UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE OFFICE OF DEPENDENTS SCHOOLS Respondent	
and	Case No. 3-CA-60491
OVERSEAS EDUCATION ASSOCIATION Charging Party	

Paul Wolfe, Esquire
For the Respondent

Richard J. Hirn, Esquire
For the Charging Party

Patricia Eanet Dratch, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This matter, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,1/ and the Final Rules and Regulations issued thereafter, 5 C.F.R. § 2423.1, et seq., is a variant names and address case in that the Overseas Education Association (hereinafter "OEA" or "Union") requested that, ". . . DODDS immediately supply the home addresses of the new CONUS recruits who have accepted

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116 (a)(5) will be referred to, simply, as "§ 16(a)(5)".

positions . . . to begin next school year" and on an ongoing basis, "as soon as you receive the . . . acceptance. . . ." (Jt. Exh. 1), it being asserted by Respondent that such persons [i.e., recruits who have accepted offers as teachers] were not then employees (Jt. Exh. 2).

This case was initiated by a charge (G.C. Exh. 1(a)) filed on August 19, 1986, which alleged violations of §§ 16(a)(1) and (5) of the Statute and by a First Amended Charge (G.C. Exh. 1(c)) filed on April 6, 1987, which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1(e)) issued on April 21, 1987; alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; and set the hearing for June 2, 1987, pursuant to which a hearing was duly held on June 2, 1987, in Washington, D.C. before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues presented, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, July 2, 1987, was fixed as the date for mailing post-hearing briefs, and each party timely filed an excellent brief, received on, or before, July 8, 1987, which have been carefully considered. On the basis of the entire record, I make the following findings and conclusions:

Findings

1. The Department of Defense Dependents Schools (DODDS) operates about 270 elementary, middle, junior high, and high schools and a community college, the community college being located in Panama, for dependents of military and civilian employees stationed overseas (Jt. Exh. 3, p. 1).2/ OEA

2/ Respondent, DODDS, asserts, "There are no DODDS schools in the United States. . . ." (Res. Brief, p.6), with which Charging Party agrees in substance (Charging Party Brief, p. 2); the record so indicates (Tr. 35); and I have no reason to doubt, as a matter of semantics, that this is true. Nevertheless, I am aware that, in fact, the Department of Defense does, indeed, operate schools in the United States for dependent children of military and civilian personnel,

(footnote continued)

represents a bargaining unit of non-supervisory professional school-level personnel employed by DODDS in the Atlantic, Germany, and Pacific regions (Res. Exh. 5).

2. Each year, beginning in August (Tr. 22) DODDS conducts a CONUS 3/ recruitment program.4/ Applications must be postmarked by January 15 to receive consideration for vacancies in the next school year (Jt. Exh. 3, pp. 2, 16; Tr. 22, 24, 25).

3. Applications are screened, certain candidates are scheduled for interviews, and interviewed by school principals by early April. After April 15, when the transfer program ends, DODDS starts making tentative offers to CONUS recruits (Tr. 24-25; Res. Exh. 1). The letter making the tentative offer of employment sets forth at least the Region of the duty station, the date school will begin, the tentative departure date from the United States, and specifically states that the appointment is conditional upon, inter alia, final certification of the applicant's qualifications; satisfactory completion of pre-employment investigation, physical examination and immunizations; securing an official passport; and the continuing need for the position. The letter cautions against resigning present employment, disposing of home or furniture, or taking any

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(footnote 2 continued)

albeit that a modifying designation is included. See, for example, United States Department of Defense Dependents Schools, Fort Bragg, North Carolina v. Federal Labor Relations Authority, 838 F.2d 129 (4th Cir. 1988).

3/ "CONUS" ordinarily means "Continental United States" and would not even include the states of Alaska or Hawaii; however, as used herein, "CONUS" specifically includes all fifty states, i.e., Alaska and Hawaii, as well as the United States territories and possessions, including, e.g., Puerto Rico and Guam.

4/ Vacancies are first offered to current employees under a negotiated transfer program (Tr. 24, 27-28) from about February through April 15 (Tr. 27-28); but current DODDS educators are not eligible to participate in the CONUS recruitment program (Tr. 27).

action that might cause inconvenience, ". . . in the event your tentative selection does not result in a definite appointment. You will be notified at such time as this commitment is final." (Res. Exh. 1; Tr. 29) (Emphasis supplied). Enclosed with the letter of tentative offer of employment is a letter of Acceptance or Declination which must be returned within 48 hours of the date of receipt of the letter of tentative offer of employment (Res. Exh. 1, Attachment).

4. For the 1986-87 school year, a total of 571 persons were hired through the CONUS recruitment program (Tr. 25). Annually, about, 6000 CONUS applications are received from which a cadre of about 3000 best qualified individuals is selected (Tr. 57). To obtain the required personnel annually, generally more than 600, DODDS must issue between 1000 and 2000 tentative offers of employment to persons in the best qualified cadre. To obtain the required 571 teachers for the 1986-87 school year, DODDS made an estimated 1500 offers of tentative employment (Tr. 25, 31, 55-58). About 49 persons who had initially accepted offers of employment for the 1986-87 school year dropped out and about 6 to 11 additional persons who had initially accepted offers of employment for the 1986-87 school year failed to pass pre-employment physicals and/or investigations (Tr. 26, 60-61). The tentative offer of employment, followed by the applicant's acceptance, nevertheless, does not become a final commitment by DODDS until the pre-employment investigatory process, physical, etc. are completed (Tr. 54-55). Although DODDS begins to send out tentative offers of employment after April 15 of each year, for various reasons, including, it is assumed, the avoidance of excessive final commitments, the majority of the positions to be filled are not received by the Office of Staffing until the end of June, July and August of each year (Tr. 65). Officially, the issuance of tentative letters of employment ends in September of each year (Tr. 31) but may extend later and, indeed, the last position filled for the 1986-87 school year was filled in October, 1986 (Tr. 31), after the school year had begun on September 4 (Tr. 36, 45).

5. Also included with the tentative offer of employment is a change of address form which applicants use to update their addresses as necessary. The need for a change of address form resulted from the fact that CONUS recruits make frequent moves during the summer (Tr. 33) which is the period during which those who are offered and have accepted

tentative employment will undergo processing for DODDS employment. Change of addresses are sent only to one of the 218 military installations designated as the applicant's point of contact (Tr. 34). No change of address is sent to DODDS (Tr. 34).5/

6. CONUS recruits depart for the overseas area about two weeks prior to the beginning of the school year and, as the 1986-87 school year began September 4, 1986, CONUS recruits were, for the most part, scheduled to arrive at their overseas duty area on, or about, August 15, 1986 (Tr. 36, 45).

7. The Standard Form 50, Notification of Personnel Action, shows the effective date of appointment as the day the CONUS recruit begins travel overseas (Tr. 45). Work does not begin and pay does not begin until the CONUS recruit reports for duty, i.e., on or after September 4, 1986 (Tr. 45). The first day of duty also marks the first time that a person recruited in the United States comes under the direct supervision of a DODDS supervisor (Tr. 46).

8. Beginning in April of each year and continuing until the last job offer is made, OEA is furnished weekly with a requisition management file which, inter alia, (a) lists all positions which the Office of Staffing has been asked to fill through the CONUS recruitment program; (b) names of persons issued tentative offers of employment and dates letters were sent; (c) names of persons accepting or declining offers; (d) date for individuals to begin processing (Tr. 37-38).

5/ I am aware that the parties stipulated,

> ". . . that the information [home addresses] was reasonably available and normally maintained by Respondent at the time of the request. There is one caveat which is that the Respondent cannot guarantee the accuracy of those home addresses at that time." (Tr. 10).

Nevertheless, from the record (Tr. 34-35), it appears that the only home address maintained by DODDS is that appearing on the original application (Tr. 35) and, perhaps, the only home address reasonably available to DODDS is that address appearing on the original application (Tr. 34, 35).

9. By letter dated June 2, 1986, OEA requested,

"... that DODDS immediately supply the home addresses of the new CONUS recruits who have accepted positions in the OEA's bargaining unit to begin next school year. . . ."

"In addition, the OEA formally requests . . . the addresses of all new CONUS recruits who accept employment . . . on an ongoing basis as soon as you receive the employees' acceptances. . . ." (Jt. Exh. 1)

10. DODDS refused OEA's request by letter dated June 23, 1986, asserting that 5 U.S.C. § 2105 defines an employee and stating, in part, that

"Applicants who have been offered positions but have not reported for duty do not meet the three criteria set forth in the above definition of employee [5 U.S.C. § 2105]. Since they are not employees, there is no obligation under 5 U.S.C. § 7114(b)(4) to provide the OEA with the requested information." (Jt. Exh. 2).

11. On October 2, 1986, OEA filed a complaint in the United States District Court For The District of Columbia (C.A. No. 86-2721) against DODDS under the Freedom of Information Act [5 U.S.C. § 552(a)] seeking access to the home addresses of teachers, newly recruited by DODDS to teach in the Pacific, Germany and Atlantic regions, for the 1986-87 school year, which OEA had requested by letter dated June 26, 1986. DODDS on August 12, 1986, had supplied OEA with the names and duty stations of these teachers but not with their stateside home addresses. On March 4, 1987, the parties entered into a Stipulation of Dismissal of Civilian Action No. 86-2721 which provided, in part, as follows:

"2. Defendant [DODDS] will provide plantiff [OEA] with access, for one time only, per teacher, to the stateside home addresses of teachers, newly hired to teach in the DODDS Pacific, Germany and Atlantic regions for the 1986-87, 1987-88 and 1988-89 school years, in the following manner:

"a. Plaintiff [OEA] will provide defendant [DODDS] with information, germane to the collective

bargaining responsibilities of plaintiff to these teachers, in stamped, sealed envelopes, to be forwarded by defendant to these teachers.

"b. Defendant [DODDS] will affix mailing labels containing the stateside home addresses of these teachers to these stamped, sealed envelopes, and promptly forward them, through the United States mail, to these newly hired teachers.

"3. Plaintiff [OEA] will pay defendant [DODDS] for all costs incurred under the terms of this settlement, including, but not limited to, full compensation to defendant for computer time spent addressing mailing labels, and employee time, including overtime pay if necessary, spent affixing these labels and mailing said packages.

. . . ." (Res. Exh. 2, Attachment).

Conclusions

Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 22 FLRA No. 34, 22 FLRA 351 (1986) (Union Proposal 1) (hereinafter referred to as the "OEA" case) [Authority's non-negotiable rulings affirmed, sub nom., Overseas Education Association, Inc. v. Federal Labor Relations Authority, 827 F.2d 814 (D.C. Cir. 1987). Proposals, including Union Proposal 1, which were found negotiable were not appealed], involved OEA's proposal that DODDS, and/or its designee at the proper level, ". . . . shall provide the Association with the opportunity to include appropriate orientation information in the orientation mailing sent to new employees in the bargaining unit." There, the Authority stated, in pertinent part, that,

". . . DODDS does not dispute that the provision of 'appropriate orientation information' is a matter affecting working conditions and hence a condition of employment . . . Thus, even though the proposal would be effective at a time before the selectees have been appointed [in 27 FLRA No. 71, the Authority made it clear that, "the individuals involved were not employees at the time. . . . (27 FLRA at 555)], it relates to matters concerning bargaining unit positions and, consequently, concerns conditions of employment in the bargaining unit. . . ." (22 FLRA at 352-353).

The present case is a step beyond in that there is no "orientation information" to affect working conditions and therefore constitute, ". . . conditions of employment." Rather, OEA here sought the home addresses of the new CONUS recruits because the Second Circuit, in American Federation of Government Employees, Local 1760 v. Federal Labor Relations Authority, 786 F.2d 554 (2d Cir. 1986), ". . . has recently held that a federal sector union has the right to unit employees' home addresses pursuant to 5 U.S.C. Section 7114(b)(4)." (Jt. Exh. 1). As noted previously, DODDS refused to furnish the home addresses because the selectees were not employees and, therefore, DODDS asserted, ". . . there is no obligation under 5 U.S.C. § 7114(b)(4) to provide the OEA with the requested information." (Jt. Exh. 2).

1. Selectees who have accepted offers are not then employees of DODDS

As the record shows, sometime after April 15 of each year, the majority in July and August, DODDS sends offers of tentative employment to which applicants are required to respond within 48 hours of receipt by indicating acceptance or declination of the tentative offer. Obviously, those who accept do not then become either employees or appointees. The first day of work and the first day of pay begins the date the recruit reports for duty at the school overseas to which he, or she, has been assigned, on, or after, the first day of the school year, which for the 1986-87 school year would have been on, or after, September 4, 1986. The first day of duty is also the first time that a CONUS recruit comes under the direct supervision of a DODDS supervisor.

DODDS' offer of tentative employment is specifically conditioned, inter alia, on final certification of applicant's qualifications; satisfactory completion of pre-employment investigation; and passing a physical examination. Each applicant is informed that, "You will be notified at such time as this commitment is final." (Res. Exh. 1). DODDS advises each selectee upon completion of the pre-employment investigation process, physical, etc. when the appointment is final. It is possible that at that point they become appointees; however, the Standard Form 50, Notification of Personnel Action, shows the effective date of appointment as the day the CONUS recruit begins travel overseas.

At the hearing, General Counsel asserted that the Authority in 22 FLRA No. 34 held that newly selected teachers

were employees (Tr. 11-12). Not only did the Authority's decision not support such assertion,6/ but the Authority's subsequent decision, issued some 22 days after the hearing, in Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 27 FLRA No. 71, 27 FLRA 492 (1987) on OEA, Proposal 20, 27 FLRA at 551 et seq. (hereinafter referred to as the "Proposal 20" case), firmly laid to rest any contention that teachers upon acceptance of DODDS' offer of tentative employment are at that point "employees." OEA's Proposal 20 was for payment, at the normal daily pay rate, for travel from his/her home of record in the United States to the overseas place of duty. The Authority there, in agreement with Respondent's contention here (Respondent's Brief, pp. 10-12), turned to 5 U.S.C. § 2105(a) for the definition of "employee". Section 2105(a) provides:

> "2105. Employee
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> "(a) For the purpose of this title, 'employee', . . . means an officer and an individual who is -
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> (1) appointed in the civil service. . . .;
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> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
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> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position."

6/ Indeed, not only were they not employees, but they were not even appointees. Thus, the Authority stated that the proposal concerning orientation information applied at, ". . . a point in time before the newly selected teachers have actually been appointed to their positions, that is, during the summer before the school year has begun. . . ." (22 FLRA at 352) and, ". . . the proposal would be effective at a time before the selectees have been appointed. . . ." (22 FLRA at 353).

The Authority stated that courts have, ". . . generally held that all three criteria of this statutory definition must be met to qualify as a Federal employee as opposed to an appointee." (27 FLRA at 554), citing: McCarley v. Merit Systems Protection Board, 757 F.2d 278 (Fed. Cir. 1985); and National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981) as Respondent does herein (Respondent's Brief, p. 11). The Authority further noted that,

> "The definition of 'employee' set forth in section 7103(a)(2) of the Statute 7/ does not require that an 'appointee,' who does not meet these three criteria, must be considered an 'employee' for the purpose of inclusion in a bargaining unit." (27 FLRA at 554).

In Proposal 20, OEA had relied ". . . on a 'workshop report' generated by the Agency's Pacific Region" for the assertion that ". . . a new hire's effective date of 'appointment' is the date he/she enters into travel. . . ." (27 FLRA at 553). Here, as the record shows, the Standard Form 50 provides that the effective date of appointment is the day the CONUS recruit begins travel overseas. Of course, in neither the OEA case nor in the Proposal 20 case were new selectees "appointees" prior to the beginning of their travel overseas and most assuredly they were not employees.

General Counsel first suggests, ". . . that the Administrative Law Judge may make an independent finding and conclude, based on the record herein, that the newly selected teachers are employees within the meaning of section 7103(a)(2) of the Statute." (General Counsel's Brief, p. 3). Nothing in the record shows, or gives even the slightest suggestion, that newly selected teachers are then employees. Certainly, they are not then "employed in an agency" as

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7/ "7103. Definitions, application

"(a) For the purpose of this chapter -

. . .

"(2) 'employee' means an individual -

"(A) employed in an agency; or
. . . ." (5 U.S.C. § 7103(a)(2)(A))

§ 3(a)(2) requires. To the contrary, some, perhaps most, would then be actively employed by an employer not an agency as defined in § 3(a)(3) of the Statute. DODDS' offer is tentative and conditional upon, inter alia, certification of each applicant's qualifications; satisfactory completion of pre-employment investigation; and passing a physical examination. For the 1986-87 school year, about 49 individuals who last accepted DODDS' offer dropped out, i.e., changed their minds; and an additional 6 to 11 who had accepted offers of tentative employment failed either to pass physicals and/or pre-employment investigations. The newly selected teachers do not, at the point of their acceptance of DODDS' offer of tentative employment, meet any requirement of 5 U.S.C. § 2105(a), i.e., they have not then been appointed in the civil service, indeed, the record shows that pursuant to the Standard Form 50 the effective date of appointment is the day each individual begins travel overseas; they are not then engaged in the performance of any Federal function; and they are not then subject to the supervision of any agency person. Finally, the Authority in the Proposal 20 case, supra, found no basis whatever for finding them "employees" prior to "the effective date of appointment" which as the record here establishes is the date that travel to their overseas posts of duty begins.

Second, General Counsel asserts that, "The precise question of whether 'new appointees' such as the teacher recruits herein are employees 8/ within the meaning of the Statute has not yet been decided by the Authority." (General

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8/ General Counsel also states, "The definition of 'employee' . . . in section 7103(a)(2) of the Statute does not address whether an 'appointee' is included. . . ." (General Counsel's Brief, p. 4). This also is not wholly accurate. True, § 3(a)(2) defines "employee" as an individual employed in an agency or whose employment in an agency has ceased because of any unfair labor practice under § 16; but by defining "employee" as an individual employed in an agency, obviously an individual whether or not "appointed", but not yet employed in an agency, was not included in the definition of "employee". General Counsel concedes that: (a) courts have acknowledged a difference between being an appointee and an employee; and (b) courts have generally held that all three criteria of 5 U.S.C. § 2105 must be met to qualify an individual as an employee.

Counsel's Brief, p. 3). This is not true. The Authority first addressed this question in the OEA case, supra. There, the Authority stated that such "newly selected teachers" were not appointees, i.e., ". . . during the summer before the school year has begun . . . before the selectees have been appointed. . . ." (22 FLRA at 352-353); and in the Proposal 20 case, supra, the Authority stated that in the OEA case it had "noted that . . . the individuals involved were not employees at the time. . . ." (27 FLRA at 555). The Authority, as noted above, re-examined the question in the Proposal 20 case, supra. Although OEA's proposal related to individuals traveling under authority of 5 U.S.C. § 5722 as "new appointees" to an overseas post of duty, the Authority reviewed 5 U.S.C. § 2105; noted that there is a difference between being an appointee and an employee; that courts generally require that all three criteria of 5 U.S.C. § 2105 must be met for an individual to be an employee; stated that § 3(a)(2) of the Statute does not require that an "appointee", who does not meet the criteria of § 2105 to be an employee must, nevertheless, ". . . be considered an 'employee' for the purpose of inclusion in a bargaining unit." (27 FLRA at 554); and that there was no basis in the record for ". . . concluding whether or not newly recruited teachers traveling under authority of 5 U.S.C. § 5722 are 'employees' while enroute between their place of actual residence at the time of appointment and their overseas place of employment." (27 FLRA at 554). Thus, the Authority held that: (a) newly recruited teachers upon appointment meet none of the criteria of 5 U.S.C. § 2105 to be employees; (b) that § 3(a)(2) of the Statute does not mandate that appointees must be included in bargaining units; and (c) that even when traveling pursuant to 5 U.S.C. § 5722 to their overseas places of employment, the fact of such travel was insufficient standing alone to constitute them "employees."

Third, General Counsel's argument that if the newly recruited teachers are ". . . 'employees' while enroute between their place of actual residence at the time of appointment and their overseas place of employment. . . ." (General Counsel's Brief, p. 4), then ". . . newly selected teachers fall within the definition of employee within the meaning of the Statute" (General Counsel's Brief, p. 6) is a non sequitur. Not only has the Authority already held that travel standing alone does not make the new recruits

employees,9/ but even if it were assumed that the newly recruited teachers become employees after beginning travel to their overseas posts of duty, this would not make them "employees" prior to the beginning of that travel when they possessed none of indicia which made them "employees" in our assumed hypothetical after travel had begun.

2. No Duty to Bargain for Home Addresses of Non-employees

Here, the sole bargaining demand was for the home addresses of ". . . the new CONUS recruits who have accepted positions. . . ." (Jt. Exh. 1), and, for reasons set forth above, such new recruits were not "employees" within the meaning of the Statute. It is true, as Charging Party argues, that, "There is no requirement in 7114(b)(4) that information requests must pertain to unit employees and unit employees only" (Charging Party's Brief, p. 7). Indeed, §14(b)(4) 10/ does not use the word "employee"; but

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9/ The only additional factors apparently not raised in Proposal 20, supra, concerned post-travel matters: (a) testimony that upon arrival at their overseas destinations they may apply for an advance of funds (Tr. 52); and (b) that if a recruit departed the United States but elected not to remain overseas, then the individual would, for breach of the travel agreement, be obligated to reimburse the government for the cost of the trip (the individual would be obligated to provide for the return trip) and for any attendant costs, including transportation of household goods undertaken prior thereto (Tr. 51-52; Res. Exh. 1, Attachment, DD Form 1616). No consideration has been given to such testimony for the reason that even if newly recruited teachers become employees sometime after overseas travel begins but before commencement of the school year, and I specifically do not decide whether they do, it does not change or affect their status prior to the commencement of overseas travel.

10/ "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -

. . .

(footnote continued)

§ 14(a) does and in context it is clear that information requests must ". . . directly relate to employment in bargaining unit positions" as the Authority held in Proposal 20, supra, 27 FLRA at 555, i.e., it must be necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. In North Germany Area Council, Overseas Education Association v. Federal Labor Relations Authority, 805 F.2d 1044 (D.C. Cir. 1986) (hereinafter referred to as "North Germany"), the union, representing non-supervisory employees, requested data concerning both bargaining unit employees and non-bargaining unit supervisors who had been disciplined in the North Germany Region during the last three years on the basis of the alleged making of false statements, in order to ascertain whether a bargaining unit employee facing proposed removal from employment was being subjected to disparate treatment. The Authority had agreed with the Administrative Law Judge that the data sought as applied to unit employees was necessary and relevant to assist the Union in fulfilling its responsibilities under the Statute; but the Authority had disagreed that the data concerning managerial employees was necessary or relevant, for, "In the Authority's view, as

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(footnote 10 continued)

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-
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> > (A) which is normally maintained by the agency in the regular course of business;
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> > (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
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> > (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . ." (5 U.S.C § 7114(b)(4)).

supervisors and management officials perform different duties and functions, the Respondent [DODDS] would be governed by different considerations in deciding the degree of discipline appropriate for such persons." (19 FLRA at 792). The Court stated, in part,

> "The Authority's ruling seems to suggest that the standards of expected behavior for unit employees and managerial employees might differ. But the Authority offers no guidance for determining why, in this case, such standards differ." (805 F.2d at 1047).

and the Court held,

> ". . . we cannot conclude that the Authority has supplied a reasoned explanation why the information requested by the Union regarding discipline of non-bargaining unit managerial officials and supervisors was not necessary to assist the Union in its representation of a unit employee. We therefore remand the case to the Authority for further explanation or reconsideration of this issue." (805 F.2d at 1050).

On remand, 28 FLRA No. 33, 28 FLRA 202 (1987) the Authority held, in relevant part, as follows:

> "Under section 7114(b)(4) of the Statute, an agency is required to furnish the exclusive representative of its employees, upon request and to the extent not prohibited by law [footnote omitted], information that is necessary to enable the union to fulfill its representational responsibilities. For example, Internal Revenue Service, National Office, 21 FLRA No. 82 (1986); U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, 26 FLRA No. 109 (1987).
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> "The Union sought the information concerning the discipline of management officials and supervisors for making false statements to establish whether the unit employee was being treated differently for the same or similar misconduct. We find that the information was necessary for the Union to effectively develop

and present its arguments in the disciplinary action proceeding. Access to the information sought was particularly necessary in this case because, as the Administrative Law Judge and the court found, there was evidence of a number of relevant situations in which management officials were alleged to have made false statements." (28 FLRA at 205).

See, also, American Federation of Government Employees, AFL-CIO, Local 2024 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA 125 (1983) (hereinafter referred to as "Local 2024"), where the Authority found negotiable a proposal which related to setting rates of pay upon re-employment of former employees in bargaining unit positions.

In the Local 2024 case, supra, the Authority stated, ". . . a bargaining proposal involves . . . conditions of employment if it relates to rights and obligations with respect to bargaining unit positions." (11 FLRA at 126). (Emphasis supplied).11/ In the North Germany case, supra, although the information in dispute concerned persons outside the bargaining unit, nevertheless the information related to rights and obligations of bargaining unit positions and was necessary for the Union to effectively carry out its representational responsibility in representing a bargaining unit employee in a grievance to establish whether the bargaining unit employee was being treated in a disparate manner. Here, the request for information was solely for home addresses of persons not then employees, and home addresses of non-employees had no relation to rights and obligations with respect to bargaining unit positions. As stated by Respondent, "The OEA cannot negotiate on behalf of persons who are not employees and such individuals cannot file grievances through the negotiated grievance procedure . . . (Respondent's Brief, p. 3). There are adequate protections which insure that the OEA can

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11/ The Authority further stated, "with regard to the instant case, it is clear that the Union's proposal could benefit former employees only if an when they are reemployed in bargaining unit positions. Thus, the proposal concerns matters which are conditions of employment. . . ." (11 FLRA at 126).

communicate with recruits as soon as they become employees. Further, to the extent that bargaining unit positions might be impacted by the selection of individuals who are not current employees . . . CONUS recruitment . . . is conducted only after the transfer program for current employees has been completed, the two groups do not compete for the same positions." (id at 4-5).

Both General Counsel and the Charging Party rely upon the OEA case, supra; but in OEA, DODDS did not dispute that "appropriate orientation information" was "a matter affecting working conditions and hence a condition of employment." (22 FLRA at 352). Accordingly, the Authority concluded that,

> ". . . even though the proposal [to provide the orientation material] would be effective at a time before the selectees have been appointed, it relates to matters concerning bargaining unit positions and, consequently, concerns conditions of employment in the bargaining unit." (22 FLRA at 353) (Emphasis supplied).

Because the proposal in OEA, i.e., the providing of orientation material, affected working conditions and was, therefore, a condition of employment, the Authority could side-step the fact that the selectees were not then employees. Here, the proposal, furnish home addresses of non-employee selectees, does not affect working conditions, does not involve working conditions, nor does it relate to rights or obligations with respect to bargaining unit positions. Consequently, as the Authority recognized in the Proposal 20 case, supra, because the proposal does not directly relate to employment in the bargaining unit, the status of the selectees may not be side-stepped and as the record here firmly establishes that the selectees were not then employees, DODDS was under no obligation to negotiate as the proposal did not concern conditions of employment of bargaining unit employees. I fully agree with DODDS that the line of cases, beginning with Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA 788 (1986), concerning disclosure of home addresses to unions, all involved the release of unit employees' home addresses to the union which represented them and are distinguishable from the present case where OEA seek the home addresses of non-employee selectees.

3. Information not necessary

Here, OEA sought the home addresses of non-employee selectees. In Farmers Home Administration Finance Office,

St. Louis, Missouri, supra, (hereinafter referred to as "Farmers Home") the Authority held that, ". . . the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations." (23 FLRA at 794). But, even though Farmers Home, supra, and its progeny 12/ have established the necessity of home addresses of bargaining unit employees for a union to carry out its statutory representational obligations, Farmers Home goes no further and affords no support for the necessity of home addresses of non-employees as to whom the OEA has no representational obligations whatever. Nor did General Counsel or the Charging Party make any attempt to show that the home addresses of the selectees were necessary for the understanding of any subject within the scope of bargaining. In the absence of a showing that the requested data was necessary within the meaning of § 14(b)(4)(B), Respondent, DODDS, did not violate §§ 16(a)(1), (5) or (8) of the Statute by refusing to furnish the data.

Having found that Respondent, DODDS, did not violate §§ 16(a)(1), (5) or (8) of the Statute by refusing to furnish the home addresses of non-employee selectees, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-60491 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 13, 1988
Washington, D.C.

12/ See, for example, Veterans Administration, Washington, D.C. and Veterans Administration Supply Depot, Hines, Illinois, 31 FLRA No. 86, 31 FLRA 1061, 1062 (1988).