In the Matter of DEPARTMENT OF DEFENSE DEPENDENT SCHOOLS and OVERSEAS EDUCATION ASSOCIATION	FACTFINDER'S REPORT AND RECOMMENDATIONS FMCS No. 94-02106 and 93 FSIP 06

Appearances For the Agency -	Martin Frantz, Chief of Labor Relations Timothy F. Curry, Labor Relations Specialist Bartley Lagomarsino, Deputy Director of DODDS Laura Vogel, Deputy Chief of Staffing
For the Association -	Ronald Austin, Esq., General Counsel Catherine V. Emerson, Esq., Staff Attorney Jan Pepelnjak, OEA Officer and Classroom Teacher Jack Rollins, President
Factfinder -	Charles Feigenbaum

The parties to this dispute are the Department of Defense Dependent Schools [DODDS or Agency], and the Overseas Education Association [OEA or Association]. By letter dated October 13, 1993, the Federal Service Impasses Panel [FSIP] directed this impasse to private factfinding. The present Factfinder was chosen by the parties under the procedures of the Federal Mediation and Concil-

iation Service. Hearing was held at the Association's office in Washington D.C. on January 10 and 11, 1994, and at DODDS' office in Arlington, VA, on January 12, 1994.

Both parties were present at the hearing and each had full opportunity to examine and cross-examine witnesses, to offer evidence, and to set forth their positions. All witnesses were sworn. The proceedings were transcribed by a court reporter and both sides submitted post-hearing briefs. The findings and recommendations which follow are based on the evidence, the positions argued by the parties, and my observation of witnesses while testifying.

BACKGROUND

The issues originally in dispute were:

Proposal 1 - Transfer Program

Proposal 2 - Assignment Preferences of Returning Educators

Proposal 3 - Drawdown

Proposal 5 - Proposals from negotiability determinations in 39 FLRA No. 10

Proposal 6 - Guidelines for Bomb Threats

Proposal 7, §§1-4 - Use of Mess Hall, BOQs and Military Controlled Transportation

Proposal 7, §7 - Office Space, Parking Space, and Equipment

During the course of the hearing the parties reached agreement on Proposals 2, 5, 6, and 7, §§1-4. The issues that remain are the Transfer Program and Drawdown [the Drawdown proposal has been incorporated into the Transfer Program]; and Office Space, Parking Space, and Equipment [hereinafter referred to as Office Space].

In addition to opposing the OEA proposals on their merits, DODDS

also argues that it is not obliged to bargain on them. It first raised the duty to bargain issue in its December 16, 1993, letters to the Panel and the OEA [Jt. Ex. 5]. It cited the FLRA's decisions in *Social Security Administration*, 47 FLRA No. 96 (1993); *Social Security Administration, Tucson District Office*, 47 FLRA No. 99 (1993); and *Sacramento Air Logistics Center*, 47 FLRA No. 114 (1993) and asked the Panel to decline jurisdiction of the matters in dispute because there was no established case law for it or the Factfinder to apply, see *Carswell Air Force Base*, 31 FLRA No. 37 (1988).

The FSIP response of January 5, 1994 [Jt. Ex. 8] stated that any jurisdictional matters should be raised with the Factfinder. Accordingly, what follows are the Agency and Association arguments concerning the duty to bargain on each proposal, and my recommendations with regard to these arguments.

THE DUTY TO BARGAIN

TRANSFER PROGRAM

Agency Position. On August 18, 1989, the parties signed a document titled "Side Bar Transfer Program". It states:

> The Association agrees to the February 1-10, 1990, dates for a one year trial basis after which we will reopen at either party's option after conclusion of the transfer program. Should the parties be unable to agree on new transfer procedures, the parties agree to use the draft regulation attached to their December 1, 1988, Memorandum of Understanding. The parties agree the draft regulation will be the basis for negotiating a new agreement. [Jt. Ex. 3]

This Side Bar clearly contemplates the possibility that agreement might not be reached. In that eventuality, which is what actually occurred, it provides that the parties will use the previously

agreed-on procedures, that is, the draft regulation attached to the December 1, 1988, Memorandum of Understanding [MOU]. Therefore, OEA's proposal is not properly before the Panel or the Factfinder.

The Association argued at the hearing that the Transfer Program proposal is a continuation of the 1989 contract negotiations, and that the Side Bar provides for deferred negotiations. However, this is contradicted by the clear language of the Side Bar, and the fact that the OEA, in the attachment to its August 19, 1993, letter to the FSIP [Jt. Ex. 20], states that the proposal covers "the impact and implementation of the transfer program".

This indicates that the proposal is not part of contract negotiations, but must be related to either I&I or midterm bargaining. Since the Association has indicated that it is an I&I proposal, the FLRA's new framework for determining the duty to bargain applies and the proposal should be dismissed because it is inseparably bound up with, and is plainly an aspect of the contract, through the Side Bar agreement.

Association Position. The Side Bar was signed one day before the current contract [Jt. Ex. 1], was signed. Article 9 "Transfer Program" in that contract was approved after the Side Bar, and the draft regulation to which it refers no longer exists. Both parties have made proposals on the subject since that time, the latest of which was offered by the Agency in January 1994 [Jt. Ex. 9]. Contrary to the DODDS position that the Side Bar means that the OEA waived its statutory right to bring the matter be-

fore the FSIP, what the Side Bar means is that bargaining is to start from the concepts contained in the draft regulation and Article 9 of the contract, which the Association proposal does.

Recommendation. There is a duty to bargain on this proposal. The Side Bar states that, after a one year trial basis, either party may reopen negotiations "on new transfer procedures". The matter was reopened and there have been proposals and counterproposals from both sides. The Agency now argues that it has no obligation to bargain because:

- the Side Bar mandates use of the 1988 draft regulations if agreement cannot be reached; and

- the proposal is inseparably bound up with, and is plainly an aspect of the contract, through the Side Bar agreement.

The first of these arguments reads the Side Bar as meaning that a failure to agree binds the parties to the terms of the draft regulation, presumably until the next term megotiations, with a waiver by the OEA of its right to take an impasse dispute on the subject to the Panel. That is an extreme reading of the document, which can only be supported by clear contract language or bargaining history, neither of which is present here, that this was the intent of the parties.

The second argument is equally flawed. The Side Bar does not bind the Transfer Program proposal to the contract, but rather ties it to a draft regulation which OEA claims is no longer in existence. Be that claim as it may, my reading of the Side Bar is that it contains a reopener provision which permits the Association to raise the issue of new transfer procedures in midterm bargaining, even though that subject is covered in Article 9 of the contract.

OFFICE SPACE

Agency Position. This is a proposal for I&I bargaining on its face. It states that it is the result of the "consolidation of DODDS Personnel functions in the United States and a drawdown of personnel". The items requested by the OEA will no doubt be beneficial to Association staff, but there is no shown benefit to the employees affected by the consolidation of personnel functions.

In *FLRA v. U.S. Department of Justice*, 994 F.2d 868 (D.C. Cir. 1993), a case which also involved union I&I proposals for office space, the court ruled that there was no obligation to bargain because while the proposals would benefit the union institutionally, they would not be of direct benefit to employees.

Even if the Office Space proposal is considered to be a midterm proposal, which it is not, the FLRA's new framework [47 FLRA Nos. 96, 99, and 114] makes the proposal not subject to further bargaining. It is inseparably bound up with and plainly an aspect of the current contract. Specifically, Article 4, §6; Article 5, §3; and Articles 7A and 7B, all deal with the function of the national office of OEA and the level of support provided OEA by DODDS.

Further, during the 1988/89 term negotiations, the Association proposed:

> The Employer/Designee shall provide an area with a minimum of a desk, chair, file cabinet, computer/word processor and a Class A telephone for the Association at the national, regional, and district levels. ... [Jt. Exs. 13 and 14, Article 2, §3H. Emphasis supplied.]

The Factfinder should not accept Mr. Rollins' self-serving testimony that this was not a serious proposal at the time. The

fact is that it was a serious proposal; OEA offered it on September 21, 1988, and four months later, offered it again on January 25, 1989. When OEA withdrew the proposal, it withdrew the issue from further consideration by DODDS.

Mr. Rollins claimed that the proposal was withdrawn without prejudice and that OEA always withdraws proposals without prejudice in bargaining. This is claim of non-prejudicial withdrawal is unilateral on the part of the Association, and it has no right to unilaterally impose such a condition on the Agency.

Association Position. Mr. Rollins testified that the OEA proposal in question was not serious with respect to the national level because of the size of the request, e.g., one desk, etc., and the fact that the Association then had sufficient free space at the NEA building. He further stated that there was never a serious discussion of the proposal as it pertained to the national level, and that management did not take it seriously. The proposal was eventually withdrawn without prejudice.

There is no legal impediment to the proposal. The FLRA decisions in 47 FLRA Nos. 96, 99, and 114, do not apply because the proposal does not lend itself to endless negotiations over the same subject matter; its subject matter is not expressly contained in the contract; and as Mr. Rollins' testimony indicates -- and the Factfinder should note that DODDS did not call any member of the management negotiating team to refute that testimony -- the parties knew within the context of their relationship that OEA was free to raise the proposal at a later time, either as midterm

bargaining under Article 7, or as I&I bargaining under 5 U.S.C. 7106 (b)(2) and (3).

Neither is the decision in *FLRA v. U.S. Department of Justice* a bar to the proposal. There, the union requested office space in buildings vacated by management and the court saw no connection between management's action, the union's proposals and adversely affected employees. In the present dispute, the consolidation of the personnel function to headquarters, and the drawdown of personnel will have an adverse affect on unit members which will be assisted by their being represented by the Association at the place of power.

Recommendation. It is not necessary to decide whether the Office Space proposal was submitted as part of midterm or I&I bargaining. The Agency is not obligated to bargain on the subject in either event.

The OEA proposal is that:

> Due to consolidation of DODDS Personnel functions in the United States and a drawdown of personnel, it is anticipated that the OEA national costs will increase substantially, therefore, we propose that DODDS provide free appropriate office space, free use of equipment, and free use of facilities to offset the additional representation costs to the OEA versus the loss of membership resulting from a decrease in unit employees.

At a later point, OEA presented DODDS with the specifics of its request for office space, for equipment, and for parking space. From the point of view of I&I negotiations and the ruling in *Department of Justice*, I see no difference between the union proposals in that case, and that of OEA in this dispute.

The statutory bases for I&I bargaining, §§7106 (b)(2) and (3) discuss, respectively, bargaining over procedures to be used by agency officials in connection with a management right, and on appropriate arrangements for employees adversely affected by the exercise of such a right. The court ruled that the proposal in *Department of Justice* did not fall under either §(b)(2) or §(b)(3). It said that the "creation of an office for the Union has nothing to do with the procedures used by management" and that "there is no showing -- nor does it appear that there can be one -- that this new office proposal assists adversely affected employees" [both quotations at 872]. I find these observations to be equally applicable to the Office Space proposal.

The Association brief asserts that the drawdown and consolidation of personnel functions in the United States, will adversely affect unit members, and that they will be assisted by their being represented by the Association at the place of power. However, there is no direct connection between adverse affect on bargaining unit members and the proposal. Rather, the proposal is, on its face, directed at the adverse impact on OEA as a result of additional representation costs and membership loss. In addition, the testimony of Mr. Rollins makes it clear that the Office Space proposal resulted from the Association's increased costs and decreased revenues resulting from the drawdown, and the loss of its former free office space. [Tr., v. 3, pp. 694, 700-704]

Adoption of the Office Space proposal would certainly help the OEA as an institution, and it seems logical to assume that it would also help those unit members who are OEA members, in that

the Agency would bear some of the cost of supporting the Association. However, this indirect help would apply to all Association members, whether affected by the drawdown or not, and it is not clear how it would apply to those teachers who are affected by the drawdown, but who are not Association members. In sum, considered as an I&I proposal, Office Space does not meet the test for I&I bargaining set out by the D.C. Circuit.

While I also find there is no duty to bargain on Office Space as a matter of mid-term bargaining, I do not agree with the Agency that this is because the proposal is inseparably bound up with and thus plainly an aspect of the present contract (specifically Articles 4, §6; 5, §3; and 7A and B). Those provisions, with the exception of Article 7B in the contesxt described below, have no direct relation to the matters contained in the proposal, i.e., office space, equipment, and parking.

The reason there is no midterm duty to bargain on this proposal is because the Association waived its right to do so in Article 7B of the collective bargaining agreement. By contract, the parties agreed that, irrespective of any statutory right OEA might have to initiate mid-term bargaining:

> **ARTICLE 7B - NEGOTIATIONS OVER ASSOCIATION PROPOSED CHANGES IN WORKING CONDITIONS OR POLICIES**
>
> Section 1. National Level.
> Proposals appropriate for negotiations at the national level concern conditions of employment affecting unit employees which fall within the scope of bargaining and which deal with matters not specifically addressed during the negotiations which led to this Agreement.

During the 1988/89 negotiations, the Association proposed that:

> The Employer/Designee shall provide an area with a minimum

> of a desk, chair, file cabinet, computer/word processor and a Class A telephone for the Association at the national, regional, and district levels.

The details of this proposal were much more modest than the one presently before me, but it covered the very same matters, except for parking. For that reason, I find that the matters contained in the Office Space proposal (again excluding parking) were specifically addressed during the negotiations which led to the contract between the parties and that Article 7B bars the present proposal from mid-term bargaining.

OEA has argued that it did not waive its right to bargain mid-term on the subject of Office Space because the 1988/89 proposal was not made or taken seriously, and that when it withdrew the proposal it did so without prejudice. I do not accept either argument.

As OEA president, Mr. Rollins is in a position to know if the Association regarded the proposal seriously, but there is no evidence in the record, other than his assertion, that the Agency did not take it seriously. Collective bargaining can be a surprising process, and it is not unknown for one party to accept what the other side submitted as a "throw away" proposal, or for one side to consider as frivolous a matter that is of great concern to the other. Collective bargaining proposals are presumed to be serious, absent evidence to the contrary. There is no such evidence here.

Mr. Rollins asserted that whenever OEA withdraws a proposal, it always reserves the right raise it at as later date without prej-

udice, and that OEA retained its right to raise the issue again under Article 7B, if conditions changed. The language of Article 7B does not support this assertion. I see no basis there for considering a unilateral declaration of "no prejudice", or of a change such as the impact of the drawdown on the Association's finances, as exceptions to the limitations on mid-term bargaining contained in that provision. In addition, I note that when the 1988/89 proposal was withdrawn, the parties agreed that the regions would bargain locally about the subject matter, but there was no agreement with respect to further negotiations at the national level. [Tr., v. 3, pp. 694, 700, 707]

As I have noted above, the matter of parking was not specifically addressed in the 1988/89 contract negotiations and is not, therefore, barred by Article 7B. However, the parking proposal is inseparably bound to the rest of the Office Space proposal. The parking space was meant for the OEA elected officers and staff who would work in the requested office space. Without such office space, the parking proposal is meaningless, and is dismissed for that reason.

THE SUBSTANTIVE ISSUE: THE TRANSFER PROGRAM

This proposal is meant as a successor to Article 9 of the 1989 contract. There has been a Transfer Program every year since then, with one exception, and the parties have negotiated *ad hoc* arrangements each of those years. The Association proposal would greatly broaden the scope of the program by adding surplus employees; those returning from leaves of absence or with Administrative Reemployment Rights; and using the program as the major

vehicle for filling jobs throughout the school year, both at the beginning of the school year and at midterm.

[Note: The OEA brief states that it has somewhat revised its proposal based on evidence presented at the hearing. These revisions were not subject to consideration and discussion during the hearing, and the Agency has had no opportunity to give its views about them. Therefore, I will not accept any change except for dropped proposals, but will work from the OEA proposals as they existed at the end of the hearing.]

OEA urges acceptance of its proposal as a way of offering employees an established and known procedure for filling jobs, rather than a narrowly based program that relies too much on management-directed reassignments. DODDS objects to having a mandatory Transfer Program when by regulation [DS 5330.9, Jt. Ex. 15a and b], it was intended to be one tool for meeting management needs in staffing positions, and that it was to be used only at the discretion of management. It points out that an arbitrator has ruled [Jt. Ex. 22] that the decision as to whether or not a program should be run each year is a management right.

I see nothing in DODDS Regulation 5330.9, or in the arbitration decision cited by the Agency, which would bar the Association's proposal. What follows are the specific provisions proposed by OEA, and my recommendations. The new language proposed by OEA is shown in *ITALIC CAPS*.

Section 1

¶2. *THE EMPLOYER SHALL MAKE EVERY REASONABLE EFFORT TO INCLUDE ALL PROJECTED OR KNOWN VACANCIES, THAT THE EMPLOYER*

INTENDS TO FILL, FOR RECRUITMENT THROUGH THE TRANSFER PROGRAM.

¶3. *THE EMPLOYER SHALL MAKE* every reasonable effort to fill projected or known vacancies referred for selection through the Transfer Program by eligible unit employees requesting transfer before outside recruitment."

Section 3C.

¶4. *THE APPLICATION PERIOD FOR TRANSFERS SHALL RUN FROM SEPTEMBER 1 - JUNE 1 EACH SCHOOL YEAR. THE EMPLOYER SHALL MAINTAIN A CONTINUOUS ROSTER OF APPLICANTS WITH UPDATES EACH MONTH. APPLICATIONS RECEIVED DURING A MONTH SHALL BE ADDED TO THE ROSTER AT THE BEGINNING OF THE NEXT MONTH. APPLICATIONS FOR PROJECTED OR KNOWN VACANCIES SHALL BE CONSIDERED FOR PLACEMENT AT THE BEGINNING OF EACH MONTH.*

These provisions are the heart of the proposal. They make the Transfer Program the primary engine for filling vacancies at any time during the school year. The Association also incorporates the drawdown into the Transfer Program through provisions contained in later sections of the proposal.

DODDS argues that a year-round program is not feasible, and that the present April 15 limitation is needed if the Agency is not to be prevented from getting the best qualified people under the CONUS Recruitment Program. The overwhelming majority of CONUS hires have to sign yearly teaching contracts in advance, normally in March and April. Many of those applicants would no longer be available under the time frame proposed by OEA. Further, the mechanical problems of getting physical examinations, passports, etc., make impractical the late cutoff date proposed by OEA.

DODDS stated that if the April 15 date is retained, the transfer round would be completed first, with remaining vacancies filled through CONUS, local hires, or management-directed reassignments. The April 15 cutoff, however, does not apply to surplus employees

or those seeking compassionate transfer. The Agency continues its efforts to place them until August 1.

It also states tha applying the Transfer Program to midyear vacancies could result in significant additional costs, such as where the use of the Transfer Program would cause the movement of a teacher from thousands of miles away when someone could be reassigned from a much closer location. It could also hinder management efforts to place surplus employees.

The Association argues that Transfer Program offers the fairest method for effecting reassignments, that it should be extended throughout the school year, and that it should be used to fill midyear vacancies. It accepts the fact that for midyear vacancies, the first recourse would be local hires and the CONUS program. However, the intent of the proposal is to prohibit the use of a management-directed reassignment to fill a midyear vacancy unless it could not be filled through the Transfer Program.

Recommendation. I find that the OEA proposed timetable would adversely affect the CONUS recruitment program, and hinder the Agency in its efforts to meet its staffing needs. Therefore, the Transfer Program should retain its cutoff date of April 15, but this would not apply to surplus employees and those eligible for compassionate transfer. Placement efforts for them would continue for as long as practical. Requiring use of the Transfer Program for midyear vacancies, rather than allowing management-directed reassignments as appropriate, could cause unnecessary and excessive costs and unduly impair needed flexibility.

Specifically:

> Article 9, §1, of the current contract should remain as is, except that the following should be inserted after the first sentence: "*THE EMPLOYER SHALL MAKE EVERY REASONABLE EFFORT TO INCLUDE ALL PROJECTED OR KNOWN VACANCIES, THAT THE EMPLOYER INTENDS TO FILL* the next school year, *FOR RECRUITMENT THROUGH THE TRANSFER PROGRAM.*" [Words added by the Factfinder are underlined.]

Midyear vacancies will not normally be part of the Transfer Program. However, in circumstances when the vacancy is advertised, the Transfer Program will apply in that the selection criteria in §4 will be used.

Section 2

> A, ¶1. Employees in the unit who have been *ISSUED A WRITTEN NOTIFICATION OF BEING SURPLUS OR* issued a written (general or specific) notice of reduction in force [~~, as defined in Chapter 351 of the Federal Personnel Manual, or who have been identified as eligible for compassionate transfer~~.] [Bracketed words ~~struckout~~ were dropped by OEA from the original language in Article 9.]
>
> A, ¶2. *EMPLOYEES IN THE UNIT* who have been identified as eligible for a compassionate transfer.
>
> B. Employees in the unit currently serving under a transportation agreement who have completed *A* [~~their~~] prescribed *TOUR-OF-DUTY* [~~tour at their present location~~].
>
> C. Any excepted-appointment-without-condition employees in the unit not currently serving under a transportation agreement upon completion of three years of [~~continuous~~] service with DODDS.
>
> D. *UNIT EMPLOYEES CURRENTLY ON EXTENDED LEAVES-OF-ABSENCE SHALL BE ELIGIBLE FOR REASSIGNMENT THROUGH THE TRANSFER PROGRAM.* [Dropped by OEA, see Brief, p. 7.]

Section 2 sets out the priority orders in which employees will be considered under the Transfer Program. The purpose of the OEA proposal is to delete the reference to the FPM, add surplus employees to the first order of priority, place employees eligible for compassionate transfer in the next lower priority order,

reflect a change to the Joint Travel Regulations, and remove the requirement for "continuous" service in §2.C.

Management raised no objections at the hearing to the changes proposed to §§2A and B, but asked that, to assure consistency of application, that the phrase "surplus employee" be defined as "an employee who will be displaced or separated as a result of a drawdown or school closure". The Association did not specifically agree to this definition, but it did not take exception to it. Also, the parties indicated their understanding that the present practice with respect to compassionate transfers will continue. [Tr., pp. 374-378]

DODDS objected to the deletion of "continuous" in §2C. The OEA proposal would allow an employee who once served three years in the system, and then has been out for many years, to be considered under the program, with no requirement for recent service. It argues that, as a matter of fairness and equity, these employees should not be allowed to compete with current employees who may have been at their present locations for many years. It also indicated that while those in the excepted-appointment-without-condition class are not temporary employees at the present time, it is not known what will happen as the drawdown continues.

Recommendation. The proposed §§2A and B are accepted, with the addition of the definition of "surplus employee" offered by the Agency. The Agency's arguments against the change to §2C are not persuasive in that they cite no operational or management harm or cost from inclusion of these employees in the Transfer Program.

While management has a legitimate concern with respect to fair and equitable treatment for its employees, it is the Association which represents and speaks for the bargaining unit. As such, it has indicated that this is what the bargaining unit wishes, and this choice should be respected absent a valid management concern or problem. However, in response to the future possibility cited by the Agency, eligibility under §2C should not apply to temporary employees.

Specifically, after the first sentence, §2A, ¶1 should read as follows:

> Employees in the unit who have been *ISSUED A WRITTEN NOTIFICATION OF BEING SURPLUS OR* issued a written (general or specific) notice of reduction in force. A surplus employee is one who will be displaced or separated as a result of a drawdown or school closure.

Sections 2A, ¶2; 2B; and 2C are accepted as offered by OEA, and §2D should be amended to read as follows:

> Any excepted-appointment-without-condition employees in the unit not currently serving under a transportation agreement upon completion of three years of service with DODDS, provided they are not temporary employees.

Section 3.C.

> ¶2. *UNIT EMPLOYEES MAY APPLY IN ANY ONE OR MORE OF THE CATEGORIES FOR WHICH HE/SHE IS CERTIFIED OR QUALIFIED.* [Dropped by OEA, see Brief, p. 7.]
>
> ¶3. *TRANSFER APPLICANTS MAY DESIGNATE ACCEPTABLE LOCATIONS BY REGION, COUNTRY, OR GEOGRAPHIC COMPLEX. THERE IS NO LIMITATION ON THE NUMBER OF LOCATIONS AND CATEGORIES WHICH MAY BE LISTED.*
>
> ¶4. Already discussed, see pp. 14, 15, above.
>
> ¶5. *THE EMPLOYER SHALL MAKE EVERY REASONABLE EFFORT TO LIMIT THE NUMBER OF CATEGORIES REQUIRED FOR FILLING EACH VACANCY THROUGH THE TRANSFER PROGRAM.*
>
> ¶6. *THE EMPLOYER SHALL MAKE EVERY REASONABLE EFFORT TO AVOID*

IDENTIFYING ADDITIONAL ACTIVITIES AS REQUIREMENTS FOR FILLING VACANCIES.

DODDS raised no objection to §3C, ¶3, but did object to ¶s5 and 6. The Association stated that the reason for the provisions is that management has "piled on" the number of categories and additional activities, and that while one or two are understandable, it has gotten to the point of four or five.

The Agency responded that requiring two categories is common, but that it is very rare to have four or five, and that applicants are not required to have experience in a listed additional activity, but only be willing to serve. Many of the schools are small and there is a need for employee flexibility. Management lists the categories and additional activities required to meet its staffing needs, and it should not be hampered in its efforts.

Recommendation. Section 3C, ¶3, is accepted without dispute, but ¶s5 and 6 are deleted. The Agency arguments about its need for flexibility are persuasive. It is management's responsibility to staff schools with teachers who are able, and in the case of additional activities, willing, to meet the schools' needs. DODDS must be allowed to set requirements for meeting those needs.

Sections 3D, E, and F.

D. A unit employee may apply in any one or more of the categories for which he or she is qualified in accordance with the qualification standards [~~published by the Employer for the pertinent school year~~] *SET BY DODDS FOR SY 1988-89 OR ANY SUBSEQUENT SCHOOL YEAR.*

E, ¶1. *THE EMPLOYER SHALL MAKE EVERY REASONABLE EFFORT TO AVOID CHANGING VACANCY REQUIREMENTS AFTER SUBMISSION FOR RECRUITMENT FROM THE SCHOOL LEVEL.*

E, ¶3. *MANAGEMENT WILL MAKE EVERY REASONABLE EFFORT THAT*

VACANCIES IDENTIFIED AT A SPECIFIED LOCATION SHOULD NOT BE CHANGED TO GENERIC LOCATION AT A LATER DATE.

F. If any vacancies not previously projected or reported to ODS occur which the Employer determines to fill through the transfer program, they shall be reported by ODS to the Association at the national level. Such vacancies shall be included in the Transfer Program if received by ODS sufficiently prior to *THE CLOSE OF THE TRANSFER PROGRAM*.

DODDS offered no objection to §3E, ¶s1 and 3, but does object to §§3D and F. Section 3D ties qualification standards back to SY 1988. The Association asserts that this incorporates the present regulations and the present practice, but the Agency responds that setting this date in a contract would tie the parties to qualifications that could become outmoded in time. The Agency objection to §3F is related to its objection to §3C, ¶4.

Recommendation. Section 3E, ¶s1 and 3, are accepted without dispute. Section 3.F is deleted because the closing date of April 15 has been retained. While DODDS objected to the specific date of 1988 in §3D, it stated it had no problem with general language that would encompass the past three years on a rolling basis. That seems to me to be a reasonable compromise that incorporates the existing practice [Tr., pp. 421-426], and I accept it.

Specifically, §3D should read as follows:

A unit employee may apply in any one or more of the categories for which he or she is qualified in accordance with the qualification standards published by the Employer for the pertinent school year or any of the three previous school years.

Section 4.

C. *ITINERANT UNIT EMPLOYEES SHALL BE ASSIGNED POINTS BASED ON LONGEVITY AT ONE OF THE SITES SERVICED THAT HAS THE GREATEST POINTS.*

D, ¶1. Each applicant shall be assigned points based on longevity at their present location *(THIS INCLUDES UNIT EMPLOYEES ON EXTENDED LEAVE) AS AGREED TO BY THE PARTIES ANNUALLY*.

D, ¶2. In addition, each applicant shall be assigned one (1) additional point for each year of DODDS service with no limitation. *THIS INCLUDES UNIT EMPLOYEES ON EXTENDED LEAVE*.

D, ¶3. A move from one location to another that was not requested by the unit employee allows the unit employee to receive the maximum possible points obtainable either from the old location or the new location. Unit employees shall be allowed to compute location points by multiplying the number of continuous years at the current location plus the number of continuous years at the location from which involuntarily moved by the higher longevity points assigned to either location. *THIS INCLUDES UNIT EMPLOYEES ON EXTENDED LEAVE*.

D. [OEA's proposal contains a second §4D.] Applicants for each particular vacancy shall be considered in the following order from among those applicants which have designated the *GEOGRAPHIC COMPLEX*, country or region where the vacancy exists.

1. Applications from employees in the unit who have been issued a written *NOTICE OF BEING SURPLUS OR A WRITTEN* (general or specific) notice of reduction in force, in order according to points.

3, subparagraph 1. *THE EMPLOYER SHALL EXTEND CONSIDERATION UNDER THE TRANSFER PROGRAM FOR THOSE UNIT EMPLOYEES WHO HAVE APPLIED FOR TRANSFER AND WHO HAVE SERVED TEN OR MORE CONTINUOUS YEARS AT THEIR CURRENT SCHOOL COMPLEX WITHOUT A BREAK IN SERVICE OR A PERMANENT CHANGE OF STATION MOVE*.

3, subparagraph 2. *THE EMPLOYER SHALL EXTEND CONSIDERATION UNDER THE TRANSFER PROGRAM FOR THOSE UNIT EMPLOYEES WHO HAVE APPLIED FOR TRANSFER AND WHO HAVE COMPLETED THE MAXIMUM YEARS OF SERVICE AT SITES WITH TOUR LIMITATIONS. (SPECIAL CATEGORY)*

G. *FOR PURPOSES OF THE TRANSFER PROGRAM THE FOLLOWING LOCATIONS SHALL BE ONE YEAR AREAS: CUBA; ICELAND; JAPAN (IWAKUNI, MISAWA, SASEBO); KOREA; NEWFOUNDLAND; NORWAY; OKINAWA*.

The following discussion assumes that OEA has dropped §§4C; 4D3, subparagraphs 1 and 2; and 4G. This is not explicitly stated in the brief, but these provisions are not contained in the statement of the Transfer Program proposal within the brief, see pp.

5/5, 5/7, and 5/8.

The Agency makes no objection to second §4D, or §4D1, with the proviso that "surplus employee" be defined. It does object to all references to the inclusion of employees on extended leave. It points out that this is intended to include those in the ARR [Administrative Reemployment Rights] and sabbatical programs. Neither are on extended leave. The former are off the rolls for mainly educational reasons, while those on sabbatical are on the rolls for half the day and on LWOP the other half. In addition, there are people on extended leave for educational purposes. In all cases, the teachers have received approval from their regions for study or work experiences which are deemed to be of benefit to that region, and allowing their inclusion in the transfer program would go against the purpose for which the approval was granted, that is, providing the benefit of the work or study to the approving region.

Recommendation. Second §§4D and 4D1 are accepted without dispute, with the understanding that "surplus employee", as used here and in any other part of this Report and Recommendations, is defined as in §2A, above. Employees on extended leave, sabbatical, ARR, etc., are not to be covered by the Transfer Program for the reason that to do so would nullify the purposes of those programs.

Specifically, the following provisions shall read as indicated:

> 4D. Each applicant shall be assigned points based on longevity at their present location *AS AGREED TO BY THE PARTIES ANNUALLY*.
>
> Second subsection D. Applicants for each particular vacancy shall be considered in the following order from among those

applicants which have designated the *GEOGRAPHIC COMPLEX*, country or region where the vacancy exists.

1. Applications from employees in the unit who have been issued a written *NOTICE OF BEING SURPLUS OR A WRITTEN* (general or specific) notice of reduction in force, in order according to points.

Section 5.

B, ¶2. *MARRIED COUPLES APPLYING FOR A JOINT (S1) TRANSFER SHALL BE ALLOWED TO LIST UP TO FIVE (5) "AREAS" CONSISTING OF ONE OR MORE GEOGRAPHIC COMPLEXES WITHIN WHICH THEY ARE WILLING TO COMMUTE.*

DODDS does not object to this language.

Recommendation. Section 5B, ¶2, is accepted without dispute.

Section 6.

A. A unit employee shall be notified of his/her [~~offer~~] *TRANSFER IN A TIMELY MANNER* by the Employer.

B, ¶1. An applicant may withdraw from the program without penalty if the Personnel Division, Office of Dependent Schools, receives notification from the unit employee or the Association at the national level at least one (1) work day prior to the actual transfer session *FROM WHICH THE UNIT EMPLOYEE IS AFFECTED.*

B, ¶2. *AN APPLICANT MAY DECLINE A TRANSFER TO ANY CATEGORY OR LOCATION NOT IDENTIFIED ON HIS/HER APPLICATION WITHOUT PENALTY.*

C, ¶2. *ONLY THE EXCLUSIVE REPRESENTATIVE HAVING RECOGNITION AT THE NATIONAL LEVEL SHALL BE AUTHORIZED ATTENDANCE AT TRANSFER SESSIONS.*

D. *A LIST OF ALL TRANSFERS TO UNIT EMPLOYEES SHALL BE POSTED IN EACH SCHOOL AFTER NOTIFICATION TO INDIVIDUAL EMPLOYEES RECEIVING TRANSFERS.*

DODDS raised no objections to §§6A and 6B, ¶1. It took exception to §§6B, ¶2; 6C; and 6D. It claims that if employees are permitted to decline offered positions this will hinder its efforts to place surplus employees because it is not always possible to place surplus employees' in categories and locations of their

preference. The result of a surplus employee's refusal to accept an offered position could mean his/her separation.

The Agency argument against §6C, ¶2, is that the Transfer Program is a worldwide program that includes employees in the OEA unit and also in two bargaining units represented by other unions. Historically, the other two unions have had a representative present to represent the interests of their units and ensure that the process is fair and equitable. This practice should be permitted to continue.

OEA states that the posting requirement in §6D is needed as a check mechanism, so that employees can notify the Association if there are any inappropriate assignments made under the program. Transfers used to be posted in schools when transfer bargaining was done in the regions. The purpose of §6D is reinstate that practice. The Agency argues that this is not needed, that OEA participates in the transfer rounds and is given a list of all vacancies and transfers, that it can notify the local schools if it chooses, and that transferred employees are each given individual notice of their transfers.

Recommendation. Sections 6A and 6B, ¶1, are accepted without dispute. Section 6B, ¶2, is no more than what the present practice is, except with respect to persons who have received RIF notices or are otherwise surplus. The OEA proposal cannot be accepted for those employees, because there is no job for them if they do not take the assignment offered.

The Association has offered no evidence in support of §6C, ¶2.,

other than it is:

> ... the only bargaining unit that has recognition at this [national] level and we want to retain the right of being the only one at the table representing our unit on the Transfer Program. [Tr., pp. 156, 157.]

There is nothing in the record to indicate that the presence of other unions during the transfer rounds will adversely affect the ability of OEA to represent its unit, or that this has posed a problem in the past. There is a legitimate basis for their presence, and I find no reason to end the practice.

I am also not persuaded by the Association's rationale for §6D. Under the present system, the entities that needs notification receive it, that is, the individual transferring employees, and OEA. If there is a need for a check at the regional levels and below, it should be a simple matter for OEA to send such information to appropriate Association officials at those levels.

Specifically:

> Sections 6A and 6B¶1, are accepted as proposed.
>
> §6B¶2 shall read as follows: "*AN APPLICANT*, other than an employee who has been issued a written notice of being surplus or a written (general or specific) notice of reduction in force, *MAY DECLINE A TRANSFER TO ANY CATEGORY OR LOCATION NOT IDENTIFIED ON HIS/HER APPLICATION WITHOUT PENALTY*.
>
> §§6C, ¶2, and 6D are deleted.

Section 7.

> ¶1. Unit employees have the right to request special consideration for a transfer for personal reasons/conditions which may warrant relocation. The request must accompany the initial transfer application and shall include supportive documentation. The documentation shall include, but is not limited to, a statement from local Management and another appropriate professional, (i.e., doctor, lawyer, etc.) The extent of special consideration to be given shall be on a case-by-case basis. *THIS INCLUDES EMPLOYEES ON EXTENDED*

LEAVE.

¶2. IF MORE DOCUMENTATION IS NEEDED FROM AN APPLICANT FOR COMPASSIONATE TRANSFER, THE UNIT EMPLOYEE SHALL BE PROMPTLY NOTIFIED AFTER REVIEW OF THE INITIAL DOCUMENTATION.

DODDS made no objection to these proposals other than the reference to extended leave.

Recommendation. I have accepted the DODDS argument against inclusion of employees on extended leave in all previous OEA proposals addressed, but that argument does not apply here. Section 7, ¶1, does not give an employee a right to a compassionate transfer; it gives only the right to ask management to consider a request for compassionate transfer on a case-by-case basis. There is no present bar to employees on extended leave making such a request, whatever the wording of this provision.

Section 7, ¶s1 and ¶2, provide a structure for requesting a compassionate transfer, and a promise that the employee will be notified promptly if there is a need for additional documentation. There is no valid basis for excluding employees on extended leave, and both provisions are accepted as proposed.

Section 8.

UPON TRANSFER OR REASSIGNMENT UNDER THIS PROGRAM, UNIT EMPLOYEES SHALL BE ENTITLED TO BENEFITS AND ALLOWANCES IN ACCORDANCE WITH APPLICABLE GOVERNMENT-WIDE REGULATIONS. THIS INCLUDES, BUT IS NOT LIMITED TO THE FOLLOWING BENEFITS: TRANSPORTATION AGREEMENT; RENEWAL AGREEMENT TRAVEL; TRANSPORTATION COSTS OF UNIT EMPLOYEE AND DEPENDENTS; TRANSPORTATION COSTS OF UNIT EMPLOYEE'S AND DEPENDENTS' HOUSEHOLD GOODS, ACCOMPANIED GOODS, AND UNACCOMPANIED GOODS; MAXIMUM WEIGHT ALLOWANCE AUTHORIZED BY GOVERNMENT-WIDE REGULATIONS; SEPARATE MAINTENANCE ALLOWANCE; TEMPORARY LIVING ALLOWANCE; LIVING QUARTER ALLOWANCE; FOREIGN POST DIFFERENTIAL; HOUSING; ETC.

OEA explained that the purpose of the proposal is first, to pro-

vide the same benefits to employees on transportation agreements and to those who are not, and second, to gain the benefits of government-wide regulations, which are less restrictive than the DOD Joint Travel Regulations. The Agency's first objection to the proposal as written is that there is a need for equity and consistency between unit employees and other DOD civilian employees in the same areas overseas which is provided by the Joint Travel Regulations. It also suggests that the list of benefits should be preceded by the phrase "this may include".

Recommendation. As the party requesting change, it is the Association's burden to show why the change is needed. That has not been done. There was no evidence presented to show problems or inequities with the present system, and the Agency recommendations for change to the proposal are accepted.

Specifically, §8 should read as follows:

> *UPON TRANSFER OR REASSIGNMENT UNDER THIS PROGRAM, UNIT EMPLOYEES SHALL BE ENTITLED TO BENEFITS AND ALLOWANCES IN ACCORDANCE WITH APPLICABLE* DOD and Agency REGULATIONS. THIS may *INCLUDE, BUT IS NOT LIMITED TO, THE FOLLOWING BENEFITS: TRANSPORTATION AGREEMENT; RENEWAL AGREEMENT TRAVEL; TRANSPORTATION COSTS OF UNIT EMPLOYEE AND DEPENDENTS; TRANSPORTATION COSTS OF UNIT EMPLOYEE'S AND DEPENDENTS' HOUSEHOLD GOODS, ACCOMPANIED GOODS, AND UNACCOMPANIED GOODS; MAXIMUM WEIGHT ALLOWANCE AUTHORIZED BY* DOD and Agency *REGULATIONS; SEPARATE MAINTENANCE ALLOWANCE; TEMPORARY LIVING ALLOWANCE; LIVING QUARTER ALLOWANCE; FOREIGN POST DIFFERENTIAL; HOUSING; ETC.*

Charles Feigenbaum — April 2, 1994

Charles Feigenbaum — Date