

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

**UNITED STATES DEPARTMENT OF STATE
(Agency)**

and

**AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)**

FS-AR-0007

DECISION

December 5, 2016

**Before the Board: Carol Waller Pope, Chairman, and
Stephen R. Ledford and Herman J. Cohen, Members**

I. Statement of the Case

Each year, the parties negotiate an agreement regarding, in relevant part, procedures for identifying employees whose work performance makes them eligible for an award called a “[m]eritorious [s]ervice [i]ncrease[.]” (MSI).¹ This case involves a dispute over the parties’ 2014 agreement concerning MSIs (the agreement). In particular, the parties disagreed about the number of MSIs that the agreement required the Agency to confer in 2014. According to the Union, the agreement mandated that 10% of MSI-eligible employees receive MSIs. In contrast, the Agency contended that the agreement capped the number of MSIs in 2014 at *no more than* 10% of eligible employees.

After the parties executed the agreement, but before the Agency awarded the 2014 MSIs, the Agency notified bargaining-unit employees that only 5% of 2014 MSI-eligible employees would receive MSIs – a number that the Agency described as a “drop from . . . historical levels.”² The Union filed, with the Agency, an

¹ Decision at 3.

² *Id.* at 7.

“implementation dispute” alleging that the Agency violated the agreement by failing to confer MSIs at the historical 10% level.³ When the Agency rejected the Union’s implementation dispute, the Union filed an appeal with the Foreign Service Grievance Board (the Grievance Board).⁴ Based primarily on the parties’ bargaining history – described further in the next section – the Grievance Board agreed with the Agency that the agreement capped MSIs at no more than 10% of eligible employees, but did not require that a full 10% of eligible employees receive MSIs. Thus, the Grievance Board found that the Agency’s decision to pay MSIs to 5% of eligible employees did not violate the agreement.

The Union has now filed exceptions to the Grievance Board’s decision,⁵ and the main question before us is whether the decision’s contractual interpretation rests on a legal error. In that regard, the Grievance Board found that the Union received an unsolicited Agency allegation that certain contract wording was non-negotiable. Further, the Grievance Board held that, if the Union wanted to continue bargaining over the disputed wording after receiving the Agency’s allegation, then the Union had to choose between: (1) conceding the Agency’s position on that wording; or (2) filing a negotiability appeal to challenge the Agency’s position. However, the negotiability case law of the Foreign Service Labor Relations Board (the Labor Relations Board) recognizes that the Union had a third option – to elect to continue bargaining without conceding the Agency’s position or filing a negotiability appeal. Because the Grievance Board’s interpretation of the agreement “centered on” an erroneous view of negotiability law,⁶ the answer to this question is yes.

II. Background and Grievance Board’s Decision

As discussed above, the Union filed, with the Agency, an implementation dispute alleging that the Agency’s refusal to pay MSIs to 10% of eligible employees violated the agreement. The Agency rejected the Union’s implementation dispute, and the Union filed an appeal asking the Grievance Board to resolve the matter.

The Grievance Board found that, each year, the parties would negotiate an agreement concerning procedures for identifying “employees who were not promoted, but whose performance was of sufficient quality that an MSI was deemed appropriate.”⁷ Under these agreements, “[s]election [b]oards”⁸ would rank employees, thereby creating “rank[-]order lists.”⁹ Using those lists, the Agency typically conferred MSIs on the

³ 22 U.S.C. § 4114(a)-(b) (statutory description of implementation disputes); *see also* Decision at 8 (describing Union’s filing of implementation dispute in this case).

⁴ *See* 22 U.S.C. § 4114(a)(3) (describing the Grievance Board).

⁵ *See id.* § 4114(b) (“Either party to an appeal [to the Grievance Board] . . . may file with the [Foreign Service Labor Relations] Board an exception to the action of the . . . Grievance Board in resolving the implementation dispute.”).

⁶ Decision at 2.

⁷ *Id.* at 4.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

top-ranking employees whom the Agency did not promote, up to a set percentage of employees in each “competitive class.”¹⁰

The parties began negotiating the agreement in early 2014, and they were still negotiating in May 2014 when, according to the Grievance Board, “the [Agency] submitted a proposal concerning . . . MSI[s] . . . that substantially altered the direction of the negotiations.”¹¹ Of particular relevance here, the Agency’s proposal “cap[ped] the maximum number of MSIs that could be awarded for the year at” 5% of the competitive class of MSI-eligible employees.¹² The Grievance Board found that the Union responded to this Agency proposal with great “concern[.]”¹³ In that regard, the Grievance Board determined that the Union cautioned the Agency not to implement the proposal until either the parties mutually agreed to it, or they completed any negotiability proceedings before the Labor Relations Board and any negotiation-impasse proceedings before the Foreign Service Impasse Disputes Panel.

The Grievance Board observed that the Agency responded to the Union’s concerns about the revised percentage cap on MSIs by informing the Union that the revision “was ‘not a proposal,’”¹⁴ but, rather, was a reflection of “[m]anagement’s right to make a policy determination in light of budgetary needs and fiscal constraints” on the number of MSIs to confer in 2014.¹⁵ Further, the Agency stated that if the Union did not agree to the Agency’s revisions to the agreement wording “by May 30, 2014,” then the Agency would unilaterally “commence the 2014 [s]election [b]oards” using the parties’ 2013 agreement.¹⁶

Continuing its examination of this bargaining history, the Grievance Board found that when the Union replied to the Agency on May 30, 2014, the Union did not agree to the Agency’s proposed 2014 wording on MSIs, or to the Agency’s suggestion to revert to the 2013-agreement wording. However, the Union proposed that the parties agree to incorporate the wording about MSIs from their 2012 agreement into the applicable agreement for 2014. The Agency stated that it was “pleased” to agree to this proposal concerning the 2012 wording to “govern[] conferral of MSIs” in 2014.¹⁷ Thereafter, the parties executed the agreement, which incorporated the 2012 wording concerning MSIs.

As mentioned earlier, the Agency proceeded with what the Grievance Board called a “considerable reduction” in the percentage of eligible employees who received MSIs in 2014 compared to previous years,¹⁸ and this reduction led to the implementation dispute, which the Union appealed to the Grievance Board.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 5 & n.2 (explaining in note 2 that the proposed cap was for “2.5% of the annual pool of eligible Foreign Service personnel,” which is roughly equal to “5% of eligible” employees in a competitive class).

¹³ *Id.* at 5.

¹⁴ *Id.* at 6 (quoting Agency’s Letter to Union (May 28, 2014)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (quoting Agency’s Email to Union (June 2, 2014)).

¹⁸ *Id.* at 5.

Endeavoring to interpret the agreement, the Grievance Board began by observing that the contractual terms were ambiguous about whether 10% was a mandatory percentage distribution of MSIs, or merely a cap – inasmuch as the following agreement wording could support differing conclusions:

Employees rank-ordered by th[e selection b]oards but not promoted because of limited promotional opportunities will be deemed qualified for MSIs up to the appropriate levels[,] and their names *will be submitted* in accordance with their rank order to the [Director General] *for approval of the MSI[s]’ conferral*. . . . *No more than [10%]* of members in a competition group shall receive MSIs.¹⁹

But the Grievance Board found that “certain events occurring during the course of the parties’ . . . negotiations” in 2014 gave more definite meaning to the agreement’s ambiguous terms.²⁰ In particular, the Grievance Board “centered on”²¹ the Agency’s description of its revision to the MSI-distribution percentage as “not [being] a proposal.”²² And the Grievance Board found that the Agency’s assertion in that regard “constitute[d] a declaration of non-negotiability,” although the assertion concerned the Agency’s own draft wording.²³ Further, the Grievance Board found that, in the face of this “declaration of non-negotiability,” it was “incumbent on” the Union either to “file a negotiability” appeal,²⁴ or to “agree to the [Agency’s] statement of intent as to what the [agreement] language meant” regarding the percentage of MSI-eligible employees who would receive awards.²⁵

The Grievance Board held that, because the Union “did not pursue the former” path of filing a negotiability appeal, the Grievance Board “*must conclude*” that the Union chose the “latter” path of subscribing to the Agency’s interpretation of the agreement’s wording on MSIs.²⁶ In fact, the Grievance Board found that viewing the parties’ bargaining history in any other manner “would allow for an unlawful result”²⁷ by permitting the Union to continue negotiations “without having the legality” of the MSI wording “authoritatively resolved” in a negotiability appeal.²⁸

For those reasons, the Grievance Board found that the agreement “grant[ed] the [Agency] sole and exclusive discretion to decide how many MSIs would be awarded for 2014, up to the stated” 10% limit.²⁹ Therefore, the Grievance Board found that the

¹⁹ *Id.* at 7 (emphases added) (quoting the agreement); *see also id.* at 13 (“reaffirm[ing]” that the sentences quoted above, like the predecessor wording in the 2013 agreement on MSIs, are “ambiguous”).

²⁰ *Id.* at 14-15.

²¹ *Id.* at 2.

²² *Id.* at 15 (quoting Agency’s Letter to Union (May 28, 2014)).

²³ *Id.* at 16.

²⁴ *Id.* at 18.

²⁵ *Id.* at 19.

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

²⁸ *Id.* at 20.

²⁹ *Id.*

Agency did not violate the agreement by awarding MSIs to less than 10% of eligible employees.

The Union filed exceptions to the Grievance Board's decision, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusion: The Grievance Board's interpretation of the agreement rests on an outcome-determinative legal error.

Under 22 U.S.C. § 4107, decisions of the Labor Relations Board "shall be consistent with decisions rendered by" the Federal Labor Relations Authority (the Authority).³⁰ In other words, "Congress has directed the Labor Relations Board . . . to follow . . . Authority . . . precedent, except when the [Labor Relations Board] finds special circumstances that require otherwise."³¹ Because no special circumstances are asserted or apparent in this case, the following analysis applies Authority precedent where there is no relevant Labor Relations Board precedent.³²

The Union argues that the Grievance Board's decision is contrary to negotiability law and regulations because it "relies on the erroneous premise that [the Union] was required to file a negotiability appeal" in response to an unsolicited allegation of non-negotiability, or else to concede the Agency's interpretation of the agreement.³³

The Labor Relations Board reviews questions of law raised by a decision of the Grievance Board and exceptions to the decision de novo.³⁴ The scope of this review is the same as the scope of the Authority's review of arbitration awards under § 7122(a) of the Federal Service Labor-Management Relations Statute.³⁵ 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.³⁶

Like the Authority, the Labor Relations Board recognizes two distinct types of non-negotiability allegations, depending on whether a union requested the allegation in writing before receiving it.³⁷ In particular, the Labor Relations Board has recognized that, where an "allegation was not in response to *specific* [u]nion proposals and was *not requested* by the [u]nion," the union is "not required" to appeal that unrequested allegation.³⁸ In other words, a union may ignore the unsolicited allegation and continue

³⁰ 22 U.S.C. § 4107(b).

³¹ *USDA, Farm Serv. Agency, Foreign Agric. Serv.*, FS-AR-0004 (1998) at 6 (*FAS*) (citing 22 U.S.C. § 4107(b), (c)(2)(F)).

³² *See, e.g., id.*

³³ Exceptions at 13.

³⁴ *USDA, Foreign Agric. Serv., Wash., D.C.*, FS-AR-0005 (2009) at 5 (citing *FAS*, FS-AR-0004 at 7).

³⁵ *Id.* (citing *Amer. Foreign Serv. Ass'n*, FS-AR-0001 (1986) at 2).

³⁶ *Id.*

³⁷ *See AFGF, Local 1812, AFL-CIO*, FS-NG-5 (1983) at 3 (*Local 1812*).

³⁸ *Id.* (emphases added).

to pursue further negotiations.³⁹ Moreover, the failure to appeal an unsolicited allegation of non-negotiability “does not prejudice a union’s right to subsequently” challenge an agency’s arguments that a matter is outside the duty to bargain.⁴⁰

The Grievance Board’s decision conflicts with these principles of negotiability law. In that regard, the decision states unequivocally that because the Union did not appeal what the Grievance Board characterized as a non-negotiability allegation, that failure to appeal *required* a conclusion that the Union conceded the Agency’s position on the MSI-distribution wording.⁴¹ Even assuming, without deciding, that the Agency’s characterization of its own draft contract wording could constitute an allegation of non-negotiability, the conclusions that the Grievance Board drew from the Union’s decision not to file a negotiability appeal were legally erroneous. Put simply, the Grievance Board erred in finding that, if the Union wanted to continue bargaining after receiving an unsolicited non-negotiability allegation, then the Union had to choose between conceding the Agency’s position, or filing a negotiability appeal.⁴²

Because the Grievance Board’s decision interpreting the agreement was “centered on” a legally erroneous rationale,⁴³ the decision is deficient. Accordingly, we grant the Union’s contrary-to-law exception and set aside the decision. As a result, the parties no longer have a contractual interpretation on which they may rely to resolve their implementation dispute. Therefore, we remand the contractual-interpretation issue to the parties for resubmission to the Grievance Board, absent settlement, for further consideration. On remand, the Grievance Board should determine whether the agreement: (1) requires conferring MSIs on a full 10% of eligible employees; or (2) merely sets the maximum MSI-conferral rate at 10%, but permits awarding MSIs at a lesser rate. However, the Grievance Board’s determination in that regard must not turn on an erroneous understanding of negotiability law.

The Union also argues that the award is based on the nonfacts that: (1) the Agency’s not-a-proposal statement was an allegation of non-negotiability; (2) the Union must have agreed with the Agency’s understanding of the agreement because the Union did not file a negotiability appeal; and (3) the circumstances in an earlier Grievance Board case about the parties’ 2013 agreement were distinguishable from the circumstances in this case.⁴⁴ Further, the Union argues that the Grievance Board’s decision here fails to draw its essence from the parties’ agreement because, according to the Union, the Grievance Board’s reasons for interpreting virtually identical wording differently in the 2013 and 2014 agreements “disregard[] the plain language” of those agreements.⁴⁵

³⁹ *E.g.*, *NFFE, IMAAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 587 (2016).

⁴⁰ *Local 1812, FS-NG-5* at 3.

⁴¹ *See* Decision at 19 (“[Because the Union] did not pursue the former [course of a negotiability appeal], we must conclude [that the Union conceded the validity of the Agency’s interpretation.]”).

⁴² *See Local 1812, FS-NG-5* at 3.

⁴³ Decision at 2.

⁴⁴ Exceptions at 12.

⁴⁵ *Id.* at 22.

In cases where the Authority has set aside an arbitrator's contract interpretation due to an error of law that controlled the arbitrator's interpretation, the Authority has found it premature to address an essence exception because the disputed contract interpretation may change on remand.⁴⁶ Further, in this case, the Union's arguments in support of its nonfact exception are either variations of the *legal* arguments that we have already resolved above, or are matters of contract interpretation that may change on remand. Therefore, we find it premature to address these other exceptions at this time. However, this decision is without prejudice to the Union's ability to resubmit these arguments to the Labor Relations Board, if any disputes remain after the conclusion of matters on remand.⁴⁷

IV. Decision

We grant the Union's contrary-to-law exception to the extent discussed above, and we remand this matter to the parties for resubmission to the Grievance Board, absent settlement, for further consideration of the implementation dispute.

⁴⁶ See, e.g., *AFGE, Council 220*, 65 FLRA 726, 729 n.4 (2011) ("As the Arbitrator has not yet interpreted the [agreement], the . . . essence exception is premature. Therefore, we decline to address the . . . essence exception.")

⁴⁷ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 981 (2012) (citing *SSA*, 30 FLRA 1003, 1005-06 (1988) (remanding case without prejudice, noting that parties could resubmit to the Authority any dispute they could not resolve)).