- Jacksonville District Joint Council	72A-50	106
	0	
Oregon Nurses Association, Inc.	73A-54	91
	P	
Professional Air Traffic Controllers Organization	74A-1	145

Labor Organization	FLRC Number	Page
Q-R-S		
Service Employees International Union, AFL-CIO		
-- Local 49	74A-6	79
-- Local 92	74A-6	79
-- Local 227	74A-5	127
-- Local 227	73A-42	164
T-U-V		
U.S. Marshals Association	74A-35	250
W-X-Y-Z		

APPEALS DECISIONS BY INDIVIDUALS

January 1, 1974 through December 31, 1974

APPEALS DECISIONS BY INDIVIDUALS

Individuals	FLRC Number	Page
-- Benedict, Frederick	74A-26	174
	74A-27	177
-- Bridges, Charles R.	73A-43	232
-- Cardiello, Gabriel P.	73A-52	76
-- Medina, Arnold	73A-43	232
-- Nixon, David A.	73A-53	253
-- Waldrop, Mary T.	73A-45	85

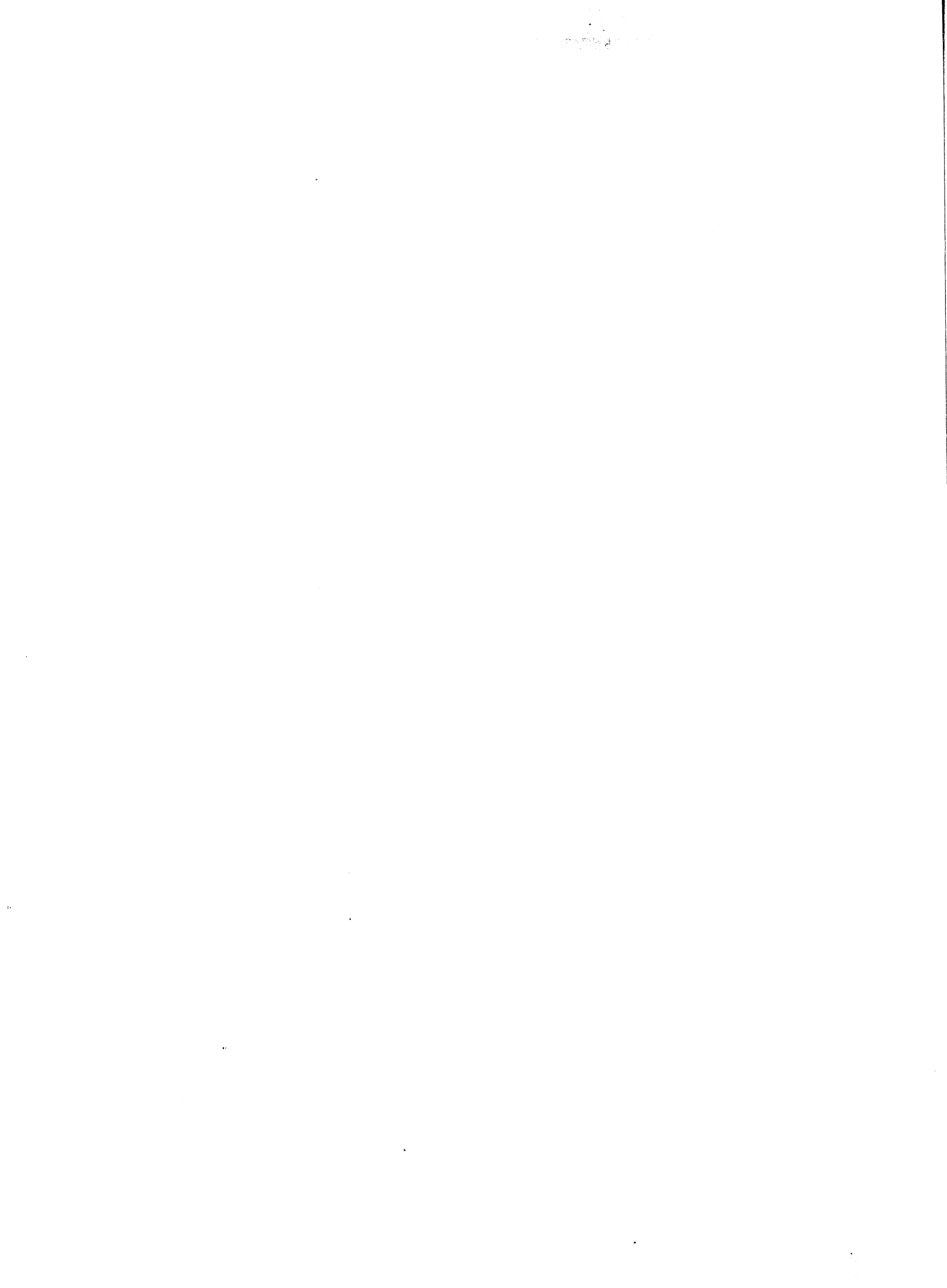
INTERPRETATIONS AND POLICY STATEMENTS
BY DOCKET NUMBERS AND TITLES

January 1, 1974 through December 31, 1974



INTERPRETATIONS AND POLICY STATEMENTS
BY
DOCKET NUMBERS AND TITLES

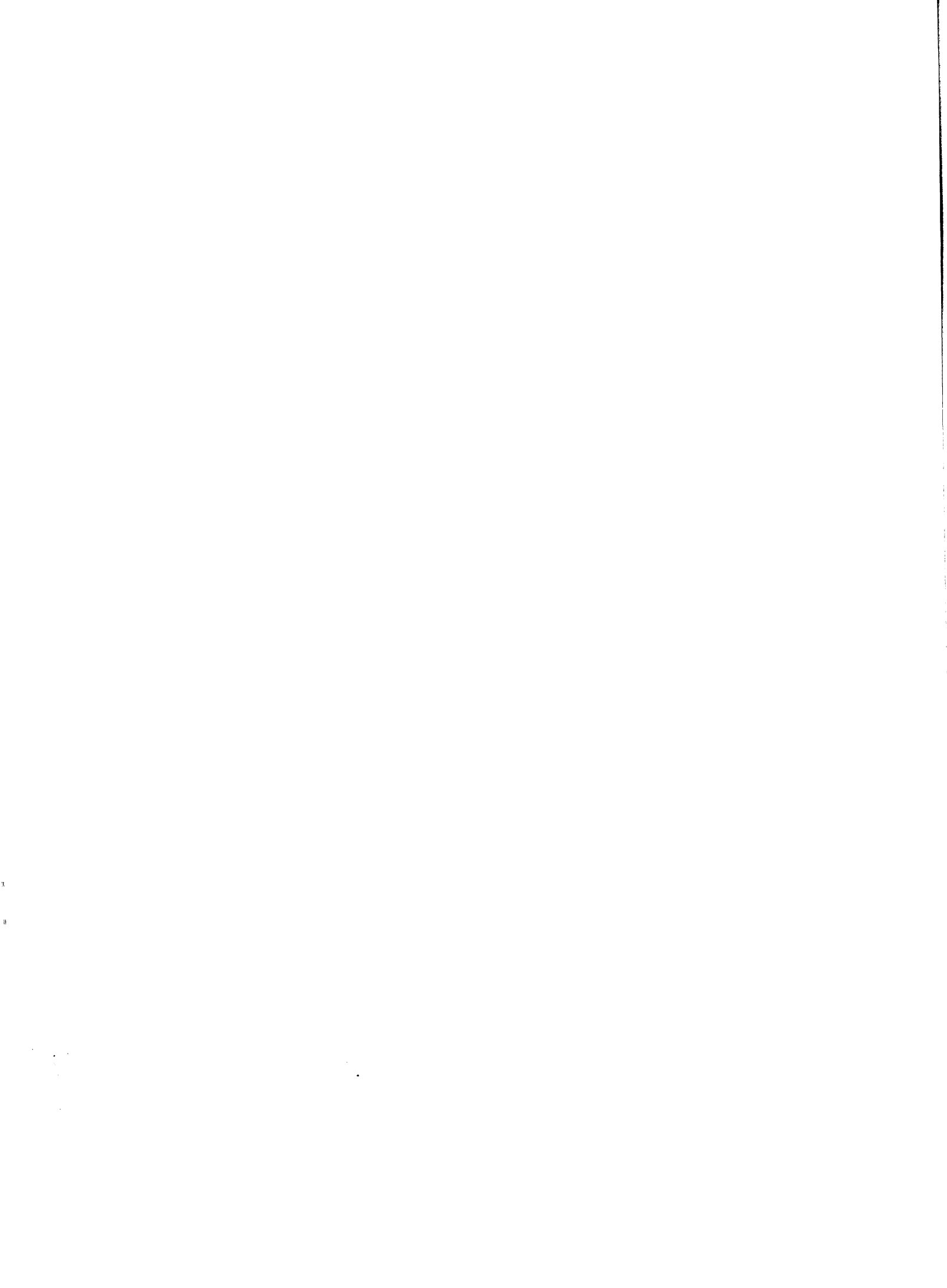
FLRC Number	Title	Page
73P-2	Definition of "Agency"	307



PART II.

TEXTS OF DECISIONS AND INTERPRETATIONS

January 1, 1974 through December 31, 1974



APPEALS DECISIONS

January 1, 1974 through December 31, 1974



General Services Administration, Region 9, San Francisco, California,
A/SLMR No. 333. The agency appealed to the Council from the Assistant Secretary's decision and direction of elections, and requested that his direction of elections be held in abeyance pending Council determination of its appeal.

Council action (January 14, 1974). The Council denied review of the agency's interlocutory appeal, without prejudice to the renewal of its contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied the agency's request that the Assistant Secretary's direction of elections be held in abeyance.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 14, 1974

Mr. G. C. Gardner, Jr.
Assistant Administrator for
Administration
General Services Administration
18th & F Streets, NW.
Washington, D. C. 20405

Re: General Services Administration,
Region 9, San Francisco, Cali-
fornia, A/SLMR No. 333, FLRC
No. 73A-65

Dear Mr. Gardner:

Reference is made to your petition for review, and your request that the Assistant Secretary's direction of elections be held in abeyance pending decision on your appeal, in the above-entitled case.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the elections has been issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, the Council has directed that your appeal be denied, without prejudice to the renewal of your contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. Your further request that the Assistant Secretary's direction of elections be held in abeyance pending decision on your appeal is therefore likewise denied.

By direction of the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

J. C. Garret
IFFP

C. Ristesund
AFGE

Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 330. The Assistant Secretary dismissed the representation petition filed by Licensed Practical Nurses Association of Florida, Inc. (LPNAF), finding inappropriate the requested separate unit of licensed practical nurses employed at the activity. LPNAF appealed to the Council, contending that the Assistant Secretary's decision appears arbitrary and capricious because he failed properly to consider, evaluate and apply evidence presented at the hearing; and that a major policy issue is presented because of the absence of any dispositive precedent under the circumstances of this case. LPNAF also requested a stay of the Assistant Secretary's decision.

Council action (January 21, 1974). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious since it does not appear that the Assistant Secretary acted without justification in his findings. The Council also held that the subject decision does not present a major policy issue, since section 10(b) of the Order clearly establishes the criteria to be applied in determining whether a unit is appropriate for exclusive representation, and such criteria were properly considered and invoked by the Assistant Secretary in this case. Accordingly, the Council denied review of LPNAF's appeal under section 2411.12 of the Council's rules of procedure. The Council likewise denied LPNAF's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 21, 1974

Mr. Stuart Rothman
Rogers & Wells
1666 K Street, NW.
Washington, D.C. 20006

Re: Veterans Administration Hospital,
Tampa, Florida, A/SLMR No. 330,
FLRC No. 73A-61

Dear Mr. Rothman:

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 pertinent part, the Assistant Secretary dismissed the petition of the Licensed Practical Nurses Association of Florida, Inc. for a separate unit of Licensed Practical Nurses (LPN's) at the Veterans Administration Hospital, Tampa, Florida. More particularly, the Assistant Secretary found as follows (at pp. 7-8):

Under all of the circumstances, I find that the unit of LPN's sought by the LPNA is not appropriate for the purpose of exclusive recognition under the Order. Thus, it is clear that the duties of this group of the LPN's are identical to those of the NA's [Nursing Assistants] (who are included in the nonprofessional employee unit sought by the AFGE) with the exception of the administering of medication, assignment to the coronary unit, and the occasional temporary filling in for the staff nurses for short periods of time. Moreover, LPN's are subject to the same supervision as NA's and their pay scales overlap. Additionally, the record reveals that the LPN's share the same benefits and are governed by the same personnel policies as other nonprofessional employees of the Activity in the unit sought by the AFGE. Accordingly, in my view, the LPN's do not constitute a functionally distinct group with a clear and identifiable community of interest, and do not share commonality of interests sufficiently distinct from the other nonprofessional employees in the unit sought by the AFGE to warrant separate representation. To permit such separate representation would, in my judgment, lead to excessive fragmentation of units in the health care service which clearly would not promote effective dealings and efficiency of agency operations as required by the Order. Consequently, I find that the unit sought by the LPNA is not appropriate for the purpose of exclusive recognition, and I shall therefore order that its petition be dismissed. [Footnote omitted]

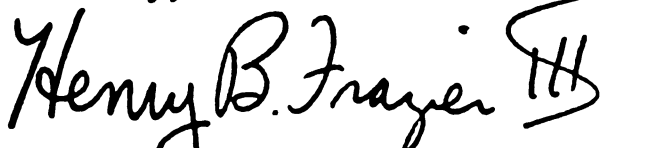
In your request for review, you assert that the Assistant Secretary's decision appears arbitrary and capricious because he failed to properly consider, evaluate and apply evidence presented at the hearing which you contend establishes that LPN's are a craft with a separate and distinct community of interest, and therefore entitled to a separate bargaining unit. You further contend that the Assistant Secretary's decision presents a major policy issue in that there had been no previous history of collective bargaining at the facility and no prior decision has been rendered by the Assistant Secretary as to the appropriateness under these circumstances of the unit here sought.

In the Council's opinion the Assistant Secretary's actions do not appear arbitrary and capricious nor does the decision present a major policy issue. With respect to your contentions relating to the matters relied upon by the Assistant Secretary in his determination, it does not appear that the Assistant Secretary acted without justification in his findings. As to the alleged major policy issue, section 10(b) of the Order clearly establishes the criteria to be applied in determining whether a unit is appropriate for exclusive representation, and such criteria were properly considered and invoked by the Assistant Secretary in the instant 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, the Council has directed that review of your appeal be denied. Likewise, the Council has directed that your request for a stay be denied under section 2411.47(c) of the Council's rules of procedure.

By direction of the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

N. Jacobs
VA

E. B. Meyers

W. C. Mudgett
AFGE

R. R. Brown
NFFE

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina. This negotiability dispute involved two management proposals which the agency head determined to be negotiable. The first proposal sets forth procedures to be followed where employee grievances involve the interpretation of published agency policy, or provisions of law, or regulation of outside authority, which have been incorporated in the agreement. The second proposal would establish procedures to be followed in settling management grievances over the interpretation or application of the agreement.

Council action (January 31, 1974). The Council found, contrary to the union's contentions, that the first proposal goes to the nature and scope of the negotiated grievance procedures and that, based on the reasoning of the Council in its Elmendorf decision, FLRC No. 72A-10, such proposal is consistent with section 13 of the Order and is negotiable. As to the second proposal, the Council, relying on the express language and purpose of section 13, ruled contrary to the position of the union that management grievances may be subject to the negotiated grievance procedure under section 13 and that the proposal is therefore negotiable. Accordingly, the Council sustained the agency head's determinations of negotiability in this case.

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

Federal Employees Metal Trades
Council of Charleston

and

FLRC No. 73A-1

Charleston Naval Shipyard,
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUES

Background

The Federal Employees Metal Trades Council of Charleston represents an activity-wide unit of wage system employees of the Charleston Naval Shipyard at Charleston, South Carolina.

During negotiation between the union and the activity, the activity presented proposals concerning grievances of employees in the bargaining unit arising under the agreement (Article 22, Section 19), and dealing with management grievances arising under the agreement (Article 22, Section 20). The proposals are set forth below:

Article 22, Section 19

Should an employee or group of employees in the unit or the Council initiate a grievance or complaint involving the interpretation or application of the Agreement which also questions the interpretation of published agency policy, provisions of law or regulations of appropriate authority outside the agency, and such policy, law or regulation has been made a part of the Agreement, the following procedure will apply:

- a. Processing of the grievance beyond the informal stage, set forth in Section 4, will be delayed until the questioned policy, law or regulation has been interpreted. In securing this interpretation, the Council will forward, via the Shipyard Commander, its inquiry to the cognizant office of issue in the Department of the Navy for review. Requests for interpretation of matters external to the Department of the Navy will be forwarded by the Council, via the Shipyard Commander to the Office of Civilian Manpower Management for review and interpretation. No hearing will be held in either review process.

- b. Within fifteen (15) calendar days of the receipt of the interpretation, the grievant may process through the formal grievance procedure the matter in the grievance concerning the interpretation or application of the agreement, if the interpretation received indicated a mis-application has taken place.

Article 22, Section 20

Management grievance[s] concerning the interpretation or application of provisions of this Agreement shall be submitted, in writing, by the Shipyard Commander to the Council President. Such grievances must be delivered within the time limit outlined in Section 6, above, and must contain the minimum information required for grievances submitted under Step 1, Section 4, except for information concerning informal efforts to resolve the issue(s). The Council President will issue a written decision on the issue(s) raised in the Management grievance within ten (10) work days following the consultation meeting. Any issue not resolved by the Council decision may be referred to arbitration under [the] provisions of Article XXIII of this Agreement, provided the referral is made within fifteen (15) calendar days of the Shipyard Commander's receipt of the Council decision.

The union contended that both proposals violated section 13 of the Order and were, therefore, nonnegotiable. Upon referral, the Department of Defense determined, contrary to the union position, that both proposals were consistent with section 13 of the Order and therefore negotiable. The union appealed to the Council from that determination and the agency filed a statement of position in support of the determination.^{1/}

^{1/} The agency initially filed a motion to dismiss the union's negotiability appeal, contending that the type of agency determination involved was outside the scope of Council review under section 11(c)(4) of the Order and section 2411.22 of the Council's rules. The Council, determining that review of the negotiability dispute would be consistent with the underlying purpose of the Order and the Council's rules of procedure, denied the agency's motion.

Opinion

The questions for Council resolution concern the negotiability under section 13 of the Order^{2/} of (1) Article 22, Section 19, and (2) Article 22, Section 20. The proposals will be considered separately below:

1. Article 22, Section 19.

The proposal prescribes the procedures to be followed when employees in the bargaining unit initiate a grievance which involves the interpretation of published agency policy or provisions of law or regulation of outside authority which have been incorporated in the agreement. The proposed procedures would delay processing of the grievance beyond the informal stage of the negotiated grievance procedure until an

2/ Section 13, provides, in pertinent part:

Sec. 13. Grievance and arbitration procedures.

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure may not cover any other matters, including matters for which statutory appeals procedures exist, and shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances

(b) A negotiated procedure may provide for the arbitration of grievances over the interpretation or application of the agreement, but not over any other matters. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

(c) Grievances intitated by an employee or group of employees in the unit on matters other than the interpretation or application of an existing agreement may be presented under any procedure available for the purpose.

interpretation of the policy, law or regulation in question was obtained by the union from the Department of the Navy or the Department of Defense. Then, following receipt of the interpretation, the grievance could be processed through the formal stage of the grievance procedure if the interpretation received indicated that a misapplication had taken place.

The union's primary contention is that the proposal is violative of section 13 of the Order because it would, in effect, permit the resolution of grievances over the interpretation or application of the agreement through a procedure other than the negotiated grievance procedure. We find that argument to be without merit.

Resolution of the issue involved in the dispute concerning this proposal is governed by the Council's reasoning in the Elmendorf decision.^{3/} In Elmendorf we stated in pertinent part:

[B]oth the amended Order and the Report and Recommendations which led to the amendments intended that the nature and scope of the negotiated grievance procedures were to be left to determination by the parties at the bargaining table, within, of course, the Order's prescription that the scope of the procedures negotiated were to be limited to grievances over the interpretation or application of the agreement [I]t was intended by the Council and by the section 13 amendments that the nature and scope of the negotiated grievance procedures were to be negotiated by the parties subject only to the explicit limitations prescribed by the Order itself.

3/ 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 of Case Decisions No. 38, dated May 21, 1973. This case involved the question of the validity under the Order of two provisions of an agency directive which respectively (1) required 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 were not to be subject to the grievance procedure negotiated by the parties, regardless of whether such policies, laws or regulations were incorporated or referenced in the agreement; and (2) established an alternative agency procedure for the resolution of such questions. The Council held that the disputed provisions of the agency directive were violative of section 13 of the Order, as amended, and in discord with the concluding requirement in E.O. 11616 that "Each agency shall issue appropriate policies and regulations consistent with this Order for its implementation."

However, limitations on the scope of negotiated grievance procedures are not inherently inconsistent with the Order and the Report. Such limitations may be proper if established through the process of negotiations^{4/}

Viewing this case in the light of our reasoning in Elmendorf, we must reject the union's contention that the proposed Article 22, Section 19 violates section 13 of the Order. What the agency is proposing here goes to the nature and scope of the grievance procedure that would be negotiated by the parties, i.e., a means of handling disputes involving the interpretation of published agency policy or provisions of law or regulation of outside authority which might be incorporated in the collective bargaining agreement. Nothing in the Order, expressly or by implication, limits the negotiability of such procedures.

Accordingly, the management proposal numbered Article 22, Section 19 under consideration in this case must be held to be consistent with section 13 of the Order and therefore negotiable.

2. Article 22, Section 20.

The principal issue with regard to this proposal is whether management grievances concerning the interpretation or application of the agreement may be subject to the negotiated grievance procedure under section 13 of the Order.

The union contends that this proposal is violative of section 13(a) of the Order, arguing in effect that the negotiated grievance procedure is only available to employees in the unit (or their representative) and that management is excluded from bringing a grievance concerning the interpretation or application of the agreement under the negotiated procedure. We cannot agree.

Section 13(a) provides, in pertinent part, that the "negotiated grievance procedure . . . shall be the exclusive procedure available to the parties and the employees in the unit for resolving . . . grievances [over the interpretation or application of the agreement]." [Emphasis supplied.] Section 13(b) further provides, in relevant part, that:

. . . 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. [Emphasis supplied.]

These provisions are clear and unambiguous. The negotiated grievance procedure under section 13(a) is the exclusive procedure available "to the parties and the employees in the unit" for settling grievances

^{4/} Id., at pp. 5-6.

over the interpretation or application of the negotiated agreement. The "parties" are of course the parties to the agreement itself, viz. the exclusive representative and agency management, not just the exclusive representative. This language of section 13(a) is consistent with the provisions that follow. Under section 13(b), either the agency or the exclusive representative may invoke arbitration and either party (i.e., the agency or the union) may file exceptions to the arbitration award.

Thus, by its express language, section 13 clearly reflects an intent that both sides to the negotiated agreement, namely agency management and the exclusive representative, have equal access to the negotiated grievance procedure under the terms and procedures incorporated therein by the parties themselves.

Apart from the literal provisions of section 13, the purposes of that section compel the conclusion that management grievances may be subject to the negotiated grievance procedure. For section 13 is designed to provide a procedure for resolving disputes between the parties concerning the interpretation or application of the agreement. Such disputes interfere with effective labor-management relations, and it is the resolution of such disputes, not the identity of the disputant, which is of overriding importance under section 13 of the Order.

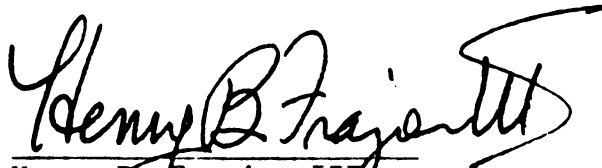
Accordingly, we find that the management proposal numbered Article 22, Section 20 is not violative of the Order as contended by the union. On the contrary, we find that the proposal is consistent with the Order and therefore negotiable.

Conclusion

Based on the reasons set forth above, we find that the determination by the agency that the management proposals here involved were negotiable under the Order was proper and must be sustained.

The foregoing decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the agency's proposals in this case. We decide herein only the issues as to the mutual obligation of the parties under section 11(a) of Executive Order 11491 to negotiate on the proposals.

By the Council.


Henry B. Frazier III
Executive Director

Issued: JAN 31 1974

Local Lodge 830, International Association of Machinists and Aerospace Workers, and Louisville Naval Ordnance Station, Department of the Navy. The dispute in this case concerned the negotiability under the Order of union proposals which would: (1) Define and clarify certain general terms used in job descriptions; (2) provide that, in cases submitted to an arbitrator under the negotiated grievance procedure, the specific terms of the agreement must stand alone; and (3) provide that all aspects of the agreement shall be subject to grievance and arbitration under the negotiated grievance procedure.

Council action (January 31, 1974). As to (1), the Council, distinguishing the Griffiss Air Force Base case, FLRC No. 71A-30 (which decision the Council expressly reaffirmed), ruled, contrary to the position of the agency, that the union's proposal would not constrict the agency's right to assign duties and to effect changes in job descriptions to reflect such assignments, and consequently was not outside the agency's obligation to bargain under the Order. With respect to (2), the Council upheld the agency determination of nonnegotiability since the union's proposal would prohibit the arbitrator from seeking access to sources necessary to implement section 12(a) of the Order and was thereby violative of the Order. And as to (3), the Council, based, among other things, on its decision in the Elmendorf case, FLRC No. 72A-10, and relevant provisions in sections 12(a) and (13) of the Order, overruled the agency's contention that the proposal was nonnegotiable. Accordingly, the agency head's determinations were sustained in part and set aside in part.

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

Local Lodge 830, International
Association of Machinists and
Aerospace Workers

and

FLRC No. 73A-21

Louisville Naval Ordnance Station,
Department of the Navy

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The union (Local Lodge 830, IAM-AW) is the exclusive bargaining representative of all nonsupervisory employees at the activity (Louisville Naval Ordnance Station).

During negotiations between the union and the activity, the union submitted proposals pertaining to position descriptions (Article 18, Section 6); the presentation of cases before an arbitrator (Article 21, Section 4); and the scope of the negotiated grievance procedure (Article 21, Sections 2(b) and 5(a)(2)). More specifically, these respective proposals are 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.

Article 21, Section 4

[Neither party shall make use of, refer to, argue from, or present before an arbitrator any interpretation of any regulation, policy rule or law to establish the meaning of

this Agreement.] The specific terms of this Agreement must stand alone. [The parties to this Agreement reserve the exclusive right to make changes thereto.]

Article 21, Section 2(b)

The negotiated procedure covers all aspects of this Agreement, and all terms and conditions set forth explicitly in this agreement shall unreservedly be subject to being grieved and arbitrated under this procedure and the provisions of Article 22 (Arbitration).

Article 21, Section 5(a)(2)

If the grievance concerns any aspects of this agreement; the aggrieved must use this procedure

The activity contended that the proposals were nonnegotiable. Upon referral the Department of Defense determined that the proposals (with the exception of the bracketed sentences in Article 21, Section 4) were nonnegotiable.

The union then appealed 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 union proposals in dispute will be separately considered below.

1. Position descriptions (Article 18, Section 6).

As previously set forth, the union proposed in Article 18, Section 6, that whenever the phrase "such other duties as may be assigned" or the like appears in a position description, it shall be defined to mean "tasks that are normally related to the position and are of an incidental nature"; and that such language in the position description does not prevent the assignment of unrelated duties to employees under circumstances referred to in the proposal.

The agency asserts that this proposal would restrict management in the assignment of duties to employees; and that, based principally on the Council's decision in the Griffiss case,^{1/} the proposal is nonnegotiable.

1/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 27, 1973), Report No. 36.

In the Griffiss case, relied upon by the agency, the union submitted proposals expressly prohibiting the assignment of certain civil disturbance functions and other allegedly unrelated duties, such as barrier detail work, to firefighters in the bargaining unit.^{2/} That is, the union's proposal would have proscribed the assignment by management of particular duties to an individual position. The Council upheld the agency's determination of nonnegotiability, on the grounds that the specific duties assigned to particular jobs, including duties allegedly unrelated to the principal functions of the employees concerned, are excepted from an agency's obligation to bargain under section 11(b) of the Order. We reaffirm that decision.

However, we cannot agree with the agency that the Griffiss decision is dispositive of the instant case. Such contention by the agency is founded, in our opinion, on a misinterpretation of the language and intent of the subject proposal of the union.

Here, unlike in Griffiss, the union's proposal is expressly directed, not at proscribing the assignment of particular duties to an individual position, but at the definition and clarification of the terms of the agency's position descriptions. Those descriptions do not determine the assignment of duties, but reflect such assignments for pay and classification purposes.^{3/} As the union explained in its appeal, it was principally to this reflection that its proposal was addressed:

The purpose of a position description is to make a listing of predominant skills and duties specific and peculiar to the job to which an employee is assigned. From this cluster of skills and duties, the classifier determines the pay level for the position. If the list of skills and duties can be

2/ Specifically, the union proposals in Griffiss provided that:

(1) Proposed Article, Civil Disturbances, Section 1: 'Unit Employees will not be used to quell Civil Disturbances in order to comply with Mutual Aid Agreement. Unit Employees will be used to perform Rescue, Fire Control and Extinguishment of Fires Only.'

Section 2: 'Unit Employees and Fire Equipment will remain in quarters on Alert Status when demonstrations are anticipated in area of Griffiss Air Force Base, as Professional Firefighters.'

(2) Proposed Article, Unrelated Duties, Section 1: 'Employer agrees not to require Unit Personnel to participate in unrelated duties, e.g., Barrier Detail and after hour I&E calls unless required due to emergency conditions on Base.'

3/ See e.g., FPM Chapter 312, Subchapter 3, Section 3-2.

modified by using the term 'other duties as assigned' to mean every skill and duty in the entire spectrum, no matter how grossly inappropriate or repugnant these may be to the duties in the position description, then again, there is no need for a classification system at all. To interpret the phrase 'other duties as assigned' to mean any other duty without regard to its compatibility to the classification and grade and duties and responsibilities encumbered in the position, then the purpose of making or constructing the listing of position descriptions is patently defeated.

Stated otherwise, the union's proposal in the present case is aimed at the precision and completeness of the description of the employee's position, not, as in Griffiss, at the content of the job itself. General phrases such as "such other duties as may be assigned" are often included in position descriptions, and the union's proposal would merely define such general phrase to mean work normally related to the position and of an incidental nature -- with the added qualification that this general phrase, even as so defined, may include unrelated work when a general plant cleanup is required or when work specified in the description is unavailable.

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. Moreover, the agreement would of course be subject to section 12(b) of the Order, the provisions of which must be included in every agreement.^{4/} Under section 12(b), for example, the agency retains the complete right, in accordance with applicable laws and regulations, to assign duties to employees or positions in such manner as to maintain the efficiency of Government operations, and to carry out the mission of the agency in emergency situations.

^{4/} Section 12 of the Order provides in pertinent part:

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

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;

(Continued)

In summary, nothing in the Order renders the mere definition and clarification of general terms in job descriptions, as proposed by the union, outside the agency's obligation to negotiate under section 11(b) of the Order. Therefore, the agency's determination of non-negotiability must be rejected.^{5/}

(Continued)

(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;

(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; . . .

.

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.

5/ Cf. AFGE Local 1923 and Social Security Administration Headquarters Bureaus and Offices, Baltimore, Maryland, FLRC No. 71A-22 (June 1, 1973), Report No. 39; and Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 27, 1972), Report No. 31.

2. Presentation of cases before an arbitrator (Article 21, Section 4).

The contested portion of the union's proposed Article 21, Section 4, provides in context that, in cases submitted to an arbitrator under the negotiated grievance procedure, the specific terms of the agreement must stand alone.

The agency determined that the proposal is nonnegotiable because under section 12(a) of the Order the arbitrator must resort to materials outside the agreement to determine the meaning and intent of the laws and regulations referred to therein, and this proposal, by denying the arbitrator such access, violates the Order. However, the union argues that, under section 13(a) of the Order, the negotiated arbitration and grievance procedure is the exclusive procedure for resolving grievances over the interpretation or application of the agreement; and therefore that "only the agreement itself may be used to establish its own meaning." We find no merit in the union's position.

Section 12(a) of the Order, as previously set forth, provides that:

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.

The provisions in section 12(a) must, as stated therein, be part of every agreement and an arbitrator, under that section, must consider the referenced laws and regulations in resolving the grievances arising under the agreement. Such laws and regulations obviously cannot be interpreted in a vacuum. They draw their intent and meaning from relevant history, reports, decisions, interpretations, policy rules and the like,

which must be derived from sources outside the four corners of the agreement itself. Since the union's proposal would prohibit the arbitrator from seeking access to sources necessary to implement section 12(a), the proposal in the context of Article 21, Section 4, is clearly violative of the Order. The agency's determination of nonnegotiability of this proposal must therefore be upheld.

3. Scope of negotiated grievance procedure (Article 21, Sections 2(b) and 5(a)(2)).

The last two union proposals in dispute provide that all aspects of the agreement shall be subject to grievance and arbitration under the negotiated grievance procedure.

The agency asserts, contrary to the union, that the proposals are nonnegotiable because: (1) they would extend grievances and arbitration to other than "bilaterally determined" matters which are alone intended to be subject to the negotiated grievance procedure under sections 13(a) and 13(b) of the Order;^{6/} and (2) if the agreement adverts to matters for which statutory appeals procedures exist, the proposals violate the specific exclusions of such matters from the negotiated grievance procedure under section 13(a). We disagree with the agency's position.

6/ Section 13 of the Order provides in pertinent part:

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

(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

(Continued)

With respect to the agency's first argument (i.e. that only "bilaterally determined" matters are subject to the negotiated grievance procedure), the Council rejected the agency's similar contention in the Elmendorf case^{7/} and held that the nature and scope of the negotiated grievance procedure under section 13 are to be negotiated by the parties themselves, subject only to the explicit limitations prescribed by the Order itself.

With respect to the agency's second contention (i.e. that the union proposals would subject to the negotiated grievance procedure matters for which a statutory appeals procedure exists and thereby violate the explicit limitation in section 13(a) of the Order), the agency has not established that the agreement would in fact cover any matter for which a statutory appeals procedure exists. Furthermore, under section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws and regulations of appropriate authorities, which would preclude coverage under the negotiated grievance procedure of matters covered by present or future statutory appeals procedures. Additionally, as to any questions which might arise concerning whether a grievance is properly subject to the negotiated grievance procedure or is excepted by reason of a statutory appeals procedure, the Council indicated in the Elmendorf decision (at p. 6):

The Assistant Secretary of Labor is authorized to decide . . . questions of grievability subject to appellate review by the Council. In addition, the Council may review arbitration awards and set aside awards which it finds to be in violation of applicable law, appropriate regulation, or the Order.
[Footnotes omitted.]

(Continued)

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.

.

(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.

.

7/ American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10 (May 21, 1973), Report No. 38.

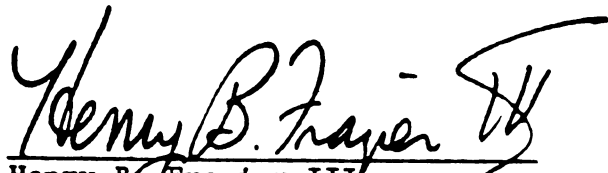
For the foregoing reasons, we overrule the agency head determination that Sections 2(b) and 5(a)(2) of Article 21 are nonnegotiable.

Conclusion

Based on the foregoing, we find that:

1. The agency head's determination as to the nonnegotiability of Article 21, Section 4 was valid. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, this determination of the agency head is sustained.
2. Article 18, Section 6 and Article 21, Sections 2(b) and 5(a)(2), are negotiable under the Order. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the agency head's contrary determinations must be set aside. This decision, however, shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposals. We decide only that, as submitted by the union and based on the record before us, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council,


Henry B. Frazier III
Executive Director

Issued: JAN 31 1974

American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama. The negotiability dispute involved the union's proposals concerning (1) the assignment of Officer of the Day duties to unit physicians; and (2) membership of a union-recommended unit physician on agency Professional Standards Boards when such boards consider whether to recommend the promotion of unit physicians.

Council action (January 31, 1974). With respect to (1), the Council held that the proposal would limit management's authority to establish staffing patterns for its organization and the accomplishment of its work and that such staffing patterns are excepted from the agency's obligation to bargain by section 11(b) of the Order. Hence, the agency determination of nonnegotiability was sustained. As to (2), the Council held that the union's proposal is negotiable under section 11(a) of the Order and, contrary to the agency determination, ruled that negotiation is not precluded by section 12(b)(2) of the Order, or by agency regulations.

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

American Federation of Government
Employees Local 997

and

FLRC No. 73A-22

Veterans Administration Hospital,
Montgomery, Alabama

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The union represents a unit of physicians at the Veterans Administration (VA) Hospital, Montgomery, Alabama. During negotiations between the parties, the union advanced proposals dealing with: (1) the assignment of Officer of the Day (O.D.) duties to unit physicians; and, (2) membership of a union-recommended unit physician on agency Professional Standards Boards when such boards consider whether to recommend the promotion of unit physicians.

The activity asserted that the proposals are nonnegotiable. Upon referral, the agency head upheld the activity's position on the grounds, principally, as to the O.D. duty proposal, that it conflicts with section 11(b) of the Order; and, as to the Professional Standards Boards proposal, that it violates section 12(b)(2) of the Order and agency regulations.

The union appealed to the Council seeking review of these agency head determinations. The agency filed a statement of position in support of its determinations.

Opinion

The negotiability questions raised with respect to each proposal will be considered separately, below.

1. The O.D. Duty proposal. VA hospitals operate continuously, 24 hours a day, 7 days per week. Physicians serve as O.D. to provide medical supervision at night, on weekends, and on holidays. If physician staffing in the unit should fall and remain below the authorized level for 30 days, the union's proposal would require the hospital director to satisfy certain conditions before he could

assign unit physicians to perform O.D. duties more often than they would, on a rotational basis, if the unit were fully staffed. The Proposal provides:

Officer of the Day duties will be rotated among all qualified bargaining unit physicians. When the physician staffing falls below authorized staffing for 30 days or more, the bargaining unit physicians will not be required to perform Officer of the Day duties more often than when the current authorized staffing is up to full complement until all of the procedures available to the director have failed to locate additional qualified physicians to perform Officer of the Day duties.

The agency argues that utilization of "all of the procedures available to the director," as mandated by the proposal, would require the hospital director to take actions with respect to the numbers, types and/or grades of employees assigned to O.D. tours of duty, and that such matters are excepted from the bargaining obligation by section 11(b) of the Order.^{1/}

The union disagrees, contending that, in effect, the proposal merely provides a procedure for management to observe in reaching the decision to assign unit physicians to O.D. duties more often than when the unit is fully staffed with physicians, that is, a question of personnel policies, practices and matters affecting working conditions which management is obligated to bargain under section 11(a) of the Order.

Section 11(b) of the Order provides in relevant part:

. . . the obligation to meet and confer [established by section 11(a)] does not include matters with respect to the mission of an agency; its budget; its organization;

^{1/} The agency additionally contended, for the first time in its statement of position, that the proposal conflicts with agency regulations. However, the agency head did not interpret or rely upon agency regulations in determining this proposal to be non-negotiable and in view of our decision herein we do not find it necessary to pass on this contention.

the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty [Emphasis added.]

The intended meaning of the underscored language is explained in section E.1. of the Report and Recommendations which led to the issuance of E.O. 11491, as follows:^{2/}

.

The words 'assignment of its personnel'^{3/} have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work -- the number of employees in the agency and the number, type, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

To remove any possible future misinterpretation of the intent of the phrase 'assignment of its personnel,' we recommend that there be substituted in a new order the phrase 'the number of employees, and the numbers, types, and grades of positions, or employees assigned to an organizational unit, work project or tour of duty' [Footnote and emphasis supplied.]

It is apparent from the foregoing that, under both E.O. 10988 and E.O. 11491, the staffing patterns for the agency's organization and the accomplishment of its work were excepted from the obligation to bargain.

Turning to the facts in the present case, the proposal would restrict management's authority to determine how frequently unit

^{2/} Labor-Management Relations in the Federal Service (1971), at pp. 42-43.

^{3/} Section 6(b) of E.O. 10988, which preceded E.O. 11491, provided that the bargaining obligation "shall not be construed to extend to such areas of discretion as the . . . [agency's] organization and the assignment of its personnel." [Emphasis added.]

employees will perform O.D. duties. That is, if, for whatever reason, unit staffing should fall below the authorized level as set forth in the proposal, management would be required to search all available avenues to locate non-unit physicians to assign to tours of O.D. duty before unit physicians could be assigned to additional tours as Officer of the Day. In this regard, the agency indicates that, to carry out the proposal's mandate, the hospital director would have to: assign supervisory and managerial physicians to tours of O.D. duty; hire additional numbers of full or part-time physicians for assignment to such tours of duty; and/or secure non-VA physicians to staff such tours of duty under a contractual arrangement. Clearly, these "procedures available to the director" are matters with respect to the numbers and/or types of positions or employees assigned to tours of O.D. duty. Hence, by requiring their use, the proposal would impose limiting conditions on management's authority to establish staffing patterns for its organization and the accomplishment of its work. And, since, as already indicated, such staffing patterns are excepted from the agency's obligation to bargain by section 11(b) of the Order, we must find that, under the circumstances of this case, the proposal is nonnegotiable.

2. The Professional Standards Boards proposal. The union's proposal, as submitted to the agency head for a determination as to its negotiability, provides as follows:^{4/}

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.

^{4/} The agency contends that the appeal with respect to this proposal is fatally defective because the union's petition fails to set forth the initial and "integral" paragraph of the proposal as it was submitted to the agency head, in apparent violation of section 2411.24 of the Council's rules of procedure which provides in pertinent part that:

A petition for review shall contain the following:
(a) A statement setting forth the matter proposed to be negotiated as submitted to the agency head for determination.

.

However, the agency does not show prejudice to have resulted by virtue of the omission and, under the circumstances, we do not find such defect to be determinative.

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.

Under VA Manual, MP-5, Part II, Chapter 5, Professional Standards Boards periodically consider, for non-competitive promotion, VA physicians who meet prescribed administrative requirements such as a current proficiency rating of "satisfactory" and adequate time-in-grade. Such boards, comprising a chairman, a secretary and one to three members, review candidates' qualifications for promotion and make recommendations based on their findings. With regard to board membership, the VA Department of Medicine and Surgery supplement to the above cited provisions of the VA Manual provides that no specific grade or specialty is required of members of boards considering physicians for promotion, except if a professional examination is conducted. In that case, each member of the board conducting such examination must hold a grade at least equivalent to the one for which the candidate is being considered and at least one board member must be of the same specialty as the candidate for promotion.

In the circumstances of the instant case, the hospital director is the agency official authorized to assign physicians to serve on Professional Standards Boards as well as to approve or disapprove the recommendations of such boards. He is authorized to implement board recommendations which he has approved but, if he disapproves a board's recommendation, he must forward the case with his comments to higher level agency authority for final decision.

a. Section 12(b)(2) of the Order. The agency asserts in substance that Professional Standards Boards constitute an integral part of the agency's promotion process for physicians; and that the proposal for union membership on such boards is nonnegotiable because it would interfere with the right "to promote" employees reserved to management officials under section 12(b)(2) of the Order.

The union argues that its proposal does not interfere with management rights but, rather, would establish a procedure, negotiable under section 11(a) of the Order, which the agency would observe in recommending physicians for membership on boards.

Section 12(b) of the Order provides in relevant part as follows:

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

.

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

.

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency

In connection with applying this provision of the Order in its VA Research Hospital decision, the Council stated:^{5/}

The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority. However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

In the VA Research Hospital case, the proposal would have enabled the union to obtain higher-level management review of a promotion selection before such action could become final. In those circumstances, the Council, in finding the proposal negotiable, held that it did ". . . not require management to negotiate a promotion selection or to secure union consent to the decision. . ." but that it would establish procedures to obtain higher-level management review before final promotion action was taken.^{6/}

5/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Ill., FLRC No. 71A-31 (November 22, 1972), Report No. 31, at p.3. See also 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, at pp. 9-11.

6/ Ibid.

The Council recently applied the same principles to the circumstances presented by VA Hospital, Lebanon, Pennsylvania^{7/} which dealt in part with the right "to hire" reserved to management by section 12(b)(2). There, the Council reached a different conclusion, holding that the hospital director's actions in requesting the employment of additional physicians constituted an integral part of the agency's hiring process and that the union's proposal which would have required such actions to be taken by the hospital director would interfere with management's reserved right.

The circumstances of the present case must carefully be distinguished from those upon which the Council based its VA-Lebanon decision. That is, whereas in VA-Lebanon the proposal would have preempted the hospital director's discretion as to whether or not to request the employment of additional physicians, the proposal in the instant case merely would provide for the selection, by management, of a representative nominated by the union to serve on Professional Standards Boards considering unit members for recommendation for promotion. And, as previously indicated, before the recommendations of such boards can become final, they are subject to the hospital director's approval or, if he disapproves, to further consideration and final decision at a higher level of the agency.

Under these circumstances, it is clear that the proposal neither would limit the discretion of Professional Standards Boards considering whether to recommend the promotion of any particular candidate, nor would it require management to negotiate a promotion selection or secure union consent to the decision. To the contrary, the proposal plainly concerns only procedures which management will observe in reaching the decision, which would assure the union an essentially non-controlling, participatory role on boards making recommendations with respect to the promotion of unit employees.

In conclusion, there is no showing that the proposal would directly interfere with the ultimate decision and action authority reserved to management. Furthermore, it does not appear that the proposal would have the indirect effect of interfering with such reserved authority by causing unreasonable delay in the decision.

^{7/} American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania.
FLRC No. 72A-41 (December 14, 1973), Report No. 46, at pp. 5-7.

Accordingly, we find that section 12(b)(2) of the Order does not bar negotiations on the union's proposal.

b. Agency regulations as a bar to negotiation. The agency head determined that the proposal is nonnegotiable because it conflicts with published agency regulations (VA Manual, DM&S Supplement, MP-5, Part II, paragraph 2.05c) which provide:

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

In explanation of this determination the agency asserts in its statement of position:

A unit physician cannot be included on a Professional Standards Board unless he meets . . . [the criteria established by the regulation.] Therefore, to comply with the union proposal might require the Hospital Director to violate that published agency policy as the appointment of a physician from the unit is mandated by the proposal whether or not the Director finds the union nominee acceptable. [Additional emphasis supplied.]

As provided in section 11(c)(3) of the Order, "An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final" and, therefore, the Council may not substitute its interpretation of such regulations in place of the agency head's. However, the union in effect argues, among other things, that the agency misinterpreted the proposal and, hence, that the agency regulation, as interpreted by the agency head is not a bar to negotiations under section 11(a) of the Order.^{8/} We find the union's argument persuasive in the circumstances of this case.

8/ Section 11(a) provides in pertinent part: "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. . . ."

The agency head's determination and the explanation thereof as quoted above from the agency's statement of position, characterize 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. In our opinion such a characterization of the proposal is erroneous.

The proposal expressly requires, as the union points out, that unit physicians recommended by the union must meet the criteria established for board members. Further, contrary to the agency's position, the union states, in the record, its intent that the proposal if agreed upon:

. . . merely would constitute prior agreement upon the Administrator's recommendation of one of the three (3) to five (5) Board members from a list submitted by the Union, provided they meet the criteria established for Board members. [Emphasis supplied.]

Based on the foregoing, it is our opinion that, while the initial paragraph of the proposal taken alone would support the agency's characterization of the proposal, the language of the proposal as a whole expressly limits the requirement to appoint a physician from the unit to such physicians as the agency official making such appointment "deems qualified" under agency regulations.

Hence, in our view, neither the language of the proposal as a whole nor the expressed intent of the union as to the meaning of such language supports the agency's characterization of the proposal as requiring the appointment of a non-qualifying physician from the unit. Therefore, the agency has failed to establish that its regulation is applicable so as to preclude negotiation of the proposal under section 11(a) of the Order.^{9/}

Accordingly, we find that, contrary to the agency head's determination, the proposal is negotiable.

9/ Cf. Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Ill., FLRC No. 71A-31 (November 22, 1972), Report No. 31, at pp. 5-6.

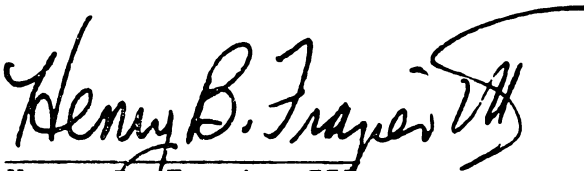
Conclusions

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 O.D. duty proposal was valid and must be sustained; and,

2. The agency head's determination as to the nonnegotiability of the Professional Standards Boards proposal 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 proposal. We decide only that, as submitted by the union and based on the record before us, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of Executive Order 11491.

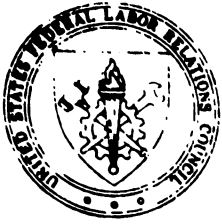
By the Council.


Henry B. Frazier III
Executive Director

Issued: JAN 31 1974

Military Ocean Terminal, Bayonne, New Jersey, Assistant Secretary Case No. 32-3101. The Assistant Secretary upheld the Regional Administrator's dismissal of the complaint filed by Gabriel P. Cardiello, which complaint alleged agency violation of section 19(a)(1) and (2) of the Order by reason of the abolition of the complainant's job at the activity. The Assistant Secretary found that Cardiello had not established a reasonable basis for his complaint. Cardiello appealed to the Council alleging, in essence, that the decision of the Assistant Secretary was arbitrary and capricious because the Assistant Secretary failed to attach sufficient weight to evidence submitted by the complainant and failed to provide a hearing on the complaint.

Council action (January 31, 1974). The Council held that nothing in Cardiello's appeal indicated any persuasive evidence which was not properly considered by the Assistant Secretary, or any substantial factual issues which required a hearing, or that the Assistant Secretary's decision was in any other manner arbitrary and capricious. Moreover, without passing on the precise reasoning adopted by the Assistant Secretary, the Council determined that the Assistant Secretary's decision presented no major policy issue. Accordingly, the Council denied review of Cardiello's appeal pursuant to section 2411.12 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 31, 1974

Mr. Gabriel P. Cardiello
123 Gordon Street
Ridgefield Park, New Jersey 07660

Re: Military Ocean Terminal
Bayonne, New Jersey,
Assistant Secretary Case
No. 32-3101,
FLRC No. 73A-52

Dear Mr. Cardiello:

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

The Assistant Secretary upheld the Regional Administrator's dismissal of your complaint, which complaint alleged that the agency violated section 19(a)(1) and (2) of the Order by reason of the abolishment of your job at the Military Ocean Terminal. In this regard, the Assistant Secretary found that you had not established a reasonable basis for your complaint that the activity interfered with your rights assured by the Order and discriminated against you because of your union activities.

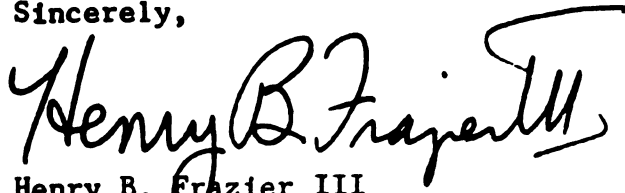
In your appeal you allege, in essence, that the decision of the Assistant Secretary is arbitrary and capricious because he failed to attach sufficient weight to the evidence which you submitted and failed to provide a hearing on your complaint.

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; or that any substantial factual issues exist which required a hearing by the Assistant Secretary; or that the Assistant Secretary's decision was in any other manner arbitrary and capricious. Moreover, the Council is of the opinion that, without passing upon the precise reasoning adopted by the Assistant Secretary, no major policy issue is presented by the Assistant Secretary's decision.

Accordingly, your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and the Council has therefore directed that review of your appeal be denied.

By direction of the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

J. Cutrone
Army

FLRC NO. 74A-6

Northwest Area Exchange (AAFES), A/SLMR No. 338. Service Employees International Union (SEIU) Locals 49 and 92 appealed to the Council from the Assistant Secretary's decision and direction of elections. However, no final disposition in the case had been rendered as to either SEIU Local 49 or Local 92.

Council action (February 7, 1974). The Council denied review of the SEIU locals' interlocutory appeal, without prejudice to the renewal of their 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

February 7, 1974

Mr. Stewart Weinberg
Levy, Van Bourg & Hackler
45 Polk Street
San Francisco, California 94102

Re: Northwest Area Exchange (AAFES),
A/SLMR No. 338, FLRC No. 74A-6

Dear Mr. Weinberg:

Reference is made to your petition for review of the Assistant Secretary's decision and direction of elections, filed on behalf of Service Employees International Union (SEIU) Locals 49 and 92, in the above-entitled case.

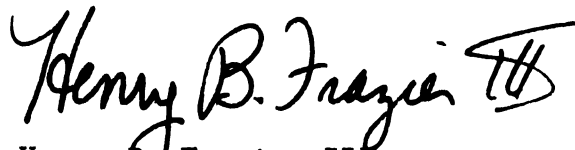
In his determination, the Assistant Secretary directed an election in an activity-wide unit sought by the American Federation of Government Employees, Local 1504, and self-determination elections in separate units sought by SEIU Locals 49 and 92, respectively. No final disposition in the case has been rendered as pertains to either SEIU Local 49 or Local 92.

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, as pertains to the appellant. More particularly, in a case such as here involved, the Council will entertain an appeal only after certifications of representatives or of the results of the elections have issued, or after other final disposition has been made of the entire representation matter, as pertains to the appellants, by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, and apart from other considerations, 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,

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

Northwest Area Exchange
AAFES

J. D. Harvison
AFGE

American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator). The arbitrator determined that the agency violated the parties' collective bargaining agreement by the agency's reassignment of certain employees, in implementing a "reorganization," without prior notice to or consultation with the union. As a remedy, the arbitrator awarded the reassigned employees the right to remain on their reassignments or to withdraw and exercise "rights of assignment to a position as such rights existed relative to a reduction-in-force" on the date of the reassignments. The agency filed exceptions to the award. The Council denied review of the agency's petition as failing to meet the requirements for review under the Council's rules (Case Report No. 36). Subsequently, the union filed a motion that the Council order a show-cause hearing as to why the Council should not direct the agency to implement the award with respect to Robert H. Morgan, an employee who was reassigned and thereafter retired.

Council action (February 12, 1974). The Council determined that a dispute existed between the parties as to the meaning of the award with respect to Morgan, and directed the parties (1) to resubmit the award to the arbitrator for clarification and interpretation of the award with respect to Morgan; and (2) within 15 days after the arbitrator's action, to file with the Council the award as clarified and interpreted and any exceptions thereto which the respective parties wish to be considered by the Council.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 12, 1974

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

Mr. Carl E. Grant
Director of Personnel
Small Business Administration
1441 L Street, NW.
Washington, DC 20416

Re: American Federation of Government
Employees, Local 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.

Upon careful consideration of the union's motion, and the agency's opposition thereto, the Council is of the opinion that there exists between the parties a dispute as to the meaning of the arbitrator's award with respect to Morgan. Accordingly, in accordance with section 2411.37(b) of the Council's rules, the parties are directed: (1) To resubmit the award to the arbitrator for clarification and interpretation of the award with respect to Morgan; and (2) within 15 days after the arbitrator's action, to file with the Council the award as clarified and interpreted and any exceptions thereto which the respective parties wish to be considered by the Council. The resubmission to the arbitrator would only be for clarification and interpretation of the award previously made, not for relitigating or modifying the award. The purpose of the resubmission in this case would be to ask the arbitrator to determine only whether or not his award applies to one of the "employees who were reassigned" and thereafter retired.

Pending receipt of the award as clarified and interpreted and any exceptions thereto, the Council will hold this case in abeyance.

By direction of the Council.

Sincerely,

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

Henry B Frazier III
Executive Director

Department of Health, Education and Welfare, Bureau of Retirement and Survivors Insurance Payment Center, Birmingham, Alabama, Assistant Secretary Case No. 40-4708 (CA). The Assistant Secretary upheld the Regional Administrator's dismissal of the complaint filed by employee Mary T. Waldrop, which alleged that the agency violated section 19(a)(1) and (3) of the Order by inviting the exclusive bargaining representative to be present at the meeting to discuss her promotional appraisal. According to the findings of the Regional Administrator, the representative, upon request of Waldrop, left the subject meeting and Waldrop was informed of the agency's position that the representative does not have the right to be present during the informal stages of a grievance unless specifically requested by the grievant. The Assistant Secretary found no evidence that the activity engaged in acts which constituted either interference with her rights under the Order or improper assistance to the union within the meaning of section 19(a)(3) of the Order, and no evidence to support her contention that the Regional Administrator decided the case without fully and fairly considering all relevant evidence.

Waldrop appealed to the Council alleging, in effect, that the activity's action was an unlawful interference with employee rights under the Order and that the Assistant Secretary improperly refused to order a hearing on her complaint.

Council action (February 28, 1974). The Council held that nothing in the appeal indicates that any substantial factual issues exist which required a hearing by the Assistant Secretary, or that the Assistant Secretary's decision was in any manner arbitrary and capricious. Moreover, without passing upon the precise reasoning of the Assistant Secretary, the Council determined that no major policy issue is presented by the Assistant Secretary's decision. Accordingly, the Council denied review of Waldrop'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

February 28, 1974

Ms. Mary T. Waldrop
Post Office Box 5761
Birmingham, Alabama 35209

Re: Department of Health, Education and Welfare, Bureau of Retirement and Survivors Insurance Payment Center, Birmingham, Alabama, Assistant Secretary
Case No. 40-4708 (CA), FLRC No. 73A-45

Dear Ms. Waldrop:

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's decision upheld the Regional Administrator's dismissal of your complaint which alleged that the agency had violated section 19(a)(1) and (3) of the Order by inviting the exclusive bargaining representative to be present at the meeting to discuss your promotional appraisal. The Regional Administrator found in this regard that you objected to the representative's presence and requested that she leave. Immediately after you made your request, the representative left and did not participate or act as an observer at the meeting. Additionally, you were informed that the agency takes the position that the exclusive representative's observer does not have the right to be present during the informal stages of a grievance unless specifically requested by the grievant.

The Assistant Secretary found no evidence that the activity engaged in any independent acts which constituted either interference with your rights under the Order or improper assistance to the union within the meaning of section 19(a)(3) of the Order, and no evidence to support your contention that the Regional Administrator decided the case without fully and fairly considering all relevant evidence.

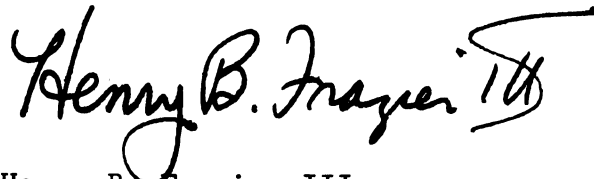
Your petition for review alleges, in effect, that the activity's action was an unlawful interference with employee rights under the Order and that the Assistant Secretary improperly refused to order a hearing on your complaint.

In the Council's opinion, nothing in your appeal indicates that any substantial factual issues exist which required a hearing by the Assistant Secretary, or that the Assistant Secretary's decision was in any manner arbitrary and capricious. Moreover, the Council is of the opinion that, without passing upon the precise reasoning of the Assistant Secretary, no major policy issue is presented by the Assistant Secretary's decision.

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 direction of the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, stylized "H" and "F".

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

E. J. Listerman
SSA

American Federation of Government Employees, Local 53, and Navy Regional Finance Center, Norfolk, Virginia. The negotiability dispute in this case involved a proposal concerning the general phrase "such other duties as may be assigned" in position descriptions.

Council action (February 28, 1974). The Council, based on its decision in the Louisville Naval Ordnance Station case, FLRC No. 73A-21 (Report No. 48), ruled that the provision is negotiable under section 11(a) of the Order. Accordingly, the agency head's contrary determination was set aside.

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

American Federation of Government Employees
Local 53

and

FLRC No. 73A-48

Navy Regional Finance Center
Norfolk, Virginia

DECISION ON NEGOTIABILITY ISSUE

Background of Case

The union (American Federation of Government Employees, Local 53) is the exclusive bargaining representative for a unit of all eligible civilian employees at the Navy Regional Finance Center, Norfolk, Virginia.

During the agency review of a proposed agreement between the union and the activity, the Department of the Navy disapproved a portion of a provision in the agreement concerning use of the phrase, "such other duties as may be assigned," in position descriptions. The disputed provision as underlined below reads as follows:

Article 17, Section 5

It is agreed that each position description shall fully spell out the duties of the employee. When the catchall phrase, "and such other duties as may be assigned" is included in a position description, the Employer agrees that it shall not, except in unusual circumstances, be used as a basis for assigning duties to an employee which are unrelated to his principal duties.

Upon referral, the Department of Defense upheld the position of the Navy, determining that the disputed portion of the provision was nonnegotiable under 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 question before the Council relates to the negotiability of the union's proposed provision concerning use of the phrase "such other duties as may be assigned" in position descriptions.

In our view the provision here in dispute bears no material difference from the union's proposal concerning position descriptions which was before the Council and held negotiable in Local Lodge 830, IAM and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974).

Therefore, based on the applicable discussion and analysis in the Louisville Naval Ordnance decision, the disputed portion of Article 17, section 5, under consideration in the instant case, must also be held to be negotiable.

Conclusion

For the foregoing reasons, we find that Article 17, section 5 is negotiable under the Order. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the agency head's contrary determination must be set aside. This decision, however, shall 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, and based on the record before us, the provision 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: **FEB 28 1974**

Veterans Administration Hospital, Portland, Oregon, A/SLMR No. 308.

The Assistant Secretary, applying the principles enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, dismissed the representation petition of the Oregon Nurses Association (ONA) seeking to sever a segment of professionals (staff nurses) from an activity-wide unit of all professional and nonprofessional employees. The ONA appealed to the Council, contending that the Assistant Secretary's decision is arbitrary and capricious based on evidence in the record; and in effect that a major policy issue is presented concerning the adoption by the Council of a new policy with regard to the representation rights of professionals.

Council action (March 20, 1974). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious since it does not appear that the Assistant Secretary acted without reasonable justification in his decision. Also, the Council held that the Assistant Secretary's determination is consistent with precedent decisions by the Council and, since no persuasive reasons were advanced by the union for overturning these precedents, no major policy issue is presented. Accordingly, the Council denied review of the ONA'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

March 20, 1974

Mr. William A. Lang
Executive Director
Oregon Nurses Association, Inc.
620 Southwest 5th Avenue
Portland, Oregon 97204

Re: Veterans Administration Hospital,
Portland, Oregon, A/SLMR No. 308,
FLRC No. 73A-54

Dear Mr. Lang:

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 dismissed the representation petition of the Oregon Nurses Association seeking to sever a segment of professionals (staff nurses) from an activity-wide unit of all professional and nonprofessional employees at the Veterans Administration Hospital, Portland, Oregon. In particular, the Assistant Secretary found that the evidence did not establish that there had been a failure or refusal of the activity-wide unit representative to render fair and effective representation to the employees in the unit sought. Rather, in his view, the record disclosed that a harmonious relationship had been maintained for several years between the activity and the activity-wide representative with respect to all unit employees, including those in the petitioned-for unit. Further, applying the principles enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, in which the Assistant Secretary concluded that ". . .where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances," the Assistant Secretary found no such "unusual circumstances" in the present case.

In your petition for review you contend that the Assistant Secretary's decision is arbitrary and capricious, principally because he failed to take cognizance of evidence in the record which allegedly demonstrated that a fair and effective collective bargaining relationship on behalf of the staff nurses did not exist, and because he failed to find that "unusual circumstances" existed which warranted the establishment of a separate unit of staff nurses. Additionally, in effect, you contend

that the Assistant Secretary's decision presents a major policy issue concerning the adoption by the Council of a new policy with regard to the representation rights of professionals under the Order.

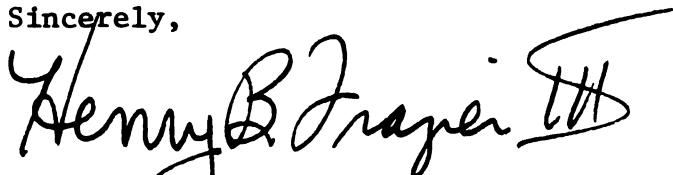
In our view your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; his findings and decision do not appear arbitrary and capricious nor do they present a major policy issue. With respect to your contentions relating to 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, the principles applied by the Assistant Secretary in this case were specifically approved by the Council in Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24 (May 22, 1973). Further, in Veterans Administration Center, Togus, Maine, A/SLMR No. 84, FLRC No. 71A-42 and Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89, FLRC No. 71A-45 (June 22, 1972), the Council held that nothing in section 10(b)(4) of the Order implies or requires that a segment of professionals be accorded any special right of severance from more comprehensive units of an activity's employees. In the instant case, no persuasive reasons are advanced for overturning these precedents. Therefore, we conclude that the subject decision of the Assistant Secretary presents no major policy issue.

Accordingly, because your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. E. Coy
VA

Department of Justice, U.S. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania, Assistant Secretary Case No. 20-4035 (AP). The Assistant Secretary denied the request of the union (Lodge 148, American Federation of Government Employees) for an extension of time in which to request review of the Regional Administrator's decision in the subject case which request for extension, predicated on the absence on vacation of the union's counsel, was received by the Assistant Secretary two days late under section 202.6(d) of the Assistant Secretary's regulations. The union appealed to the Council alleging that the Assistant Secretary's decision was arbitrary and capricious, denying the union due process under the spirit, intent and letter of the Order.

Council action (March 20, 1974). The Council held that the decision of the Assistant Secretary applying his rules in the circumstances of this case does not appear in any manner arbitrary and capricious. Also, the appeal did not allege, nor does it appear therefrom, that the Assistant Secretary's decision presents a major policy issue. Accordingly, the Council denied review of the union's appeal 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

March 20, 1974

Mr. William R. Tait, Jr.
McNerney, Page, Vanderlin & Hall
433 Market Street
Williamsport, Pennsylvania 17701

Re: Department of Justice, U.S. Bureau
of Prisons, U.S. Penitentiary,
Lewisburg, Pennsylvania, Assistant
Secretary Case No. 20-4035 (AP),
FLRC No. 73A-55

Dear Mr. Tait:

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 for an extension of time in which to request review of the Regional Administrator's decision in the subject case, which request for extension (predicated on your absence on vacation) was received by the Assistant Secretary on the last day for the filing of the request for review. The Assistant Secretary based his decision on section 202.6(d) of his regulations which provides, in pertinent part, that: "Requests for an extension of time shall be in writing and received by the Assistant Secretary not later than three (3) days before the date the request for review is due." The Assistant Secretary determined that considerations of uniform and expeditious handling of cases compelled adherence to the timeliness requirements of his regulations.

In your petition for review you contend that the Assistant Secretary's decision was arbitrary and capricious, denying you due process under the spirit, intent and letter of the Order.

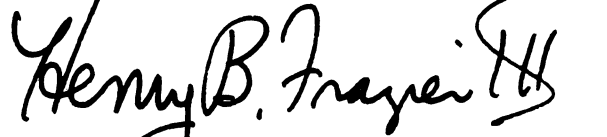
Section 2411.12 of the Council's rules provides that a "petition for review of a decision of the Assistant Secretary is not a matter of right, but of discretion, and, subject to the requirements of this part, will be granted only where there are major policy issues present or where it appears that the decision was arbitrary and capricious." Your petition for review fails to meet these requirements.

In the Council's opinion, the decision of the Assistant Secretary applying his rules in the circumstances of the instant case does not appear in any manner arbitrary and capricious. Also, you neither alleged in your appeal, nor does it appear therefrom, that the Assistant Secretary's decision presents a major policy issue.

Accordingly, as your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure, 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

R. Alpher
Bureau of Prisons

United States Air Force 321st Combat Support Group, Grand Forks Air Force Base, North Dakota, A/SLMR No. 319. The Assistant Secretary dismissed a representation petition filed by American Federation of Government Employees (AFGE) Local 3379 because he found it barred by a draft agreement between National Federation of Federal Employees Local 1347 and the activity. In this connection, the Assistant Secretary found that the agreement contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship, and had been timely signed by authorized representatives of the parties on the last day of a ninety day period during which they could negotiate such an agreement free from a rival union's claim for representation (pursuant to section 202.3(d) of the Assistant Secretary's regulations). AFGE appealed to the Council, asserting that the Assistant Secretary's decision was arbitrary and capricious because it did not resolve credibility issues posed by the record, and because the Assistant Secretary's findings of fact regarding the conclusion of the agreement by the parties were unsupported by substantial creditable evidence.

Council action (March 20, 1974). The Council held that the Assistant Secretary's decision did not appear arbitrary and capricious because he made dispositive findings of fact, and it did not appear from AFGE's appeal that the decision was without reasonable justification. Moreover, the Council ruled that AFGE's appeal did not allege, nor did it appear therefrom, that any major policy issue was presented by the Assistant Secretary's decision. Accordingly, the Council denied review of AFGE'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

March 20, 1974

Mr. L. M. Pellerzi
General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: United States Air Force 321st Combat
Support Group, Grand Forks Air Force
Base, North Dakota, A/SLMR No. 319,
FLRC No. 73A-58

Dear Mr. Pellerzi:

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

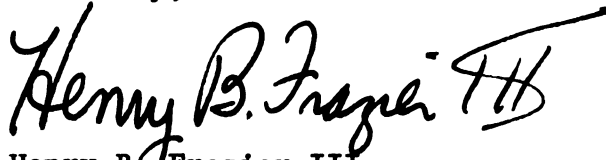
In his decision, the Assistant Secretary dismissed a representation petition filed on October 30, 1972, by American Federation of Government Employees (AFGE), AFL-CIO, Local 3379, because the petition was barred by an agreement entered into between the National Federation of Federal Employees (NFFE) Local 1347 and the activity. In this regard, the Assistant Secretary found that on October 26, 1972, the last day of a ninety day period during which NFFE Local 1347 and the activity could negotiate an agreement free from a rival union's claim for representation (pursuant to section 202.3(d) of the Assistant Secretary's Regulations), the president of NFFE Local 1347 and the Civilian Personnel Officer of the activity signed a draft of a collective agreement which contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship. The Assistant Secretary further found that the Civilian Personnel Officer had been authorized by the Base Commander to sign such an agreement on behalf of the activity. Based on these findings, the Assistant Secretary determined that this draft agreement was binding on the parties, and properly barred a subsequently filed representation petition.

In your petition for review, you contend that the decision of the Assistant Secretary was arbitrary and capricious because the Assistant Secretary did not resolve credibility issues posed by the record, and because he made findings of fact concerning the conclusion of an agreement on October 26, 1972, which are unsupported by substantial creditable evidence.

In the opinion of the Council, your appeal does not meet the requirement for review under section 2411.12 of the Council's rules. That is, the Assistant Secretary's actions do not appear arbitrary and capricious, for he made dispositive findings of fact, and it does not appear from your appeal that the decision was without reasonable justification. Moreover, your appeal neither alleges, nor does it appear therefrom, that any major policy issue is presented by the Assistant Secretary's decision. Accordingly, since your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

Capt. J. E. Dumerer
USAF

M. A. Forscey
NFFE

National Association of Government Employees, Local R14-32 (Fort Leonard Wood), Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-3712 (CO). The Assistant Secretary upheld the Regional Administrator's dismissal of the complaint filed by the National Federation of Federal Employees (NFFE), which complaint alleged that National Association of Government Employees (NAGE) Local R14-32 violated section 19(b)(1) of the Order by soliciting signatures for a representation election petition during duty hours. The Assistant Secretary found that NAGE did not violate section 19(b)(1) since there was no evidence that such conduct interfered with, restrained, or coerced the employees in the exercise of their rights under section 1(a) of the Order. NFFE appealed to the Council alleging that the Assistant Secretary's decision presents a major policy issue concerning whether a union may be charged by another union with an unfair labor practice under section 19(b)(1) for soliciting election petition signatures from employees during duty hours.

Council action (March 20, 1974). The Council, without adopting the reasoning reflected in the precise language used by Assistant Secretary concerning union activities by employee supporters during duty hours, determined that the Assistant Secretary's decision presented no major policy issue. The Council further held that the petition neither alleged, nor did it otherwise appear, that the Assistant Secretary's decision was arbitrary and capricious. Accordingly, the Council denied review of NFFE'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

March 20, 1974

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

Re: National Association of Government
Employees, Local R14-32 (Fort Leonard
Wood), Fort Leonard Wood, Missouri,
Assistant Secretary Case No. 62-3712
(CO), FLRC No. 73A-62

Dear Mr. Sussman:

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

The Assistant Secretary's decision upheld the Regional Administrator's dismissal of your complaint that the National Association of Government Employees (NAGE) Local R14-32 had violated section 19(b)(1) of the Order by allegedly soliciting, during duty hours, signatures for a representation election petition. The Assistant Secretary found that NAGE did not violate section 19(b)(1) of the Order since there was no evidence that such conduct interfered with, restrained, or coerced the employees in the exercise of their rights under section 1(a) of the Order.

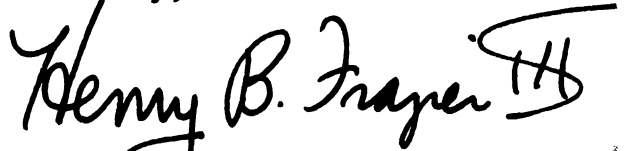
You contend in your petition for review that the Assistant Secretary's decision presents a major policy issue concerning whether a union may be charged by another union with an unfair labor practice under section 19(b)(1) of the Order for soliciting election petition signatures from employees during duty hours.

In the Council's opinion, your petition for review does not meet the considerations governing review established by section 2411.12 of the Council's rules. That is, without adopting the reasoning reflected in the precise language used by the Assistant Secretary in his decision concerning union activities by employee supporters during duty hours, no major policy issue is presented with respect to the meaning of section 19(b)(1) of the Order by the Assistant Secretary's decision in this case. Moreover, you do not allege, nor does it otherwise appear, that such decision was in any manner arbitrary and capricious.

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

G. J. Arrington
NAGE

R. Simboli
Ft. Leonard Wood

Department of the Army, United States Army Base Command, Okinawa, A/SLMR No. 243. The Assistant Secretary, in pertinent part, excluded several employee classifications from an activity-wide unit because they were vested with supervisory authority over foreign nationals, and he made no determination with regard to another classification because of an absence of information concerning the incumbent's duties and extent of direction over foreign nationals. In reaching his decision, the Assistant Secretary relied upon principles enunciated in his decision in Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134 [upheld by the Council, FLRC No. 72A-15 (April 17, 1973), Report No. 36], which stated, in effect, that the determinative factors with regard to supervisory status are the duties performed by, rather than the type of personnel working under, the alleged supervisor. The union appealed to the Council, alleging that the Assistant Secretary's decision presents a major policy issue or appears arbitrary and capricious principally because: the agency failed to produce evidence concerning the supervisory duties of the incumbents in the disputed classifications; the Assistant Secretary's findings were not supported by the weight of the evidence in the record; the Assistant Secretary failed to adhere to applicable precedent; and the McConnell principles are not dispositive.

Council action (March 20, 1974). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious because it does not appear that he acted without reasonable justification in his findings. The Council also held that the subject decision does not present a major policy issue, since the Assistant Secretary's decision is consistent with McConnell and other pertinent Council decisions. Accordingly, the Council denied review of the union's appeal 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

March 20, 1974

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

Re: Department of the Army, United
States Army Base Command, Okinawa,
A/SLMR No. 243, FLRC No. 73A-63

Dear Mr. Malloy:

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, in pertinent part, excluded several employee classifications from the activity-wide unit because they were vested with supervisory authority over foreign nationals. He further made no determination as to another category's inclusion or exclusion from the unit because of the absence of specific information as to the incumbent's duties and the extent to which he provides direction to foreign nationals. In reaching his determination, the Assistant Secretary relied upon the principles enunciated in his decision in Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134 [upheld by the Council, FLRC No. 72A-15 (April 17, 1973), Report No. 36] where he excluded from the recognized unit, as supervisors, individuals who exercised supervisory authority over military personnel who were not "employees" as defined by section 2(b) of the Order. In that case, the Assistant Secretary stated, in effect, that the determinative factors with regard to supervisory status are the duties performed by, rather than the type of personnel working under, the alleged supervisor.

In your petition for review you contend that the Assistant Secretary's decision appears arbitrary and capricious or that a major policy issue is presented principally because: the agency failed to produce evidence relating to the supervisory duties of the incumbents in the disputed classifications; the Assistant Secretary's findings are not supported by the weight of the evidence in the record; the Assistant Secretary failed to adhere to applicable precedents in reaching his determination;

and because the McConnell principles relied on by the Assistant Secretary are not dispositive of the instant case since McConnell was not concerned with supervision of foreign nationals as are here involved.

In the Council's opinion, your appeal does not meet the requirements for review as provided 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. With respect to your contentions that his decision appears arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification. As to the alleged major policy issues, the Assistant Secretary's decision clearly is consistent with the Council's decisions in McConnell and other pertinent cases.*

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, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

G. L. Olmsted
Army

*See, e.g. Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129, FLRC No. 72A-12 (May 25, 1973), Report No. 40; United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11 (May 25, 1973), Report No. 40; and United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4 (April 17, 1973), Report No. 36.

Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida, A/SLMR No. 214. Upon a complaint filed by the National Treasury Employees Union, Jacksonville District Joint Council, and the National Treasury Employees Union, the Assistant Secretary held that the agency had not violated section 19(a)(6) of the Order by refusing to furnish the union with the home addresses of all employees in the union's exclusive bargaining unit. The Council accepted the case for review, having determined that a major policy issue was present. [Report No. 42]

Council action* (March 29, 1974). The Council agreed with the Assistant Secretary that an exclusive representative is entitled to and, to the extent necessary, must be provided with effective means of communicating with the employees in the unit. In this regard, agencies, as a part of their obligation to consult, confer, or negotiate with an exclusive representative, must where appropriate, provide an exclusive representative with means of communicating with unit employees and a failure to do so would constitute a violation of section 19(a)(6). Further, in this regard the Council held that a determination of whether an exclusive representative in fact has effective means of communicating with unit employees must be made on a case-by-case basis. Applying the foregoing in the instant case, the Council sustained the Assistant Secretary's determination on the basis of the record that the union did in fact have effective means of communicating with the unit employees and, therefore, the agency had no obligation to provide the union with the additional means of communication here involved.

*The Chairman of the Civil Service Commission did not participate in this decision.

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

Internal Revenue Service,
Office of the District Director,
Jacksonville District, Jacksonville,
Florida

Respondent

and

A/SLMR No. 214
FLRC No. 72A-50

National Treasury Employees Union,
Jacksonville District Joint Council,
and the National Treasury Employees Union

Complainant

and

United States Civil Service Commission

Intervenor

DECISION ON APPEAL FROM ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by National Treasury Employees Union, Jacksonville District Joint Council, and the National Treasury Employees Union (herein jointly called the union),^{1/} held that Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida (herein referred to generally as the IRS), had not violated section 19(a)(6) of the Order by refusing to furnish the union with the home addresses of all employees in the union's exclusive bargaining unit.

The underlying facts as found by the Administrative Law Judge, whose findings, conclusions, and recommendations were adopted by the Assistant Secretary, are essentially undisputed. Briefly the facts are as follows:

^{1/} The name of the union appears as amended during the pendency of the instant proceeding.

The union, which is the exclusive bargaining representative for a unit of all nonsupervisory professional and nonprofessional employees at the activity requested IRS to provide it with the home addresses of the employees in the unit. When IRS declined to provide the requested information, the union filed the instant complaint.

The Assistant Secretary determined, in effect, that an exclusive representative is entitled to and, to the extent necessary, must be provided with effective means of communicating with unit employees under the Order. In this regard, he found dispositive in the instant case that the union had about one steward for each 40 unit employees; the union receives from IRS a quarterly list of the names of unit employees; IRS has agreed to provide the union with meeting spaces and bulletin boards; the union can distribute literature in IRS offices on nonduty time; and IRS provides each new employee with information concerning the existence of the union, including an "announcement card" inviting the employee to furnish the union with his home address. Also noted was the union's apparent failure to utilize existing means of communicating with unit employees, for example, use of IRS meeting facilities and visitation by union officials at the duty posts. The Assistant Secretary concluded that on the facts of this case the union had effective means of communicating with unit employees and dismissed the complaint.^{2/}

The union appealed the Assistant Secretary's decision to the Council. The Council found that a major policy issue was presented concerning the criteria applied by the Assistant Secretary in this case and accepted the petition for review on this issue. The union filed a brief and a supplemental submission.^{3/} IRS filed a response to the union's supplemental material and also relied in effect on the opposition which it had filed to the union's initial request for review.^{4/}

2/ The Assistant Secretary found it unnecessary to consider the contention of the Civil Service Commission that he was barred by certain CSC regulations from ordering the IRS to furnish the union with the addresses of employees in the unit, stating that his decision should not be construed to mean that he necessarily agrees with the contention. The Assistant Secretary also specifically did not adopt the finding of the ALJ to the extent that he implies that where an exclusive representative has several different means in which to communicate with unit employees, each of which alone may be inadequate to provide effective communication, the cumulative effect of the various means available may nevertheless provide the union with an adequate means of communicating with unit employees.

3/ The union also requested an opportunity to present oral argument before the Council. The request is denied as the record adequately reflects the issues and the respective positions of the parties.

4/ The United States Civil Service Commission made no submission.

Opinion

As already indicated, the essence of the criteria enunciated by the Assistant Secretary is that an exclusive representative is entitled to and, to the extent necessary, must be provided with effective means of communicating with the employees in the unit. The Council agrees with this determination.

Section 10(e) of the Order provides that a labor organization which has been selected as the exclusive bargaining representative is entitled to act for and to negotiate agreements covering all employees in the unit and it is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership.^{5/}

To this end, in our opinion, the implementation of the provisions of section 10(e) of the Order requires that the exclusive representative have effective means of communicating with unit employees. Moreover, agencies, as a part of their obligation to consult, confer, or negotiate with an exclusive representative, must where appropriate, provide an exclusive representative with means of communicating with unit employees and a failure to do so would constitute a violation of section 19(a)(6).

A determination of whether an exclusive representative in fact has effective means of communicating with unit employees must be made on a case-by-case basis. In many instances, little or no action by the agency would be necessary to supplement the means of communication readily available to the union on its own initiative. On the other hand, in some instances where because of such factors as the size of unit, geographic dispersion of employees, isolated duty locations, etc., the union may not have effective means of communicating with the unit employees. In such situations, as stated above, the proper implementation of the Order might require that the agency assist the exclusive representative in facilitating such communication, consistent with law and regulation, e.g., by providing the union with the periodic use of the intraagency mailing system or addressing envelopes containing union material and depositing those envelopes in the U.S. mail for delivery to employees at their home addresses. A failure to provide the exclusive bargaining representative such access to employees in the unit, where required, would constitute a failure on the part of the agency to meet its obligation to consult, confer, or negotiate with the exclusive representative in violation of section 19(a)(6) of the Order.

^{5/} Moreover Section 13 requires that an agreement between an agency and a labor organization must contain a grievance procedure for the consideration of grievances over the interpretation or application of the agreement. Of course, the exclusive representative's interaction with unit employees is an integral part of such a grievance procedure.

In the instant case, applying the criterion that a union must have effective means of communicating with unit employees, the Assistant Secretary determined, on the basis of the record, that the union did in fact have effective means of communicating with the unit employees and, therefore, IRS had no obligation to provide the union with additional such means of communication. Accordingly, the IRS's actions did not violate section 19(a)(6) of the Order. The Assistant Secretary's decision is clearly supported by the record and consistent with the purposes of the Order.^{6/}

Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure, we sustain the Assistant Secretary's dismissal of the complaint.

By the Council.*


Henry B. Frazier III
Executive Director

Issued: March 29, 1974

*The Chairman of the Civil Service Commission did not participate in this decision.

^{6/} Like the Assistant Secretary, we find it unnecessary in this case to consider the propriety of the CSC regulation which prohibits an agency from furnishing a union with the home addresses of employees.

Federal Aviation Administration, U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station (Hatcher, Arbitrator). The arbitrator determined that the parking accommodations for FAA employees, furnished by the city under its lease to the FAA of airport technical facilities, did not meet the adequacy requirements of FAA policy on employee parking, and thus violated the negotiated agreement which required FAA to provide adequate parking in compliance with agency policy on parking at FAA technical facilities on airports. The arbitrator also found that the FAA regional director had made repeated but unsuccessful demands of the city to provide adequate parking which would meet such FAA policy. As a remedy, the arbitrator directed the agency to immediately provide, by use of agency funds, temporary parking in substantial compliance with the agreement and the FAA policy, to be furnished rent-free unless the FAA regional director determines that a reasonable cost is appropriate, until the agency can provide other parking which fully meets the adequacy requirements of the agreement and the FAA policy. The agency filed exceptions, alleging in effect that: (1) the arbitrator exceeded his authority under the agreement by interpreting agency policy contrary to the agency's interpretation and erroneously adding his own interpretation; and (2) the remedy would require the improper use of appropriated funds in violation of various Comptroller General decisions and a GSA order. The agency also requested a stay of the arbitrator's award.

Council action (March 29, 1974). The Council determined that the agency's exceptions were not supported by sufficient facts and circumstances to warrant review, as required by section 2411.32 of the Council's rules (5 CFR 2411.32). Regarding the agency's first exception, the Council held that the agency misinterpreted the arbitrator's award in which he merely made an application of the FAA policy to the particular facts of the grievance, and made essentially the same determination as the agency's regional director, i.e., the parking was not adequate under the FAA policy. As to the agency's second exception, in the Council's view, the applicability of the GSA order and the various Comptroller General decisions was not shown. Accordingly, the Council denied the agency's petition for review. Likewise, the Council 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

March 29, 1974

Mr. Kenneth H. Chandler
Acting Director of Personnel
and Training
Office of the Secretary
U.S. Department of Transportation
Washington, D.C. 20590

Re: 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

Dear Mr. Chandler:

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, Article VIII of the collective bargaining agreement^{1/} requires the agency to provide "adequate" parking to its flight service employees and to comply with agency policy on parking accommodations at FAA facilities. Such policy on parking is contained in FAA Order 4665.3A, which obligates the agency to provide "adequate" parking for FAA employees engaged in the maintenance and operation of its technical facilities on airports and which establishes considerations by which such adequacy is determined.

According to the award, the bargaining unit employees involved in this case are engaged in the maintenance and/or operation of FAA technical facilities located on the Municipal Airport at Des Moines, Iowa which are occupied under a lease with the City of Des Moines. As part of the

1/ Article VIII (Parking Facilities) provides:

To the extent that FAA has control over parking, adequate parking accommodations shall be provided for the privately owned vehicles of on-duty Flight Service Employees. Where the local situation permits, parking facilities may be designated as reserved for employees of the facility. Regional officials and Facility Chiefs shall assure that the FAA policy on parking accommodations at FAA facilities is complied with.

rental consideration, the city furnishes free parking for FAA employees' vehicles and Government vehicles for the term of the lease. The lease does not contain provisions assuring adequate employee parking accommodations at the technical facilities located at the airport.^{2/}

During the term of the lease a disagreement arose between the FAA and the City of Des Moines over the adequacy of the parking afforded FAA employees when the city relocated the parking area for employees, including the employees of FAA and the airport owner/operator and other non-FAA employees. The agency's regional director advised the city that the new parking area was not "adequate" and sought to secure "adequate" parking facilities for the FAA employees. In turn the city insisted that the increased number of airport customer-users necessitated FAA's use of the new parking area. The regional director's demands for "adequate" parking were not successful.

Bargaining unit employees complained to FAA that the new parking area was not adequate. These complaints culminated in the filing of a collective grievance requesting that the agency comply with its obligation to furnish "adequate" parking under Article VIII of the agreement and FAA Order 4665.3A. The agency and the union submitted the grievance to arbitration under the agreement.^{3/}

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. The arbitrator determined that the FAA agents who executed the lease were remiss in their duties by failing to have included in the lease a provision that adequate free employee parking accommodations should be made available at the Municipal Airport for FAA employees, as

2/ Section 4a(2)(a) of FAA Order 4665.3A provides, in relevant part:

- (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.

* * * * *

- 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. . . .

3/ Section 7 of Article XX (Grievance Procedure) of the agreement provides, in relevant part:

The decision of the arbitrator is final, except that either Party may take exception to the award to the Federal Labor Relations Council in accordance with its regulations.

agreed with the union in Article VIII of the agreement and the employer's Order 4665.3A. As a remedy, the arbitrator directed the agency to immediately provide, by use of agency funds, temporary parking which complies as closely as possible with Article VIII of the agreement and FAA Order 4665.3A, and that the temporary parking must be furnished rent free unless the regional director determines a reasonable cost is appropriate until such time as the agency can provide (either by renewing the lease or by prior agreement with the lessor) other parking at an area which fully complies with the "adequacy requirements . . . as set forth in Article VIII of the agreement and FAA Order 4665.3A."^{4/}

The agency requests that the Council grant review of the arbitrator's award on the basis of two exceptions discussed below. The agency also requests that the Council grant a stay of the arbitrator's award pending such review.

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

The agency's first exception contends, in effect, that the arbitrator exceeded his authority under Article XX, Section 10 of the agreement^{5/} by interpreting the agency's policy in FAA Order 4665.3A contrary to the agency's interpretation and erroneously adding his own interpretation to FAA Order 4665.3A. However, this exception is not supported by facts and circumstances, as required by section 2411.32 of the Council's rules of procedure. It is uncontroverted that the arbitrator was authorized by the parties to determine whether the FAA "has provided adequate parking

^{4/} In fashioning his remedy, the arbitrator expressly relied upon paragraph 6a(2)(b) of FAA Order 4665.3A, which provides:

- (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

^{5/} Article XX, Section 10 provides:

The arbitrator shall not in any manner or form whatsoever directly or indirectly add to, subtract from, or in any other way alter the provisions of this agreement.

accommodations at FAA facilities. . .at Des Moines, Iowa. . .in compliance with Article VIII of the Association-Employer Agreement and Federal Aviation Administration's Order 4665.3A." Moreover, as noted previously, Article VIII specifically incorporates the "FAA policy on parking accommodations at FAA facilities." In the opinion of the Council, the agency has misinterpreted the arbitrator's award in which the arbitrator merely made an application of the provisions of FAA Order 4665.3A to the particular facts of the grievance and, in so doing, made essentially the same determination as had the agency's regional director, namely, that the parking afforded the agency's employees was not "adequate," as required by FAA Order 4665.3A.

The agency, in its second exception, contends that the remedy fashioned by the arbitrator would require the improper use of appropriated funds, in violation of various Comptroller General decisions and a GSA order. In the Council's opinion, the applicability of the GSA order and the cited Comptroller General decisions has not been demonstrated. It therefore appears to the Council that the agency has not provided sufficient facts and circumstances to support its second exception, as required by section 2411.32 of the Council's rules of procedure.

Accordingly, the Council has directed that the agency's petition for review be denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council has directed that the agency's request for a stay be denied under section 2411.47(d) of the Council's rules.

By 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

cc: W. Graham
NAATS

U.S. Air Force, Andrews Air Force Base, Base Fire Department, Assistant Secretary Case No. 22-3954 (CA). Based on section 19(d) of the Order, the Assistant Secretary upheld the Assistant Regional Director's dismissal of the National Federation of Government Employees (NFFE) complaint alleging violations of section 19(a)(1), (5) and (6) of the Order. NFFE appealed to the Council on the ground that the Assistant Secretary's decision was arbitrary and capricious because he failed adequately to investigate and consider the union's contentions, and to order a hearing, in the case.

Council action (April 29, 1974). The Council held that the Assistant Secretary did not appear to have disregarded the union's contentions; the union's appeal did not demonstrate that substantial factual issues exist requiring a hearing; and the decision of the Assistant Secretary did not appear to be without reasonable justification or in any other manner arbitrary and capricious. The Council further held that the petition neither alleged, nor did it appear therefrom, that any major policy issue is presented by the Assistant Secretary's decision. Accordingly, the Council denied review of NFFE'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

April 29, 1974

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

Re: U.S. Air Force, Andrews Air Force Base,
Base Fire Department, Assistant Secretary
Case No. 22-3954 (CA), FLRC No. 73A-66

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, alleging violations of section 19(a)(1), (5) and (6) of the Order. In this regard, the Assistant Secretary found, in agreement with the Assistant Regional Director, "that your complaint cannot be processed based on section 19(d) of the Order as it is clear that the issues herein were raised previously under a grievance procedure." He further rejected your contention that section 19(d) is inapplicable (because your complaint was filed after a claimed second implementation of the alleged change in working conditions which had been the subject of the grievance) finding this contention was raised for the first time in your request for review and was not supported by the evidence presented to the Assistant Regional Director.

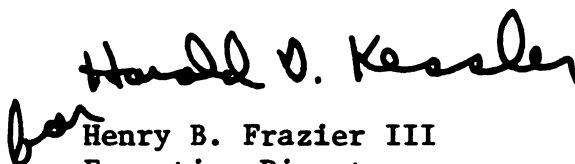
In your petition for review you contend that the Assistant Secretary's decision is arbitrary and capricious because he failed (1) to make his own investigation of your allegation that there were two separate implementations of the changed working conditions; (2) to consider your argument that section 19(d) of the Order does not raise a bar to this action because the grievance was withdrawn without settlement; and (3) to direct that a hearing be held to resolve the conflicting evidence.

In our 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. The Assistant Secretary does not appear to have disregarded your contentions; 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 arbitrary and capricious. Moreover, your petition neither alleges, nor does it appear therefrom, that any major policy issue is presented by the Assistant Secretary's decision.

Accordingly, since your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is denied.

By the Council.

Sincerely,


for Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. E. Keller
Andrews Air Force Base

Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334. The Assistant Secretary dismissed complaints filed by the individual grievant and American Federation of Government Employees Local 2816 (AFGE), alleging agency violations of section 19(a)(1) of the Order in failing to follow the agency grievance procedure in several matters in which the grievant was represented by the union. The Assistant Secretary found that, even assuming an agency fails to apply the provisions of its own grievance procedure, such failure, standing alone, does not interfere with rights assured under the Order. Further, he found that the evidence did not establish that the agency's conduct was motivated by anti-union considerations. The Assistant Secretary concluded that the agency's failure to process the grievances under its grievance procedure did not violate 19(a)(1).

AFGE appealed to the Council, contending a major policy issue is present, namely whether an agency's alleged unjustified failure to process a grievance according to the terms of an agency grievance procedure violates 19(a)(1) where the grievance was presented and prosecuted by the grievant through his exclusively recognized union representative; and asserting in this regard that the agency's action discourages union membership.

Council action (April 29, 1974). The Council held that, based on the contentions of the union described above, the Assistant Secretary's decision did not present a major policy issue. In this connection the Council ruled, as did the Assistant Secretary, that clearly the failure of an agency to follow its own grievance procedure, standing alone, does not violate section 19(a)(1) of the Order; moreover, such a failure does not become a violation of 19(a)(1) merely by reason of the representation of a particular grievant by a labor organization.

The Council also held that AFGE did not allege, nor did it otherwise appear, that the Assistant Secretary's decision was in any manner arbitrary and capricious. Accordingly, the Council denied review of AFGE'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

April 29, 1974

Mr. Charles Barnhill, Jr.
Davis, Miner, Barnhill & Bronner
22 East Huron Street
Chicago, Illinois 60611

Re: Office of Economic Opportunity,
Region V, Chicago, Illinois,
A/SLMR No. 334, FLRC No. 74A-3

Dear Mr. Barnhill:

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

The Assistant Secretary dismissed several unfair labor practice complaints filed by Mr. Bottigliero and AFGE Local 2816 which alleged violations of section 19(a)(1) of the Order by reason of the agency's failure to follow the agency grievance procedure in several matters in which the grievant was represented by the union. The Assistant Secretary based his decision on his findings, in pertinent part, that:

. . . [T]he grievance procedure which allegedly has been violated by the agency involved, is a procedure established by the agency itself rather than through the process of bilateral negotiations, [A]n agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order. Moreover, such a procedure is applicable to all employees of an agency not covered by a negotiated grievance procedure, regardless of whether or not they are included in exclusively recognized bargaining units. Under these circumstances, . . . even assuming that an agency improperly fails to apply the provisions of its own grievance procedure, such a failure, standing alone, cannot be said to interfere with rights assured under the Order and thereby be violative of Section 19(a)(1).

Based on the foregoing, and noting the Administrative Law Judge's finding, which I adopt, that the evidence does not establish that the Respondent's conduct herein was motivated by anti-union considerations, I find that the Respondent's failure to process the Complainants' grievances under the former's grievance procedure did not constitute a violation of Section 19(a)(1) of the Order. [Footnote omitted; emphasis in original.]

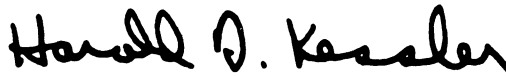
In your petition for review, you contend that the Assistant Secretary's decision presents a major policy issue concerning whether an agency's unjustified failure to process a grievance according to the terms of an agency-promulgated grievance procedure violates section 19(a)(1) of the Order, where that grievance has been presented and prosecuted by the grievant through his exclusively recognized union representative. In this regard, you assert that the agency's action discourages membership in the union.

In the Council's opinion, your petition for review does not meet the considerations governing review established by section 2411.12 of the Council's rules. That is, based upon the contentions described above, no major policy issue is presented by the Assistant Secretary's decision, for it is clear, as held by the Assistant Secretary, that the agency's failure to follow its own grievance procedure, standing alone, is not violative of section 19(a)(1) of the Order. Moreover, such a failure on the part of an agency to follow its own grievance procedure does not become a violation of 19(a)(1) merely by reason of the representation of a particular grievant by a labor organization. Further, you do not allege, nor does it otherwise appear, that such decision was in any manner arbitrary and capricious.

Since the Assistant Secretary's decision does not present a major policy issue and does not appear arbitrary and capricious, it 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.

By the Council.

Sincerely,



for Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

W. Foreman
OEO

American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator). The agency appealed to the Council from the arbitrator's award. The appeal was due, under the Council's rules, no later than January 7, 1974. However, the appeal was not filed with the Council until after the close of business on January 8, 1974, and no extension of the time for filing this petition for review was either requested by the agency or granted by the Council.

Council action (April 29, 1974). Because the agency's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 29, 1974

Mr. Howard Toy
Director of Personnel
Office of Economic Opportunity
Washington, D.C. 20506

Re: American Federation of Government Employees
Local 2677 and Office of Economic Opportunity
(Dougherty, Arbitrator), FLRC No. 74A-4

Dear Mr. Toy:

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. 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 an appeal must be filed within 20 days from the date of service of the arbitrator's award on the party seeking review; and under section 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. In computing these limits, 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.

According to the record before the Council, the arbitrator's award in this case was served on you by hand on December 17, 1973. Therefore, under the above rules, your appeal was due in the Council's office on or before January 7, 1974. However, your petition for review was not filed until after the close of business on January 8, 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.

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

By the Council.

Sincerely,

Harold D. Kessler
for
Henry B. Frazier III
Executive Director

cc: P. Kete
National Council of OEO
Locals, Local 2677

Defense Contract Administration Services Region, St. Louis, Missouri, and American Federation of Government Employees, Local 1711 (Madden, 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 was provided time to effect compliance with the rules. Further, the union was advised that failure to effect compliance would result in dismissal of the appeal. The union failed to complete the necessary actions within the time limit prescribed.

Council action (May 6, 1974). 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

May 6, 1974

Mrs. Stasia L. McAvoy, President
American Federation of Government
Employees, AFL-CIO, Local 1711
1809 West Woodbine Avenue
Kirkwood, Missouri 63122

Re: Defense Contract Administration
Services Region, St. Louis, Missouri,
and American Federation of Government
Employees, Local 1711 (Madden, Arbitrator),
FLRC No. 74A-18

Dear Mrs. McAvoy:

By Council letter of April 12, 1974, you were advised that preliminary examination of your appeal reflected deficiencies in meeting various requirements of the Council's rules (a copy of which was sent to you for your information). The pertinent sections of the rules were indicated, namely, sections 2411.34, 2411.42, 2411.46(a), and 2411.46(b), and the deficiencies were explained, in the letter.

You were also advised in the Council's letter:

Further processing of your appeal is contingent upon your immediate compliance with the above provisions in the Council's rules. Accordingly, you are hereby granted until the close of business on April 26, 1974, to accomplish the required actions and file the statements prescribed. Failure to do so will result in the dismissal of your appeal.

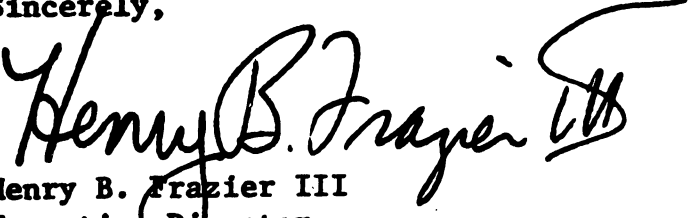
You have made no submission showing accomplishment of the required actions, and you have not filed the statements prescribed, within the time limit provided therefor. Accordingly, your appeal is

hereby dismissed for failure to comply with the Council's rules of procedure.

For your convenience, the papers which you initially filed in the case are returned herewith.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

Enclosure

Veterans Administration Hospital, Butler, Pa., Assistant Secretary Case No. 21-3923 (RO). The Assistant Secretary upheld the Assistant Regional Director's denial of the request by Service Employees International Union Local 227 (SEIU) to intervene in a representation proceeding initiated by National Association of Government Employees concerning the unit for which SEIU was the incumbent labor organization. The Assistant Secretary found that SEIU's request was untimely filed and that good cause was not shown for extending the period of timely intervention. Further, the Assistant Secretary found that SEIU's intervention request was not simultaneously served on all other interested parties as required by the Assistant Secretary's rules. SEIU appealed to the Council contending that the Assistant Secretary's decision presented a major policy issue or appeared arbitrary and capricious principally because: (1) SEIU's members were prevented from choosing SEIU as their exclusive representative; and (2) the incumbent should have a right to appear on the ballot without being required to intervene under the Order.

Council action (June 18, 1974). The Council held that no major policy issue was presented as SEIU had failed to advance any persuasive reason for overturning the Assistant Secretary's well established policy that incumbent unions must timely intervene in representation elections pursuant to the requirements of the Assistant Secretary's rules. Further, the Council held that the Assistant Secretary's decision does not appear arbitrary and capricious since the Assistant Secretary, relying upon an established policy reflected in his rules and published precedent, does not appear to have acted without reasonable justification in this case. Accordingly, the Council denied review of SEIU's appeal 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 18, 1974

Mr. George Hardy
International President
Service Employees International
Union, AFL-CIO
900 17th Street, NW.
Washington, D.C. 20006

Re: Veterans Administration Hospital, Butler,
Pa., Assistant Secretary Case No. 21-3923
(RO), FLRC No. 74A-5

Dear Mr. Hardy:

The Council has carefully considered your petition for review of the Assistant Secretary's decision and the opposition thereto filed by the National Association of Government Employees (NAGE) 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 Service Employees International Union (SEIU) Local 227 to intervene in the representation proceeding filed by NAGE concerning the unit for which Local 227 was the incumbent labor organization. The Assistant Secretary found, among other things, that: On September 7, 1973, simultaneously with the filing of its petition, NAGE served a copy on SEIU (by certified mail with return receipt); one week later the Area Administrator sent a letter of notice of the petition to the activity with simultaneous service on SEIU; and, on September 20, 1973, the official Department of Labor Notice of Petition was posted at the activity indicating, in accordance with section 202.5 of the Assistant Secretary's rules, that any incumbent union must file a request to intervene within ten days of such posting. The Assistant Secretary further found that SEIU's request to intervene was not filed until October 25, 1973, i.e., beyond the permissible ten day period, and that good cause had not been shown for extending the period for timely intervention. Finally, the Assistant Secretary found that, besides having been untimely filed under his rules, SEIU's intervention request was not simultaneously served on all other interested parties as required by section 202.5(c) of the Assistant Secretary's rules.

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

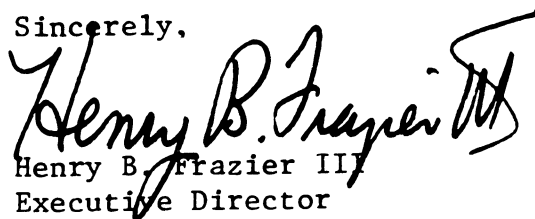
principally because: The Assistant Secretary's policy requiring an incumbent union to timely intervene in a representation election in compliance with the rules of the Assistant Secretary works an unjust burden on SEIU's members who are prevented in this case from choosing SEIU as their exclusive representative; since the election was of the type mentioned in section 10(d)(2) of the Order, i.e., to determine whether a labor organization should replace another labor organization as the exclusive representative, the incumbent union should appear on a ballot without being required to intervene; and, the Assistant Secretary's enforcement of section 202.5 of his rules in this case nullifies the intent of section 10(d)(2) of the Order by taking away the employees' right to choose between the incumbent union and the challenging union, and by denying employees their right under section 1 of the Order to assist any labor organization.

In the Council's opinion, your petition for review does not meet the requirements for granting review under section 2411.12 of the Council's rules; the decision of the Assistant Secretary neither appears arbitrary and capricious nor presents a major policy issue. Your 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. Therefore, we conclude that the Assistant Secretary's decision does not present a major policy issue. Further, with respect to your contentions that the decision of the Assistant Secretary appears arbitrary and capricious, it does not appear that he acted without reasonable justification in the circumstances of this case. Instead, the Assistant Secretary relied upon an established policy reflected in his rules and in a previously published Report on a Ruling. (Report No. 43.)

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.

By the Council.

Sincerely,


Henry B. Frazier II
Executive Director

cc: A/SLMR
Dept. of Labor

A. J. Whitney
NAGE

P. A. Kennedy
VA

Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336. The Assistant Secretary dismissed a complaint filed by Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO (AFGE), which alleged that the agency's denial of an employee's request for union representation at "counseling sessions," and its denial of the employee's reenlistment in the Texas Air National Guard which resulted in the employee's loss of civilian Guard employment, violated section 19(a)(1), (2) and (6) of the Order. The Assistant Secretary found that the evidence did not establish the "counseling sessions" were "formal discussions" within the meaning of section 10(e), and that the denial of union representation did not violate section 19(a)(6) or 19(a)(1). As to the alleged discriminatory denial of reenlistment, the Assistant Secretary found that the employee had used the Guard's appeals procedure, including the final step thereof, in which the employee had the opportunity to raise the issue of such alleged discrimination, but failed to do so; and that the Assistant Secretary was thereby precluded from determining the issue here involved in the context of an unfair labor practice proceeding under section 19(d) of the Order ("Issues which can be properly raised under an appeals procedure may not be raised under this section.").

AFGE appealed to the Council, alleging that the Assistant Secretary's decision presents a major policy issue and appears arbitrary and capricious, principally because the "counseling sessions" were in effect grievance or adverse action procedures at which the employee was entitled to union representation; no proper basis existed for invoking section 19(d); and the Assistant Secretary's decision is unsupported by facts or reason and ignores applicable precedents. Separately, National Treasury Employees Union (NTEU) filed a petition for review and request for stay as amicus curiae.

Council actions (June 18, 1974). As to AFGE's appeal, the Council found that the Assistant Secretary's decision does not appear arbitrary and capricious, since it does not appear that the Assistant Secretary acted without reasonable justification in his decision. Further, the Council held that, in the circumstances presented, the Assistant Secretary's determination (namely, that denial of representation at the particular "counseling sessions" involved, which were not "formal discussions" within the meaning of section 10(e), did not interfere with any rights accorded under the Order) does not present a major policy issue warranting Council review. Also, the Council ruled that the Assistant Secretary's conclusion under section 19(d) that he lacked jurisdiction to determine in an unfair labor practice proceeding the issue of discriminatory denial of reenlistment which could have been raised under the Guard appeals

procedure clearly reflects the plain language of 19(d) and thus presents no major policy issue. Accordingly, the Council denied review of AFGE's appeal pursuant to section 2411.12 of the Council's rules (5 CFR 2411.12).

As to NTEU's appeal, the Council denied consideration of NTEU's petition for review and request for stay since such submissions may be made only by a "party" to the case as defined in section 2411.3(c)(1) of the Council's rules (5 CFR 2411.3(c)(1)), and NTEU failed to meet the requirements of that definition. Further the Council noted that such submissions may not be filed by an amicus curiae under section 2411.49 of the Council's rules (5 CFR 2411.49) which provides only for the filing of briefs and oral argument.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 18, 1974

Mr. Dolph David Sand
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Department of Defense, National Guard
Bureau, Texas Air National Guard,
A/SLMR No. 336, FLRC No. 74A-11

Dear Mr. Sand:

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

The Assistant Secretary dismissed a complaint filed by the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, which alleged violations of sections 19(a)(1), (2) and (6) of the Order by reason of the agency's denial of employee James Burgamy's requests for union representation at "counseling sessions"; and its denial of Burgamy's reenlistment in the Texas Air National Guard, assertedly because of union activities and his filing of grievances, thereby resulting, under applicable statutes, in Burgamy's loss of civilian employment in the National Guard. The Assistant Secretary found that the evidence did not establish that the "counseling sessions" in question were "formal discussions" concerning grievances, personnel policies and practices, or working conditions within the meaning of section 10(e) of the Order at which the exclusive representative was entitled to be represented by virtue of section 10(e). Consequently, he determined that the agency's denial of union representation at the "counseling sessions" did not constitute a violation of section 19(a)(6). He also determined that the agency's denial of such representation did not interfere with any rights accorded Burgamy under the Order and therefore did not constitute a violation of section 19(a)(1). With respect to the denial of Burgamy's military reenlistment, the Assistant Secretary found that Burgamy had utilized the Texas Air National Guard's appeals procedure, including utilization of the final step of such procedure, an appeal to the Adjutant General of the Texas Air National

Guard. As for Burgamy's allegation that he had been denied reenlistment for discriminatory or other improper reasons under the Order, the Assistant Secretary found that the evidence established that Burgamy had the opportunity to raise the issue of such alleged discrimination under the Texas Air National Guard's appeals procedure, but failed to do so. Thus, the Assistant Secretary concluded under section 19(d), which states in pertinent part that "Issues which can be properly raised under an appeals procedure may not be raised under this section," that the Assistant Secretary was precluded from determining in the context of an unfair labor practice proceeding whether Burgamy was, in fact, denied reenlistment for discriminatory reasons.

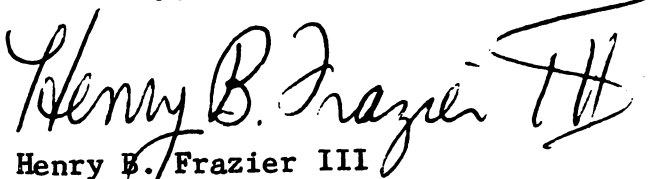
In your petition for review, you contend that the Assistant Secretary's decision presents a major policy issue and is arbitrary and capricious, principally because, as you allege: The "counseling sessions" were, in effect, part of a grievance or an adverse action procedure and the Federal Personnel Manual guarantees an employee the right to present an appeal or grievance accompanied, represented and advised by a representative of his choice at any stage of the proceedings; Burgamy was not given an opportunity to present his arguments that he had been denied reenlistment for discriminatory or other improper reasons, and moreover, the Texas Air National Guard appeals procedure applies to military, and not civilian matters, thus providing no proper basis for invoking section 19(d) of the Order; and, the Assistant Secretary's decision is not supported by facts or reason and ignores his prior decisions.

In the Council's opinion, your appeal does not establish any basis for review under the Council's rules, i.e., the Assistant Secretary's decision does not present a major policy issue nor does it appear arbitrary and capricious. 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. As to the alleged major policy issues, the Council is of the opinion that in the circumstances presented the Assistant Secretary's determination, that denial of representation at these particular "counseling sessions" which were not "formal discussions" within the meaning of section 10(e) of the Order did not interfere with any rights accorded under the Order, does not present a major policy issue warranting Council review in this case. Furthermore, the Assistant Secretary's conclusion under section 19(d) that he lacked jurisdiction to determine in an unfair labor practice proceeding, the issue of discriminatory denial of reenlistment which could have been raised under the Texas Air National Guard appeals procedure clearly reflects the plain language of section 19(d), as previously set forth. Thus no major policy issue is presented by this determination of the Assistant Secretary.

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. Likewise, your request to present oral argument is denied under section 2411.48 of the Council's rules of procedure.

By the Council.

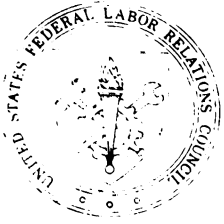
Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in dark ink and is positioned above the printed name and title.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

D. W. Pace
Texas Air National Guard



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 18, 1974

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

Re: Department of Defense, National Guard Bureau,
Texas Air National Guard, A/SLMR No. 336,
FLRC No. 74A-11

Dear Mr. Tobias:

Reference is made to your petition for review and request for stay of the Assistant Secretary's decision, filed by the National Treasury Employees Union (NTEU), as amicus curiae in the above-entitled case.

Under section 2411.13(a) of the Council's rules of procedure, a petition for review of a decision of the Assistant Secretary may be filed only by the respective "parties" to the case before the Council. Likewise, under the clear intent of section 2411.47 of the rules, only the respective "parties" to the case may file a request for stay of the Assistant Secretary's decision.

The term "party" is defined in section 2411.3(c)(1) of the Council's rules, as follows:

- (c) 'Party' means any person, employee, labor organization, or agency that participated as a party--
- (1) In a matter that was decided by the Assistant Secretary under Section 6 of the Order. . . .

The Assistant Secretary has defined the term "party" for purposes of relevant matters before him, as follows (sec. 201.21 of Assistant Secretary rules):

'Party' means any person, employee, group of employees, labor organization, agency, or activity: (a) Filing a complaint, petition, request, or application; (b) named in a complaint, petition, request, or application; or (c) whose intervention in a proceeding has been permitted or directed by the Assistant Secretary, Regional Administrator, Area Administrator, Director, Hearing Officer, Chief Administrative Law Judge, or Administrative Law Judge, as the case may be.

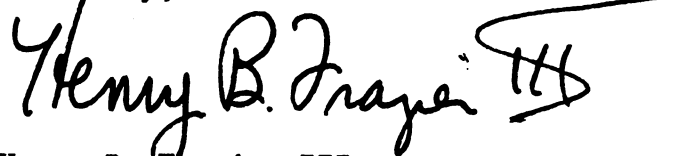
In this case AFGE was the complainant and Texas Air National Guard was the respondent and no intervention was permitted or directed by the Assistant Secretary or his representatives in the proceeding before him. Consequently, it does not appear from the Assistant Secretary's decision that your organization participated as a "party" in the matter before him, within the meaning of that term as defined in the Assistant Secretary's rules. Accordingly, your organization is not a "party" to the instant case before the Council, under section 2411.3(c)(1) of the Council's rules, and is not entitled to file a petition for review, under section 2411.13(a), or a request for stay, under section 2411.47 of the rules.

Therefore, the Council must deny consideration of your amicus curiae petition for review and request for stay. Moreover, section 2411.49 of the Council's rules provides only for the filing of briefs and oral arguments by amicus curiae.

In this regard, on this same date, the parties to the above-entitled case are being notified that the Council has denied AFGE's petition for review. (A copy of the Council's letter in this regard is enclosed for your information.)

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

D. W. Pace
Texas Air National Guard

D. D. Sand
AFGE

Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina. The negotiability dispute involved two management proposals concerning discussions between management officials and individual unit employees, which the agency head determined to be negotiable. A question was also raised in the union's appeal to the Council as to the validity of a provision in agency regulations dealing with informal discussions between an employee and a supervisor (DOD Directive 1426.1, section VII B.3.b.).

Council action (June 21, 1974). The Council found, contrary to the union's contentions, that the management proposals are not violative of section 10(e) of the Order since: (1) The disputed language of the proposals, as tacitly conceded by the union, pertains only to "informal" discussions which are outside the limitations of section 10(e); and (2) the difference in treatment which would be accorded temporary and probationary employees, as distinguished from career/career-conditional employees, in one of the proposals, does not constitute "discrimination" within the meaning of section 10(e). Accordingly, the Council sustained the agency head's determination that the proposals are negotiable.

As to the alleged invalidity of the provision in agency regulations, the Council found that the regulations were not expressly or impliedly invoked by the agency head with respect to a proposal in his negotiability determination and, therefore, the validity of the regulations is not properly before the Council in this proceeding under section 11(c) of the Order.

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

Federal Employees Metal
Trades Council of Charleston

and

FLRC No. 73A-6

Charleston Naval Shipyard
Charleston, South Carolina

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The Federal Employees Metal Trades Council of Charleston represents wage grade employees at the Charleston Naval Shipyard. In connection with the parties' negotiations, the activity proposed articles (detailed hereinafter) dealing with a management-conducted "preliminary investigation" and "informal investigative discussion" in regard to deciding whether to take formal disciplinary action against an employee (Article 16, Section 1); and, management rights, including the right "to hold private, informal discussions with individual employees of the unit" (Article 2, Section 1).

The union asserted the activity's proposals were nonnegotiable and referred the question to the agency for determination, claiming, in addition, that a provision contained in published agency regulations (DOD Directive 1426.1, section VII B.3.b.) dealing with informal discussions between an employee and a supervisor violates the Order.

The Department of Defense (DOD) upheld the activity, determining that both management proposals are negotiable. In addition, DOD found no conflict between the cited provision of agency regulations and the Order.

The union petitioned the Council to review the agency's determination under section 11(c) of the Order. Thereafter, DOD filed a statement of position in support of its determination.^{1/}

^{1/} DOD earlier moved to dismiss the petition on grounds that the petition failed to meet the requirements for review prescribed by the Order and the Council's rules of procedure, in that "the agency
(Continued)

Opinion

The issues raised with respect to the management proposals and the agency regulation will be discussed separately, below.

1. The management proposals. The management proposals provide as follows (underscoring in body indicates specific provisions in dispute):

Article 16, Section 1

Prior to initiating a formal disciplinary action such as letters of reprimand or suspension of 30 calendar days or less against an employee, a preliminary investigation will be made by the immediate supervisor or other management official to document the facts and to determine whether a prima facie case exists. This preliminary investigation will normally include a private discussion with the employee if he is in a duty status. If the findings of the preliminary investigation indicate that formal disciplinary action may be warranted, an informal investigative discussion will be held with the employee if he is other than a temporary or probationary employee, prior to issuance of a proposed disciplinary action. If the employee so desires he may have a fellow employee present at this discussion.

Article 2, Section 1

The rights, functions, and authority of Management are vested in Management officials. Included, but not limited thereto, are the following:

- a. To direct employees of the Shipyard.
- b. To hire, promote, transfer, assign, and retain employees in positions within the Shipyard, and to suspend, demote, discharge, or take other disciplinary action against employees.

(Continued)

has not made a determination that a proposal is nonnegotiable." The Council ruled that review of the negotiability dispute would be consistent with the underlying purpose of the Order and the Council's rules of procedure and denied DOD's motion.

- c. To relieve employees from duties because of lack of work or other legitimate reason.
- d. To maintain the efficiency of the Government operations entrusted to Management.
- e. To determine the methods, means, and personnel by which such operations are to be conducted.
- f. To take whatever actions may be necessary to carry out the mission of the Shipyard in situations of emergency as determined by Management.

The foregoing shall apply to all supplemental implementing and subsidiary or informal agreements between Management and Council. Further, to avoid possible misunderstandings with respect to other provisions of this agreement Management has the right to hold private, informal discussions with individual employees of the unit. Management agrees that it will not attempt to use these discussions to negotiate individually with employees.

The union principally contends that the language contained in both proposals, as set forth and underscored above, insofar as it provides for private discussions between management officials and individual unit employees, violates section 10(e) of the Order^{2/} because:

2/ Section 10(e) of the Order provides:

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

. . . When Management schedules preliminary or informal investigative discussions which may lead to disciplinary action which is grievable under the Negotiated Grievance Procedure against employees in the Unit, the employee has an established right to be represented by the exclusive representative during such discussions. Since the exclusive representative is clothed with the responsibility of 'acting for' and representing 'the interest' of all employees in the Unit, the exclusive representative has the right to be in attendance at such discussions.^{3/}

We cannot agree with the union's contentions. Section 10(e), as previously set forth, expressly qualifies the union's right to be represented by limiting it to "formal" discussions. The language of the proposals in dispute, as tacitly conceded by the union, calls only for "informal" discussions, and the union does not claim or seek to establish that such discussions could be characterized in any manner as being "formal." Hence, the proposals clearly are not proscribed by section 10(e) of the Order.

The union additionally asserts in its appeal to the Council, as violative of section 10(e) of the Order, the provision contained in the proposed Article 16, Section 1, which would accord temporary and probationary employees different treatment from that accorded to career/career-conditional employees for purposes of informal investigative discussions.^{4/} More specifically, the union argues that section 10(e) requires it to represent the

^{3/} The union also contends the proposals violate sections 1(a), 12(b) and 19(a)(1) of the Order. But the union advanced no persuasive reasons to support its contentions. Hence, we find these unsupported claims to be without merit.

^{4/} The disputed language of Article 16, Section 1 in this regard, as previously set forth, states:

If the findings of the preliminary investigation indicate that formal disciplinary action may be warranted, an informal investigative discussion will be held with the employee if he is other than a temporary or probationary employee, prior to issuance of a proposed disciplinary action.

interests of all employees in the unit without discrimination and, in effect, that the proposed provision would cause the union to discriminate against the interests of temporary and probationary employees by denying the latter a right accorded to other types of employees.

The agency, noting that this issue was raised for the first time by the union in its petition for review, contends in its statement of position that no applicable authority would prohibit different treatment for different classes of employees, and that the proposed provision is negotiable.

Apart from the question of the timeliness of the union's contention,^{5/} we find without merit the union's assertion that the proposal constitutes "discrimination" within the meaning of section 10(e) of the Order. Section 10(e) states that a labor organization which has been accorded exclusive recognition is responsible for representing the interests of all employees in the unit without discrimination. In the Council's view the discrimination proscribed by section 10(e) encompasses a union's according different rights within like classes of employees in the bargaining unit. But we cannot agree that section 10(e) means that every employee in the unit must be accorded precisely the same rights by each provision of the negotiated agreement. For such a construction of section 10(e), as advanced by the union, would unrealistically prevent parties fashioning an agreement from taking account of the significant variations of tenure and status incident to different employment categories under Civil Service Commission regulations.

Applying the foregoing to the instant case, the provision claimed by the union to be improperly discriminatory concerns employees in the "temporary" and "probationary" categories whose employment rights are essentially different under Civil Service Commission regulations from those of "career" and "career-conditional"

5/ Section 2411.51 of the Council's rules of procedure provides in pertinent part that:

Consistent with the scope of review set forth in this part, the Council will not consider . . . any issue, which was not presented in the proceedings before . . . an agency head

employees. For example, as a general rule, the employment of employees in the former categories may be terminated upon written notice, without benefit of the adverse action procedural protection which must be accorded to employees in the latter categories.^{6/}

In our opinion, the parties may take such differences in the basic terms and conditions of particular types of employment into consideration when fashioning their agreements, without thereby engaging in proscribed discrimination under section 10(e). Accordingly, in the circumstances presented by the case at hand, we find no merit in the union's contention that the proposed provision violates section 10(e) of the Order.

In summary, based on the foregoing, we conclude that the management proposals are negotiable matters.

2. The agency regulation. As previously indicated, the union contends that DOD Directive 1426.1, Section VII B.3.b. violates the Order.

Section 11(c) of the Order provides for appeal to the Council as to the validity of an agency regulation only if such regulation is expressly or impliedly invoked by the agency head with respect to a proposal. Here, the regulation in question was not so invoked and, therefore, without ruling on the substance of the union's contention, we find that no issue is properly before the Council concerning DOD Directive 1426.1, Section VII B.3.b., in this proceeding.

Conclusion

In conclusion, we find that management's proposals (Article 16, Section 1 and Article 2, Section 1) are negotiable under the Order. Accordingly, pursuant to section 2411.27 of the Council's rules of procedure, the agency head's determination is sustained. This decision shall not be construed as expressing or implying

^{6/} See Federal Personnel Manual 315.8-4 and 316.4-2.

any opinion of the Council as to the merits of the proposals. We decide only that, as submitted and based on the record before us, the proposals are 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 21, 1974

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator). The question before the arbitrator was whether a letter of warning issued to the individual grievant, after a "system deviation," violated the provision in the bargaining agreement that, in the event of "a difference in professional opinion between the employee and the supervisor," the employee shall comply with the supervisor's instructions and the supervisor shall be responsible for his own decision. The arbitrator found that the "system deviation" occurred contemporaneously with the supervisor's denial of several requests for assistance by the grievant; that there was a "difference in professional opinion" between the grievant and supervisor within the meaning of the agreement; that the grievant complied with the supervisor's instructions; that the requests for assistance were legitimate and bona fide, and the grievant was not shown to have acted negligently or carelessly; and that the letter of warning thereby violated the agreement. The agency excepted to the arbitrator's award, alleging in effect that (1) the opinion on which the award is based violates section 12(b) of the Order; and (2) the arbitrator misinterpreted the subject provision of the agreement, and as so interpreted and applied in the award, this provision violates section 12(b) of the Order.

Council action (June 21, 1974). The Council determined that, with regard to the first exception, it did not appear from the facts and circumstances described in the petition that the award violates the Order; and as to the second exception, the petition further did not state a ground upon which review of an arbitrator's award will be granted. The Council therefore denied review of the agency's petition because it failed to meet the standards set forth in section 2411.32 of the Council's rules of procedure (5 CFR 2411.32). Likewise, the agency's request for a stay was denied 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

June 21, 1974

Mr. R. J. Alfultis
Director of Personnel and
Training
Office of the Secretary
Department of Transportation
Washington, D.C. 20590

Re: Professional Air Traffic Controllers
Organization and Federal Aviation
Administration, Department of
Transportation (Britton, Arbitrator),
FLRC No. 74A-1

Dear Mr. Alfultis:

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.

In his decision, the arbitrator found that during the tour of duty here involved, while the grievant air traffic controller was assigned to work two positions, the grievant determined that he was so busy that he needed assistance. Therefore, during the ensuing ten to fifteen minutes, he made several requests for assistance, but these requests were denied by the supervisor in charge. Contemporaneously, the grievant failed to take certain actions with regard to an aircraft in the airspace under his control which resulted in a "system deviation", i.e., a situation wherein the potential for a mid-air collision was created due to an aircraft being in a place where it should not have been. The agency's investigation of the incident resulted in a determination that the grievant's "failure to complete the required coordination . . . was a direct cause of the deviation." The grievant received a Letter of Warning from the facility chief and, shortly thereafter, filed a grievance alleging that the issuance of the Letter of Warning violated Article 55, Section 1 of the negotiated agreement.^{1/} The parties submitted the grievance to arbitration under the agreement.

^{1/} Article 55, Section 1 of the agreement provides as follows:

Article 55 - Controller Performance

Section 1. In the event of a difference in professional opinion between the employee and the supervisor, the

(Continued)

The arbitrator determined that, within the meaning of Article 55, Section 1, there had been "a difference in professional opinion" between the grievant and the supervisor; the grievant had complied with the supervisor's instructions; and thus, the agency violated Article 55, Section 1 by issuing the Letter of Warning holding the grievant responsible for the "system deviation." The arbitrator therefore sustained the grievance and directed the agency to remove the Letter of Warning from the grievant's file.

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

The agency excepts to the award on two grounds, i.e., (1) the opinion upon which the award is based violates section 12(b)(5) of the Order;^{2/} and (2) the arbitrator misinterpreted Article 55, Section 1 of the agreement.

As to (1), the agency claims in substance that the decision will result in supervisors being "inhibited in their decisions on proper staffing levels because a decision at odds with a controller's assessment of the work situation carries with it a grant of immunity;"

(Continued)

employee shall comply with the instructions of the supervisor and the supervisor shall assume responsibility for his own decisions.

2/ Section 12(b)(5) of the Order provides as follows:

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

.

(5) to determine the methods, means, and personnel by which such operations are to be conducted. . . .

and, that implementation of the decision will authorize employees to participate in determining the personnel who will conduct agency operations and directing their own work, matters reserved to management by section 12(b) of the Order.

As to (2), the agency claims that the "professional opinion" referred to in Article 55, Section 1 pertains only to controllers performance and not to personnel assignments or staffing. In this regard, the agency asserts, in effect, that as interpreted and so applied by the arbitrator, Article 55 conflicts with management's retained rights under section 12(b)(5) of the Order.

For the reasons which follow, it is the Council's view that the agency's petition does not meet the requirements for review prescribed in section 2411.32 of the Council's rules of procedure.

With regard to the first exception, it does not appear from the facts and circumstances presented that the arbitrator's findings and decision, as previously set forth, infringe on rights reserved to management by the Order. Clearly, the arbitrator did not purport to authorize employees to participate in management decisions on personnel assignment and workload matters. Rather, he was concerned only with applying Article 55 of the parties' agreement which he interpreted as fixing responsibility for the consequences of such decisions once made by management.

As to the agency's contention that, as a result of the arbitrator's decision, supervisors will be inhibited in making decisions on proper staffing levels, such a claim is merely speculative in nature. In any event, inhibition of supervisors would not follow simply as the result of a supervisor's assuming responsibility for his decision under Article 55. Rather, it would result from a concern by the supervisor as to the consequences of such responsibility, e.g., disciplinary action against him. Thus, the causal factors relating to the claimed inhibition are matters under the control of agency management, and do not establish a violation of section 12(b)(5).

Moreover, the agency's claim in this regard, that a supervisor's decision at odds with a controller's "professional opinion" will confer immunity on the controller, finds no support in the arbitrator's decision. On the contrary, the arbitrator explicitly states in his decision that he does not interpret Article 55 as absolutely shielding a controller from discipline. Thus, the arbitrator states in his award as follows:

This is not to say that Article 55 creates absolute immunity, regardless of the facts of the case, the degree of culpability,

or the magnitude of the error, for a controller once he renders a professional opinion. For example, if a controller's negligence or carelessness is the casually [sic] related factor in a mid-air collision, Article 55 would not protect a controller who has rendered a 'professional opinion' in the case, and who seeks to shield himself from discipline. Here, however, only the facts of this case are of concern to the Arbitrator, i.e., Mr. Kennedy's actions versus those of Mr. Clarke. As to this, there is no convincing evidence in the record that Mr. Kennedy acted negligently or carelessly. To the contrary, his 'professional opinion', upon recognizing the dangers of his too-busy workload, and requesting assistance, is shown to have been legitimate and bona fide, and in the considered judgment of the Arbitrator should therefore be upheld.

Accordingly, the agency's first exception that the award violates the Order does not appear to be supported by the facts and circumstances described in the agency's petition, as required by section 2411.32.

The second exception, as already mentioned, alleges that the arbitrator misinterpreted Article 55, Section 1 of the agreement and, as interpreted and so applied in his award, this section violates section 12(b) of the Order. In the private sector, courts have consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. See, e.g., United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960). This principle regarding the interpretation of negotiated provisions is likewise applicable in the Federal sector under section 2411.32 of the Council's rules of procedure. American Federation of Government Employees Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Case Report No. 44. This does not mean, of course, that an arbitrator's interpretation of an agreement provision need not be consistent with applicable law, appropriate regulation or the Order. For where it appears, based upon the facts and circumstances described in a petition that there is support for a contention that an arbitrator has interpreted an agreement provision in a manner which results in the award violating applicable law, appropriate regulation or the Order, the Council, under its rules, will grant review of the award. Here, as previously discussed, it does not appear that the arbitrator's interpretation of Article 55 has resulted in an award which violates the Order. Moreover, the agency does not allege and it does not appear that the award violates applicable law or appropriate regulation. Therefore, the agency's second exception does not state a ground upon which review of an arbitrator's award may be granted under 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 standards for review set forth in section 2411.32 of the Council's rules. Likewise, the agency's request for a stay is denied under section 2411.47(d) of the Council's rules.

By the Council.

Sincerely,

A handwritten signature in black ink, reading "Henry B. Frazier III". The signature is written in a cursive, flowing style with a prominent initial "H".

Henry B. Frazier III
Executive Director

cc: W. B. Peer
PATCO

Department of Agriculture, Office of Information Systems, Kansas City, Missouri, A/SLMR No. 387. National Federation of Federal Employees (NFFE) appealed to the Council from the Assistant Secretary's finding that the record in the subject case is inadequate to determine the appropriateness of the unit sought by NFFE, and his remand to the Assistant Regional Director to secure additional evidence in this regard. NFFE further requested a stay of the Assistant Secretary's decision and remand.

Council action (June 24, 1974). The Council denied review of NFFE's interlocutory appeal, without prejudice to the renewal of its contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied NFFE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 24, 1974

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

Re: Department of Agriculture, Office of
Information Systems, Kansas City, Missouri,
A/SLMR No. 387, FLRC No. 74A-37

Dear Ms. Cooper:

Reference is made to your petition for review, and your request for stay, of the Assistant Secretary's decision and remand in the above-entitled representation case.

The Assistant Secretary found the record in the subject case does not provide an adequate basis to determine the appropriateness of the unit sought by your organization and remanded the case to the Assistant Regional Director in order to secure additional evidence in this regard. No final disposition was therefore rendered by the Assistant Secretary in the case.

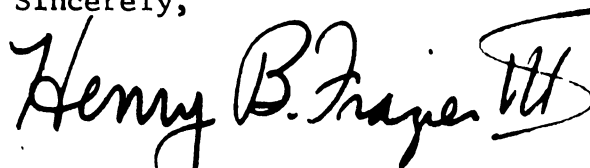
Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of an Assistant Secretary's decision until a final decision has been rendered on the entire proceeding before him, as pertains to the appellant. More particularly, 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, and apart from other considerations, the Council has directed that your appeal be denied, without prejudice to the renewal of your

contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. Your further request for stay pending decision on your appeal is therefore likewise denied.

By 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

J. Tosino
Agriculture

Department of Health, Education, and Welfare, Social Security Administration, New York Payment Center, Flushing, New York, Assistant Secretary Case No. 30-5150 (GP). The Assistant Secretary, upholding the Regional Administrator, determined that the conduct which the activity sought to grieve (alleged interference by American Federation of Government Employees Local 1760 with the activity's right to discipline supervisors) is subject to the grievance procedure in the parties' existing agreement. The union appealed to the Council alleging that the Assistant Secretary's decision presents a major policy issue, principally because the decision "violates the employees right of free speech as guaranteed by the Constitution, the Lloyd-LaFollette Act and section 1(a) of the Executive Order."

Council action (June 28, 1974). The Council determined that the Assistant Secretary's decision did not present a major policy issue because the union petition failed to demonstrate that the decision has in any manner violated the rights of employees under the Order, the Constitution, or the Lloyd-LaFollette Act. In this connection, the Council noted that the Assistant Secretary's decision is limited to the threshold determination that the grievance is subject to the negotiated grievance procedure; and that neither the Assistant Secretary nor the Council has considered or passed upon the merits of the grievance, which is left to subsequent determination under the negotiated grievance procedure. 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). The Council likewise denied the union's request for stay pursuant to section 2411.47(e) of the Council's rules (5 CFR 2411.47(e)).



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 28, 1974

Mr. Clyde M. Webber
National President
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, New York
Payment Center, Flushing, New York, Assistant
Secretary Case No. 30-5150 (GP), FLRC No.
74A-10

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 set aside the Regional Administrator's report and finding that the matter in dispute between the activity and American Federation of Government Employees (AFGE) Local 1760 is subject to the grievance procedure in the existing agreement. The Assistant Secretary found that the conduct which the activity sought to grieve (alleged interference by AFGE Local 1760 with the activity's right to discipline supervisors) "is a matter which comes within the scope of Article 4, Section (a) of the parties' existing agreement as well as Article 1 and Article 3, Section (b)(2) of such agreement."

In your petition for review you contend that the decision of the Assistant Secretary presents a major policy issue, principally, that the decision "violates the employees right of free speech as guaranteed by the Constitution, the Lloyd-LaFollette Act and section 1(a) of the Executive Order."

In the Council's opinion, the Assistant Secretary's decision does not present a major policy issue; your petition fails to demonstrate that the Assistant Secretary's decision has, in any manner, violated the rights of employees under the Order, the Constitution, or the Lloyd-LaFollette Act. Section 13 of the Order provides, in pertinent part:


"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"; and "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 . . . may be referred to the Assistant Secretary for decision." Thus, the Assistant Secretary's decision in the subject case is limited to the threshold determination that the activity's grievance is subject to the negotiated grievance procedure because it concerns a matter of interpretation and application of the parties' agreement; and it is clear that such decision presents no major policy issue. Of course, in so deciding, the Assistant Secretary did not consider and did not pass upon the merits of the activity's grievance; that is left to subsequent determination under the negotiated grievance procedure. Likewise, the Council is not, in any way, considering or passing upon the merits of the activity's grievance.

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 under section 2411.12 of the Council's rules of procedure.

Accordingly, review of your appeal is hereby denied. Likewise, your request for stay pursuant to section 2411.47(e) of the Council's rules is also denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. J. Parisi
SSA

Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC, and Long Beach Naval Shipyard, Long Beach California. The negotiability dispute involved a union proposal requiring that no unit employee be assigned on a temporary basis to a position which he could not qualify to occupy on a permanent basis. A further question raised was whether, under section 15 of the Order, an agency properly could withhold approval of a provision of the local parties' negotiated agreement on the ground that it deemed the provision to be in conflict with the Order.

Council action (July 31, 1974). The Council held that the proposal would so constrict the agency's discretion as to effectively deny management's reserved right, under section 12(b)(2) of the Order, to assign unit personnel. Accordingly, the Council sustained the agency head determination that the proposal is nonnegotiable. Further, based on its decision in Local 174 American Federation of Technical Engineers, AFL-CIO and Supships, USN 11th Naval District, San Diego, California, FLRC No. 71A-49 (June 29, 1973), Report No. 41, the Council rejected the union's contention in this case that the agency was not authorized to disapprove an agreement provision which it deemed to be contrary to the Order.

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

Local 174 International Federation of
Professional and Technical Engineers,
AFL-CIO, CLC

and

FLRC No. 73A-16

Long Beach Naval Shipyard, Long Beach,
California

DECISION ON NEGOTIABILITY ISSUES

Background

Local 174 of the International Federation of Professional and Technical Engineers, AFL-CIO, CLC,^{1/} is the exclusive bargaining representative for a unit of all graded nonprofessional technical employees in the engineering sciences and related fields, excluding supervisors and managerial executives. The union and the activity concluded a collective bargaining agreement and forwarded it for approval pursuant to section 15 of the Order.^{2/}

The Department of the Navy disapproved a portion of a provision in the agreement relating to temporary assignments, details and promotions. The disputed provision as underlined below reads as follows:

1/ The name of the union appears as officially changed during the pendency of this proceeding.

2/ Section 15 of the Order provides:

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (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.

Article XIII, Section 2

When an employee in the Unit is temporarily assigned to a higher level supervisory position for 30 days or more, such detail will be documented by the preparation of a Standard Form 50. If it is necessary to continue the detail beyond 60 days, a temporary promotion will be effected if the employee meets all the qualification standards. No Unit employee will be temporarily assigned, detailed or promoted to a position for which he could not qualify to occupy on a permanent basis.

Upon referral, the Department of Defense determined that the disputed portion of the provision would serve to bar assignment or detail of an employee to any position within or external to the bargaining unit for which the employee did not fully meet applicable qualification requirements and therefore is violative of section 12(b)(2) of the Order and nonnegotiable.^{3/} 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.^{4/}

Opinion

Two questions are presented for Council resolution in this case, as follows:

(1) Whether, under section 15 of the Order, the agency properly could withhold approval of a provision of the local parties' agreement because it deemed the provision to be in conflict with the Order; and

(2) whether the disputed provision is nonnegotiable under section 12(b)(2) of the Order.

The questions will be considered separately below.

1. Section 15. The union contends, in essence, that, under section 15 of the Order, an agency can withhold approval of a locally negotiated and agreed upon collective bargaining agreement provision only on the basis of a finding that the provision conflicts with applicable law, existing published agency policies and regulations, or regulations of

^{3/} The DOD also relied on section 12(b)(5) of the Order as a basis for holding the provision nonnegotiable. In view of our decision herein we find it unnecessary to reach and, therefore, make no ruling as to the disputed provision vis-a-vis section 12(b)(5).

^{4/} There is no apparent dispute between the parties with regard to the temporary promotion aspect of the proposal. As indicated, temporary promotions were not addressed in the agency head determination. Nor were such promotions adverted to in the agency's statement of position.

other appropriate authorities. Thus, the union concludes that in this case the agency head exceeded his authority by withholding approval of the agreement provision here involved on the basis that it conflicts with management's rights under the Order.

Resolution of this issue is governed by the Council's decision in Local 174 American Federation of Technical Engineers, AFL-CIO and Supships, USN, 11th Naval District, San Diego, California, FLRC 71A-49 (June 29, 1973), Report No. 41. In that case, the Council held (at p. 3 of the decision):

In the subject case the agency disapproved the agreement on the ground that the two disputed provisions infringed upon reserved agency rights under the Order. Although not alluded to by the union, it should be noted that 'Order' is not specified in section 15 as a ground for disapproving an agreement. However, the absence of specific reference to the Order does not mean that conformity to the Order may not be considered by an agency head during the agreement approval process. In the light of the purposes of section 15, to assure conformity of the agreement with supervening requirements, it is clear that the Order is included within 'applicable laws' referred to in section 15. Moreover, the requirement that an agreement be in conformity with the Order is inherent in the section 15 approval process by virtue of its relationship to section 11(a) and (c) of the Order which recognize the authority of an agency head to determine nonnegotiability of proposals which conflict with the Order. Such actions by the agency during the approval process under section 15 are, of course, subject to review by the Council upon compliance by the parties with the provisions of section 11(c) of the Order and the Council's implementing regulations.

Accordingly, we must reject the union's contention in this case that the agency was not authorized to disapprove a contract provision which it deemed contrary to the Order.

2. Section 12(b)(2). In pertinent part, section 12 of the Order 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 agency determined that the union's proposed provision is nonnegotiable under section 12(b)(2) of the Order because it would interfere with the agency's reserved right to assign employees in positions within the agency. In more detail, the agency asserted that short-term assignments or details as are the subject of the provision are essential means for an agency to use to meet its temporary operational needs (e.g., in abnormal workload situations, when new mission requirements are established, when unanticipated absences occur, and in other situations requiring shifts of personnel for relatively brief periods).^{5/} And as stated by the agency:

Although it is the general practice to use qualified personnel wherever practicable, in some situations requiring immediate action there may not be time to conduct a qualifications review and in other situations fully qualified persons may not be available. Nevertheless, management must retain the ability to make temporary assignments as needed to get the job done.

We have previously held that section 12(b) rights are mandatory in nature and expressly reserved to management under any bargaining agreement.^{6/} And, as we stated in our VA Research Hospital^{7/} 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. [Emphasis added.]

^{5/} "Temporary assignments" or "details" are, in the context of section 12(b)(2) of the Order, the same personnel action, i.e., assignments. Nothing in the Order indicates that the reservation of authority by section 12(b)(2), except as may be provided by applicable laws or regulations, is in any way dependent upon the intended duration of the particular personnel action involved.

^{6/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41, pp. 4-5.

^{7/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31, p. 3.

The union proposal involved in the negotiability dispute in the VA Research Hospital case, which would have enabled the union to obtain higher level management review of a selection for promotion before the promotion could be effected, did not appear to the Council as one which would unreasonably delay or impede management's discretion with regard to selections for promotion so as to, in effect, deny the right reserved by section 12(b)(2).^{8/} Instead, it dealt with procedures which management will observe in reaching the decision concerning promotions.

The question before the Council, then, is whether the portion of the agreement provision here at issue would so constrict management's ability to assign employees as to, in effect, deny the right reserved by section 12(b)(2).

The provision would deny management the right to temporarily assign, detail, or promote employees to positions for which they could not qualify to occupy on a permanent basis. Thus, the impact of the language would be that in the event no employees are qualified to occupy the positions on a permanent basis, management would be unable to assign the duties to any employee. It is clear, therefore, we are not dealing with procedures for handling details or even for guaranteeing that "qualified" employees are assigned or detailed before "unqualified" employees, if there were time available to determine such qualifications.

As noted in the agency's decision letter concerning the negotiability of the language in question, there may be situations requiring immediate action in which there may not be time to conduct a qualifications review, and there may be times when work must be done but no employee is available who would "qualify to occupy [the position] on a permanent basis."

Thus, in this case, unlike in VA Research Hospital, the union's proposal by requiring that assignment of a bargaining unit employee on a temporary basis could not be made unless the employee was fully qualified to fill the particular position in question on a permanent basis would so constrict management's discretion in the exercise of a right retained under section 12(b)(2), i.e., the right to assign personnel, as to effectively deny that right in the circumstances here involved. Accordingly, insofar as the proposal affects management's right to assign, it must be considered non-negotiable.

Conclusion

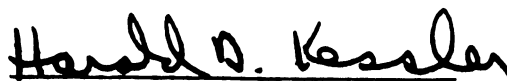
Based on the reasons set forth above, and pursuant to section 2411.27 of the Council's Rules and Regulations, we find that the agency head's determination that the union proposal here involved is nonnegotiable under

^{8/} Id.

section 12(b)(2) of the Order was proper as it pertains to the temporary assignment or detail of bargaining unit personnel and must, therefore, be sustained.

By the Council.

Issued: July 31, 1974


Harold D. Kessler
Harold D. Kessler
Acting Executive Director

Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator). The Council accepted the agency's petition for review in this case, which petition alleged that the arbitrator's award violated the Order by directing the hospital, before assigning all present licensed practical nurses (LPN's) to the midnight shift, to recognize the LPN's rights under the seniority clause of the collective bargaining agreement and consider assigning either nursing assistants (NA's) or newly employed LPN's with lesser seniority to that shift (Report No. 47).

Council action (July 31, 1974). The Council held that the award compels the hospital to treat the NA's as the functional equivalent to and interchangeable with the LPN's and thereby violates the Order by interpreting and applying the seniority clause of the agreement in such a manner as to infringe upon the right reserved to the hospital, under section 12(b)(5) of the Order, to determine the personnel by whom its nursing care services are to be performed. Accordingly, pursuant to section 2411.37(b) of its rules (5 CFR 2411.37(b)), the Council set aside the arbitrator's award.

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

Veterans Administration Hospital,
Canandaigua, New York

and

FLRC No. 73A-42

Local 227, Service Employees International
Union, Buffalo, New York

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Several GS-6 licensed practical nurses (LPN's) filed a grievance against the Veterans Administration Hospital, Canandaigua, New York, alleging that they had been assigned to the midnight shift against their wishes in violation of the seniority clause (Article XVII, Section 4) of the collective bargaining agreement.^{1/}

Based on the findings of the arbitrator, the agency's uncontroverted statements in its appeal to the Council and the entire record, the circumstances of the case appear as follows:^{2/}

The hospital cares for predominately psychiatric patients. Its physical plant consists of several separate buildings which contain patient care areas. Most of these buildings house the more acutely ill patients and include "locked ward" areas; the less acutely ill patients are housed in three buildings referred to as "open buildings."

The hospital's nursing staff includes registered nurses (RN's), LPN's, and nursing assistants (NA's). Both the LPN's and the NA's are classified to the General Schedule Position Classification Series GS-621. The record shows that the officially assigned title of the LPN positions involved herein is: Licensed Practical Nurse; the officially assigned title of the NA positions involved herein is: Psychiatric Nursing Assistant. The GS-621 Series is defined by the U.S. Civil Service Commission as covering

positions which involve a variety of personal care, nursing care, or related technical procedures which do not require the full professional background in nursing care planning and evaluation

1/ Article XVII, Section 4 provides: "Senior employees will be given preference in the selection of shifts or tour of duty in all Services and Divisions."

2/ The union filed no opposition to the agency's petition for review, nor any brief, in this case.

acquired in professional nurse education programs. Employees in these positions typically are under the supervision of registered nurses or physicians.

The Position-Classification Standards which the Civil Service Commission has issued for the GS-621 Series provide, in pertinent part:

For positions at GS-3 and above the titles are:

Licensed Practical Nurse (or Licensed Vocational Nurse)
(See discussion below.)

.

Psychiatric Nursing Assistant

.

Licensed Practical Nurse (or Licensed Vocational Nurse) may be used as the official title for any position at grade GS-3 and above that is properly classified in this series and is staffed by an individual who is licensed by a State, Territory, or the District of Columbia to use the title "Licensed Practical Nurse", or "Licensed Vocational Nurse". The title applies to positions that otherwise would be titled "Nursing Assistant", "Operating Room Nursing Assistant", "Psychiatric Nursing Assistant" or "Psychiatric Nursing Assistant (Drug Abuse)."

Authorization of this title does not in any way affect the hospital management's authority to assign duties and responsibilities and make staffing decisions. It does not require management to limit or prescribe specific assignments to Licensed Practical Nurses, nor does it limit management's authority to make the most effective use of the total nursing care staff.

.

Psychiatric Nursing Assistant is the title for positions involving care of patients in psychiatric hospitals, in psychiatric units in general medical and surgical hospitals, or in mental health clinics. . . . Psychiatric Nursing Assistant positions are under the supervision of registered nurses, psychiatrists, or psychiatric technicians of higher grade.

.

There are great variations in assignments of duties and responsibilities of nonprofessional nursing care positions among different hospitals. For example, some hospitals . . . depend upon the training that employees have previously received in "approved" licensed practical nurse training programs; in these hospitals only individuals so trained are assigned to administer medications

The criteria in this standard are intended to provide grade-level guidance for nursing assistant and Licensed Practical Nurse positions regardless of the way in which management assigns patient care work

The Position Descriptions which describe the duties actually performed in the VA Hospital at Canandaigua assign different work responsibilities to the two groups of employees.^{3/} From the Position Descriptions and the record, it appears that the LPN positions were established primarily to

^{3/} The differences between the nature and purpose of position descriptions and the nature and purpose of position classification standards, as they are used within the Federal Government, are profound. The Federal Personnel Manual (Chapters 312 and 511) describes the nature and purposes of the position descriptions and position classification standards:

Agencies have the discretion in the interest of the efficiency of the Federal service, to assign, change, or eliminate part or all of the duties and responsibilities that have been grouped together to constitute a position.

.

A position in the Federal Government is a specific civilian office or employment consisting of all the duties and responsibilities currently assigned or delegated by competent authority and requiring full-time or part-time employment of one person.

.

A written record of the basic duties and responsibilities assigned to a position must be prepared before an employee can be hired or assigned. . . . The official record of this information is usually called the position description.

.

(Continued)

operate "in charge" of the work responsibilities in one building under the indirect supervision of an RN in another building. LPN's are required to have completed a one year course of study in an approved school of licensed practical nursing and to have received a state license to practice their occupation. LPN's are permitted to administer medicine after completion of a special VA medication course. The NA positions, on the other hand, were established primarily to provide therapy to small groups of patients requiring intensive and continuous retraining and redirection of behavior. NA's are not assigned "in charge" responsibility, but, rather, work under the direct supervision of an RN who has charge of the building. NA's are never permitted to administer medication. NA's are not required to have had specialized education, training, or experience to qualify initially for their positions; they are given on-the-job training and progress to more responsible duties upon successful completion of specialized training and selection through merit promotion. LPN's and NA's compete separately for promotion.

(Continued)

A position description is a statement of the duties and responsibilities comprising the work assigned to a civilian officer or employee. A group of like positions may be covered by a single description.

Position descriptions are the basic and official source documents for determining the proper class and grade of positions under the General Schedule.

The General Schedule classification system is a comprehensive, orderly system for classifying positions by occupational group, series, class, and grade according to similarities and differences in duties, responsibilities, and qualification requirements. It evolves from chapter 51 of title 5, United States Code.

The law requires that agencies classify positions in conformance with, or consistent with, standards published by the Commission.

(Continued)

The hospital, following a manpower utilization survey and in an attempt to upgrade the quality of its patient care, attempted to provide for the assignment of an RN to every building on every shift except the midnight shift. On the midnight shift, RN's were assigned to each building with the exception of the three "open buildings."^{4/} The hospital then assigned all the LPN's to "in charge" responsibility over these three "open buildings" during the midnight shift. The determination that the LPN's should be the personnel who will conduct the "in charge" operations in the "open buildings" when RN's were not available (i.e., on the midnight shift) was based upon the hospital's decision that LPN's, because of their superior training and abilities, would best serve the maintenance of quality patient care by assuming the "in charge" responsibility when no RN was available. Prior to this determination, which precipitated the instant grievance, LPN's had exercised the same "in charge" responsibilities on other shifts, but they did not compete with NA's in this regard. Although the reassignments were effected only after notice to the union,^{5/} the LPN's objected to the reassignments on the ground in effect that NA's with less seniority were

(Continued)

A position classification standard describes the duties, responsibilities, and qualifications required for full performance for a class of positions. It distinguishes one class of positions from another under the position classification plan.

[Thus, position classification standards are a] set of documents published by the Civil Service Commission which provides information for distinguishing the duties, responsibilities, and qualification requirements of positions in one class from those of positions in other classes, and which thus provides the criteria for placing each position in its proper class. These standards distinguish both in level of difficulty and responsibility and in kind of work.

4/ The arbitrator, in his opinion, inadvertently refers to these buildings as being "not open."

5/ Such notice was made under Article XVII, Section 5 of the agreement:

Establishment of new tours of duty or changes in existing tours of duty will be brought to the attention of the Union in advance and their views considered prior to any action taken or any changes made.

available for the assignments. The hospital offered the LPN's the alternative of accepting the reassignment or remaining on their present shifts taking a voluntary reduction to GS-5.^{6/} The LPN's grieved.

The Arbitrator's Award

The arbitrator, finding that the hospital by its action had violated the seniority clause (Article XVII, Section 4) of the agreement, sustained the grievance. As a remedy, he directed the hospital to recognize the grievants' rights under the seniority clause of the agreement and to consider others of GS-6 ratings, either NA's or newly employed LPN's with lesser seniority, for the midnight shift before assigning the grievants to that shift and tour of duty.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council, alleging, in part, that the award violated section 12(b)(5) of the Order.^{7/} The Council accepted the petition for review. Neither party filed a brief.

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 the grounds that the award violates . . . the order"

As previously stated, the hospital, pursuant to its decision to upgrade the quality of its patient care, determined that the GS-6 LPN's should be the

^{6/} The CSC Position Classification Standards for the GS-621 Series at grade GS-6 provide, inter alia:

GS-6 psychiatric nursing assistants and Licensed Practical Nurses serve in an "in-charge" capacity on a ward or other patient unit, with responsibility for ensuring that all nonprofessional personal and nursing care is accomplished, usually on the evening or night shift. Generally, this assignment also includes responsibility for measuring, pouring, and administering medications required by patients on the ward during the shift. Assignments at the GS-5 level do not typically involve "in-charge" or equivalent responsibilities.

^{7/} The agency also alleged violations of section 11(b) and sections 12(b)(1), (2) and (4) of the Order; however, it is not necessary for the Council to rule on these allegations in view of our decision herein.

personnel who conduct the "in charge" operational responsibilities in the "open buildings" on the midnight shift. In this connection, the hospital concluded that the LPN's, because of their superior training and abilities, were best suited to maintain quality patient care by assuming "in charge" responsibilities in the absence of RN's during that shift. The arbitrator, however, in sustaining the LPN's grievance, determined that the hospital had violated the LPN's contractual seniority rights, and directed the hospital to recognize the grievants' seniority rights and to consider others of GS-6 ratings, either Nursing Assistants or newly employed LPN's with lesser seniority, for the midnight shift before assigning the grievants to that shift.^{8/}

The agency contends, in substance, that the award would force management to assign NA's to conduct "in charge" operational responsibilities on the midnight shift contrary to management's determination that LPN's should be the personnel who conduct these operations.

8/ In reaching this conclusion the arbitrator cites, among other things, the Union's reliance "upon the GS-6 Position-Classification Description [sic] in the Civil Service Regulations whereby Nursing Assistants and Licensed Practical Nurses, whose salary is the same, are treated alike as to duties." As was noted above, those CSC Position Classification Standards provide:

Authorization of this title [LPN] does not in any way affect the hospital management's authority to assign duties and responsibilities or make staffing decisions. It does not require management to limit or prescribe specific assignments to Licensed Practical Nurses, nor does it limit management's authority to make the most effective use of the total nursing care staff.

.

The criteria in this standard are intended to provide grade-level guidance for nursing assistant and Licensed Practical Nurse positions regardless of the way in which management assigns patient care work

See also International Association of Fire Fighters, Local F-111, and Griffis Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report No. 36 at pages 3-5 of the Council's decision for a general exposition by the CSC concerning position classification standards.

The agency's exception to the arbitrator's award specifically raises the issue of whether the award violates section 12(b)(5) of the Order, which reads as follows:

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

.
(5) to determine the methods, means, and personnel by which such operations are to be conducted; (emphasis added)

The Council, in Tidewater^{9/} defined the term "personnel," as used in the Order, as meaning

. . . the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations.

The arbitrator's award in this case would negate management's right to determine whether LPN's or NA's will be the personnel responsible for conducting the "in charge" responsibilities in the "open buildings" when RN's are not available (i.e., on the midnight shift). The award clearly would prevent the agency from implementing its determination that the assignment of all its GS-6 LPN's to the "in charge" operational responsibility on the midnight shift would best serve to upgrade the quality of its patient care, patient care being the basic operation of the governmental activity here involved. The award interferes with the management right to determine "who" will conduct the particular agency operations involved in that it mandates the hospital to assign other types or categories of personnel to conduct "in charge" operational responsibilities on the midnight shift. Such right to determine the types or categories of personnel by which the hospital's operations are to be conducted is reserved to management under the Order and cannot be bargained away. As the Council stated in this regard in Tidewater:

Section 12(b) establishes rights expressly reserved to management officials under any bargaining agreement. The mandatory nature of

9/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56 (June 29, 1973), Report No. 41.

this reservation was underscored in our recent decision in the VA Research Hospital case where, in interpreting and applying section 12(b)(2), we said:

"Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel actions, i.e., to hire, promote, etc. The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority."

Although the decision in the VA Research Hospital case dealt only with the interpretation and application of section 12(b)(2), this reasoning is equally applicable to section 12(b)(5). (Emphasis added and footnote in original omitted.)

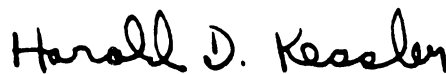
Management's reserved rights under section 12(b)(5) of the Order may not be infringed by an arbitrator's award under a negotiated grievance procedure.^{10/} The award here at issue (which compels the hospital to treat the NA's as being the functional equivalent to and interchangeable with the LPN's) interferes with the hospital's reserved right under section 12(b)(5) of the Order to determine the personnel by which its nursing care services are to be performed. Therefore, the award cannot be permitted to stand.

Conclusion

For the foregoing reasons, we find that the arbitrator's award violates the Order by interpreting and applying the seniority clause of the collective bargaining agreement in such a manner as to infringe upon the right reserved to management under section 12(b)(5) of the Order.

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.



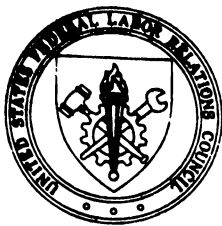
Harold D. Kessler
Acting Executive Director

Issued: July 31, 1974

10/ Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator) FLRC No. 74A-1 (June 24, 1974), Report No. 53 at page 4 of the Council's decision letter.

Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4067. The Assistant Secretary upheld the Assistant Regional Director's dismissal of Frederick Benedict's complaint which alleged that a remark made by a supervisor to a union official (i.e., the FAA Flight Surgeon "had a strong case against Frederick Benedict (regarding separation attempt by FAA)") violated section 19(a)(1) and (3) of the Order by discouraging the union from representing Benedict. The Assistant Secretary found that the remark in question failed to establish a reasonable basis for Benedict's complaint and that Benedict failed to sustain his burden of proof under the Assistant Secretary's regulations. Benedict appealed to the Council contending, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue, substantially because a hearing should have been conducted, and because the union had failed to represent him properly.

Council action (July 31, 1974). The Council held that nothing in Benedict's appeal indicated that substantial factual issues exist requiring a hearing; and the Assistant Secretary's decision did not appear to be without reasonable justification or in any other manner arbitrary and capricious. The Council further determined that no major policy issue was presented by the Assistant Secretary's decision. Accordingly, the Council denied review of Benedict'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. 20418

July 31, 1974

Mr. Frederick Benedict
2351 Olive Avenue
Fremont, California 94538

Re: Federal Aviation Administration, Western
Region, San Francisco, California, Assistant
Secretary Case No. 70-4067, FLRC No. 74A-26

Dear Mr. Benedict:

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 in substance affirmed the Assistant Regional Director's dismissal of your unfair labor practice complaint. Your complaint had alleged that a supervisor, in a telephone conversation with a union official, stated the FAA Flight Surgeon "had a strong case against Frederick Benedict (regarding separation attempt by FAA);" and that such statement violated section 19(a)(1) and (3) of the Order by discouraging the union from representing you. The Assistant Secretary found that such statement, standing alone, does not establish a reasonable basis for your complaint and that you had failed to sustain your burden of proof as required by Section 203.5(c) of his regulations.

In your petition for review, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue, substantially because a hearing should have been conducted, and because the union failed to represent you properly, as evidenced in a pending unfair labor practice complaint which you filed against the union.

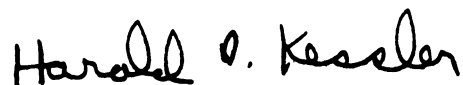
In the Council's opinion, nothing in your appeal indicates that substantial factual issues exist requiring a hearing. Moreover, the Assistant Secretary's determination does not appear to be without reasonable justification or in any other manner arbitrary and capricious. Additionally, in our view, no major policy issue is presented by the Assistant Secretary's decision.

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,

A handwritten signature in cursive script that reads "Harold D. Kessler".

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor

R. J. Alfultis
Transportation

Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4068. The Assistant Secretary pursuant to section 203.2(b)(3) of his regulations (requiring the filing of a complaint within nine months of the occurrence of the alleged unfair labor practice) dismissed as untimely filed Frederick Benedict's complaint which alleged that written communications sent by the activity to the Civil Service Commission between 1967 and 1970, concerning Benedict's organizational activities, violated sections 1 and 19(a)(1) and (3) of the Order. Benedict appealed to the Council, contending, in substance, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue because the time period for filing a complaint should run from the date of discovery, rather than occurrence, of the alleged unfair labor practice, and asserting that the alleged unfair labor practice was a continuing matter.

Council action (July 31, 1974). The Council held that the Assistant Secretary's decision did not present a major policy issue since no persuasive reasons were advanced by Benedict for overturning the Assistant Secretary's regulation, as interpreted and applied, requiring that a complaint be filed within nine months of the occurrence, rather than the date of discovery, of the alleged unfair labor practice. The Council further held that the Assistant Secretary's decision did not appear arbitrary and capricious since it did not appear to be without reasonable justification in this case. In this regard, the Council noted that Benedict failed to show that the subject communication constituted a continuing unfair labor practice; nor were other grounds adduced, such as fraudulent concealment, that might warrant a "waiver" of the timeliness requirement. Accordingly, the Council denied review of Benedict'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

July 31, 1974

Mr. Frederick Benedict
2351 Olive Avenue
Fremont, California 94538

Re: Federal Aviation Administration, Western Region,
San Francisco, California, Assistant Secretary
Case No. 70-4068, FLRC No. 74A-27

Dear Mr. Benedict:

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 in effect upheld the Assistant Regional Director's dismissal of your unfair labor practice complaint. Your complaint had alleged that written communications sent by the activity to the Civil Service Commission between 1967 and 1970 link you to two "sickouts," and make reference to union activities on your part; and that such communications constituted violations of sections 1 and 19(a)(1) and (3) of the Order. In this regard the Assistant Secretary found further proceedings with respect to your complaint to be unwarranted because the complaint was not filed within nine months of the occurrence of the alleged unfair labor practice as required by section 203.2(b)(3) of the Assistant Secretary's regulations, and he rejected your contention that your "discovery" of the communications after the expiration of the prescribed filing period warranted a "waiver" of the timeliness requirement.

In your petition for review, you contend in substance that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue, because the time period for filing your complaint should run from the date that you discovered the alleged unfair labor practice; and you assert that this unfair labor practice "has been a continuing matter."

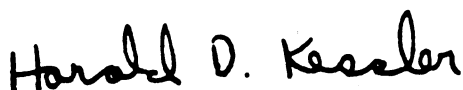
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious nor do they present a major policy issue. As to the alleged major policy issue, your appeal

presents no persuasive reasons for overturning the Assistant Secretary's regulation, as interpreted and applied, that a complaint be filed within nine months of the occurrence of the alleged unfair labor practice rather than from the date of discovery of such unfair labor practice. With respect to your contention that the decision of the Assistant Secretary appears arbitrary and capricious, it does not appear that the findings and decision of the Assistant Secretary were without reasonable justification in the circumstances of this case. In the above regard, while you make a bare assertion that the unfair labor practice has been a continuing matter, you make no showing, for example, that the written communications were retained in your personnel file and thereby constituted a continuing unfair labor practice; nor are any other grounds adduced in your appeal, such as fraudulent concealment, that might warrant the granting of a "waiver" of the timeliness requirement.

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,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor

R. J. Alfultis
Transportation

Air Engineering Center, Naval Air Support Activity, Philadelphia, Pa.,
Assistant Secretary Case No. 20-4311. The individual complainant (Joseph J. Chickillo) appealed to the Council from the decision of the Assistant Secretary which issued on July 8, 1974. The appeal was due, under the Council's rules, on or about July 31, 1974. However, the appeal was not filed with the Council until August 6, 1974, and no extension of the time for filing was either requested by the complainant or granted by the Council.

Council action (August 15, 1974). Because the complainant's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 15, 1974

Mr. John J. D'Angelo
Bank, Minehart & D'Angelo
Suite 2409
Twelve South Twelfth Street
Philadelphia, Pennsylvania 19107

Re: Air Engineering Center, Naval Air
Support Activity, Philadelphia, Pa.,
Assistant Secretary Case No. 20-4311,
FLRC No. 74A-56

Dear Mr. D'Angelo:

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.

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 Assistant Secretary's decision in this case was dated July 8, 1974 and, so far as your appeal indicates, was mailed on or about that date. Therefore, under the above rules, your appeal was due in the Council's office on or about July 31, 1974. However, your petition for review was not filed until August 6, 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)).

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

U.S. Army Electronics Command, Ft. Monmouth, New Jersey, Assistant Secretary Case No. 32-3329 (CA). The union (Local 476, National Federation of Federal Employees) appealed to the Council from the Assistant Secretary's decision denying the union's request for review of the dismissal of its unfair labor practice complaint, which decision was based on the untimeliness of the request for review. After the appeal was filed, the Assistant Secretary vacated his subject decision and ruled that he will consider the union's request on its merits.

Council action (August 19, 1974). Since the dispute involved in the union's appeal to the Council was rendered moot, the Council denied review of the appeal, without prejudice to the union's right of appeal to the Council after a final decision on the entire case by the Assistant Secretary.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 19, 1974

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

Re: U.S. Army Electronics Command, Ft.
Monmouth, New Jersey, Assistant
Secretary Case No. 32-3329 (CA),
FLRC No. 74A-21

Dear Mr. Cahn:

Reference is made to your appeal from the Assistant Secretary's denial, on the basis of untimeliness, of your request for review of the Assistant Regional Director's dismissal of your unfair labor practice complaint in the above-entitled case.

The Council is administratively informed that the Assistant Secretary, by letter dated July 22, 1974, has vacated his subject decision and has ruled that he will now consider your request for review on its merits.

Accordingly, since the dispute involved in your appeal to the Council has been rendered moot, review of your appeal is denied, without prejudice to your right of appeal, 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

H. F. Foster, Jr., Maj. Gen.
USAECOM

Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator). The issue submitted to the arbitrator in this case was whether electroplaters were entitled to "high degree (8%)" environmental differential pay under the bargaining agreement which provided for "environmental pay differentials." The arbitrator concluded that, while he was unable to decide the "high degree" issue, the electroplaters were entitled to "low degree (4%)" environmental differential pay and made such award. The agency filed exceptions on the grounds that (1) the arbitrator exceeded his authority by deciding an issue not submitted to him; and (2) implementation of the award would violate the FPM or, derivatively, section 12(a) of the Order.

Council action (September 9, 1974). The Council determined that the agency's exceptions were not supported by sufficient facts and circumstances to warrant review as required by section 2411.32 of the Council's rules of procedure. More particularly, as to (1), the Council held that the parties appear to have intended to resolve the dispute as to whether electroplaters were entitled to environmental differential payments; and that in the private sector courts have recognized a policy allowing arbitrators considerable leeway in fashioning remedies, which policy likewise applies to the federal sector under the Council's rules. With respect to (2), the Council held that the agency failed to support its claim that implementation of the award will violate the FPM or, derivatively, the Order. Accordingly, the Council denied the agency's petition for review. The Council also denied related procedural requests filed by the agency.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 9, 1974

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

Re: Naval Air Rework Facility, Pensacola,
Florida and American Federation of
Government Employees, Lodge No. 1960
(Goodman, Arbitrator), FLRC No. 74A-12

Dear Mr. Di Pasquale:

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, Article XX ("Environmental Pay, Health, Safety, and General Welfare") of the agreement between the parties provides in pertinent part as follows:

Section 2. Environmental pay differentials are paid for exposure to various degrees of hazards, physical hardships, and working conditions of an unusual nature. Appendix J of FPM 532-1 describes all of the current environmental pay situations authorized by the Civil Service Commission

Based on the facts described in the award, it appears that the subject grievance was filed as a result of the termination by the activity of "high degree" (8%) environmental differential payments on a continuing basis to electroplaters. The grievant, an electroplater, alleged in effect that termination of such payments was contrary to the applicable provisions of FPM Supplement 532-1 and Appendix J thereto, in that he "continually encounter[ed] hazards that are not alleviated by safety devices, and . . . [he is] vulnerable to injuries because of the numerous toxic and corrosive materials used daily" in his work, which have not been eliminated by safety devices. The grievant therefore stated that, pursuant to FPM Supplement 532-1 and Appendix J thereto, he should receive "high degree" environmental differential payments, retroactive to the termination of such payments by the activity. The grievance was denied by the activity, and was then submitted to arbitration pursuant to the agreement. While the arbitrator's opinion itself is in part somewhat ambiguous, it is clear from the submissions to the Council that the following issue was submitted to arbitration: ". . . whether the Electroplaters working in

the Electroplating Shop in Building 604 of the Naval Air Rework Facility, Pensacola, Florida, are entitled to 'high degree' (8%) environmental differential pay on a continuing basis."

In his award, the arbitrator concluded that due to the nature of the question, the testimony and evidence presented at the hearing was insufficient to enable him to decide the issue as to "high degree" environmental differential pay. This was so, the arbitrator stated, essentially because he could not determine the exact degree of hazard present at the electroplaters' work site. He did find, however, that:

. . . since Management has recognized that the degree of hazard and elements normally considered in the giving of a differential justifies low degree environmental differential pay for Plant Services Division (maintenance) employees when working about the Electroplating tanks, I feel compelled to say that this differential should be applied to the Electroplaters. To do otherwise would be to ignore the payment of the differential to some employees in the area or to attempt to assert my judgment for that of Management in an area where it has made this determination. [Emphasis in original.]

Accordingly, the arbitrator awarded "low degree" environmental differential pay on a continuing basis to electroplaters.^{1/} The agency requests that the Council set aside the arbitrator's award, based on the 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 exceeded the scope of his authority by directing that electroplaters receive "low degree" environmental differential payments, because the specific issue submitted to him was whether or not electroplaters are entitled to receive "high degree" payments. Hence, the agency asserts that the arbitrator exceeded the scope of his authority by deciding an issue not submitted to him, and that his award directing the payment of "low degree" environmental differentials should therefore be stricken. In support of this exception, the agency relies on alleged precedent in the private sector; and cites the Council's decision in American Federation of Government Employees Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator),

^{1/} The arbitrator did not address himself to the question of whether such payments should be made retroactively, as was requested in the grievance.

FLRC No. 72A-3 (July 31, 1973), Report No. 42, as establishing the principle in the federal sector that an arbitrator's award should be vacated where the arbitrator has exceeded the scope of his authority.

We are of the opinion, however, that the agency's petition does not present facts and circumstances to support its assertion that the arbitrator exceeded the scope of his authority. While the issue submitted to arbitration was described by the parties as being whether electroplaters are entitled to "high degree" (8%) environmental differential payments, the parties appear on the basis of the entire record to have intended to resolve the dispute which had arisen as to whether electroplaters are entitled to environmental differential payments. In this connection, the issue submitted to arbitration did not specifically deny the arbitrator the authority to determine whether something less than "high degree" differential payments would be appropriate.^{2/} Moreover, in the private sector, courts have recognized a policy in favor of allowing arbitrators considerable leeway in fashioning remedies.^{3/} This policy is likewise applicable in the federal sector under section 2411.32 of the Council's rules of procedure.

Further, the agency's reliance on the Council's decision in AFGE Local 12 and U.S. Department of Labor, supra, as support for its first exception, is misplaced. In that case, the Council held in essence that the arbitrator had exceeded his authority by granting contractual relief to non-grievants, as well as the grievant. That holding is inapposite to the present question of whether an arbitrator may properly award to a grievant relief which is of lesser degree than that specified in the submission agreement.

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.

^{2/} See I.B.E.W. Local 2130 v. Bally Case & Cooler Co., 232 F. Supp. 394 (E.D. Pa. 1964). In that case, the submission agreement posed the question for resolution as being whether certain employees were discharged for just cause and whether there should be backpay. The arbitrator decided that there was no just cause for discharge, and went on to state that suspension of the employees was a proper discipline, even though the specific question of suspension was not submitted to him. The court held, however, that this fact did not mean that the arbitrator had exceeded his authority, and affirmed the award, noting that the submission agreement "did not specifically deny to the arbitrator the power to consider whether there was just cause for suspension rather than discharge. . . ."

^{3/} See generally United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) at p. 597, wherein the Court states that an arbitrator:

(Continued)

In its second exception, the agency contends that the arbitrator's award violates FPM Supplement 532-1, Section S8-7, and Appendix J to FPM Supplement 532-1. These provisions of the FPM deal with the payment of environmental differentials. Section S8-7 provides in part that "an environmental differential is paid to a wage employee who is exposed to a hazard, physical hardship, or working condition of an unusually severe nature listed under the categories in Appendix J. . . ." The agency argues that these FPM provisions require the arbitrator to make specific findings of fact as to what, if any, hazards, physical hardships or working conditions of an unusually severe nature the electroplaters in this case are exposed to in order to justify an award of "low degree" environmental differential pay; and that in view of his failure to make such findings, the activity would violate the FPM if it were to implement the award. The agency further asserts that such violations of the FPM would constitute a violation of section 12(a) of the Order,^{4/} in that the arbitration proceeding in this case is pertinent to a "matter covered by the agreement," and as a result the arbitrator's award must, pursuant to section 12(a), comply with the provisions of the FPM. We must hold that the agency's petition does not present support for its contentions in this regard.

Various provisions of FPM Supplement 532-1, Section S8-7, address themselves to the role of the local installation or activity in the payment of environmental differentials. They provide as follows (emphases supplied):

- b. Basis for environmental differential. These instructions provide the basis for (1) approving and paying environmental differentials to wage employees (full-time, part-time, or intermittent); (2) listing categories of situations in appendix J of this subchapter and specifying the differentials payable for each category listed; and (3) providing guidelines under each category to identify the various degrees of hazard, physical hardships, and working conditions of an

(Continued)

. . . is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be available to meet a particular contingency.

4/ Section 12(a) of the Order provides, in pertinent part, as follows:

- (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. . . ."

unusually severe nature, by the use of examples for the categories listed in appendix J.

e. . . . When examples are listed under the categories in appendix J, these examples are illustrative only and are not intended to be exclusive of other exposures which may be encountered under the circumstances which describe the listed category.

g. Determining local situations when environmental differentials are payable. (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship, or working condition involved in performing the category. The examples of the situations are not all inclusive but are intended to be illustrative only.

(2) Each installation or activity must evaluate its situation against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.

(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category.

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J

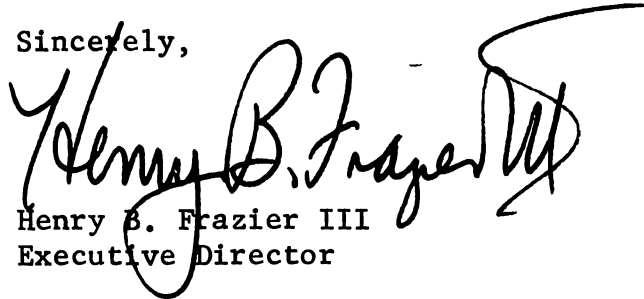
The agency alleged that the arbitrator was required by the broad guidelines in FPM Supplement 532-1, Section S8-7 and Appendix J to FPM Supplement 532-1 to make specific findings of fact and failed to do so. Obviously, in the determination of local situations for which environmental differential is authorized the FPM must be complied with; however, with regard to the instant case, the agency does not advert to any specific FPM requirement to support its contention that the arbitrator must make specific findings of fact, nor does our research reveal the presence of any such requirement in the FPM.

We therefore find that the agency has not supported its contention that implementation of the award will violate the FPM, or derivatively, section 12(a) of the Order, and hold that the facts and circumstances described in the petition do not adequately support the allegations made in regard to the agency's second exception, as required by section 2411.32.

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. Finally, the agency's alternative request that the award be remanded to the arbitrator for clarification or for a hearing de novo is denied, since no persuasive reason has been advanced by the agency for such action.

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: W. J. Smith
AFGE

American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator). The agency filed with the Council its petition for review of the arbitrator's award, which award was served on the agency on July 12, 1974. Under the Council's rules the petition was due no later than August 5, 1974; however, the petition was not filed until August 6, 1974, and no extension of time for filing was either requested by the agency or granted by the Council. Likewise, no persuasive reason was advanced by the agency for waiving the time limits in this case.

Council action (September 20, 1974). Because the agency'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

September 20, 1974

Mr. Howard Toy
Director of Personnel
Office of Economic Opportunity
1200 19th Street, NW.
Washington, D.C. 20506

Re: American Federation of Government
Employees, Local 2677, and Office
of Economic Opportunity (Kleeb,
Arbitrator), FLRC No. 74A-57

Dear Mr. Toy:

The Council has carefully considered your petition, and the union's opposition thereto, 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 deposited in the mail or delivered in person, as the case may be, and section 2411.45(c) provides that, where such service was made by mail, 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.

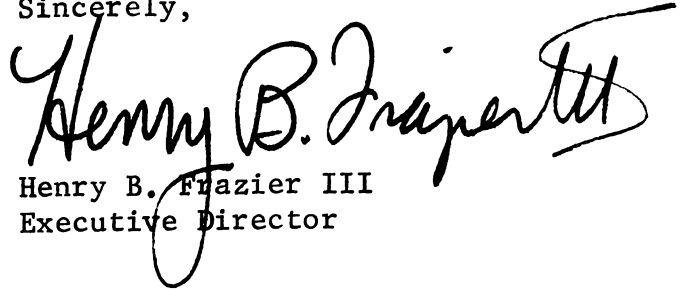
According to the record before the Council, the arbitrator's award in this case was mailed to, and thereby served upon, your agency on July 12, 1974. Accordingly, under the above rules, your petition for review was due in the Council's office on or before the close of business on August 5, 1974. However, your petition was not received by the Council until August 6, 1974, and no extension of time was either requested by your agency or granted by the Council under section 2411.45(d) of the Council's

rules. Likewise no persuasive reason has been advanced for waiving the time limits in this case.

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, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, looping initial "H".

Henry B. Frazier III
Executive Director

cc: P. Kete
National Council of OEO
Locals, Local 2677

Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator). The arbitrator in this case determined that the agency violated the collective bargaining agreement by the manner in which it scheduled work to avoid overtime; and directed that the agency compensate the grievants for the four hours additional pay they would have received had they worked such overtime. The Council accepted the agency's petition for review insofar as it challenged the legality of the additional pay for the grievants in the remedy portion of the award (Report No. 45).

Council action (September 24, 1974). Based on the advice of the Civil Service Commission, which agency is authorized under 5 U.S.C. § 5548 to prescribe regulations to implement statutory provisions relating to premium pay, including holiday and overtime pay, the Council held that the remedy portion of the award violates applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules (5 CFR 2411.37(b)), the Council modified the arbitrator's award by striking so much thereof as directed the payment of additional compensation to the grievants.

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

DECISION OF 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.^{1/}

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).

^{1/} 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."^{2/}

Agency's Appeal to the Council

The agency filed a petition for review of the remedy portion of the arbitrator's award.^{3/} 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.^{4/} The Council also granted the agency's request for a stay pending the Council's determination of the instant appeal.

^{2/} 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.)

^{3/} 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.

^{4/} 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, in accordance with Council practice, 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. The Civil Service Commission replied in relevant part as follows:

Your letter . . . requested an interpretation of Civil Service Commission regulations as they relate to the arbitration award in the case of Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator), FLRC No. 73A-46.

The arbitrator determined that the agency had avoided overtime pay in violation of the provision of the agreement that "holiday work will not be scheduled to avoid overtime." As a remedy, the arbitrator awarded four hours pay to all personnel who worked on a Thursday holiday and were not allowed to work the following Saturday, to compensate for the difference between the pay they would have received had they worked on that Saturday instead of the Thursday holiday and the pay they received for working on the Thursday holiday but not on the following Saturday (an otherwise overtime day).

The Comptroller General has consistently ruled that the language of the law (title 5, United States Code 5542, and title 5, USC 5544) and CSC instructions (5 CFR 550.103,

550.111, and FPM Supplement 532-1, S8-4b) is interpreted as requiring actual performance of work in order to be entitled to overtime pay.

The Comptroller General Decisions cited by Navy are all valid references in that they all essentially say "no work, no pay." The decision found in 42 Comp. Gen. 195 was cited in the decision found in 46 id. 217, (cited by Navy), and also was again cited in 47 id. 359. The unpublished decision, B-175867, June 19, 1972, relates to a situation where a grieving employee was claiming overtime pay as the result of a violation of a union contract, and the Comptroller General again ruled "no work, no pay," in spite of the fact that the contract may have been violated.

In summary, the agency is prevented by law, regulations, and interpretations thereof, from implementing the arbitrator's award of overtime pay.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the remedy portion of the arbitrator's award is in violation of applicable law and appropriate regulation. We believe that the award must therefore be modified by striking that portion awarding four additional hours pay to those personnel who worked on Thursday, January 25, 1973, and were not allowed to work on Saturday, January 27, 1973.

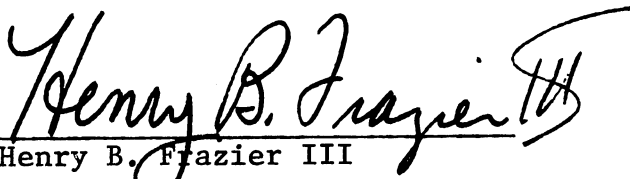
Conclusion

For the foregoing reasons, we find that the remedy portion of the arbitrator's award violates 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 last sentence thereof which reads:

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.

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: September 24, 1974

American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator). The Council accepted the agency's petition for review in this case, which disputed the legality of the arbitrator's award of retroactive promotion of the grievant to GS-13, step 10, with backpay (Report No. 47).

Council action (September 24, 1974). Based on the advice of the Civil Service Commission, which agency is authorized to prescribe regulations to implement the statutes here involved, the Council decided that the arbitrator's award, insofar as it directs the retroactive promotion of the grievant to GS-13, step 10, with backpay, violates applicable law and appropriate regulations. Therefore, pursuant to section 2411.37(b) of the Council's rules of procedure (5 CFR 2411.37(b)), the Council modified the award consistent with its decision.

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

American Federation of Government
Employees, Local 2449

and

FLRC No. 73A-51

Headquarters, Defense Supply Agency
and DSA Field Activities
Cameron Station
Alexandria, Virginia

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:

In May 1969, Russell D. Mikel, Management Technician, GS-12, applied for each of two GS-13 positions, but was found not to meet the eligibility requirements. As to one of these positions, the agency conceded that Mikel had not been referred to the selecting official and, hence, had been denied an opportunity for consideration in competition with other qualified candidates. Mikel filed a grievance and, as corrective action, the agency directed that Mikel be given "priority consideration"^{1/} for the next position for which he was qualified. Subsequently, Mikel was considered for another GS-13 vacancy; however, he was not considered by the selecting official because he had not been ranked among the best qualified. Mikel grieved, and the agency agreed with Mikel that since the promotion panel did not rank Mikel among the best qualified, indeed "priority consideration" was not afforded for this particular vacancy. On January 30, 1970, the agency directed that Mikel receive "priority consideration" for the first two vacancies for which he was basically qualified.

1/ "Priority consideration" and the treatment of employees entitled thereto, are covered by Part II, Article Q, Section 10, of the collective bargaining agreement, which provides:

PART II - ARTICLE Q. PROMOTIONS AND FILLING POSITION VACANCIES

Section 10. Employees entitled to priority consideration as defined in the FPM will receive such consideration including a personal interview prior to official announcement . . . of the vacancy. Nonselection of an employee having the right to priority consideration must be justified in writing. An employee

(Continued)

On February 5, 1973, Mikel filed a grievance grounded, as the arbitrator concluded, on two basic claims: (1) that his position had been incorrectly classified, and (2) that he had not been accorded "priority consideration" for a promotion. The grievance was submitted to arbitration.

The Arbitrator's Award

The arbitrator determined in his opinion that the second claim in the Mikel grievance, relating to "priority consideration," was arbitrable, but the first claim was not.^{2/}As to the merits of the second claim, the arbitrator determined that the agency on several occasions had not accorded Mikel the "priority consideration" for promotion required by Part II, Article Q, Section 10, of the agreement and that, had he been accorded such consideration, Mikel would have been promoted to several of the GS-13 positions he sought. As his award, the arbitrator directed that Mikel be "upgraded" to GS-13, step 10, retroactive to July 1, 1969, and be made whole accordingly. The arbitrator further directed that "any later action by way of promotion" be in conformance with all legal requirements, and that any dispute between the parties as to compliance with the award would be subject to terminal arbitration.

(Continued)

with such rights who is nonselected shall automatically be included on all promotion registers for which he is qualified, developed as a result of official announcement, and will be rated and ranked by the panel in the same manner as all other applicants.

FPM ch. 335, sec. 6-4c, provides:

c. Action involving nonselected employees.

.

(2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. An employee may be selected on the basis of this consideration as an exception to competitive promotion procedures (see section 4-3f).

2/ The arbitrator determined that Mikel's first claim concerning the classification of his position was "beyond arbitral jurisdiction in view of the procedures availed of by Mikel via his appeals to the Civil Service Commission and its disposition of the appeals."

The Arbitrator's Supplemental Award

The agency disputed the legality of the award as to (1) backpay to July 1, 1969, and (2) starting Mikel at GS-13, step 10, on that date.^{3/} The agency requested terminal arbitration of this dispute, and the matter was submitted to the arbitrator. The arbitrator issued a supplemental award in which he determined that (1) an award that grants backpay in such matters is legal, and (2) that the remedy of starting Mikel at GS-13, step 10, as of July 1, 1969, is legal. Accordingly, the arbitrator reaffirmed his earlier award.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award, as reaffirmed by his supplemental award, with the Council, alleging (1) that the award of retroactive promotion with backpay to July 1, 1969, would violate the Back Pay Act (5 U.S.C. § 5596) as implemented by Civil Service Commission regulations and as interpreted by the Comptroller General, and (2) the award of the promotion to GS-13, step 10, would violate the law applicable to the fixing of pay on promotion (5 U.S.C. § 5334(b)). The Council accepted the agency's petition for review on these issues. The Council also granted the agency's request for a stay pending the Council's determination of the instant appeal. The union filed a brief and the agency relied on its brief previously filed in support of the 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 . . . on the grounds that the award violates applicable law, appropriate regulation"

As previously stated, the agency contends that the arbitrator's award of retroactive promotion with backpay to July 1, 1969, would violate the Back Pay Act (5 U.S.C. § 5596) as implemented by Civil Service Commission regulations and as interpreted by the Comptroller General, and that his award of the promotion to GS-13, step 10, would violate the law applicable to the fixing of pay on promotion (5 U.S.C. § 5334(b)). The Civil Service Commission is authorized to prescribe regulations to implement the statutes here involved.^{4/} Therefore, that agency was requested, in accordance with Council practice, for an interpretation of the statutes and the implementing regulations of the Civil Service Commission as they pertain to the questions presented in the instant case.

^{3/} The agency contends that, since on July 1, 1969, the grievant was a GS-12, step 7, the proper grade and step to which he could be promoted at that time was GS-13, step 4. After receipt of the award, the agency promoted Mikel to GS-13, step 5, effective June 17, 1973.

^{4/} 5 U.S.C. §§ 5334 and 5596(c).

The Commission replied as follows:

This letter is in response to your request of January 24, 1974, for an interpretation of 5 U.S.C. 5596 and 5 U.S.C. 5334, and the implementing Civil Service Commission regulations as they apply to the arbitrator's award in the case of the 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.

The arbitrator found the agency in violation of the negotiated agreement when it failed to give the grievant, Russell D. Mikel, priority consideration for promotion. The arbitrator's award directed the agency to promote the grievant to grade GS-13, and fix the pay at step 10 of the grade, retroactively to July 1, 1969. Your letter states that the question is whether the award violates 5 U.S.C. 5596, 5 U.S.C. 5334, and the implementing CSC regulations.

It has been consistently held that after all discretionary acts that are required to effect a personnel action have been taken, and nothing remains to be done except ministerial and nondiscretionary acts, the personnel action is completed. In other words, the appointment power is exhausted when the last discretionary act is completed; the appointment is then irrevocable, and not subject to reconsideration. (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 S. 134; Board of Education v. McChesney, (1930), 32 SW2d 26; 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). However, in the instant case, there is no evidence that all discretionary acts were completed.

Technically, the question is not whether the award violates 5 U.S.C. 5596, since there was no "unjustified or unwarranted personnel action taken." Section 550.803(e) of the Commission's regulations defines personnel action for this purpose as being any action by an authorized official of an agency which results in the withdrawal or deduction of all or any part of the pay, allowances, or differentials of an employee. The Comptroller General, in his decision at 48 Comp. Gen. 502, stated "that a positive administrative action adverse to the employee must be the basis for back pay rather than an omission or failure to take action for an improper reason."

Rather, the question is whether there is a basis for the agency to approve a promotion to be effective retroactively. The Comptroller General has ruled on numerous occasions that promotions may not be made to take effect retroactively, except in

cases where through administrative error, such as clerical error resulting in the delayed typing of the personnel action, a personnel action was not effected as originally intended. See 3 Comp. Gen. 559, cited at 45 id. 99. Also, see B-178156, June 5, 1973, which will be published in Volume 52 at page 631, and B-179833, January 4, 1974, which will be published in Volume 53; and unpublished decisions B-180046, April 11, 1974; B-180056, May 28, 1974; and B-179323, May 16, 1974.

The Comptroller General and the Court of Claims have repeatedly ruled that a Federal employee is only entitled to the salary of the position to which he has been officially appointed. (B-178156, June 5, 1973; Tierney v. United States, 168 Ct. Cl. 77 (1964); Nordstrom v. United States, 177 Ct. Cl. 818 (1966); Bielic v. United States, 197 Ct. Cl. 550, 560 (1973)).

The Comptroller General has also ruled that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. (See 39 Comp. Gen. 583 and 40 id. 207).

In its second exception to the award, the agency alleged that it may not fix pay on promotion at a rate which is not in accordance with law and regulation. In the instant case, the proper step would have been step 4, if the promotion could have been legally effected retroactively to July 1, 1969; however, neither citation would have permitted the agency to fix the pay at the step 10.

For the reasons set forth above, the arbitrator's award in this case may not be implemented.

Based on the foregoing response by the Civil Service Commission, we find that the arbitrator's award, insofar as it directs the retroactive promotion of the grievant to GS-13, step 10, with backpay, violates applicable law and appropriate regulations. Therefore, the subject portions of the arbitrator's award cannot be permitted to stand.

Conclusion

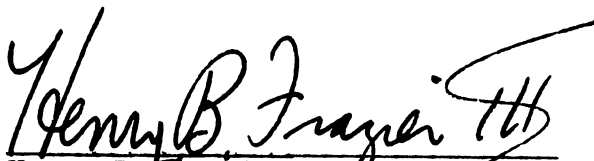
For the foregoing reasons, we find that the arbitrator's award, insofar as it directed that the grievant be retroactively promoted to GS-13, step 10, to July 1, 1969, with backpay, violates applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the award of the

arbitrator by striking the first sentence thereof which reads:

Mikel is to be upgraded to the GS-13 level, Step 10,
retroactive to July 1, 1969, and be made whole
accordingly.

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: September 24, 1974

AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service. The dispute in this case concerned the negotiability under the Order of union proposals which would: (1) Provide that grievances which are subject to the negotiated grievance procedure shall conform to the same procedural requirements as pertain to adverse actions; (2) establish ratios of inspectors to passengers during overtime assignments; (3) proscribe the overtime use of border patrol agents on alien bus movements when detention guards are readily available; and (4) prohibit the assignment of noninspection duties to I&NS personnel called in for inspection work on an overtime basis.

Council action (September 30, 1974). As to (1), the Council, based principally on its decisions in the Elmendorf case, FLRC No. 72A-10, and the Louisville Naval Ordnance case, FLRC No. 73A-21, and on relevant provisions in sections 12(a) and 13 of the Order, found that the union's proposal is negotiable. With respect to (2), the Council ruled that the proposal is excluded from the agency's obligation to negotiate under section 11(b) of the Order since the proposal would materially effect and is thereby integrally related to the numbers of employees assigned to inspection functions by the agency and since no different result obtains under section 11(b) simply because the project or tour of duty is performed in an overtime status. Finally, as to (3) and (4), the Council, based on its decision, among others, in the Griffiss case, FLRC No. 71A-30, and its conclusion as to overtime status in item 2, above, held that the union's proposals are outside the agency's obligation to bargain under section 11(b) of the Order. Accordingly, the agency head's determinations of nonnegotiability were set aside in part and sustained in part.

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

AFGE (National Border Patrol Council
and National Council of Immigration
and Naturalization Service Locals)

and

FLRC No. 73A-25

Immigration and Naturalization Service

DECISION ON NEGOTIABILITY ISSUES

Background of Case

The negotiability issues in this case arose during national negotiations of a multi-unit agreement between the Immigration and Naturalization Service (INS) and the American Federation of Government Employees (AFGE), covering border patrol and other Immigration and Naturalization Service personnel. Specifically, the dispute involved AFGE proposals (detailed hereinafter) relating to the processing of grievances over disciplinary actions (Article 10, Section K); staffing ratios (Article 21, Section A); and the proscribed assignment of certain personnel functions (Article 21, Sections B and E).

Upon referral, the Department of Justice determined that the subject union proposals were nonnegotiable under the Order. AFGE appealed to the Council, disagreeing with the agency determination; and the agency filed a statement of position in support of its determination.^{1/}

Opinion

The union proposals in dispute will be separately considered below.

1. Article 10, Section K. The union proposal reads as follows:

^{1/} The union's appeal initially covered a substantial number of other proposals, but the negotiability issues relating to those proposals were resolved by the parties and are no longer before the Council for decision in this case.

Article 10

Disciplinary Actions

Section K. All disciplinary or adverse actions will be processed in accordance with applicable CSC and Justice regulations and employees shall be afforded all rights and privileges provided therein.

The agency contends that the proposal would subject adverse actions, for which statutory appeals procedures exist, to the negotiated grievance procedure provided in the agreement, and that the proposal is therefore nonnegotiable as violative of section 13(a) of the Order.^{2/}

However, the union asserts, in effect, that the agency has misinterpreted the proposal in question, and that the proposal merely intends that the processing of those grievances which are subject to the negotiated grievance procedure shall conform to the same procedural requirements as pertain to adverse actions. More particularly, the union states:

In the Federal sector discipline is divided into two categories [sic], those that are appealed under the grievance machinery of either the agency's procedure or the negotiated procedure and those disciplinary actions that are processed under the provisions of FPM Chapters 751 and 752 and Executive Order 10987. Discipline including oral admonishments, written reprimands and suspensions up to and including 30 days are processed through the grievance machinery while suspensions of more than 30 days, discharges and reduction in rank or grade are processed through the adverse actions procedures outlined in FPM Chapter 752

In Section K the Union is attempting to contractually apply all the procedural aspects of the Civil Service Commission and Justice Department regulations for processing disciplinary actions for bargaining unit employees when these employees are processing grievances under the provisions of the negotiated grievance procedure These would include prior notice, rights to representation, time limits and access to witnesses.

2/ Section 13(a) of the Order provides in relevant 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

The Justice Department states that the Union's proposal would make its actions under the statutory procedures subject to the negotiated grievance procedure. This allegation cannot be substantiated. As stated above, the procedures for appealing discipline are divided into two categories; and the Union addresses itself to both procedures in Section N. Parts 1 and 2 of Section N are the procedures for appealing disciplinary actions of suspensions of 30 days or less and letters of reprimand under the negotiated procedure. Part 3 of Section N is the procedure for processing disciplinary actions that are suspensions of more than 30 days, discharge and reduction in rank or grade . . . in conformity with FPM Chapter 752 and Executive Order 10987. [Emphasis added.]

We find merit in the union's contentions that its proposal is negotiable, in the circumstances of this case.

As the Council held in the Elmendorf case,^{3/} the nature and scope of the negotiated grievance procedures are to be negotiated by the parties subject to the explicit limitations prescribed in the Order. While the agency maintains that the union's proposal falls within such an explicit limitation in section 13(a) of the Order, namely the proscribed coverage under the negotiated grievance procedure of adverse actions which are subject to statutory appeals procedures, we cannot agree with this position. For it is apparent, from the context of the proposal and from the union's expressed intent as to the meaning of its own proposal (and as we therefore so construe the proposal for purposes of this decision^{4/}), that grievances under the negotiated grievance procedure will be processed in accordance with the procedural requirements contained in CSC and Justice regulations governing the processing of adverse actions; however, no matter for which statutory appeals procedures exist, including adverse actions, would thereby be covered by the negotiated grievance procedure.

Moreover, any ambiguity in the union's proposal must be considered in the light of other provisions of the Order. As we recently noted in this regard in the Louisville Naval Ordnance case:^{5/}

3/ 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.

4/ See AFGE Local 1923 and Social Security Administration Headquarters Bureaus and Offices, Baltimore, Maryland, FLRC No. 71A-22 (May 23, 1973), Report No. 39, at pp. 6-7 of decision.

5/ Local Lodge 830, International Association of Machinists and Aerospace Workers, and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974), Report No. 48, at p. 8 of decision.

. . . under section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws and regulations of appropriate authorities, which would preclude coverage under the negotiated grievance procedure of matters covered by present or future statutory appeals procedures. Additionally, as to any questions which might arise concerning whether a grievance is properly subject to the negotiated grievance procedure or is excepted by reason of a statutory appeals procedure, the Council indicated in the Elmendorf decision (at p. 6):

The Assistant Secretary of Labor is authorized to decide . . . questions of grievability subject to appellate review by the Council. In addition, the Council may review arbitration awards and set aside awards which it finds to be in violation of applicable law, appropriate regulation, or the Order.
[Footnotes omitted.]

Accordingly, we overrule the agency's determination that Article 10, Section K, as proposed by the union is nonnegotiable.

2. Article 21, Section A. This proposal of the union reads as follows (underscoring indicates provisions in dispute):

Overtime, night, Sunday and Holiday assignments within a station, and within the employees regularly assigned duties will be distributed equitably among those employees qualified to perform the work. For this purpose 'equitable distribution' shall mean equal periods (1/2 day = 1 period) of overtime for all participating employees computed by the day. To assure implementation of this section at sea and airports the Agency agrees to the following staffing ratios: All Citizen Passengers - 1 Inspector to 40 passengers; Alien and Citizen Passengers - 1 Inspector to 30 passengers; All Alien Passengers - 1 Inspector to 20 passengers. Supervisors shall not assign premium work as a reward or penalty but solely in accordance with the agency's need. Complaints or disagreements on the distribution of premium work shall be processed in accordance with the negotiated grievance procedure.

The agency asserts that the union's proposal would establish the number of inspectors to be called out for overtime inspection assignments, based on

the numbers and types of passengers to be inspected, and therefore concerns the agency's staffing patterns which are outside the agency's obligation to negotiate under section 11(b) of the Order.^{6/}

The union denies that its proposal impacts on staffing by the agency. Rather, according to the union, the language in dispute merely relates to production standards under which inspectors perform their duties while in an overtime status and is not an attempt to increase staffing by the agency, since it involves only employees assigned to overtime work.

We cannot agree with the position of the union. It is obvious that the ratios of inspectors to passengers sought to be established in the union's proposal would materially effect, and are thereby integrally related to, the numbers of employees assigned to sea and airport inspection functions by the agency. Section 11(b) of the Order expressly provides that the numbers of employees so assigned to a work project or tour of duty are outside the agency's obligation to bargain. And, as the Council held in the Charleston Naval Shipyard case, a proposal which "is integrally related to the numbers of employees that the activity might assign to particular tours of duty" falls within the meaning of section 11(b).^{7/}

Contrary to the union's contentions, nothing in section 11(b), its "legislative history," or the Council's decisions thereon, requires that any different result obtain simply because the project or tour of duty is performed in an overtime status, instead of during normal working hours.

We therefore find that the disputed provisions in Article 21, Section A, of the union's proposal are excluded from the agency's obligation to bargain under section 11(b) of the Order.

3. Article 21, Section B. This section, as proposed by the union, provides:

The agency agrees to continue its current policy of not using Border Patrol Agents on alien bus movements when Detention Guards are readily available.

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

. . . the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices [Emphasis added.]

7/ Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-35 (June 29, 1973), Report No. 41, at p. 5 of decision.

The agency contends, among other things, that the proposal concerns the assignment of specific duties to its employees and is therefore outside the agency's obligation to bargain under section 11(b) of the Order.

The union argues, however, that its proposal recognizes the agency's authority to assign border patrol agents to alien bus movements and merely establishes a "procedure" for making such overtime assignment of duties, namely, when detention guards are not readily available, which procedure does not conflict with section 11(b). We find that the union's position is without merit.

As the Council held in the Griffiss case,^{8/} 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.^{9/}

While, as already mentioned, 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),^{10/} and, as discussed under item 2 above, this conclusion obtains regardless of whether the work involved is performed in an overtime status rather than during ordinary working hours.

Our decision does not, of course, preclude negotiation by the parties on the policies or procedures to be applied by the agency in the selection

8/ International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report No. 36, at p. 10 of decision.

9/ See, e.g., 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. 8-9 of decision. In that case, the Council held that a proposal which would prohibit the assignment of autopsy duties to staff physicians "when there is a pathologist employed by the hospital" is excepted from the agency's obligation to bargain under section 11(b) of the Order.

10/ Cf. American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48, at pp. 1-4 of decision.

of individual employees for assignment to particular shifts or to overtime status.^{11/} We here decide only that the union proposal which would constrict the agency's assignment of specific duties to particular types of positions or employees is excepted from the agency's obligation to bargain under section 11(b) of the Order.^{12/}

Accordingly, we agree with the agency that the union's proposal is non-negotiable.

4. Article 21, Section E. The final union proposal in dispute reads as follows:

Immigration Officers and employees of the Immigration and Naturalization Service who perform on an overtime basis inspections of persons and vehicles entering the United States will not be required to perform non-inspectional duties including, but not limited to, the adjudication of various I&NS petitions and applications, or clerical and custodial type duties. The work hours of Immigration inspectors and employees of I&NS on Sundays or Holidays shall commence with the first anticipated entry, or arrival, of a person or vehicle and continue for not more than eight continuous hours if anticipated inspections are continuous.

The agency asserts, in the main, that the union's proposal, which seeks to proscribe the assignment of noninspection duties to immigration inspectors particularly when they are performing Sunday and holiday work, relates to the job content of the inspectors and is therefore outside the agency's bargaining obligation under section 11(b) of the Order.

The union contends that the proposal is merely a "procedure" for assigning employees to overtime, pointing in this regard to special statutory provisions (8 U.S.C. 1353a) for the payment of overtime to I&NS personnel who

^{11/} See Report accompanying E.O. 11491, section E.1, Labor-Management Relations in the Federal Service (1971), at p. 42.

^{12/} In its appeal, the union also adverted to the fact that the proposal in question had been contained in a prior agreement with the agency. However, as the Council has repeatedly held, such circumstance is without controlling significance. See, e.g., International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, N.Y., footnote 8, supra, at p. 11 of decision.

perform inspection duties on a Sunday or holiday,^{13/} and to the ineligibility of such employees for additional overtime pay, on those days, for noninspection duties performed along with the inspection duties.^{14/} According to the union, it "should be able to negotiate that employees who are called in to perform overtime work under the provisions of one law should be limited to perform only that work that is compensated under that law." We cannot agree with the union's position.

The union does not deny that the agency, consistent with the statute relied upon by the union (8 U.S.C. 1353a), may properly assign noninspection duties to I&NS personnel called in for inspection work on Sundays or holidays. Indeed, as the Comptroller General specifically ruled, "The matter of whether inspectors should be required on Sundays or holidays to perform duties not directly connected with the particular inspections for which they were summoned is for determination by the Immigration and Naturalization Service."^{15/}

Since the agency may properly assign noninspection duties to I&NS personnel who are called in to perform inspection duties on an overtime basis, the union's proposal which would proscribe such assignment of duties clearly concerns the job content of the employees involved and, for the reasons already set forth under item 3, above, is excepted from the agency's obligation to bargain under section 11(b) of the Order.

We therefore sustain the agency's determination of the nonnegotiability of the union's proposed Article 21, Section E.

13/ 8 U.S.C. 1353a provides in pertinent part:

The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty . . . on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of . . . two additional days' pay for Sunday and holiday duty

14/ The Comptroller General, in B-171621 dated August 2, 1971, ruled that I&NS personnel receiving special overtime compensation under 8 U.S.C. 1353a for inspection work would not be entitled, in addition, to regular overtime pay, under other statutory authority such as 5 U.S.C. 5542, when performing noninspection duties in the same time frame.


15/ Ibid, at p. 3 of decision.

Conclusions

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 Article 21, Sections A, B, and E, was valid and must be sustained; and
2. The agency head's determination as to the nonnegotiability of Article 10, Section K, 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 proposal. We 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.


Henry B. Frazier III
Executive Director

Issued: September 30, 1974

Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 344. The union (National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 1) sought an election in a unit of professional engineers in the activity's Quality and Reliability Assurance Department, contending that those professionals, together with nonprofessional employees in that department already represented in a separate unit by the union, shared a community of interest. The Assistant Secretary, in his decision as clarified, found among other things that the claimed professional engineers lacked a clear and identifiable community of interest separate and distinct from other professional engineers at the activity, and that the unit sought by the union was thereby inappropriate. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues, allegedly because the Assistant Secretary failed to understand that the union was seeking only to add the claimed professional engineers to the existing nonprofessional unit, and because such a mixed unit is appropriate.

Council action (October 21, 1974). The Council held that the Assistant Secretary's decision as clarified does not appear arbitrary and capricious, nor does it present any major policy issues. In this regard, the Council noted the explicit statement in the Assistant Secretary's decision that he had considered the union's petition as seeking to add the claimed professionals to an existing non-professional unit, and his conclusion that any resulting mixed unit (or a separate unit) would be inappropriate because it would not include other employees having a community of interest with those sought by the union. The Council also found that the Assistant Secretary's decision does not appear inconsistent with his previous rulings or the purposes of the Order, or otherwise without reasonable justification. Accordingly, the Council denied review of the union's appeal 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
October 21, 1974

Mr. Francis M. O'Laughlin
National President
National Association of
Government Inspectors
National Headquarters
P. O. Box 31257
Jacksonville, Florida 32230

Re: Department of the Navy, Naval Air Rework
Facility, Jacksonville, Florida, A/SLMR
No. 344, FLRC No. 74A-14

Dear Mr. O'Laughlin:

The Council has carefully considered your petition for review of the Assistant Secretary's decision and the agency's opposition thereto, and the additional comments and arguments filed by the parties following receipt of the Assistant Secretary's clarification of his decision in the above-entitled case.

The National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 1, represents a unit of approximately 80-85 non-professional Quality Assurance Specialists employed in the activity's Quality and Reliability Assurance Department. Unit No. 1 sought an election, according to the findings of the Assistant Secretary, "in a unit consisting of all professional employees of the Quality and Reliability Assurance Department . . . excluding all nonprofessional employees . . ." contending that those professional employees, together with employees in that department already represented in a separate unit by the petitioner, shared a community of interest. The Assistant Secretary found that a unit limited to the professional engineers of the Quality and Reliability Assurance Department of the Activity is not appropriate for the purpose of exclusive recognition, in that they do not have a clear and identifiable community of interest separate and distinct from other professional engineers located at the Activity. He also concluded that such a fragmented unit would not promote effective dealings and efficiency of agency operations. The Assistant Secretary ordered that the petition be dismissed.

Following receipt of your appeal, the Council requested clarification of the Assistant Secretary's decision, as to (a) whether he considered

your petition as one seeking to add the professionals to an existing nonprofessional unit; and (b) if so, the reasons which he had for not addressing the appropriateness of such a mixed unit. In response, the Assistant Secretary stated that he had considered your representation petition "as one seeking to add certain professional employees to an existing nonprofessional unit." Further, with regard to his reasons for not addressing the appropriateness of such a mixed unit, he stated that:

. . . it was found that a unit limited to the professional engineers of the Quality and Reliability Assurance Department of the Activity was not appropriate for the purpose of exclusive recognition. In this connection, it was concluded, among other things, that the claimed professional engineers did not have a clear and identifiable community of interest separate and distinct from other professional engineers located at the Activity. In my judgment, the foregoing conclusions were determinative either in the event that, pursuant to Section 10(b)(4) of the Order, the claimed professional engineers did not vote to be included in the existing unit, but, rather, indicated a desire to constitute a separate unit, or in the event that they voted to be added to the existing nonprofessional unit. Thus, in either case, the claimed professional engineers were viewed as an inappropriate grouping of employees who shared a community of interest with other professional employees not covered by the instant petition. Based on these considerations, clearly, any resulting 'mixed unit' would be inappropriate as it would not include certain employees having a community of interest with those in the 'mixed unit.'

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, the Assistant Secretary has misunderstood the intent of the subject representation petition as seeking to establish a separate unit of professionals, rather than to add the professionals to the existing nonprofessional unit. Consequently, you conclude that his holding as to the inappropriateness of a separate professional unit is erroneous. Moreover, you contend that the "mixed" unit of professionals and nonprofessionals sought is an appropriate unit under the Order, and that the petitioned-for professionals therefore have a right to be represented in such a mixed unit if they so desire. In response to the Assistant Secretary's clarification of his decision, you contend essentially that the Assistant Secretary's view that the professional engineers sought do not have a clear and identifiable community of interest separate and distinct from other professional engineers at the Activity is irrelevant and that his decision is not in consonance with previous rulings and not in harmony with the intent and philosophy of protecting individual rights.

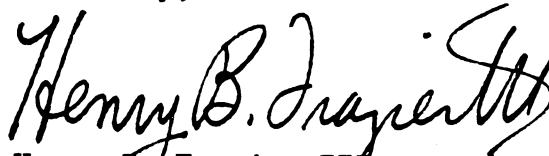
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear in any manner arbitrary and capricious nor do they present a major policy issue. With regard to your contention that the Assistant Secretary misunderstood the subject representation petition, he states in his clarification, "the subject petition was considered as one seeking to add certain professional employees to an existing nonprofessional unit." We interpret the Assistant Secretary's decision, as clarified, as finding that under the facts of the case a unit consisting of the professional employees sought and the nonprofessionals currently represented would not constitute an appropriate unit.

Accordingly, the Assistant Secretary's finding with regard to the lack of a "clear and identifiable community of interest" on the part of the five professional engineers, separate and distinct from other professionals, was not the result of a misinterpretation of the union's representation petition, but rather was the basis for his holding that "any resulting 'mixed unit' would be inappropriate as it would not include certain employees having a community of interest with those in the 'mixed unit.'" Further, as he noted in his clarification, should the claimed professional engineers vote for representation in a separate unit pursuant to section 10(b)(4) of the Order, they would constitute "an inappropriate grouping of employees." Nor does it appear from your petition that the Assistant Secretary's decision is not consonant with previous rulings or not in harmony with the intent and philosophy of protecting individual rights. As to your contention that the decision of the Assistant Secretary appears arbitrary and capricious, it does not appear that the findings and decision of the Assistant Secretary were without reasonable justification.

Accordingly, because your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept of Labor

A. Di Pasquale
Navy

Internal Revenue Service, Chicago District, A/SLMR No. 279;
and Internal Revenue Service, Western Service Center, Ogden, Utah,
A/SLMR No. 280. These two cases involved the same principal issue,
that is, the propriety of the Assistant Secretary's holding, in
effect, that section 7(d)(1) of the Order does not confer on super-
visors any right to select representatives of their choice in agency
grievance or appellate actions, and that an agency's refusal to
permit such choice is therefore not violative of section 19(a)(1)
of the Order. The Council accepted the cases for review having
determined that major policy issues are present in the Assistant
Secretary's decisions (Report No. 44).

Council actions (October 22, 1974). Based on the express language,
context and "legislative history" of section 7(d)(1), the Council
agreed with the Assistant Secretary that this section does not
confer any rights whatsoever on supervisors or other employees
under the Order. Rather, section 7(d)(1) simply means that the
granting of exclusive recognition to a labor organization does
not prevent an employee from choosing his own grievance or appeals
representative (except under a negotiated grievance procedure) if
such right is granted elsewhere under law or regulation. The
Council noted in this regard that alleged violations of such rights
granted elsewhere may be raised in the appropriate procedures estab-
lished by those directives pursuant to which the rights are claimed.
Accordingly, the Council held that the Assistant Secretary's dis-
missal of the 19(a)(1) complaints, based on his finding that
section 7(d)(1) does not confer any rights enforceable under section 19,
was consistent with the purposes of the Order and must be sustained.

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

Internal Revenue Service
Chicago District

and

National Treasury Employees
Union and Chapter 10, National
Treasury Employees Union

A/SLMR No. 279
FLRC No. 73A-32

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 the National Treasury Employees Union and Chapter 10, National Treasury Employees Union (herein jointly called the union),^{1/} held that the Internal Revenue Service, Chicago District (herein referred to as the activity) had not violated section 19(a)(1)^{2/} of the Order by refusing to permit a supervisory employee of the activity to select the representative of his choice in connection with his action pursuant to the agency's grievance procedure, allegedly in contravention of rights conferred on employees by section 7(d)(1) of the Order.

The pertinent facts as found by the Administrative Law Judge, whose findings, conclusions, and recommendation were adopted by the Assistant Secretary, are essentially undisputed. Briefly the facts are as follows: A supervisor^{3/} at the activity, who had been reassigned from one supervisory position to

^{1/} The name of the union appears as amended during the pendency of the instant proceeding.

^{2/} Section 19(a)(1) of the Order provides as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not-

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

.

^{3/} In view of the Council's conclusion herein, that section 7(d)(1) does not confer any rights either on a supervisory or on a nonsupervisory employee, the fact that the grievant in the instant case is a supervisor is, to that extent, without significance.

another, felt that the reassignment had lessened his opportunity for promotion. As a result, he filed a grievance under the agency grievance procedure seeking reinstatement to his former position. A member of the union, he designated the president of the local chapter to be his representative in the grievance proceeding. The activity declined to permit the supervisor to be represented by an official of the union. Following unsuccessful attempts to resolve the matter, the union filed the instant unfair labor practice complaint.

The Assistant Secretary determined, in pertinent part, that section 7(d)(1) of the Order does not confer any rights enforceable under section 19 of the Order. In this regard, he found that section 7(d)(1) simply disavows the taking away of certain rights that may be conferred by law or regulation; and that any rights flowing from section 10(e) do not flow to supervisors.^{4/} Accordingly, the Assistant Secretary dismissed the complaint.

The union appealed the Assistant Secretary's decision to the Council. The Council found that major policy issues were presented by the decision and accepted the petition for review. The union and the Internal Revenue Service filed briefs with the Council.

Opinion

The question presented by this case is whether, as determined by the Assistant Secretary, section 7(d)(1) does not confer any rights enforceable under section 19 of the Order. For the reasons which follow, the Council agrees with the determination of the Assistant Secretary.^{5/}

The union principally alleges that section 7(d)(1) confers upon employees an unqualified right to appoint representatives of their choice in actions under agency grievance procedures; and, the "right not to be precluded from exercising the right" to designate such representatives in such actions,

^{4/} The Council agrees with the Assistant Secretary that section 10(e) is not applicable in the present case. Section 10(e) expressly applies to "employees in the unit" and, under section 10(b), a unit may not include a supervisor. Therefore, since the instant case involves a supervisor, the Council finds it unnecessary in reaching its decision to consider questions as to which rights, if any, flow to employees under section 10(e) of the Order.

^{5/} The Council's conclusion herein is addressed to whether section 7(d)(1) of the Order confers any rights upon supervisory or nonsupervisory employees. In arriving at this conclusion we do not reach or in any respect pass on the issue, currently under study by the Council in connection with its general review of the Federal labor-management relations program, as to, "What policy should pertain to the representation of supervisors by unions in proceedings under agency grievance and appeals procedures?"

"no matter what is the source of that right."^{6/} The union bases its assertions on its interpretation of the language and construction of section 7(d)(1), as well as certain language extracted from the Report and Recommendations on the Amendment of Executive Order 11491.

Section 7(d)(1) of the Order provides as follows:

RECOGNITION

Sec. 7. Recognition in general

-
- (d) Recognition of a labor organization does not-
 - (1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in section 13;
-

In our opinion, the literal meaning of the quoted language 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.

This conclusion as to the meaning and purpose of section 7(d)(1) is confirmed by consideration of the context in which the section appears. As indicated by its title, section 7 is concerned primarily with the subject of "Recognition in general." Thus, sections 7(a), 7(b) and 7(c) deal respectively with, in effect, when an agency shall accord recognition, certain

^{6/} In this regard, the union claims that agency regulations and the Federal Personnel Manual confer on the grievant in the instant case the right to choose his own representative. The Council finds it unnecessary to consider these claims in reaching its decision herein and, of course, does not pass on the merits of such claims.

requirements imposed upon a union seeking recognition, and the duration of recognition which has been accorded. That is, these sections are concerned only with the process of achieving and retaining exclusive recognition by a labor organization and not at all with the conferring of individual employee rights to choose representatives in particular actions. Set in this context, the remainder of section 7(d), itself,^{7/} plainly does not confer rights or in any manner indicate that rights, not otherwise existing, are established thereby. Clearly, apart from some distinctions not relevant here, the provisions of section 7(d) are consistent as to the meaning of their common phraseology-- "Recognition of a labor organization does not- . . . preclude . . . [certain acts or conduct]"--and as to their obviously common purpose-- to indicate simply that the according of recognition to a labor organization under the Order does not have the legal consequence of precluding the acts and conduct enumerated in the whole of section 7(d) which might be undertaken pursuant to rights elsewhere conferred by law or regulation.

Further, in this regard, the Council finds to be without merit the union's assertion, previously mentioned, that the Council's 1971 Report and Recommendations on the Amendment of Executive Order 11491 contains language indicating that the Order confers rights in connection with an employee's choice of representative in grievance actions. In that Report, the Council stated that, "The Order and [Civil Service Commission] regulations reserve to the employee rights to choose his own representative (which may be a rival union)" [Emphasis supplied.]^{8/}

7/ Sections 7(d)(2) and 7(d)(3) provide as follows:

(d) Recognition of a labor organization does not-

.

(2) preclude or restrict consultations and dealings between an agency and a veterans organization with respect to matters of particular interest to employees with veterans preference; or

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, professional or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members. Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

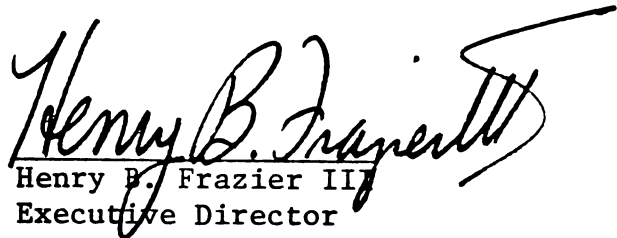
8/ Labor-Management Relations in the Federal Service (1971), p. 28.

In the first place, the reservation of rights referred to in the Report, on its face, is not a conferral of such rights but, as similarly noted in our previous discussion of section 7(d)(1), amounts to a disclaimer of effect on rights elsewhere conferred. Moreover, in context, the quoted language refers to the then existing situation with regard to negotiated grievance procedures whereby "the role of the exclusive union . . . [was] diminished and distorted by permitting a rival union to represent a grievant with respect to the interpretation and application of the agreement negotiated by the exclusive representative" Thus, the Council recommended that the Order be amended to permit an employee to file a grievance under the negotiated grievance procedure "only with representation by the exclusive union or a representative approved by the union."^{9/} Such a policy currently is embodied in section 13 of the Order and is reflected in the "exception" portion of section 7(d)(1), as previously set forth herein. Therefore, since the Report language relied upon by the union concerns negotiated rather than agency grievance procedures, as are here involved, and, moreover, since in any event a reservation of rights is not a conferral of rights, we find that the language relied upon does not support the claims at issue in the instant case.

Accordingly, based on the foregoing, we find the Assistant Secretary's dismissal of the union's 19(a)(1) unfair labor practice complaint, based on his finding that section 7(d)(1) of the Order does not confer any rights enforceable under section 19, to be consistent with the purposes of the Order.^{10/}

Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure, we sustain the Assistant Secretary's dismissal of the complaint.

By the Council.


Henry B. Frazier II
Executive Director

Issued: October 22, 1974.

^{9/} Id.

^{10/} Alleged violations of rights claimed by the union to be conferred by agency regulations and the Federal Personnel Manual, not remediable under the Order, may be raised in appropriate procedures established by the directives pursuant to which the rights are claimed.

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

Internal Revenue Service
Western Service Center
Ogden, Utah

and

A/SLMR No. 280
FLRC No. 73A-33

National Treasury Employees
Union and Chapter 67, National
Treasury Employees Union

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

This appeal, which was accepted for review by the Council, arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by the National Treasury Employees Union and Chapter 67, National Treasury Employees Union (herein jointly called the union)^{*/} held that the Internal Revenue Service, Western Service Center, Ogden, Utah, had not violated section 19(a)(1) of the Order by announcing a policy whereby a supervisor would not be permitted to be represented in a grievance or appellate action by a representative of the labor organization that represents employees supervised by the aggrieved supervisor. In reaching his decision on this issue, the Assistant Secretary relied exclusively on his decision in Internal Revenue Service, Chicago District, A/SLMR No. 279.

On this date the Council has issued its Decision on Appeal from Assistant Secretary Decision in the matter of Internal Revenue Service, Chicago District, A/SLMR No. 279, FLRC No. 73A-32, in which it sustained the Assistant Secretary's finding that the agency had not violated section 19(a)(1) of the Order by refusing to permit a supervisor to select the representative of his choice in connection with his action pursuant to the agency's grievance procedure. For the reasons fully set forth in that Decision, and pursuant to section 2411.17 of the

^{*/} The name of the union appears as amended during the pendency of the instant proceeding.

Council's rules of procedure, we find that the Assistant Secretary's decision in the instant case, with respect to a finding that the agency did not violate section 19(a)(1) of the Order, is consistent with the purposes of the Order, and, therefore, it is sustained.

By the Council.



Henry B. Frazier III
Executive Director

Issued: October 22, 1974.

Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056 (CA). The Assistant Secretary dismissed a complaint filed by the National Treasury Employees Union (NTEU), which alleged that the agency's denial of an employee's request for union representation at certain "investigative interviews" violated section 19(a)(1) and (6) of the Order. The Assistant Secretary found that the "investigative interviews" did not constitute "formal discussions" within the meaning of section 10(e) of the Order and, relying upon his decision in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, concluded that the agency's denial of union representation did not violate section 19(a)(1) or (6). With regard to NTEU's assertion that a hearing was required to bring out additional facts in the case, the Assistant Secretary determined, in effect, that it was NTEU's burden as the complainant to adduce at the investigative stage those facts necessary to establish a reasonable basis for the complaint.

NTEU appealed to the Council, alleging that the Assistant Secretary's decision is arbitrary and capricious essentially because, contrary to his own rules, he failed to direct a hearing to resolve remaining factual issues; he misconstrued section 10(e) of the Order; and he departed without explanation from his previous decisions. NTEU further alleged that major policy issues are presented concerning union representation at discussions between employees and the agency.

Council action (October 22, 1974). The Council found that the Assistant Secretary's decision did not appear to be without reasonable justification, or in any other manner arbitrary and capricious. In this connection, the Council held that the Assistant Secretary did not violate his own rules in refusing to conduct a hearing; his decision is based on the language and meaning of 10(e); and the Assistant Secretary did not appear to depart from his earlier decisions. The Council also held that, in the circumstances presented, the Assistant Secretary's determination did not present a major policy issue warranting Council review in this case. Accordingly, the Council denied review of NTEU's appeal 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

October 22, 1974

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

Re: Internal Revenue Service,
Washington, D.C., Assistant
Secretary Case No. 22-4056
(CA), FLRC No. 74A-23

Dear Mr. Tobias:

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 (6) of the Order. These alleged violations were based upon the agency's refusal to permit an employee to be accompanied by a representative of the union at "investigative interviews" conducted by the agency (which you characterize as "formal discussions" within the meaning of section 10(e) of the Order).

On the basis of the facts properly before him and under all the circumstances the Assistant Secretary found that the "investigative interviews" in this case which "related to a single IRS employee's obligation to file timely a proper Federal tax return" did not constitute a formal discussion within the meaning of section 10(e) of the Order and that, therefore, the agency was not required to afford the union an opportunity to be present. He noted in this regard that the interviews at issue did not concern a grievance, nor did they deal with personnel policies or practices or matters affecting general working conditions of employees in the unit. Consequently, relying on his decision in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336,*/he determined that the agency's actions did not constitute violations of subsections 19(a)(1) or (6) of the Order. As for your assertion that a hearing was required to bring out "many additional facts," in addition to those undisputed in the case, the Assistant Secretary determined, in effect, that it was the union's burden as the complaining party to adduce at the investigative stage those facts necessary to establish a reasonable basis for the complaint.

*/ Review subsequently denied by Council. (FLRC No. 74A-11, June 18, 1974, Report No. 54).

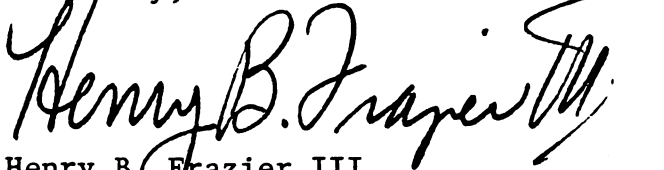
In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious because: (1) he improperly failed to direct a hearing while substantial factual issues remained to be resolved, contrary to his own rules of procedure; (2) he misconstrued section 10(e) of the Order in concluding that the "investigative interviews" in question were not "formal discussions" within the meaning of that section, and that the employee did not have an unqualified right to seek union representation during such an interview; and, (3) the asserted misconstruction of section 10(e) represents an unexplained departure from his previous decisions. You also contend that the Assistant Secretary's decision presents major policy issues concerning the rights of unions to be present and the rights of employees to select the union to be their representative at discussions between employees and the agency. Finally, you object to the admission of evidence submitted ex parte to the Council on behalf of the agency.

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 major policy issues. The Assistant Secretary did not violate his own rules of procedure in refusing to conduct a hearing. Moreover, his decision is based on the language and meaning of section 10(e) and does not appear to depart in any respect from interpretations of that section contained in his earlier decisions. Therefore, the Council finds that the decision of the Assistant Secretary does not appear to be without reasonable justification, or in any other manner arbitrary and capricious. As to the alleged major policy issue, the Council is of the opinion that, in the circumstances presented, the Assistant Secretary's determination, that denial of representation at these particular investigative interviews which were not "formal discussions" within the meaning of section 10(e) of the Order did not interfere with any right accorded under the Order, does not present a major policy issue warranting Council review in this case. With respect to your assertions concerning the agency's ex parte submission of evidence to the Council, it has been deemed unnecessary, in reaching the decision herein, to examine the material in question, submitted by the agency under separate cover and denoted "For official use only." Therefore, without passing on the admissibility of such material, it is being returned, unopened, to the agency.

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: G. Jerry Shaw, IRS
A/SLMR, Labor

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. Upon complaint filed by two employees (Charles R. Bridges and Arnold Medina), the Assistant Secretary determined that AFGE and AFGE Local 1650 violated section 19(c) of the Order by refusing to reinstate these employees to membership based upon their failure, pursuant to a provision of Local 1650's constitution, to obtain a two-thirds majority of voting members. The Assistant Secretary held in this regard that section 19(c) provides, in effect, that an employee in an appropriate unit shall not be denied membership in a labor organization which is accorded exclusive recognition except for failure to meet reasonable occupational standards uniformly required for admission or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership; and that, since the denial of reinstatement of the two employees involved was not based on either of the foregoing exceptions, such action was violative of 19(c). The Council accepted the case for review, having determined that a major policy issue was present (Report No. 45).

Council action (October 25, 1974). The Council agreed with the Assistant Secretary as to the meaning and application of section 19(c). In this connection, the Council ruled 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. Accordingly, the Council upheld the Assistant Secretary's determination that the denial of reinstatement here involved which failed to satisfy these requirements violated section 19(c); further, the Council agreed with the Assistant Secretary's finding that both AFGE and its Local 1650 were responsible for such violation.

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

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

and

Charles R. Bridges and
Arnold Medina

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon complaint filed by two employees (Charles Bridges and Arnold Medina) against their national union (American Federation of Government Employees, hereinafter referred to as AFGE National), and their local union (American Federation of Government Employees, Local 1650, hereinafter referred to as Local 1650) held, in pertinent part, that by refusing to reinstate them to membership based upon their failure, pursuant to a provision of Local 1650's constitution, to obtain a two-thirds majority of voting members, AFGE National and Local 1650 violated section 19(c) of the Order.^{1/} The Assistant Secretary held that section 19(c) provides, in effect, that an employee in

^{1/} Section 19(c) of the Order provides:

(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

an appropriate unit shall not be denied membership in a labor organization which is accorded exclusive recognition except for failure to meet reasonable occupational standards uniformly required for admission or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. In this regard, the Assistant Secretary found that the denial of reinstatement to the two employees was not based on either of the foregoing exceptions. Further, it was clear that the employees were never charged by the Local with respect to any alleged misconduct engaged in during the period in which they were members of the Local.

Based on the foregoing, the Assistant Secretary ordered that Charles Bridges^{2/} be unconditionally reinstated to membership in the Local.^{3/} AFGE appealed to the Council from this Decision and Order, and the Council accepted the petition for review, deciding that the Assistant Secretary's decision presented major policy issues.

Opinion

The question presented in this case is whether the section 19(c) proscription on an exclusive representative denying membership to any unit employees except for failure to meet occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership extends to situations where an employee seeks reinstatement as a member of a union from which he has previously resigned.

As indicated above, the Assistant Secretary found that a denial of reinstatement to membership 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 a permissible denial. In the opinion of the Council, this analysis as to the meaning and coverage of section 19(c) is correct, and is hereby sustained.

Section 19(c) mandates that "A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit . . .," except for the reasons specified. [Emphasis supplied.]

^{2/} The Assistant Secretary found that because the evidence established that Arnold Medina had retired from Federal service, and therefore no longer a unit employee, it was inappropriate to issue a remedial order in such a situation.

^{3/} The Assistant Secretary noted that after reinstatement, as a member, Bridges would be subject to any discipline, enforced in accordance with the procedures under the constitution and by-laws of either of the Respondents which conform to the requirements of the Order, with respect to any improper conduct engaged in during the period of his prior membership.

Nothing in the language of the Order, or in the Study Committee Report, indicates that the term "membership", as used in section 19(c), is intended to distinguish between the type of membership enjoyed by an employee when he joins a labor organization for the first time, as opposed to the type of membership entered into upon reinstatement to a labor organization. Indeed, the use of the generalized term, "membership", indicates to us that the intent of the Order was to include both situations within the section 19(c) mandate to labor organizations. Had it been intended to make the distinction between initial membership and reinstatement to membership, such as is urged by AFGE, it seems clear to us that section 19(c) would contain language which would make that distinction more readily apparent.

Moreover, this interpretation is clearly consistent with the obvious intent of section 19(c), which is to prohibit labor organizations which have been accorded exclusive recognition from denying membership to employees except for very limited specified reasons. Such an intent would not be fostered if we were to conclude that the prohibition against denying membership does not protect an employee who has voluntarily resigned from a labor organization, but then wishes to be reinstated to membership.

AFGE's arguments that the language of section 19(c) does make such a distinction are not persuasive. The union contends first that the reference in 19(c) to ". . . failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership" indicates that the intent of section 19(c) is that it apply only to original memberships, not reinstatements, because initiation fees are not required upon reinstatement to membership. It is further alleged in this regard that the reference to "retaining membership" also indicates that 19(c) pertains to original memberships only and not reinstatements. However, while it appears to be true that the reference to "initiation fees" in section 19(c) refers only, in the case of AFGE, to employees who are becoming members of the union for the first time, the reference to "dues" would clearly be applicable to both employees applying for original membership, and those applying for reinstatement to membership. Moreover, even assuming a connection between initiation fees and dues in 19(c) which would make them both applicable to original membership only, it should be noted that this portion of 19(c) deals only with the exceptions to the mandate that a union accept any unit employee into membership, not with the mandate itself. Hence, this union contention does not establish that section 19(c) intends to distinguish between original membership in a union, and reinstatement to membership therein, and is therefore rejected.

Second, AFGE argues that "not one word in the Order, or its background history, indicates or even implies that unions are obligated to accept . . . every applicant for reinstatement." This view is predicated on the assumption that reinstatement and membership are two different concepts. Once this assumption is made, it is a simple matter to survey the Order and its history and discover that no specific mention is made of reinstatement,

concluding therefore that reinstatement was not intended to be covered by section 19(c). However, as indicated above, we are of the opinion that the Order did not intend to make reinstatement to membership a separate concept from initial membership. Again, the term "membership" includes both concepts.4/

AFGE also contends that the record of the case before the Assistant Secretary does not provide a sufficient basis for a finding that AFGE National had acted in violation of the Order. In this regard, it is argued first, that the National office had no way of knowing, at the time that it approved Local 1650's constitutional provisions dealing with reinstatement, that the Assistant Secretary would interpret section 19(c) to apply to reinstatement to membership; and second, that the National office was in no way involved in implementing the reinstatement policy here involved. These arguments must be rejected. The fact that AFGE National did not, at the time it approved Local 1650's constitutional provisions, have an authoritative ruling as to the meaning of section 19(c) does not alter the fact that once such a ruling is issued, AFGE National must comply with an order directing it to act in accordance with such a ruling.

As to the extent of involvement of AFGE National in the rejection of Bridge's application for membership, we are of the opinion, as was the Assistant Secretary, that the National's approval of the Local's constitutional provisions and its approval of the Local's action with regard to Bridges constitute sufficient involvement to hold the National responsible, with the Local, for the denial of membership involved in this case.5/

4/ Also based on this supposed distinction between reinstatement and initial membership is the contention that because neither section 19(c), nor any other provision of the Order or its history, contains a specific reference to reinstatement as being encompassed in the section 19(c) requirement that labor organizations accept all unit employees into membership, that the Assistant Secretary has exceeded the authority granted to him under the Order by extending the express provisions of the Order to cover a situation it was not intended to cover. Based on the same rationale as set forth above, however, this union contention must also be rejected. The Assistant Secretary has not exceeded the scope of his authority, because he has properly interpreted the term "membership" as used in section 19(c) to include reinstatement to membership. He has not extended or, in effect, rewritten the Order to include something which was not there in the first place.

5/ AFGE argues that there is a "national labor-relations policy" to the effect that unions may promulgate rules to maintain "internal control and discipline" over locals, and that this policy is adopted in the federal labor-management relations program by means of the portion of section 19(c) which provides as follows:

This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

(Continued)

Accordingly, based on the foregoing, we find the Assistant Secretary's holding that AFGE Local 1650 and AFGE National violated section 19(c) by refusing to reinstate Bridges and Medina to membership is consistent with the purposes of the Order. Therefore, pursuant to section 2411.17 of the Council's rules of procedure, we sustain the subject Decision and Order of the Assistant Secretary, and vacate our stay of the order issued by the Assistant Secretary.

By the Council.


Henry B. Brazier III
Executive Director

Issued: October 25, 1974

(Continued)

The union concludes, in the light of the foregoing, that because the denials of reinstatement to membership of the Complainants were for disciplinary reasons, that they were permissible under the Order. However, in this case the Assistant Secretary found that the Complainants had not been charged with any alleged misconduct and there is no evidence that the denial of reinstatement was a discipline in accordance with procedures under the Local's constitution or by-laws which conform to the requirements of the Order.

Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SLMR No. 322. Upon a complaint filed by the union (American Federation of Government Employees, AFL-CIO, Local Union 1367), the Assistant Secretary found that, pursuant to the Council's decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (Report No. 30), the activity had not violated section 19(a)(6) of the Order by failing to meet and confer with the union in regard to the adoption of a Defense Language Institute regulation dealing with the assignment of activity employees to overseas duty. In this regard, the Assistant Secretary found that the subject regulation, which in part required activity management to consider employees from outside the activity for job assignments, was issued to achieve a desirable degree of uniformity and equality on a matter common to more than one subordinate activity of the parent organization and, in accordance with Merchant Marine, was excepted from the bargaining obligation under section 11(a) of the Order. The Council accepted the case for review, having determined that a major policy issue was present, namely: Whether the Assistant Secretary correctly applied the Council's Merchant Marine decision in concluding that the activity was not obligated, under section 11(a), to meet and confer with the union in regard to the subject regulation (Report No. 51).

Council action (October 25, 1974). The Council found, contrary to the Assistant Secretary, that the subject regulation was applicable only to the single activity here involved and therefore the Assistant Secretary incorrectly applied the Merchant Marine decision in holding that the activity was not obligated, under section 11(a), to negotiate with the union in regard to that regulation. The Council ruled, in this connection, that under Merchant Marine, a policy or regulation referred to in section 11(a) as an appropriate limitation on the scope of negotiations must be directed to the management of more than one subordinate activity and deal with the administration of matters which are common to those activities. The Council further ruled that such condition is not established merely because, as here, the regulation requires activity management to consider employees from outside the activity for job assignments. Accordingly, the Council remanded the case to the Assistant Secretary for further proceedings, consistent with the Council's decision.

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

Department of Defense
Air Force Defense Language Institute
English Language Branch
Lackland Air Force Base, Texas

and

A/SLMR No. 322
FLRC No. 73A-64

American Federation of Government
Employees, Local Union 1367

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who dismissed a complaint filed by American Federation of Government Employees Local 1367 (herein referred to as "the union") against the Air Force Defense Language Institute, English Language Branch (herein referred to as "the activity") which complaint had alleged that the activity had violated section 19(a)(6) of the Order^{1/} by unilaterally implementing Defense Language Institute Regulation 690-2 on April 14, 1972 and failing to confer, consult, or negotiate with the complainant in respect thereto.

The factual background of this case, as found by the Administrative Law Judge and adopted by the Assistant Secretary, is as follows: The activity located at Lackland Air Force Base, San Antonio, Texas, employs instructors to teach English to foreign military students, preparatory to their technical or professional training. The activity also sends instructors to foreign countries to assist host countries to develop programs and train instructors to teach English to others. Prior to April 1972, the selection of instructors for overseas assignments was governed by DLIEL Memorandum 690-1, which provided for a

1/ Section 19(a)(6) of the Order provides as follows:

(a) Agency management shall not--

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

1

rotation roster system based on tenure; i.e., the instructors with the most tenure would be the last to go overseas. In March of 1971, a new Commandant was assigned to the activity. After having reviewed DLIEL Memorandum 690-1, he concluded that the operation of the rotation roster should be reversed so that the instructors with the most tenure would be the first to be sent overseas. In this connection the Commandant met with the president of the union to discuss such a proposed change, and it was agreed that the rotation roster should be changed as proposed by the Commandant. A draft of a revised DLIEL Memorandum 690-1 was then prepared by the Commandant, and sent to Defense Language Institute (DLI) Headquarters in Washington, D.C. for review and inspection. At Headquarters, however, it was decided that any rotation system based solely on tenure would be contrary to Civil Service Commission regulations. As a result, a new headquarters regulation, DLI Regulation 690-2, was prepared by DLI and sent to the activity in April 1972. The new regulation, which superseded DLIEL Memorandum 690-1, provided for an overseas selection system based on experience and qualifications. The regulation was issued by DLI Headquarters and was deemed applicable to employees at the activity as well as other employees at other activities under DLI. The Commandant of the activity, upon receipt of the new regulation, held a meeting with union officials to inform them that it now governed selection for overseas assignments. The union officials objected that they had not been consulted with regard to the adoption of the regulation, to which the Commandant replied that there was no need for the activity to consult with the union because the regulation had been issued by DLI Headquarters. In subsequent months, the union and the activity met to discuss DLI Regulation 690-2, the union arguing that the regulation should be rescinded while the activity contended that such action could not be taken. These discussions culminated in the filing of the subject unfair labor practice complaint by the union.

The Assistant Secretary, in his decision, held that the activity was not obligated to meet and confer with the union over the adoption of DLI Regulation 690-2. In reaching this conclusion, the Assistant Secretary cited 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. In particular, he made reference to those portions of the decision wherein the Council stated that:

. . . higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations . . . [and] . . . the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope

of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity.^{2/}
[Emphasis in original.]

Based on the Merchant Marine decision, the Assistant Secretary found that DLI Regulation 690-2 was not inconsistent with section 11(a) of the Order,^{3/} because it was issued to achieve "a desirable degree of uniformity and equality" on a matter common to employees of more than one subordinate activity of the Defense Language Institute.^{4/} Accordingly, the Assistant Secretary concluded that the issuance of DLI Regulation 690-2 removed the matter of overseas assignments from the scope of negotiations at the local level, and therefore, that the activity had not violated section 19(a)(6) of the Order. The union appealed the Assistant Secretary's decision to the Council. The Council found that a major policy issue was presented and accepted the union's petition for review. The union and the agency (the Department of the Army) filed briefs with the Council.

2/ United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972), Report No. 30, at 6.

3/ Section 11(a) of the Order 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, 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

4/ In this regard, the Assistant Secretary relied on the testimony of the civilian personnel advisor for DLI at the unfair labor practice hearing, who testified that DLI Regulation 690-2 applies to employees outside the English Language Branch of DLI and to employees outside DLI itself. Specifically, the civilian personnel advisor stated that ". . . any persons within these other branches that are qualified and come up on the best qualified list will also be included on the referral."

Opinion

The major policy issue presented is as follows: Whether the Assistant Secretary correctly applied the Council's decision in Merchant Marine, supra, in holding that the activity was not obligated, under section 11(a) of the Order, to meet and confer with the union over the adoption of DLI Regulation 690-2. As already indicated, the Assistant Secretary held, in essence, that because DLI Regulation 690-2 provides that qualified employees outside the activity^{5/} may be included on referral lists used in making overseas assignments, it is a regulation which, pursuant to the Council's Merchant Marine decision, may appropriately limit the scope of negotiations between the union and the activity. The Council disagrees with the Assistant Secretary's holding for the reasons specified below.

In the Merchant Marine case, we were confronted with a situation wherein the union submitted for negotiation two proposals relating to faculty compensation at the Merchant Marine Academy, and the agency held them to be nonnegotiable, in part because they were contrary to agency regulations, as interpreted by the agency head. One of these regulations was issued by agency authority above the Merchant Marine Academy, and established the salary plan and schedule for certain professional employees of the Merchant Marine Academy, a single activity of the agency. In these circumstances the Council concluded that to permit an agency unilaterally to limit the scope of bargaining on otherwise negotiable matters peculiar to an individual unit, in a single field activity, merely by issuing a regulation at a higher level, would be an improper dilution of the section 11(a) bargaining obligation. With regard to the 11(a) bargaining obligation we stated, as quoted in part by the Assistant Secretary in his decision, that:

. . . the policies and regulations referred to in section 11(a) as an appropriate limitation on the scope of negotiations are ones issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity. Any other interpretation of the phrase "published agency policies and regulations," in the context of the Order, which would permit ad hoc limitations on the scope of negotiations in a particular bargaining unit, would make a mockery of the bargaining obligation. [Emphasis in original.]

^{5/} It appears to be uncontroverted from the record of this case that the English Language Branch of DLI consists of only one activity, located at Lackland Air Force Base, Texas.

Also in connection with the published agency policies and regulations referenced in section 11(a), we stated that:

. . . higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations. . . .
[Emphasis supplied.]

In conclusion, we held in Merchant Marine, among other things, that the subject agency regulation could not properly render the union's proposal nonnegotiable, and the agency head's determination of nonnegotiability was set aside.

To determine whether the Assistant Secretary correctly applied the Merchant Marine decision to the regulation in the instant case, we must resolve the issue of whether or not DLI Regulation 690-2 is "applicable uniformly" to more than one activity. Contrary to the Assistant Secretary, we find that the regulation is not so applicable, but is rather "applicable uniformly" only to the employees of one activity.

An analysis of the terms of DLI Regulation 690-2 supports this finding. Sections 1 and 2 of the regulation provide as follows:

1. PURPOSE. The purpose of this regulation is to establish the policies and procedures by which Defense Language Institute, English Language Branch (DLIEL) personnel will be selected for overseas assignments.
2. SCOPE. This regulation applies to all DLIEL employees who have career or career conditional status and who are serving in positions classified in the 1700 Education and Training Occupational Group. . . . [Emphasis supplied.]

It is clear from the face of these provisions that the drafters of the regulation intended its purpose and scope to be limited to employees of the English Language Branch of DLI only, which consists only of the one activity located at Lackland Air Force Base, Texas.

As already indicated, the Assistant Secretary, in his decision, made reference to the testimony of the civilian personnel advisor for the DLI that DLI Regulation 690-2 applies to employees outside the English Language Branch, because these employees, if qualified, will be included on referral lists to be used in making overseas assignments. This constituted sufficient evidence for the Assistant Secretary to find that the regulation is applicable to employees of other branches of DLI. The agency, in its brief, argues along the same line, making reference to paragraph 3.i. of the regulation, which provides as follows:

i. All placement actions and subsequent administration of DLIEL LTD positions will be accomplished in accordance with governing civilian personnel regulations. Simultaneous consideration must be given to both voluntary Army applicants outside the minimum area of consideration and applicants outside of DA [Department of the Army] as required by FPM Chapter 335 and CPR 300 (Ch. 12), Chapter 335.

Hence, because consideration must be given to voluntary applicants outside the minimum area of consideration, the agency concludes that DLI Regulation 690-2 is applicable to more than one activity, and may therefore properly limit the scope of negotiations on overseas assignments.

We do not believe that because a regulation requires activity management to consider employees from outside the activity for job assignments, that the regulation is therefore "applicable uniformly to more than one activity," within the meaning of Merchant Marine.

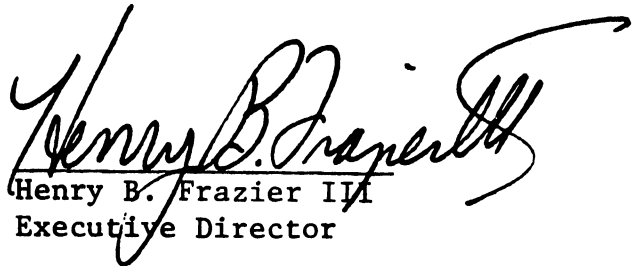
The kind of regulation which we found to be an appropriate limit on the scope of negotiations in Merchant Marine was one "issued to achieve a desirable degree of uniformity and equality in the administration of matters common to . . . employees of more than one subordinate activity." [Emphasis in original.] Implicit in this language is the principle that the regulation must deal with matters that are administered at more than one subordinate activity. Thus, the fact that the regulation may affect employees at more than one subordinate activity is not sufficient. A policy or regulation referred to in section 11(a) of the Order as an appropriate limitation on the scope of negotiations must direct itself to the management of more than a single subordinate activity. It must be directed to the management of more than one subordinate activity and deal with the administration of matters which are common to those activities. The regulation in this case, however, appears to us to be clearly directed to the management of a single activity, and only affects employees outside the activity in an indirect and limited way. More specifically, it appears to establish a procedural framework for the voluntary consideration of employees outside the English Language Branch for selection by that Branch for overseas assignments. Consequently, it is not a regulation which is "applicable uniformly to more than one activity," in that it is not directed to a manager or managers of more than one subordinate activity, providing guidance concerning matters common to employees of these activities.^{6/} We therefore find, contrary

^{6/} In its opposition to the union's petition for review in this case, the agency stated that career referral lists compiled since DLI Regulation 690-2 took effect have included employees from outside the English Language Branch, and that at least one employee from outside the English Language Branch has been selected for an overseas position. However, based on our holding in this case, we find these facts to be without weight.

to the Assistant Secretary and the contentions of the agency, that DLI Regulation 690-2 may not serve as an appropriate limitation on the scope of the negotiations at DLIEL on overseas assignments under section 11(a), pursuant to our holding in Merchant Marine.

Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure [5 CFR 2411.17(b)], we remand this case to the Assistant Secretary for further proceedings as to the resolution of the subject unfair labor practice complaint, in a manner consistent with our holding herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: October 25, 1974.

Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412 (RO). The Assistant Secretary upheld the Assistant Regional Director's denial of a request by the incumbent union, National Federation of Federal Employees, Local No. 179 (NFFE), to intervene in a representation proceeding initiated by American Federation of Government Employees, AFL-CIO. The Assistant Secretary found that NFFE had failed to show good cause for its failure to comply with his regulation (section 202.5(c)) requiring simultaneous service on interested parties of such a request to intervene, or to raise any material issue which would warrant reversal of the Assistant Regional Director's action. The Council accepted the Assistant Secretary's decision for review, finding that a major policy issue was present, namely: The procedural responsibility of the Assistant Secretary under the Order in the processing of matters brought before him pursuant to his regulations--noting particularly in this case that the Acting Area Administrator had initially, within the critical ten-day period, informed the other parties that NFFE "has intervened in this matter pursuant to section 202.5 of the Regulations of the Assistant Secretary and will be permitted to participate in these proceedings" (Report No. 51).

Council action (October 30, 1974). The Council held that the Assistant Secretary is empowered to prescribe regulations needed to administer his functions under the Order; that section 202.5 of his regulations is a proper exercise of his authority; and that the Assistant Secretary as the issuer of the subject regulation is responsible for its interpretation and implementation. However, the Council further ruled 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 the right of employees to select their exclusive representative may be abridged. The Council concluded that under the particular circumstances of the case, the Assistant Secretary's application of his regulations did not assure that NFFE's right to participate in the proceeding was protected and the denial of NFFE's intervention in the case abridged the right of the affected employees to select the exclusive representative of their choice and was therefore inconsistent with the purposes of the Order. The Council set aside the Assistant Secretary's denial of NFFE's intervention request and remanded the matter to the Assistant Secretary for appropriate action consistent with the decision of the Council.

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

Department of the Air Force
Ellsworth Air Force Base,
South Dakota

and

National Federation of Federal
Employees, Local No. 179

Assistant Secretary
Case No. 60-3412 (RO)
FLRC No. 73A-60

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 denial of a request by the National Federation of Federal Employees (NFFE) to intervene in a representation proceeding

The American Federation of Government Employees, AFL-CIO (AFGE) filed a petition for exclusive recognition between the 90th and 60th date preceding the expiration of an agreement between the activity and NFFE, which had been the exclusive representative of the employees in the unit sought for nearly eight years. NFFE was notified in writing by the Area Office of the filing of the petition and given instructions as to the required procedures necessary for it to request intervention in the proceeding. Of significance to the instant case is the fact that the letter made no mention of a requirement for simultaneous service of such a request on the other parties to the case. NFFE filed a timely request to intervene in the proceedings and the Area Administrator subsequently notified NFFE, AFGE and the activity (during the ten-day intervention period) that NFFE had intervened in the case and would be permitted to participate in the proceedings. However, after the close of the ten-day intervention period a motion was filed by the activity seeking dismissal of the request for intervention on the basis of the fact that NFFE had failed to serve simultaneously the request on all interested parties. Subsequent to an order to show cause why the request for intervention should not be dismissed, the Assistant Regional Director granted the agency's motion for dismissal of NFFE's request for intervention.

Upon a request for review filed by NFFE, the Assistant Secretary upheld the Assistant Regional Director's denial of the request to intervene, finding that NFFE had failed to show good cause for its failure to comply

with section 202.5(c)^{*/} of the Assistant Secretary's regulations or to raise any material issue which would warrant reversal of the Assistant Regional Director's action. The Assistant Secretary also noted that the simultaneous service requirement was clearly set out in the "Notice to Employees" (LMSA 1102) which had been posted by the activity.

The Council accepted the Assistant Secretary's decision for review, finding that a major policy issue was present, namely: The procedural responsibilities of the Assistant Secretary under the Order in the processing of matters brought before him pursuant to his regulations--noting particularly in this case that the Acting Area Administrator had initially, within the critical ten-day period, informed the other parties that NFFE "has intervened in this matter pursuant to section 202.5 of the Regulations of the Assistant Secretary and will be permitted to participate in these proceedings."

Opinion

Section 6(a) of the Executive Order provides for the functions of the Assistant Secretary, including the responsibility to decide questions as to appropriate unit for the purpose of exclusive recognition and related issues, and supervising elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certifying the results. Section 6(d) empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order. Clearly section 202.5(c) of the Assistant Secretary's regulations, which is part of the procedure whereby decisions are made as to appropriate unit and participation in elections to determine an exclusive representative, is a proper exercise of the Assistant Secretary's authority. Moreover, the Assistant Secretary, as the issuer of the regulation is responsible for its interpretation and implementation. However, 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.

*/ Section 202.5(c) provides:

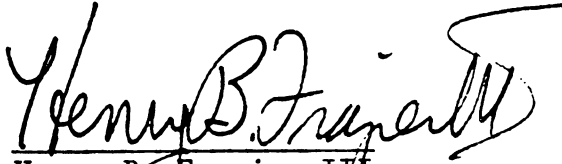
(c) No labor organization may participate to any extent in any representation proceeding unless it has notified the Area Administrator in writing, accompanied by its showing of interest as specified in paragraph (a) of this section, of its desire to intervene within ten (10) days after the initial date of posting of the notice of petition as provided in § 202.4(a), unless good cause is shown for extending the period. Simultaneously with the filing of a request for intervention, copies of such request, excluding the showing of interest, shall be served on all known interested parties, and a written statement of such service shall be filed with the Area Administrator.

In the instant case, the NFFE local was the incumbent exclusive representative and its identity and status were known to the AFGE and the activity. The Area Administrator communicated with the NFFE local and provided it with what appeared to be a complete statement of the requirements of the intervention procedure. His letter set forth in some detail the process of complying with section 202.5 of the Assistant Secretary's rules, but made no mention of the requirement for simultaneous service of the intervention request on all interested parties. NFFE's local president thereafter complied with all of the stated requirements and was subsequently informed that NFFE was in compliance with the rules and had been permitted to intervene. This notice was issued when there was time available for NFFE to correct the deficiency in its intervention, that is, to perform the ministerial act of serving the other parties with its request to intervene within the prescribed time period for intervention. Moreover, the other parties had actual notice of NFFE's intervention request in that they had received copies of the Area Administrator's letter granting the request so the purpose of the service requirement had been met.

Under the circumstances of this case, as described above, we conclude that the Assistant Secretary's application of his regulations did not assure that NFFE's right to participate in the proceeding was protected and, moreover, the denial of NFFE's intervention in this case abridged the right of the affected employees to select the exclusive representative of their choice. Accordingly, we find that the Assistant Secretary's denial of NFFE's intervention was inconsistent with the purposes of the Order.

For the foregoing reasons, and pursuant to section 2411.17 of the Council's rules of procedure, we set aside the Assistant Secretary's denial of NFFE's request for review of the Assistant Regional Director's denial of NFFE's intervention request and remand the matter to the Assistant Secretary for appropriate action consistent with this decision of the Council.

By the Council.


Henry B. Frazier IV
Executive Director

Issued: October 30, 1974.

U.S. Marshals Service, District of Columbia, Assistant Secretary Case No. 22-5174 (RO). The Assistant Secretary upheld the Assistant Regional Director's dismissal of a cross-representation petition filed by the U.S. Marshals Association, Ind., finding that the cross-petition was not timely filed; that insufficient evidence was adduced of any prejudicial statements or conduct of any area office employee; and that allegations by the Marshals Association concerning the legality and validity of the waiver of exclusive recognition by American Federation of Government Employees Local 2272 would not be considered, being raised for the first time in the request for review submitted to the Assistant Secretary. The Marshals Association appealed to the Council, contending that the decision of the Assistant Secretary appears arbitrary and capricious because of his refusal to consider allegations erroneously found to be raised for the first time on appeal, and his refusal to explain the area office policy in counting the posting period; and that a major policy issue is presented as to whether an officer of a local may waive exclusive recognition or whether local members must be given an opportunity to vote on the matter.

Council action (October 30, 1974). The Council held that the Assistant Secretary's decision does not appear arbitrary and capricious since it does not appear that the Assistant Secretary acted without justification in his findings. The Council noted in this regard that the Assistant Secretary relied upon established policy reflected in his rules and in his previously published Report Number 46. The Council also held that the subject decision does not present a major policy issue, since no persuasive reasons were advanced for overturning the Assistant Secretary's policy that an officer of a labor organization may waive exclusive recognition. Accordingly, without passing on the timeliness of the Marshals Association appeal to the Council, the Council denied review of the appeal under section 2411.12 of the Council's rules of procedure (5 CFR 2411.12). The Council likewise denied various procedural requests by the Marshals Association.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 30, 1974

Mr. Wallace G. Roney
Acting President
U.S. Marshals Association, Ind.
P.O. Box 1349
Washington, D.C. 20013

Re: U.S. Marshals Service, District of
Columbia, Assistant Secretary Case
No. 22-5174 (RO), FLRC No. 74A-35

Dear Mr. Roney:

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

The Assistant Secretary upheld the Assistant Regional Director's dismissal of an RO petition filed in the above named case by the Washington, D.C. United States Marshals Association, Ind. In doing so he found: (1) that the subject cross-petition was not timely filed in accordance with Section 202.5(b) of his Regulations and in the absence of sufficient evidence establishing good cause for extending the posting period of the initial petition (Case No. 22-5070 (RO)); (2) no indication of any improper statements or conduct on the part of any LMSA Area Office employee (other than your bare assertions) which in any way might be prejudicial to the union's position; and (3) allegations concerning the legality and validity of the American Federation of Government Employees, Local 2272's waiver of exclusive recognition would not be considered because it was raised for the first time in the request for review.

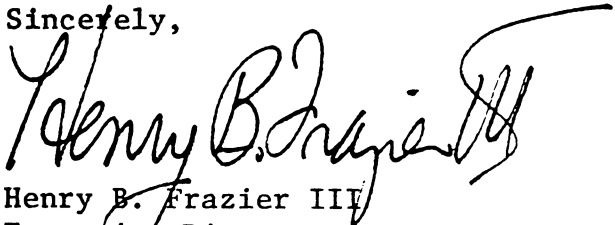
In your appeal you contend, in summary, that the decision of the Assistant Secretary is arbitrary and capricious because of his refusal to consider allegations erroneously found by the Assistant Secretary to be raised for the first time on appeal, concerning the "illegal and invalid" waiver of exclusive recognition by AFGE and the posting of the notice of petition during a period when 85% of the employees at the Marshals Office were on leave or detail, and his refusal to explain the Washington Area Office policy "in counting the ten-day posting period in a nationwide petition." Additionally, in effect, you contend that the Assistant Secretary's decision presents a major policy issue as to whether an officer of a Local may waive exclusive recognition or whether Local members must be given an opportunity to vote on the matter. The appeal also requested the Council to stay the Assistant Secretary's decision and to hold the AFGE petition in abeyance pending the Council decision in the instant appeal.

In our view, your petition for review of the Assistant Secretary's decision does not meet the requirements of Section 2411.12 of the Council rules; his findings and decision do not appear arbitrary and capricious nor do they present a major policy issue. With respect to your contentions, it does not appear that the Assistant Secretary acted without reasonable justification in his decision. Instead, the Assistant Secretary relied upon established policy reflected in his rules and previously published Report Number 46. Further, your appeal presents no persuasive reasons for overturning the Assistant Secretary's policy that an officer of a labor organization may waive exclusive recognition. Therefore, we conclude that the Assistant Secretary's decision does not present a major policy issue.

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 as provided under Section 2411.12 of the Council's rules of procedure. Likewise the Council has directed that the union's requests for stays be denied under Section 2411.47(c) of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

K. Holecko
Dept. of Justice

C. Webber
AFGE

National Labor Relations Board, Region 17, and National Labor Relations Board, and David A. Nixon, Assistant Secretary Case No. 60-3035 (CA). Pursuant to section 2411.4 of the Council's rules (5 CFR 2411.4) and section 203.25(d) of his regulations (29 CFR 203.25(d)), the Assistant Secretary referred to the Council for decision the present case as concerns the following major policy issues: (1) Whether applicable laws and regulations, including Federal Personnel Manual policies, preclude an employee or his representative from seeing and adducing evidence from another employee's appraisal in an unfair labor practice proceeding held pursuant to section 6(a)(4) of the Order; and (2) if an employee or his representative is so precluded, does such prohibition apply also to the Assistant Secretary, his representatives and/or Administrative Law Judges acting pursuant to their responsibilities under the Order?

Council action (October 31, 1974). On the basis of the Civil Service Commission's interpretation of the Federal Personnel Manual directives relating to the two major policy issues posed, the Council held that the FPM: (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 specific guidelines, as found for example in the Handbook for Discrimination Complaints Examiners, published by the Commission in April 1973. The Council determined that procedures similar to those enumerated in the Handbook are consistent with the purposes of the Order, thus enabling the Assistant Secretary to carry out his responsibilities under the Order to decide unfair labor practices, using all the necessary and relevant facts while protecting the Federal employee's right to privacy, as required under applicable law and regulation.

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."

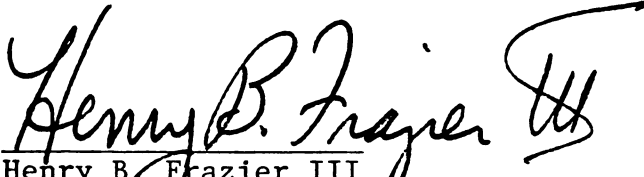
The above illustrations are cited not to suggest their specific applicability in the case at hand but rather to illustrate how the policy of nondisclosure of supervisory appraisals cited in Chapter 335 of the Federal Personnel Manual may be accommodated in open proceedings where a formal file or record 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

NFFE Local 997 and Ames Research Center, National Aeronautics and Space Administration, Moffett Field, California. The agency head issued a determination as to the nonnegotiability of a proposal submitted by NFFE Local 997, which determination was properly served on the local on June 13, 1974. Under the Council's rules of procedure, any appeal from this determination was due in the Council's office no later than July 3, 1974. However, apparently as a result of a delay in communication between the local and the union's national office concerning the agency head determination and the local's desire to initiate an appeal, the subject appeal was not filed until August 2, 1974.

Council action (October 31, 1974). The Council ruled that the delay in communication which here occurred does not warrant the waiver by the Council of the time limit in its rules, citing its earlier decision in NFFE Local 1633 and U.S. Department of Agriculture, Federal Crop Insurance Corporation, FLRC No. 73A-14 (May 22, 1973), Report No. 39. Accordingly, as the appeal was untimely filed, and apart from other considerations, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 31, 1974

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

Re: NFFE Local 997 and Ames Research Center,
National Aeronautics and Space Administration,
Moffett Field, California, FLRC No. 74A-55

Dear Mr. Helm:

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

The Council has carefully considered all the documents submitted in this case, including your petition and the statement of position filed by the agency. For the reasons indicated below, the Council has determined that your petition cannot be accepted for review.

Section 2411.23(b) of the Council's rules specifically provides that an appeal must be filed within 20 days from the date the agency head's determination was served on the labor organization. Under section 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 Council has been administratively advised by the union and the agency that the agency head's determination in this case was served on NFFE Local 997 on June 13, 1974; therefore, absent any extension of time granted by the Council, your appeal was due on July 3, 1974. Your petition for review was filed with the Council on August 2, 1974.

You assert in your appeal that the date of July 17, 1974 should be used in determining whether the petition is timely. You indicate in this regard that, although the national office of NFFE had corresponded with NASA headquarters before the agency head determination had been made, the national office was not served with a copy of the determination and was unaware of the determination until the president of NFFE Local 997 contacted the national office to request an appeal to the Council. The national office then requested a copy of the determination from NASA

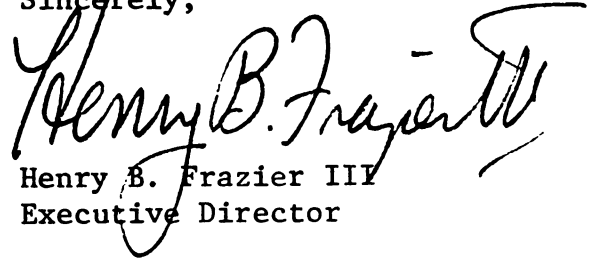
headquarters, which copy was received on July 17, 1974 and it is this date, as already mentioned, which you contend should constitute the date of service on the union. We cannot agree with your contention.

According to the record, the correspondence from NFFE's national office to the agency, before the agency head's determination, stated: "We have suggested to our local that they move immediately to request local management to request a ruling from your office of the negotiability of this issue" (emphasis added). The agency head's determination of non-negotiability subsequently was issued regarding Local 997's proposal and was properly served on the Local. While there appears to have been a delay in communication between Local 997 and the national office of NFFE regarding the agency head's determination and the local's desire for an appeal of that determination to the Council, such delay does not warrant the waiver by the Council of the time limit in its rules. See NFFE Local 1633 and U.S. Department of Agriculture, Federal Crop Insurance Corporation, FLRC No. 73A-14 (May 22, 1973), Report No. 39.

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

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. C. Fletcher
NASA

Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator). The Council accepted the agency's petition for review of the arbitrator's award, which award ordered the agency to promote the grievant retroactively with backpay, on the ground that: (1) the arbitrator assertedly exceeded his authority by failing to decide the question submitted to arbitration and by deciding issues not included therein, and (2) the award assertedly violated the Back Pay Act and its implementing regulations (Report No. 45).

Council action (November 6, 1974). The Council found that the arbitrator decided the question submitted to arbitration, that he did not determine issues not included in that question, and that he did not exceed his authority. Further, based on the advice of the Civil Service Commission, which agency is authorized under the Back Pay Act to prescribe regulations to implement that Act, the Council held that the award does not violate the Back Pay Act (5 U.S.C. § 5596) and the implementing CSC regulations (5 CFR 550.803). Accordingly, pursuant to section 2411.37(b) of its rules of procedure (5 CFR 2411.37(b)), the Council sustained the arbitrator's award.

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

Small Business Administration

and

FLRC No. 73A-44

American Federation of Government
Employees, Local 2532

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's determination that the agency's failure to promote the grievant, Leonard A. Rosen, to a GS-14 position violated the parties' negotiated agreement,^{1/} and from the arbitrator's award ordering the agency to promote Rosen retroactively to the GS-14 position with backpay.

Based on the findings of the arbitrator and the entire record, the circumstances of the case appear as follows:

In October 1972, the agency decided to add a Program Development Specialist, GS-14, position in its Procurement and Management Assistance (PMA), Office of Business Development (OBD), Project Development Division, Washington, D.C., where, at the time, there were two incumbents in that classification. The agency gave notice of the vacancy by posting a job opportunity announcement and Rosen, a Price Analyst, GS-13, in PMA/OBD, was one of the candidates. According to the arbitrator, it was undisputed that Rosen was properly selected for the position on November 30, 1972. On that date, the selecting official called Rosen, then on vacation, and notified him that he had been selected to fill the position. The selecting official advised the agency's personnel office of Rosen's selection and, on December 2, 1972, that office notified the unsuccessful candidates of Rosen's selection.

The personnel office also received a Form SF-52^{2/} requesting that Rosen's promotion be effected. The only step remaining for the personnel office was to make on a Form SF-50^{3/} a written memorial of Rosen's promotion since, according to the arbitrator, the Form SF-52 had, in effect, all necessary

1/ In so deciding, the arbitrator also determined that the agency violated the agency's merit promotion program and the Federal Personnel Manual (FPM).

2/ Civil Service Commission (CSC) Standard Form 52 titled "Request for Personnel Action."

3/ CSC Standard Form 50 titled "Notification of Personnel Action."

concurrences^{4/} and the administrator had delegated authority to the personnel director to execute Form SF-50's without further approval. However, the agency delayed execution of a Form SF-50 for Rosen until signed concurrences of his selection at the associate and/or assistant administrator levels were obtained on a CO Form 164^{5/} as required by agency internal administrative procedures. Under those procedures, all promotions to GS-13 positions and above had to have such concurrences. The arbitrator found that the agency's use of CO Form 164, which was not incorporated in the agency's merit promotion program, was not permissible under either the agreement, the agency's merit promotion program or the FPM. A partially completed CO Form 164 with the notation "within authorized ceiling" was seen in Rosen's personnel file and copied by the grievant and union president. The personnel director testified that he was not aware of the existence of the incompleated form; the agency was unable to produce it at the arbitration hearing because, according to the arbitrator, it had been removed or destroyed.

About November 30, 1972, the date that Rosen was selected, the agency made a decision to reduce the number of positions in PMA from 94 to 86; one of the positions to be eliminated was the third position of Program Development Specialist for which Rosen had been selected. This decision was announced at an agency management meeting on December 11, 1972. In the meantime, on December 8, 1972, the associate administrator of PMA requested the personnel director to cancel the job opportunity announcement of the vacancy, which Rosen had been selected to fill, due to the "recent reduction in the PMA's Central Office personnel ceiling which has necessitated a reordering of priorities."

On December 14, 1972, personnel posted another job opportunity announcement cancelling the prior job opportunity announcement of the vacancy in dispute. On December 18, 1972, the personnel office returned to Rosen his original application with notations informing him that the prior job opportunity announcement had been cancelled, and that its previous notification to Rosen of his selection for the GS-14 position was amended. After the vacancy was cancelled, a third employee, already classified as a GS-14, was brought in to do the work of Program Development Specialists along with the two other GS-14's.

Rosen filed a grievance, joined in by the union, stating that the basis of the grievance is the "agency's violation of the General Agreement Article XXII, Merit Staffing and Promotion" and, more specifically, alleging a

^{4/} According to the arbitrator, the agency admittedly had destroyed the Form SF-52 for Rosen by the time of the arbitration hearing.

^{5/} The agency's CO Form 164 is titled "Proposed Personnel Actions Review Sheet."

violation of Article XXII, i, of the General Agreement.^{6/} The grievance requested that the violation be remedied by the promotion of Rosen to the position of Program Development Specialist, GS-14, with backpay to December 10, 1972.

The agency denied the grievance on the grounds that the position for which Rosen had been "tentatively" selected was eliminated when personnel ceilings were reduced after the President's freeze directive (dated December 12, 1972, and ordering a freeze on all hirings and promotions),^{7/} and its internal administrative procedures had not been completed prior to the freeze.

The parties ultimately submitted the grievance to arbitration.

The Arbitrator's Award

The parties did not enter into a submission agreement formulating the question or questions to be posed to the arbitrator^{8/}; instead, they submitted

6/ Section i of Article XXII (Merit Staffing and Promotions) provides:

If there are a sufficient number of basically qualified candidates to require the convening of a Merit Promotion Panel, such panel shall designate those who are best qualified. In any case in which a panel has designated at least five persons as best qualified, the selecting official shall select from among those designated best qualified.

7/ On the following day (December 13, 1972), the CSC issued questions and answers about the freeze, which in relevant part stated:

. . . where an authorized official has offered a promotion to a properly selected employee prior to the President's directive, the promotion may be made.

The arbitrator therefore concluded that the agency was not justified in using the freeze as an excuse for not promoting Rosen and, moreover, that the agency's statement the personnel ceilings were reduced after the Presidential freeze was factually incorrect because the PMA associate administrator had acted to cancel the vacancy on December 8 before the freeze order was issued on December 12, 1972.

8/ However, the agency contends, in effect, that the parties' joint letter to the Federal Mediation and Conciliation Service requesting a panel of arbitrators was a form of submission agreement. The agency states, without contradiction, that the parties agreed there the issue to be determined by the arbitrator was:

[T]he interpretation of Article XXII(i) of the General Agreement. The Union's position prior to this letter was the same. (Citations omitted.)

their separate versions. The arbitrator in his decision formulated the issue as follows:

Did SBA violate Article XXII, i, of the General Agreement between SBA and AFGE, Local 2532, by not promoting the Grievant, Leonard Rosen, to the position of Program Development Specialist, GS-14, after he had been selected to fill this position?

The parties do not challenge this formulation of the issue. However, both the agency and the union, without objection, presented evidence and arguments on other issues such as the meaning and the applicability of the agency's merit promotion program and the FPM to the grievant's case. (It should be noted that Article XXII makes specific reference to the agency's merit promotion program, which was adopted in accordance with requirements established in the FPM, Ch. 335, Subch. 2.)

The arbitrator determined that the grievance should be granted on the grounds that the agency's course of action following the grievant's selection for the GS-14 position was in violation of the agreement. In so deciding, he also determined that the agency had violated FPM requirements, and the agency's merit promotion program. As a remedy, his award ordered the agency to place Rosen in the position of Program Development Specialist, GS-14, effective December 10, 1972, and to reimburse him for any losses he may have suffered from December 9, 1972, to the date he is placed in the GS-14 position.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it relates to two exceptions. One exception alleges that the arbitrator did not decide the question submitted to arbitration and determined issues not included in the question submitted to arbitration, and thereby exceeded his authority. The other exception alleges that the award violates the Back Pay Act (5 U.S.C. § 5596) and the implementing regulations prescribed by the CSC (5 CFR 550.803). The Council also granted the agency's request for a stay pending the Council's determination of the instant appeal.

Both the agency and the union filed briefs.

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, . . . or other grounds similar to those applied by the courts in private sector labor-management relations."

We consider first the agency's exception alleging that the arbitrator exceeded his authority by failing to decide the question submitted to arbitration and by deciding issues not included in the question submitted. As previously stated, the arbitrator's unchallenged formulation of the issue^{9/} in this case is:

Did SBA violate Article XXII, i, of the General Agreement between SBA and AFGE, Local 2532, by not promoting the Grievant, Leonard Rosen, to the position of Program Development Specialist, GS-14, after he had been selected to fill this position?

When the substance of his award is examined, it is clear that the arbitrator answered the question at issue, i.e., the alleged violation of Article XXII, i. As previously stated, the arbitrator determined that the agency had violated the agreement which, of course, includes Article XXII, i. This general determination clearly encompasses the arbitrator's answer to the specific question at issue. Furthermore, the award granted the grievance, and the agency itself contends that the violation of Article XXII, i, was the only issue raised by the grievance.

The agency also alleges that the arbitrator neglected to "interpret" or to discuss the meaning of Article XXII, i, and that he did not mention Article XXII, i, in his opinion accompanying the award. However, as the Council has indicated, it is the award rather than the conclusion or the specific reasoning employed that is subject to challenge. 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. The arbitrator is not required to discuss the specific agreement provision involved; nor does the fact that the opinion accompanying his award did not mention Article XXII, i, establish that the arbitrator did not rule upon it. See, e.g., Meat Cutters, Local 195 v. Cross Brothers Meat Packers, 85 LRRM 2935, 2937 (E.D. Pa. 1974) and cases cited therein. In this regard, the Supreme Court stated in United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960) that:

* * * A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. * * *

9/ In the absence of a submission agreement, as in this case, 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.

These principles regarding the interpretation of negotiated provisions are likewise applicable in the Federal sector under section 2411.32 of the Council's rules of procedure.

The agency contends that the arbitrator determined issues not included in the question at issue when he also determined that the agency had violated the agency's merit promotion program and FPM rules and regulations. In this regard, the agency relies on the Council's decision in FLRC No. 72A-3, stating that: ". . . if the arbitrator's award determines an issue not included in the subject matter submitted to arbitration, a challenge to the award will be sustained on the ground that the award is in excess of his authority." The agency's reliance on that portion of the decision is misplaced. The Council's decision in FLRC No. 72A-3 also stated that:

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

Moreover, as stated previously, both parties presented, without objection, their respective positions on the meaning and applicability of the agency's merit promotion program and the FPM to the grievant's case. Thus, the arbitrator of necessity considered and decided the meaning of CSC requirements in the FPM pertaining to agency merit promotion programs as well as the agency's own regulations establishing such a program in order to decide the specific question at issue. In the Federal sector, arbitrators in resolving grievances under negotiated agreements must often consider the meaning of law and regulations, including the FPM, since the agreements often deal with substantive matters which are also covered by such law or regulations. Cf. Local Lodge 830, International Association of Machinists and Aerospace Workers, and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974), Report No. 48 at pp. 6-7 of the Council's decision. Moreover, as previously stated, the agency's merit promotion program, which was established pursuant to the FPM, was specifically referenced in the negotiated agreement itself in this case. Therefore, we are of the opinion that the specific question at issue necessarily included the issues of the agency's alleged violation of the agency's merit promotion program and the FPM.

We are of the opinion that the arbitrator decided the question submitted to arbitration, that he did not determine issues not included in that question, and that he did not exceed his authority.

As previously stated, the other question before the Council is whether the arbitrator's award violates the Back Pay Act (5 U.S.C. § 5596) and CSC implementing regulations (5 CFR 550.803).

Since the Civil Service Commission is authorized, under 5 U.S.C. § 5596, to prescribe regulations to carry out the provisions of the Act, that agency

was requested, in accordance with Council practice, for an interpretation of the Back Pay Act and the implementing CSC regulations as they pertain to the arbitrator's award of backpay in this case. The Civil Service Commission replied in pertinent part as follows:

The arbitrator granted the grievance and ordered the SBA to place the grievant, Leonard Rosen, in the position of Program Development Specialist, GS-301-14, as of December 10, 1972, and to pay him the salary he lost beginning on that date to the date of corrective action. The award was based on the finding that the SBA's merit promotion program, and the CSC rules and regulations were violated by the failure to promote the grievant to the GS-14 position.

Our examination and view of the file of the written opinion and findings of the arbitrator upon which his award was based disclose that the grievant was promoted, and, further, that the arbitrator found that the grievant was promoted and that the promotion was subsequently cancelled. He found that the grievant was selected for promotion and that the SF-52 prepared to effect the promotion had all necessary concurrences. He further found that CO Form 164, the completion of which was a requirement beyond that necessary to complete promotion, was itself partially completed, but that both CO Form 164 and SF-52 were subsequently destroyed to "wipe out" the promotion and defeat the grievant's right to the position. The arbitrator found:

"As I review SBA's action, it had already exercised its right to promote grievant and he was entitled to be put in that position. If having done that, management then wished to reduce jobs because of ceiling requirements, it would have had to do so with the grievant occupying the new GS-14 position, not with him occupying his old GS position."

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).

It is also generally held that the completion of the acts requisite and necessary to complete an appointment includes some kind of written memorial of the fact emanating from the appointing power. The personnel action, in this case promotion, cannot be defeated by the destruction of the memorial or other record of the action. Form SF-50 is not a requisite to a personnel action, it is a report that a personnel action was taken. Mr. Leonard Rosen, the grievant in this case was promoted when the appointing power had expended itself by the completed exercise of all discretionary acts necessary to promote. The failure to perform ministerial acts, or the destruction of any memorial of the completed action, did not affect Mr. Rosen, whose right to the promotion had vested.

The arbitrator's finding that the promotion should be given effect December 10, 1972, was a reasonable exercise of the arbitrator's authority and discretion. The acceptance by the agency of his finding is sufficient administrative determination that Mr. Rosen underwent an unjustified or unwarranted personnel action in the agency's failure to pay him the salary of the position to which it had promoted him.

In view of the foregoing, there does not appear to be a question of retroactive promotion. Rather, the arbitrator recognized the existence of a fact or event that occurred December 10, 1972. Mr. Rosen is therefore entitled to the salary properly attendant to the higher grade, beginning December 10, 1972.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the arbitrator's award does not violate the Back Pay Act (5 U.S.C. § 5596) and the implementing regulations (5 CFR 550.803) prescribed by the CSC.

Conclusion

For the foregoing reasons, we find that the arbitrator did not exceed his authority and that his award does not violate the Back Pay Act (5 U.S.C. § 5596) and the implementing regulations (5 CFR 550.803) prescribed by the CSC. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 6, 1974

Mid-America Program Center, Social Security Administration and Local 1336, American Federation of Government Employees (Yarowsky, Arbitrator). The union filed with the Council its petition for review of the arbitrator's award, which award was served on the union on July 31, 1974. Under the Council's rules the petition was due on or before August 23, 1974; however, the petition was not filed until August 27, 1974. While the Council subsequently granted the union an extension of time to file additional documents including copies of the award, no extension of time with respect to the initial filing of such petition was either requested by the union or granted by the Council.

Council action (November 21, 1974). 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

November 21, 1974

Ms. Norma J. Dennis, Chief Steward
American Federation of Government
Employees, AFL-CIO, Local 1336
P.O. Box 15281 - 601 E. 12th Street
Kansas City, Missouri 64106

Re: Mid-America Program Center, Social Security
Administration and Local 1336, American
Federation of Government Employees (Yarowsky,
Arbitrator), FLRC No. 74A-62

Dear Ms. Dennis:

The Council has carefully considered your petition, and the agency's opposition thereto, for review of the arbitrator's award filed in the above-entitled case. For the reasons indicated below, the Council has determined, as contended in part by the agency, 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.

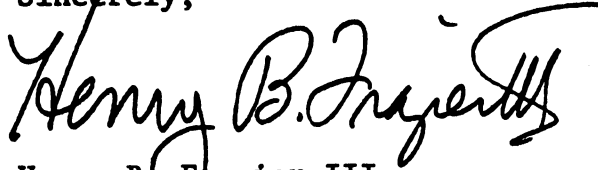
According to the record before the Council, your petition, which was incomplete in that it failed to include a copy of the arbitrator's award among other things, was received by the Council on August 27, 1974. On August 29, 1974, the Council, under section 2411.45(d), granted you an extension to September 10, 1974 to submit copies of the arbitrator's award and other pertinent documents for the purpose of completing your petition. As the documents which you subsequently submitted to complete your petition make clear, the arbitrator's award was served on you on July 31, 1974. Therefore, under the Council's rules, stated above, your petition for review was due in the Council's office on or

before the close of business on August 23, 1974. However, as previously indicated, your petition was not received by the Council until August 27, 1974, and no extension of time with respect to the filing of such petition 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, reading "Henry B. Frazier III". The signature is written in a cursive style with a large, prominent "H" and "F".

Henry B. Frazier III
Executive Director

cc: R. S. Whiteman
AFGE

I. L. Becker
SSA

Department of Health, Education, and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey, A/SLMR No. 361. The Assistant Secretary determined that employees in certain disputed job classifications were not management officials and should not be excluded from the districtwide unit on that basis. In reaching his determination, the Assistant Secretary relied upon principles enunciated in his decision in the Arnold Engineering case, A/SLMR No. 135, petition for review dismissed as moot, FLRC No. 72A-19, Report No. 36, as to the definition of "management official" and its application. The agency petitioned the Council for review, alleging that the Assistant Secretary's decision was arbitrary and capricious or presented major policy issues.

Council action (November 22, 1974). The Council held that the Assistant Secretary's decision did not appear arbitrary and capricious, noting that the Assistant Secretary did not appear to have acted without reasonable justification in that he based his determination upon established principles reflected in his previously published decisions. The Council also held that the Assistant Secretary's decision presented no major policy issues since the agency did not contend, nor did it offer evidence to suggest, that the Assistant Secretary's definition of "management official," promulgated in his decision in Arnold Engineering and upon which he relied in the subject case, was inconsistent either with the purposes of the Order or with other applicable authority. Accordingly, without adopting the precise language of the Assistant Secretary's definition of "management official," the Council denied review of the agency's petition under 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

November 22, 1974

Mr. William M. Russell
Deputy Assistant Secretary for
Personnel and Training
Office of the Secretary
Department of Health, Education,
and Welfare
Washington, D.C. 20201

Re: Department of Health, Education, and
Welfare, Food and Drug Administration,
Newark District, Newark, New Jersey,
A/SLMR No. 361, FLRC No. 74A-34

Dear Mr. Russell:

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

The Assistant Secretary determined, in pertinent part, that employees in certain disputed job classifications are not management officials and should not be excluded from the districtwide unit on that basis. More particularly, the Assistant Secretary found that Consumer Safety Officers, GS-12 and GS-13, in the Compliance Branch, "are engaged essentially in enforcing established policy within controlled agency guidelines, rather than participating in the determination of what that policy, in fact, should be"; and that Consumer Affairs Officers, GS-11, "essentially apply, implement and make recommendations with respect to established policy, as distinguished from employees who actively participate in the ultimate determination as to what a policy would be." In reaching his determination, the Assistant Secretary relied on principles enunciated in his decision in Department of the Air Force, Arnold Engineering Development Center, A/SLMR No. 135 (February 28, 1972),* as to the definition of "management official" and its application, as follows:

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

*/ Petition for review dismissed as moot, FLRC No. 72A-19 (April 18, 1973), Report No. 36.

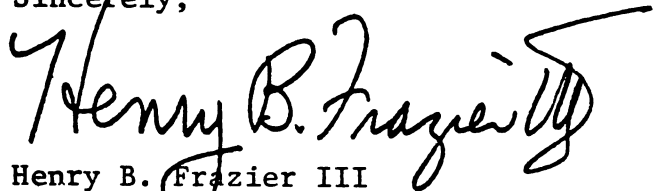
In your petition for review you assert that the Assistant Secretary's decision is arbitrary and capricious or presents a major policy issue principally because the Assistant Secretary's findings are not supported by the weight of the evidence in the record and because he improperly applied or failed to adhere to applicable precedents in reaching his determination.

In the Council's opinion your petition does not meet the requirements for review as provided 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. As to your contentions that his decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in that the decision is based upon established principles reflected in previously published decisions of the Assistant Secretary. With respect to the alleged major policy issues in this case, your petition neither contends, nor does it offer evidence to suggest, that the Assistant Secretary's definition of "management official," which he enunciated in his decision in Arnold Engineering, and upon which he relied in the instant case, is inconsistent either with the purposes of the Order or with other applicable authority. Thus, without adopting the precise language of the Assistant Secretary's definition of "management official", we conclude that his decision in this case raises no major policy issue with respect thereto.

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,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in dark ink and is positioned above the typed name and title.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

W. W. Treptow
AFGE

Internal Revenue Service, Chamblee Service Center, Chamblee, Georgia, Assistant Secretary Case No. 40-5246 (CA). The Assistant Secretary sustained the Assistant Regional Director's dismissal of the complaint filed by National Treasury Employees Union, which alleged that a supervisor's profane statement at the time a union representative presented an employee's grievance violated sections 19(a)(1) and 19(a)(6) of the Order. The Assistant Secretary found that there was no evidence that the supervisor told the union representative that the agency would refuse to process the grievance; that the agency would initiate punitive action against the grievant or the representative; or that the grievant should bypass the union. The Assistant Secretary found rather that the supervisor's statement represented "At most . . . a blunt, albeit coarse and vulgar, expression" of the supervisor's opinion of the merits of the grievance. NTEU appealed to the Council contending that the Assistant Secretary's decision was arbitrary and capricious and that it raised major policy issues.

Council action (November 22, 1974). The Council concluded that the Assistant Secretary's decision did not appear arbitrary and capricious in that nothing in the union's appeal indicated that substantial factual issues existed which would require a hearing or that the findings and decision of the Assistant Secretary were otherwise without reasonable justification in the circumstances of the case. The Council found, additionally, that in the circumstances presented, particularly including the ambiguous nature and isolated character of the remark, the Assistant Secretary's decision did not raise major policy issues warranting review. Accordingly, without passing upon the question of whether later management action can expunge an agency unfair labor practice, the Council, pursuant to section 2411.12 of its rules of procedure, denied review of the appeal (5 CFR 2411.12).



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 22, 1974

Mr. Stephen D. Poor
National Field Representative
National Treasury Employees Union
Suite 1101
1730 K Street, NW.
Washington, D.C. 20006

Re: Internal Revenue Service, Chamblee
Service Center, Chamblee, Georgia,
Assistant Secretary Case No. 40-5246
(CA), FLRC No. 74A-39

Dear Mr. Poor:

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

In this case, in which the Assistant Secretary sustained the Assistant Regional Director's dismissal of your unfair labor practice complaint, you alleged, in essence, that a supervisor's profane statement at the time a union representative presented an employee's grievance constituted a violation of sections 19(a)(1) and 19(a)(6) of the Order.

The Assistant Secretary found, that under all of the circumstances disclosed by the investigation in the case, that a reasonable basis for the complaint did not exist. The Assistant Secretary found, in pertinent part, that there was no evidence that the supervisor told the union representative that the respondent would refuse to process the grievance in contravention of the negotiated grievance procedure; that the agency would initiate punitive actions against the grievant or the representative; or that the grievant should bypass the union. The Assistant Secretary found that the supervisor's statement represented "At most . . . a blunt, albeit coarse and vulgar, expression . . ." of the supervisor's opinion of the merits of the grievance.

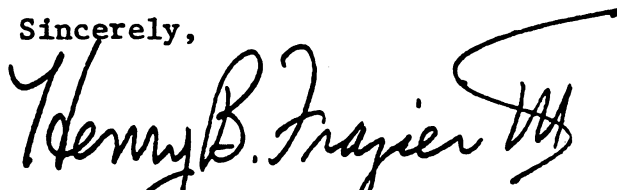
In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious and presents major policy issues.

In the Council's opinion, your petition 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. 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 issues, the Council is of the opinion that in the circumstances presented, particularly including the ambiguous nature of the remark and its isolated character, the Assistant Secretary's determination that a reasonable basis for the complaint does not exist does not raise major policy issues warranting review. In these circumstances, we do not pass upon the question of whether later management action can expunge an agency unfair labor practice.

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 sections 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. J. Shaw
IRS

Local Lodge 2333, International Association of Machinists and Aerospace Workers, and Wright-Patterson Air Force Base, Ohio. The dispute concerned the negotiability under the Order of union proposals which would: (1) Define certain terms used in position descriptions; (2) condition the assignment of duties to employees on the "scope of the classification assigned" to such employees as defined in "appropriate classification standards;" and (3) provide the measurement for grading wage grade employees who perform mixed jobs.

Council action (December 5, 1974). As to (1), the Council, based on its decision in the Louisville Naval Ordnance case, FLRC No. 73A-21, Report No. 48, found that the provision is negotiable under section 11(a) of the Order. With respect to (2), the Council, relying mainly on the reasoning and analysis in its recent decision in the Immigration and Naturalization Service case, FLRC No. 73A-25, Report No. 57, held that the proposal was excepted from the agency's obligation to bargain under section 11(b) of the Order. Lastly, as to (3), the Council, based on Civil Service Commission advice as to the meaning of its own directives, rejected the agency's contention that the proposal would violate Commission requirements and found the proposal negotiable under section 11(a) of the Order. However, to avoid any possible misunderstanding in the latter regard, the Council added that it was not here deciding that disputes over the interpretation or application of the proposal, if agreed upon by the parties, would be subject to the negotiated grievance procedure, since job-grading disputes are subject to a statutory appeals procedure and, under section 13(a) of the Order, a negotiated grievance procedure may not cover matters for which statutory appeals procedures exist. Accordingly, the agency head's determinations of non-negotiability were set aside in part and sustained in part.

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

Local Lodge 2333, International Association
of Machinists and Aerospace Workers

and

FLRC No. 74A-2

Wright-Patterson Air Force Base, Ohio

DECISION ON NEGOTIABILITY ISSUES

Background of Case

Local Lodge 2333, International Association of Machinists and Aerospace Workers (union) is the exclusive representative of a unit of wage-grade employees at the activity.^{1/} During negotiations, a dispute arose between the parties as to the negotiability of three proposals by the union (detailed hereinafter) concerning position descriptions (section 6); assignments of work to unit employees (section 7 and first clause of section 10); and measurement of compensation of unit employees (second clause of section 10).

Upon referral, the Department of Defense determined that the proposals in dispute were nonnegotiable under the Order. The union appealed to the Council, disagreeing with the agency determination; and the agency filed a statement of position in support of its determination.

Opinion

The negotiability questions relating to the respective union proposals will be considered separately below.

1. Position descriptions (section 6). This proposal by the union reads as follows:

Section 6. 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 which are normally related to the position and are of an incidental nature."

^{1/} The parties administratively advised the Council as to the wage-grade composition of the unit, after the union's appeal and the agency's statement of position were filed in the instant case.

The agency determined principally that the proposal would limit management in the assignment of duties to employees and, based on the Griffiss case,^{2/} was thereby nonnegotiable under section 11(b) of the Order. We cannot agree.

The Council considered the negotiability of a proposal similar to that here involved more recently in the Louisville Naval Ordnance case.^{3/} As we pointed out in the latter case, such a proposal, unlike that presented in the Griffiss case, is expressly directed at the meaning of language in position descriptions, which descriptions do not determine but reflect the assignment of duties. Additionally, the Council stated in the Louisville Naval Ordnance case (at pp. 4-5 of Council decision):

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. Moreover, the agreement would of course be subject to section 12(b) of the Order, the provisions of which must be included in every agreement. Under section 12(b), for example, the agency retains the complete right, in accordance with applicable laws and regulations, to assign duties to employees or positions in such manner as to maintain the efficiency of Government operations, and to carry out the mission of the agency in emergency situations.

In summary, nothing in the Order renders the mere definition and clarification of general terms in job descriptions, as proposed by the union, outside the agency's obligation to negotiate under section 11(b) of the Order
[Footnote omitted.]

Accordingly, for the reasons more fully set forth in the Louisville Naval Ordnance case, we find that section 6 as here proposed by the union is negotiable.^{4/}

2/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report 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, are excepted from the agency's obligation to bargain under section 11(b).

3/ Local Lodge 830, International Association of Machinists and Aerospace Workers, and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974), Report No. 48.

4/ See also American Federation of Government Employees, Local 53, and Navy Regional Finance Center, Norfolk, Virginia, FLRC No. 73A-48 (February 28, 1974), Report No. 49.

2. Assignments of work (section 7; first clause of section 10). The disputed sections concerning work assignments (referred to herein for convenience as a single union proposal) provide 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.]

Again, the agency principally determined that the union proposal is non-negotiable under section 11(b) of the Order, because it would limit management in the assignment of duties to unit employees. We fully agree with the agency determination as applied to the provisions in section 7 and the first clause of section 10 of the proposed agreement.

It is clear from the express language here involved, as distinguished from that in section 6 discussed immediately above, that the proposal would restrict the actual assignment of duties by the agency, namely, by conditioning such assignment on the "scope of the classification assigned" to the respective unit employees as defined in "appropriate classification standards." The classification standards so referred to in the union's proposal, more properly identified as "job-grading standards" when concerning wage-grade employees as here involved, constitute groupings by the Civil Service Commission of duties, skills, knowledges and other aspects of jobs, for establishing the grade levels of particular jobs.^{5/} These standards are neither designed nor intended by the Commission to limit the agencies in any manner in the actual assignment of job duties.^{6/} Therefore, the use of these standards to effect such a limitation, as proposed by the union, would impose extraneous conditions on the agency's authority to determine work assignments required only by the agreement itself.

5/ FPM Supplement 532-1, Subchapter S6-4.

6/ See U.S. Civil Service Commission "Job Grading System for trades and labor occupations," section II.B.2. For a discussion of analogous "position classification standards" which apply to General Schedule employees, see, e.g., 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, and citations therein.

The Council, in the recent Immigration and Naturalization Service case, considered a similar proposal which would have prevented an agency from assigning duties to unit employees unless conditions prescribed in the agreement existed.^{7/} The proposal there conditioned the overtime assignment of alien bus duties to border patrol agents, on the unavailability of detention guards to perform such duties. In finding the proposal nonnegotiable under section 11(b) of the Order, the Council said:

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 union's proposal would likewise limit the agency in the assignment of duties to unit employees unless conditions prescribed in the agreement exist -- here, the conformity of the duties with the scope of job-grading standards. Accordingly, we find that the union's proposal is excepted from the agency's obligation to bargain under section 11(b) of the Order.

We therefore sustain the agency's determination as to the nonnegotiability of the union's proposed section 7 and the first clause of section 10.

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, at pp. 5-7 of decision.

3. Measurement of compensation of unit employees (second clause of section 10). The final disputed proposal reads as follows:

Section 10. The Employer agrees that . . . [it] will compensate employees on the basis of the highest level of duties assigned as a substantial portion of the continuous work assignment for a representative period of time.

The agency determined that the proposal violates Civil Service Commission directives and is therefore not negotiable.^{8/}

Since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, that agency was requested, in accordance with Council practice, for an interpretation of Commission directives as they pertain to the question raised in the present case. The Commission replied in relevant part as follows:

.
Whether or not the proposal conflicts with Civil Service Commission directives depends upon whether it is for application to General Schedule (GS) or Wage Grade (WG) employees^{9/}

Wage Grade Application:

If the problem is concerned with grading mixed jobs for Wage Grade (blue collar) employees, the proposal is not in conflict with Civil Service Commission directives. Subchapter S6 from the Federal Personnel Manual 532-1, dated January 1973, clearly regulates the appropriate pay practices.

The mixed job policy in the FPM states:

"In grading a job requiring the performance of work in two or more occupations on a regular and recurring basis, the whole job

^{8/} The agency also asserted that the proposal violates agency regulations (paragraph 3-5e, Air Force Supplement to paragraph 3-5, Subchapter 3, Position Classification Standards). However, this regulation concerns the classification of General Schedule positions and is manifestly inapplicable to the wage-grade employees involved in the instant case.

^{9/} The administrative advice by the parties as to the wage-grade composition of the unit, referred to in footnote 1, supra, was received by the Council after the response from the Commission.

is considered including the full range and level of skills, knowledges, and qualifications required, as well as all other relevant job facts. Such a mixed job is graded in keeping with the highest skill and qualification requirements of the job, even if the duties involved are not performed for majority of the time but are regular and recurring."

Thus, the proposal is not in conflict with Commission directives with respect to Wage Grade jobs.

Based on the foregoing interpretation by the Civil Service Commission of its own issuances, and in view of the wage-grade composition of the unit here involved, we find that the union's proposal is not in conflict with Civil Service Commission requirements. Accordingly, we overrule the agency's determination as to the nonnegotiability of the second clause of the union's proposed section 10.

While we have found that the union's proposal concerning the grading of mixed jobs is negotiable, we must add, in order to avoid any possible misunderstanding, that we do not here decide that disputes over the interpretation or application of this proposal (if agreed upon by the parties) would thereby be subject to the negotiated grievance procedure. Job-grading disputes are subject to a statutory appeals procedure,^{10/} and, as provided in section 13(a) of the Order, a "negotiated grievance procedure may not cover . . . matters for which statutory appeals procedures exist."

Conclusions


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 section 7 and the first clause of section 10 was valid and must be sustained; and
2. The agency head's determination as to the nonnegotiability of section 6 and the second clause of section 10 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 proposals. We decide only

10/ See, 5 U.S.C. 5346(c); FPM Supplement 532-1, Subchapter S7.

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 II
Executive Director

Issued: December 5, 1974

American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator). The parties submitted to arbitration a grievance requesting backpay for the grievant whose promotion was delayed 4 months for various reasons including the completion of a current position description for the position involved. The union alleged that the agency had violated a provision in the negotiated grievance which required that the parties "proceed in accordance with and abide by all . . . regulations of the Employer . . . in matters relating to the employment of employees covered by this Agreement." The arbitrator determined that, because an agency regulation required completion of a current position description before a promotion could be processed and because the collective bargaining agreement required the parties to proceed in accordance with all agency regulations, the agency's action was in compliance with the agreement. Further, he determined that the delay was not, under the circumstances, undue or unreasonable. The union filed an exception with the Council, alleging in substance (as it had before the arbitrator) that an agency staff manual required the promotion to be processed in 8 working days and that the agency violated the staff manual which assertedly is an agency regulation and therefore violated the agreement; and arguing that the award thereby violates an "appropriate regulation" under the Council's rules.

Council action (December 5, 1974). The Council determined, 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 of procedure (5 CFR 2411.32), that the union's exception does not appear to be supported by facts and circumstances described in the union's petition, as required by section 2411.32. Moreover, the Council was of the opinion that the union in substance was simply contending that the arbitrator reached an incorrect result in his interpretation of the agreement--a matter the Council, like the courts, has held to be left to the arbitrator's judgment. Further, the Council held, contrary to the union's contention, that an award issued by another arbitrator involving a different grievance is without controlling significance. The Council therefore denied review of the union's petition because it failed to meet the standards set forth in section 2411.32 of the Council's rules (5 CFR 2411.32).



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 5, 1974

Mr. Rex L. Carey, President
Local 2649, American Federation of
Government Employees, AFL-CIO
1100 Commerce Street
Dallas, Texas 75202

Re: American Federation of Government
Employees, AFL-CIO, Local 2649
and Office of Economic Opportunity
(Sisk, Arbitrator), FLRC No. 74A-17

Dear Mr. Carey:

The Council has carefully considered your petition for review of the arbitrator's award, which denied a grievance requesting retroactive pay for a period prior to the grievant's promotion, filed in the above-entitled case, and the agency's opposition thereto.

Based on the facts described in the award, it appears that the grievance had its genesis in the agency's announcement of a vacancy in the position of Public Information Specialist, GS-5/7, which set forth the differentiation in the qualifications for the GS-5 and GS-7 levels of the position. Mrs. Frances D. Coppedge was selected. She was reassigned from the position of Clerk Stenographer, GS-5, to Public Information Specialist, GS-5, effective December 15, 1972. On September 27, 1973, Mrs. Coppedge filed the instant written grievance requesting a promotion to Public Information Specialist, GS-7. Early in September 1973, a Form SF-52 requesting her promotion to the GS-7 level was forwarded to the regional personnel office where, according to the arbitrator, such requests "normally . . . are processed within a period of thirty days." However, the Form SF-52 for the grievant was not processed within that period because there was no current position description for Public Information Specialists at the GS-7 level. On January 3, 1974, a current position description for a Public Information Specialist, GS-7, was prepared, and the grievant was promoted to the GS-7 position, effective January 20, 1974. The arbitrator concluded that the delay of approximately 4 months in the processing of her promotion occurred, in part, for the following reasons: (1) no current position description existed when the Form SF-52 was submitted on September 17, 1973; (2) while a freeze on promotions was lifted on August 27, 1973, the instructions necessary to implement recommended promotions were not received in the field until September 28, 1973, at which time the headquarters of this region was preparing plans for reorganization; (3) the reorganization

plans were approved on October 28, 1973; it was not known until then that the Public Information Specialist position held by the grievant would continue; (4) the information from the grievant required for preparation of a current position description was not received until December 19, 1973; and (5) a current position description for a Public Information Specialist was prepared on January 3, 1974.

At the arbitration hearing, the union contested only the timeliness of the grievant's promotion. The parties stipulated that the arbitrator was to decide the following issue:

Was the delay in the promotion of the grievant from Public Information Specialist GS-5 to Public Information Specialist GS-7 the result of arbitrary, capricious, discriminatory, or malicious actions on the part of the Employer?

The union, according to its petition, contended before the arbitrator that an agency staff manual (OEO Staff Manual 250-2)^{1/} provided for a total of 8 working days for the personnel division to process promotions of the career ladder type; that the staff manual was a regulation of the agency; and that, therefore, the delay of 4 months in processing the grievant's promotion violated Article 2, Section 2,^{2/} of the collective bargaining agreement, and constituted an undue and arbitrary action. As a remedy, the union sought backpay for the grievant prior to her promotion on January 20, 1974, at the GS-7 level for some period beginning on various dates between January 31 and September 27, 1973.

1/ The preface of the agency staff manual states:

This publication was prepared as a Guide for Administrative Officers and other OEO employees who have the responsibility for initiating requests for personnel actions. It is designed to standardize the preparation and processing of personnel documents.

The agency staff manual in relevant part provides:

TIME FRAMES

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.

2/ Section 2 of Article 2 (Employee Rights) provides:

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.

In his award, the arbitrator determined in essence that the agency's requirement for a current position description was an agency regulation within the meaning of Article 2, Section 2, of the agreement and, therefore, the agency's delay in processing the grievant's promotion until obtaining the required description was in compliance with Article 2, Section 2. The arbitrator determined that the agency's delay for approximately 4 months, for the reasons previously described, was not an undue or unreasonable delay. Moreover, he determined that the period of one year in grade as a GS-5 served by the grievant was not unreasonable. Accordingly, the arbitrator denied the remaining portion of the grievance requesting backpay for the grievant.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the 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 . . . appropriate regulation . . . 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 exception contends that the award violates OEO Staff Manual 250-2 and, therefore, violates an "appropriate regulation." In support of this contention, the union's petition presents a "summary of evidence and arguments" submitted by the union to the arbitrator. The sole argument in this summary is the same contention which, as previously stated, the union made before the arbitrator, i.e., that the agency, by delaying the processing of the grievant's promotion for 4 months, violated OEO Staff Manual 250-2, which assertedly is an agency regulation, and, therefore, violated Article 2, Section 2, of the agreement, and engaged in an undue and arbitrary act--a contention rejected by the arbitrator.

Without passing upon whether the agency staff manual is an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules, we conclude that the union's exception does not appear to be supported by facts and circumstances described in the union's petition, as required by section 2411.32. The union has not shown that OEO Staff Manual 250-2 is an agency regulation within the meaning of Article 2, Section 2, of the agreement. As previously stated, the manual is described in its preface as a "guide," and the time frames established therein are applicable "only if the request [in a Form SF-52] follows a routine schedule," which is defined as meaning that "all necessary forms, documents . . . are properly signed and received in Personnel with the request" (Emphasis supplied.) Moreover, even if the union had established that OEO Staff Manual 250-2 is an agency regulation within the meaning of Article 2, Section 2, of the agreement, the union's contention appears to be no more than a request that the Council review the merits of the arbitrator's award.

As previously stated, the union relies on a summary of the same evidence and arguments which the union presented to the arbitrator in asking him to sustain its grievance, specifically the argument that the agency's action in processing the grievant's promotion allegedly violated OEO Staff Manual 250-2, and thereby violated Article 2, Section 2, of the agreement. But the arbitrator determined in essence that the agency's action in processing the grievant's promotion was in compliance with, not in violation of, Article 2, Section 2, of the agreement. Therefore, when the substance of the union's petition is considered, we are of the opinion that the union is simply contending that the arbitrator reached an incorrect result in his interpretation of Article 2, Section 2, of the agreement. However, the Council has held, as courts consistently have 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. 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. While the union adverts to an award issued in a different grievance by another arbitrator as "controlling precedent," that award is not controlling on the Council in deciding whether the arbitrator's award violates an appropriate regulation.

Accordingly, the union'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.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A. Arnett
OEO

National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator). The union filed a grievance alleging that a position had been filled in a manner violative of contractual merit promotion procedures, and requested removal of the incumbent and refilling of the position in a manner consistent with the agreement. The agency vacated the contested position, but refused to accede to the union's demand that the agency refill the position. Following submission of the dispute to arbitration, the arbitrator issued an award, finding that management once having decided to fill the position could not change its decision absent a showing of new conditions sufficient to convince the arbitrator that a change was warranted. He further found that such showing was not made in this case and (1) directed the agency to fill the position in question; and (2) under provision of the parties' agreement, assessed the costs of the arbitration to the agency. The Council accepted the agency's petition for review of the award (Report No. 51).

Council action (December 6, 1974). The Council held as to (1) that in the circumstances of the case the arbitrator's award improperly limited management's authority to decide and act under section 12(b)(2) of the Order and therefore set aside the arbitrator's direction that the position be filled. However, as to (2), the Council found no grounds were adduced to support disturbing the arbitrator's award assessing costs against the agency. Therefore, pursuant to section 2411.37(b) of the Council's rules of procedure (5 CFR 2411.37(b)), the Council modified the award consistent with its decision.

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

National Council of OEO
Locals, AFGE, AFL-CIO

and

FLRC No. 73A-67

Office of Economic Opportunity

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose primarily from the remedy awarded by the arbitrator for the agency's failure, as he found, to comply with provisions of the parties' collective bargaining agreement which set forth merit promotion procedures to be followed in filling various positions within the agency.

The National Council of OEO Locals, AFGE, AFL-CIO (the union) filed a grievance alleging that the Office of Economic Opportunity (OEO) had filled two GS-15 positions in the agency in a manner which violated merit promotion procedures under the parties' agreement. As a remedy the union requested removal of the incumbents from the two positions; and the refilling of the positions in a manner consistent with the procedures contained in the parties' agreement.

Before the grievance went to arbitration, the agency vacated the two contested positions, refilling one of them and refusing at that time to take any action to fill the other. Thus, at the time of the arbitration hearing, the one unfilled position (Chief, Evaluation Division, Office of Legal Services) remained in dispute and was the principal subject of the arbitrator's award.

The Arbitrator's Award

The arbitrator upheld the union's grievance^{1/} and, granting the remedy requested by the union, directed management to "forthwith take proper action to fill the position" Also, under provisions of the

^{1/} The matter grieved by the union as stated by the arbitrator was, "that Management had improperly filled two GS-15 positions without utilizing required merit promotion procedures."

parties' agreement, the arbitrator assessed the costs of the arbitration to OEO.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council alleging principally that (1) insofar as the award directs management to fill the position in question it conflicts with rights reserved to management under section 12(b) of the Order and should be set aside; and (2) in conjunction therewith, the costs of the arbitration should be assessed to the union as the losing party. The Council accepted the agency's petition for review.^{2/} Neither party filed a brief.

Opinion

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

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

The two questions before the Council are: (1) whether the portion of the arbitrator's award directing management to fill the position in question conflicts with rights reserved to management under section 12(b) of the Order and, therefore, must be set aside; and, (2) if so, whether the portion of the award assessing costs of the arbitration to the agency should be set aside. These questions are discussed, separately, below.

1. Does the award conflict with section 12(b) of the Order?

Section 12(b)(2) of the Order^{3/} provides as follows:

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

.

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

^{3/} Although the agency alleged, in particular, violations of sections 12(b)(4) and (5) of the Order, the Council finds it unnecessary to pass on these allegations in view of its decision herein under section 12(b)(2).

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

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency

As to the meaning of section 12(b)(2), 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, in its VA Research Hospital decision, the Council stated as follows:^{4/}

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 the present case, as already indicated, the agency caused the position in question to be vacated when faced with a union grievance alleging that the position had been filled in a manner violative of contractual merit promotion procedures;^{5/} but refused to accede to the

4/ 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, 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.

5/ OEO in effect admits that it violated the parties' agreement as alleged in the grievance. In this regard, OEO's petition for Council review in this case states, for example:

Throughout the arbitration proceeding, OEO maintained the position that the violation of the contract had been corrected and the grievance, therefore, mooted when the two improperly appointed individuals were removed from the contested positions.
[Emphasis added.]

union's demand that the agency take action to refill the position. The arbitrator, in reaching his award sustaining the grievance and directing the agency to fill the position in question, stated that:

[T]here is nothing in Article 4 of the Agreement^{6/} or in Executive Order 11491 which prevents a ruling on the Union's request that Management must fill the disputed position either by merit promotion or reassignment using merit factors. To be sure Management retains the right under the Executive Order and in Article 4 of the Agreement 'to direct employees of the agency . . . promote, transfer, assign and retain employees in positions within the agency' This is not a situation, however, where the Union is asking the Arbitrator to require Management to determine to fill the supervisory position in question here. Rather, Management made this decision prior to the filing of the grievance. [Footnote and additional emphasis supplied.]

The arbitrator further found contrary to the agency's assertions that, in his opinion, the current situation, in regard to the need for the position in question, was not so different from the situation existing when the agency had improperly filled the position that management would be warranted in "making a new determination that the position is no longer needed." Thus, he concluded in effect, that management, once having exercised its right to decide to fill the position, could not change its decision absent a showing of "new conditions" of sufficient magnitude to convince the arbitrator that a change was warranted.

In our view, the arbitrator's interpretation and application of Article 4 of the agreement (incorporating, as already indicated, the language of section 12(b) of the Order) is inconsistent with the meaning of the Order in that it fails to recognize that, implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action. It is clear from the language and history of the Order, as well as from previous Council decisions as already noted, that no interference with management's authority to decide and act with respect to the matters enumerated in section 12(b)(2) may be permitted under the Order.

The arbitrator's award, in the circumstances presented by this case, would limit management's authority to decide and act under section 12(b)(2) with regard to filling a position by conditioning management's authority to determine not to fill the position in

^{6/} Article 4 of the Agreement, entitled "Employer Rights," repeats in substance the wording of section 12 of the Order, among other things.

question upon management's ability to justify its decision to the arbitrator's satisfaction. Thus, the portion of the arbitrator's award directing management to fill the position in question interferes with management's reserved authority to decide whether or not to hire, promote, transfer or assign employees under section 12(b)(2) of the Order. However, management's reserved rights under section 12(b) may not be infringed by an arbitrator's award under a negotiated grievance procedure.^{7/} Therefore, the portion of the award directing management to fill the position in question cannot be permitted to stand.^{8/}

2. Costs of the arbitration. In his award, the arbitrator stated, "Under Article 17, Section 4 [of the agreement] the costs of the Arbitration are assessed to OEO." The cited provision of the agreement provides in relevant part that certain fees, expenses and costs incident to an arbitration shall be borne by the losing party.

In the circumstances of the present case, where the arbitrator sustained the union's grievance and the agency has successfully excepted to part of the remedy granted by the arbitrator, we find that no grounds have been adduced (under section 2411.37(a) of the Council's rules of procedure as previously set forth herein) to support our disturbing the arbitrator's award which assesses costs against the agency. Merely because one part of the remedy awarded by the arbitrator is set aside does not necessarily affect the other parts of the award. That is, our decision herein, setting aside in part the remedy awarded by the arbitrator, does not alter his having sustained the union's grievance; and no 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 of the arbitration to OEO. Therefore, this portion of the arbitrator's award is sustained.

7/ Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator) FLRC No. 74A-1 (June 24,, 1974), Report No. 53 at p. 4 of the Council's decision letter.

8/ The circumstances in the instant case are distinguished from those present in International Association of Machinists and Aerospace Workers, Arsenal Lodge No. 81, AFL-CIO and Rock Island Arsenal, Rock Island, Illinois (Sembower, Arbitrator), FLRC No. 73A-29 (December 12, 1973), Report No. 46, where the Council denied review of the arbitrator's award which directed, in part, that management fill a vacancy "in accordance with regulations and the Negotiated Agreement." That is, in Rock Island, the agency's continuing intention to fill the position there involved was clear and unquestioned.

Conclusion

For the foregoing reasons, we find that (1) the arbitrator's award, insofar as it directs the agency to "forthwith take proper action to fill the position of Chief, Evaluation Division, Office of Legal Services," violates the Order by interfering with rights reserved to management officials under section 12(b)(2); and (2) no grounds were adduced by the agency to support the Council's setting aside the arbitrator's assessment to the agency of the costs of the arbitration under provisions of the parties' agreement. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the penultimate sentence thereof which reads:

Management shall forthwith take proper action to fill the position of Chief, Evaluation Division, Office of Legal Services.

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 6, 1974

Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator). The parties submitted to arbitration the union's grievance which alleged in substance that the agency, by detailing an employee to a different office, changed a personnel policy without consulting the union, in violation of the collective bargaining agreement. The union subsequently requested the agency to agree to join for hearing by the same arbitrator a separate grievance filed by the detailed employee, but the agency refused on the ground that the two grievances raised separate issues; there is no specific indication that the union renewed its request before the arbitrator. The arbitrator formulated the issue to be decided as whether the agency changed existing personnel policy in handling the detailed employee's case. In his award the arbitrator determined that the agency did not. The union filed exceptions alleging (1) that his award contains erroneous findings of fact, and (2) that the arbitrator made an arbitrary and capricious award by tending to restrict the scope of the hearing to the alleged agreement violation and refusing to consider an issue in the employee's separate grievance.

Council action (December 20, 1974). The Council determined that neither of the union's exceptions asserted a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations, as required by section 2411.32 of the Council's rules (5 CFR 2411.32). Regarding the union's first exception, the Council held, based on private sector law as likewise applicable to the Federal sector, that an arbitrator's findings of fact are not to be questioned. As to the union's second exception, the Council found that the union's petition furnished no facts or circumstances to show that the parties had submitted the employee's separate grievance to the arbitrator; that the question of whether a single arbitrator may consider more than one grievance is a procedural question left by courts in private sector cases to final disposition by the arbitrator; and that no precedent was established in which a court set aside an award in the private sector on the ground here advanced by the union. 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

December 20, 1974

Mr. Percy O. Daley, Jr.
President, Local 1164
American Federation of Government
Employees, AFL-CIO
53 Hildreth Street
Westford, Massachusetts 01886

Re: 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

Dear Mr. Daley:

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

The award shows that the agency's Boston Regional Office detailed Mrs. Judith C. Brogioli to a different branch office within the Boston Region to assist in the increased workload. The union filed a grievance which in substance alleged that the Region, by its action, had changed a personnel policy and procedure without consulting the union as required in Article 6, Section 6, of the collective bargaining agreement.^{1/} In its answer, the agency stated that its (unwritten) policy on details was, as shown through past practices, "to seek volunteers for details when feasible and practicable; otherwise to make specific details when required." When the parties submitted the union's grievance to arbitration, it appears that they did not enter into a submission agreement formulating the question or questions to be posed to the arbitrator,^{2/} and they could not agree upon the issue

1/ Section 6 of Article 6 (Union-Management Relations at the BDOO Regional Level) provides:

The Region agrees to consult the Union on the formulation of new or revised personnel policies and procedures or of plans for changes in working conditions.

2/ The union's petition shows that, in a joint letter to the Federal Mediation and Conciliation Service, the parties stated that they had "failed to arrive at a mutually acceptable application of Article 6, Section 6," of the agreement, and, therefore, requested a list of arbitrators.

when the hearing opened. As a consequence, the arbitrator, ruling that the issue should be based upon the union's grievance and the agency's answer, formulated the issue to be: "In handling Mrs. Brogioli's case did the Region change existing personnel policy?"

The arbitrator determined that the union did not furnish the proof required to establish that the universal and unvarying practice of the Boston Region, when detailing employees, was to seek volunteers in general or a particular volunteer, or both, and that employees were never ordered to be detailed without a prior request. Therefore, in his award, the arbitrator concluded that the Region did not change existing personnel policy in handling Mrs. Brogioli's detail.

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

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

The union's first exception contends that the arbitrator's award contains a number of erroneous findings of fact. However, the law is well settled in the private sector that an arbitrator's findings as to the facts are not to be questioned by the courts. See, e.g., Meat Cutters & Butcher Workmen, Local 540 v. Neuhoff Bros. Packers, 481 F.2d 817, 819, 83 LRRM 2652, 2653 (5th Cir. 1973). This principle is likewise applicable in the Federal sector under section 2411.32 of the Council's rules of procedure. 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 similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

The union's second exception contends that, because of the arbitrator's manner in tending to restrict the scope of the hearing to Article 6, Section 6, of the agreement and his refusal to consider an issue in the separate grievance filed by Mrs. Brogioli,^{3/} the award is arbitrary

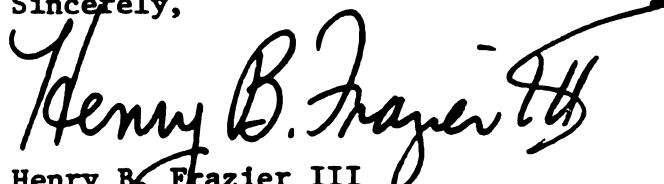
^{3/} Mrs. Brogioli had filed a grievance which, according to the arbitrator, overlapped the union's grievance in some respects but was separate in others. The arbitrator noted that the agreement provided for different processing of the two grievances: while the union's grievance had been processed through a quicker procedure established by the agreement for "union-management" disputes, Mrs. Brogioli's grievance was processed through the procedure for "employee initiated" grievances and had not been submitted to arbitration.

and capricious. However, the union's petition furnishes no facts or circumstances to show that the parties had submitted Mrs. Brogioli's grievance to the arbitrator. On the contrary, the award shows that after the arbitrator was selected to decide the union's grievance, the union requested the agency to agree to join Mrs. Brogioli's grievance with the union's grievance so it could be heard by the arbitrator at the same hearing. The Region refused on the ground that the two grievances raised separate issues and, therefore, should be resolved at separate arbitration hearings, and there is no specific indication that the union renewed before the arbitrator the request to join the two grievances. Courts in private sector cases hold that the question of whether a single arbitrator may consider more than one grievance is a procedural question to be left to final disposition by the arbitrator. See, e.g., American Can Co. v. Papermakers and Paperworkers, Local 412, 356 F. Supp. 495, 498, 82 LRRM 3055, 3057 (E.D. Pa. 1973) and cases cited therein. Further, the union has not furnished the Council with any decisions in which a court has set aside an award in the private sector on the ground that the arbitrator tended to confine the scope of the hearing to the substance of the grievance he was commissioned to resolve and refused to consider an issue in a grievance which was not before him; we find none. Therefore, the union's second exception does not assert a ground similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases.

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: Philip J. DiBenedetto
SSA

INTERPRETATIONS AND POLICY STATEMENTS

January 1, 1974 through December 31, 1974



A labor organization requested the Council to issue an interpretation and statement on the following questions:

1. Under Executive Order 11491, as amended, is the agency within the department or the department itself the "agency" with which the labor organization shall negotiate agreements?
2. If the department is the "agency," may the labor organization insist that a representative of the department negotiate the next agreement?

The Council advised the labor organization on February 26, 1974, that after careful consideration of the request and the submission of the department concerned it had determined that the request did not meet the requirements of section 2410.3 of the Council's rules. The Council concluded that:

First, the questions raised can more appropriately be resolved by other means available under the Order. In this regard, it was noted that section 19(a)(6) provides that it shall be an unfair labor practice for agency management to refuse to consult, confer, or negotiate with a labor organization as required by the Order. Section 6(a)(4) of the Order provides that the Assistant Secretary of Labor for Labor-Management Relations shall decide unfair labor practice complaints. In fact, it was noted that the labor organization had indicated in its request that during the last negotiations "consideration was given to filing of unfair labor practice charges." That course was not pursued because it would not assure "that a contract would be in hand"; instead the labor organization decided "to raise the underlying issues in the appropriate forum at a later time, after the contract was an absolute, . . . [department]-approved certitude."

Second, the resolution of the questions which were raised would not prevent the proliferation of cases involving the same or similar policy issues. No information was offered to indicate that similar questions exist or are likely to arise with respect to the relationship between executive departments and their immediate major organizational subdivisions.

Third, while the specific questions appeared to have some general applicability to other labor-management relationships within the executive branch, the series of events described in the request were peculiar to the immediate relationship and there was no indication that this problem exists elsewhere.

Fourth, while the questions confronted the parties in the context of their labor-management relationship in negotiations conducted during 1973, there was no indication that the questions require resolution at this time through the Council's major policy procedures.

Fifth, the questions were not presented jointly by the parties involved. Instead, the department contended that the questions do not constitute major policy issues requiring decision by the Council under Part 2410 of its regulations. In particular, the department conceded in its brief that the labor organization was certified by the Assistant Secretary as the exclusive representative of a unit in the agency; that the Aberdeen Proving Ground decision (FLRC No. 70A-9) was dispositive of the issue of whether the agency is the "agency" with which the labor organization should deal; and finally, specifically stated:

[F]or the purposes of negotiating an agreement under section 11, . . . [the agency] is the "agency." Any contrary interpretation would virtually eliminate the subordinate organization of the . . . [department] from coverage of the entire order and as the Council has stated: ". . . section 2(a) obviously did not intend so incongruous a result."

Sixth, while resolution of the problems presented by the labor organization might improve its bargaining relationship with the agency, it would offer no special benefits in promoting constructive and cooperative labor-management relationships in the Federal service generally or otherwise promote, in an overall way, the purposes of the Order.

In sum, the Council concluded that there was no real question as to the agency with which the labor organization is to bargain. The Assistant Secretary has certified the labor organization as the exclusive bargaining representative for a nationwide unit within the agency and the department has conceded in its brief that the agency is the "agency" with which the labor organization should deal. Moreover, as recognized by the labor organization in its submission, an alleged failure by an agency to meet the requirements of section 11(a) and the requirements of section 15 of the Order would be subject to the unfair labor practice procedures of section 19.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 26, 1974

Mr. William B. Peer
General Counsel
Professional Air Traffic
Controllers Organization
Suite 1002
1101 Seventeenth St., NW.
Washington, DC 20036

Re: FLRC No. 73P-2

Dear Mr. Peer:

This is in further reply to your "Request for Interpretation of Executive Order and Statement on Major Policy Issues." You request the Council to issue an interpretation and statement on the following questions:

1. Under Executive Order 11491, as amended, is the Federal Aviation Administration or Department of Transportation the "agency" with which the Professional Air Traffic Controllers Organization shall negotiate agreements?
2. If Department of Transportation is the "agency," may the Professional Air Traffic Controllers Organization insist that a representative of Department of Transportation negotiate the next agreement?

Section 2410.3 of the Council's rules contains the considerations governing issuance of interpretations and policy statements. It provides that:

- (a) The Council shall, in its discretion, issue interpretations of the order and statements on major policy issues which it deems to have general applicability to the overall program in assuring the effectuation of the purposes of the order. The Council may act on its own initiative or upon request as provided in § 2410.4.

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;

(2) Where other means are available, whether Council action would prevent the proliferation of cases involving the same or similar question of interpretation or major policy issue;

(3) Whether the resolution of the question presented would have general applicability to the overall program;

(4) Whether the issue currently confronts parties in the context of a labor-management relationship;

(5) Whether the question is presented jointly by the parties involved; and

(6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

The Council has considered carefully your request and the submission of the Department of Transportation in relation to § 2410.3 and has determined that your request does not meet the requirements of that section.

First, the questions which you raise can more appropriately be resolved by other means available under the Order. In this regard, it is noted that section 19(a)(6) provides that it shall be an unfair labor practice for agency management to refuse to consult, confer, or negotiate with a labor organization as required by the Order. Section 6(a)(4) of the Order provides that the Assistant Secretary of Labor for Labor-Management Relations shall decide unfair labor practice complaints. In fact, you indicated in your request that during the last negotiations "consideration was given to filing of unfair labor practice charges." That course was not pursued because it would not assure "that a contract would be in hand"; instead you decided "to raise the underlying issues in the appropriate forum at a later time, after the contract was an absolute, DOT-approved certitude."

Second, the resolution of the questions which you raised would not prevent the proliferation of cases involving the same or similar policy issues. You offered no information to indicate that similar questions exist or are likely to arise with respect to the relationship between executive departments and their immediate major organizational subdivisions.

Third, while the specific questions appear to have some general applicability to other labor-management relationships within the executive branch, the series of events described in your request are peculiar to the FAA-PATCO relationship and there is no indication that this problem exists elsewhere.

Fourth, while the questions confronted the parties in the context of their labor-management relationship in the 1973 negotiations, there is no indication that the questions require resolution at this time through the Council's major policy procedures.

Fifth, the questions have not been presented jointly by the parties involved. Instead, the Department of Transportation contends that the questions do not constitute major policy issues requiring decision by the Council under Part 2410 of its regulations. In particular, the Department of Transportation concedes in its brief that PATCO was certified by the Assistant Secretary as the exclusive representative of a unit in the Federal Aviation Administration; that the Aberdeen Proving Ground decision (FLRC No. 70A-9) is dispositive of the issue of whether the FAA is the "agency" with which PATCO should deal; and finally, specifically states:

[F]or the purposes of negotiating an agreement under section 11, FAA is the "agency." Any contrary interpretation would virtually eliminate the subordinate organization of the Department of Transportation from coverage of the entire order and as the Council has stated: ". . . section 2(a) obviously did not intend so incongruous a result."

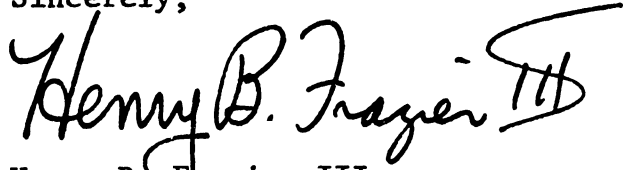
Sixth, while resolution of the problems presented by PATCO might improve its bargaining relationship with FAA, it would offer no special benefits in promoting constructive and cooperative labor-management relationships in the Federal service generally or otherwise promote, in an overall way, the purposes of the Order.

In sum, there is no real question here as to the agency with which PATCO is to bargain. The Assistant Secretary has certified PATCO as the exclusive bargaining representative for a nationwide unit within FAA and DOT has conceded in its brief that FAA is the "agency" with which PATCO should deal. Moreover, as recognized by PATCO in its submission, an alleged failure by an agency to meet the requirements of section 11(a) and the requirements of section 15 of the Order would be subject to the unfair labor practice procedures of section 19.

Therefore, for all of the preceding reasons, the Council has determined that the questions presented do not meet the considerations in section 2410.3 of the Council's rules. Accordingly, 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: Hon. C. Brinegar
Transportation

Hon. A. P. Butterfield
FAA

Mr. E. V. Curran
FAA

Hon. P. Fasser, Jr.
Dept. of Labor

Mr. H. W. Solomon
FSIP

FMCS
Dept. of Labor

PART III.

SUBJECT MATTER INDEX



January 1, 1974 through December 31, 1974



SUBJECT MATTER INDEX*

January 1, 1974 through December 31, 1974

*PRACTICE AND PROCEDURE separately indexed beginning at 337.

SUBJECT MATTER
INDEX TO FLRC DECISIONS

FLRC No(s).

A

AGENCY

Definition..... 73P-2

AGENCY GRIEVANCE PROCEDURE

Agency failure to follow agency
grievance procedure..... 74A-3

Selection of union representative
by supervisor..... 73A-32, 73A-33

AGENCY REGULATIONS

Applicable uniformly to more than
one activity..... 73A-64

Arbitrator's interpretation of agency
staff manual as "appropriate regulation"... 74A-17

Interpretation by agency head, misinter-
pretation of union proposal..... 73A-22

AGREEMENT, AGENCY HEAD APPROVAL..... 73A-16

AGREEMENT BAR..... 73A-58

AMICUS CURIAE [See "PRACTICE AND PROCEDURE -
Amicus curiae"]

APPROPRIATE UNIT DETERMINATIONS

Community of interest criterion..... 73A-61, 74A-14

Eligibility of employees

- management officials.....	74A-34
- professionals and nonprofessionals.....	74A-14
- supervisors.....,.....	73A-63
Fair and effective representation criterion.....	73A-54
Mixed unit of professionals and nonprofessionals.....	74A-14
Petition misunderstood by A/SLMR.....	74A-14

ARBITRATION

Costs.....	73A-67
Dispute as to meaning of award.....	73A-4
Grounds for review of awards	
- ambiguity.....	73A-44
- arbitrator acting in excess of authority under the agreement.....	73A-44, 73A-50, 74A-12
- arbitrator exceeded scope of submission agreement.....	74A-12
- arbitrator's failure to decide question submitted.....	73A-44
- erroneous findings of fact.....	74A-49
- failure to consider related grievance.....	74A-49
- misinterpretation of agreement.....	74A-1
- misinterpretation by agency of arbitrator's award.....	73A-50
- no review on merits.....	74A-17

- prior award as controlling precedent.....	74A-17
- violates Comptroller General decisions.....	73A-46, 73A-50, 73A-51
- violates GSA order.....	73A-50
- violates law.....	73A-44, 73A-46, 73A-51
- violates Order.....	73A-42, 73A-67, 74A-1, 74A-12
- violates regulation.....	73A-44, 73A-46, 73A-51, 74A-12, 74A-17
Implementation of award, Council direction of.....	73A-4
Procedural question left to final disposition by arbitrator.....	74A-49
Remedies	
- leeway allowed in fashioning.....	74A-12
- remand for hearing de novo.....	74A-12
- remand to arbitrator for clarification.....	74A-12
Submission agreements.....	73A-44, 74A-49
ARBITRATION PROCEDURE, NEGOTIABILITY AS APPLIED TO INTERPRETATION OF NONNEGOTIABLE REGULATION OR PRACTICE.....	73A-21
A/SLMR REVIEW [See also specific subject matter heading]	
Procedure [See "PRACTICE AND PROCEDURE"]	
Representation cases	
- ballots [See "ELECTIONS - Ballots"]	

- failure [of A/SLMR] to adhere to applicable precedents..... 74A-34
- procedural responsibility of A/SLMR... 73A-60
- refusal to consider allegations..... 74A-35
- refusal to consider RO cross-petition [for representation]..... 74A-35
- regulations of A/SLMR, interpretation and implementation..... 73A-60

Unfair labor practice cases

- access to supervisory appraisals of employees..... 73A-53
- agency failure to follow agency grievance procedure..... 74A-3
- issues raised previously under a grievance procedure..... 73A-66
- jurisdiction over issues subject to established grievance or appeals procedures..... 74A-11

B

- BACKPAY..... 73A-44, 73A-51, 74A-17
- BALLOTS [See "ELECTIONS - Ballots"]
- BARGAINING HISTORY, EFFECT ON UNIT DETERMINATIONS..... 73A-61
- BARGAINING REPRESENTATIVE CHOICE, AGENCY'S..... 73P-2

C

CARVE-OUT OR SEVERANCE OF UNIT

Nurses.....	73A-54
Professionals, subprofessionals.....	73A-54

CIVIL SERVICE COMMISSION INTERPRETATION
OF CSC REGULATIONS.....

	73A-44, 73A-46, 73A-51, 73A-53, 74A-2
--	--

5 CFR 550.803.....	73A-44
--------------------	--------

COMPENSATION

Backpay.....	73A-44, 73A-51, 74A-17
Environmental pay differentials.....	74A-12
Holiday pay.....	73A-46
Measurement, grading of mixed jobs.....	74A-2
Of wage grade employees.....	74A-2
Overtime.....	73A-46

COMPTROLLER GENERAL DECISIONS.....	73A-25, 73A-46, 73A-50, 73A-51
------------------------------------	-----------------------------------

CONFIDENTIAL RECORDS, ACCESS TO.....	73A-53
--------------------------------------	--------

CONSTITUTION AND BYLAWS, UNION.....	73A-43
-------------------------------------	--------

CONTRACT BAR [See "AGREEMENT BAR"]

COUNSELING SESSIONS [See "FORMAL DISCUSSIONS"]

D

DETAILS AND TEMPORARY ASSIGNMENTS

Employee qualifications for.....	73A-16
Involuntary.....	74A-49

DISCIPLINE

By employer, preliminary to investigation.....	73A-6
By union [See also "UNION RIGHTS AND PRIVILEGES"].....	73A-43

DISCRIMINATORY TREATMENT

Denial of reenlistment.....	74A-11
Temporary and probationary employees v. career and career-conditional employees.....	73A-6

DISCUSSIONS

Informal v. formal.....	73A-6
-------------------------	-------

E

ELECTIONS

Ballots.....	74A-5
Intervention in.....	74A-5

EMPLOYEE APPRAISALS.....	73A-53
--------------------------	--------

EMPLOYEE CATEGORIES AND CLASSIFICATIONS

Air Traffic Controllers.....	74A-1
------------------------------	-------

Career and career-conditional.....	73A-6
Management officials.....	74A-34
Nurses.....	73A-42, 73A-54, 73A-61
Probationary.....	73A-6
Professionals.....	74A-14
Supervisors.....	73A-32, 73A-33, 73A-63
Temporary.....	73A-6

EMPLOYEE RIGHTS UNDER THE ORDER

Choice of own representative in agency grievance or appellate action.....	73A-32, 73A-33
Free speech.....	74A-10
Membership in a union.....	73A-43
Privacy of supervisory appraisals.....	73A-53
Reinstatement to union membership.....	73A-43
Selection of exclusive representative.....	73A-60

Union representation

- at agency grievance proceeding.....	73A-32, 73A-33
- at counseling sessions.....	74A-11
- at formal discussions.....	74A-23
- at investigative interviews.....	74A-23
- at promotion appraisal meetings.....	73A-45
- employer discouragement of.....	74A-26

EVIDENCE [See "PRACTICE AND PROCEDURE - Evidence"
and "A/SLMR REVIEW"]

EXECUTIVE ORDER 10987.....	73A-25
----------------------------	--------

EXECUTIVE ORDER 11491

Section 1.....	74A-5, 74A-27
Section 1(a).....	73A-6, 73A-62, 74A-5, 74A-10
Section 2(a).....	73P-2
Section 2(b).....	73A-63
Section 6(a).....	73A-60
Section 6(a)(4).....	73P-2, 73A-53
Section 6(d).....	73A-60
Section 7(a).....	73A-32, 73A-33
Section 7(b).....	73A-32, 73A-33
Section 7(c).....	73A-32, 73A-33
Section 7(d)(1).....	73A-32, 73A-33
Section 7(d)(2).....	73A-32, 73A-33
Section 7(d)(3).....	73A-32, 73A-33
Section 10(b).....	73A-32, 73A-33
- "community of interest".....	73A-61
Section 10(b)(4).....	74A-14
- "professional . . . employees".....	73A-54
Section 10(d)(2).....	74A-5
Section 10(e).....	72A-50
- "employees in the unit".....	73A-32, 73A-33
- "formal discussions".....	73A-6, 74A-11, 74A-23
- "is responsible for representing the interests of all employees in the unit without discrimination".....	73A-6

Section 11(a).....	73P-2, 73A-1, 73A-21, 73A-22, 73A-48, 74A-2
- "applicable laws and regulations, including policies set forth in the Federal Personnel Manual".....	73A-64
- "published agency policies and regulations".....	73A-64
Section 11(b).....	73A-21, 73A-42
- "its organization[,] . . . numbers, types, and grades of positions or employees assigned to an organiza- tional unit, work project or tour of duty".....	73A-22, 73A-25, 74A-2
Section 11(c).....	73A-6
Section 11(c) (3).....	73A-22
Section 11(c) (4).....	73A-1
Section 12(a).....	73A-21, 73A-25
- "matters covered by the agreement".....	74A-12
Section 12(b).....	73A-6, 73A-21, 74A-2
Section 12(b) (1).....	73A-42
Section 12(b) (2).....	73A-42
- to "assign".....	73A-16
- "to hire"	73A-67
- to "promote".....	73A-22, 73A-67
Section 12(b) (4).....	73A-42
Section 12(b) (5).....	73A-16
- "to determine . . . personnel".....	73A-42, 74A-1

Section 13 [prior to amendment].....	72A-50, 73A-1, 73A-32, 73A-33, 74A-10
Section 13(a) [prior to amendment].....	73A-1, 73A-21, 73A-25
- "negotiated grievance procedure may not cover . . . matters for which statutory appeals procedures exist".....	74A-2
Section 13(b) [prior to amendment].....	73A-21
Section 13(b)	
- "Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions".....	73A-1
Section 15 [prior to amendment].....	73P-2, 73A-16
Section 19(a) (1).....	73A-6, 73A-32, 73A-33, 73A-45, 73A-52, 73A-66, 74A-3, 74A-11, 74A-23, 74A-26, 74A-27, 74A-39
Section 19(a) (2).....	73A-52, 74A-11
Section 19(a) (3).....	73A-45, 74A-26, 74A-27
Section 19(a) (5).....	73A-66
Section 19(a) (6).....	73P-2, 72A-50, 73A-64, 73A-66, 74A-11, 74A-23, 74A-39
Section 19(b) (1).....	73A-62
Section 19(c)	
- "shall not deny membership".....	73A-43
Section 19(d).....	73A-66, 74A-11

F

FEDERAL PERSONNEL MANUAL

Chapter 312.....	73A-21, 73A-42
Chapter 315	
- subchapter 8-4.....	73A-6
Chapter 316	
- subchapter 4-2.....	73A-6
Chapter 335.....	73A-64
- subchapter 2.....	73A-44
- subchapter 5.....	73A-53
- subchapter 6-4.....	73A-51
Chapter 511.....	73A-42
Chapter 713	
- appendix B.....	73A-53
Chapter 771	
- subchapter 1.....	73A-53
- subchapter 3.....	73A-53
Supplement 532-1	
- subchapter S6-4.....	74A-2
- subchapter S8-7.....	74A-12
- appendix J.....	74A-12
FORMAL DISCUSSIONS.....	74A-11, 74A-23

G

GRIEVANCE/ARBITRATION

Agency failure to follow agency grievance procedure.....	74A-3
Grievability.....	74A-10
Negotiated procedure, nature and scope	
.. adverse actions excluded.....	73A-25
- application to other than bilaterally determined matters.....	73A-21
- management grievances.....	73A-1
- matters for which statutory appeals procedures exist.....	73A-21, 73A-25, 74A-2
- procedures to initiate a grievance....	73A-1
- subject only to the explicit limitations prescribed by the Order.....	73A-21, 73A-25
Refusal to process.....	74A-39

H

HEALTH AND SAFETY, HAZARDOUS WORKING CONDITIONS.....	74A-12
--	--------

HOLIDAY

Pay [See "PREMIUM PAY" and "COMPENSATION"]

Work [See "WORK SCHEDULES" and "HOURS OF WORK"]

HOURS OF WORK

Holiday, Sunday and night assignments.....	73A-25, 73A-46
Overtime.....	73A-25

- equitable distribution..... 73A-25
- not to be assigned as reward
or penalty..... 73A-25
- pay for work not performed..... 73A-46

I

INTERVENTION, REPRESENTATION PROCEEDING..... 73A-60, 74A-5

J

JOB CONTENT

- Assignment of specific duties to
particular types of positions or
employees..... 73A-25
- Assignment of unrelated duties..... 73A-25, 74A-2
- "Job grading standards" as
controlling..... 74A-2

K-L-M

MANAGEMENT OFFICIALS [See "EMPLOYEE
CATEGORIES AND CLASSIFICATIONS"]

MANAGEMENT RIGHTS [See also "EXECUTIVE
ORDER 11491 - Section 12(b)"]

Mandatory nature..... 73A-67

MEMBERSHIP, UNION

- Denial of..... 73A-43
- Reinstatement to..... 73A-43

N

NAMES AND ADDRESSES [See "REFUSAL TO BARGAIN"]

NEGOTIABILITY [See also specific subject matter headings]

Agency regulations as bar.....	73A-6, 73A-64
Order as bar.....	73A-16
Proposals	
- ambiguity.....	73A-25
- constitutes "discrimination" within the meaning of section 10(e).....	73A-6
- contained in prior agreement.....	73A-25
- misinterpretation.....	73A-25

NOTICE [See "PRACTICE AND PROCEDURE - Service"]

NOTICE, POSTING OF..... 74A-35

NURSES [See "EMPLOYEE CATEGORIES AND CLASSIFICATIONS - Nurses"]

O

OBLIGATION TO BARGAIN [See "REFUSAL TO BARGAIN" and "NEGOTIABILITY"]

OVERTIME [See "PREMIUM PAY," "HOURS OF WORK," and "WORK SCHEDULES"]

P

PARTY, DEFINITION.....	74A-11
PAY [See "COMPENSATION" and "PREMIUM PAY"]	
PERSONNEL ACTION.....	73A-51
PERSONNEL, DEFINITION.....	73A-42
POSITION CLASSIFICATION STANDARDS.....	73A-42
POSITION DESCRIPTIONS.....	73A-42
Definitions and clarification of terms, negotiability.....	73A-21, 73A-48, 74A-2
Preparation as part of promotion procedure.....	74A-17
POSTING OF NOTICES [See "NOTICE, POSTING OF"]	
PRECEDENT, A/SIMR FAILURE TO ADHERE TO.....	74A-34
PREMIUM PAY	
Assignment of holiday work to avoid.....	73A-46
Environmental pay differentials.....	74A-12
Overtime pay for work not performed.....	73A-46
PRIVACY.....	73A-53
PRIVATE SECTOR PRACTICE, SIGNIFICANCE.....	74A-12

PROCEDURE [See "PRACTICE AND PROCEDURE"]

PRODUCTION STANDARDS..... 73A-25

PROFANITY [See "SPEECH"]

PROFESSIONAL EMPLOYEES [See "EMPLOYEE CATEGORIES AND CLASSIFICATIONS - Professional employees"]

PROMOTIONS

Delay in processing..... 74A-17

Merit

- arbitrator's award directing..... 73A-44, 73A-67

"Procedures" for..... 73A-16, 73A-22

Priority consideration..... 73A-51

Retroactive..... 73A-51

Temporary, qualification necessary for..... 73A-16

Q-R

REFUSAL TO BARGAIN [See also "EXECUTIVE ORDER 11491- Sections 11(b), 12(b), and 19(a)(6)"]

Employer failure to supply names and addresses..... 72A-50

REINSTATEMENT TO UNION MEMBERSHIP..... 73A-43

REPRESENTATION PETITION, SOLICITATION OF SIGNATURES..... 73A-62

REPRESENTATION PROCEEDINGS, INTERVENTION IN..... 73A-60, 74A-5

RULES AND REGULATIONS [See "AGENCY REGULATIONS,"
"FEDERAL LABOR RELATIONS COUNCIL RULES AND
REGULATIONS," and "FEDERAL PERSONNEL MANUAL"]

S

SENIORITY AND TENURE

Overseas assignments..... 73A-64

Shift assignments..... 73A-42

SERVICE [See "PRACTICE AND PROCEDURE"]

SEVERANCE [See "CARVE-OUT OR SEVERANCE OF UNIT"]

SHIFTS [See "WORK SCHEDULES" and "HOURS OF WORK"]

SOLICITATION DURING DUTY HOURS..... 73A-62

SPEECH

Employee..... 74A-10

Employer

- discouraging union representation..... 74A-26

- supervisor's profane statement..... 74A-39

STAFFING PATTERNS AND TOURS OF DUTY

Job content..... 73A-25

Number of employees assigned to tours
of duty as integrally related to..... 73A-25

Overseas assignments.....	73A-64
Overtime assignments.....	73A-25
Request for assistance by Air Traffic Controller.....	74A-1
Rotation of officer of the day duties.....	73A-22

STARE DECISIS [See "PRECEDENT"]

STAY [See also "PRACTICE AND PROCEDURE -
Stay of A/SLMR's decision pending review"
and "PRACTICE AND PROCEDURE - Stay of
arbitrator's award"]

SUPERVISORS

Indicia of status, authority over foreign nationals.....	73A-63
Inhibited in making decisions.....	74A-1
Right to designate union officials as representative during agency grievance procedure.....	73A-32, 73A-33

T

TEMPORARY ASSIGNMENTS [See "DETAILS
AND TEMPORARY ASSIGNMENTS"]

TOURS OF DUTY [See "STAFFING PATTERNS
AND TOURS OF DUTY," "HOURS OF WORK,"
and "WORK SCHEDULES"]

U

UNFAIR LABOR PRACTICES [See also "A/SLMR
REVIEW - Unfair labor practice cases" and
specific subject matter headings]

Charge by another union.....	73A-62
Timeliness of complaint [See "PRACTICE AND PROCEDURE"]	
UNILATERAL ACTION.....	73A-64
UNION RIGHTS AND PRIVILEGES	
Effective means of communication with employees.....	72A-50
Incumbent union	
- at counseling sessions.....	74A-11
- at investigative interviews.....	74A-23
- in representation proceedings.....	74A-5
To discipline locals.....	73A-43
To discipline members.....	73A-43
Waiver of exclusive recognition.....	74A-35
UNIT DETERMINATION [See "APPROPRIATE UNIT DETERMINATIONS"]	
UNITED STATES CODE	
5 U.S.C. § 5334(b).....	73A-51
5 U.S.C. § 5346(c).....	74A-2
5 U.S.C. § 5542.....	73A-25
5 U.S.C. § 5596 (Back Pay Act).....	73A-44, 73A-51
8 U.S.C. § 1353(a).....	73A-25
V-W-X-Y-Z	
WAIVER OF EXCLUSIVE RECOGNITION.....	74A-35

WORK ASSIGNMENT [See also "JOB CONTENT"]

Of specific duties to particular types of positions or employees.....	73A-21, 73A-25
Of unrelated duties.....	73A-21, 73A-25, 73A-48, 74A-2
Of work not in "appropriate classification standards".....	74A-2
Performed in an overtime status.....	73A-25

WORKLOAD.....	74A-1
---------------	-------

WORK SCHEDULES [See also "STAFFING PATTERNS" and "TOURS OF DUTY"]

Holiday work.....	73A-25, 73A-46
Number and duration of tours "integrally related" to number, types and grades of employees assigned to them.....	73A-25
Night work distribution.....	73A-25
Overtime distribution.....	73A-25
Premium work, assignment as reward or penalty.....	73A-25
Rotation roster system.....	73A-64
Shift changes.....	73A-42
Tours of duty.....	73A-22, 73A-25

PRACTICE AND PROCEDURE

Access to employee appraisals.....	73A-53
Amicus curiae petition for review.....	74A-11
Clarification of A/SLMR decision, request by FLRC.....	74A-14
Evidence	
- A/SLMR finding not supported by weight of.....	74A-34
- burden to adduce facts at investigative stage of ULP to establish a reasonable basis.....	74A-23
- ex parte submission to FLRC.....	74A-23
- failure to consider by A/SLMR.....	73A-45, 73A-52, 73A-54, 73A-61
- substantial factual issues, require- ment for hearing.....	73A-45, 73A-52, 73A-66, 74A-23, 74A-26, 74A-39
Extension of time.....	73A-55
Grounds for review	
- appeal from A/SLMR denial of request to intervene.....	73A-60
- appeal from A/SLMR dismissal.....	73A-52, 73A-66, 74A-26, 74A-34, 74A-35, 74A-39
- arbitration exceptions.....	73A-42, 73A-46, 73A-51, 73A-67, 74A-12, 74A-17, 74A-49
- contents of petition.....	73A-22
Interlocutory appeals	
- A/SLMR remand of appropriate unit determination to ARD.....	74A-37

- direction of elections, request to be held in abeyance.....	73A-65, 74A-6
Joinder of grievances, procedural question to be left to final disposi- tion by arbitrator.....	74A-49
Mootness	
- arbitration award review.....	73A-67
- review of A/SLMR decision.....	74A-21
Motions	
- show cause hearing.....	73A-4
Oral argument.....	72A-50
Petition incomplete.....	74A-62
Policy issues, considerations governing issuance of.....	73P-2
Service	
- actual notice, effect of.....	73A-60
- of negotiability determination.....	74A-55
Stay of A/SLMR decision pending review	
- denied.....	74A-10, 74A-11, 74A-35, 74A-37
- granted.....	74A-8
Stay of arbitration award	
- denied.....	74A-1
- granted.....	73A-44, 73A-46, 73A-51, 73A-67
Timeliness	
- continuing ULP.....	74A-27

- extension of time.....	73A-55
- filing of request for stay of A/SLMR's decision pending review.....	74A-8
- filing of ULP.....	74A-27
- intervention in representation proceeding.....	73A-60, 74A-5
- measurement from date of discovery v. occurrence.....	74A-27
- negotiability appeal.....	74A-55
- of cross-petition for review.....	74A-35
- of nonnegotiability contention.....	73A-6
- petition for review of A/SLMR decision.....	74A-56
- review of arbitration award.....	74A-4, 74A-57, 74A-62
- submission of necessary materials.....	74A-18
- waiver of requirement.....	74A-27, 74A-55

