

**FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**UNITED STATES DEPARTMENT OF AGRICULTURE
FOREIGN AGRICULTURAL SERVICE
WASHINGTON, D.C.
(Agency)**

and

**AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)**

FS-AR-0005

DECISION

December 7, 2009

**Before the Board: Carol Waller Pope, Chairman, and
Earle William Hockenberry, Jr. and Stephen R. Ledford, Members**

I. Statement of the Case

This matter is before the Foreign Service Labor Relations Board (the Labor Relations Board) on an exception filed by the Agency under 22 U.S.C. § 4114(b)¹ to the “action” (decision) of the Foreign Service Grievance Board (the Grievance Board) in resolving an “implementation dispute”² between the Agency and the Union. The Union filed an opposition to the Agency’s exception.

¹ Section 4114(b) provides, in pertinent part, as follows: “Either party to an appeal under subsection (a)(3) of this section may file with the Board an exception to the action of the Foreign Service Grievance Board in resolving the implementation dispute.”

² An implementation dispute is a dispute between an agency and a union concerning the effect, interpretation, or claim of breach of a collective bargaining agreement. § 4114(a).

The Grievance Board concluded that the Agency violated the parties' collective bargaining agreement (agreement) when it assigned three civil service employees to overseas agricultural trade office (ATO) positions in the first round of bidding. The Grievance Board ordered the Agency to rescind the assignments and rerun the assignment process in accordance with law, regulation, and the agreement. For the reasons that follow, we deny the Agency's exception.

II. Background and Grievance Board's Decision

In September 2008, ATO positions in Hong Kong, Tokyo, and Riyadh were advertised for assignment. Following the first round of bidding on the assignments, the Agency selected three civil service employees, and the Union protested the assignments. The Agency viewed the Union's protest as a grievance and denied it. In response, the Union filed an implementation dispute with the Grievance Board. Grievance Board's Decision at 2.

Before the Grievance Board, the Union alleged that the Agency violated both Article 27.16³ and Article 6.2⁴ of the parties' agreement when it assigned the civil service employees to the disputed ATO positions in the first round of the bidding process. *Id.* at 6. As to the violation of Article 27.16, the Union argued that the contract provision constituted a procedure for making assignments consistent with section 502(b) of the Foreign Service Act.⁵ In opposition, the Agency argued that the agreement's use of the term "normally" permitted it to make the disputed assignments. *Id.* at 13.

As to the alleged violation of Article 6.2, the Union introduced statistical evidence and statements from individuals who had been involved in administering the Agency's assignment system. According to the Grievance Board, the statistical evidence demonstrated that, from 2000 to 2007 out of a total of fifty-one assignments, only two civil service employees were assigned in the first round. *Id.* at 10. The Agency argued that there is no established past practice because the assignments of the two civil service employees showed a lack of consistency and mutual acceptance necessary to a determination of an established past practice. *Id.* at 13-14. Alternatively, the Agency asserted that enforcing the agreement and past practice, as alleged by the Union, would improperly restrain the exercise of management's rights. *Id.* at 14.

In addressing the alleged violation of Article 27.16 and Article 6.2, the Grievance Board interpreted Article 27.16 to mean, and the past practice under Article 6.2 to be, that, absent unusual circumstances, first round assignments are reserved for foreign

³ Article 27.16 provides, in pertinent part: "Consistent with Article 502(b) of the [Foreign Service] Act, positions designated as Foreign Service positions, including ATO positions, normally will be filled by assigning Foreign Service employees to those positions." Grievance Board's Decision at 7.

⁴ Article 6.2 provides, in pertinent part: "The Agency recognizes its responsibility to promptly and timely notify [the Union] and to negotiate, if requested by the Union, on any proposed change in Agency procedures, practices or changes in working conditions for employees in the bargaining unit prior to implementation." *Id.* at 6.

⁵ Section 502(b) provides, in pertinent part: "Positions designated as Foreign Service positions normally shall be filled by the assignment of members of the Service to those positions." 22 U.S.C. § 3982(b).

service officers. *Id.* at 21. Reiterating the Union's statistical evidence, the Grievance Board found that there was clear evidence of a past practice. *Id.* The Grievance Board additionally found that enforcement of Article 27.16 must be viewed in relation both to section 502(b), which Article 27.16 tracks, and to the Secretary of Agriculture's adoption of the foreign service personnel system, pursuant to which ATO positions were designated as foreign service. *Id.* at 19-20. Analyzing the assignment process for foreign service positions, the Grievance Board concluded that, unless first round assignments are reserved for foreign service employees, it is "less likely" that the positions "normally" will be filled by assignment of foreign service officers, as required by section 502(b), and that foreign service officers would be disadvantaged. *Id.* at 21.

Based on the foregoing, the Grievance Board concluded that this dispute was governed by section 502(b) and that the Agency was obligated to comply with Article 27.16 and Article 6.2. *Id.* at 22-23. In so concluding, the Grievance Board rejected the Agency's reliance on management rights. The Grievance Board determined that section 502(b) "override[s] and further define[s] the application of management rights[.]"⁶ *Id.* Consequently, the Grievance Board held that the Agency violated Article 27.16 and Article 6.2.⁷ As a remedy, the Grievance Board ordered that the improper selections be rescinded and that the Tokyo and Riyadh selections be rerun in accordance with the agreement and applicable law and regulation.⁸

III. Positions of the Parties

A. Agency's Exception

The Agency contends that the Grievance Board's decision is deficient as contrary to law in several respects. First, the Agency contends that the decision is contrary to "management's right to select under 5 U.S.C. § 7106(a)(2)(C)." Exception at 11-13 (citing *Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 857 F.2d 819 (D.C. Cir. 1988) (*BATF*)). The Agency notes that the court in *BATF* concluded that a proposal requiring the agency to rank and consider current employees for promotion before soliciting or ranking outside candidates impermissibly affected management's right to select under § 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute (the Statute). *Id.* at 12. The Agency further notes that, subsequently, the Federal Labor Relations Authority (the Authority) held that proposals--which allow management to concurrently solicit unit and non-unit employees, but preclude management from rating and ranking non-unit employees until a preliminary placement process for unit employees is completed--also impermissibly affect management's right to select. *Id.*

⁶ The Grievance Board additionally determined that, even if the Federal Service Labor-Management Relations Statute (the Statute) applied to this dispute, the agreement provisions were enforceable as appropriate arrangements within the meaning of § 7106(b)(3) of the Statute, 5 U.S.C. § 7106(b)(3). Grievance Board's Decision at 23 n.16.

⁷ The Grievance Board also held that the Agency violated the agreement by not providing the Union with sufficient advance notice of the bidding instructions issued in connection with the disputed assignments. The Agency does not dispute this holding, and it will not be discussed further.

⁸ No relief was directed with respect to the Hong Kong assignment because it was cancelled for reasons unrelated to the dispute before the Grievance Board. *Id.* at 23 n.17.

The Agency maintains on the basis of these decisions that the Grievance Board's decision is deficient because it precludes the simultaneous rating and ranking of foreign service officers and civil service employees. *Id.* at 13.

Second, the Agency contends that the Grievance Board's decision is deficient because it "determined that the [Agency] had a duty to bargain over the appointment of GS employees . . . with the Union despite the [U]nion not having representational authority over those employees." *Id.* at 15. The Agency asserts that, in so doing, the Grievance Board "overstepped its jurisdiction[.]" *Id.* at 22.

Third, the Agency contends that the Grievance Board's decision is contrary to "past practice law" because "no change in process occurred for the bargaining unit employees whom the Union represents." *Id.* at 16, 18. In this regard, the Agency argues that there is no duty for the Agency to bargain with the Union over employees they do not represent. *Id.* at 18. In the Agency's view, the decision of the Grievance Board requires the Agency "to enter into formal bargaining with the Union on employees who the Union does not represent and thereby affects management's right to select under 5 U.S.C. § 7106(a)(2)(C)." *Id.* at 19. The Agency also claims that the Union failed to show the requisite consistency necessary for a past practice. *Id.* at 16.

Finally, the Agency contends that the Grievance Board's decision is contrary to "de minimis impact law." *Id.* at 19. The Agency argues that there "was no reasonably foreseeable impact on the employees" represented by the Union that would require "the [Agency] to bargain with the [Union]." *Id.* at 21.

In conclusion, the Agency requests that the Grievance Board's decision be overruled and that it be permitted "to present oral argument on this matter." *Id.* at 24-25.

B. Union's Opposition

The Union contends that the Grievance Board's decision is not contrary to management's right to select. *Opp'n* at 9-10. The Union notes that, in *United States Department of Agriculture, Farm Service Agency, Foreign Agricultural Service*, FS-AR-0004 (1998) (*FAS*), the Labor Relations Board applied the two-prong framework the Authority set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), to assess whether the decision of the Grievance Board was contrary to management's rights under 22 U.S.C. § 4105(a). *Id.* at 12-13. The Union asserts that the Grievance Board's decision satisfies the first prong of *BEP* because Article 27 implements the assignment preference of section 502(b) of the Foreign Service Act and constitutes a procedure negotiated pursuant to § 4105(b). *Id.* at 12. The Union also asserts that the Grievance Board's decision satisfies prong II of *BEP* because it reconstructs what the Agency would have done had it not violated Article 27. *Id.* at 13.

As to the Agency's contentions that the Grievance Board's decision is deficient because the Union does not represent civil service employees, the Union contends that

the Agency has confused the scope of the duty to bargain with the scope of permissible remedies. *Id.* at 15. The Union asserts that, like the decision of the Grievance Board in *FAS*, the Grievance Board's decision in this case is not deficient because, even though it affects civil service employees, it is designed to correct the Agency's violation of the parties' agreement. *Id.* As to the Agency's contention pertaining to the *de minimis* doctrine, the Union contends that the Agency has confused the issue of an implementation dispute with a negotiability dispute. *Id.* at 17. The Union asserts that the Grievance Board's decision is not deficient because the remedy is within the parameters affirmed by the Labor Relations Board in *FAS*. *Id.* at 17-18.

As to the Agency's request for oral argument, the Union maintains that oral argument is not necessary because the record is sufficient for decision. *Id.* at 19-20.

IV. Analysis and Conclusions

A. Standard of Review

The Labor Relations Board reviews questions of law raised by a decision of the Grievance Board and exceptions to the decision *de novo*. *FAS*, decision at 7. The scope of this review by the Labor Relations Board is the same as the scope of review by the Authority of arbitration awards under § 7122(a) of the Statute. *AFSC*, FS-AR-0001 (1986), decision at 2. Accordingly, in applying a standard of *de novo* review, the Labor Relations Board assesses, similar to the Authority, whether the Grievance Board's legal conclusions are consistent with the applicable standard of law. *See, e.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In addition, the decision of the Labor Relations Board on review must be consistent with decisions rendered by the Authority under the Statute unless the Labor Relations Board finds that special circumstances require otherwise. *FAS*, decision at 6 (citing 22 U.S.C. § 4107(b) and (c)(2)(F)).

B. The Grievance Board's decision is not contrary to law.

The Agency contends that the Grievance Board's decision is contrary to management's right to select under § 7106(a)(2)(C). Although the Agency cites a management right set forth in the Statute, the Agency's management rights are set forth in 22 U.S.C. § 4105(a). Section 4105(a)(5) sets forth a management right "to fill positions from any appropriate source[.]" We construe the Agency's contention to be that the decision is contrary to § 4105(a)(5).

In resolving whether a Grievance Board decision is contrary to a management right under § 4105(a), the Labor Relations Board first examines whether the decision affects the exercise of the management right. *Id.* If the decision affects the exercise of a management right, then the Labor Relations Board applies the two-prong framework established by the Authority in *BEP* to determine whether the Grievance Board's decision is deficient. *Id.* It is not contested that the Grievance Board's decision affects management's right to fill positions. Consequently, it is necessary for the Labor Relations Board to apply the framework of *BEP*.

Under prong I, the Labor Relations Board examines whether the Grievance Board's decision enforces an applicable law or a provision of a collective bargaining agreement negotiated pursuant to § 4105(b). *Id.* at 7-8. In this regard, the exercise of management rights in § 4105(a) is expressly subject to "applicable law[.]" Consequently, unions may require management to adhere to an applicable law in the exercise of its management rights under § 4105(a). *See id.* at 7 n.11.

The Grievance Board concluded that Article 27.16 implements section 502(b) and that the Agency was obligated to comply with its contractual commitment under section 502(b). The Grievance Board rejected the Agency's reliance on management rights because section 502(b) "override[s] and further define[s] the application of the management rights[.]" Grievance Board's Decision at 22-23. As there is no dispute that section 502(b) is a law applicable to the filling of positions in the foreign service, the Grievance Board correctly concluded that it constrains management's right to fill positions in the foreign service. Because Article 27.16 restates section 502(b), the Grievance Board's decision enforcing Article 27.16 satisfies prong I by enforcing adherence to section 502(b)--an applicable law--in the exercise of management's rights. *See FAS*, decision at 7 n.11.⁹

In addition, the Grievance Board's decision also satisfies prong I because, consistent with precedent, Article 27.16 is a contract provision negotiated pursuant to § 4105(b)(2), as the contractual procedure implementing the preference of section 502(b). *See id.* at 8. In this regard, as interpreted by the Grievance Board, Article 27.16 merely reserves first round assignments for foreign service officers; the provision does not inhibit the Agency from soliciting and considering applications from outside the foreign service and does not limit the sources from which the Agency may fill positions. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Louisville Dist.*, 36 FLRA 375, 386 (1990) (prong I satisfied because arbitrator's enforcement of contract provision did not inhibit the agency's ability to solicit or consider applicants from outside the agency and did not limit the sources from which the agency could consider candidates). In view of this interpretation, the Agency fails to establish that the Grievance Board's decision is deficient because it precludes the simultaneous rating and ranking of foreign service officers and civil service employees. *See, e.g., AFGF Local 868*, 45 FLRA 224, 228 (1992) (provision that merely requires unit employee to be considered first and does not prohibit the simultaneous solicitation, rating, and ranking of non-unit applicants constitutes a procedure negotiated pursuant to § 7106(b)(2)). Moreover, the Agency acknowledges that civil service employees bid on ATO positions at the same time as foreign service officers and are rated and ranked prior to the first round of consideration for assignment. Exception at 4-5.

Based on the foregoing, the Agency's reliance on *BATF* and similar Authority decisions is misplaced. *E.g., Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475 (2001) (proposal 2) (*BATF* does not compel a conclusion that a

⁹ It is well established under the Statute that contract provisions which require management to act in accordance with law are within the duty to bargain and are enforceable even if they restate the legal obligation. *See NAGE Local R1-109*, 64 FLRA 132 (2009).

proposal which permits simultaneous solicitation of applications from unit and non-unit employees is contrary to management's right to select). Consequently, the Agency provides no basis for finding the Grievance Board's decision contrary to § 4105(a).¹⁰

The Agency also contends that the Grievance Board's decision is deficient because the Grievance Board "decided that the [Agency] would be required to negotiate with the Union[.]" Exception at 22. The Agency further contends that the decision is deficient because it requires the Agency "to enter into formal bargaining with the Union" and because there is no basis for requiring the Agency "to bargain with the [Union]." *Id.* at 19, 21. The Agency misconstrues the award.

The Grievance Board concluded that the Agency had violated the parties' agreement and ordered a "make-whole remedy[.]" Grievance Board's Decision at 24. As described by the Grievance Board, its remedy was to direct that the improper selections be rescinded and that the Tokyo and Riyadh selections be rerun. *Id.* at 23. Specifically, the Grievance Board ordered the Agency to: (1) rescind the assignments made in 2008 to the ATO positions in Riyadh and Tokyo; (2) reopen the bidding process for the ATO positions in Riyadh and Tokyo; (3) submit the bidding instructions to the Union in advance to provide the Union an opportunity to review them, as required by the agreement; and (4) adhere to the provisions of the agreement, applicable law, and regulation when filling the Riyadh and Tokyo positions. *Id.* at 24. The plain wording of the Grievance Board's decision and remedy does not order the Agency to negotiate or bargain with the Union, and the Agency fails to cite where the Grievance Board decided the Agency would be required to negotiate with the Union or where the Grievance Board required formal bargaining with the Union. Accordingly, the Agency's contentions provide no basis for finding the Grievance Board's decision deficient.¹¹

In addition, we reject the Agency's claim that the assignment of civil service employees in the first round of bidding in violation of the agreement was "obviously *de minimis*" and had "no reasonably foreseeable impact" on foreign service officers who had bid for assignments. Exception at 21. After an extensive analysis of the foreign service assignment process, including its "highly competitive up-or-out system[.]" the Grievance Board specifically concluded that foreign service officers are "disadvantag[ed]" by the selection of civil service employees in the first round of bidding. Grievance Board's Decision at 16, 21. The Agency fails to establish otherwise.

¹⁰ Under prong II of the *BEP* framework, the Labor Relations Board examines whether the Grievance Board's decision reflects reconstruction of what the agency would have done had it acted properly. *FAS*, decision at 8. As the Agency does not argue that the Grievance Board's decision fails to satisfy prong II, we do not address prong II. See, e.g., *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 6 (2007). In addition, we note that the Authority has indicated that prong II does not apply to the enforcement of applicable law. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Detention Ctr., Guaynabo, P.R.*, 59 FLRA 787, 792 (2004).

¹¹ In addition, to the extent that the Agency contends that the Grievance Board erred in finding a past practice, no basis is provided for finding the decision contrary to law. Instead, such claims are addressed under the nonfact framework. See *NTEU Chapter 66*, 63 FLRA 512, 514 n.3 (2009). Even if we addressed the claim under the nonfact framework, we would deny it because the existence of a past practice was disputed before the Grievance Board. See *FAS*, decision at 9.

Moreover, the Agency's arguments confuse implementation disputes and negotiability disputes. As in *FAS*, the Agency erroneously argues matters relating to the duty to bargain and negotiability. See *FAS*, decision at 10. In particular, its allegations that the Grievance Board's decision is deficient because it requires bargaining with the Union pertaining to employees the Union does not represent are misplaced. As the Labor Relations Board recognized in *FAS*, the relevant issue in this context is whether the Grievance Board awarded relief to employees outside the bargaining unit. *Id.* As in *FAS*, the Agency fails to show that the Grievance Board's decision grants relief to non-bargaining unit, civil service employees. *Id.*

Based on the foregoing, we deny the Agency's exception. In addition, because the record in this case is sufficient for the Labor Relations Board to make a decision, we also deny the Agency's request for oral argument. See, e.g., *AFGE Local 3230*, 59 FLRA 610, 610 n.2 (2004).

V. Decision

The Agency's exception is denied.

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FS-AR-0005

STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

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