



DECISIONS AND
INTERPRETATIONS
OF THE
FEDERAL
LABOR RELATIONS
COUNCIL

Volume 6



#60

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FEDERAL LABOR
RELATIONS AUTHORITY





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

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

**Volume 6
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January 1, 1978 through December 31, 1978**

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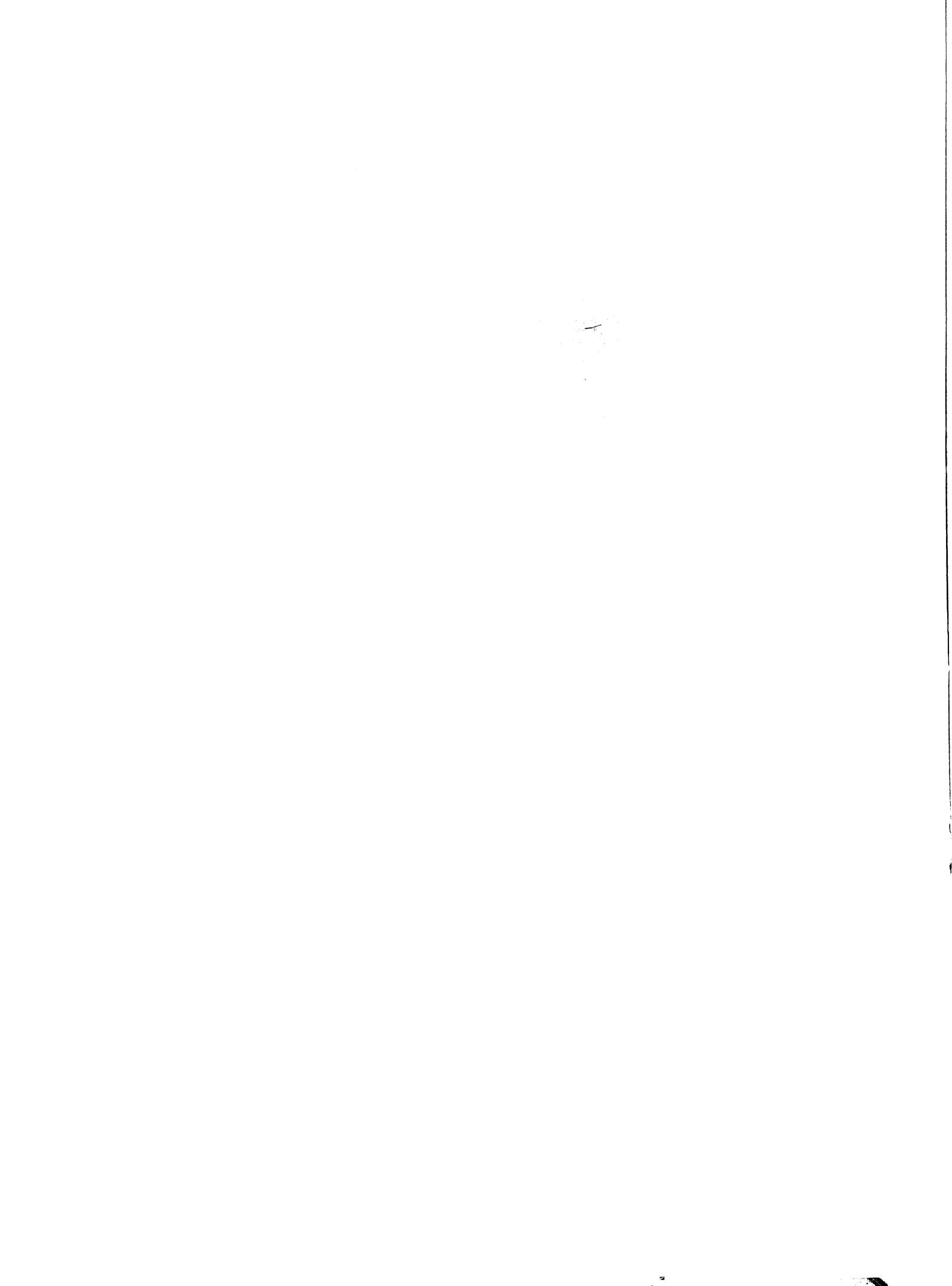
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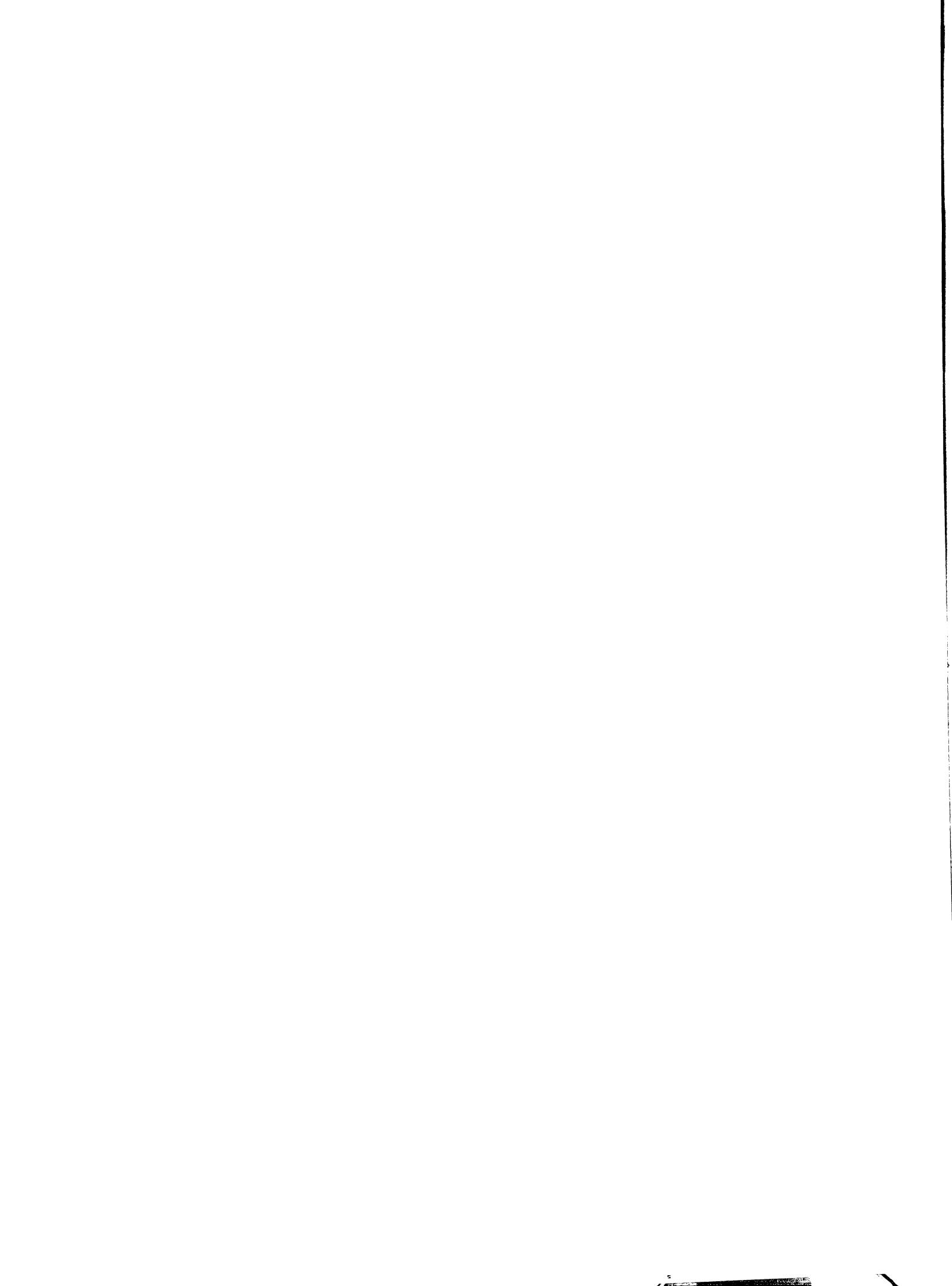
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PART I.

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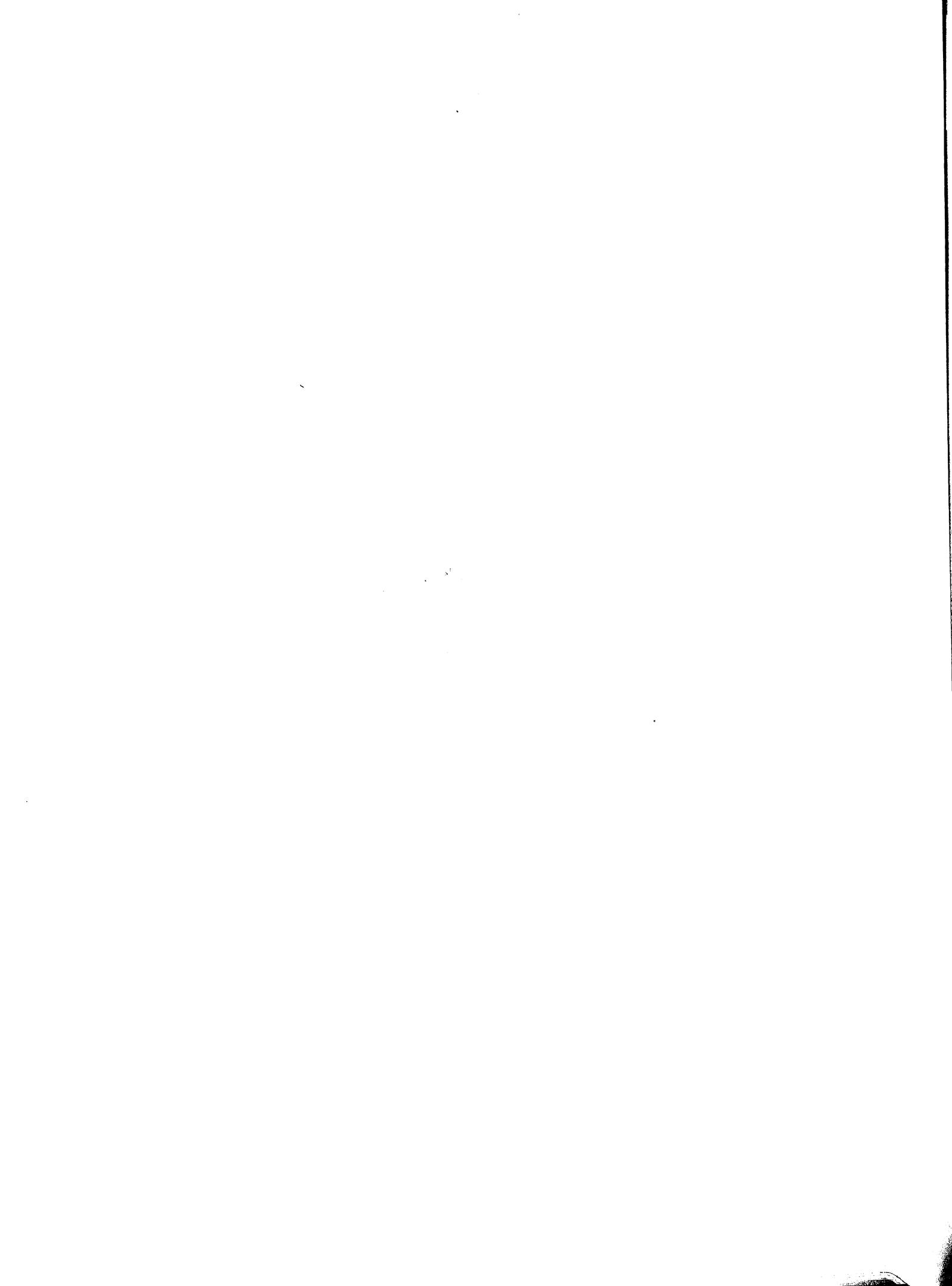
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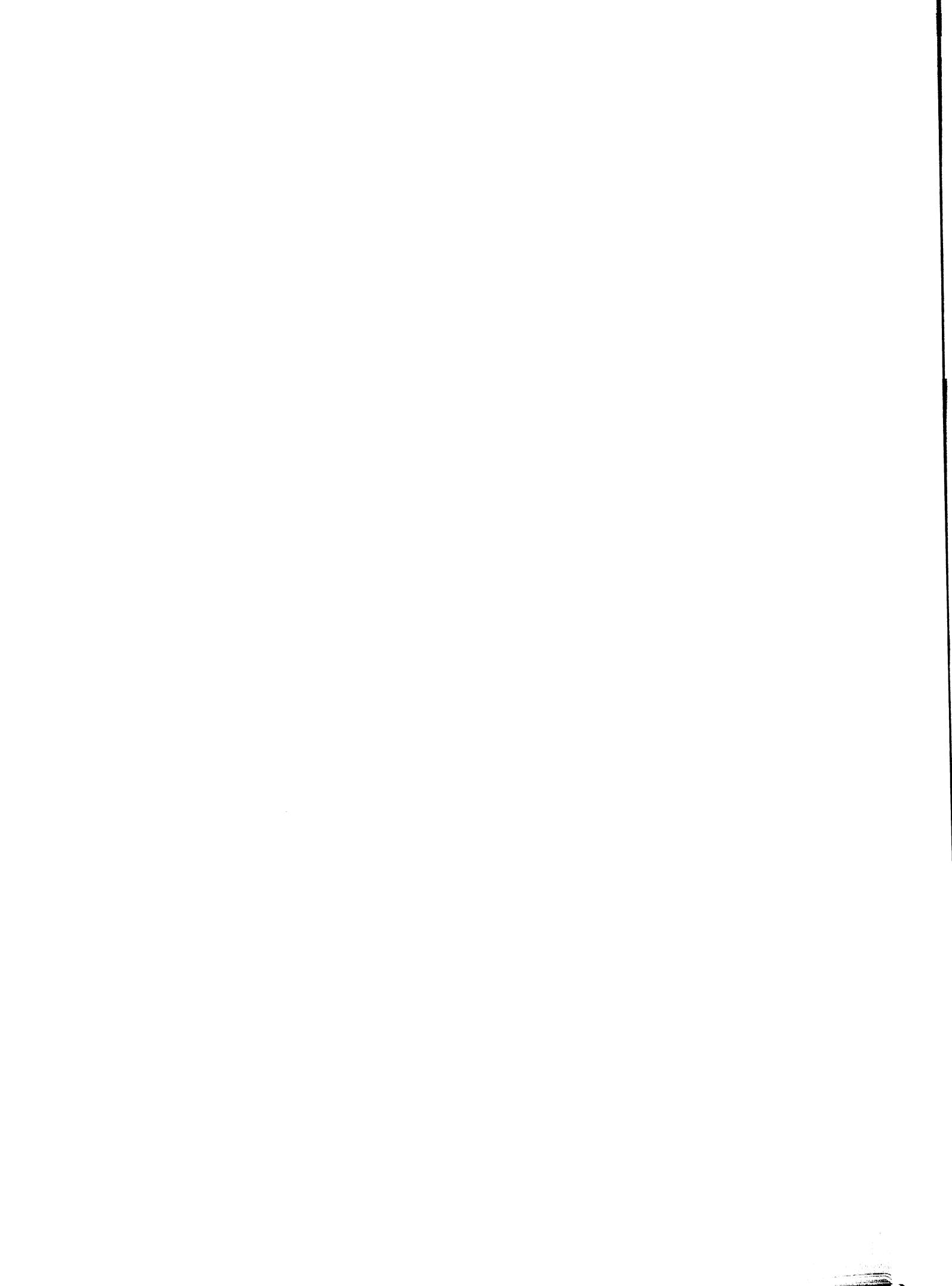
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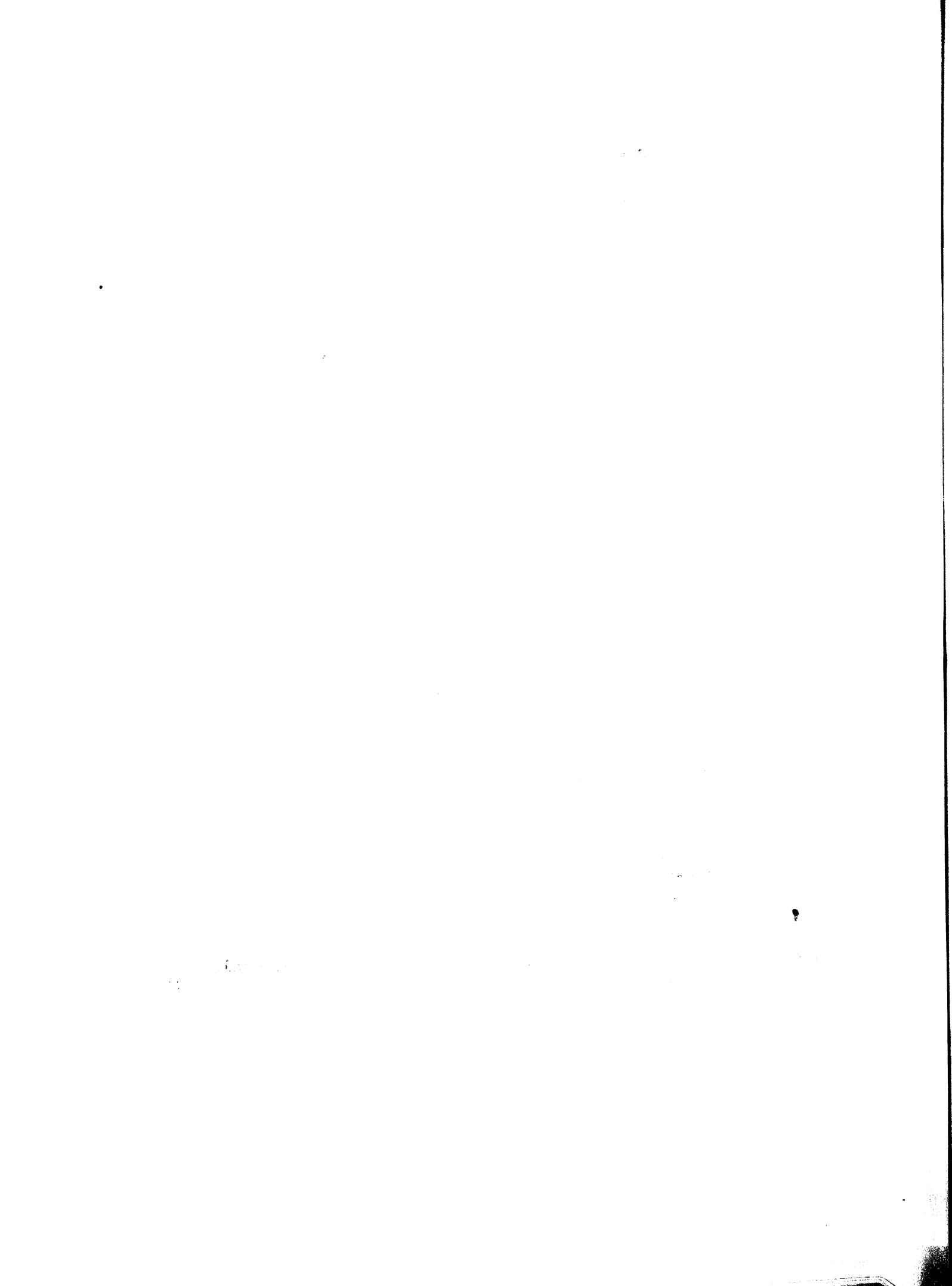
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INTERPRETATIONS AND POLICY STATEMENTS
BY
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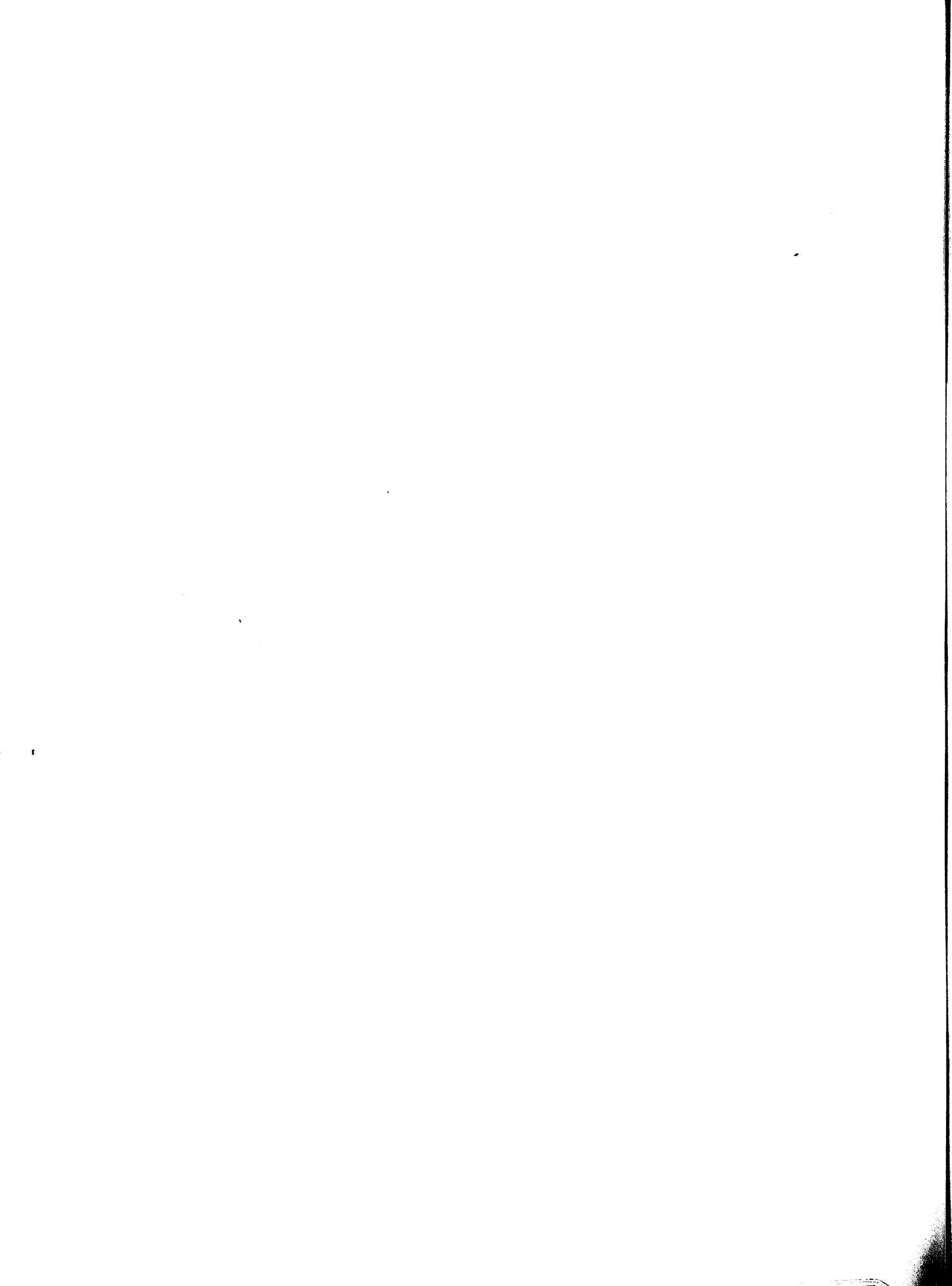
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PART II.

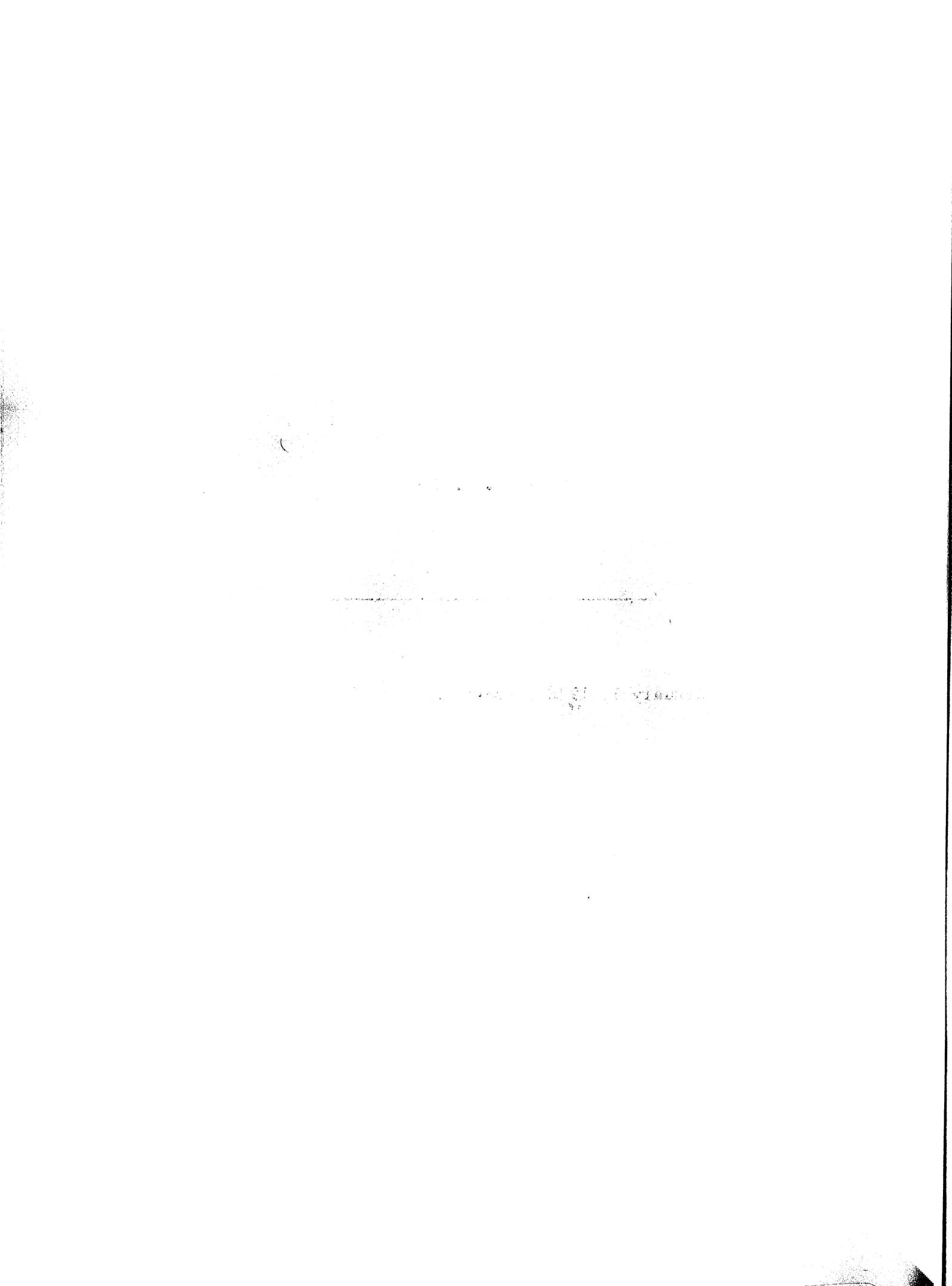
TEXTS OF DECISIONS AND INTERPRETATIONS

January 1, 1978 through December 31, 1978



APPEALS DECISIONS

January 1, 1978 through December 31, 1978



Internal Revenue Service, Ogden Service Center, A/SLMR No. 944. The decision of the Assistant Secretary was dated November 23, 1977, and appeared (as confirmed by administrative advice) to have been served on the parties by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, the agency's appeal was due in the office of the Council no later than the close of business on December 28, 1977. However, the agency's appeal was not filed with the Council until December 30, 1977, and no extension of time for such filing was requested by the agency or granted by the Council.

Council action (January 10, 1978). Since the agency's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 10, 1978

Mr. Robert Breivis
Acting Assistant Director
(Labor-Management Relations)
Office of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Ogden Service Center,
A/SLMR No. 944, FLRC No. 77A-149

Dear Mr. Breivis:

This refers to your petition for review and request for a stay of the Assistant Secretary's decision and order in the above-entitled case, which you filed with the Council on December 30, 1977. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject decision and order of the Assistant Secretary is dated November 23, 1977, and appears (as confirmed by administrative advice) to have been served on the parties by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on December 28, 1977. However, as stated above, your appeal was not filed with the Council until December 30, 1977, and no extension of time for such filing was either requested by you or other representative of the agency, or granted by the Council.

Accordingly, since your appeal was untimely filed, and apart from other considerations, your petition for review is hereby denied. Likewise, your request for a stay is also denied.

For the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III".

Henry B. Frazier III
Executive Director

Enclosure

cc: A/SLMR F. D'Orazio
Labor NTEU

Headquarters, XVIII Airborne Corps and Fort Bragg and American Federation of Government Employees, Local 1770, AFL-CIO (Murphy, Arbitrator). The arbitrator concluded that the activity violated the parties' agreement by subtracting from the total amount of individual dues deductions for a particular payroll period a sum of money which had been erroneously deducted from an employee's salary, thereby failing to pay the union the proper amount of dues deductions for the period in question. Therefore, as his award, the arbitrator directed the activity to pay the union the sum of money that had been subtracted. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law (Report No. 122).

Council action (January 12, 1978). Because the case concerned issues within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from him a decision as to whether the arbitrator's award violated applicable law. Based on the decision of the Comptroller General, the Council held that the arbitrator's award violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Headquarters, XVIII Airborne Corps
and Fort Bragg

and

FLRC No. 76A-145

American Federation of Government
Employees, Local 1770, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, on January 11, 1972, an activity employee in the bargaining unit executed an authorization for the withholding of his union dues and such withholding subsequently began. In September 1972 the employee was promoted to a position outside the bargaining unit. At that time the employee's dues checkoff should have been terminated; however, due to an error, dues deductions continued until the error was discovered in September of 1975. During that period the employee was aware that the dues checkoff was being made and he made no effort to revoke his checkoff authorization nor to resign from the union. When the error was discovered, the employee and the union were notified and, acting on its own initiative, the activity computed the amount of dues erroneously withheld, paid that amount to the employee, and subtracted an equal amount from the dues deduction payment made to the union for the payroll period October 5-18, 1975. The grievance resulting in the instant arbitration arose as a consequence of this action on the part of the activity.

The Arbitrator's Award

The issue before the arbitrator as stipulated by the parties was:

Did the Employer violate Section 4a and Section 7, Article XXXVI of the negotiated agreement between Headquarters XVIII Airborne Corps and Fort Bragg and AFGE Local 1770, dated 12 August 1974, by remitting \$170.15 to [the employee] and deducting that amount from

funds which AFGE Local 1770 regularly receives for union dues withheld via the negotiated Payroll Deduction of Union Dues system?^{1/}
[Footnote added.]

The arbitrator determined, based upon his reading of the negotiated agreement, that the activity had violated the agreement by not paying to the union the total amount of the individual dues deductions withheld during the pay period in question, less only the service fee authorized in the agreement for providing the withholding service. He further determined that nothing in the agreement supported "any right of Employer self-help in deducting the amount in question. The arbitrator therefore concluded that "the Employer, in making the \$170.15 subtraction in this case, violated Article XXXVI, Section 7 of the collective agreement."

Accordingly, the arbitrator awarded as follows:

The award is that the Employer violated Article XXXVI, Section 7 of the collective agreement and is therefore directed to pay to the Union the amount of \$170.15.

1/ According to the arbitrator's award, the relevant portions of Article XXXVI (PAYROLL DEDUCTION OF UNION DUES) are as follows:

Section 3. The Union agrees to:

.
h. To take reasonable steps to include refunding of erroneously obtained funds, to protect the Employer from any and all claims and disputes by reason of its acting hereunder.

Section 4. The Employer agrees to:

a. Promptly notify the Union of the revocation of an allotment for Union dues by an eligible employee.

(Note: to be accomplished by Finance & Accounting Office, Civilian Pay Section).

Section 7. Within five (5) working days after each bi-weekly pay period, the Finance and Accounting Office, Civilian Pay Section, will furnish the Union a summary, in duplicate, which will identify the Union, list each member of the Union who has authorized a voluntary allotment, the amount of the fee of \$.02 per employee per pay period for providing the withholding service and the net amount remitted to the Union. A single check covering the net amount due the Union will be forwarded within five (5) working days after each bi-weekly pay day. The check will be forwarded to a specific Union Officer designated by name, in writing, by the Union.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulation.^{2/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award violates applicable law. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from him a decision as to whether the arbitrator's award violates applicable law. The Comptroller General's decision in the matter, B-180095, December 8, 1977, is set forth below.

The Federal Labor Relations Council (FLRC) has requested our decision as to whether an arbitration award violates applicable law. The American Federation of Government Employees has also requested that we decide this matter. The Federal Labor Relations Council has captioned the case Headquarters, XVIII Airborne Corps and Fort Bragg and American Federation of Government Employees, Local 1770, AFL-CIO (Murphy, Arbitrator), FLRC No. 76A-145. The issue presented is whether, where dues allotments had been erroneously paid to the union, the agency was entitled to recover the same amount by setoff from a later dues allotments payment to the union.

The facts in this case are not in dispute and may be summarized as follows. Mr. Robert A. Johnson, a Fort Bragg employee and a dues-paying member of Local 1770, was promoted out of the bargaining unit to a supervisory position on September 10, 1972. At that time, Mr. Johnson's agency should have terminated his union dues allotment pursuant to 5 C.F.R. § 550.322(c) which provides that:

". . . an agency shall discontinue paying an allotment when the allotter is . . . promoted within the agency outside the unit

^{2/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

for which the labor organization has been accorded exclusive recognition" (Emphasis added.)

The agency, however, due to an error by a payroll clerk in the Finance Office, did not terminate Mr. Johnson's checkoff but continued to deduct his union dues allotment from his pay and pay it over to the union until September 1975, when the error was discovered. The agency notified Mr. Johnson and Local 1770 of the error and made the necessary adjustment by refunding the erroneous deductions in the total amount of \$170.15 to Mr. Johnson and concurrently deducting an equal amount from the dues payment made to Local 1770 for the payroll period of October 5-18, 1975. The adjustment was made pursuant to para. 10-118a, Army Regulations (AR) 37-105, that provides as follows:

"[a]djustment to correct amounts erroneously withheld or where through error withholdings have not been made from the salary of a currently employed individual will be made on a subsequent payroll on which the employee's name appears."

During the period that Mr. Johnson's dues checkoff were erroneously made, he received Statements of Earnings and Leave indicating that his checkoff was still in effect. Johnson made no effort to revoke his checkoff authorization nor to resign from the union. He continued to receive the union newspaper and other publications, and also had the use of a union member purchase discount card. Even after the agency notified him of the error, Johnson did not request a refund of the dues, either from the agency or from the union.

The union filed a grievance on November 7, 1975, alleging that pursuant to section 7, Article XXXVI of the collective-bargaining agreement between the agency and the union, the agency was not permitted to deduct the \$170.15 from the amount due the union for that biweekly pay period. In this connection, section 7 provides as follows:

"Section 7. Within five (5) working days after each bi-weekly pay period, the Finance and Accounting Office, Civilian Pay Section, will furnish the Union a summary, in duplicate, which will identify the Union, list each member of the Union who has authorized a voluntary allotment, the amount of the fee of \$.02 per employee per pay period for providing the withholding service and the net amount remitted to the Union. A single check covering the net amount due the Union will be forwarded within five (5) working days after each bi-weekly pay day. The check will be forwarded to a specific Union Officer designated by name, in writing, by the Union."

The grievance was submitted to arbitration and hearings were held on October 1, 1976, at Fort Bragg, North Carolina. The agency contended that termination of Mr. Johnson's dues checkoff was

required at the time of his promotion out of the unit on September 10, 1972, pursuant to 5 C.F.R. § 550.322(c) and that when the allotment was erroneously continued and eventually discovered, corrective action in the form of immediate pay adjustments were mandated by para. 10-118, AR 37-105. The agency also contended that our holdings in Aberdeen Proving Ground (APG), B-180095, October 1, 1974, and Reconsideration of APG, 54 Comp. Gen. 921 (1975) were directly applicable to this case. The APG decisions held that immediate agency recoupment of previous erroneous dues overpayments to the union was permitted, despite an agreement provision requiring that all dues deducted by the agency for each pay period less a fixed collection charge were to be paid over to the union. Finally, the agency contended that if the arbitrator ordered it to pay the union the disputed \$170.15, it would be unable to comply with the award because no appropriation existed from which such payment could be made pursuant to 31 U.S.C. § 628.

In deciding this grievance, the arbitrator assumed that he had no power to interpret laws, regulations and administrative decisions that impact on the provisions of the agreement. The arbitrator stated that he could only interpret and apply the provisions of the agreement, and that since the law and regulations were not a part thereof, he had no authority to construe the law and regulations. He added, that if the regulations were to be given legal precedence over the contract, someone else would have to act to accomplish that result.

The agreement, according to the arbitrator, in section 7 required the agency to pay over the "net amount due" to the union for each pay period, and did not authorize the agency to unilaterally initiate a refund to an employee and then reimburse itself from the amount due the union for the next payroll period. He concluded that the agency in making the \$170.15 deduction had violated the agreement and he directed the agency to pay the amount of \$170.15 to the union.

In so deciding, the arbitrator concluded that the APG decision is distinguishable and not controlling in this case. We disagree. We believe that the issues in the two cases are very similar and that our APG holding in B-180095, October 1, 1974, and 54 Comp. Gen. 921 (1975) are directly in point here and require that the arbitrator's award be invalidated.

The APG decision involved an agency's unilateral action in deducting \$80.33 from its payment of dues to the union to recover a previous overpayment of dues resulting from the agency's failure to terminate an allotment when an employee had been promoted out of the bargaining unit. Although there are differences between the collective-bargaining agreements in the two cases, these differences are immaterial because the subject matter is controlled by Civil Service

Commission regulations and by Executive Order 11491, both of which provide that a dues allotment terminates when an employee is transferred out of the bargaining unit.

Because the APG case is so similar to the Fort Bragg case before us, we suspended action on the present case, and so notified the Federal Labor Relations Council by letter of September 27, 1977, pending resolution of the union's suit in the Court of Claims on the APG matter.

On October 19, 1977, the Court of Claims decided the APG case in Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO v. United States, Ct. Cl. No. 172-76. The court's opinion first cites the Department of Defense directive, the Executive order, and the Civil Service Commission regulation, all of which require that the union dues allotment must be discontinued when the employee is transferred out of the bargaining unit. The opinion then quotes section 12(a) of Executive Order 11491 which provides that each agreement between an agency and a union is subject to existing or future laws and regulations of appropriate authorities. The court then concluded as follows:

"Since the law, as provided in the regulations, required a termination of the dues allotment upon Mr. Wright's transfer, the payments made by the Government thereafter were both erroneous and illegal."

As to the remaining issue of the legality of the Government's self-help recovery of the erroneous overpayments, the Court of Claims found that the means used were not only authorized by the regulations but also sanctioned by the well-settled rule of law allowing the Government to recover by setoff or otherwise sums illegally or erroneously paid.

In addition the Court of Claims made it clear that Federal laws and regulations are controlling in Federal sector arbitration by the following rationale (slip opinion, pp. 9-10):

"In an effort to avoid the difficult obstacle presented by the cited regulations, plaintiff maintains that judicial review of an arbitrator's decision is a limited one and that the court must enforce an arbitrator's award where the arbitrator does not 'exceed the scope of his authority.' In support of this position, plaintiff cites a long line of cases, including United Steelworkers of America v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974), reversing 339 F. Supp. 302 (N.D. Ala. 1971); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564

(1960). However, we reject plaintiff's argument because we find that the authorities cited are inapposite to the facts of this case. See Byrnes v. United States, Ct. Cl. No. 354-75, order of February 4, 1977 at p. 2, 213 Ct. Cl. ____ (1977).

"In the first place, the cases cited by plaintiff all concern labor arbitration awards made in the context of private labor disputes. Those decisions focus on the Congressional intent, as reflected in the Labor-Management Relations Act, 29 U.S.C. § 141, et seq., 61 Stat. 136, that industrial labor disputes be settled by arbitration. However, the definition of 'employer' in the Labor-Management Act specifically excludes the United States, 29 U.S.C. §§ 142(3) and 152(2). Consequently, those cases, which limit judicial review and accord finality to decisions of arbitrators, including their construction of provisions of collective bargaining agreements, have no application to an arbitrator's decision made pursuant to a collective bargaining agreement between the Government and a union.

"In the second place, we cannot agree with the plaintiff's contention that the arbitrator 'did not exceed the scope of his authority' in awarding the \$80.33 to the union. On the contrary, we find that he based his decision on a literal reading of one section of the collective bargaining agreement and ignored laws and regulations which were an integral part of that agreement and binding upon him as equally as on the parties. Since the decision was contrary to law, it cannot be upheld."

In the instant case the law and regulations governing employee dues checkoff and adjustment of payroll accounts where erroneous deductions occur are the same as in the APG case. Pursuant to 5 C.F.R. § 550.322(c) an agency is required to discontinue paying the union dues allotment of an employee when he is promoted within the agency outside the unit for which the labor organization has been accorded exclusive recognition. Because Mr. Johnson was promoted outside the bargaining unit, the agency was absolutely required to terminate paying his allotment on September 10, 1972. However, because of an administrative error, the allotment was continued until September 1975 and Mr. Johnson's aggregate compensation for the period, to which he was legally entitled, was reduced by \$170.15. Upon discovering that union dues had been erroneously withheld from Mr. Johnson's pay, his agency complied with the mandatory provisions of para. 10-118, AR 37-105, governing adjustments for union dues deductions. That paragraph requires that the agency make an adjustment on a subsequent payroll to correct amounts erroneously withheld. Then, having reimbursed the employee for funds erroneously withheld, it was necessary for the agency to make an adjustment in the union's account to correct the past overpayments. This it did by a one-time recoupment which was recognized as an appropriate measure to adjust such accounts in our Aberdeen Proving Ground

decisions B-180095, October 1, 1974, and 54 Comp. Gen. 921 (1975). As noted above, those decisions have recently been upheld in Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO v. United States, Ct. Cl. No. 172-76, supra.

Accordingly, we conclude that the arbitrator's award is inconsistent with the applicable regulations and, therefore, may not be implemented.

Based on the foregoing decision of the Comptroller General it is clear that the arbitrator's award in this case violates applicable law and appropriate regulations and, therefore, must be set aside.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 12, 1978

Aerospace Guidance and Metrology Center, Newark AFS, Ohio and American Federation of Government Employees, Local 2221 (DiLeone, Arbitrator). This appeal arose from the arbitrator's award which directed that the grievant be assigned to a particular position for which she had applied but not been selected. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated appropriate regulation, namely the Federal Personnel Manual (Report No. 133).

Council action (January 13, 1978). Based upon Civil Service Commission interpretations of applicable Commission regulations previously received and applied in like arbitration cases, the Council held that the arbitrator's award in this case was violative of the Federal Personnel Manual. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Aerospace Guidance and Metrology
Center, Newark AFS, Ohio

and

FLRC No. 77A-47

American Federation of Government
Employees, Local 2221

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award which directed that the grievant be assigned to a particular GS-5 position for which she had applied but not been selected.

Based upon the findings of the arbitrator and the record before the Council, it appears that the Aerospace Guidance and Metrology Center (the activity) sought to fill a vacancy for the position of GS-5 Equal Opportunity Specialist. A number of activity employees, including the grievant, applied for the position. Following personal interviews with all the applicants, the activity's staffing development office determined that the grievant was the only activity employee eligible to be considered for the vacant position. Thereafter, a determination was made to expand the area of consideration to encompass all Air Force personnel. Following issuance of a second announcement of the vacancy for the GS-5 position, a new "profile" was established which included the grievant and four other applicants from other Air Force locations. These four new applicants were interviewed by telephone and one of those interviewed in this manner was selected to fill the vacancy. The grievant challenged her nonselection by filing a grievance alleging a violation of Article 29, Section A of the parties' negotiated agreement which provides that "Full consideration will be given to AGMC employees in filling vacant positions consistent with Air Force policy." The matter was ultimately submitted to arbitration.

The Arbitrator's Award

The arbitrator determined that the activity violated Article 29, Section A of the parties' agreement when it did not select the grievant for the vacant GS-5 position. In arriving at this conclusion the arbitrator found that, although in the circumstances of this case the activity could properly expand its area of consideration, it was required to evaluate the applicants from the second profile "by the same means as those used to

evaluate the grievant." Noting particularly that "the selection was made from the second profile by a mere long distance telephone call," the arbitrator found, in essence, that no meaningful comparison between the grievant and the other applicants could be made in view of the disparity of the means used to evaluate the applicants. According to the arbitrator, the activity failed to present persuasive evidence that the successful applicant possessed qualifications that were not possessed by the grievant. Consequently, he concluded that "[f]rom the evidence . . . the grievant should have been selected among those who applied." To remedy the contract violation, the arbitrator directed that the grievant be assigned to the GS-5 Equal Opportunity Specialist position.^{1/}

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates appropriate regulation, namely the Federal Personnel Manual.^{2/} The union filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates appropriate regulation, namely the Federal Personnel Manual.

With respect to the issue presented by acceptance of the agency's exception alleging that the award violates the Federal Personnel Manual, the Council has previously received and applied Civil Service Commission interpretations of applicable Commission regulations pertaining to arbitration awards

^{1/} It appears that the grievant was considered for the GS-5 position under competitive procedures because the position was one with known promotion potential and, as the grievant was already a GS-5 at the time she applied for the position, backpay was not involved in the matter and the arbitrator did not award the grievant backpay.

^{2/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council granted the agency's request for a stay of the award pending determination of the appeal.

which, as here, direct an agency to select a particular individual for a particular position. The Civil Service Commission has advised the Council that:^{3/}

FPM Chapter 335, Subchapter 2 (Requirement 6)^{4/} sets forth the management right to select or nonselect. This management right can only be abridged if a direct causal connection between the agency's violation(s) and the failure to select a specific employee or from a specific group of employees is established. It must be determined by competent authority that but for the violation(s) that occurred, the employee in question would definitely (and in accordance with law, regulation, and/or negotiated agreement) have been selected. [Footnote added.]

In the present case there is no finding that the requisite direct causal relationship exists between the agency's violation of the negotiated agreement and the grievant's failure to be selected, a finding essential to sustaining as consistent with the Federal Personnel Manual an award directing that an individual be selected for a particular position.^{5/} Accordingly, we conclude that the arbitrator's award which directs that

3/ Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (July 7, 1976), Report No. 108 at 3-4 of the Council's decision. See also Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99; Francis E. Warren Air Force Base, Cheyenne, Wyoming and American Federation of Government Employees, Local 2354 (Rentfro, Arbitrator), FLRC No. 75A-127 (Sept. 30, 1976), Report No. 114.

4/ Requirement 6. Each plan shall provide for management's right to select or nonselect. Each plan shall include a procedure for referring to the selecting official a reasonable number of the best qualified candidates identified by the competitive evaluation method of the plan (referral of fewer than three or more than five names for a vacancy may only be done in accordance with criteria specified in the plan).

5/ While the arbitrator in the present case found that the activity violated the provision of the negotiated agreement entitling activity employees to "full consideration" in the filling of vacant positions, he did not find that but for the grievant's failure to receive "full consideration," she would have definitely been selected for the position. That is, the arbitrator did not find that had the grievant been given the "full consideration" required by the negotiated agreement she definitely would have received the position. The arbitrator's finding that "the grievant should have been selected" is not, in the circumstances of this case, tantamount to the requisite but for determination required by the Commission to abridge management's right to select or nonselect set forth in the Federal Personnel Manual.

the grievant be assigned to the position of GS-5 Equal Opportunity Specialist is violative of the Federal Personnel Manual and cannot be sustained.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby set aside the arbitrator's award.

By the Council.


Henry B. Frazier II
Executive Director

Issued: January 13, 1978

Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, A/SLMR
No. 878. The Assistant Secretary, in agreement with the Administrative Law Judge, found that the union violated section 19(b)(1) and (3) of the Order by the conduct of its agents in coercing, or attempting to coerce, the individual complainant (who was a member of the union) for the purpose of hindering or impeding his work performance, productivity, or the discharge of his duties owed as an employee of the United States; and further violated section 19(b)(1) by interfering with the employee's section 1(a) right to refrain from assisting a labor organization. The union appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and raised major policy issues.

Council action (January 13, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 13, 1978

Mr. William B. Peer
Barr and Peer
Suite 1002, 1101 17th Street, NW.
Washington, D.C. 20036

Re: Professional Air Traffic Controllers
Organization, MEBA, AFL-CIO, A/SLMR
No. 878, FLRC No. 77A-99

Dear Mr. Peer:

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

In this case, as found by the Assistant Secretary, the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO (PATCO) was the exclusive representative of certain employees at the St. Louis, Missouri, Air Traffic Control Facility (the activity). An employee at the activity (who was a member of PATCO) filed an unfair labor practice complaint alleging, in substance, that PATCO violated section 19(b)(1) and (3) of the Order by certain coercive acts taken by its agents against him while he was engaged in his air traffic control duties and was exercising his rights assured by section 1(a) of the Order. More specifically, the complaint alleged that agents of PATCO failed to cooperate with him in carrying out his air traffic control duties and took specific action which impeded his work performance, and that he was improperly threatened by PATCO's Facility Representative.

The pertinent facts of this case, as found by the Assistant Secretary, are as follows: the complainant employee disagreed with PATCO's Facility Representative (who was also President of the PATCO local representing the facility employees) over certain methods advocated by the Facility Representative to carry out PATCO's goals. The Facility Representative, and other employees identified as among the leadership of the PATCO local, attempted, through various acts, to "persuade" the employee to agree with their approach to labor-management relations. Although this "persuasion" included such conduct as merely "shunning" the employee, a pattern of refusing to cooperate with the employee while he was carrying out his air traffic control duties also developed. This lack of cooperation generally was limited to not responding immediately when the employee requested assistance in carrying out his air traffic control responsibilities. However, on one occasion, another controller at the facility, identified

as a PATCO crew or team representative, made an apparent deliberate attempt to cause a "systems error" by the employee. During a confrontation over this incident a few days later between the employee and PATCO's Facility Representative, the latter accused the employee of being a dangerous controller, and alluding to the fact that the employee had used PATCO's Facility Representative and other controllers to check out at the activity, threatened him to the effect that he (the employee) would get his in the end. Subsequently, PATCO's Facility Representative intimated to a supervisor that the employee had caused a "systems error" and stated that it had been a bad operation. During the same period, PATCO's leadership protested working with the employee to the same supervisor. Finally, following this discussion, a Regional Vice President of PATCO charged that the supervisor was covering up a "systems error" involving the employee.

The Assistant Secretary, in agreement with the Administrative Law Judge (ALJ) found, in pertinent part, that PATCO violated section 19(b)(1) and (3) of the Order by the foregoing conduct of its agents.^{1/} Thus, he found that "[t]he evidence clearly establishe[d] that . . . the [employee] was a member of [PATCO], and that [PATCO] coerced, or attempted to coerce, [him] for the purpose of hindering or impeding his work performance, productivity, or the discharge of his duties owed as an employee of the United States." [Footnotes omitted.]^{2/} The Assistant Secretary further held that PATCO's conduct violated section 19(b)(1) of the Order by interfering with the employee's section 1(a) right to refrain from assisting a labor organization.

In your petition for review on behalf of PATCO, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that he rejected, without analysis, PATCO's contentions that the ALJ made conflicting rulings on what was being tried and allowed matters outside the scope of the complaint to be litigated, thereby denying PATCO due process and a fair hearing. You also allege that the Assistant Secretary's decision raises major policy issues as to (1) "whether the conduct of [PATCO] is covered by § 19(b)(1)," contending that only acts or threats of physical violence are prohibited, rather than the type of conduct alleged in the instant case;

^{1/} However, the Assistant Secretary rejected the ALJ's finding that the PATCO local also violated the Order. In this regard, the Assistant Secretary stated that "procedural due process precludes construing a complaint so broadly as to include as party respondents components of national labor organizations not named in the complaint." The Assistant Secretary also rejected the ALJ's finding of a violation of the Order based upon matters not alleged in the complaint.

^{2/} In this regard, the Assistant Secretary rejected PATCO's contention that section 19(b)(3) is applicable only to situations involving internal union discipline, finding instead that it also "was intended to protect union members from any act by a labor organization which in any way interferes with the performance of their duties as employees."

(2) "whether § 19(b)(3) prohibits the conduct complained of against [PATCO]," contending that the provision refers not to the rights of an employee but to the rights of a union member which are protected from infringement, e.g., to be a member of a union, hold office and vote; and (3) "whether PATCO is guilty for the unheard of and unauthorized acts of others," contending that PATCO was not culpable for the acts of others which were attributed to it.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your allegation that the decision of the Assistant Secretary is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, we note the Assistant Secretary's finding, based upon his examination of the record, that the ALJ's rulings in question were not contradictory or prejudicial to PATCO, and further note (supra n. 1) the Assistant Secretary's rejection of the ALJ's finding of a violation based upon matters not set forth in the complaint. As to your contentions relating to the Assistant Secretary's application of section 19(b)(1) and (3) of the Order herein, no major policy issue is presented warranting Council review. Thus, your appeal fails to demonstrate that the Assistant Secretary's application of section 19(b)(1) and (3), in the facts and circumstances of this case, is in any manner inconsistent with the purposes and policies of the Order.

As to the conduct prohibited by section 19(b)(1), your appeal fails to provide any basis to support your assertion that it prohibits only threats or acts of physical violence and intimidation, rather than the conduct involved herein, noting particularly that section 19(b)(1) provides that a labor organization shall not "interfere with . . . an employee in the exercise of his rights assured by this Order." As to the rights protected by section 19(b)(3), your appeal likewise fails to provide any basis to support your assertion that it refers only to the rights of a union member qua union member, noting particularly, as did the Assistant Secretary, that section 19(b)(3) "was intended to protect union members from any act by a labor organization which in any way interferes with the performance of their duties as employees." Finally, with respect to your contention that PATCO should not be held responsible for "the unheard of and unauthorized acts of others," such assertion essentially constitutes mere disagreement with the Assistant Secretary's finding that PATCO violated the Order by certain specific acts and "conduct of its agents with respect to the [employee]," and thus presents no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

C. Oldham
Attorney for Complainant

FLRC No. 77A-111

Department of Treasury, IRS, Chicago District, Assistant Secretary Case No. 50-15400(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that section 19(d) of the Order barred further proceedings on the 19(a)(1) and (2) complaint filed by the union (National Treasury Employees Union). The union appealed to the Council, alleging that the Assistant Secretary's decision presented a major policy issue.

Council action (January 17, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue, and the union neither alleged, nor did it otherwise appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 17, 1978

Mr. William E. Persina
Associate General Counsel
National Treasury Employees Union
Suite 1101, 1730 K Street, NW.
Washington, D.C. 20006

Re: Department of Treasury, IRS, Chicago District,
Assistant Secretary Case No. 50-15400(CA),
FLRC No. 77A-111

Dear Mr. Persina:

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

In this case, a pre-complaint unfair labor practice charge was filed with the Department of Treasury, IRS, Chicago District (the activity) by the National Treasury Employees Union (the union) in a letter dated March 15, 1976. Thereafter, on December 3, 1976, the union filed an unfair labor practice complaint with the Assistant Secretary alleging, in pertinent part, a violation by the activity of section 19(a)(1) and (2) of the Order. The violations were based upon an allegation that the activity had denied an employee (the local union president) administrative time to attend a meeting with the Civil Service Commission and had orally admonished the employee for using administrative time to attend the meeting in question.

In the interim, between the filing of the charge and the complaint, the employee had invoked the agency grievance procedure by letter dated April 13, 1976, over the same issues. The grievance was entertained by the activity, and was pursued on the merits through the various steps except the final one (the appointment of a hearing examiner), at which point the activity informed the union that it would hold the grievance in abeyance pending disposition of the unfair labor practice charge.

The Assistant Secretary, in agreement with the Regional Administrator, found that further proceedings in the matter were unwarranted in that section 19(d) of the Order bars further proceedings under section 19(a). The Assistant Secretary found first that the filing of a pre-complaint charge, as prescribed in his regulations, initiates the unfair labor

practice procedure.* / Thereafter, relying upon the Council's 1971 Report and Recommendations he found:

. . . under the particular circumstances of this case, . . . if the same issue was involved herein in both forums, Section 19(d) would bar further proceedings on the instant unfair labor practice complaint. Thus, despite the fact that the pre-complaint charge herein was filed prior to the grievance, the complainant elected to pursue the latter procedure and, in this regard, pursued the grievance, on its merits, through the various steps. [Citation deleted.]

Finding that the issue raised in the complaint was clearly argued in the various steps of the grievance procedure, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the portions of the complaint pertinent herein.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision presents the following major policy issue:

Whether, under § 19(d) of EO 11491, as amended, the pursuit of an agency grievance after the invocation of the [unfair labor practice] procedure, but before active pursuit of a complaint, mandates dismissal of the ULP complaint. [Emphasis in original.]

In this regard you contend, in substance, that the analysis by the Assistant Secretary is inappropriate to the resolution of 19(d) issues, "in that it looks, not to which procedure was employed first, but which procedure had the most work or effort put into it first." You contend this to be a "highly subjective criteria" uncalled for under the Order, and "as a practical matter, unworkable."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it otherwise appear, that his decision was arbitrary and capricious. Thus, in the Council's view, the Assistant Secretary's finding that section 19(d) of the Order barred the union's complaint "[u]nder the particular circumstances of this case," wherein the union pursued a grievance through the grievance procedure after having filed a pre-complaint charge, presents no major policy issue

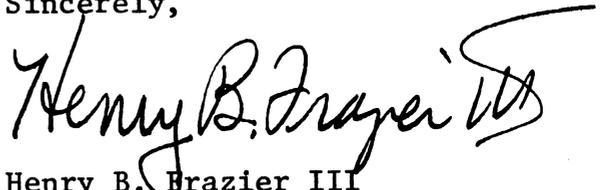
*/ " . . . when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made optional with the aggrieved party whether to seek redress under the grievance procedure or the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure." Labor-Management Relations in the Federal Service (1975), at 57-8.

warranting Council review, noting, as did the Assistant Secretary, that section 19(d) was designed to preclude an aggrieved party from "simultaneously or sequentially" pursuing redress under a grievance procedure or the unfair labor practice procedure.

Since the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it otherwise appear, that his decision was arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. J. O'Rourke
IRS

Department of the Treasury, United States Secret Service, Executive Protective Service, Washington, D.C., Assistant Secretary Case No. 22-07770(RO).

The Assistant Secretary, upon a representation petition filed by the union (Police Association of the District of Columbia) found, in agreement with the Acting Regional Administrator (ARA), that since the agency head had determined that the employees involved should be excluded from coverage of the Order pursuant to section 3(b)(3), the Assistant Secretary was without authority to review that decision, and further proceedings in the matter were not warranted. Accordingly, the Assistant Secretary denied the union's request seeking reversal of the ARA's dismissal of the subject representation petition. The union appealed to the Council, alleging that the Assistant Secretary's decision presented a number of constitutional questions concerning the provisions of section 3(b)(3) of the Order.

Council action (January 17, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision neither raised major policy issues warranting Council review, nor appeared arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 17, 1978

Mr. Joel M. Finkelstein
Counsel for Police Association
of the District of Columbia
Suite 1105
1120 Connecticut Avenue, NW.
Washington, D.C. 20036

Re: Department of the Treasury, United States Secret Service, Executive Protective Service, Washington, D.C., Assistant Secretary Case No. 22-07770(RO), FLRC No. 77A-117

Dear Mr. Finkelstein:

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

According to the documents filed with your petition, this case arose upon the filing, on February 7, 1977, of a representation petition by the Police Association of the District of Columbia (the union) seeking to represent a unit of officers and sergeants of the Department of the Treasury, United States Secret Service, Executive Protective Service (EPS). On July 26, 1971, the head of the agency had excluded employees of the Executive Protective Service under section 3(b)(3) of the Order. This determination was reaffirmed by the Acting Secretary of the agency on August 22, 1975. The present Secretary of the Treasury reaffirmed this exclusion on March 23, 1977 when he determined under section 3(b)(3) of the Order ". . . that the provisions of the Executive Order, as amended, cannot be applied to the Executive Protective Service in a manner consistent with national security requirements and considerations." Thereafter, the Acting Regional Administrator dismissed the union's representation petition. The Assistant Secretary denied the union's request for review seeking reversal of the dismissal of the petition. In so ruling, the Assistant Secretary stated:

In agreement with the Acting Regional Administrator, I find that as the head of the agency has determined, in his sole judgment, that employees of the Executive Protective Service should be excluded from coverage of Executive Order 11491, as amended, under Section 3(b)(3), I am without authority to review such decision and further proceedings in this matter are not warranted. See Naval Electronic Systems Command Activity, Boston, Massachusetts, FLRC No. 71A-12.

In your petition for review on behalf of the union you allege that the following questions are presented: (1) whether the procedures used by the Secretary of the Treasury were consistent with due process when the Secretary's determination was made without providing the union access to

the information supplied to and relied upon by the Secretary and without an opportunity for the union to respond to such information; (2) whether the decision of the Secretary of the Treasury was inconsistent with union members' first amendment rights in that it did not take into account the lack of a relationship between matters traditionally the subject of collective bargaining agreements and national security; and (3) whether the decision of the Secretary of the Treasury denied union members equal protection of the law in that other Federal employees similarly situated have been and are accorded the right to bargain collectively. You further allege that this case is distinguishable from Naval Electronic Systems Command in that the constitutional issues raised by this petition were not addressed in that case, and that in any event, the Council's decision in that case is inconsistent with due process and the first amendment.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision neither raises major policy issues warranting Council review nor appears arbitrary and capricious. More particularly, the question which you present in this case concern alleged constitutional issues deriving from the provisions of section 3(b)(3) of the Order. In this regard, the Council has previously stated:

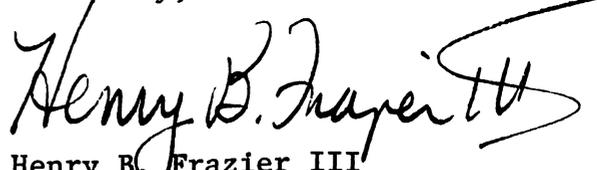
As the courts have frequently held, the role of a Government agency is not to judge the constitutionality of the law which it is empowered to administer. Thus, the Council's function in the instant case is strictly limited to interpreting and applying the provisions of the Order in a manner which is consonant with the language, intent and purposes of the Order. [National Treasury Employees Union and Internal Revenue Service, Department of Treasury, A/SLMR No. 536, FLRC No. 75A-96 (Mar. 3, 1976), Report No. 97.]

Accordingly, no basis for Council review is presented by your petition for review. Moreover, your appeal fails to show that the Assistant Secretary's decision herein was inconsistent with controlling Council precedent. Naval Electronic Systems Command Activity, Boston, Mass., Assistant Secretary Case No. 31-3371(EO), 1 FLRC 144 [FLRC No. 71A-12 (Jan. 19, 1972), Report No. 18]

Since the Assistant Secretary's decision does not present any major policy issues warranting review, nor does it appear arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR P. T. Weiss
Labor Treasury

U.S. Army Support Detachment, Fort McArthur, California and American Federation of Government Employees, Local 2866 (Jones, Arbitrator). The arbitrator determined that although the union was aware of a recurrent failure by the activity to publicize promotional opportunities as required by the parties' agreement, it nonetheless did not move to correct the situation until it proceeded to protest the promotion action here involved. Thus, the arbitrator concluded that the grievances pressed by the union in the instant proceeding were untimely in the sense that the union did not move earlier to correct such noncompliance with the agreement. As his award, the arbitrator, in pertinent part, directed the activity to henceforth comply with the relevant provision of the parties' agreement but ruled that the union was not entitled to retroactive relief in this case for past violations by the activity of the subject provision. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon exceptions alleging, in essence, that the arbitrator's factual determination as to untimeliness was not based on any evidence before the arbitrator and was erroneous.

Council action (January 19, 1978). The Council held that the union's exceptions provided no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1978

Mr. Peter B. Broida, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Army Support Detachment, Fort McArthur,
California and American Federation of Government
Employees, Local 2866 (Jones, Arbitrator), FLRC
No. 77A-98

Dear Mr. Broida:

The Council has carefully considered the union's petition for review of the arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

According to the arbitrator's opinion accompanying his award, this matter involves a dispute over a promotion to the position of Supervisory Production Controller, GS-8. The union filed a grievance complaining that the parties' negotiated agreement had been "misapplied" in the promotion of an employee to that position. The grievance was ultimately submitted to arbitration.

The arbitrator stated the "core contractual issue" before him to be as follows:

Was the Employer obligated to publicize the Supervisory Production Controller job on or about April 11, 1976, and, having failed to do so, what remedy, if any, is now appropriate?

In discussing this issue, the arbitrator observed that the negotiated agreement "declares without equivocation that 'Promotion opportunities will be publicized'" In this respect, the arbitrator concluded that "[n]othing that has been proffered by the Employer demonstrates convincingly that the Agreement should not mean, or be allowed to mean, that quite plainly stated intendment." However, at the same time, he concluded that "there are at least three sets of circumstances that occur in the course of labor-management relations that result in one party or the other being precluded from availing of an otherwise existing contractual entitlement: waiver, estoppel and untimeliness." Noting that "there has existed a practice at least since 1973 for promotional opportunities among repromotional eligibles to be effectuated without compliance with the provisions of [the negotiated agreement]," the arbitrator, accordingly, concluded "that the grievances pressed by the Union in this proceeding are untimely in the sense that, being aware of a recurrent failure to publicize promotional opportunities, the Union nonetheless did not move to correct

the situation of noncompliance with the provisions of [the negotiated agreement] until it proceeded to protest [the disputed] promotion." The arbitrator, therefore, made in pertinent part the following award:

1. The Employer shall henceforth comply with Article XVII, publicizing all promotion opportunities, including those that will in the circumstances be filled by repromotion-eligible employees.
2. The Union is not contractually entitled to retroactive relief in this proceeding relative to past violations of the requirements of Article XVII.

The union requests that the Council accept its petition for review of the arbitrator's award based upon the exceptions discussed below. The agency filed an opposition.

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

In its first exception to the award, the union contends that the award should be set aside since a crucial determination was not based upon any evidence before the arbitrator. In support of this exception, the union argues that the arbitrator's conclusion as to untimeliness was based upon his finding that the union had not objected to prior unposted promotions and that this "factual determination is based purely on conjecture." In essence, the union appears to be disagreeing with the arbitrator's findings of fact and his specific reasoning behind the award. In these respects, the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal, e.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96, and the Council has consistently held that the conclusion or the specific reasoning employed by an arbitrator is not subject to challenge, e.g., American Federation of Government Employees, Local 1858, AFL-CIO, Redstone Arsenal, Alabama and U.S. Army Missile Command, U.S. Army Communications Command Agency, Redstone Arsenal, Alabama (Griffin, Arbitrator), FLRC No. 77A-6 (June 6, 1977), Report No. 127. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

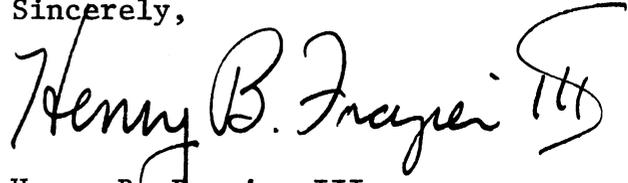
In its second exception to the award, the union contends that the award is so incomplete as to make implementation impossible. In support of this exception, however, the union merely asserts that if the arbitrator's conclusion as to untimeliness is not supported by fact, then the award is incomplete because it does not include a remedy to meet the violation by

the activity of the merit promotion regulations. Although the Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition for review, that the exception presents the ground that the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible, e.g., Headquarters, Western Area Military Traffic Management Command and American Federation of Government Employees, Local 1157 (Grodin, Arbitrator), FLRC No. 77A-57 (Aug. 2, 1977), Report No. 133, the Council is of the opinion that the union's petition fails to present the necessary facts and circumstances to support its exception that the award is so incomplete as to make implementation impossible. The union again argues that the arbitrator's factual determination as to untimeliness is erroneous. Thus, the essence of the union's second exception is identical to its first exception and, as previously indicated, such an exception and such contentions provide no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: W. J. Schrader
Army

Social Security Administration, Bureau of Hearings and Appeals and American Federation of Government Employees, Local 3615 (Oldham, Arbitrator). The arbitrator determined that a memorandum issued by the activity's acting personnel officer to supervisors pertaining to the recording of "official time" did not constitute a unilateral change in the relevant provision of the parties' agreement, and was not violative of the agreement, as alleged by the union in its grievance. Accordingly, the arbitrator denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging that the award violated section 11(a) of the Order.

Council action (January 19, 1978). The Council held that the union's exception provided no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1978

Ms. Evelyn D. Bethel, President
Local 3615, American Federation of
Government Employees, AFL-CIO
P.O. Box 147
Arlington, Virginia 22210

Re: Social Security Administration, Bureau of
Hearings and Appeals and American Federation
of Government Employees, Local 3615 (Oldham,
Arbitrator), FLRC No. 77A-104

Dear Ms. Bethel:

The Council has carefully considered your petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when the acting personnel officer for the Bureau of Hearings and Appeals (the activity) issued a memorandum (Silver memorandum) to all central office supervisors pertaining to the recording of "official time" under the parties' negotiated agreement. No copy of the memorandum was sent to the union. The union subsequently filed a grievance contending that the memorandum was issued without first meeting and conferring with the local and that the procedures outlined in the memorandum are not set forth in the negotiated agreement. The matter ultimately proceeded to arbitration.

The arbitrator stated that the case involved an interpretation of Article VI, Section 5^{1/} of the negotiated agreement and that the central issue was

1/ According to the arbitrator, Article VI, Section 5 of the parties' negotiated agreement provides:

Union functionaries as well as other employees must request permission from their immediate supervisor, or designee, to be excused from their assigned duties. The following is the procedure for all employees to follow in requesting official time:

(1) The employee requesting official time will provide at least two (2) hours notice prior to the intended use of such official time. In extraordinary circumstances, the supervisor will waive this requirement when justified.

(2) All employees, including Union functionaries, will when requesting

(Continued)

"[D]id the issuance of the Silver memorandum^{2/} constitute a unilateral modification of Section 5 of Article VI?" [Footnote added.] The arbitrator noted that the items of information enumerated in the Silver memorandum essentially tracked the contract language in Article VI, Section 5, and that

(Continued)

such official time, indicate the purpose of the request, the estimated time required, the place of the meeting, and report his/her return to their assigned duties.

(3) Where the use of official time involves an unfiled grievance, the functionary requesting official time to interview the employee need not reveal the identity of the potential grievant in the matter. Where an unfiled grievance is involved, the Union functionary will indicate if official time requested is for a first or subsequent meeting, i.e. 1st, 2nd, . . . , etc.

However, the grievant's name and the information required in subsection 2 of this section must be furnished when requesting official time where the grievance has been filed.

(4) In those cases in which a functionary is requesting official time to interview an employee concerning an unfiled grievance, Local 3615 shall maintain accurate daily records which shall account for the total time spent by each Union functionary in such activities. Whenever the employer believes that official time is being used improperly, the Employer will discuss its specific concerns with the Union President in an effort to seek a mutually satisfactory solution. If this does not resolve the matter, the Chief of Labor Relations Staff will make a written request for the Union's records, giving specific reasons for doing so. Such records will then be made available to the Employer.

2/ According to the arbitrator, the Silver memorandum, after referring to Article VI of the agreement, provided that:

Information obtained pursuant to the request for official time should be recorded by the supervisor granting the request . . . and placed in a file which is maintained exclusively for each individual making a request and must include:

1. Name of employee
2. Date and time of request
3. The purpose of the request
4. The name of the individual to be represented (Unless the exception under Section 5(3) is applicable.)
5. The estimated and actual time used
6. The place the official time is to be utilized

the dispute centered on "whether or not the recordation of this information comports with the contract." He determined that "the Silver memorandum was, by and large, a natural and logical implementation of Article VI, Section 5." He added that while "[i]t may have been an error in judgment for Ms. Silver not to have forwarded a copy of her memorandum to the union at the time it was written, . . . this omission was not a violation of the contract." The arbitrator concluded that a unilateral modification of Section 5 of Article VI "ha[d] not been established by the factual record" and accordingly he denied the grievance.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency did not file an opposition.

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

In its exception, the union asserts that "the evidence of record shows that the arbitrator's decision violates section 11 of the Order, which requires that an agency negotiate before instituting [a] unilateral change." In support of this exception the union contends that "the arbitrator improperly drew certain conclusions which were not supported by the evidence of record" and cites various testimony from the transcript of the arbitration hearing.

On its face, the union's exception that the award violates the Order states a ground upon which the Council will grant a petition for review. However, in its reference to section 11 of the Order, it appears that the union is contending that the award violates the Order because the arbitrator failed to find that the activity violated the Order by refusing to negotiate with the union. The Council has previously held that a contention that an arbitrator has failed to decide, during the course of a grievance arbitration proceeding, whether an unfair labor practice has been committed under the Order does not present a ground upon which the Council will accept a petition for review of an arbitration award. The National Labor Relations Board Union (NLRBU) and The National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135. Likewise, if the union's exception is read as contending that the agency violated the Order by refusing to negotiate with the union, Council precedent is clear that an assertion that the agency violated the Order does not state a ground upon which the Council will grant a petition for review of an arbitrator's award. The National Labor Relations Board Union (NLRBU) and The National Labor Relations Board (NLRB), supra.

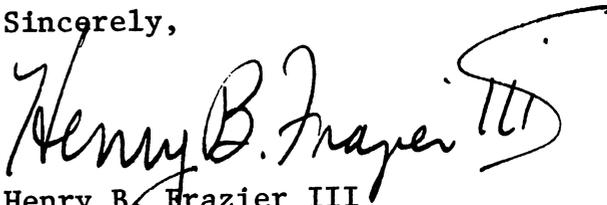
Further, an examination of the union's more detailed contentions in support of its exception indicate that they are directed to the arbitrator's finding, based upon his examination of the negotiated agreement between

the parties, that, in the facts of this case, the issuance of the "Silver memorandum" did not constitute a unilateral modification of the agreement. Thus, the union is contending that the arbitrator's award contains a number of erroneous findings of fact. The Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned by the Council. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Consequently, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

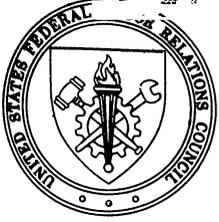


Henry B. Frazier III
Executive Director

cc: J. J. Toner
SSA

Department of the Navy and American Federation of Government Employees, AFL-CIO (Larkin, Arbitrator). The arbitrator concluded that the grievant's conduct was proper cause for the issuance of a letter of caution by the activity, and dismissed the union's grievance requesting that the letter be withdrawn from the grievant's personnel file. The union filed a petition for review of the arbitrator's award with the Council, asserting, in essence, that the arbitrator failed to address the issues presented.

Council action (January 19, 1978). The Council held that the union's assertions provided no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1978

Mr. William R. English
National Representative
American Federation of Government
Employees, AFL-CIO
P.O. Box 388
Round Lake, Illinois 60073

Re: Department of the Navy and American Federation
of Government Employees, AFL-CIO (Larkin,
Arbitrator), FLRC No. 77A-108

Dear Mr. English:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, this case arose as a result of the issuance of a "letter of caution" to the grievant, a firefighter at the Naval Air Station, Glenview, Illinois (the activity). The "letter of caution" was issued because of the grievant's failure to appear on his assigned truck in response to an emergency and his failure to notify the officer-in-charge. The union filed a grievance requesting that the letter of caution be withdrawn. The grievance specifically contended that the activity violated Article XXIV, Sections 1 and 12 of the parties' negotiated agreement^{*/} and alleged that the letter was unjustified because it was impossible for the grievant to mount the truck since the

*/ Article XXIV of the parties' agreement, DISCIPLINARY ACTIONS, states, in pertinent part:

Section 1. When a disciplinary action is contemplated, no employee will be subject to formal questioning before witnesses or required to make a sworn statement without first being informed of his right to representation by the Union or any other representative of his choice. This section does not apply to informal questioning by a supervisor as part of the pre-investigation process.

Section 12. In the interest of maintaining an effective employee-supervisory relationship, the parties agree that applicable and traditional rules and regulations and good supervisory practices will be observed in disciplining, correcting or counseling employees. The Union agrees to cooperate with the Employer and not interfere with normal supervisory employee relationship within the unit.

number of men already aboard completely filled all available standing room on the tailboard and that it is not standard practice to notify a supervisor after being unable to respond.

After determining that the "issuance of a letter of caution" was arbitrable, the arbitrator found that the reason that there was not room for the grievant on the truck was because he was late getting to the truck and that instead of reporting his absence he had "retired to his bunk." Therefore, the arbitrator concluded that the grievant's conduct was proper cause for the issuance of the letter of caution and dismissed the request that the letter of caution be withdrawn from the grievant's personnel file.

The union takes exception to the arbitrator's award on the grounds discussed below.

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

In its petition the union asserts, in essence, that the arbitrator failed to address the issues as presented. In this regard the union asserts that the logic employed by the arbitrator in his decision "is erroneous" and that his conclusion and award were "based upon the grievant's activities before and after the incident, rather than speaking to the issues of the Letter of Caution." Thus, the union states that the arbitrator's finding that the grievant could not board the truck because he was late getting to it is contrary to the testimony presented at the hearing and ignores the safety question of whether the grievant was justified in not mounting the truck. The union further asserts that the arbitrator, in finding that the grievant should have reported his failure to respond to the officer in charge, "totally ignored the facts, and then failed to give any rationale for this finding." The union further contends that the arbitrator's ruling is "invalid."

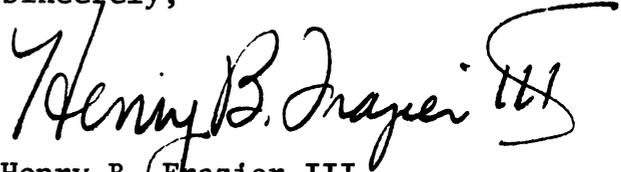
In essence it appears that the union, by asserting that the arbitrator's logic is erroneous, that his finding with respect to why the grievant could not board the truck is contrary to the testimony, that he ignored the facts and gave no rationale for his finding with respect to the grievant's failure to respond, and that the award is "invalid," is disagreeing with the arbitrator's reasoning and conclusion in arriving at his award and is disagreeing with the arbitrator's findings of fact. In these respects, the Council has consistently held that the conclusion or the specific reasoning employed by an arbitrator is not subject to challenge, e.g., Federal Employees Metal Trades Council and Portsmouth

Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111, and the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal, e.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Similarly, arbitral determinations as to the credibility of witnesses and the weight to be given their testimony are not matters subject to Council review, e.g., The National Labor Relations Board Union (NLRBU) and The National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135. Thus, the union's assertions provide no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

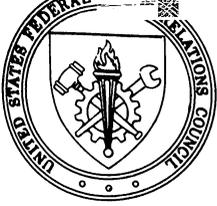


Henry B. Frazier III
Executive Director

cc: J. Powell
Navy

National Federation of Federal Employees, Local 1631 and Veterans Administration Hospital, Amarillo, Texas. The union filed petitions for review of a negotiability dispute in the above-entitled consolidated cases. However, it did not appear that the particular union proposal, which was the subject of the union's appeals and which the union indicated it had sought to negotiate, was in fact presented to the agency head for a negotiability determination. Likewise, such proposal was not the subject of the negotiability determinations which had been rendered by the agency head in the cases. Subsequently, consonant with permission granted by the Council, the union requested a negotiability determination from the agency head on the disputed proposal as described in the union's appeals. In response to the union's request, the agency head, by letter of December 19, 1977, determined that the subject proposal was negotiable.

Council action (January 26, 1978). The Council held that the agency's action of December 19, 1977, rendered moot the dispute involved in the union's appeals. Accordingly, the Council dismissed the union's petitions for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 26, 1978

Robert J. Englehart, Esq.
National Federation of Federal Employees
1016 - 16th Street, NW.
Washington, D.C. 20036

Re: National Federation of Federal Employees,
Local 1631 and Veterans Administration Hospital,
Amarillo, Texas, FLRC Nos. 77A-73 and 77A-90

Dear Mr. Englehart:

This is in further reference to your petitions for review of a negotiability dispute in the above-entitled consolidated cases.

By Council letter of November 3, 1977, you were informed that:

It appears from your appeals, which arose from the same negotiations between the union and the activity, that the intent of the union was to negotiate a grievance procedure as broad in coverage and scope as that permitted by section 13(a) of the Order, and without expressly excluding any particular matter from that procedure. [Footnote omitted.]

While you contend in your appeals to the Council that the agency determined such a proposal was nonnegotiable, the records before the Council do not support that contention. More specifically, the union's request to the agency head of March 26, 1977, in FLRC No. 77A-73 (and, so far as the record indicates, the request of May 15, 1977, in FLRC No. 77A-90), did not seek a determination as to the negotiability of such proposal. Rather, the union appears merely to have sought agency head determinations as to the negotiability of six matters apparently advanced by the activity during the subject negotiations as express exclusions from the parties' grievance procedure. Moreover, the agency head, in his responses of June 1 and July 14, 1977, to the union's request in FLRC Nos. 77A-73 and 77A-90, respectively, did not address the negotiability of any proposal concerning a broad grievance procedure, without particularization of exclusions, which you claim to be the proposal here in dispute. Instead, he addressed the negotiability of the particular matters identified by the union in its requests and determined that five of the matters were nonnegotiable (the sixth matter was determined to be negotiable) and, therefore, proposals to include such matters within the coverage and scope of the parties' negotiated grievance procedure were also nonnegotiable.

Thus, it does not appear that the proposal which you indicated the union sought to negotiate and which is the subject of your instant

appeals to the Council was in fact presented to the agency head for a negotiability determination. Likewise, such a proposal was not the subject of the negotiability determinations subsequently rendered by the agency head in these cases.

If the proposal in dispute is a grievance procedure which is as broad in coverage and scope as that permitted by section 13(a) of the Order and which does not expressly exclude any particular matter from that procedure, an agency head determination as to the negotiability of such proposal is required, in order to meet the conditions for review provided in section 11(c)(4) of the Order and incorporated in section 2411.22 of the Council's rules of procedure. If, on the other hand, the proposals in dispute are ones which expressly include within the coverage and scope of the parties' negotiated grievance procedure those individual matters referred to the agency head by the union and determined to be nonnegotiable, then amendment of your appeals is required alleging grounds for such appeals as provided in section 2411.25 of the Council's rule.

Accordingly, you were granted time by the Council either (1) to serve a written request on the agency head for a negotiability determination on the disputed proposal as described in your appeals; or (2) to file amended petitions for review in response to the agency head's negotiability determinations.

Consonant with (1) above, the union, by letter of November 9, 1977, requested a negotiability determination from the agency head on the disputed proposal described in your appeals. In response to the union's request, the agency head, by letter of December 19, 1977, determined that the subject proposal was negotiable.

In the Council's opinion, the agency's action of December 19, 1977, rendered moot the dispute involved in your appeals. Cf. American Federation of Government Employees Local 3285 and Veterans Administration Hospital, Omaha, Nebraska, FLRC No. 77A-120 (Dec. 15, 1977), Report No. 139; and National Federation of Federal Employees, Local 1641 and Veterans Administration Hospital, Spokane, Washington, FLRC No. 77A-74 (Aug. 31, 1977), Report No. 137.

Accordingly, your petitions for review are hereby dismissed.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. E. Adams
Veterans Administration

American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey. The cases, consolidated by the Council for purposes of decision and relating to nonappropriated fund (NAF) employees, involved negotiability issues as to the following matters: Proposals I and III, merit increases, and negotiation of pay for NAF employees whose pay is not covered by law, respectively; proposal II, pay periods; proposal IV, retirement plan; provision V, use of intermittent employees; provision VI, filling of vacancies; provision VII, recall and position offers in reduction-in-force (RIF) situations, and retention system for RIF purposes; and provision VIII, merit promotions. The issues in proposals I through IV, comprising the union's appeal in FLRC No. 77A-18, concerned disputed union proposals declared nonnegotiable by the activity, which determinations were subsequently upheld by the agency (Department of Defense or Department of the Air Force). The remaining issues in dispute, comprising the union's appeal in FLRC No. 77A-21, concerned provisions in the local parties' agreement which were determined to be nonnegotiable by the agency following review of the agreement under section 15 of the Order.

Council action (January 27, 1978). With regard to proposal I, as applied to those NAF employees categorized as crafts and trades employees, the Council held that the proposal violated statute. Further with regard to proposals I and III, as they apply to administrative support, patron service and universal annual categories of NAF employees, and with regard to proposal IV and provision VII (concerning retention system for RIF purposes), the Council held that the proposals and provision violated agency regulations for which a "compelling need" existed under section 11(a) of the Order and part 2413 of the Council's rules. As to proposal II, the Council held that no "compelling need" existed under section 11(a) of the Order and part 2413 of the Council's rules for the agency regulation relied upon by the agency to bar negotiations on the union's proposal. As to provision V, the Council held that the disputed provision, while not violative of section 12(b)(5) of the Order, as determined by the agency, was outside the agency's obligation to bargain under section 11(b) of the Order; however, the Council further held that since the local parties had agreed to the provision, the agency could not, after that agreement, raise an issue as to the negotiability of the provision during the section 15 review process, on the basis of section 11(b) of the Order. Finally, as to provisions VI, VII (concerning recall and position offers in RIF situations), and VIII, the Council held that the disputed provisions violated section 12(b)(2) of the Order. Accordingly, for the reasons fully detailed in its decision, the Council held that the agency's determinations as to the nonnegotiability of the proposals and provisions numbered I, III, IV, VI, VII and VIII, were proper and, pursuant to section 2411.28 of the Council's rules, sustained those determinations. As to proposal II and provision V, however, the Council held that the agency's determinations of nonnegotiability were improper and, pursuant to section 2411.28 of its rules, set aside those determinations.

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

American Federation of Government
Employees, Local 1778

(Union)

and

FLRC Nos. 77A-18 & 77A-21

McGuire Air Force Base, New Jersey

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposals I and III^{1/}

- I. Longevity, Section 1. After a NAF employee has reached the fifth step of their grade, there will be a Merit Increase every two years based on 10% hourly rate. This will not preclude the employee from getting full increases from wage surveys.

- III. Pay, Section 3. The employer and the UNION agree to negotiate the pay of all NAF employees wherein their pay is not covered by Law. All existing pay rates and schedules shall remain in effect until negotiations are completed.

^{1/} The negotiability dispute involved in the present cases, which cases are here consolidated for purposes of decision, arose in connection with negotiations between the union and the activity, covering an activity-wide unit of nonappropriated fund (NAF) employees. Disputed union proposals I through IV, comprising the appeal to the Council in FLRC No. 77A-18, were declared nonnegotiable by the activity and, upon referral, the agency (Department of Defense or Department of the Air Force) upheld the activity's position as to such nonnegotiability. Disputed provisions V through VIII, comprising the appeal to the Council in FLRC No. 77A-21, were determined nonnegotiable by the agency (Department of Defense) following review of the bargaining agreement between the local parties, under section 15 of the Order.

Agency Determination

As to proposal I, the agency determined that, with respect to one category of hourly paid NAF employees (crafts and trades), the proposal is non-negotiable essentially because it violates statutory law; and that, with respect to two other categories of such employees (administrative support and patron service), the proposal is nonnegotiable because it violates agency regulations for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

As to proposal III, the agency determined that the proposal applies to three categories of NAF employees (administrative support, patron service, and universal annual), and that, with respect to these employees, the proposal is likewise nonnegotiable because it conflicts with agency regulations for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Questions Here Before the Council

- A. Whether proposal I, as applied to crafts and trades employees, is violative of statute.
- B. Whether proposals I and III, as applied to other categories of NAF employees, violate agency regulations for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Opinion

Conclusion as to Question A: Proposal I, as applied to crafts and trades employees, violates statute (5 U.S.C. § 5343(e)(1)). Accordingly, the agency's determination that the proposal as so applied is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: In order to fully comprehend the reasons for the above conclusion as well as for our conclusion concerning Question B, below, an understanding of the nature of NAF instrumentalities and the employees involved in the present dispute is required.

Nonappropriated fund instrumentalities (NAFIs), as the name implies, are activities which are not directly funded by Congressional appropriations. The Department of Defense NAFI system is agency-wide in scope and is designed to provide or assist other DoD organizations in providing morale, welfare and recreational programs for military personnel and authorized civilians. These nonappropriated fund activities are characterized in general as either "revenue producing activities" (e.g., armed services exchanges), the net income from which is used to supplement funds appropriated for the support of other welfare and recreational programs; or "welfare and recreation funds," used, for instance, to develop recreational activities

and to assist in augmenting recreational facilities; or "sundry funds," consisting principally of the open (nonappropriated fund) mess system.

The NAF employees are excepted generally from the competitive service^{2/} and are governed, instead, by separate laws and regulations such as those here involved. As of March 1976, the NAF system employed approximately 185,000 employees worldwide in the various components of the Department of Defense. Of those employees, about 96,200 or 52 percent were crafts and trades (CT) workers (such as cooks, electricians, janitors, plumbers, and warehousemen); 49,950 or 27 percent were patron service (PS) employees (such as cashier-checkers, customer service clerks, sales clerks, and ticket sellers); 22,200 or 12 percent were administrative service (AS) employees (such as receptionists, secretaries, and audit, file, or payroll clerks); and the balance were in other pay groups, including universal annual (UA) employees (such as budget administrators, equipment specialists, librarians, and recreation specialists). The CT, PS and AS workers are hourly paid, while the UA personnel are paid by an annual salary.^{3/}

Turning now to the disputed union proposals, and specifically the application of proposal I to CT employees, the agency asserts that this proposal as applied to CT employees conflicts with Public Law 92-392 (Aug. 19, 1972, 86 Stat. 564), and particularly 5 U.S.C. § 5343(e)(1).^{4/} We agree with the agency's position.

Under Public Law 92-392, Congress established a system for determining the pay of trade, craft or laboring occupations based on prevailing wage rates in designated wage areas (5 U.S.C. § 5341 et seq.). By its terms, the law, which expressly covers CT employees,^{5/} sets forth a comprehensive schedule

^{2/} See, e.g., 5 U.S.C. § 2105(c).

^{3/} As of November 1976, approximately 63,000 of the NAF employees were organized in 285 exclusive units, according to U.S. Civil Service Commission, Union Recognition in the Federal Government (1976). For the most part, CT, PS, AS and UA employees are grouped together in these units.

^{4/} The agency also relies on regulations issued by the Civil Service Commission (e.g., FPM Supp. 532-2, subchapter S4, para. S4-2(b)). However, these regulations merely implement the cited public law and are without dispositive significance in the present dispute.

^{5/} 5 U.S.C. § 5342(a)(2)(B) reads as follows:

§ 5342. Definitions; application

(a) For the purpose of this subchapter --

(2) "prevailing rate employees" means --

(Continued)

for wage progressions within individual grades. More specifically, the law, in 5 U.S.C. § 5343(e)(1), provides that employees within each grade shall progress in five separate steps from 96 percent to 112 percent of the prevailing rate.^{6/}

In proposal I, the union would add to this statutory framework for wage progressions, as applied to CT employees, a "merit increase" each two years based on 10 percent of the hourly rate, in addition to the full increases deriving from wage surveys.^{7/} However, as already indicated, 5 U.S.C. § 5343(e)(1) clearly limits wage progressions within grades to five steps and to the percentage increments fixed by statute. Research fails to disclose any sanction elsewhere in the statute or in its legislative history for any additions to these wage schedules. Moreover, the union fails to cite any statutory authority whatsoever in support of its proposal.

(Continued)

(B) an employee of a nonappropriated fund instrumentality . . . who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semi-skilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement. . . .

6/ 5 U.S.C. § 5343(e)(1) states as follows:

§ 5343. Prevailing rate determinations; wage schedules; night differentials

.
(e)(1) Each grade of a regular wage schedule for nonsupervisor prevailing rate employees shall have 5 steps with --

- (A) the first step at 96 percent of the prevailing rate;
- (B) the second step at 100 percent of the prevailing rate;
- (C) the third step at 104 percent of the prevailing rate;
- (D) the fourth step at 108 percent of the prevailing rate; and
- (E) the fifth step at 112 percent of the prevailing rate.

7/ While phrased by the union as a "merit increase," the proposed wage additions are plainly based on "longevity" alone, without reference to improved effectiveness on the job, or other merit criteria.

Under these circumstances, we find that proposal I as applied to CT employees is contrary to law and is thereby nonnegotiable under section 11(a) of the Order.^{8/}

We shall now consider Question B, namely, whether proposals I and III, as applied to other categories of NAF employees involved herein, violate agency regulations for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Conclusion as to Question B: A "compelling need" exists within the meaning of section 11(a) of the Order and part 2413 (specifically, section 2413.2(e)) of the Council's rules for the subject regulations (DoD 1330.19-1M, chapter III) to bar negotiations on proposals I and III as applied to AS, PS and UA employees.

That is, the agency regulations, as applied to these employee categories, establish uniformity for a substantial segment of the employees of the agency where this is essential to the effectuation of the public interest. Therefore, the agency determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Public Law 92-392, as already mentioned, establishes a prevailing rate system for trade, craft or laboring occupations and expressly covers CT employees, who constitute the majority of NAF employees. Following the adoption of that statute, the agency issued DoD 1330.19-1M (1974), entitled "Personnel Policy Manual for Nonappropriated Fund Instrumentalities," which, in chapter III, sets forth the compensation policies for NAF personnel, and which, among other things, administratively extends the relevant prevailing rate principles of Public Law 92-392 to the remaining NAF workers who are paid an hourly rate, i.e., the AS and PS employees.

The agency relies on chapter III of DoD 1330.19-1M, the significant portions of which are detailed in the Appendix here attached, as a bar to negotiation on proposals I and III, insofar as those proposals apply to the remaining NAF employees herein involved. It claims, in this regard, that a "compelling need" exists for those regulations under section 11(a) of the Order and section 2413.2(e) of the Council's rules. We find merit in these contentions by the agency.^{9/}

8/ Section 11(a) of the Order provides, in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization . . . , shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws. . . .

9/ The agency also contends that a "compelling need" exists for the subject regulations under section 2413.2(b) of the Council's rules, and that, in any event, the union is "estopped" from challenging the agency's regulatory system. However, in view of our decision herein, we find it unnecessary to pass upon these contentions by the agency.

Section 11(a) of the Order provides in pertinent part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision. . . . [Emphasis supplied.]

Among the criteria for determining compelling need so established by the Council, section 2413.2(e) of the Council's rules provides:

§ 2413.2. Illustrative criteria.

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

-
- (e) The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest.

It is uncontroverted that the disputed union proposals, which would render negotiable the pay of AS, PS and UA employees and, in particular, would add "merit increases" to the five-step wage progressions for AS and PS employees, conflict with the subject agency regulations. It is likewise unquestioned that the agency regulations here involved establish uniformity in compensation policies throughout the NAFI system for a substantial segment of agency employees, namely, the approximately 185,000 workers employed in the entire NAFI system. The sole issue, therefore, is whether such uniformity "is essential to the effectuation of the public interest." In our opinion, this requirement of essentiality is fully satisfied in the present dispute.

Apart from other considerations, the "public interest" here involved was expressly set forth by Congress in Public Law 92-392 which covers CT employees and was administratively extended in relevant part by the agency, in the subject regulations, to the bulk of the remaining NAF employees. In that law, Congress stated the following underlying policy (5 U.S.C. § 5341):

§ 5341. Policy

It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that--

(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area;

(2) there will be relative differences in pay within a local wage area when there are substantial or recognizable differences in duties, responsibilities, and qualification requirements among positions;

(3) the level of rates of pay will be maintained in line with prevailing levels for comparable work within a local wage area; and

(4) the level of rates of pay will be maintained so as to attract and retain qualified prevailing rate employees.

While Public Law 92-392 applied only to trade, craft or laboring occupations and therefore, among NAF personnel, covered only CT employees, the agency properly deemed the same prevailing rate policy applicable to the remaining NAF employees (i.e., AS and PS employees) who, like the CT employees, were also hourly paid and whose interests were closely akin to those of the CT employees.^{10/} As the agency states without contradiction, such establishment of a uniform method for determining the pay scales of NAF employees was "consistent with [an agency] commitment to Congress" during the legislative process. And as the agency further explains, the principles set forth in Public Law 92-392 apply equally to the remaining hourly paid NAF employees. Thus, the agency states:

On reviewing the situation [after the adoption of Public Law 92-392], the Agency found that the great majority of nonappropriated fund AS employees were already being paid on a locality basis. Since such a pay system ensured that the nonappropriated fund activities which employed those AS workers were paying the "going rate" paid by private establishments engaged in similar enterprises in the immediate locality, the Agency concluded that the only way by which nonappropriated fund AS employees performing similar kinds of work would receive uniform treatment was if such workers, as well as PS employees, were paid on an hourly pay plan and that their rates of pay were adjusted annually, pursuant to a survey of wages paid to employees in comparable jobs in a representative number of [retail], wholesale, service, recreational and financial establishments in the local geographical area. To the Agency, the introduction of such a uniform prevailing rate system had

^{10/} As indicated in n. 3, supra, PS, AS and UA employees are generally grouped with CT employees in the 285 separately recognized units within the NAFI system.

four distinct advantages: (1) it established a uniform method of paying nonappropriated fund employees on a comparable basis with their counterparts in the private sector of the economy in the local area; (2) it provided the maximum continuity of existing Agency nonappropriated fund practices, thereby minimizing disruption in the implementation of the new wage determination system; (3) it eliminated differences in payment for like nonappropriated fund work in a single wage area; and (4) it was consistent with Federal trends regarding pay-setting for clerical and other positions which traditionally have been at the lower end of the General Schedule pay scale. [Footnote omitted; emphasis in original.]

To the end of applying the public policy of Public Law 92-392 to the remaining hourly paid NAF employees, the agency issued DoD 1330.19-1M, which provides that the agency "has administratively extended certain of the principles of PL 92-392 and CSC instructions to cover Administrative Support (AS) and Patron Service (PS) positions, hourly paid positions not covered by PL 92-392." Also, as the law mandates concerning CT employees, the agency regulation provides with respect to AS and PS employees:

Compensation for an employee in a NAFI clerical, administrative, fiscal, sales, and patron service position will be fixed and adjusted from time to time as nearly as is consistent with the public interest, in accordance with prevailing rates determined by a survey of wages paid by private employers to full-time employees doing comparable work in a representative number of retail, wholesale, banking, insurance, service and recreational establishments in the immediate locality of employment and engaged in activities similar to those of the NAFIs for which the survey is made. [Emphasis supplied.]

For like purposes, the salaries of the limited number of UA employees in the NAF system were directed to be "fixed and adjusted from time to time as nearly as is consistent with the public interest, commensurate with the rates of compensation for Civil Service employees in positions of comparable difficulty and responsibility subject to the 'General Schedule'" [Emphasis supplied.]

It is thus clear that the subject agency regulations were carefully designed to effectuate the public interest reflected in Public Law 92-392, and, in our opinion, uniform application of DoD 1330.19-1M to AS, PS and UA employees is plainly essential to the effectuation of that public interest.]

Therefore, we hold that a "compelling need" exists for the subject agency regulations within the meaning of section 11(a) of the Order and section 2413.2(e) of the Council's rules. Since proposals I and III as applied to the remaining NAF employees would plainly conflict with the agency regulations in question, as interpreted by the agency, we further find that the proposals are nonnegotiable and that the agency determination must be sustained.

Union Proposal II

Pay, Section 1.

NAF employees shall be paid on a bi-weekly schedule with the Administrative work week beginning on Sunday at 0001 and ending the following Saturday at 2400 hours.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates an agency regulation for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Question Here Before the Council

The question is whether a "compelling need" exists for the subject agency regulation within the meaning of section 11(a) of the Order and part 2413 of the Council's rules.^{11/}

Opinion

Conclusion: No "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules, for the agency regulation relied upon to bar negotiation on the union's proposal. Accordingly, the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{12/}

^{11/} We reject the union's contention that the agency should be deemed to have waived the regulations relied upon in determining proposals II and IV, infra, to be nonnegotiable, because the agency delayed more than 45 days in rendering its negotiability decision on those proposals. Section 2411.24(c)(1) of the Council's rules permits a union to seek review of a negotiability issue without a prior determination by an agency head, if the agency head has not made a decision on the issue within 45 days after a referral for determination through prescribed agency channels. However, nothing in the Order or the Council's rules further provides that any such delay constitutes a waiver of agency regulations as a bar to negotiations on a disputed proposal.

^{12/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, in the circumstances presented, such proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

Reasons: The union's proposal, as indicated above, provides that employees shall be paid every two weeks, that is, on a "bi-weekly schedule." However, an agency regulation (AFM 176-378, para. 1-6b) establishes semi-monthly pay periods as the current pay system. The agency asserts that a "compelling need" exists for this regulation under section 11(a) of the Order and specifically under section 2413.2(b) and (e) of the Council's rules; and, that, since the union's proposal violates this regulation, it is non-negotiable. We cannot agree with the agency's position.

Section 2413.2(b) and (e) of the Council's rules, quoted in part hereinbefore, provides that a "compelling need" exists for an agency regulation when:

(b) The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;

(e) The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest. [Emphasis supplied.]

In claiming that the subject agency regulation satisfies the section 2413.2(b) and (e) criteria, the agency argues that its complex pay systems for NAF accounting and reporting purposes mandate a central mechanized payroll system, and that other financial problems also dictate a centralized banking program. According to the agency, nonstandard pay periods as here sought by the union, in contravention of the agency regulation, would create various "difficulties" and add (undefined) "expenses" in regard particularly to such matters as maintaining accounting procedures and controls on employee programs, preparing consolidated financial data for reporting needs, and maximizing use of available cash resources.

In our opinion, these arguments fail to show that the subject regulation is "essential, as distinguished from helpful or desirable," to the management of agency operations, or establishes uniformity which "is essential to the effectuation of the public interest," so as to bar negotiation on the union's proposal.

As the Council stated in the consolidated National Guard cases:^{13/}

[T]he compelling need provisions of the Order were designed and adopted to the end that internal "agency regulations not critical to effective agency management or the public interest" would be prevented from resulting in negotiations at the local level being "unnecessarily constricted. . . ."

^{13/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 11-12.

Thus, the Council's illustrative criteria for determining compelling need, while distinctive from one another in substance, share one basic characteristic intended to give full effect to the compelling need concept: They collectively set forth a stringent standard for determining whether the degree of necessity for an internal agency regulation concerned with personnel policies and practices and matters affecting working conditions warrants a finding that the regulation is "critical to effective agency management or the public interest" and, hence, should act as a bar to negotiations on conflicting proposals at the local level. This overall intent is clearly evidenced in the language of the criteria, several of which expressly establish that essentiality, as distinguished from merely helpfulness or desirability, is the touchstone. [Emphasis in original.]

While the agency in the present case has adverted to alleged "difficulties" and unspecified increased costs which might derive from the union's proposed biweekly pay periods, it has failed to establish in any manner that semimonthly pay periods, as uniformly provided in the regulation are of critical significance to agency management or to the effectuation of any public interest. Indeed, the agency tacitly recognized the nonessentiality of the concept of semimonthly pay periods, stating in its determination:

As a matter of information, a new Chapter 14 to Air Force Regulation 40-7, which is currently being staffed, will mandate bi-weekly pay periods for Air Force non-appropriated fund employees beginning sometime in 1977 after computer programming and testing have been completed. This change may alleviate the concerns of the non-appropriated fund employees at McGuire Air Force Base.^{14/}

Accordingly, we find that the agency has failed to show that a "compelling need" exists, within the meaning of section 11(a) of the Order and part 2413 of the Council's rules, for the agency regulation (AFM 176-378, para. 1-6b) asserted as a bar to negotiation on the union's proposal. The agency's determination of nonnegotiability must therefore be set aside.

Proposal IV

Retirement Plan

Section 1. The UNION and MANAGEMENT agree to formulate a Committee within 10 days of the signing of the contract for the purpose of procuring an employees retirement plan.

Section 2. The committee shall consist of nine members, six (6) appointed by the UNION and three (3) appointed by management. The committee shall be tasked with completion of an agreement no later than sixty (60) days after the formulation of the committee.

^{14/} The Council is administratively advised that the anticipated amendment to AFR 40-7 has not yet issued.

Section 3. The cost of the plan will be on a contributory basis with ninety (90) percent of the cost borne by the employer and ten (10) percent by the employee. All NAF employees shall be eligible to participate.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates agency regulations for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Question Here Before the Council

The question is whether a "compelling need" exists for the subject agency regulations within the meaning of section 11(a) of the Order and part 2413 of the Council's rules.

Opinion

Conclusion: A "compelling need" exists within the meaning of section 11(a) of the Order and part 2413 (specifically, section 2413.2(e)) of the Council's rules for the agency regulations here involved (AFR 40-7, chapter 12, and related directives) to bar negotiation on the union's proposal. Thus, the agency determination that the disputed proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The union proposal would create a union-management committee to procure a retirement plan confined to NAF employees at the activity, with costs of the plan borne 90 percent by the agency and 10 percent by the employees. The agency claims that this proposal conflicts with AFR 40-7, chapter 12 and related agency directives (AFR 34-3, vol. VIII, chapter 1, and Air Force Welfare Board (AFWB) policy), which, as interpreted by the agency, prohibit individual or Base-wide NAF instrumentalities from developing their own separate retirement plans. The agency further argues that a "compelling need" for these agency regulations exists under section 11(a) of the Order and section 2413.2(e) of the Council's rules.^{15/} We agree with these contentions by the agency.

Under the cited agency regulations, the Department of the Air Force (in conformity with DoD 1330.19-1M, chapter VI) has established a single and comprehensive retirement program for all regular, full-time NAF employees within that agency. The program is centrally administered by the AFWB through a centrally established and maintained retirement fund. And the retirement benefits, which are generally comparable to those provided for

15/ The agency also relies upon the "compelling need" criteria in section 2413.2(a) and (b) of the Council's rules. However, in view of our decision herein, we find it unnecessary to pass upon the applicability of these criteria to the subject regulations.

Federal Civil Service employees,^{16/} extend uniformly to the personnel in the approximately 1200 separately funded individual NAF instrumentalities at about 160 Air Force Bases, under the jurisdiction of the AFWB.

Without going into detail as to the operations and provisions of the central retirement plan, it appears, based on the substantially uncontroverted assertions of the agency, that single computerized programs have been developed for the handling and accounting of employee and agency contributions, the maintenance of lifetime employee and survivor annuitant needs, and the technical preparations for actuarial and projections of benefit costs. Moreover, NAF employees of the agency may transfer freely between individual NAF instrumentalities, without loss or interruption of pension benefits accrued under the central retirement plan, and, in some circumstances, may move between NAFI components of DoD without interruption in pension benefits accrued under the retirement plans of the components involved.^{17/} Finally, enhanced financial security and integrity of benefits is afforded by the central retirement plan. As stated by the agency in the latter regard: "[I]t is . . . important to note that under AFWB jurisdiction, the central nonappropriated funds administered at the HQ USAF level are the designated eventual successor funds for any liability incurred by an individual NAFI, which cannot be borne by that NAFI . . . [A]n activity such as McGuire Air Force Base is not authorized to commit HQ USAF central nonappropriated funds through the local negotiation process."

Section 2413.2(e) of the Council's rules, as previously indicated, provides that a "compelling need" exists for an agency regulation if such regulation establishes uniformity for a substantial segment of employees of a primary national subdivision, "where this is essential to the effectuation of the public interest."^{18/} In our opinion, the "public interest" plainly demands that any retirement plan established for NAF employees be financially solvent and provide benefits which are financially secure and completely dependable for the NAF personnel.

Based on the entire record in the instant proceeding, we believe that the central retirement program established by the subject regulations effectuates this public interest. We further believe that the uniform application of this central plan throughout the agency, as provided in the regulations, is critical to the effectuation of the public interest; that is, such uniformity is essential to the assurance of a financially solvent and fully reliable retirement program for the NAF employees here involved.

^{16/} NAF employees are covered by the Social Security Act, so their benefits derive from two sources, namely, social security and the agency central retirement plan.

^{17/} As pointed out by the agency, the activity would be without authority to negotiate transfer rights binding on another organization.

^{18/} It is, of course, unquestioned that the Department of the Air Force, which issued the regulations here involved, is a "primary national subdivision" of the Department of Defense as defined in section 2411.3(e) of the Council's rules. Also the subject regulations clearly establish uniformity for a substantial segment of the Air Force employees.

Accordingly, we find that a "compelling need" exists for AFR 40-7, chapter 12 and related agency directives, under section 11(a) of the Order and section 2413.2(e) of the Council's rules. Since the union's proposal, which seeks to establish a separate retirement plan for the NAF employees at the activity, violates the subject agency regulations, as interpreted by the agency, we find that the proposal is nonnegotiable and that the agency's determination must be upheld.

Provision V

Article 9 (Hours of Work), Section 3

The NAF Intermittent employee will not be regularly scheduled to more than 20 hours per workweek, and only used after the scheduling of the RPT [regular part time] employees have reached the maximum scheduled hours. . . .

Agency Determination

The agency determined that this provision conflicts with section 12(b)(5) of the Order and is therefore nonnegotiable.

Question Here Before the Council

The question is whether the provision is violative of section 12(b)(5) or otherwise nonnegotiable under the Order.

Opinion

Conclusion: The provision, while not violative of section 12(b)(5), is outside the agency's obligation to bargain under section 11(b) of the Order. However, since the local parties agreed to this provision, the agency cannot, after that agreement, raise an issue as to the negotiability of the provision during the section 15 review process, on the basis of section 11(b) of the Order. Thus, the agency's determination of non-negotiability was improper, and, pursuant to section 2411.28 of the Council's rules, that determination must be set aside.^{19/}

Reasons: The agency contends that the subject provision improperly restricts management's retained right to determine the methods, means, and personnel

^{19/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the disputed provision. We decide only that, in the circumstances here presented, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order and, once agreed upon, could not be disapproved under section 15 of the Order.

by which its operations are to be conducted and thereby violates section 12(b)(5) of the Order.^{20/} We find this contention to be without merit.

The Council considered the negotiability of a proposal closely analogous to the provision here involved in the McClellan Air Force Base case.^{21/} As the Council ruled in that case, the limitations established in such a proposal on the use of intermittent employees concern "the numbers of employees that the agency might assign to a particular organizational unit, work project or tour of duty," i.e., the staffing patterns of the

20/ Section 12(b)(5) of the Order provides:

(b) [M]anagement officials of the agency retain the right, in accordance with applicable laws and regulations --

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

21/ NAGE Local R12-183 and McClellan Air Force Base, California, FLRC No. 75A-81 (June 23, 1976), Report No. 107, at 1-4 of Council decision. The proposal in that case read as follows (underscoring reflects portions in dispute):

Article VIII, Hours of Work/Tours of Duty

Section 2. The basic workweek will be five consecutive days with two consecutive days off. The hours of work for employees will be as follows:

- a. Full-time employees will have the opportunity to work a forty hour week unless the workload is such that it will not support forty hours. However, in no instance will the full-time employees have their hours reduced by using part-time or intermittent employees. At no time shall the hours for full-time employees go below thirty-five hours per workweek.
- b. Part-time employees will have the opportunity to work a thirty-four hour week unless the workload is such that it will not support thirty-four hours. However, in no instance will the part-time employees have their hours reduced by using intermittent employees. At no time shall the hours for part-time employees go below twenty hours per workweek.

agency. Accordingly, the disputed proposal was held excluded from the agency's obligation to bargain under section 11(b) of the Order^{22/} and was therefore nonnegotiable.

For the reasons fully set forth in the McClellan Air Force Base decision, we likewise find in the instant case that the subject provision is not violative of section 12(b)(5), but is outside the agency's obligation to bargain under section 11(b), of the Order. However here, unlike in the McClellan Air Force Base case, the local parties agreed to the provision in dispute and the agency disapproved the provision only later during review of the agreement under section 15 of the Order.^{23/} Since the agency had the option to bargain on the subject provision under section 11(b) and the agency's local bargaining representative exercised that option by negotiating and entering into an agreement on this provision, the agency was without authority, during the review process, to determine the provision nonnegotiable on the basis of section 11(b) of the Order.^{24/}

Accordingly, we find that the agency's determination that Article 9 (Hours of Work), Section 3 is nonnegotiable was improper and must be set aside.

Provision VI

Article 14 (Reduction-in-Force), Section 1

The Civilian Personnel Office will notify the Union as soon as possible, but not less than 30 days, if one or more unit employees are being separated due to a RIF action. The notice shall contain the number of spaces and/or positions to be affected, the projected date of the action and the reasons. In order to minimize the impact of

^{22/} Section 11(b) of the Order provides, in relevant part, that "the obligation to meet and confer does not include matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty."

^{23/} Section 15 of the Order provides in relevant part as follows:

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

^{24/} See, e.g., IAFF Local F-103 and U.S. Army Electronics Command, FLRC No. 76A-19 (March 22, 1977), Report No. 122, and cases cited therein at n. 6 of Council decision.

a RIF, vacant positions in any base NAFI will be used for placement of employees otherwise to be separated, if qualified for the vacancy. [Underscoring reflects sentence in dispute.]

Agency Determination

The agency determined that the last sentence of this provision is non-negotiable, because it conflicts with section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether the disputed provision violates section 12(b)(2) of the Order and is therefore nonnegotiable.

Opinion

Conclusion: The disputed provision infringes on management's right to decide and act on the filling of existing vacancies, in violation of section 12(b)(2) of the Order. Thus, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 12(b)(2) of the Order reserves to management the right "to hire, promote, transfer, assign, and retain employees in positions within the agency." As the Council has explained with respect to this right:^{25/}

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

Additionally, the Council has ruled that section 12(b)(2) reserves to management not only the right to decide whether or not to fill a position, but also the right to change that decision once made.^{26/}

^{25/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

^{26/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 297 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61]; NFFE Local 1555 and Tobacco Division, AMS, USDA, 3 FLRC 138 [FLRC No. 74A-32 (Feb. 21, 1975), Report No. 64], at n. 5 of Council decision.

The provision in question in the present case expressly states that management will fill existing vacancies in nonappropriated fund installations with unit employees adversely affected by reduction-in-force actions. Thus, the agency is plainly constricted, by the literal language of the disputed provision, in its reserved authority under section 12(b)(2) to decide not to fill existing positions, as well as its right to change such decision once made.

For the foregoing reasons, we find that Article 14 (Reduction-in-Force), Section 1, is violative of section 12(b)(2) of the Order.^{27/} Therefore, the agency's determination of nonnegotiability was proper and must be sustained.

Provision VII

Article 14 (Reduction-in-Force), Section 7

The bumping and retreat right of employees affected by RIF shall be in accordance with seniority (Article 8). Those employees having the least seniority shall be reached for RIF first. Recall and position offers shall be in reverse order. Employees reached for RIF have the rights to bump lower graded and category employees, when those employees are in the same line of work, and also have retreat rights to a lower graded position to which they previously held for a period of at least six (6) months, providing there is an employee with less seniority.

Agency Determination

The agency determined that the third sentence (underscored) of the above provision conflicts with rights reserved to management under section 12(b)(2) of the Order and is therefore nonnegotiable. The agency further determined that the balance of this provision violates a Department of Defense regulation for which a "compelling need" exists under section 11(a) of the Order, and part 2413 of the Council's rules, and is thus also nonnegotiable.

Questions Here Before the Council

A. Whether the third sentence of the subject provision is rendered nonnegotiable by section 12(b)(2) of the Order.

27/ We do not, of course, here decide that provisions which, for example, would accord priority consideration in the filling of vacant positions to employees adversely impacted by reductions-in-force, would be nonnegotiable. For comparison, see, FPM, chapter 351, subchapter 10; FPM, chapter 330, subchapter 2-1 through 5, which apply to employees who, unlike the employees here involved, are in the competitive service.

B. Whether the balance of the subject provision conflicts with an agency regulation for which a "compelling need" exists within the meaning of section 11(a) of the Order and part 2413 of the Council's rules.

Opinion

Conclusion as to Question A: The third sentence of the provision here involved contravenes management's reserved authority to fill positions, i.e., to hire, promote, transfer and assign employees in positions within the agency, under section 12(b)(2) of the Order. Accordingly, the agency determination that this sentence is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: As previously indicated under Provision VI, supra, section 12(b)(2) reserves to management alone the decision and action authority to hire, promote, transfer and assign employees in positions within the agency, which authority cannot be interfered with by any agreement of the parties.

The disputed sentence in the subject provision requires that, where a RIF action has occurred, recall and position offers shall be made to employees adversely affected by such action on the basis of the seniority of the employees involved. The intent of this sentence, as explained by the union, is "that a senior employee will be offered a job to which . . . he would have preference, rather than allowing the employer to 'skip' down a list of senior employees in order to 'select out' senior employees through an unrestricted reemployment process."

The Council was presented with a question as to the negotiability of comparable language in a proposal in the Maritime Union case.^{28/} There, the disputed proposal required that "rehire preference" for certain positions be accorded employees who were laid off after 90 days of satisfactory employment. In holding nonnegotiable this proposal (along with a proposal granting "hiring preference" to applicants with Coast Guard endorsements), the Council stated:^{29/}

Rather than calling for the "consideration" of certain criteria in selecting applicants for agency vacancies, the record indicates that the proposals would establish 'preference' for the categories of job seekers described therein. That is, the proposals would establish a positive requirement that the categories of job seekers described therein be hired or rehired ahead of any other job seekers. Thus, the language of the proposals, through the use of the phrases 'hiring, preference' and 'rehire preference' clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had

^{28/} National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128.

^{29/} Id., at 3 of Council decision.

been made to fill a position through the hiring process. The proposals would deprive the selecting official of the required discretion inherent in making such a decision.

The union's proposals, which would require management to give preference to individuals who fall within the particular categories described therein, i.e., who meet the criteria described therein, impose constraints upon and clearly interfere with management's authority to hire employees in positions within the agency under section 12(b)(2) of the Order. Accordingly, we find that the proposals violate section 12(b)(2) of the Order. [Emphasis in original; footnotes omitted.]

For similar reasons, we are of the opinion that the third sentence of the subject provision in the instant case, which would require preference in recalls and position offers to the most senior employee adversely impacted by RIF action, would interfere with management's reserved authority to fill positions within the unit and would thereby violate section 12(b)(2) of the Order. Accordingly, we uphold the agency's determination that the third sentence of Article 14 (Reduction-in-Force), Section 7 is nonnegotiable.^{30/}

We turn then to the next question (Question B), concerning the negotiability of the balance of the disputed provision.

Conclusion as to Question B: The first, second and fourth sentences of the provision here involved conflict with a Department of Defense regulation for which a "compelling need" exists, within the meaning of section 11(a) of the Order and part 2413 (specifically, section 2413.2(c)) of the Council's rules. Thus, the agency determination that the balance of the subject provision is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The Department of Defense regulation relating to nonappropriated fund instrumentalities, relied upon by the agency to bar negotiation on the balance of the disputed provision, reads as follows:^{31/}

^{30/} As indicated in n. 27, supra, we do not decide in the present case that provisions which, for instance, would grant priority or special consideration in the filling of vacant positions to employees adversely affected in a RIF action, would be violative of section 12(b)(2) of the Order. See also, for comparison, FPM chapter 335, subchapter 4-3(c)(2) which applies to employees in the competitive service.

^{31/} Department of Defense Personnel Policy Manual for Nonappropriated Fund Instrumentalities, Section 1330.19-1M, chapter V, paragraph A.2.j. (1974). A separate regulation of the Air Force (AFR 40-7, paragraph 5-5a(4)) implements the cited DoD regulation, but the agency did not expressly rely on the Air Force directive in its determination of non-negotiability.

Personnel Relations and Services

A. Employee-Management Relations.

2. Specific Policies

j. Reduction in Force. Heads of DoD Components will develop and implement procedures for their respective organizations which will, when necessary, provide for the orderly reduction of the workforce of NAFIs with a minimum of disruption to operations. A system of retention for regular full-time and regular part-time personnel will be developed which will consider employee fitness, performance, and length of NAFI service. All elements in any retention point credit plan will be job related in keeping with DoD policies of fair employment practices. Every effort should be made to accomplish necessary adjustments in the workforce through reassignment, transfer and normal attrition. [Emphasis supplied.]

The union contends that the above regulation is not a bar to negotiation on the disputed portions of the provision, in effect, because: (1) the agency has misinterpreted the language of the agreement provision and, as properly construed, this language is not violative of the agency regulation; and (2), in any event, no "compelling need" exists for the regulation relied upon by the agency. We find no merit in the union's position.

As to (1), the disputed portions of the provision require, by their express terms, that employees having the least seniority shall be the first reached for RIF action, and that the various retention rights for employees adversely affected by RIF, as described in the provision, shall be controlled by the seniority of the employees involved. The union argues that the term "seniority" must be "assumed" to include such factors as fitness and performance, since employees who were unfit or had failed adequately to perform would not have been maintained in their jobs before the RIF action; and, that the agency therefore erred in construing the provision as establishing a retention system based solely on length of service.

However, the term "seniority" as used in the provision is well recognized in the field of labor relations to refer simply and solely to the length of service of the particular employee concerned.^{32/} Moreover, it is a matter of common knowledge, as more fully discussed hereinafter, that significant differences in fitness and performance frequently prevail between acceptable employees in like positions within any organizational entity

32/ Roberts' Dictionary of Industrial Relations 493 (rev. ed. 1971).

and such differences do not necessarily derive from the length of service of the respective employees. Thus, the reference in the agreement provision to "seniority" does not, in itself, embrace the fitness and performance of existing personnel as compared with one another for RIF purposes.^{33/}

Accordingly, we are of the opinion that the agency properly interpreted the disputed portions of the provision as establishing a retention system based solely on length of service. Further, as the Council has frequently indicated, the agency's interpretation of its own regulation as precluding such a provision is, of course, binding on the Council in a negotiability dispute, under section 11(c)(3) of the Order.^{34/} Therefore, we find that the disputed portions of the provision violate the cited regulation relied upon by the agency.

As to (2), namely the "compelling need" for the agency regulation here involved, the agency determined that the regulatory requirement (i.e., that the retention system for nonappropriated fund employees in RIF circumstances must take into account employee fitness and performance as well as length of service) "is necessary to insure the maintenance of basic merit principles" and thereby fully satisfies the criterion for establishing "compelling need" under section 2413.2(c) of the Council's rules.^{35/} The union disputes this determination, contending again that seniority for retention purposes sufficiently takes into account the fitness and performance of employees if management has previously fulfilled its obligation to correct personnel deficiencies on a day-to-day basis, and therefore that no "compelling need" exists for the subject regulation.

It is not seriously controverted by the union that the phrase "basic merit principles," as used in section 2413.2(c) of the Council's rules,

^{33/} Cf. American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania, FLRC No. 76A-128 (Aug. 31, 1977), Report No. 137.

^{34/} See, e.g., id., at 7 of Council decision.

^{35/} Section 2413.2(c) of the Council's rules provides as follows:

§ 2413.2 Illustrative criteria

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

.
(c) The policy or regulation is necessary to insure the maintenance of basic merit principles.

reflects the concept, among others, that employees should be selected, assigned, promoted and retained on the basis of their relative ability to perform the assigned work, and thereby to assure the effective performance of government operations. As already indicated under (1), above, significant differences often exist in the relative ability of employees within similar positions of the same organizational entity, which differences are not alone dependent on the comparative lengths of service of the respective employees involved. Therefore, to maintain basic merit principles, a retention system which is operative under RIF conditions plainly should include consideration of such factors as fitness and performance, in addition to the length of service of the affected employees.^{36/}

Contrary to the argument of the Union, the sanctioned consideration by an agency of an employee's fitness and performance, as well as length of service, during a reduction of the workforce neither impliedly condones previous failures to discipline nonperformance or previous failures to correct deficiencies in performance, nor constitutes "a second screening process" which is subject to abuse by the agency. Rather, such consideration merely recognizes the differences in relative abilities which often exist between acceptable employees in similar positions within the agency and seeks to retain the most competent workforce consistent with the needs of the agency and the interests of the public. Moreover, so far as appears from the record, any abuse by the agency is readily subject to correction by means such as grievance and arbitration provisions of an agreement entered into in conformity with the Order.

Accordingly, we find that the agency regulation here in question "is necessary to insure the maintenance of basic merit principles" and, therefore, that a "compelling need" exists for the regulation to bar negotiation on the balance of the disputed provision under section 11(a) of the Order and section 2413.2(c) of the Council's rules. Since the first, second and fourth sentences of Article 14 (Reduction-in-Force), Section 7, would violate this regulation, the provision is nonnegotiable and the agency determination of nonnegotiability must be upheld.

Provision VIII

Article 18 (Merit Promotion), Section 1

.

2. In order to be eligible for Merit Promotion, an employee must be a regular employee of the unit and meet the minimum qualifications of the Merit Promotion Announcement.

^{36/} While as previously mentioned at p. 3, supra, nonappropriated fund employees are outside the competitive service, the basic merit principles applicable to the competitive service are of course relevant to these employees. In this regard, the retention system for RIF purposes under the competitive service is predicated not only on length of service, but also on such individual considerations as the performance ratings of the employees involved. See, e.g., FPM, chapter 351, subchapter 5-5 and 6.

3. All qualified employees in the unit will have the first opportunity for vacant positions. Up to three highest qualified employees will be referred to the supervisor for selection. Selection will be made from that certificate.

Agency Determination

The agency determined that the above provision violates section 12(b)(2) of the Order and is thereby nonnegotiable.

Question Here Before the Council

The question is whether the subject provision is nonnegotiable because it contravenes section 12(b)(2) of the Order.

Opinion

Conclusion: The disputed provision conflicts with management's reserved authority to hire, promote and transfer employees under section 12(b)(2) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: As discussed under Provision VI, supra, section 12(b)(2) of the Order reserves to management alone the right to decide and act on the hire, promotion and transfer of employees in positions within the agency. Such agency authority may not be interfered with by any right accorded a union under a bargaining agreement.

The provision here in question would limit eligibility for merit promotions to "regular employees in the unit," meeting the minimum qualifications for the position, and would accord such employees "the first opportunity for vacant positions." In other words, the regular unit employees, under the subject provision, would be granted preference over other unit or nonunit applicants who seek by hire, transfer or promotion, to fill the vacant unit positions. The Council considered a similar proposal in the recent Immigration and Naturalization Service case.^{37/} The Council held such proposal plainly violative of section 12(b)(2), stating (at 16 of Council decision):

37/ AFGE (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136. The disputed proposal in that case (Proposal XI.8-1.B.4.(b)) reads as follows:

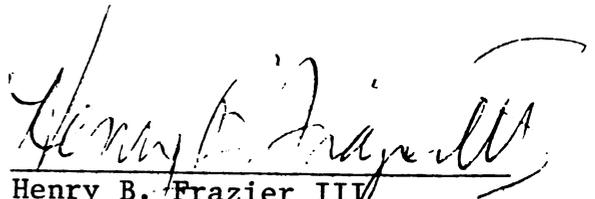
(b). A person from outside the agency will not be considered for appointment, transfer to a position or to a lower position with known promotion potential unless he is evaluated under the same competitive promotion procedures as agency employees for promotion and found to rank above the best qualified.

Paragraph (b) of the proposal presently before us . . . would require management to select from among internal candidates for the positions covered by the proposal ahead of any applicant from outside the agency who was not better qualified than the best qualified agency candidate. Hence, contrary to the union's assertion, paragraph (b) does not merely address the "area of consideration," as previously discussed herein. Rather, it would in effect bar consideration of nonagency candidates in the circumstances described in the proposal. Hence, apart from other considerations, it would impose constraints upon, and clearly interfere with, management's authority to hire or transfer employees in positions within the agency under section 12(b)(2) of the Order. Therefore, we find paragraph (b) of the proposal to be violative of section 12(b)(2) and, consequently, nonnegotiable. [Emphasis in original.]

Furthermore, the disputed provision in the instant case provides that selection for promotion would be required from a certificate containing the names of "up to three highest qualified employees." Thus, management's right to decide and act on promotions would be wholly negated if the certificate contained only one name, since promotion of that individual would be mandatory upon the agency.

In view of the foregoing, including the reasons more fully set forth in the Immigration and Naturalization case, we find that Article 18 (Merit Promotion), Section 1, violates section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was proper and must be sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 27, 1978

Attachment:
APPENDIX

APPENDIX

Personnel Policy Manual for Nonappropriated Fund Instrumentalities,
DOD 1330.19-1M, 6 September 1974.

CHAPTER III

SALARIES AND WAGES

A. GENERAL POLICY

1. Hourly Paid Employees. Rates of pay for hourly paid employees will be determined on the basis of the duties and responsibilities of the jobs, and will be generally commensurate with prevailing rates in the immediate locality of employment for comparable work in similar enterprises in the private sector. Locality wage surveys, at approximately annual intervals will serve as the basis for adjustments of pay rates, if warranted.

b. In accordance with the provisions of PL 92-392, the Civil Service Commission has issued FPM Supplement 532-2, which contains detailed procedural instructions for the operation and implementation of the wage system for NAFL CT employees. The Department of Defense Nonappropriated Fund Salary and Wage Fixing Authority (the pay fixing authority for NAFL employees within the DoD) has administratively extended certain of the principles of PL 92-392 and CSC instructions to cover Administrative Support (AS) and Patron Services (PS) positions, hourly paid positions not covered by PL 92-392.

2. Salaried Employees. The Department of Defense Non-appropriated Fund Salary and Wage Fixing Authority has also established the Universal Annual (UA) salary system which covers employees in managerial, executive, technical and professional positions.

a. Pay for annual salary employees in managerial, executive, technical and professional positions . . . will be administratively fixed and adjusted from time to time, as nearly as is consistent with the public interest, and the Universal Annual (UA) salary system, commensurate with the rates of compensation for Civil Service employees in positions of comparable difficulty and responsibility subject to the "General Schedule."

B. SPECIFIC POLICIES

2. Compensation.

a. Pay Plans - Coverage. NAFI employees will be compensated under one of the following pay plans:

(1) Hourly Pay Plan

(a) Compensation for an employee in a recognized trade or craft, or other skilled mechanical craft or in an unskilled, semiskilled, or skilled manual labor occupation and any other individual including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement, will be fixed and adjusted from time to time, as nearly as is consistent with the public interest in accordance with prevailing rates determined by a survey of wages paid by private employers to full-time employees doing comparable work in a representative number of retail, wholesale, service and recreational establishments in the immediate locality of employment and engaged in activities similar to those of NAFIs for which the survey is made.

(b) Compensation for an employee in a NAFI clerical, administrative, fiscal, sales, and patron service position will be fixed and adjusted from time to time as nearly as is consistent with the public interest, in accordance with prevailing rates determined by a survey of wages paid by private employers to full-time employees doing comparable work in a representative number of retail, wholesale, banking, insurance, service and recreational establishments in the immediate locality of employment and engaged in activities similar to those of the NAFIs for which the survey is made.

(2) Annual Salary Plan. Compensation for employees in managerial, executive, technical or professional positions will be on an annual salary basis and will be administratively fixed and adjusted from time to time as nearly as is consistent with the public interest, commensurate with the rates of compensation for Civil Service employees in positions of comparable difficulty and responsibility subject to the "General Schedule," (Title 5 U.S.C. 5332).

Department of Housing and Urban Development and American Federation of Government Employees, Local 3409, AFL-CIO, Greensboro, North Carolina (Jenkins, Arbitrator).

This appeal arose from the arbitrator's award directing the agency to appoint the grievant to a supervisory position. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated Civil Service Commission regulations (Report No. 130).

Council action (January 27, 1978). The Council concluded that the arbitrator's award was violative of the Federal Personnel Manual. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award.

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

Department of Housing and Urban
Development

and

FLRC No. 77A-42

American Federation of Government
Employees, Local 3409, AFL-CIO,
Greensboro, North Carolina

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the entire record, it appears that the grievant, a nonsupervisory employee in the Greensboro Area Office of the Department of Housing and Urban Development (the activity) and a member of the bargaining unit covered by the parties' negotiated agreement, applied for the posted vacancy of Supervisory Loan Specialist, GS-1165-12. After being informed that an employee of the Manchester, New Hampshire, Area Office had been selected for the position and that he (grievant) had been in the best qualified group of candidates considered by the selecting official, the grievant filed a grievance. He alleged, in part, that the selection of the other employee for the position was improper because neither the selecting official nor his designee had interviewed him and the selected employee was not an employee of the activity. Failing resolution of the dispute, the union invoked arbitration.

Arbitrator's Award

In the opinion accompanying his award the arbitrator defined the issue before him as follows:

In the appointment of [the selected employee] instead of [the grievant], did Management comply with its obligations, both explicit and implicit, as predicated in pertinent articles of the Agreement, especially Article XVII, B.5?^{1/} [Footnote added.]

^{1/} According to the award, Article XVII, Section B.5 provides:

It is agreed that the employer will utilize to the maximum extent possible, the skills and talents of its employees. Therefore, consideration will first be given in filling vacant positions and newly-created positions to employees within the Greensboro Area Office. Outside candidates will not be considered until lateral reassignment and promotion procedures have been exhausted, except where precluded by Civil Service Commission or HUD regulations.

The arbitrator reasoned that "there was an implicit infraction of Article XVII, B.5" because:

1. As the language of the disputed Article neither includes nor excludes threshold supervisory positions, the position in question is not specifically excluded.
2. A GS-12 candidate on the Best Qualified List of the Greensboro Area Office, the grievant was highly eligible and his qualifications were exceptional.
3. For three years preceding the appointment of [the selected employee], management filled . . . threshold supervisory vacancies with members of the bargaining unit.
4. The short conversation . . . [given the grievant] which "concerned individuals in the Loan Management Branch," and failed to "deal with any of the numerous items listed in the Vacancy Announcement" scarcely met the obligation "to utilize, to the maximum extent possible, the skills and talents of its employees." By virtue of his expertise in the field of Loan Management, the grievant deserved due consideration in an extensive interview. This short interview hardly fulfilled the assurance that "[o]utside candidates will not be considered until lateral reassignment and promotion procedures have been exhausted."

As his award, the arbitrator stated:

After careful consideration of the facts, exhibits, testimony of both parties, and pertinent provisions of the Agreement . . . especially Article XVII, B.5, the arbiter grants the request of the Union in part. He rules that the Area Director . . . shall within a few weeks consult with the grievant . . . concerning his wishes and before January 1, 1978, appoint him to a supervisory position, either that of Supervisory Loan Specialist or another which is acceptable.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates Civil Service Commission regulations.^{2/} The union filed a brief.

^{2/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award, by directing the appointment of the grievant to a supervisory position, violates Civil Service Commission regulations.

With respect to the issue presented by the acceptance of the agency's exception, the Council has previously received and applied Civil Service Commission interpretations of applicable Commission regulations pertaining to arbitration awards which, as here, direct an agency to select a particular individual for a particular position.^{3/} The Civil Service Commission has advised the Council that:^{4/}

FPM Chapter 335, Subchapter 2 (Requirement 6)^{5/} sets forth the management right to select or nonselect. This management right can only be abridged if a direct causal connection between the agency's violation(s) and the failure to select a specific employee or from

3/ The Council notes that in this case the arbitrator directed the agency to select the grievant for the position of Supervisory Loan Specialist or "another which is acceptable." However, the arbitrator made it clear that the agency had to select the grievant for a particular type of position, specifically a supervisory position.

4/ Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (July 7, 1976), Report No. 108 at 3-4 of the Council's decision. See also Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99; Francis E. Warren Air Force Base, Cheyenne, Wyoming and American Federation of Government Employees, Local 2354 (Rentfro, Arbitrator), FLRC No. 75A-127 (Sept. 30, 1976), Report No. 114.

5/ Requirement 6. Each plan shall provide for management's right to select or nonselect. Each plan shall include a procedure for referring to the selecting official a reasonable number of the best qualified candidates identified by the competitive evaluation method of the plan (referral of fewer than three or more than five names for a vacancy may only be done in accordance with criteria specified in the plan).

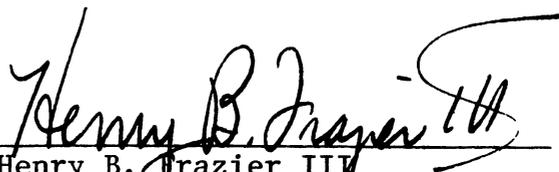
a specific group of employees is established. It must be determined by competent authority that but for the violation(s) that occurred, the employee in question would definitely (and in accordance with law, regulation, and/or negotiated agreement) have been selected. [Footnote added.]

In the instant case, however, there has been no finding by the arbitrator that the requisite direct causal relationship exists between the agency's violation of the negotiated agreement and the grievant's failure to be selected, a finding essential to sustaining as consistent with the Federal Personnel Manual an award directing that an individual be selected for a particular position.^{6/} Accordingly, we conclude that the arbitrator's award which directs the agency to appoint the grievant to a supervisory position is violative of the Federal Personnel Manual and cannot be sustained.

Conclusion

For the foregoing reasons and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 27, 1978

6/ Although the arbitrator in the present case found that "there was an implicit infraction" of the parties' negotiated agreement because of the interviewing official's "short conversation" with the grievant, nowhere in the award does the arbitrator make the requisite finding that if the agreement had not been violated and the lengthier interview had been granted, the selecting official would definitely have selected the grievant for promotion.

Because, as indicated, in this case the arbitrator did not make the requisite finding of a causal connection between the violation of the agreement and the grievant's failure to be selected for promotion, we do not reach the question of whether, had such a causal connection been established, the arbitrator could have legally granted the remedy he did, i.e., if the grievant were not appointed to the position of Supervisory Loan Specialist, then to another supervisory position "which is acceptable."

FLRC No. 77A-52

Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sinclitico, Arbitrator). This appeal arose from part of the arbitrator's award directing the agency to provide certain improvements in the agency parking lot at a particular airport. The Council accepted the agency's petition for review, which took exception to the award on the ground that the arbitrator exceeded his authority. The Council also granted the agency's request for a stay of the award (Report No. 133).

Council action (January 27, 1978). The Council concluded that the arbitrator exceeded his authority by directing the agency to provide the parking lot improvements in question. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by striking that part of the award here in dispute. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Federal Aviation Administration

and

FLRC No. 77A-52

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing the Federal Aviation Administration (the agency) to provide certain improvements in the FAA parking lot at the Seattle-Tacoma Airport.

Based upon the findings of the arbitrator and the entire record, it appears that parking was provided for FAA employees at the Seattle-Tacoma Airport in a lot adjacent to the main parking garage. Parking in the main garage was reserved primarily for passengers utilizing the airport. An executive lot, set off from the main parking area of the garage, but in the same structure, was reserved by the airport for top management personnel of the airport. Other airport employees were required to use a parking facility serviced by a shuttle bus and located approximately 1 mile from the terminal area. The Professional Air Traffic Controllers Organization (the union) filed a grievance alleging that since "airport employees" were parking in the executive parking lot and since the executive lot is "far superior" to the FAA lot, the agency had violated Article 47, Section 1 of the parties' agreement which provides that FAA "will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator," and FAA Order 4665.3A, which is incorporated into the agreement and which provides that "[p]arking accommodations should be at least equal to those provided the employees of the airport owner/operator."^{1/} The grievance was ultimately submitted to arbitration.

^{1/} Article 47 (PARKING) provides in pertinent part:

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bona fide

The Arbitrator's Award

The parties stipulated the issue to be decided by the arbitrator as follows:

Is the Agency in compliance with Article 47 of the current PATCO-FAA Agreement and with FAA Order 4665.3A as respects the adequacy of

(Continued)

physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator. Where it is possible to reserve more than three parking spaces, one additional reserved space shall be made available to the principal facility representative.

.

Section 4. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and FAA Order 4665.3A.

FAA Order 4665.3A provides in pertinent part:

.

5. DETERMINING ADEQUACY OF PARKING.

.

b. Factors to be Considered. In pursuing the objective of providing parking accommodations close to a facility at no or very minimal cost to the employees, a firm but reasonable and responsible position must be taken. Some considerations are:

(1) Parking accommodations should be at least equal to those provided the employees of the airport owner/operator.

(2) The distance between the parking area and the facility should take into account weather conditions and personnel safety factors.

A reasonable distance may be 500 feet depending on the specific circumstances at a given location. Generally, an employee should not have to resort to another means of transportation (e.g., shuttle buses) to reach the facility from the parking area. But the availability of this type transportation must be considered in arriving at a final decision on the adequacy question.

(3) Free parking for employees is a desirable objective. A reasonable cost to employees as determined by Regional and Center Directors, may be appropriate depending on specific situations.

parking accommodations provided for the bargaining unit members at Seattle-Tacoma air traffic control tower? If not, what is the appropriate remedy?

In the opinion accompanying his award the arbitrator discussed the meaning of the terms "adequate parking" and "employees" as used in Article 47 of the agreement and FAA Order 4665.3A. In doing so he referred primarily to the three factors to be considered in determining adequacy of parking listed in section 5(b) of FAA Order 4665.3A.^{2/}

As to the first factor, that parking accommodations should be at least equal to those provided the employees of the airport owner/operator, the arbitrator found that the word "employees" as used therein does not encompass top management personnel of the airport for purposes of providing FAA personnel with equivalent parking. Therefore he determined that while "the Executive lot is superior to the lot being used by FAA employees . . . , no 'employees' as the term is utilized in FAA Order 4665.3A are currently parking there." As to the other two factors, the arbitrator found that the distance between the parking area and the facility is under 500 feet, that the employees do not have to resort to shuttle buses or other means of transportation to get between the facility and the parking area, and that the parking provided FAA personnel is free of charge. Therefore the arbitrator concluded that "the FAA lot is adequate and in compliance with Article 47 and FAA Order 4665.3A."

After reaching this conclusion as to the grievance the arbitrator stated:

Notwithstanding this conclusion, the Arbitrator is concerned with the status of security at the FAA lot. It is his opinion that additional lighting and protection from trespassers and falling objects is warranted. The Award which follows recognizes this need and adds the conditions stated herein. Furthermore, these conditions should be met since [it was recommended] that the lot be accepted only if "lighting, security, and snow removal" were provided.

Accordingly, the arbitrator made the following award:

- A. The Agency is in compliance with Article 47 of the current FAA agreement and with FAA Order 4665.3A as respects the adequacy of parking accommodations provided for the bargaining unit members at Seattle-Tacoma air traffic control tower.
- B. In order to fully provide for the adequacy of its lot, it is directed that FAA:
 1. Provide a security fence around the perimeter of the FAA parking lot.

^{2/} See n. 1 supra.

2. Provide additional lighting sufficient to illuminate the back portions of the lot.
3. Provide a protective barrier to prevent objects from falling in the lot. This can be accomplished by adding some protective wiring to the top of the security fence along the side of the parking garage.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that the arbitrator exceeded his authority.^{3/} Neither party filed briefs as provided in section 2411.36 of the Council's rules.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously indicated, the Council accepted the agency's petition for review of the arbitrator's award on the ground that the arbitrator exceeded his authority.^{4/}

The Council will sustain a challenge to an arbitration award where it is shown that the arbitrator exceeded the scope of his authority by determining an issue not included in the subject matter submitted to arbitration. American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479, 485 [FLRC No. 72A-3 (July 31, 1973), Report No. 42].^{5/} However, the Council has made it clear that in addition to determining those issues specifically included in the particular question submitted, an arbitrator may extend his award to issues which

^{3/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

^{4/} The agency took exception only to part "B" of the arbitrator's award.

^{5/} This is consistent with the practice of courts in the private sector. E.g., Local 791, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Magnavox Company, 286 F.2d 465 (1961); Kansas City Luggage & Novelty Workers Union, Local 66, AFL-CIO v. Neevel Luggage Manufacturing Company, 325 F.2d 992 (1964); and Lee v. Olin Mathieson Chemical Corporation, 271 F. Supp. 635 (1967). See also, O. Fairweather, Practice and Procedure in Labor Arbitration 359-60 (BNA 1973).

necessarily arise therefrom.^{6/} Further, in Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Meyers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101, the Council stated that "if there is not a submission agreement with a precise issue, an arbitrator in the Federal sector has unrestricted authority to pass on any dispute presented to him so long as it is within the confines of the collective bargaining agreement,"^{7/} and that "even when the parties have entered into a submission agreement, the Council . . . will construe an agreement broadly with all doubts resolved in favor of the arbitrator when a question is presented to the Council as to whether an arbitrator exceeded his authority in a particular matter."^{8/} In Pacific Southwest, wherein the parties entered into a submission agreement, the Council indicated that in the course of making a determination as to whether the arbitrator exceeded his authority, it would carefully examine the entire record in the case, including the transcript of the proceedings before the arbitrator. In Pacific Southwest the Council found after examining the record and the transcript and the manner in which the parties had framed their submission agreement, that the parties had not reached total agreement on a precise issue submitted to arbitration. Thus, the Council found that the arbitrator had not exceeded his authority when he fashioned an award which was consistent with the "underlying" issue in the case.^{9/}

6/ Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), 3 FLRC 83 [FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62]; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), 2 FLRC 262 [FLRC No. 73A-44 (Nov. 6, 1974), Report No. 60]; American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479, 485, n. 11 [FLRC No. 72A-3 (July 31, 1973), Report No. 42].

7/ Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Meyers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101, at 6-7 of the Council's decision.

8/ Id. at 8.

9/ In that case the question submitted to the arbitrator was whether agency management had violated the parties' agreement, specifically Article 8, by the selection process it used to fill various positions. The arbitrator found that management had not violated Article 8, but that it had violated another provision of the agreement by failing to meet and consult with the union with respect to certain personnel practices before him. The Council sustained the arbitrator's award, finding that since the parties had failed to agree on a precise issue and since, in the arbitration hearing, both the parties and the arbitrator had expressed concern about an "underlying" issue of a management practice contrary to the agreement, the arbitrator had not decided an issue not before him and, therefore, had not exceeded his authority. As to the reference to Article 8, the Council concluded that the manner in

(Continued)

In the present case, the parties were precise in their formulation of the stipulated issue.^{10/} That is, the question submitted to the arbitrator was straightforward and unequivocal:

Is the Agency in compliance with Article 47 of the current PATCO-FAA agreement and with FAA Order 4665.3A as respects the adequacy of

(Continued)

which the parties framed their submission agreement gave rise to the inference that the words used therein were meant to be attention calling rather than issue limiting.

^{10/} In his award the arbitrator stated that "[t]he parties stipulated the issue." Further, the Council notes that at the beginning of the arbitration hearing the following discussion took place:

[ARBITRATOR]: At this point I would ask is there a submission agreement, a precise issue the arbitrator has to resolve? Have you agreed on one?

[AGENCY REPRESENTATIVE]: We have a hand-drafted submission.

[ARBITRATOR]: . . . Let me read the issue into the record and I ask you to stipulate if this is the precise issue the arbitrator must resolve.

Is the Agency in compliance with Article 47 of the current PATCO-FAA agreement and with FAA Order 4665-3A.

[AGENCY REPRESENTATIVE]: That should be .3A.

[ARBITRATOR]: Let's correct that. That number is 4665.3A.

As respects the adequacy of parking accommodations provided for the bargaining unit members at Seattle-Tacoma air traffic control tower.

If not, what is the appropriate remedy--off the record.

(Discussion off the record.)

[ARBITRATOR]: Back on the record.

I ask both counsel is this the issue as I have read it into the record that arbitrator must resolve?

[UNION REPRESENTATIVE]: Yes, Mr. Arbitrator.

[AGENCY REPRESENTATIVE]: Yes, Mr. Arbitrator.

Transcript of the Arbitration Proceedings, ANW 76-SEA at 11-12.

parking accommodations provided for the bargaining unit members at Seattle-Tacoma air traffic control tower?

The arbitrator's answer to that question was equally straightforward:

The Agency is in compliance with Article 47 of the current PATCO-FAA agreement and with FAA Order 4665.3A as respects the adequacy of parking accommodations provided for the bargaining unit members at Seattle-Tacoma air traffic control tower.

Thus, the parties, in their stipulation of the issue, specified the issue before the arbitrator as whether the agency was in compliance with Article 47 of the negotiated agreement and with FAA Order 4665.3A regarding the adequacy of parking accommodations provided bargaining unit members at the Seattle-Tacoma air traffic control tower. When the arbitrator answered that precise issue, concluding that the agency was in compliance with Article 47 of the agreement and with FAA Order 4665.3A regarding the adequacy of parking accommodations, the arbitrator had decided the issue submitted to him and his authority ended. By then going on to direct the agency to provide for a security fence, additional lighting, and a protective barrier in the FAA parking lot, the arbitrator exceeded the scope of the authority conferred upon him by the parties in submitting the matter to arbitration. Moreover, nothing in the record before the Council, including the transcript of the proceedings before the arbitrator, indicates that there existed an "underlying" issue which the arbitrator may have been resolving in his formulation of Part B of his award. While there are numerous references throughout the transcript to the security and lighting of the lot, there is nothing therein to indicate that these references are anything more than testimony elicited for the purpose of resolving the precise issue submitted to the arbitrator of whether the agency was in compliance with Article 47 of the negotiated agreement and FAA Order 4665.3A with respect to the adequacy of the lot.

Conclusion

For the foregoing reasons, we conclude that the arbitrator exceeded his authority by directing the agency to provide for a security fence, additional lighting, and a protective barrier in the FAA parking lot. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking Part "B" thereof. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier II
Executive Director

Issued: January 27, 1978

National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury. The dispute involved the negotiability of a union proposal that in effect would require, when the agency decides to suspend an employee for 30 days or less and if the union invokes an arbitration procedure to determine whether the suspension is imposed for just cause, the suspension would be stayed pending the outcome of the arbitration procedure.

Council action (January 27, 1978). The Council concluded that the union's proposal would so unreasonably delay and impede management's reserved right under section 12(b)(2) of the Order to discipline employees as to negate that right. Accordingly, the Council held that the agency's determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, sustained that determination.

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

National Treasury Employees Union

(Union)

and

FLRC No. 77A-58

Bureau of Alcohol, Tobacco and
Firearms, Department of the Treasury

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

The union proposal [set out in full in the appendix to this decision] in effect would require that, when the agency decides to suspend an employee for 30 days or less and if the union invokes an arbitration procedure to determine whether the suspension is imposed for just cause, the suspension will be stayed pending the outcome of the arbitration procedure.

Agency Determination

The agency head determined that the proposal to stay suspensions is nonnegotiable because it would essentially preclude the agency from effecting disciplinary actions and would negate management's reserved rights under section 12(b) of the Order.

Question Here Before the Council

The question is whether the proposal is nonnegotiable under section 12(b)(2) of the Order.^{1/}

1/ Section 12(b)(2) of the Order provides in relevant part:

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

(Continued)

Opinion

Conclusion: The proposal would negate management's right to discipline employees under section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The agency contends that the proposed arbitration procedure under consideration here would effectively preclude management from taking action in suspension cases until several months after the agency had reached the decision to suspend an employee and that this would have the effect of so unreasonably delaying the exercise of its management right to discipline employees as to negate that right.^{2/}

The union counters that the arbitration procedure included in its proposal is an "expedited" procedure, which "contemplates" timely resolution of cases processed under its terms and would not, therefore, cause unreasonable delay. In support of this contention, the union points to specific features of the procedure designed to accelerate the arbitration process.^{3/}

(Continued)

.

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

.

(2) . . . to suspend, demote, discharge, or take other disciplinary action against employees. . . .

In view of our decision herein it is unnecessary to consider the remaining contention of the agency concerning the negotiability of the proposal.

^{2/} In support of its position that the proposal in this case would involve unreasonable delay in processing suspension cases, the agency refers to the one-year average time involved in processing disciplinary cases under allegedly similar arbitration procedures contained in existing agreements between the union and another agency. We make no ruling as to the similarity of the procedures adverted to by the agency and do not rely on the agency's assertions or analysis on this point in reaching our decision in this case.

^{3/} See the following provisions of the proposal in the appendix to this decision: Article 32, Section 2E 1-2 (initiation of process to select arbitrator within 5 days of the issuance of agency's final decision on the proposed suspension); Section 2E 3 (scheduling of arbitration hearing on first available date); Section 2E 6 (elimination of filing of post-hearing briefs); and, Section 2E 7 (requirement for issuance of a final decision by arbitrator within 7 days of close of hearing).

We disagree with the union's position. While the specific provisions referred to immediately above may accelerate the arbitration process, they do not, either individually or in combination, create a discernible time frame beyond which the arbitration procedure may not extend. More particularly, none of the terms and provisions of the proposed procedure requires the arbitration process to begin, proceed, or end within any definite time limits whatsoever. Consequently, the proposed procedure does not establish an arbitration process which would necessarily be expeditiously concluded as claimed by the union. Rather, the proposed procedure establishes an arbitration process of indefinite duration. For example, while the proposed arbitration procedure provides that an arbitration hearing shall be scheduled on the "first available date," there is no requirement that a hearing date actually be scheduled within a definite time period from the date the proposed arbitration procedure is invoked; and, while the proposed procedure requires the issuance of a final decision by the arbitrator within 7 days of the close of the hearing, there is no requirement that the arbitration hearing itself be completed within a specific time, thus rendering the 7-day requirement for issuance of a final decision relatively meaningless in defining or controlling the length of time to process cases under the union's proposed procedure.

In deciding that such a proposal is nonnegotiable under section 12(b)(2), we rely particularly on two prior Council decisions. In its decision in VA Research Hospital,^{4/} the Council established the standard that section 12(b)(2) of the Order does not preclude the negotiation of procedures which management will follow in exercising its retained rights to decide and act in matters covered by that section, as long as those procedures do not negate management's reserved authority by unreasonably delaying or impeding the exercise of that authority. In a later decision in Blaine,^{5/} the Council, applying this general standard, found a union proposal for a promotion procedure nonnegotiable because the procedure, by failing to establish any "precise and readily definable limitation" before the personnel actions were taken by the agency, would create the potential for significant delays in filling vacancies.^{6/} The Council determined that these delays would be so unreasonable as to negate management's reserved authority under section 12(b)(2) of the Order, thereby violating that provision.

4/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

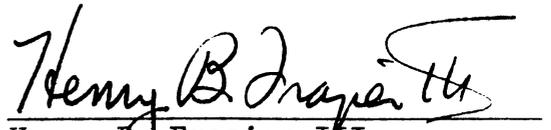
5/ Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington, 3 FLRC 75 [FLRC No. 74A-33 (Jan. 8, 1975), Report No. 61]. In that case the union proposal would have prevented management from filling any vacancy on a permanent basis, when a formal grievance is filed under the agency grievance procedure, until the grievance is finally resolved or until an employee has exercised any of his statutory or mandatory placement rights, whichever occurs first.

6/ Id. at 79.

The Council's decisions in both VA Research Hospital and Blaine make clear that management's authority under section 12(b)(2) includes the right to act in the matters reserved under that section without unreasonable delay. As noted above, the union's proposed arbitration procedure under consideration in this case would result in potential delays of indefinite duration since the procedure does not precisely define and limit the time to process cases through arbitration before management can act to implement its decisions to take disciplinary action. Delay of indefinite duration is, under the circumstances of this case, unreasonable and interferes with management's right to take prompt, timely action in a matter specifically reserved to it under the Order, namely the right to take prompt, timely disciplinary action. Stated otherwise, the union's proposed procedure here would so unreasonably delay and impede the exercise of the reserved right to suspend employees as to negate that right and, hence, violates section 12(b)(2) of the Order.

Accordingly, the proposal is nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Attachment:

APPENDIX

Issued: January 27, 1978

Article 32, Section 2

When the Employer proposes to suspend an employee for thirty (30) days or less, the following procedures will apply:

- A. The Employee [sic] will provide the affected employee with fifteen (15) days advance written notification of the proposed suspension;
- B. Upon request in writing an employee will, in any disciplinary action, be furnished a copy of that portion of all written documents which contain evidence relied on by the Employer which form the basis for the proposed action. An affected employee will be granted a reasonable amount of official time for reviewing material relied on by the Employer to support the reasons in the notice and for furnishing affidavits in support of the answer.
- C. The employee may file a written reply to the notification provided that the reply must be received by the Employer prior to the end of the fifteen (15) day notice period; and
- D. After receipt of the reply or termination of the notice period, the Employer shall issue a final decision to the employee.
- E. Within five (5) days of the Employer's final decision, the Union may invoke the following expedited arbitration procedure:
 1. Upon receipt of such notice, the Employee [sic] shall request from the FMCS a list of arbitrators, and the suspension shall be stayed.
 2. Upon receipt of the list, the Employer and the Union, in that Order, shall strike names from the list and the arbitrator so selected shall be notified.
 3. A hearing shall be scheduled on the first available date to determine whether the suspension has been imposed for just cause.
 4. The burden of proof shall be that of substantial evidence.
 5. The arbitrator's expenses shall be borne equally by the parties.
 6. The submission of briefs in lieu of closing arguments shall not be permitted. Either side, or both, may request the recording of a transcript, but the cost thereof shall be borne by the party so requesting unless the request is mutual, in which case the cost shall be shared equally.
 7. The Arbitrator's decision shall be rendered within seven (7) days of the close of the hearing, and shall be final and binding on the parties. The award may affirm, reverse or modify the Employer's decision.

American Federation of Government Employees, Local 2953, AFL-CIO and Nebraska National Guard. The dispute involved the negotiability of a union proposal concerning the reduction in force retention standing of National Guard technicians. The agency determined that the proposal was nonnegotiable because it conflicted with an agency regulation for which a "compelling need" existed within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules. The agency also denied the union's request for an exception to the subject regulation; and the union appealed to the Council.

Council action (February 14, 1978). The Council concluded that a "compelling need" existed within the meaning of section 11(a) of the Order and Part 2413 (section 2413.2(d)) of the Council's rules for the agency regulation in question to bar negotiations on the union's conflicting proposal. Accordingly, the Council held that the agency determination that the union's proposal was nonnegotiable was proper and, pursuant to section 2411.28 of its rules and regulations, sustained that determination.

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

American Federation of Government
Employees, Local 2953, AFL-CIO

(Union)

and

FLRC No. 77A-106

Nebraska National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

In establishing reduction-in-force retention rosters of technicians, the procedure should provide that the length of technician service be the primary factor in determining RIF retention standing; and the technician performance rating would be the second criterion; and, the length of Federal service would be used as a tie breaker if the first two ranking factors did not differentiate between technicians.

Agency Determination

The Department of Defense determined that the union's proposal, concerning the reduction in force (RIF) retention standing of National Guard technicians,^{1/} is nonnegotiable because it would make technician seniority the primary factor in determining RIF retention standing and thereby conflicts with the National Guard Bureau (NGB) regulation establishing RIF procedures for National Guard technicians.^{2/} The agency further determined that a "compelling need" exists for its regulation within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules. The agency denied the union's request for an exception to the regulation.

^{1/} National Guard technicians are employed pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1970), in full-time civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces. Such technicians must, as a condition of their civilian employment under the Act, become and remain members of the National Guard (i.e., in a military capacity) and hold the military grade specified for the technician position pursuant to 32 U.S.C. § 709(b) and (e).

^{2/} The NGB regulation, Technician Personnel Manual (TPM) 351, provides in essence that RIF retention standing is based on a composite measurement of technician performance and related military performance. Technician seniority is utilized, however, only as a tie breaker when competing technicians have otherwise equal retention standing.

Question Here Before the Council

The question is whether a "compelling need" exists within the meaning of section 11(a) of the Order^{3/} and Part 2413 of the Council's rules,^{4/} for the NGB regulation concerning RIF procedures for National Guard technicians.

3/ Section 11(a) of the Order as amended provides in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order.

4/ 5 CFR Part 2413.

§ 2413.2 Illustrative criteria.

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

- (a) The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or the primary national subdivision;
- (b) The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;
- (c) The policy or regulation is necessary to insure the maintenance of basic merit principles;
- (d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or
- (e) The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest.

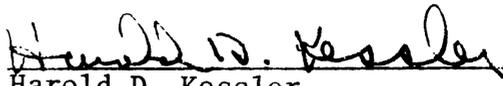
Opinion

Conclusion: A "compelling need" exists within the meaning of section 11(a) of the Order and Part 2413 (Section 2413.2(d)) of the Council's rules for the NGB regulation concerning RIF procedures for National Guard technicians. That is, the regulation implements a mandate to the agency or primary national subdivision under law, which implementation is essentially non-discretionary in nature. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The proposal here in dispute would, in effect, substitute a RIF retention system based primarily on technician seniority for the existing RIF retention system, established by TPM 351, which is based on technician and related military performance, and permits the use of technician seniority only to break ties. In this regard, the proposal here in dispute bears no material difference from the one to establish seniority as the primary factor in the determination of technician displacement rights which the Council held nonnegotiable in the Adjutant General, State of Kentucky and Adjutant General, State of Wyoming case.^{5/} In that case the Council found that the proposal conflicted with a NGB regulation (Technician Personnel Pamphlet 910) for which a "compelling need" existed under section 2413.2(d) of the Council's rules. While the regulation involved in the present case, TPM 351, superseded Technician Personnel Pamphlet 910, TPM 351 does not differ in any material respects from its predecessor with regard to the calculation of RIF retention standing and the utilization of technician seniority.

Accordingly, for the reasons more fully set out in the Adjutant General, State of Kentucky and Adjutant General, State of Wyoming case, we find that a "compelling need" exists for TPM 351 to bar negotiations on the union's conflicting proposal under section 11(a) of the Order and section 2413.2(d) of the Council's rules. Thus, we find that the agency determination that the proposal is nonnegotiable must be sustained.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: February 14, 1978

5/ National Association of Government Employees, Local R5-100 and Adjutant General, State of Kentucky and National Association of Government Employees, Local R14-76 and Adjutant General, State of Wyoming, FLRC No. 76A-109 (July 20, 1977), Report No. 132.

Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Eigenbrod, Arbitrator). The arbitrator sustained the grievance concerning the agency's reprimand of the grievant for accepting a reduced air fare from an airline. In his award, the arbitrator held that the disciplinary action involved was not for just cause and directed that the reprimand be removed from the grievant's personnel folder. The Council accepted the agency's petition for review of the arbitrator's award insofar as it alleged that the award violated Executive Order 11222 (which prescribes standards of ethical conduct for Government officers and employees) and Civil Service Commission regulations (Report No. 130).

Council action (February 22, 1978). Since the Civil Service Commission is authorized by E.O. 11222 to issue regulations pertaining to employee conduct and conflict of interest within the Federal service, the Council requested from the Commission an interpretation of the relevant Commission regulations as they pertain to the questions raised by the arbitrator's award. Based on the interpretation and conclusion of the Commission in response to the Council's request, the Council held that the arbitrator's award violated E.O. 11222 and Civil Service Commission regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award in its entirety.

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

Federal Aviation Administration,
Department of Transportation

and

FLRC No. 77A-29

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, the grievant, an employee of the Federal Aviation Administration (FAA) and a member of the Professional Air Traffic Controllers Organization (the union), was reprimanded by the agency for accepting a reduced air fare from an air carrier. Prior to the grievant's acceptance of the reduced air fare, the agency had informed him that an employee's acceptance of a reduced air fare by a carrier regulated by the FAA would constitute a violation of Department of Transportation regulations relating to employee conduct and conflict of interest, specifically Part 99.735-9(a) thereof.^{1/}

A grievance was filed over the reprimand, and subsequently the matter was submitted to arbitration. The parties submitted the following issues to the arbitrator:

- (a) Whether or not the letter issued to [the grievant] violated Article 69, Section 1(a)?^{2/}

1/ 49 CFR § 99.735-9(a) provides in relevant part:

[N]o employee may solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, food, lodging, loan, or other thing of monetary value, from a person or employer of a person who . . . [c]onducts operations or activities that are regulated by the Department

. . . .

2/ Article 69, Section 1(a) of the parties' negotiated agreement provides in relevant part:

This Article covers disciplinary actions involving written warnings, written reprimands, or suspensions for thirty (30) days or less. Adverse action may not be taken against an employee covered by this agreement except for such cause as will promote the efficiency of the service. A just and substantial cause is necessary as a basis for an adverse action and the action must be determined on the merits of each individual case.

(b) Does FAA violate Article 15^{3/} of the Agreement when it disciplines a PATCO member, as having violated 49 CFR Section 99.735-9(a), for accepting a reduced air fare offered to PATCO members by an air carrier that is covered by the Federal Aviation Act of 1958 and regulations issued thereunder, in either of the following circumstances?

- (1) The member is an active air traffic controller?
- (2) The member is an FAA employee on leave without pay from FAA and employed full-time by PATCO? [Footnotes added.]

The arbitrator stated that "the first question to be answered is whether or not 49 CFR, Section 99.735-9(a) and FAA Regulations prohibit PATCO members or their immediate families from availing themselves of those benefits set out in Article 15, notwithstanding Article 15 is part and parcel of the Agreement between the parties." With respect to this the arbitrator noted that the activity had agreed to reinclusion of Article 15 in the parties' negotiated agreement in July 1975 despite a letter in April 1975 from the "Director ASO-1" which stated, in substance, that the reduced air travel benefit is a violation of the rules governing conflict of interest. Thus, he concluded that "[i]f we do not look upon such action on the part of the Agency as a waiver, then we must look to the Agency's reasons for its non-action in agreeing that Article 15 should be a provision of the Agreement. The record reveals no reason for such inclusion."

The arbitrator sustained the grievance. In doing so, he determined:

PATCO members may take advantage of any agreement made between PATCO and airlines pertaining to reduced or free fares for its members, and said Article 15 is not in violation of 49 CFR, Section 99.735-9(a).

In his "AWARD" the arbitrator stated that the disciplinary action was not for just cause and directed that the reprimand be removed from the grievant's personnel folder.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the

3/ Article 15 of the parties' negotiated agreement provides in relevant part:

Where applicable law and regulations permit, the Employer acknowledges that the Union may enter into agreement with any individual commercial passenger airline, whether international, domestic, interstate, or intrastate, to obtain reduced or free fares for its members and their immediate families.

Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates Executive Order 112224/ and Civil Service Commission regulations. Both parties filed briefs.^{5/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception which alleged that the award violates Executive Order 11222 and Civil Service Commission regulations.

Since the Commission is authorized by Executive Order 11222 to issue regulations pertaining to employee conduct and conflict of interest within the Federal service, the Council requested from the Commission an interpretation of the relevant Commission regulations as they pertain to the questions raised by the arbitrator's award. The Commission replied in relevant part as follows:

The grievant in this case, an air traffic controller, accepted reduced air fare from a commercial airline regulated by the Federal Aviation Administration. The agency reprimanded the grievant for this alleged violation of FAA policy. The grievant claims that issuance of the letter of reprimand is in violation of Article 15 of the negotiated agreement which allows the union to negotiate reduced or free fares for its members, where applicable law and regulations permit. The agency claims that the grievant's acceptance of reduced air fare violates Executive Order 11222 and Civil Service Commission regulations, as well as the Department of Transportation regulations found in 49 CFR, Section 99.735-9(a), and therefore is not allowable under Article 15 of the agreement. The union claims that by agreeing to inclusion of Article 15 in the agreement, the agency waived its right to assert a violation of the "conflict of interest" standards embodied in 49 CFR. The arbitrator determined that union members could take advantage of any agreement made between the union and airlines

^{4/} Executive Order 11222, as amended, prescribes standards of ethical conduct for Government officers and employees.

^{5/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the arbitrator's award pending determination of the appeal.

pertaining to reduced or free fares for its members without violating 49 CFR, Section 99.735-9(a) and sustained the grievance.

Executive Order 11222 prescribes standards of ethical conduct for Government officers and employees. Section 201 of the Order, in pertinent part, cautions as follows:

. . . No employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which . . . conducts operations or activities which are regulated by his agency or has interests which may be substantially affected by the performance or nonperformance of his official duty.

Part 735 of title 5, CFR, issued pursuant to E.O. 11222, sets forth the Commission's regulations under which each agency head must issue regulations prescribing standards of conduct and responsibilities for its employees. Subpart B of this Part sets forth minimum standards that must be embodied in those regulations. Specifically, section 735.202(a)(2) contains the same prohibitions as section 201 of E.O. 11222. The Commission's regulations are binding on Federal agencies, which are required by section 735.107 of title 5, CFR, to take whatever disciplinary or other remedial action is necessary to insure compliance. Adoption of Article 15 of the agreement cannot be viewed as a waiver of these regulations since the Government's rights may not be waived by its officers or employees. [Utah Power and Light Co. v. United States, 243 U.S. 389 (1917) and United States v. California, 332 U.S. 19 (1947)].

The acceptance of a reduced air fare not available to the general public would constitute, in our opinion, a gratuity or favor from a company regulated by the Federal Aviation Administration or whose interests could be affected by the FAA. Hence, it would violate E.O. 11222 and the Commission's regulations.

Based on the foregoing, we find that the arbitrator's award in this case--that PATCO members may continue to receive reduced air fares negotiated by the union under Article 15 of the agreement--is inconsistent with the Executive Order and relevant Civil Service Commission regulations.

Based upon the foregoing interpretation and conclusion by the Civil Service Commission, we find that the arbitrator's award in this case, based upon his determination that PATCO members may receive reduced air fares, violates Executive Order 11222 and Civil Service Commission regulations.

Conclusion

For the foregoing reasons, we conclude that the arbitrator's award violates Executive Order 11222 and Civil Service Commission regulations.

Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award in its entirety.

By the Council.


Henry B. Frazier III
Executive Director

Issued: February 22, 1978

U.S. Army Engineer District, Kansas City, Missouri and National Federation of Federal Employees, Local 29 (Moore, Arbitrator). The arbitrator concluded that there was reason to believe that sick leave had been abused by the grievant and that under the parties' agreement the leave restriction letter issued to him by his supervisor was authorized. The arbitrator therefore denied the union's grievance. The union filed exceptions to the arbitrator's award with the Council, contending (1) that the award was violative of law and the parties' agreement, citing a particular provision in the agreement in support of the exception; (2) that the award was violative of the intent of an agency regulation; and (3) that the arbitrator was arbitrary and capricious.

Council action (February 22, 1978). The Council held that the union's exceptions provided no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 22, 1978

Mr. Luther H. Smith, President
Local 29, National Federation
of Federal Employees
Box 15146
601 East 12th Street
Kansas City, Missouri 64106

Re: U.S. Army Engineer District, Kansas City,
Missouri and National Federation of Federal
Employees, Local 29 (Moore, Arbitrator),
FLRC No. 77A-134

Dear Mr. Smith:

The Council has carefully considered the union's petition, and the agency's opposition thereto, for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when the grievant received a "leave restriction letter" signed by his supervisor. The letter stated that the grievant "ha[d] been counseled on proper leave usage without satisfactory results," and set forth a procedure for restricting the grievant's use of sick and annual leave. The union grieved and the matter was ultimately submitted to arbitration. Before the arbitrator the union contended that "[m]anagement did not comply with the provisions in the Agreement requiring the Supervisor to 'discuss with and warn the employee about excessive use of sick leave,'" and that "the Leave Restriction Letter goes beyond the Agreement and the Regulation,*/ in that the letter requires that all requests for normal annual leave must be made at least one day in advance." [Footnote added.]

The basic question, according to the arbitrator, was "whether Grievant's attendance record is such that 'there is reason to believe that sick leave privilege has been abused . . .'" Based upon the evidence and the testimony before him, the arbitrator concluded that "there was reason to believe sick leave was being abused and the Leave Restriction Letter and its contents were authorized." Therefore he denied the grievance.

The union's petition for review takes exception to the arbitrator's award on the basis of the exceptions discussed below. The agency filed an opposition.

*/ The pertinent provisions of the parties' negotiated agreement and the activity regulation referred to in the arbitrator's award are set forth in the Appendix attached hereto.

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

In its first exception, the union contends that the arbitration award is "in violation of the law of the Agreement," and refers to Article 20 of the parties' negotiated agreement. Since Article 20 was specifically set forth by the arbitrator in his award as the "relevant" contract provision, it appears that the union, in substance, is disagreeing with the arbitrator's interpretation of the parties' negotiated agreement. Council precedent is clear that the interpretation of provisions in a negotiated agreement is a matter to be left to the arbitrator's judgment. E.g., American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitration award is in violation of "the intent of [Kansas City District Regulation] 690-1-004." As previously indicated, the Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground that the award violates appropriate regulations. However, without passing upon whether the cited regulation in this case is an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules, the Council notes that, other than to simply refer to the regulation and recite certain facts of the case, the union in its petition advances no arguments in support of its exception and describes no facts and circumstances to show in what manner the award violates the cited regulation. The Council will not accept a petition for review when there appears in the petition no support for the stated exception to the award. E.g., Department of the Air Force, 4392D Aerospace Support Group (SAC) and National Federation of Federal Employees (NFFE), Local 1001 (Vandenberg Air Force Base, California) (Pollard, Arbitrator), FLRC No. 77A-24 (May 4, 1977), Report No. 125. Accordingly, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

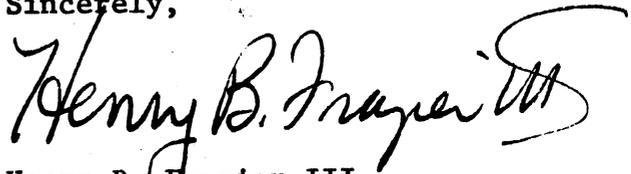
In its third exception, the union contends that "the Arbitrator was arbitrary and capricious in his award." In support of this exception, the union contends that "the employee's legal rights under [Article 20, Section 1, Paragraph d of the negotiated agreement] . . . were violated," and cites various testimony from the transcript of the arbitration hearing. In essence, it appears that the union is again merely contending that the arbitrator reached an incorrect result in his interpretation of the agreement. As previously stated, the Council has consistently held that

disagreement with the arbitrator's interpretation of contract provisions is not a ground for review of an arbitrator's award. Further, the union's reference to various testimony in the transcript is, in substance, nothing more than mere disagreement with the weight given by the arbitrator to certain evidence. The Council has previously held that arbitral determinations as to the credibility of witnesses and the weight to be given their testimony are not matters subject to Council review. Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82. Accordingly, the union's third exception does not state a ground upon which the Council will accept a petition for review of an arbitration award.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

Attachment

cc: W. J. Schrader
Army

APPENDIX

The negotiated agreement between the parties provides in part:

ARTICLE 20 - LEAVE

Section 1. Annual and Sick Leave. [W]hen requested in advance, annual leave will be approved consistent with the needs of the employer. . . .

a. Annual leave will be scheduled early in the year. . . .

.

c. Supervisors are authorized to approve sick leave for employees when they are incapacitated for the performance of their duties because of illness, injury, or medical . . . examination or treatment, as provided by sick leave regulations. . . .

d. A grant of sick leave must be supported by evidence administratively acceptable. For an absence in excess of three (3) workdays, a medical certificate or other administratively acceptable evidence as to the reason for absence may be required. For an absence of less than three (3) workdays a supervisor may require a medical certificate or other administratively acceptable evidence as to the reason for absence provided such certificate or evidence is requested in writing by the supervisor prior to the absence. Regardless of the duration of the absence, an employee's certification as to the reason for his absence may be considered as evidence administratively acceptable. However, the supervisor will discuss with and warn the employee about excessive use of sick leave. Should such a discussion or warning fail to improve the employee's sick leave record, the requirement for furnishing medical certificates for each sick leave absence will be applied. This requirement shall be reviewed by the supervisor within six (6) months and will be withdrawn when the reasons for the requirement no longer exist. [Emphasis added.]

According to the arbitrator's award, Kansas City District Regulation (KCDR) 690-1-004 provides in part:

13. Use of Sick Leave.

.

c. Supporting Evidence.

.

(3) Sick Leave Abuse. When in individual cases there is reason to believe that the sick leave privilege has been abused, a medical certification may be required to justify the use of sick leave thereafter.

In such cases, the employee will be advised in advance in writing that a medical certificate will be required to support any future grant of sick leave, regardless of duration. [Emphasis added.]

Defense Logistics Agency, Defense Contract Administration Services Region, Los Angeles, A/SLMR No. 958. The decision of the Assistant Secretary was dated December 30, 1977, and appeared (as confirmed by administrative advice) to have been served on the individual complainant, Mr. Paul Yampolsky, by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, Mr. Yampolsky's appeal was due in the office of the Council no later than the close of business on February 3, 1978. However, Mr. Yampolsky's appeal was not filed with the Council until February 9, 1978, and no extension of time for such filing was requested by him or granted by the Council.

Council action (February 23, 1978). Since Mr. Yampolsky's appeal was untimely filed with the Council, and apart from other considerations, the Council denied his petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 23, 1978

Mr. Paul Yampolsky
3764 Meier Street
Los Angeles, California 90066

Re: Defense Logistics Agency, Defense Contract
Administration Services Region, Los Angeles,
A/SLMR No. 958, FLRC No. 78A-17

Dear Mr. Yampolsky:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, filed with the Council on February 9, 1978. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated December 30, 1977, and appears (as confirmed by administrative advice) to have been served on you by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on February 3, 1978. However, as stated above, your appeal, which is postmarked February 1, 1978, was not filed with the Council until February 9, 1978, and no extension of time for such filing was requested by you or granted by the Council.

While you state in your instant submission that you did not actually receive the subject decision of the Assistant Secretary until January 6, 1978, such asserted date of receipt is clearly not dispositive in this case. Section 2411.46(e) of the Council's rules expressly provides:

The date of service or date served shall be the day when the matter served is deposited in the U.S. mail or is delivered in person, as the case may be.

Consequently, the time limit prescribed under sections 2411.13(b) and 2411.45(b) and (c) of the Council's rules for the filing of your appeal (35 days) began to run from December 30, 1977, the date the decision of the Assistant Secretary was mailed to and thereby "served" upon you. Thus, as already indicated, your appeal had to be received in the office of the Council before the close of business on February 3, 1978, to be considered timely.

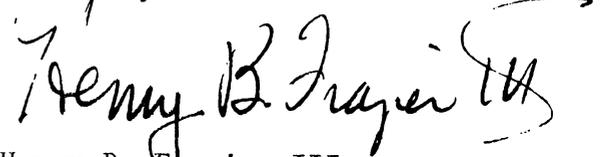
Further, while you also state in your appeal that on January 31, 1978, you requested reconsideration by the Assistant Secretary of his subject decision, such request, as expressly provided in section 2411.45(d) of the Council's rules, did not operate to extend the time limits established in the Council's rules.

Moreover, while you have not requested a waiver of the expired time limit for the filing of your appeal, as provided for in section 2411.45(f) of the Council's rules, your instant submission advances no persuasive reason for granting such a waiver. See, e.g., United States Department of Defense, 3245th Air Base Group, United States Air Force, A/SLMR No. 904, FLRC No. 77A-119 (Nov. 3, 1977), Report No. 138; U.S. Army Materiel Readiness Command, Redstone Arsenal, Alabama, Assistant Secretary Case No. 40-7979(CA), FLRC No. 77A-116 (Oct. 28, 1977), Report No. 138. Further in this regard, although as previously stated your appeal was postmarked February 1, 1978, and not received in the office of the Council until February 9, 1978, the apparent delay of the postal service in delivering your petition to the Council does not constitute "extraordinary circumstances" within the meaning of section 2411.45(f) of the Council's rules such as to warrant waiver of the Council's timeliness requirements in the circumstances of this case. See, Council decision letter of May 20, 1976, in Department of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local Union 2921 (Schedler, Arbitrator), FLRC No. 76A-20, Report No. 105, and cases cited therein.

Accordingly, since your appeal was untimely filed with the Council, and apart from other considerations, your petition for review is hereby denied.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

Enclosure

cc: A/SLMR
Labor

D. W. Jenkins (w/c subject petition)
DLA

Ida Nicholson [Local 12, American Federation of Government Employees, AFL-CIO] and U.S. Department of Labor (Seidenberg, Arbitrator). The arbitrator denied the grievance which alleged that the agency violated the parties' agreement in the filling of the positions involved and in failing to select the grievant for any of the vacancies. Ms. Patricia J. Barry filed a petition for review of the arbitrator's award with the Council. Ms. Barry noted that the petition was submitted without the approval of either the National President of the American Federation of Government Employees (AFGE) or his designee, as required by section 2411.42 of the Council's rules of procedure, and requested that the Council waive that requirement, contending that because of the unique circumstances involved in this case she had been unable to obtain the requisite approval. With regard to the arbitrator's award, Ms. Barry alleged in her petition, as exceptions to the award: (1) that the award violated appropriate regulation; (2) that the award was based on a nonfact; (3) that the arbitrator refused to hear pertinent and material evidence; (4) that the president of the local union failed to require, or at least approve, the presence of a principal witness on behalf of the grievant at the arbitration proceeding, that the witness refused to testify because of the local president's refusal to endorse the arbitration proceeding, and that the local president's failure or refusal to act in effect constituted a breach of the union's duty of fair representation; and (5) that there was newly discovered evidence which supported the grievant's position. The agency filed an opposition to Ms. Barry's petition for review, as well as to her request for a waiver described above.

Council action (February 24, 1978). Without passing upon Ms. Barry's request for a waiver of the requirement of section 2411.42 of its rules of procedure or the contentions of the agency set forth in its opposition to that request, the Council held, as to Ms. Barry's exceptions numbered (1), (2) and (3) above, that her petition did not describe the necessary facts and circumstances to support those exceptions. As to (4), the Council held that this exception did not state a ground upon which the Council will grant review of an arbitration award. Finally, with regard to (5), the Council held that this exception did not provide a basis for Council acceptance of Ms. Barry's petition for review. Accordingly, the Council denied Ms. Barry's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 24, 1978

Ms. Patricia J. Barry
Attorney at Law
Suite 100
522 - 21st Street, NW.
Washington, D.C. 20006

Re: Ida Nicholson [Local 12, American Federation of Government Employees, AFL-CIO] and U.S. Department of Labor (Seidenberg, Arbitrator), FLRC No. 77A-75

Dear Ms. Barry:

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

According to the arbitrator's award, the grievant, an Accounting Technician since 1971, with three years' experience in her present GS-7 grade level and a total of eleven years' service with the Federal government in various clerical positions, was a candidate who was not selected for one of three newly established GS-7 Budget Technician positions in the Office of Budget and Program Review at the Department of Labor (the agency). The grievant filed a grievance resulting in the instant arbitration, contending that the agency breached the letter and spirit of the negotiated agreement by making arbitrary selections for the Budget Technician positions and excluding the grievant, a highly qualified candidate.

The arbitrator stated the issue before him as follows:

Did Agency violate Articles X, XVI of the current collective bargaining Agreement and relevant provisions of Federal Personnel Manual and Department Merit Staffing Plan when it failed to select the Grievant for one of three newly created vacancies of Budget Technician?^{1/}
[Footnote added.]

Before the arbitrator the union argued that the newly established Budget Technician positions were "bridge positions" within the purview of the Upward Mobility Program, that they should have been filled in accordance

^{1/} Although the relevant provisions of the negotiated agreement were not set forth in the arbitrator's award, Article X was characterized as pertaining to merit staffing, and Article XVI as calling upon the parties to implement programs to achieve equal employment opportunity including those listed in FPM Chapter 713, as well as providing for disciplinary action in instances of willful disregard of agency regulations concerning equal employment opportunity.

with the agency's Merit Staffing Plan, and that the grievant should have been selected for one of the positions. The agency argued that the positions had been filled through lateral reassignments and that the positions were not subject to the Merit Staffing Plan, that they were not bridge positions, and that there was no Upward Mobility Program in existence at the time the lateral transfers were effected.

The arbitrator stated that the evidence revealed that at the time the agency filled the Budget Technician positions it had no formally approved Upward Mobility Program and, therefore, "[m]anagement could not implement the Program, validly or invalidly." Therefore, the arbitrator determined that he could not find under all the circumstances that there were any "bridge positions" to jobs with greater promotional opportunities that had to be, but were not, made available to the grievant and others similarly situated. The arbitrator also found "the lateral transfer or reassignment . . . under the facts of this case, to be an action that was excepted from the Department's competitive merit staffing program." The arbitrator concluded that "the Grievant's contractual rights under the Negotiated Agreement, as well as under the requisite regulations and provisions of the Federal Personnel Manual were not breached with regard to the Upward Mobility Program or Merit Staffing" and, accordingly, he denied the grievance.

Your petition for review takes five exceptions to the arbitrator's award. In addition, noting that your petition was submitted without the approval of either the National President of the American Federation of Government Employees or his designee, as required by section 2411.42 of the Council's rules of procedure,^{2/} you request that the Council waive the requirements of that section, contending that because of the unique circumstances involved in this case you have been unable to obtain such approval. The agency filed an opposition to your petition for review, as well as to your request for waiver.

In the Council's opinion, without passing upon your request for waiver of the requirements of section 2411.42 or the contentions of the agency set forth in its opposition to that request, for the reasons set forth below, your petition for review of the arbitrator's award does not meet the requirements of the Council's rules governing review of arbitrators' awards.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the

^{2/} Section 2411.42 of the Council's rules of procedure provides, in pertinent part:

[T]he Council shall consider a petition from an agency or labor organization only when the head of the agency (or his designee), or the national president of the labor organization (or his designee), or the president of a labor organization not affiliated with a national organization (or his designee), as appropriate, has approved submission of the petition.

facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In your first exception, you contend that the arbitrator's award violates appropriate regulation. In support of this exception, you quote extensively from the transcript and the exhibits of the hearing before the arbitrator and assert, in essence, that the preponderance of the evidence before the arbitrator proves, contrary to his findings, that the Budget Technician positions in question are de facto bridge positions, which, therefore, should have been filled through merit competition. Therefore, you request that, given the preponderance of the evidence, the Council rule in your favor that the positions were bridge positions which should have been filled through merit promotion competition.

The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulations. In this case, however, the Council is of the opinion that your contentions do not provide facts and circumstances to support your exception. You do not specifically state which appropriate regulations you believe the award to violate, nor do you provide any explanation as to why or in what manner the award is violative of any regulation. Instead, your assertion that the arbitrator's findings are contrary to the preponderance of the evidence is, in essence, nothing more than disagreement with the arbitrator's factual determinations. The Council has consistently held that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96, and cases cited therein. Therefore, your first exception does not present the necessary facts and circumstances to support a ground upon which the Council grants a petition for review of an arbitration award under section 2411.32 of its rules of procedure.

In your second exception, you contend that the award is based on a nonfact. In support of this contention you allege that the arbitrator rejected the evidence presented and concluded that the Budget Technician positions were not bridge positions and, having arrived at this conclusion, determined that the positions did not have to be competed for under merit promotion procedures. You refer to the extensive testimony quoted by you in support of your first exception and conclude that, since the positions met all the criteria of bridge positions, they should have been subject to competitive procedures.

The Council will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been

reached." Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), 3 FLRC 533 [FLRC No. 74A-102 (Aug. 12, 1975), Report No. 81]. However, the Council is of the opinion that your petition does not describe sufficient facts and circumstances to support this exception. That is, your petition for review does not present facts and circumstances to demonstrate that the central fact underlying this arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. Instead, the substance of your second exception is the same as your first wherein, as indicated, you are in essence disagreeing with the arbitrator's findings as to the facts and arguing that such findings are not supported by the record. Such contentions, as previously indicated, do not assert grounds for review under section 2411.32 of the Council's rules.

Your third exception alleges that the arbitrator refused to hear pertinent and material evidence. In support of this exception, you contend that the arbitrator and the agency refused to compel the presence of a "recalcitrant witness" who had "first-hand" information as to whether the positions in question were viewed by management as bridge positions.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that an arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair hearing. U.S. Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO (National Border Patrol Council) (Shister, Arbitrator), FLRC No. 77A-51 (Aug. 26, 1977), Report No. 136, and cases cited therein. However, in the Council's view, your petition does not describe the necessary facts and circumstances to support this exception. That is, your exception does not assert that the arbitrator refused to hear testimony, refused to accept evidence, or refused to permit the witness to testify. Instead, your exception is based on the contention that the witness himself refused to testify and the arbitrator and the agency would not compel him to do so. Such a contention does not present facts and circumstances to support an exception that the arbitrator refused to hear pertinent and material evidence and, hence, denied the grievant a fair hearing.^{3/} Your third exception, therefore, provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

3/ Cf. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1238 (D.C. Cir. 1971), wherein the court held that the fact that a witness who had refused to testify at the original arbitration hearing was now willing to do so was not a ground for vacating an arbitrator's award and remanding the case for a new hearing and stated:

Because subpoenas are not available in private arbitration proceedings, appellant was unable to compel [the witness's] attendance and testimony. Nevertheless, it was the Guild's bargain with the Post to have disputes

(Continued)

In your fourth exception, you assert that the president of the local union failed to require, or at least approve, the presence of a principal witness on behalf of the grievant at the arbitration proceeding, and that this witness allegedly refused to testify because of the local president's refusal to endorse the arbitration proceeding. Such failure or refusal to act by the local president, you contend, constituted in effect a breach of the union's duty of fair representation and, for this reason, the award must be set aside.

However, your exception, based on the union's alleged breach of its duty of fair representation, does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32 of its rules. That is, your exception that the award should be set aside because the union breached its duty of fair representation does not assert or support a ground upon which the Council has previously granted a petition for review of an arbitration award. Moreover, research has failed to disclose that such a ground is "similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations," in the circumstances provided in the Council's rules.^{4/} Thus, your fourth exception establishes no basis for acceptance of your petition under section 2411.32 of the Council's rules.

(Continued)

over the discharge of employees settled by arbitration, with all of its well known advantages and drawbacks.

In that case the court also cited and quoted Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885, 886 (2d Cir. 1963) as follows:

We only hold that the parties, having agreed to an arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator.

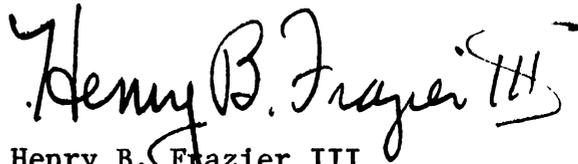
^{4/} The cases relied upon in your appeal (Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), and Lewis v. Greyhound Lines - East, 555 F.2d 1053 (D.C. Cir. 1977)) are without controlling significance. Unlike the present case, those decisions involved suits for damages filed by individual employees against a union and employer, under section 301 of the Labor-Management Relations Act (29 U.S.C. 185), based on the union's alleged breach of its statutory duty of fair representation during a grievance proceeding. Neither of the cited cases involved a challenge to an arbitration award in the private sector initiated by a party to the arbitration proceeding and directly (rather than collaterally) challenging the subject arbitration award. Only decisions on such challenges were intended to be of precedential significance in appeals from arbitration awards under the Council's rules. Therefore, without deciding whether a "duty of fair representation" similar to that in the private sector exists under the Order and, if so, the appropriate forum for challenging an alleged breach of such duty, and apart from other considerations, we find that the cited decisions are not dispositive in the present case.

In your fifth exception, you contend that there is newly discovered evidence which supports the grievant's position and therefore the arbitrator's award should be reversed. However, the Council has previously held that such an exception provides no basis for Council acceptance of a petition for review of an arbitrator's award. American Federation of Government Employees, Local 1760 and Department of Health, Education, and Welfare, Social Security Administration, Northeastern Program Center (Wolf, Arbitrator), FLRC No. 77A-78 (Dec. 20, 1977), Report No. 140.^{5/} Therefore, this exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

Accordingly, your petition for review is denied because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.^{6/}

Sincerely,



Henry B. Frazier III
Executive Director

cc: H. T. Harris
Labor

^{5/} In that case, the Council cited and quoted Bridgeport Rolling Mills Co. v. Brown, supra note 3, at 886, as follows:

[T]he parties, having agreed to an arbitration of their differences are bound by the arbitration award made upon the testimony before the arbitrator.

^{6/} The Secretary of Labor did not participate in this decision.

American Federation of Government Employees, Local 1739 and Veterans Administration Hospital, Salem, Virginia. The case involved two questions: (1) Whether the authority of the Council delegated by the President under section 11(a) of the Order to rule on the "compelling need" for agency regulations to bar negotiations infringes upon the regulatory authority of the Administrator of the Veterans Administration pursuant to 38 U.S.C. 4108(a); and (2), if not, whether a "compelling need" exists, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules, for the VA regulation asserted as a bar to negotiation of the union's proposal here involved, which proposal would permit probationary medical employees to seek assistance in preparing and presenting their cases during review of their employment records before the agency's Professional Standards Board.

Council action (February 28, 1978). As to (1), the Council concluded that there is no conflict between the authority of the Council, as delegated by the President under section 11(a) of the Order, to rule on the "compelling need" for agency regulations and the regulatory authority of the Administrator of the Veterans Administration under section 38 U.S.C. 4108(a); and, accordingly, that the Council had jurisdiction to determine the "compelling need" for the VA regulation relied on to bar negotiation of the union's proposal in the instant case. As to (2), the Council concluded that no "compelling need" exists, under section 11(a) of the Order and Part 2413 of the Council's rules for the VA regulation relied on to bar negotiation of the union's proposal; held that the agency's determination that the proposal is nonnegotiable was improper; and, pursuant to section 2411.28 of the Council's rules, set aside that determination.

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

American Federation of Government
Employees, Local 1739

(Union)

and

FLRC No. 76A-88

Veterans Administration Hospital,
Salem, Virginia

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

In case of a review by the Professional Standards Board, probationary employees may seek assistance and representation as deemed desirable or necessary in preparing and presenting their cases to the Board.

Agency Position

The agency determined that the union's proposal is nonnegotiable because it conflicts with a published agency policy and regulation for which a "compelling need" exists under section 11(a) of the Order and Part 2413 of the Council's rules and regulations; and denied the union's request for an exception to the regulation. The agency takes the further position that a statute (38 U.S.C. 4108(a)) limits the authority of the Council under section 11(a), to rule on the "compelling need" for the subject regulation to bar negotiation on conflicting union proposals.

Questions Here Before the Council

- A. Whether the authority of the Council delegated by the President under section 11(a) of the Order to rule on the "compelling need" for agency regulations to bar negotiations infringes upon the regulatory authority of the Administrator of the Veterans Administration pursuant to 38 U.S.C. 4108(a).
- B. If not, whether a "compelling need" exists, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules, for the VA regulation asserted as a bar to negotiation of the union's proposal.

Opinion

Conclusion as to Question A: There is no conflict between the authority of the Council, as delegated by the President under section 11(a) of the Order, to rule on the "compelling need" for agency regulations and the regulatory authority of the Administrator of the Veterans Administration under 38 U.S.C. 4108(a). Accordingly, the Council has jurisdiction to determine the "compelling need" for the VA regulation relied on to bar negotiation of the union's proposal in the instant case.

Reasons: By letter of July 26, 1977, the Council referred to the Department of Justice the conflict alleged by the agency to exist between the asserted regulatory authority of the agency under statute and the "compelling need" authority of the Council, as derived from the President under the Order. In this referral (which was accompanied by the pertinent record, including the relevant submissions by the parties), the Council stated:

This letter requests the opinion of your office to resolve an alleged conflict concerning the authority delegated to the Federal Labor Relations Council by the President under E.O. 11491, as amended, and the authority vested in the Administrator of the Veterans Administration under 38 U.S.C. 4108(a).

As you know, the President, by E.O. 11491, as amended, created the Council as the central authority of the labor-management relations program for the executive branch of the Federal Government. (This action was accomplished pursuant to the authority vested in the President by the Constitution and statutes of the United States, including 5 U.S.C. 3301^{1/} and 7301.)^{2/} In section 4(b) of the Order

1/ 5 U.S.C. 3301 provides as follows:

The President may—

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section. [Footnote in original.]

2/ 5 U.S.C. 7301 provides as follows:

The President may prescribe regulations for the conduct of employees in the executive branch.

The Supreme Court stated in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 at n. 5 (1974) that E.O. 11491 is "a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch," and that there is "express statutory authorization" for the Order in 5 U.S.C. 7301. [Footnote in original.]

the President directed the Council to "administer and interpret" the Order, "decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President." Further, by section 4(c), the President authorized the Council to consider various matters, including, as relevant here, appeals on negotiability issues arising between labor organizations and agencies under this Order.

The scope of negotiations under the Order is established in section 11(a), which, as amended by E.O. 11838, reads in relevant part: "An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision[.]" [Emphasis added.] With respect to negotiability disputes involving agency regulations under section 11(a), therefore, the President authorized the Council, in deciding such disputes to determine whether a "compelling need" exists for an agency regulation to bar negotiation of a conflicting union bargaining proposal.

In a case presently pending before the Council (AFGE Local 1739 and Veterans Administration Hospital, Salem, Virginia, FLRC No. 76A-88, the case papers in which are enclosed for your convenience), the VA has asserted that a statute (38 U.S.C. 4108(a)^{3/}) limits the authority of the Council, under section 11(a), to rule on the "compelling need" for certain internal VA personnel regulations to bar negotiation on a conflicting union bargaining proposal. In the subject case, the union representing a unit of medical personnel at a VA hospital advanced the following proposal during negotiations:

In case of a review by the Professional Standards Board, probationary employees may seek assistance and representation as deemed desirable or necessary in preparing and presenting their cases to the Board.

The agency determined that negotiations on this proposal are barred by an agency regulation pertaining to probationary employees which provides:

3/ 38 U.S.C. 4108(a) reads, in relevant part, as follows:

Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, and nurses . . . appointed to the Department of Medicine and Surgery [Footnote in original.]

If during the review of the record there is evidence that an employee may not be fully qualified and satisfactory, he shall be so advised in writing by the reviewing board. Notification to the employee will include:

That he is not entitled to legal or other representation during conduct of the review. (Veterans Administration Manual, MP-5, Part II, Chapter 4, 4.c.(3). See also Department of Medicine and Surgery Supplement, MP-5, Part II, Chapter 4, 4.06.b.(4).)

The union, in its appeal from the agency's determination to the Council under section 11(c) of the Order,^{4/} contends that no "compelling need"

4/ Section 11(c) of the Order is as follows:

Sec. 11. Negotiation of agreements.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when—

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under paragraph (a) of this section. [Footnote in original.]

exists for this regulation under the criteria established in its rules by the Council (5 CFR Part 2413), and that the proposal is therefore negotiable. The agency, in its statement of position in opposition to the union's appeal, reasserts that its regulation bars negotiations on the proposal. Further, the agency argues that a ruling by the Council on the "compelling need" for such regulation to serve as a bar to negotiation is beyond the authority of the Council (or the President) by reason of the exclusive regulatory authority granted the agency under 38 U.S.C. 4108(a).

Thus, an alleged conflict exists between the asserted regulatory authority of the VA under statute and the "compelling need" authority of the Council, as derived from the President under E.O. 11491, as amended. Under these circumstances, and in view of the nature of the issues involved, the Council decided to refer the matter to your office for advice as to the Council's authority to apply the "compelling need" provisions of the Order to the subject VA regulation. (The Council will not render a decision on the merits of the negotiability dispute involved in the instant case pending your resolution of this matter.)

The position of the Council, as detailed hereinafter, is that its authority under the Order to rule upon the "compelling need" for agency regulations to bar negotiation does not infringe upon, or conflict with, the authority of the Administrator under the statute; or stated conversely, that the statutory authority of the Administrator does not limit the authority of the Council under the Order. First, we do not agree with VA's basic contention that the wording of the statute requires the conclusion that, with respect to regulations issued pursuant to 38 U.S.C. 4108(a), the Administrator is not subject to the constitutional and statutory authority of the President over personnel matters within the executive branch. Such a literal reading of the VA statute would permit the agency to exempt the personnel covered by the statute from overriding Presidential policies such as those involving equal employment, health and safety, ethical conduct, and, indeed, the entire labor-management relations program, simply by the regulatory fiat of the Administrator. In our opinion, neither the language nor the legislative history of the VA statute dictates such an incongruous result. Nor, to our knowledge, has the agency previously asserted that such widespread authority is vested in the Administrator. Rather, it would appear that, while it was the intent of Congress to assure the authority of the Administrator to issue regulations "[n]otwithstanding any law, Executive order, or regulation," the statute does not authorize the Administrator to determine the content of such regulations without regard to policies deemed of paramount significance to the entire executive branch by the President.

Moreover, the VA position concerning the conflict of its regulatory authority under the VA statute with the Council's "compelling need" authority under the Order reflects a misunderstanding of a "compelling need" determination by the Council. Even if the Council were to

determine that no "compelling need" exists for the subject regulation to bar negotiation on the union proposal, such determination would not render the regulation invalid or otherwise impair the viability of that regulation. Instead, the determination would merely render the regulation inoperative as a bar to negotiation on the union's proposal at the local hospital here involved. As explained more fully in the Report accompanying E.O. 11838, in which Order the "compelling need" provisions were added to E.O. 11491 (Labor-Management Relations in the Federal Service (1975), at 38-39):

. . . [W]e are here concerned only with the question of whether a higher level internal agency regulation covering personnel policies and practices or matters affecting working conditions should serve as a bar to negotiations on a conflicting proposal submitted at the local level.

. . . [E]ven a regulation which does not satisfy the "compelling need" standard would remain completely operative as a viable agency regulation in full force and effect throughout the agency or the primary national subdivision involved, including those organizational elements wherein exclusive bargaining units exist. The effect of a determination that the regulation does not meet the "compelling need" standard would simply mean that the regulation would not serve to bar negotiation on a conflicting proposal. Such a regulation, if otherwise valid, would thus continue to apply in a given exclusive bargaining unit except to the extent that the local agreement contains different provisions.

Thus, the authority of the Council in a negotiability dispute to determine that no "compelling need" exists for a regulation to bar negotiation on a union proposal does not conflict in any manner with the regulatory authority of the agency. Such determination, as previously mentioned, is limited in nature and simply means that negotiations may properly be conducted on the proposal involved.^{5/}

Turning further to the agency's position, the agency argues that the specific delegation of authority to the Administrator should take precedence over the general statutory authority of the President. However, such contention appears inapposite. As the agency itself recognizes, this principle of statutory construction applies only

5/ Cf. American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73, at 8-11 of Council Supplemental Decision, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. Va., Sept. 5, 1975). [Footnote in original.]

where it is impossible to harmonize the particular statutes involved and, based upon the apparent meaning of the VA statute, no conflict exists between that statute and the broad constitutional and statutory authority of the President. Additionally, to repeat, no conflict prevails between the agency's regulatory authority as provided by statute and the Council's authority to determine "compelling need" under the Order as derived from the foregoing authority of the President.

Also, contrary to the argument of VA, the instant case does not present an issue as to a violation of the constitutional principle of the separation of executive and legislative powers. In this regard, the principal case cited by VA, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) seems without controlling significance. In Youngstown, the Supreme Court held that the Executive order whereby the President authorized the Secretary of Commerce to take possession of and operate the Nation's steel mills during a Presidentially declared emergency situation was invalid in that it had no basis in the constitutional or statutory powers of the President but was, instead, an exercise of the law-making power reserved to Congress by the Constitution. Clearly, the instant case does not present the circumstance of an Executive order issued without constitutional or statutory sanction. Rather, the present case involves an action by the President pursuant to his constitutional and statutory authority over employees of the executive branch. And, in any event, no conflict exists between the statutory authority vested in the VA Administrator and the provisions of E.O. 11491, as amended.

Also, contrary to VA's contention, the circumstances here do not concern any proscribed waiver of its "legislative regulations." As previously indicated, a Council determination that no "compelling need" exists for the subject regulation would merely require the agency to negotiate with the union regarding the conflicting proposal. Moreover, even if the agency agreed to the union's proposal, such an implied exception to its regulation at the local hospital involved in the present case would not prejudice any party and therefore, apart from other considerations, would appear clearly sanctioned under established precedent.^{6/}

^{6/} See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970); NLRB v. Monsanto Chemical Co., 205 F.2d 763 (8th Cir. 1953); Sun Oil Co. v. FPC, 256 F.2d 233 (5th Cir. 1958), cert. denied, 358 U.S. 872 (1958); Superior Trucking Co. v. United States, 302 F. Supp. 257 (N.D. Ga. 1969). Cf. Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974). [Footnote in original.]

Finally, while the agency argues that the statute was designed to assure the ability of VA to provide the best of medical care for the Nation's veterans, nothing whatsoever in the "compelling need" provisions of the Order is inconsistent with these underlying purposes of the statute. For instance, under the "compelling need" criteria established by the Council, a "compelling need" will be found to exist for any regulation essential either to the accomplishment of the agency's mission or to the management of the agency; or for any regulation which implements an essentially nondiscretionary mandate to the agency; or if the regulation establishes uniformity for all or a substantial segment of agency employees where this is essential to the effectuation of the public interest (5 CFR 2413.2(a), (b), (d), (e)). Likewise, a "compelling need" will be found to exist if the regulation is necessary to insure the maintenance of basic merit principles (5 CFR 2413.2(c)); and, as explained by the Council, upon the request of VA, these principles embrace any statutorily authorized personnel system within the executive branch which is based on "basic merit principles" (Information Announcement on Revision of Council Rules (Sept. 24, 1975), at 5). Thus, full protection is afforded VA under the "compelling need" provisions of the Order since any VA regulation which meets any of the standards of essentiality in the Council's rules would constitute a bar to negotiation on a conflicting union bargaining proposal.

Moreover, in the above regard, the Order, as stated in its preamble, is intended to enhance "the well-being of employees and efficient administration of the Government" -- which would thereby implement rather than impede the agency's providing the best quality of medical care for veterans. And even apart from the "compelling need" provisions here involved, a proposal may be found negotiable only if it is fully consonant with the entire Order, including the management rights provisions prescribed in section 12(b). Thus, further safeguards are afforded to the agency to assure its ability to supply the highest quality of medical care as intended by Congress.

Accordingly, for the foregoing reasons, and at the direction of the Chairman and members of the Federal Labor Relations Council, who are, respectively, the Chairman of the Civil Service Commission, the Director of the Office of Management and Budget and the Secretary of Labor, the Council respectfully requests your opinion as to whether the authority of the Council, delegated by the President under section 11(a) of E.O. 11491, as amended, to rule on the "compelling need" for agency regulations to bar negotiation infringes upon the authority of the Administrator of the Veterans Administration pursuant to 38 U.S.C. 4108(a).

In its response of September 28, 1977, the Department of Justice declined to resolve the alleged dispute, stating:

This is in response to your letter of July 26, 1977, which requests the opinion of the Office of Legal Counsel with respect to an alleged conflict between the authority of the Federal Labor Relations Council under Executive Order 11491, as amended, and the authority of the Veterans Administration under 38 U.S.C. § 4108(a). Our examination of your letter and the attached documents shows that the question has arisen in the course of a labor dispute between the Veterans Administration and Local 1739, American Federation of Government Employees, over whether the Administration must bargain with the Union about certain personnel policies in its regulations. Under section 11(c) of Executive Order 11491, the Federal Labor Relations Council is responsible for adjudicating the dispute. The Veterans Administration has claimed, in effect, that 38 U.S.C. § 4108(a) places the dispute outside the Council's jurisdiction. Initial responsibility for determining its own jurisdiction is placed on the Council by section 4(b) of the Executive Order. One district court has held that judicial review is available with respect to the Council's decision on a negotiability dispute. See National Broiler Council, Inc. v. Federal Labor Relations Council, 382 F. Supp. 322 (E.D. Va. 1974).

The question which you wish resolved is actually an issue in an administrative adjudication of a dispute between a private party and a government agency which might be ultimately presented to the courts. If the courts do take jurisdiction, an issue as to which we express no view, the opinion of this Office would have no binding effect on either the private party or the court. It is the long settled policy of the Department of Justice not to render opinions in this situation. See 40 Op. Atty. Gen. 286, 288 (1943); 38 Op. Atty. Gen. 1, 2 (1934).

Accordingly, the Office of Legal Counsel must decline to provide the opinion you have requested.

Following the above action by the Department of Justice, the Council again fully considered the issue raised by the agency as to the Council's authority to rule upon the "compelling need" for the subject agency regulation, in the circumstances of this case. Based upon the entire record and for the reasons fully detailed in the Council's letter to the Department of Justice as set forth hereinabove, we find that the authority of the Council, delegated by the President under section 11(a) of the Order to rule on the "compelling need" for agency regulations to bar negotiations does not infringe upon the authority of the Administrator of the agency under 38 U.S.C. 4108(a). Thus, contrary to the agency's position, the Council has authority and will proceed to determine whether a "compelling need" exists for the VA regulation asserted to bar negotiation of the union's proposal in the instant case.

Conclusion as to Question B: No "compelling need" exists, under section 11(a) of the Order and Part 2413 of the Council's rules, for the VA regulation relied on to bar negotiation of the union's proposal, which proposal would permit probationary employees to seek assistance in preparing and presenting their cases during review of their employment record before the

Professional Standards Board. Accordingly, the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{1/}

Reasons: 38 U.S.C. 4106(b) provides that appointments of physicians, dentists, and nurses to the Department of Medicine and Surgery of the VA shall be for a probationary period of three years and that the record of each person so appointed shall be reviewed from time to time by a board appointed in accordance with regulations of the Administrator.^{2/} Implementive of this statute, VA regulations provide as follows:^{3/}

c. If during review of the record there is evidence that an employee may not be fully qualified and satisfactory, he shall be so advised in writing by the reviewing board. Notification to the employee will include:

.
(3) That he is not entitled to legal or other representation during conduct of the review.

1/ This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

2/ 38 U.S.C. 4106 provides, in relevant part, as follows:

(a) Appointments of physicians, dentists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements.

(b) Such appointments as described in subsection (a) of this section shall be for a probationary period of three years and the record of each person serving under such appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Administrator, and if said board shall find him not fully qualified and satisfactory he shall be separated from the service.

3/ VA Manual, MP-5, Part II, Chapter 4, 4.c.(3). To like effect, see DM&S Supplement, MP-5, Part II, Chapter 4, 4.06.b.(4).

The agency contends that a compelling need exists for this provision to bar negotiation under section 2413.2(a) and (b) of the Council's rules^{4/} (5 CFR 2413.2(a) and (b)) because it is essential to the accomplishment of the mission, and to the management, of the agency.^{5/}

In particular, the agency argues that its procedure established under agency regulations for reviewing the performance of medical personnel, serving in probationary status, to determine whether those personnel are qualified to be retained or should be dismissed, is a nonadversary method of review which is an essential management tool in the agency's hiring process and which is essential to the accomplishment of the mission of the agency. The agency further argues that the union's proposal, in effect, would change the "fundamental nature" of the proceedings before Professional Standards Boards by giving rise to misconceptions that a proceeding before the Board is an adversary appeal process.^{6/}

4/ Section 2413.2 of the Council's rules and regulations provides, in relevant part, as follows:

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

(a) The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or the primary national subdivision;

(b) The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision.

5/ The agency also asserts that the review authority of the Council in this case is no greater than that available to a court reviewing the validity of legislative regulations and that, therefore, the proper standard of review is the "reasonableness" of the challenged regulations and not "compelling need." We do not agree with the agency's contention. As the Council has recently held, the scope of Council review of agency regulations asserted as a bar to negotiations under section 11(a) of the Order does not extend to questions regarding the "validity" of those regulations. Cf. National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (May 18, 1977), Report No. 125 at 2 of the Council decision denying agency request for reconsideration.

6/ In this respect, the agency enumerates various aspects of the procedure which it states were designed to keep the Board process from becoming an adversary proceeding.

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In our opinion, the agency has failed to establish that the regulation asserted to bar negotiation of the union's proposal is essential, as opposed to merely helpful or desirable, to either the accomplishment of the mission, or the management, of the agency within the meaning of section 2413.2(a) and (b) of the Council's rules. More specifically, it appears that, even assuming that a probationary review procedure which is nonadversary is essential to accomplishing the mission and managing the agency, as the agency asserts, the agency has misinterpreted the impact of the union's proposal.

In the above regard, the agency, as already indicated, claims that the proposal would change the fundamental nonadversary nature of the proceedings before the Board by giving rise to the misconception that such proceedings constitute an adversary appeal process. The agency fails to establish, however, that any significant change in the nature of the proceedings in question would derive from the union's proposal merely to permit employees (whom the agency already allows to have assistance during preparation of their cases)^{7/} to choose to be represented in presenting their cases. Furthermore, permitting a probationary medical employee to have a representative would not alter in any manner the other requirements and restrictions in agency regulations (note 6, supra) designed to preserve the assertedly nonadversarial methodology which the agency finds to be essential. Moreover, neither the proposal itself nor the union's statements in the record as to its intended meaning purport to grant to such employee representative any rights different from, or in addition to, those which the probationer would have, himself or herself, if presenting the case, without representation, under the agency's regulations. Hence, it is clear that the proposal would not, alone, have the impact the agency ascribes to it of changing a nonadversarial

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. . . [T]here is no burden of proof which either the agency or the individual must meet; the Board has access to the employment records of the employee; the Board is charged with considering all aspects of the employee's service. Interviews with the employee, supervisors, or others are conducted in an informal manner; the interviews are held in privacy with the employee not present while others are being questioned; cross-examination is barred. Oaths are neither required nor administered; neither is a verbatim record made in most circumstances.

^{7/} Department of Medicine and Surgery regulations permit probationary medical personnel to obtain assistance from within VA in the preparation of their cases for presentation to the Board. (DM&S Supplement, MP-5, Part II, Chapter 4, 4.06.b.(4)).

procedure into one which is adversarial; or of changing the fundamental nature of the proceedings before the Professional Standards Board in any manner.^{8/}

In conclusion, the agency's position, in effect, that legal or other type of representation on behalf of a probationary medical employee in the presentation of such employee's case during the probationary review process would prevent the Professional Standards Board from operating in a nonadversary manner, is unsupported in the record. Likewise, there is no showing by the agency that such representation would delay the agency's separating unqualified or otherwise unsatisfactory probationary medical personnel, or would in any other manner hinder or render ineffectual the agency's designated processes in connection with the probationary period of the employees involved.

In reaching this conclusion, we emphasize that the proceedings here involved differ significantly from the review of probationers, generally, in the Federal service. Here, the relevant statute and implementing regulations of the agency provide that the probationary period extends for a period of not 1 but 3 years. Further, the statute and regulations establish a substantive review of the probationer's qualifications, and inquiry as to whether the probationer is in all respects a satisfactory employee, not just by the immediate supervisory or managerial personnel of the agency, but by a review board specially designated for that purpose. Finally, such review proceedings are conducted prior to any decision to separate the probationer and, as already mentioned, no delay in the completion of the board's review process would result from the subject proposal. In these unique circumstances, where the review process is already mandated by law, it would not appear that permitting the probationer to be represented during the conduct of the statutory review proceeding, as proposed by the union, would interfere with the agency's accomplishment of its mission or the management of its operations.

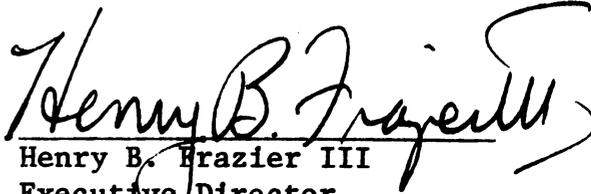
Based on the foregoing, we find that the agency has failed to establish that VA Manual, MP-5, Part II, Chapter 4, 4.c.(3), as related to the union's proposal, is essential, as opposed to helpful or desirable, to

^{8/} Moreover, even assuming that the proposal would have such an impact, and may to that extent change the fundamental nature of the procedures of the Board, there is no showing of a critical linkage between the introduction of such an "adversarial element" and the accomplishment of the mission, or the management, of the agency. See National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 18 of Council decision.

the accomplishment of the mission, or to the management, of the agency within the meaning of section 2413.2(a) and (b) of the Council's rules.^{9/}

Accordingly, the agency determination of nonnegotiability must be set aside.

By the Council.


Henry B. Brazier III
Executive Director

Issued: February 28, 1978

9/ Cf. NFFE Local 1332 and U.S. Army Materiel Command Headquarters, FLRC No. 76A-29 (June 7, 1977), Report No. 128, at 8 of Council decision.

American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania. The Council previously held that one of the provisions involved in this dispute (concerning overtime), while not excepted from the agency's obligation to bargain under section 11(b) of the Order and not violative of section 12(b), conflicts with a published agency regulation as interpreted by the agency, and found that the "compelling need" provisions of section 11(a) of the amended Order were therefore applicable in the case. However, since the agency had failed to address the issue of the "compelling need" for the subject regulation asserted as a bar to negotiation of the disputed provision, and since the record was consequently inadequate upon which to base a finding on that question, the Council held in abeyance its decision as to the "compelling need" issue (and, hence, its decision as to the negotiability of the disputed provision) pending the agency's submission of its statement of position on the issue and the union's response thereto (Report No. 137). The parties thereafter filed such submissions with the Council.

Council action (February 28, 1978). The Council, for the reasons fully set forth in its supplemental decision, concluded that a "compelling need" exists within the meaning of section 11(a) of the Order and section 2413.2(a) of the Council's rules for the subject agency regulation to bar negotiations on the disputed provision. Accordingly, the Council held that the agency's determination as to the nonnegotiability of the provision was proper and, pursuant to section 2411.28 of the Council's rules, sustained that determination.

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

American Federation of Government
Employees, Local 1862

(Union)

and

FLRC No. 76A-128

Veterans Administration Hospital,
Altoona, Pennsylvania

(Activity)

SUPPLEMENTAL DECISION ON NEGOTIABILITY ISSUE^{1/}

Provision

Article XXI. Over-time

(Excludes title 38 Physicians and Dentists)

Section 1. The parties agree that it is the intent of this article that overtime shall be equitably distributed among interested employees (by job categories) on a calendar year basis, insofar as possible. In those services where over-time may be required the over-time rosters will be maintained in the Service Chief's office, in the following manner:

- a. Rosters will be maintained by job categories and service computation dates.

^{1/} On August 31, 1977, the Council issued its decision in the instant case (American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania, FLRC No. 76A-128 (Aug. 31, 1977), Report No. 137) holding, among other things, that the provision here in dispute does not violate section 12(b) of the Order and is not excepted from the agency's obligation to bargain under section 11(b) of the Order. The Council also found that the provision violated published agency policies and regulations, as interpreted by the agency, but that the agency had failed to address the issue, raised by the union, of the "compelling need" for the agency regulations asserted as a bar to negotiation of the provision. Consequently, since the record was insufficient upon which to predicate a

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b. Those employees desiring to be included on the voluntary over-time roster will notify the Service Chief in writing.

c. When it is determined that over-time will be required, the official assigning the over-time will begin by contacting the most senior (SCD) employees on the voluntary list, and will continue this procedure in descending order (SCD), until the over-time is assigned.

d. In the event the voluntary procedure does not satisfy the over-time requirements, the official will then assign the over-time to the remaining non-volunteer employees beginning with the least senior (SCD) and continue in ascending order until the over-time requirement is satisfied.

e. For purposes of this article, when an employee on the voluntary list is given the opportunity to work over-time and does not wish to do so, he will be considered to have worked the over-time for "equitable distribution purposes."

Section 2. Over-time rosters will be made available to Union representatives upon request, in the Service Chief's office, for review.

Section 3. When assigning non-voluntary over-time, management will upon request, relieve an employee from an over-time assignment if his reason is an emergency, and there is another qualified employee available for that over-time assignment.

Section 4. The provisions of the Fair Labor Standards Act of 1974 or such future laws, will be adhered to regarding over-time assignments.

Section 5. When it is known in advance that there will be an over-time requirement, employees assigned over-time work will be given as much advance notice of such assignments as possible. The Supervisor shall make a reasonable effort to provide a minimum of 4 hours of work to an employee who is requested to perform work on an over-time basis on a non-scheduled work day.

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finding as to "compelling need," the Council held in abeyance its decision as to "compelling need" (and, hence, as to the negotiability of the provision) pending the agency's submission of its statement of position and the union's response on this question. The agency filed a statement of position raising a threshold issue as to the authority of the Council to determine the "compelling need" for VA regulations and asserting that, in any event, a "compelling need" exists for the regulation to bar negotiation of the union provision; and the union filed a response thereto.

Agency Determination

The agency takes the position that a "compelling need" exists for its regulation,^{2/} issued pursuant to 38 U.S.C. § 4108(a),^{3/} to bar negotiation of the provision here at issue under Part 2413 of the Council's rules.^{4/}

2/ Department of Medicine and Surgery (DM&S) Supplement to Veterans Administration Manual MP-5, Part II, Chapter 7 (published pursuant to 38 U.S.C. § 4108) provides, in pertinent part:

Para. 7.04. The proper care and treatment of patients shall be the primary consideration in scheduling hours of duty and granting of leave under these instructions.

.

Para. 7.04.(b). Because of the continuous nature of the services rendered at hospitals, the Hospital Director, or the person acting for him (in no case less than a chief of service), has the authority to prescribe any tour of duty to insure adequate professional care and treatment to the patient [Emphasis in original.]

Para. 7.04.(c). In the exercise of the authority to prescribe tours of duty, it will be the policy (1) to prescribe individual hours of duty as far in advance as is possible, (2) to schedule the administrative nonduty days or the days off of each workweek on consecutive days, where possible, . . . and (4) to give each full-time employee every possible consideration in arranging schedules so long as such consideration is compatible with the professional obligation to the patients.

3/ 38 U.S.C. § 4108(a) provides, in relevant part, as follows:

Section 4108. Personnel administration.

(a) Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, and nurses, . . . appointed to the Department of Medicine and Surgery

4/ The agency also contends that the Council is without authority to determine the "compelling need" for Veterans Administration (VA) regulations issued pursuant to 38 U.S.C. § 4108(a). For the reasons stated in American Federation of Government Employees, Local 1739 and Veterans Administration Hospital, Salem, Virginia, FLRC No. 76A-88 (Feb. 28, 1978), Report No. 144, we reject this agency contention.

Question Here Before the Council

Whether a "compelling need" exists, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules, for the VA regulation asserted as a bar to negotiation of the provision here at issue.

Opinion

Conclusion: A "compelling need" exists within the meaning of section 11(a) of the Order and section 2413.2(a) of the Council's rules for the agency regulation to bar negotiations on the disputed provision. Accordingly, the agency determination that the disputed provision is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The VA contends that the regulation in question^{5/} satisfies the criterion set forth in section 2413.2(a) of the Council's rules and regulations^{6/} in that the regulation is "essential . . . to the accomplishment of the mission of the agency." For the reasons set forth below, we find merit in the contention.

It is not controverted in the record before us that the mission of the Department of Medicine and Surgery of the VA is to strive to provide the best available medical care for veterans. Thus, the functions of the Department of Medicine and Surgery include "those necessary for a complete medical and hospital service . . . for the medical care and treatment of veterans."^{7/} Moreover, it is clear that the regulation in question, establishing "proper

^{5/} See supra, n. 2.

^{6/} Section 2413.2 of the Council's rules and regulations provides, in relevant part, as follows:

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

(a) The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or the primary national subdivision.

^{7/} 38 U.S.C. § 4101(a) provides as follows:

There shall be in the Veterans Administration a Department of Medicine and Surgery under a Chief Medical Director. The functions of the Department of Medicine and Surgery shall be those necessary for a complete medical and hospital service, including medical research, as prescribed by the Administrator pursuant to this chapter and other statutory authority, for the medical care and treatment of veterans.

care and treatment of patients" as the primary consideration pertaining to the assignment of nurses' tours of duty, is directly related to the accomplishment of that mission.^{8/} Thus, the issue upon which our decision with respect to the challenged regulation must turn is whether such regulation as applied to the disputed provision, which would establish seniority as the primary consideration for the assignment of nurses to overtime, is essential, as opposed to merely helpful or desirable, to the accomplishment of the agency's mission.^{9/}

The regulation in question, as interpreted by the agency,^{10/} reserves the discretion of hospital management to take into account the medical care needs of the patients and the professional skills of the nurses involved, when assigning individual nurses to tours of duty. The disputed contract provision, in contrast, would negate such discretion and require nurses to be assigned to tours of overtime duty solely on the basis of seniority within "job categories," i.e., classifications, including nurse specializations,^{11/} and grade levels.^{12/} In other words, the provision would preclude management from exercising discretion as to which employees, in this case, nurses, it would assign to a particular overtime tour of duty in the very special circumstances of a hospital situation.

There may be some overtime assignments in a hospital situation in which the qualifications of the nurse within a particular "job category" who is to be assigned to a tour of overtime duty would not be critical to the quality of the medical care being delivered. If the disputed provision concerned only

8/ Cf. National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith)(Jan. 19, 1977), Report No. 120 at 13 of Council decision (agency conceded absence of functional relationship between day-to-day work and requirement of challenged regulation.)

9/ Id. at 11-12 of Council decision.

10/ Section 11(c)(3) of the Order provides as follows:

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final.

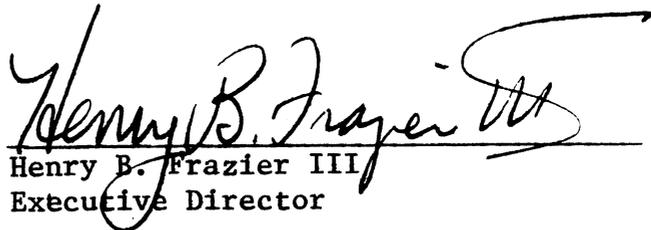
11/ For a discussion of nurse specializations see Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), 2 FLRC 164 [FLRC No. 73A-42 (July 31, 1974), Report No. 55].

12/ See American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania, FLRC No. 76A-128 (Aug. 31, 1977), Report No. 137, at 6 of Council decision; Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 5 of Council decision.

the selection of nurses for such routine assignments on the basis of seniority, the regulation in question would not be essential to the ability of the agency to accomplish its mission of striving to provide the best quality of medical care to patients. However, the more likely situation in a hospital, wherein more serious or unusual circumstances will arise, is that the various factors personal to the particular employees (in this case, nurses) assigned, such as specialized experience, demonstrated skill, judgment or alertness, will be absolutely crucial to and determinative of the quality of medical care provided. It follows that the discretion to take account of such qualitative factors when assigning individual nurses to overtime in such serious or unusual circumstances is essential to maintaining management's ability to provide the best available medical care to patients. However, as already indicated, the disputed provision would negate such discretion and require nurses to be assigned to tours of overtime duty solely on the basis of seniority within "job categories." Hence, we must conclude that the regulation reserving such discretion to hospital management is essential to the accomplishment of the mission of the agency within the meaning of section 2413.2(a) of the Council's rules.

For the foregoing reasons, we find that a "compelling need" exists within the meaning of section 2413.2(a) of the Council's rules for the agency regulation to bar negotiation of the particular provision disputed herein which applies to all assignments of nurses to overtime without regard for the circumstances in which the overtime duties would be taking place. Accordingly, we find that the provision is nonnegotiable under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: February 28, 1978

Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools. The dispute involved the negotiability under the Order of various union proposals as follows: Proposals I, II and III, procedures for implementation of statutory formulas for compensation for teachers in the agency's overseas schools; proposal IV, the number of workdays in the school year, observance of a "Host Nation Day" by both students and teachers, and the amount of time to be provided to teachers, as well as when it will be provided, to perform certain assigned duties; proposal V, school entrance age; proposal VI, tours of duty; proposal VII, school activity funds; proposal VIII, ratios of students to teachers, and classroom space for children; proposal IX, seniority in reassignment of teachers; proposal X, substitute teachers; proposal XI, staffing procedures; proposal XII, employment of new teachers; and proposal XIII, assignments of duties to teachers.

Council action (February 28, 1978). As to proposals I, II and III, the Council held, contrary to the agency's position, that the Overseas Teachers Pay and Personnel Practices Act, as amended, does not prevent negotiation on the union's proposals. With regard to proposal IV, the Council held that the portion concerning the number of workdays in the school year conflicted with section 12(b)(5) of the Order; that the portion concerning observance of a "Host Nation Day," as it applied to students, was outside the scope of bargaining under section 11(a) of the Order, and, as it applied to teachers, was excepted from the agency's obligation to bargain by section 11(b) of the Order; and that portion of the proposal concerning the amount of time to be provided to teachers, as well as when it would be provided, to perform certain assigned duties was also excepted by section 11(b) of the Order from the agency's obligation to bargain. As to V, the Council held that the union's proposal would so restrict as to negate management's reserved right under section 12(b)(5) of the Order to determine the methods by which it will conduct its school operations. With respect to VI, the Council held, contrary to the agency's position, that the proposal did not infringe upon management's rights under sections 12(b)(2) and 12(b)(4) of the Order. As to proposal VII, that part of proposal VIII pertaining to classroom space for students, and proposal X, the Council ruled that the proposals were outside the bargaining obligation established by section 11(a) of the Order. With regard to that part of proposal VIII pertaining to ratios of students to teachers, and proposal XIII, the Council held that the proposals were excepted from the agency's obligation to bargain by section 11(b) of the Order. Finally, as to IX, XI and XII, the Council concluded that the proposals conflicted with section 12(b)(2) of the Order. Accordingly, for the reasons fully detailed in its decision, and pursuant to section 2411.28 of its rules and regulations, the Council set aside the agency's determinations as to the nonnegotiability of the proposals numbered I, II, III and VI above; and sustained the determinations as to the remaining proposals.

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

Overseas Education Association, Inc.

and

FLRC No. 76A-142

Department of Defense, Office of
Dependents Schools

DECISION ON NEGOTIABILITY ISSUES

Union Proposals I - III^{1/}

- I. Salary Schedules. In order to pay teachers according [to] Public Law 86-91, Management agrees to accept the rates of compensation from 60% of the schools cited in 20 USC 903 as soon as it is available. The 60% must, however, be geographically distributed to ensure reliability and validity.
- II. Salary Schedules (Extra Pay Lanes). Extra pay lanes shall be provided on the salary schedule for any category justified by the results of the wage survey conducted under P.L. 86-91, as amended. The statistics for subcategories shall be added together when appropriate. For example, in considering whether a BA plus 30 pay lane should be established, schools offering pay lanes of less than a BA plus 30 (e.g., BA plus 12, BA plus 15, etc.) shall be added to schools offering a BA plus 30 pay lane. [First sentence not in dispute.]
- III. Compensation for Summer School Teachers. Members of the unit who are teaching in summer school shall be paid on the basis of their daily rate of compensation for the previous school year.

Agency Determination

The agency determined the proposals to be nonnegotiable on the ground that such matters are not subject to negotiation under the Overseas Teachers Pay and Personnel Practices Act, as amended [referenced as P.L. 86-91 in the union's proposals].^{2/}

Question Here Before the Council

The question is whether the Overseas Teachers Pay and Personnel Practices Act, as amended, precludes negotiation on the subject proposals.

^{1/} For convenience of decision, these three proposals which involve essentially the same issues and contentions are discussed together.

^{2/} Department of Defense Overseas Teachers Pay and Personnel Practices Act of 1959, as amended, 20 U.S.C. § 901, et seq. (1970).

Opinion

Conclusion: The Overseas Teachers Pay and Personnel Practices Act, as amended, does not prevent negotiation on the proposals here involved. Therefore, the agency head's determination that the union proposals are nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations is hereby set aside.^{3/}

Reasons: The parties agree that the Overseas Teachers Pay and Personnel Practices Act, as amended, is controlling. The purpose of that Act, insofar as its provisions^{4/} are related to the issues here involved, is "that

^{3/} This decision should not be construed as expressing or implying any opinion of the Council as to either the merits of the union proposals or the consistency of the specific methodology in the proposals with the compensation requirements of the Act. We decide only that, as submitted by the union and based on the record before the Council, such proposals seeking to establish the manner of implementing the Act are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{4/} 20 U.S.C. § 902(a)(2) (1970) provides in pertinent part:

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern--

.

(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population[.]

20 U.S.C. § 903(a) and (c) (1970) provides in pertinent part:

(a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 902 of this title.

.

(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.

basic compensation for ODS teachers is to be calculated on a parity with basic compensation for teachers in the United States."^{5/} Their dispute concerns whether these proposals containing mechanisms intended by the union to implement the Act are negotiable. The agency claims that the proposals in question are nonnegotiable in substance because the Act preempts negotiations or otherwise renders the proposals nonnegotiable under the Order, insofar as teacher compensation matters are concerned. We find the agency's position to be without merit.

As to the assertion by the agency that the Overseas Teachers Pay and Personnel Practices Act, as amended, preempts from negotiation all matters concerning compensation for teachers in its overseas schools, the agency offers no support for this contention. Further, we find nothing in the language of the statute or in the statute's legislative history^{6/} either expressly precluding, or indicating any legislative intent to preclude, negotiations on procedures to be followed in carrying out the provisions of the Act relating to compensation, as here sought by the union.

With respect to the agency's further claim that particular provisions of the Act render the union's proposals nonnegotiable, we find this contention also to be unsupported. The language of the Act relied upon by the agency provides in substance that basic compensation for teachers and teaching positions in the Defense Department's overseas schools shall be fixed "at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population." However, there is no indication in the record that the rates which would derive from the mechanisms proposed by the union would fail properly to equal such "average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."

More specifically as to the union's first proposal on salary schedules, the language of the statute, in our opinion, does not expressly or impliedly require "that all [100%] qualifying school districts will be

^{5/} March v. United States, 506 F.2d 1306, 1313 (D.C. Cir. 1974).

^{6/} S. Rep. No. 2032, 85th Cong., 2d Sess. (1958); Salaries for Teachers and School Officers Overseas: Hearing on H.R. 12225 Before the House Comm. on Post Office and Civil Service, 85th Cong., 2d Sess., (1958); S. Rep. No. 141, 86th Cong., 1st Sess. (1959); Overseas Dependents Schools: Hearing on H.R. 1871 and related bills before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 357, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 519, 89th Cong., 1st Sess. (1965); S. Rep. No. 951, 89th Cong., 2d Sess. (1966); Conf. Rep. No. 1347, 89th Cong., 2d Sess. (1966); Overseas Teachers Pay: Hearing on H.R. 6845 before the Subcomm. on Compensation of the House Comm. on Post Office and Civil Service, 89th Cong., 1st Sess. (1965).

polled and considered," in determining the average of the range of rates of basic compensation to serve as the measure of comparability, as claimed by the agency. Rather, in our view, the statutory language and intent (calling for the computation of an average of the range of rates for a group of similar positions in a specified category of school jurisdictions) allows the use of a statistically valid sample of the designated "universe" of target school jurisdictions as a data source for determining the rate of basic compensation for the agency's overseas teachers; and the agency has failed to show that the 60 percent sample envisioned by the union proposal is not such a statistically valid sample.

Moreover, with regard to the "extra pay lanes" proposal (the propriety of which extra pay lanes, themselves, under the statute is conceded by the agency), the dispute similarly concerns in effect the weight to be accorded certain data in determining the average of the range of rates to serve as the measure of comparability under the statute. Again, the agency provides no persuasive argument that either the language of the statute or its purpose as reflected in its legislative history precludes negotiations on such a mechanism for effectuating the standard of comparability required by the Act.

Finally, as to the proposal regarding summer school compensation, the agency contends that it is nonnegotiable because the statute makes no distinction between summer school and other teachers; and, therefore, that their salaries must be similarly determined in accordance with the requirements of the statute. However, the agency has failed to establish that the mechanism for fixing the compensation of summer school teachers proposed by the union would necessarily result in pay levels inconsistent with the comparability standard in the statute. In other words, even assuming the identity of summer school and other teachers for compensation purposes, there is no showing by the agency that the proposed method of basing summer school wages on rates paid teachers during the previous school year would not provide a result which conforms to the average range of rates, required to be determinative under the Act.

In summary, the agency has failed to support its contention that these three proposals are rendered nonnegotiable under the provisions of the Overseas Teachers Pay and Personnel Practices Act, as amended.^{7/} Accordingly, we find the three union proposals concerning compensation for teachers in the agency's overseas schools to be negotiable to the extent that they implement the formula set out in 20 U.S.C. §§ 902,903.

^{7/} While not a controlling consideration herein, it appears that to the extent that the proposals would expedite the process of computation and thereby the payment of the correct rate of compensation to the teachers, the proposals would tend to effectuate the intent of the Act to provide "temporal as well as monetary equality." (See March v. United States, supra n. 5, at 1315-16.)

Union Proposal IV

School Calendar

Section 1. The school year for teachers shall be not more than 185 workdays.

Section 2. The calendar(s) for each of the three regions shall include but not be limited to the following:

A. A Host Nation Day during the school year in order that students and teachers may participate in a Host Nation Holiday or celebration.

B. One full day at the end of each semester, for the purposes of recordkeeping.

C. One half day for recordkeeping at the end of each marking period other than the semester.

Agency Determination

The agency determined the various parts of the proposal to be nonnegotiable under section 12(b)(5), and outside the obligation to bargain under sections 11(b) and 11(a) of the Order.

Questions Here Before the Council

The questions are whether Section 1 of the proposal conflicts with section 12(b)(5) of the Order; whether Section 2A of the proposal is outside the agency's obligation to bargain under section 11(a) of the Order; and whether Section 2B and Section 2C are excepted from the obligation to bargain by section 11(b) of the Order.

Conclusion: Section 1 of the proposal conflicts with management's right to determine the methods by which it will conduct agency operations under section 12(b)(5) of the Order. Section 2A of the proposal as it applies to students does not relate to personnel policies and practices or matters affecting unit working conditions and is outside the scope of bargaining under section 11(a) of the Order. As it applies to teachers, it concerns matters with respect to job content and is excepted from the obligation to bargain by section 11(b) of the Order. Section 2B and Section 2C of the proposal concern matters with respect to job content and are excepted from the agency's obligation to bargain by section 11(b) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is hereby sustained.

Reasons: Section 1 of the proposal, which would limit the number of workdays in the school year, conflicts with rights reserved to management

under section 12(b) of the Order. Section 12(b), as here dispositive, reserves to management officials the right to determine the methods by which agency operations will be conducted.^{8/}

The term "method" as used in section 12(b) of the Order means "a way, technique, or process of or for doing something . . . the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted--in short, how operations are to be conducted."^{9/}

Section 1 of the union's proposal, by establishing an absolute maximum number of working days in the school year for teachers, would perforce limit the number of days that could be scheduled for instruction and other instruction-related activity for students in the agency's overseas dependents schools. In other words, the effective length of the school year as already indicated and, therefore, the amount of instruction and other educational activities for students would be circumscribed by the proposed limitation on the number of working days for teachers. It would, in effect, put a ceiling on the number of instructional days in the school year. The amount of instruction and other types of educational activity to be provided to students, i.e., the number of instructional days in a school year, is a necessary component of the agency's determination of "how" it will conduct its operation of providing an educational system for the dependent children of military and civilian personnel of the agency. Section 1 of this proposal, by, in effect, limiting the number of days that could be scheduled for such instructional activities, would improperly restrict management's discretion in deciding and establishing the number of such days in the school year. Section 1 thereby interferes with management's reserved authority under section 12(b)(5) of the Order to determine the methods by which the agency's overseas dependents school operations are to be conducted^{10/} and is nonnegotiable.

8/ Section 12(b)(5) of the Order provides:

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

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

(5) to determine the methods . . . by which [Government] operations are to be conducted

9/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 436 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

10/ Cf. National Council of B.I.A. Educators, National Education Association and Department of the Interior, Bureau of Indian Affairs, Navajo

(Continued)

Section 2A of the proposal provides that the observance of a "Host Nation Day" by both students and teachers will be included in the school calendar. Insofar as observing a Host Nation Day is intended to benefit students by allowing them to participate in a local holiday or celebration and to thereby encourage them to increase their knowledge of the customs and traditions of the host country, the proposal is not within the scope of bargaining under section 11(a) of the Order.^{11/} That is, the significance of the proposal would be to preclude management from deciding whether or not to provide students with a particular educational experience, rather than relating to personnel policies and practices and matters affecting working conditions of the teachers in the bargaining unit, within the meaning of section 11(a).^{12/} To the extent that the proposal would require the agency to set aside a certain period of time during the school year for teachers to observe a Host Nation Day, it would of necessity negate management's discretion under section 11(b) to assign other duties to be performed during these periods. Accordingly, the agency is not obligated under the Order to bargain on Section 2A.

Section 2B and C are concerned with the amount of time which will be provided to teachers, as well as when it will be provided, to perform certain assigned duties. In this regard, section 11(b) of the Order^{13/}

(Continued)

Area Office, FLRC No. 77A-9 (Aug. 31, 1977), Report No. 137, at 3-4. (Proposal mandating specific methods of student discipline is violative of section 12(b)(5) of the Order.)

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

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order. . . .

12/ See AFGE, Local 1738 and VA Hospital, Salisbury, North Carolina, FLRC No. 75A-103 (July 28, 1976), Report No. 107; Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100; and National Treasury Employees Union, Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98.

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

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

excepts from the obligation to bargain determinations of job content, i.e., the assignment of duties to particular positions or employees.^{14/} Section 2B and C of the instant proposal, however, would require the agency to set aside certain periods of time (one full day at the end of each semester and one-half day at the end of other marking periods) which would be reserved for the performance of certain duties, namely, recordkeeping duties. Hence, these sections would, in effect, negate management's discretion to assign teachers other duties to be performed during those periods of time. Accordingly, we find Section 2B and C of the proposal to be excepted from the bargaining obligation under section 11(b) of the Order.

Union Proposal V

School Entrance Age. To ensure that the work load of kindergarten and first grade teachers is not unduly multiplied and that their working conditions are not allowed to deteriorate unnecessarily by the introduction of unusually immature children, Management agrees that students entering school must have had their fifth birthday by September 1 of the year in which they enter unless they have not had kindergarten experience, in which case, they must have had their sixth birthday by September 1 of the year in which they enter the first grade.

Agency Determination

The agency determined the proposal to be nonnegotiable on the ground that it conflicts with section 11(b) of the Order.

Question Here Before the Council

The question is whether, under the facts and circumstances of this case, the proposal is nonnegotiable under the Order.

Opinion

Conclusion: The proposal conflicts with management's right to determine the methods by which agency operations will be conducted under section 12(b)(5) of the Order. Therefore, the agency determination that the

^{14/} International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, New York, 1 FLRC 323, 328-32 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36]. In its appeal, the union also adverted to the fact that the proposal in question had been contained in prior agreements with the agency. However, as the Council has repeatedly held, such circumstance is without controlling significance. See, e.g., International Association of Machinists and Aerospace Workers and U.S. Kirk Army Hospital, Aberdeen, Md., 1 FLRC 65, 68 [FLRC No. 70A-11 (Mar. 9, 1971), Report No. 5].

proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{15/}

Reasons: Section 12(b)(5) of the Order reserves to agency management the right to determine the "methods" by which Government operations are to be conducted. As noted with respect to Proposal IV (at 5-6, supra), the term "method" as used in section 12(b) of the Order means "a way, technique, or process of or for doing something . . . the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted--in short, how operations are to be conducted." The disputed Proposal V, however, would interfere with management's reserved authority to determine "how" it will conduct its operations relating to providing an educational system for dependent children of agency personnel. This proposal would establish the minimum age at which children could enter school in the agency's overseas dependents school program. The entry age for school pupils is clearly a basic, integral component of the overall policy or plan of the educational system. The determination of the age which a child must have attained in order to enter school is a definitive factor in decisions on other important aspects of the educational program, such as curriculum and staff resources. It follows that deciding minimum age requirements for school entrance is a critical component of the agency's comprehensive determination of how to conduct its operations in providing and managing a system of schools for the dependent children of its overseas personnel. Consequently, this proposal mandating the minimum age requirements for children entering school in our opinion would so restrict as to negate management's reserved authority to determine the methods by which it will conduct its school operations. Accordingly, we find the union's proposal nonnegotiable.

Union Proposal VI

Tour of Duty

Section 1. The tour of duty (meaning the length of time a teacher must serve overseas before entitlement to round trip transportation to the United States and shipment of household goods in accordance with JTR, Vol. II) for members of the unit who have transportation agreements shall be either one (1) year or two (2) years.

Section 2. The tour of duty for the following locations shall be one (1) school year:

Antigua
Azores
Bahamas
Bahrain

^{15/} In view of our decision herein, we find it unnecessary to consider the agency's contention that the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Crete
Cuba
Iceland
Japan (all)
Korea (all)
Newfoundland
Midway Island
Okinawa
Philippines
Taiwan
Turkey (all)

The tour of duty for all other locations shall be two (2) years.

Agency Determination

The agency determined the proposal to be nonnegotiable under section 12(b)(2) and (4) of the Order and excepted from the obligation to bargain under section 11(b) of the Order.

Question Here Before the Council

The question is whether, under the facts and circumstances of this case, the proposal is nonnegotiable under section 12(b) of the Order.^{16/}

Opinion

Conclusion: The proposal does not infringe upon management's rights under section 12(b) of the Order. Thus, the agency head's determination that the union's proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby set aside.^{17/}

Reasons: The agency asserts that the proposal violates agency rights "to hire . . . employees in positions within the agency," under section 12(b)(2), and "to maintain the efficiency" of its operations under

^{16/} The agency's contention under section 11(b) that the proposal is integrally related to and determinative of its staffing patterns and therefore is excepted from its obligation to bargain is clearly without merit. The proposal is in no manner concerned with the assignment of employees or positions to an organizational unit, work project or tour of duty within the meaning of section 11(b), and, therefore, section 11(b) of the Order is inapplicable. Rather, "tour of duty" as used in this proposal relates solely to a determination of eligibility for certain transportation benefits.

^{17/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

section 12(b)(4) of the Order. These contentions are without merit. The proposal at issue is concerned solely with the length of time a teacher, who has a transportation agreement with the agency, must serve the agency overseas in order to be eligible for certain transportation benefits which the agency is authorized to pay in accordance with applicable laws and regulations. Specifically, the proposal lists locations which would require a tour of duty of one year's duration and establishes that all other duty locations in the agency's overseas school system would require two years of service before the employee could receive the benefits involved.^{18/} Hence, the proposal is unrelated to the agency's action in hiring employees within the meaning of section 12(b)(2) of the Order. Thus, contrary to the agency's position, the proposal would not constrict the agency's right under section 12(b)(2) of the Order to hire employees to teaching positions at its overseas schools.

Furthermore, the agency's claim that the proposal violates management's right to maintain the efficiency of its operations under section 12(b)(4) (because it would increase the number of one-year tour-of-duty locations and, hence, transportation costs to the agency), is not supported by any substantial demonstration that increased costs "are inescapable and significant and are not offset by compensating benefits," such as improved morale, referred to by the union.^{19/} Hence, the agency has failed to establish that the proposal would violate section 12(b)(4) of the Order.^{20/} Accordingly, we find the proposal negotiable.

Union Proposal VII

School Activity Funds

Section 1. For the purposes of this Article, Activity Fund and School Fund money is that money which is normally raised or donated

^{18/} Thus, the proposal plainly is not concerned with negotiating the terms or scope of the transportation benefits themselves, since, as expressly stated in the proposal, these are established in the "JTR" (Joint Travel Regulations). Rather, it is concerned merely with the length of service in a particular overseas location needed for an employee to become eligible to receive such benefits as are established and which the agency is authorized to grant.

^{19/} In this regard, the agency acknowledges that most of the locations named in the union's proposal as one-year duty stations are presently so designated by the agency. (Antigua, the Azores, Bahrain, Crete, Cuba, Iceland, Newfoundland, Midway Island, Okinawa, Taiwan, and parts of the Bahamas, Japan, Korea, and Turkey; only the Philippines would be added in toto to the list.)

^{20/} Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219, 223-25 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

by teachers, students and/or community groups for either specific or general use by the school and does not include appropriated funds.

Section 2. Money raised or donated for a particular approved class or activity project shall be kept in a separate Activity Fund and shall be used for the purpose for which the funds were raised.

Section 3. Money raised or donated for general school use shall be kept in a School Fund. Allocation and day-to-day administration of the money in the School Fund shall be the responsibility of the Principal.

Section 4. The Principal shall establish a School Fund Council to advise him/her in the expenditure of monies from this Fund. Teacher members of the Council shall be elected from the Association membership. It is recognized that parent and student participation on such a Fund Council is desirable. Such representation shall be a subject for deliberations between the Association Faculty Representative Spokesperson and the Principal.

Section 5. The frequency of reports of income and expenditures from this Fund shall also be a subject for deliberations.

Agency Determination

The agency determined principally that the proposal is outside the scope of its bargaining obligation under section 11(a) of the Order.

Question Here Before the Council

The question is whether the proposal is outside the agency's obligation to bargain under section 11(a) of the Order.^{21/}

Opinion

Conclusion: The proposal is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby sustained.

Reasons: Section 11(a) of the Order establishes, within specified limits not here in issue, an obligation to bargain concerning personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions.^{22/} The proposal here at issue is expressly

^{21/} In view of our decision herein it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

^{22/} See p. 7 supra.

concerned with the control and management of nonappropriated funds for general or specific use by the schools involved. According to the terms of the proposal itself and the record before us, such funds are generated locally by the efforts of those with an interest in the particular school, e.g., students, parents and teachers, in order to support extracurricular activities, such as athletics, and other school projects. The primary beneficiaries of such funds are the students in the schools. Thus, the proposal is not concerned with personnel policies or practices or matters affecting working conditions of members of the bargaining unit within the meaning of section 11(a) of the Order, but, rather, with funds that are used primarily to benefit persons other than employees in the bargaining unit. Consequently, the control and management of such funds are not matters about which the agency is obligated to bargain within the meaning of section 11(a) of the Order.^{23/}

Union Proposal VIII

Teaching Load

Section 1. Management and the Association, agreeing that large class size and/or the use of a pupil-teacher ratio to determine class size may be harmful to effective teaching and learning activities, agree to the following guidelines:

A. Except as provided in "B" below, maximum class size shall not exceed the following:

- (1) 20 for kindergarten through grade 2
- (2) 25 for grades 3 through 8
- (3) 20 for combination or split/grade classes
- (4) 8 for retarded and emotionally disturbed, sight conservation, or hearing classes
- (5) 12 for remedial classes
- (6) 20 for industrial arts, home economics classes, and science
- (7) 30 for typewriting classes
- (8) 40 for music
- (9) 40 for physical education
- (10) 25 for secondary classes not otherwise defined

B. An acceptable reason for altering the class size may be any of the following:

- (1) lack of sufficient funds for equipment or supplies.
- (2) there is no classroom space and/or personnel available to permit scheduling of any additional class or classes in order to reduce class size.

23/ See National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, Calif., FLRC No. 76A-111 (July 13, 1977), Report No. 131, and cases cited therein.

- (3) conformity to the class size guideline would result in organization of half or part-time classes.
- (4) a class larger than the above is necessary and desirable in order to provide for specialized or experimental instruction.
- (5) a class larger than the maximum is necessary for placement of pupils in a subject for which there is only one class offered.

Section 2. Class size must be controlled to assure that each child has a minimum of 28 sq. ft. of space in the classroom.

Agency Determination

The agency determined that the proposal concerns matters integrally related to the agency's staffing patterns under section 11(b) of the Order and is nonnegotiable.

Questions Here Before the Council

The questions are whether Section 1 of the proposal is outside the obligation to bargain under section 11(b) of the Order, and whether Section 2 is outside the obligation to bargain under section 11(a) of the Order.

Opinion

Conclusion: Section 1 of the union's proposal involves matters integrally related to the agency's staffing patterns and is excepted from the agency's obligation to bargain by section 11(b) of the Order. Section 2 of the proposal concerns a matter outside the scope of bargaining established in section 11(a) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{24/}

Reasons: Section 11(b) of the Order excepts from the agency's obligation to bargain, among other things, matters concerning the agency's staffing patterns, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.

Section 1 of the instant proposal clearly is concerned with the agency's staffing patterns in its overseas schools, since establishing specific maximum ratios of pupils to teachers would be determinative of the numbers of classroom teachers which the agency would be required to assign to positions within the agency. Accordingly, we find that the union

^{24/} In view of our decision herein, it is unnecessary to consider the remaining contention of the agency that Section 2 of the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.

proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.^{25/}

As to Section 2 of the proposal, it falls outside the scope of bargaining set out in section 11(a) of the Order. As noted with respect to Proposal IV (at 7 , supra), the bargaining obligation under section 11(a) of the Order extends to personnel policies and practices and matters affecting working conditions of the bargaining unit. Section 2 of the proposal, by its express terms, is concerned with the amount of space provided for and to be used by the students in the agency's overseas schools. Therefore, this section of the proposal does not involve personnel policies or practices affecting the bargaining unit or matters affecting bargaining unit working conditions within the meaning of section 11(a). Accordingly, Section 2 of the union's proposal is outside the required scope of bargaining under section 11(a) of the Order.^{26/}

Union Proposal IX

Article 50, Section 3 [Seniority for Reassignments]

When an involuntary reassignment must be made and more than one teacher within the same school is qualified for such assignment, then the teacher with the least amount of service in the DODDS system shall be involuntarily reassigned. Management may make exceptions to this rule under compelling circumstances.

Agency Determination

The agency determined the proposal is nonnegotiable under section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether the proposal conflicts with management's reserved rights under section 12(b)(2) of the Order.^{27/}

25/ National Council of B.I.A. Educators, National Education Association and Department of the Interior, Bureau of Indian Affairs, Navajo Area Office, FLRC No. 77A-9 (Aug. 31, 1977), Report No. 137, at 1-2 and cases cited therein.

26/ See National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98.

27/ In view of our decision herein, it is unnecessary to consider the remaining contention of the agency concerning the negotiability of the proposal.

Opinion

Conclusion: The union's proposal conflicts with management's reserved right to assign employees in positions within the agency under section 12(b)(2) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(2) of the Order reserves to management officials the right, in accordance with applicable laws and regulations, to hire, promote, transfer, assign and retain employees in agency positions.

We have consistently indicated that section 12(b)(2) manifests an intent to bar from agreements provisions which infringe upon management officials' authority to decide and act concerning the personnel actions specified therein.^{28/} In our opinion, the union's proposal here significantly infringes upon management's authority, within the meaning of section 12(b)(2), to assign an employee to a position within the agency.^{29/} That is, the requirement that the agency assign the least senior of those teachers qualified for the position clearly interferes with management's authority to decide which particular individual will be reassigned once a decision has been made to fill a position by reassigning an employee. The proposal thus would deprive the management official involved of the discretion inherent in the reserved authority to make such a decision^{30/} under section 12(b)(2).

28/ See, e.g., Association of Academy Instructors, Inc. and Department of Transportation, Federal Aviation Administration, FAA Academy, Aeronautical Center, Oklahoma City, Oklahoma, FLRC No. 75A-85 (Apr. 12, 1976), Report No. 103, at 3-4 of Council decision.

29/ This proposal is distinguished from those involving the use of seniority in the assignment to different shifts of individual employees already assigned to a position. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123 at 4-6 of Council decision and Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124.

30/ Cf. National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128 (hiring decision); American Federation of Government Employees, AFL-CIO, Local 1960 and Naval Air Rework Facility, Pensacola, Florida, 1 FLRC 571 [FLRC No. 73A-24 (Oct. 18, 1973), Report No. 45] (promotion decision); and Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Maryland, 1 FLRC 525, 538 [FLRC No. 72A-18 (Sept. 17, 1973), Report No. 44] (promotion decision).

In summary, the proposal by requiring management to select the least senior qualified teacher, imposes a constraint which would in effect negate management's authority to assign employees in positions within the agency under section 12(b)(2) of the Order. Accordingly, the proposal is nonnegotiable.

Union Proposal X

Substitute Conversion

When it is determined that the services of a substitute teacher will be required full time for a period in excess of twenty days, action shall be taken to appoint and compensate him/her as an NTE.

Agency Determination

The agency determined principally that the proposal is nonnegotiable on the ground that it is outside the scope of bargaining required by section 11(a) of the Order.

Question Here Before the Council

The question is whether the proposal is outside the agency's obligation to bargain under section 11(a) of the Order.^{31/}

Opinion

Conclusion: The proposal is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: As noted before in connection with Proposal IV (at 7, supra), the section 11(a) bargaining obligation extends to personnel policies and practices and matters affecting working conditions of members of the bargaining unit. The proposal at issue, however, does not relate to members of the unit and hence does not fall within the scope of the agency's obligation to bargain within the meaning of section 11(a) of the Order.

In this regard, the agency states without contradiction that substitute teachers in the agency's overseas schools, who are the subject of the proposal, are not members of this bargaining unit. It follows that the plain meaning of the proposal is to confer a benefit upon people who are not included in the bargaining unit. Thus, since the proposal does not involve personnel policies or practices or matters affecting the working

^{31/} In view of our decision herein, it is unnecessary to consider the remaining contention of the agency concerning the negotiability of the proposal.

conditions of members of the bargaining unit within the meaning of section 11(a) of the Order, it is outside the agency's obligation to bargain.^{32/}

Union Proposals XI - XII^{33/}

Proposal XI:

Staffing Procedures

Management retains the right to fill individual vacancies which occur during the school year. However, the filling of vacancies for each new school year shall be in accordance with the following priorities:

- A. Locally hired school teachers who have satisfactorily completed one year (at least 150 working days) of teaching in the DODDS on a temporary limited appointment (NTE) shall be converted to an indefinite appointment.
- B. Second preference will be given to teachers in the DODDS who have applied for vacancies under provisions of the negotiated inter-regional transfer program and teachers who have applied for vacancies under provisions of an intra-regional transfer program.
- C. Third preference will be given to fully qualified locally available teachers who can reasonably be expected to be at the location of the school for the full school year. Preference will be given to fully qualified dependents of military and civilian personnel who are stationed in the area. If a locally available non-dependent candidate has clearly superior qualifications, an exception to this requirement may be authorized by the Regional Director.
- D. Any remaining vacancies will be filled through recruitment in the United States.

32/ See AFGE, Local 1738 and VA Hospital, Salisbury, North Carolina, FLRC No. 75A-103 (July 28, 1976), Report No. 107; Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-7 (Mar. 3, 1976), Report No. 100; and National Treasury Employees Union, Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98.

33/ The proposals are considered together for convenience of decision since essentially the same issues and contentions are involved.

Proposal XII:

Policy for Employment of New Teachers

Teachers employed by management must have not less than two years of successful full-time professional employment as a teacher, counselor, or librarian in an educational institution during the past five years. In unusual or unforeseeable circumstances, management may grant waivers to applicants who do not meet this requirement.

Agency Determination

The agency determined the proposals to be nonnegotiable, relying principally on section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether the proposals violate section 12(b)(2) of the Order.^{34/}

Opinion

Conclusion: Both proposals conflict with management's reserved right to hire employees in positions within the agency under section 12(b)(2) of the Order. Thus, the agency determination that the proposals are non-negotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(2) of the Order reserves to management officials the right, in accordance with applicable laws and regulations, to hire employees in agency positions.^{35/}

34/ In view of our decision herein, it is unnecessary to consider the remaining contention of the agency concerning the negotiability of Proposal XI.

35/ Section 12(b)(2) provides:

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

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

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees. . . .

The proposals at issue here, by their specific terms, would require the agency, when filling vacant positions for a new school year, to give "preference" over other individuals to those who meet the criteria established by the proposals. Hence, these proposals are in critical substance analogous to the two proposals which the Council held violative of section 12(b)(2) in the Maritime Union decision.^{36/} There, the Council said:^{37/}

[T]he proposals would establish a positive requirement that the categories of job seekers described therein be hired . . . ahead of any other job seekers. Thus, the language of the proposals, through the use of the phrase "hiring preference" . . . clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had been made to fill a position through the hiring process. The proposals would deprive the selecting official of the required discretion inherent in making such a decision.

The union's proposals, which would require management to give preference to individuals who fall within the particular categories described therein, impose constraints upon and clearly interfere with management's authority to hire employees in positions within the agency under section 12(b)(2) of the Order. [Footnotes omitted.]

This analysis is directly applicable to Proposal XI at issue here. By requiring the agency to fill vacant positions in its overseas schools at the beginning of each school year in rank order preference from the categories described in Proposal XI, the proposal negates management's authority under section 12(b)(2) of the Order. Likewise, Proposal XII would require that all teachers hired by management have two years of successful full-time professional employment, except in unusual circumstances, and would thereby similarly so circumscribe as to negate management's reserved authority under section 12(b)(2) of the Order to hire employees to positions within the agency. Accordingly, we find the proposals nonnegotiable.

Union Proposal XIII

Assignment Outside NCA Standards

Teachers shall not be assigned outside the scope of the North Central Association qualification standards unless very unusual circumstances exist justifying such assignment. In the latter case, such assignment shall be for no longer than required for such unusual circumstances.

36/ National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128.

37/ Id. at 3.

Agency Determination

The agency determined that the proposal is nonnegotiable because it restricts the agency's decisions with regard to job content and therefore is excepted from the obligation to bargain by section 11(b) of the Order. It further determined that the proposal interferes with management's reserved right under section 12(b)(2) of the Order to "assign" employees to positions within the agency.

Question Here Before the Council

The question is whether the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.^{38/}

Opinion

Conclusion: The proposal concerns matters with respect to the agency's determination of job content and therefore is excepted from the obligation to bargain by section 11(b) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: As previously discussed in connection with Proposal IV (at 7-8, supra), agency determinations regarding the assignment of duties to positions or employees, i.e., job content, are excepted under section 11(b) of the Order from the obligation to bargain. Further, the Council consistently has held that this exception from the obligation to bargain over job content under section 11(b) of the Order applies, not only to proposals which would require or totally proscribe the assignment of duties to particular types of employees, but also to proposals, such as the one presently under consideration, which would prevent the agency from assigning such duties unless certain conditions prescribed in the agreement exist.^{39/}

Turning to the present proposal, it would impose a limitation on the agency's discretion to assign duties to positions or employees. Namely, it would condition the assignment of duties to teachers on the scope of

^{38/} In view of our decision that the proposal essentially concerns matters with respect to determining job content, section 12(b) is inapplicable and it is unnecessary further to consider the remaining contention of the agency that the proposal conflicts with section 12(b)(2).

^{39/} See NAGE, Local R12-58 and McClellan Air Force Base, FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114, at 6, and cases cited therein.

certain specified qualification standards, except in "unusual circumstances." Such a restriction of the agency's authority to assign duties is excepted from the agency's obligation to bargain under section 11(b) of the Order.^{40/}

Accordingly, the agency determination of nonnegotiability is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: February 28, 1978

40/ Cf. Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, 2 FLRC 280, 283-84 [FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60]. (Union proposal conditioning the assignment of duties to employees on the "scope of the classification assigned" to such employees as defined in "appropriate classification standards" is excepted from the obligation to bargain under section 11(b).)

International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina. The dispute involved the negotiability of union proposals concerning (1) the assignment of duties to particular categories of employees; (2) the filling of supervisory positions; and (3) procedures for selecting individuals to fill, either temporarily or permanently, vacant positions at the activity (portions of which concerned the definition of and procedures to expand the area of consideration for unit position vacancies, and the time limit for effectuating promotion actions).

Council action (February 28, 1978). As to (1), the Council held that the union's proposal was excepted from the agency's obligation to bargain by section 11(b) of the Order. As to (2), the Council held that the union's proposal was outside the bargaining obligation established by section 11(a) of the Order. Finally, as to (3), which was a multipart proposal, the Council concluded that the portions of the proposal concerning the definition of and procedures to expand the area of consideration for unit position vacancies, and the time limit for effectuating promotion actions were within the bargaining obligation established by section 11(a) of the Order; but that the remaining portions of the proposal either violated section 12(b)(2) of the Order or were outside the obligation to bargain established by section 11(a) of the Order. Accordingly, for the reasons fully detailed in its decision and pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determinations as to the nonnegotiability of the union's proposals numbered (1) and (2) above, as well as the determinations with regard to those portions of proposal (3) which the Council found to be violative of section 12(b)(2) of the Order or outside the obligation to bargain established by section 11(a) of the Order; and set aside the agency's determinations as to those portions of proposal (3) which the Council found to be negotiable.

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

International Association of
Machinists and Aerospace
Workers, Local Lodge 1859

(Union)

and

FLRC No. 77A-28

Marine Corps Air Station and
Naval Air Rework Facility,
Cherry Point, North Carolina

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

Article XIII

Section 5. No journeyman or fourth year apprentice employee in the Unit shall be required to perform janitorial type duties, such as cleaning heads and urinals. However, journeymen and fourth year apprentices are responsible for the cleanliness of their immediate work area and any area the individual employee is responsible for being unclean. This responsibility includes the routine daily cleaning of machinery, tools, equipment and floors. However, such cleaning will not include tasks requiring the use of solvents, paints or other chemical cleaning agents.

Agency Determination

The agency determined that the proposal is excepted from the obligation to negotiate by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to negotiate by section 11(b) of the Order.

Opinion

Conclusion: The proposal concerns the job content of unit employees and therefore is excepted from the obligation to negotiate by section 11(b) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The proposal here in dispute would prohibit the assignment of certain cleaning duties to journeymen and fourth year apprentices and in this regard bears no material difference from the union's proposal, prohibiting assignment to unit positions of certain allegedly unrelated duties, which was before the Council and held to be excluded from the obligation to negotiate by section 11(b) in the Charleston Naval Shipyard decision.^{1/} Therefore, based on the applicable discussion and analysis in the Charleston Naval Shipyard decision, the proposal here in dispute must also be held to be excepted from the obligation to bargain by section 11(b).^{2/}

Union Proposal II

Article XX

Section 1. The Employer agrees that all promotions to Leader and Foreman (Leadingman) shall be made in accordance with the principles and specific provisions of Article XIX, with the following additional considerations.

Section 2. In complying with the provisions of Article XIX, Section 9, it is agreed that temporary promotions to Leader or Foreman (Leadingman) will be rotated on a fair and equitable basis among employees within the affected shop who are on the appropriate Leader or Foreman (Leadingman) register, if such a register exists. In the event neither an appropriate Leader or Foreman (Leadingman) promotion register exists, the selection will be made from among the journeymen in the shop on a strict rotation basis, based on Service Computation Date.

Agency Determination

The agency determined that the proposal is outside the scope of the agency's obligation to bargain under section 11(a) of the Order.

Question Here Before the Council

The question is whether the proposal is outside the agency's obligation to bargain under section 11(a) of the Order.

1/ Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 444 [FLRC No. 72A-33 (June 29, 1973), Report No. 41]. Accord, International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

2/ The union's reliance on the fact that the proposal has been contained in prior agreements with the agency is without controlling significance, as the Council has repeatedly held, e.g., National Maritime Union of America AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128.

Opinion

Conclusion: The proposal concerns the filling of supervisory, nonbargaining unit positions and, thus, is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is hereby sustained.

Reasons: This proposal prescribes principles and procedures for all promotions to "leader" and "foreman" positions.^{3/} In this regard it bears no material difference from the union's proposal concerning the filling of "threshold" supervisory positions outside the bargaining unit which was before the Council and held to be outside the bargaining obligation established by section 11(a) of the Order in the State of Texas National Guard decision.^{4/} Therefore, based on the applicable discussion and analysis in State of Texas National Guard, the present proposal must also be held to be outside the bargaining obligation established by section 11(a) of the Order.^{5/}

Union Proposal III

Article XIX (set forth in an appendix, hereto) is a multipart proposal which would establish procedures for selecting individuals to fill, either temporarily or permanently, vacant positions at the activity.

Agency Determination

The agency determined that insofar as the proposal concerns certain actions to fill vacant positions on a temporary basis, e.g., temporary promotions for 120 days or less, details to higher graded positions or details to positions with known promotion potential for 60 days or less, it is nonnegotiable because it violates section 12(b)(2) of the Order. Additionally, the agency determined that various portions of the proposal are nonnegotiable because they are outside the obligation to bargain under section 11(a) of the Order or violate section 12(b) of the Order.

^{3/} The agency claimed and the union tacitly conceded that the "leader" positions involved in this case are supervisory. Hence, we find it unnecessary to pass on whether the leader positions in this case actually encompass supervisory duties; and, of course, make no ruling as to whether "leader" positions, in other circumstances, are necessarily supervisory under section 2(c) of the Order.

^{4/} Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100.

^{5/} As previously indicated, the inclusion of the disputed provision in prior agreements with the agency is without controlling significance. See note 2 supra.

Questions Here Before the Council

- I. The question is whether the proposal is excluded from bargaining under section 12(b)(2) of the Order insofar as it concerns the temporary filling of vacant positions.
- II. The question is whether various portions of the proposal (detailed hereinafter) are outside the obligation to bargain under section 11(a) or whether other portions of the proposal are excluded from bargaining under section 12(b) of the Order.

Opinion

A. Conclusion as to Question I: The proposal violates section 12(b)(2) of the Order insofar as it would in effect require competitive procedures to be used to fill vacant positions on a temporary basis in circumstances where competitive promotion procedures are not required under applicable laws and regulations.^{6/} Thus, the agency determination that the proposal is nonnegotiable to that extent was proper and, pursuant to section 2411.28 of the Council's rules, is hereby sustained.

Reasons: Section 12(b)(2) of the Order, as here controlling, provides:

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

.

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

.

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

Section 12(b) of the Order enumerates rights reserved to management under any collective-bargaining agreement. Specifically, in the VA Research Hospital case the Council stated:^{7/}

6/ FPM Chapter 335, subchapter 4-3(e) provides that an agency may make a temporary promotion for 120 days or less as an exception to competitive promotion procedures. FPM Chapter 300, subchapter 8-4(e) provides that details to higher graded positions or to positions with known promotion potential for more than 60 days must be made under competitive promotion procedures.

7/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

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

Subsequently, the Council further noted in its Long Beach Naval Shipyard decision^{8/} that:

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

Thus, the section 12(b)(2) right to assign includes the right to temporarily assign or to detail employees. The proposal here in dispute, however, in effect would deny management the authority to temporarily assign or to detail employees to positions unless those employees had been found qualified to occupy the positions on a permanent basis. The effect of this denial of authority, in the event that no employee is found to be qualified to occupy a particular position on a permanent basis, would be to prevent management from temporarily assigning or detailing any employee to that position.

Similarly, the section 12(b)(2) right to promote includes the right to temporarily promote without resort to competitive procedures.^{9/} The disputed proposal, however, in effect would deny management the authority to temporarily promote employees to positions unless those employees had been determined, competitively, to be among the top three or fewer qualified candidates. The effect of this denial of authority would be to prevent management from temporarily promoting qualified employees without resort to competition.^{10/}

8/ Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157, 161 n. 5 [FLRC No. 73A-16 (July 31, 1974), Report No. 55].

9/ American Federation of Government Employees (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136 at 9 of Council decision.

10/ As previously noted, management officials under applicable laws and regulations may make certain temporary promotions without regard to the use of competitive procedures. See note 6 supra. Of course, however, no employee may be temporarily promoted who fails to meet the minimum qualification standards prescribed for the position. See FPM Chapter 335, Subchapter 2, Requirement 2.

These limitations imposed by the proposal on management's right to temporarily assign or, without use of competitive procedures, to temporarily promote bargaining unit employees would so constrict management's discretion in the exercise of its right to assign or promote personnel under section 12(b)(2) as to effectively deny that right. Accordingly, insofar as the proposal would in effect negate management's right to temporarily assign employees or to temporarily promote employees noncompetitively, it is nonnegotiable.^{11/}

B. Conclusion as to Question II: Turning now to the question of whether various portions of the proposal are outside the obligation to bargain under section 11(a) of the Order or whether other portions of the proposal are excluded from bargaining under section 12(b) of the Order we conclude that the second and third sentences of section 1c are outside the obligation to bargain under section 11(a); the first sentence of section 1c, sections 1d, 6e, 5a, 8 and 10 violate section 12(b)(2) of the Order. Thus, the agency determination that these portions of the proposal are nonnegotiable is, pursuant to section 2411.28 of the Council's rules, sustained. Sections 2 and 6g are within the obligation to negotiate under section 11(a) of the Order. Accordingly, the agency determination that these sections are nonnegotiable was improper and, pursuant to section 2411.28 of the rules, is set aside.^{12/}

1. Section 1c of Article XIX

Section 1c. Filling vacancies is not confined to promotions. When announcements for establishing registers are published, they will clearly indicate that the register will be the only source for filling vacancies on Station. "Station" means NARF, MCAS and the Naval Hospital.

Conclusion: The agency determination that the portion of this section providing that procedures for filling vacancies are "not confined to promotions" violates section 12(b) of the Order was proper and, must be sustained. The agency determination that the portion of this section extending the procedures for filling bargaining unit vacancies to nonbargaining unit positions is outside the obligation to bargain under section 11(a) of the Order was also proper and must be sustained.

11/ American Federation of Government Employees (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136 at Proposal IX; Local 174 International Association of Professional and Technical Engineers, AFL-CIO and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157 [FLRC No. 73A-16 (July 31, 1974), Report No. 55].

12/ The Council's ruling with regard to each section of Article XIX determined by the agency to be nonnegotiable will be discussed separately.

Reasons: Article XIX in its entirety establishes, as previously indicated, procedures for filling vacant positions at the activity. The first sentence of section 1c, in effect, would require that the management actions taken to fill vacant positions which would be subject to the procedures of Article XIX would not be limited to permanent promotions.

Thus, the language would, in effect (as similarly discussed in connection with Question I), limit management's authority to temporarily assign or to detail employees to positions unless those employees had been found qualified to occupy the positions on a permanent basis and, in addition, to prevent management from temporarily promoting qualified employees without resort to competitive procedures. As further indicated in our conclusion as to Question I, such a limitation on management's right to temporarily assign employees or to temporarily promote employees noncompetitively would so constrict management's discretion in the exercise of its right to assign or promote personnel under section 12(b)(2) as to effectively deny that right. Accordingly, insofar as the first sentence would in effect negate management's right to temporarily assign employees or to temporarily promote employees noncompetitively, it is nonnegotiable.^{13/}

The second and third sentences of the section would extend procedures for filling bargaining unit vacancies to nonbargaining unit vacancies.^{14/} Thus, by their express terms the second and third sentences do not relate to the personnel policies and practices and matters affecting bargaining unit working conditions which are encompassed within the bargaining obligation under section 11(a).^{15/} Accordingly, since the second and third sentences of section 1c fall outside the scope of required bargaining under section 11(a) of the Order, we hold that they concern a matter upon which the agency is not obligated to negotiate.^{16/}

^{13/} See cases cited note 11 supra.

^{14/} In this regard, consistent with the agency's uncontested allegation that the "Naval Hospital" referred to in the disputed section is not included in the bargaining units involved, the Office of Labor Management Relations, U.S. Civil Service Commission, Union Recognition in the Federal Government, 255-56 (1976) indicates that International Association of Machinists and Aerospace Workers, Local Lodge 1859 represents a unit of employees at the Marine Corps Air Station, Cherry Point, North Carolina, and a second unit of employees at the Naval Air Rework Facility, Cherry Point, North Carolina.

^{15/} Section 11(a) of the Order provides, in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order.

^{16/} See Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100.

2. Section 2 of Article XIX

Section 2. The Employer agrees to use the maximum possible extent the skills of employees in the bargaining unit. The area of consideration for internal placement announcements shall be the Naval Air Rework Facility, Marine Corps Air Station and U.S. Naval Hospital, Cherry Point, N.C., unless this area will not supply sufficient candidates for the vacancy. The Employer will discuss with the Union the need for extending the area of consideration before it is in fact extended. Consideration may also be made of voluntary application of employees outside the area of consideration. Every reasonable effort will be made by the Employer to obtain identical information on nonunit candidates as is obtained for unit candidates. Nonunit candidates shall be evaluated as nearly as possible by the same criteria used to evaluate unit candidates.

Conclusion: Contrary to the agency's contention that this section concerning the definition of and procedures to expand the area of consideration for unit vacancies is outside the scope of bargaining under section 11(a) of the Order, this section concerns personnel policies and practices and matters affecting working conditions of bargaining unit employees and, therefore, is within the bargaining obligation established by section 11(a) of the Order.

Reasons: Section 11(a) of the Order^{17/} establishes, within specified limits not here in dispute, an obligation to bargain concerning personnel policies and practices and matters affecting working conditions of bargaining unit employees. Clearly, the area of consideration, i.e., the area in which an intensive search for eligible candidates for unit positions is to be made, as well as procedures to extend that area and to determine the framework within which unit employees would have to compete with outside applicants for unit positions fall squarely within the ambit of agency personnel policies and practices and matters affecting working conditions of bargaining unit employees. That is, as the Council noted in its Kirk Army Hospital decision,^{18/} "a particular proposal directly affecting legitimate and important interests of a bargaining unit is not rendered nonnegotiable merely because it, also, would have some effect on rights of non-unit employees of the agency." Accordingly, we find that

^{17/} See note 15 supra.

^{18/} Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., 1 FLRC 525 [FLRC No. 72A-18 (Sept. 17, 1973), Report No. 44]. Accord, American Federation of Government Employees (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136 at proposal XI, Question 1.

the agency head's determination that this section is outside the scope of bargaining under section 11(a) and therefore nonnegotiable was improper and must be set aside.^{19/}

3. Sections 1d and 6e of Article XIX

Section 1d [second sentence]. The Employer agrees, in turn, that if it does choose to fill a vacancy from a Civil Service Commission register, even though an inside Station register exists with qualified candidates available on it, then the person chosen from the CSC register will be clearly better qualified than any of those in reach on the existing inside Station register.

Section 6e [last sentence]. In any event that a selection is made from a source other than the internal placement register for that position, the ultimate selection shall result in a clearly better qualified candidate than any candidate available from the top three (or fewer) on the in-house register for that class of positions.

Conclusion: The agency determination that these sections in effect establish preference for bargaining unit personnel over nonbargaining unit personnel for unit positions and thereby violate section 12(b)(2) of the Order was proper and must be sustained.

Reasons: These sections would in effect establish "preference" for bargaining unit vacancies in a manner similar to proposals requiring management to give preference to individuals within particular categories held nonnegotiable in the Maritime Union case.^{20/} In finding those proposals to be violative of section 12(b)(2) of the Order, the Council stated (at 3):

Rather than calling for the "consideration" of certain criteria in selecting applicants for agency vacancies, the record indicates that the proposals would establish "preference" for the categories of job seekers described therein. That is, the proposals would establish a positive requirement that the categories of job seekers described therein be hired or rehired ahead of any other job seekers.

^{19/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{20/} National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128. ("Hiring preference" for applicants with Coast Guard endorsements; "rehire preference" for those laid off after 90 days of satisfactory employment.)

Thus, the language of the proposals, through the use of the phrases "hiring preference" and "rehire preference" clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had been made to fill a position through the hiring process. The proposals would deprive the selecting official of the required discretion inherent in making such a decision. [Footnote omitted.]

The two sections here in dispute similarly would require management to select from among internal candidates for the positions covered by the proposal ahead of any applicant from outside the bargaining unit who was not "clearly better qualified" than the best qualified bargaining unit candidate. Hence, these sections, apart from other considerations, would impose constraints upon, and clearly interfere with, management's authority to hire or transfer employees in positions within the agency under section 12(b)(2) of the Order. Therefore, we find these sections to be violative of section 12(b)(2) and, consequently, nonnegotiable.^{21/}

4. Sections 5a and 8 of Article XIX

Sections 5a [third and fourth sentences]. Positions without established registers which become vacant during the period of establishing registers for all classes of positions may be temporarily filled on a fair and equitable basis within the shop where the vacancy exists, with the understanding that as soon as the appropriate register is established, the position will be filled competitively from that register. Such temporary position changes will not exceed 90 calendar days. If more than 90 calendar days is required to convert to the new system, such assignments will be rotated by 90 calendar day increments until conversion is complete.

Section 8. Selections for temporary promotions, temporary lateral reassignments to different positions, details, loans, or other position changes, shall be made from an appropriate register. The only exception to this shall be at the time of conversion from the old system to the new system contained in this Article, and/or any other time that a register may, despite all efforts to keep it active, become prematurely depleted and not restored in time to meet a need for filling a vacancy. In that event, temporary internal placement may be made without competition on a fair and equitable basis within the shop where the vacancy exists, provided there are qualified eligibles available within the shop.

^{21/} American Federation of Government Employees (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136 at proposal XI, Question 2.

Conclusion: The agency determination that these sections by requiring, in effect, that employees be qualified to fill a position on a permanent basis in order to be eligible for temporary assignments selection and by requiring that employees be determined competitively to be within the top three or fewer qualified candidates in order to be eligible for temporary promotion selection violate section 12(b)(2) of the Order was proper and must be sustained.

Reasons: As previously indicated in this decision,^{22/} a union proposal permitting management to temporarily assign or to detail only employees who are qualified to fill the position involved on a permanent basis and prohibiting management from temporarily promoting qualified employees without resort to competitive procedures would so constrict management's discretion in the exercise of its 12(b)(2) right to assign or promote personnel as to effectively deny that right. Accordingly, as these sections would likewise constrict management's right they must be considered nonnegotiable.^{23/}

5. Section 6g of Article XIX

Section 6g. An employee shall be promoted within a period of ten (10) work days after notification of his selection.

Conclusion: This section, which concerns the time limit within which a promotion will be effectuated, does not violate section 12(b)(2) of the Order as contended by the agency, but is within the bargaining obligation established by section 11(a) of the Order.

Reasons: Contrary to the agency's contention, this section does not infringe on management's 12(b)(2) right to decide to promote or to decide not to promote. Rather, this section merely provides that, once management has decided to promote an employee and has actually selected a candidate for promotion, action to effectuate that promotion shall be accomplished within ten days. In this regard, the Council has indicated in prior decisions that section 12(b)(2) does not prohibit agencies from negotiating procedures which management will observe in taking the promotion action involved, so long as any negotiated procedures which might result do not interfere with the exercise of the right reserved under 12(b)(2) and do not conflict with applicable laws and regulations.^{24/} The disputed

^{22/} See Council reasons concerning proposal III, Question I, p. 4 supra and Council reasons concerning section 1c of Article XIX, p. 6 supra.

^{23/} See cases cited note 11 supra.

^{24/} E.g., Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

section concerns the timing of the ministerial act of effectuating promotions, and not the decision as to whether or whom to promote. Accordingly, we find that the agency head's determination that this section violates section 12(b)(2) of the Order and is therefore nonnegotiable was improper and must be set aside.^{25/}

6. Section 10 of Article XIX

Section 10. Employees who have accepted a change to a lower-level position in lieu of separation as a result of RIF action shall be repromoted in accordance with Article XXI, Section 5 of this Agreement.^{26/} [Footnote added.]

Conclusion: The agency determination that this section would, in effect, guarantee that employees demoted because of a RIF be repromoted in inverse order of their demotion and thereby violate section 12(b)(2) of the Order was proper and must be sustained.

Reasons: This section, as characterized by the parties, would guarantee that employees demoted because of a RIF would be repromoted in inverse order of their demotion and thus bears no material difference from the union's proposal, requiring the repromotions of employees, demoted because

25/ This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

26/ Article XXI, Section 5 of the agreement provides:

In the case of demotions taken voluntarily in lieu of separation because of reduction-in-force action, the employer will, when a vacancy occurs, give consideration to returning such employees to their former classification and/or competitive levels. Consideration will be in the inverse order of the reduction-in-force action. An employee will be considered qualified if the minimum qualification standards have not substantially changed since the employee's demotion. Excluded from this provision are situations involving the normal advancement of apprentice to journeyman at the satisfactory completion of their apprentice training and the mandatory promotion or placement directed by higher authority. Promotions under this section will be governed by the following criteria:

- a. The employee's service in the higher rate was satisfactory;
- b. The employee's conduct prior to demotion and his conduct during the period subsequent to his demotion has been

(Continued)

of a RIF in inverse order of their demotion, which was before the Council and held to be violative of section 12(b)(2) of the Order in the Kirk Army Hospital decision.^{27/}

Therefore, based on the applicable discussion and analysis in the Kirk Army Hospital decision, the section here in dispute must also be held to violate section 12(b)(2) of the Order.^{28/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: February 28, 1978

(Continued)

satisfactory (proof of satisfactory conduct will be based on a review of the employee's personnel record). It is further agreed that the reasons for not promoting an employee under these criteria will be furnished the Union upon request.

^{27/} Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., 1 FLRC 525 [FLRC No. 72A-18 (Sept. 17, 1973), Report No. 44].

^{28/} As previously indicated, the inclusion of the disputed provision in prior approved agreements with the activity is without controlling significance. See note 2 supra.

APPENDIX

UNION PROPOSAL

ARTICLE XIX
FILLING VACANCIES

Section 1. It is the intent of the parties that every position in the bargaining unit is filled by the best qualified available candidates. This, it is agreed, is the meaning of "merit." To assure that this happens, the parties agree to these principles, which are the basis for the rest of this Article:

a. Whenever a position is vacant and must be filled, whether temporarily or permanently, the person selected must be chosen from a register.

b. Registers will be established and maintained for every class of jobs in the bargaining unit.

c. Filling vacancies is not confined to promotions. When announcements for establishing registers are published, they will clearly indicate that the register will be the only source for filling vacancies on Station. "Station" means NARF, MCAS and the Naval Hospital.

d. It is recognized by the Union that the Employer has a right to decide whether to fill a vacancy from a Civil Service register, or from an inside register. The Employer agrees, in turn, that if it does choose to fill a vacancy from a Civil Service Commission register, even though an inside Station register exists with qualified candidates available on it, then the person chosen from the CSC register will be clearly better qualified than any of those in reach on the existing inside Station register.

e. The Union also recognizes that there are mandatory methods required for filling vacancies before competitive methods are used, such as the stopper list. The Employer agrees, in turn, to notify the Union in full detail of the methods used to fill every position in the bargaining unit that becomes vacant and is subsequently filled.

Section 2. The Employer agrees to use to the maximum possible extent the skills of employees in the bargaining unit. The area of consideration for internal placement announcements shall be the Naval Air Rework Facility, Marine Corps Air Station and U.S. Naval Hospital, Cherry Point, N.C., unless this area will not supply sufficient candidates for the vacancy. The Employer will discuss with the Union the need for extending the area of consideration before it is in fact extended. Consideration may also be made of voluntary applications of employees outside the area of consideration. Every reasonable effort will be made by the Employer to obtain identical information on non-unit candidates as is obtained for unit candidates. Non-unit candidates shall be evaluated as nearly as possible by the same criteria used to evaluate unit candidates.

Section 3.

a. The Employer agrees to post on official bulletin boards copies of internal placement announcements for positions within the unit and for threshold positions just outside the unit, the unit employees being principal normal source of recruitment therefore, for at least ten (10) days prior to the closing date. Ten (10) copies of each announcement will be mailed to the Union President and five (5) copies to the Chief Steward, Facilities Maintenance for posting.

b. Such announcements will include the qualification requirements for the positions which shall be the current minimum standards approved by the Civil Service Commission. The Union recognizes that provisions for inservice placement and appropriate selective provisions are essential for certain positions and such provisions will be applied to the CSC standards when necessary. Such selective placement factors may not be used merely because it would be desirable for candidates to possess them. Examples of inappropriate selective placement factors for determining eligibility are: (1) additional general or specialized experience; (2) quality of experience inappropriate to the type of position to be filled; (3) additional formal education; (4) requirements which unduly restricts the number of eligible candidates, or which is intended to favor a particular candidate; and (5) requirement designed solely to eliminate the need for a brief period of training or adjustment; and (6) requirement not essential to the duties of the immediate vacancy. If a selective placement factor is used, the justification for its use shall be supplied to the Union prior to the time the announcement is posted. A qualification standard may not be modified after the announcement has been posted unless an inappropriate standard has been used or the Commission issues a revised standard.

c. If the type of position to be filled will or may lead to further noncompetitive promotion in accordance with Civil Service Commission policies and regulations, this must be stated in the announcement. The announcement will also state that the register will remain in effect continuously, subject to periodic reopening periods to assure a continuously available source or recruitment and supply of internal candidates (See Section 5 below). The announcement will also state the area of consideration, the evaluation methods to be used, and what the employee has to do in order to apply.

d. Employees in the unit shall have the right to submit applications in response to these announcements, all such applications will be duly processed, and selections for the vacancy will be made from the top three (3) names on the registers established as a result of the announcement.

Section 4. Employees who apply and are considered for internal placement but are not selected will be notified of nonselection and will be furnished the name of the successful candidate.

Section 5.

a. Immediately on the effective date of the Agreement, the Employer will publish and post announcements for all classes of positions in the bargaining unit. Until registers are established as the result of these announcements, any class of positions which already has an established register will be filled from the register. Positions without established registers which become vacant during the period of establishing registers for all classes of positions may be temporarily filled on a fair and equitable basis within the shop where the vacancy exists, with the understanding that as soon as the appropriate register is established, the position will be filled competitively from that register. Such temporary position changes will not exceed 90 calendar days. If more than 90 calendar days are required to convert to the new system, such assignments will be rotated by 90 calendar day increments until conversion is complete. Existing registers will be abolished as soon as the new registers are established. Establishment of the new registers will be accomplished promptly, and in this regard the parties agree that the transition will be completed no later than 180 calendar days after the effective date of the Agreement.

b. Thereafter, no register shall be allowed to become totally depleted, nor will a register be prematurely reopened. To accomplish this, the register will be reopened only on one or the other or both of the following two conditions: (a) the Employer has objective evidence that within the time period normally needed to establish a register, the number of expected vacancies will exceed the number of candidates remaining on the register; or (b) the register has not been reopened on the above basis for one calendar year after its original establishment (or one calendar year since the last time it was formally reopened for any reason). In either of these two cases, the opportunity for position change will be announced as soon as the criteria for either is met. Any candidates who remain on the register at such a time will be notified of the reopening, and such candidate may choose to update the information on his Form 630 and be rerated and reranked. In the event an employee does not submit an updated Form 630, that employee's previous score on the existing register will remain unchanged, and he will be reranked accordingly on the new register relative to the scores of the new applicants. Further, if the employee does not update the information on his Form 630, he may not appeal the score brought forward to the new rank-order. The existing register will be used to fill all vacancies during the time required to establish the new register, but shall be abolished when the new register is ready for official use.

c. Announcements for establishing registers may be opened on a continuous basis in cases of a heavy turn-over in the position or where experience has indicated it is difficult to obtain qualified candidates.

Whenever a register appears to be depleting itself prematurely, an announcement will be published and posted as promptly as possible, complying with Section 3 above and with subsection (b) of this Section. Similarly, no register will stand for more than one year without being reopened on the same basis as indicated in Section 3 and in subsection (b) of this Section.

d. Employees who were absent from the Station during the entire period announcement was open due to officially approved leave, or on official Temporary Duty, may upon return to duty have the same number of calendar days to file as the announcement was originally open. However, selections for current vacancies need not be held up pending establishment of their eligibility. It is further agreed that applications received after the time limits herein set forth will not be processed during the period the register is not open to all employees.

e. Employees who are new to the initial area of consideration will have 90 calendar days to file for any announcement which closed prior to his entry on duty at this Station. In this case, the employee's rating shall be computed as of the closing date of the announcement, not the date of filing.

Section 6.

a. All applicants for positions covered by this Agreement will, if eligible, be assigned a numerical score and ranked accordingly on a register, and notified of their score and relative standing on the register promptly after it is established. Rating schedules and promotion lists shall be made available for review by the Union President on request.

b. Evaluation procedures must provide a sound basis for considering, evaluating and comparing candidates through analysis of the position to be filled to determine the knowledge, skills and abilities actually required for any incumbent to perform satisfactorily in the position. The numerical score assigned to each candidate shall be the total points earned after evaluation on the following factors:

1. Experience and training (including self-development and outside activities that are specifically relevant to the position to be filled), shall be measured by type and quality the candidate has in relation to the actual requirements of the position to be filled. Length of experience shall be used when there is a relationship with quality of performance. Length of qualifying experience and Federal Service Computation Date shall be used, in that order, to break ties. That is, the employee with the greatest length of qualifying experience shall appear on the register above the other employees with whom he is tied, etc. The raw score for experience

and training shall be converted to a scale of 70 to 100, and this score shall be the base score to which points for all of the remaining factors below are to be added after the score for training and experience has been converted to a scale of 70 to 100.

2. Awards will be considered as a means of assessing the relative initiative, resourcefulness and/or planning ability of applicants when the basis for the award is clearly relevant to the position to be filled.

3. Written tests for ranking purposes will be used only for apprentices and other positions when they are mandatory by the Civil Service Commission. Such tests shall not be the sole means of evaluating candidates but the raw score may be added to the converted score of 70 to 100 for training and experience. Performance tests may be used when required, and such performance tests will be used as a screen-out factor.

4. Supervisory appraisals of past performance will be used, the score being based on the total resulting from appropriate use of Form 12430/2 (appended to this Article). It is agreed that supervisory appraisals must be backed up by supportable facts which are objective in nature, job-related and relevant to the element being rated. Supervisory appraisals on potential shall not be used either to screen out or to rank candidates from the unit. No employee shall be qualified or disqualified or screened out by a supervisory appraisal. Point values assigned to supervisory appraisals of past performance shall be added only after the raw score for training and experience has been converted to a scale of 70 to 100.

Every reasonable effort will be made to obtain at least two separate appraisals for each qualified candidate. If possible, the appraisals will be obtained from the candidate's current immediate supervisor and from his most recent former immediate supervisor. If only one such appraisal is obtained, the next higher level supervisor will provide his own rating. Where two appraisals are used as indicated, the scores shall be added and then divided by 2 for the score to all to the raw score of 70 to 100 for training and experience.

The elements portion of Form 12430/2 (appended hereto) will be filled in for each position and such elements will be the same as those of Form 630 which the employee is required to complete when applying for the position with no additions or deletions. Under column I of the appraisal form, the importance of the element shall be applied only to the employee's requirements of positions he has held and shall not be applied to the requirements of the position for which he is applying. Under column II, if the basis of the judgment is marked "general impression," such appraisal shall be discounted entirely for scoring purposes. If the basis for judgment is marked "good evidence," the

rating supervisor must present that "evidence" to the employee and his steward at the time discussion of the appraisal takes place; and such "good evidence" must be objective, factual, job-related, and relevant to the element being rated. Under Column III of the appraisal form, if "unable to judge" is marked, such appraisal shall be disregarded for evaluation of that particular element.

At the time a supervisory appraisal of past performance is made, and prior to forwarding it to the rating panel, the supervisor shall discuss the appraisal with the employee and his shop steward. If an employee is on leave or is absent at the time the appraisal must be returned to the panel, he will be advised on his return that he was rated and shall be offered an opportunity to discuss it. In any case, at the time the supervisor discusses the appraisal with the employee and his steward, a copy of said appraisal shall be provided to the employee; and in the case of an absent employee, a copy will be given to him on his return.

If Form 12430/2 is modified at any time during the life of this Agreement, the Employer agrees to negotiate the changes with the Union before making use of any such modified Form.

If an employee believes an element or elements in his supervisory appraisals is inaccurate, or is not based on objective, factual, job-related information clearly relevant to the element being rated, he may grieve such a complaint through the negotiated grievance procedure. During the time of litigation, the employee shall be placed on the register in the order in which he appears using the score based on the challenged supervisory appraisal uncorrected. If, as the result of the arbitration award (or a prior decision favorable to the employee and accepted by him), the employee's rating is changed and his relative standing is also changed so that he displaces a candidate already among the top three on the register, and if that candidate displaced has been selected for a position change during the period of litigation, the displaced candidate shall be removed from the position to which changed, and a new selection shall be made from the newly-ranked top three candidates.

The factors used in evaluating candidates shall be applied to each element under consideration. The elements to be used in the evaluation process shall be those set forth in Civil Service Commission Handbook XII8C for particular job family with no additions or deletions. Each element will have a point value of 0 to 4. The rating panel shall establish a rating schedule prior to rating employees for a particular position. Such rating schedules shall establish the abilities an employee must possess in order to obtain each point value for each element, i.e., certain abilities for 4 points, lesser abilities for 3 points, etc. The total score obtained from this process for each candidate will be converted to a scale of 70 to 100.

The credit on the screen-out factor on the rating form shall be determined based on the evaluation of all valid information as it related to experience, training, awards, etc. Supervisory appraisals shall not be used in any way as a screen-out factor.

c. All candidates placed on an internal placement register will be selectable providing they are within reach for certification. If there are three or more candidates who meet or exceed minimum qualifications including any selective placement factors, they will be ranked numerically on the basis of the evaluation in subsection (b) above and placed on a register. Those candidates who rank among the top three when compared with other candidates will be referred to the selecting official on a certificate when a vacancy is to be filled from the register. Candidates will be listed on the register in the direct descending order of their numerical score, (with ties to be broken as already indicated by length of qualifying experience and SCD, in that order), and those candidates to be considered for position changes who are in the top three of the candidates remaining on the register at anytime will be the candidates placed on the certificate to the selecting official. This process shall continue until the register has fewer than three eligibles or until the register is updated as described in Section 5 above.

d. Two of the four rating panel members, who will assist in evaluating candidates who apply for internal placement for positions covered by this agreement will be appointed from among unit employees. Only those employees who are presently employed as a journeyman within the same family of trades ratings will be considered as qualified to serve as the Union Rating Panel members. Also, management representatives on the Rating Panel shall be journeyman or above within the same family of trade ratings. The Union shall have the right to appoint qualified unit employees to serve as rating panel members.

The Employer agrees that selection board procedures and practices shall be consistent and applied to temporary as well as permanent position changes, and shall be administered fairly and equitably. The Employer further agrees to remove selection board members upon request of employees who have responsible evidence that such a member is prejudiced.

e. Selections for filling vacancies within the unit will be made only after the selection board has interviewed all certified candidates from among the top three on the register, without discrimination in selection for any reason not related to qualifications to perform the duties entailed in the position. The selection board will be provided the certificate containing the top three rated candidates on the register. Once a certificate is called for to fill a vacancy, if in fact it is filled by internal placement, the position must be filled by selection of one of the top three candidates on the register. Further, employees shall not be transferred, loaned, reassigned or detailed so as to evade or have the effect of evading the merit principle that the best qualified available candidate is in each Federal position. Additionally, if there

are only one or two qualified candidates left on a register before it is recharged as indicated in Section 5 above, the selection board may choose one of these without extending the area of consideration or making use of a CSC register. In any event that a selection is made from a source other than the internal placement register for that position, the ultimate selection shall result in a clearly better qualified candidate than any candidate available from the top three (or fewer) on the in-house register for that class of positions.

f. The Employer agrees to notify the Union of the filling of all vacancies in the unit, and the name(s) of the successful candidate(s), and the method used to fill that vacancy, such as promotion, reassignment, detail, in-hire from CSC register, use of stopper list, etc.

g. An employee shall be promoted within a period of ten (10) work days after notification of his selection. This notification shall be made by use of Standard Form 50.

Section 7. Any applicant for internal placements as described in this Article may appeal his earned rating. Such an appeal must be made within five (5) work days of the date of the notice of rating to the employee. Such an appeal shall be based on the information which had been submitted at the time the original rating was made. No new information, not available to the panel at the time the rating was made, may be used in such an appeal.

Review of such appeals shall be made, first, by the four original raters. They shall meet within five (5) work days following receipt of the appeal with the applicant and his representative to explain their reasons for the original rating and to consider the applicant's reasons for changing it.

The applicant will be given every opportunity to explain why the information he originally submitted was not properly understood or interpreted by the raters. He may not introduce new information not included in the original Form 630 he submitted in response to the announcement of position vacancy, and therefore was not considered by the raters in the first place. Within two work days following this meeting, the raters shall issue a joint, written decision as to whether to change the rating, and if so, by how much.

If the employee is still dissatisfied, he may, within two work days following receipt of the decision of the original raters, appeal for a final review. This final review shall be made by a panel of two persons, chosen on a one-at-a-time basis: one selected by the Employer and one by the Union, neither of whom shall be among the original raters.

Within five (5) work days following receipt of the appeal for a final review, this review panel will hold a meeting. At this meeting, the appellant, his representative, and a representative of the original raters shall be present. The appellant will explain his continuing objection. The raters' representative will explain the basis for the decision on the first step of

the appeal. Following these representations, the review panel will adjourn. They will have full access to all records, documents, schedule and/or guides used by the raters in making the original rating which is in dispute. Within five (5) work days after the meeting, the panel will issue a final decision which will not be further appealable or grievable.

The Employer may fill a vacancy from the register without waiting for the appeal to be resolved. In this event, if the employee's appeal is later resolved in his favor, and if this in turn results in the incumbent of the previously vacant position, who was selected from the unadjusted register, being reranked lower than the top three eligibles on the reranked register (following resolution of the appeal), then the incumbent so selected shall be removed from the position and a new selection shall be made from among the top three candidates on the properly rated and ranked register. Any employee so removed must be returned to the position, or its equivalent, from which he was changed.

In the event the newly ranked register does not result in the incumbent (the person selected from the unadjusted register during litigation) being lower than the top three, he shall retain his position. If the appellant whose appeal was favorable resolved is among the top three in the newly ranked register, but would not have displaced the incumbent from the top three, then the appellant shall be given consideration for the next vacancy. In the event the appeal, though resolved in the appellant's favor, does not result in placing him among the top three, in the newly ranked register, then the appellant is not due consideration for that vacancy until he appears among the top three.

Section 8. Selections for temporary promotions, temporary lateral reassignments to different positions, details, loans, or other position changes, shall be made from an appropriate register. The only exception to this shall be at the time of conversion from the old system to the new system contained in this Article, and/or any other time that a register may, despite all efforts to keep it active, become prematurely depleted and not restored in time to meet a need for filling a vacancy. In that event, temporary internal placement may be made without competition on a fair and equitable basis within the shop where the vacancy exists, provided there are qualified eligibles available within the shop.

Section 9. No loan, detail or reassignment shall be made which has the effect of evading the Merit Internal Placement Program agreed to in this Article.

Section 10. Employees who have accepted a change to a lower-level position in lieu of separation as a result of RIF action shall be repromoted in accordance with Article XXI, Section 5 of this Agreement.

Section 11. The Employer agrees that all tests and interviews for positions covered by this Agreement, which are required under the Merit Internal Placement Program, shall be conducted during normal working hours without loss of pay or leave for the participating employees. All other written tests and interviews for positions within the Facility will also be scheduled during regular duty hours without loss of pay or leave unless the numbers are of such magnitude as to create a disruption of the productive efforts of the Facility, or testing facilities available during normal working hours are inadequate.

Section 12. The Employer agrees to return those application forms of employees which are not essential to the Employer, upon request of the individuals.

Section 13. The Employer agrees that there shall be no discrimination in the evaluation or selection for internal placement because of race, color, religion, sex, national origin, politics, marital status, physical handicap, age, or membership or non-membership in a labor organization or authorized activities connected with the Union, or any other factor not specifically relevant to the employee's objective qualifications for performing in a position.

Alabama National Guard, Montgomery, Alabama, A/SLMR No. 895. The Assistant Secretary dismissed the 19(a)(1) and (6) complaint filed by the union (Local 1445, National Federation of Federal Employees) related to the issuance of a memorandum by the Base Commander at the activity to his division chiefs concerning the enforcement of grooming standards. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (February 28, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 28, 1978

Mr. George Tilton
Associate General Counsel
National Federation of
Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Alabama National Guard, Montgomery, Alabama,
A/SLMR No. 895, FLRC No. 77A-115

Dear Mr. Tilton:

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

In this case, Local 1445, National Federation of Federal Employees (the union) filed an unfair labor practice complaint against the Alabama National Guard, Montgomery, Alabama (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by embarking on a program of more strict enforcement of grooming standards without providing the union with proper notification and opportunity to discuss the matter.

The Assistant Secretary, contrary to the Administrative Law Judge (ALJ), found that the activity's "conduct . . . was not inconsistent with its bargaining obligations under the Order" and, therefore, ordered that the complaint be dismissed. In so concluding, the Assistant Secretary found that a memorandum issued by the Base Commander at the activity to his four division chiefs stating that they would be held personally responsible if their assigned personnel violated grooming standards "did not constitute a change in the [activity's] prior policy with respect to enforcement of the grooming standards," but rather "was a reaffirmation of the [activity's] existing policy and was intended to ensure uniformity of enforcement of the existing policy"

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that: (1) the Assistant Secretary, without benefit of briefs or the ability to observe the witnesses' demeanor, improperly rejected the ALJ's specific findings of fact and substituted his own findings that the memorandum did not constitute a change in prior policy; and (2) the Assistant Secretary's attempt to distinguish the instant case from New Mexico National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe,

New Mexico, A/SLMR No. 362 (Feb. 28, 1974) is "unwarranted and does not comport to the facts of the case." In this latter regard, you contend that both cases involve the institution of a new policy regarding the enforcement of grooming standards, contrary to the Assistant Secretary's findings. You further allege that the Assistant Secretary's decision presents a major policy issue:

[S]hould the Assistant Secretary, absent a finding of plain or substantial error, be permitted to overturn the decision of an [ALJ] when exceptions have not been filed to the recommended decision and order? It is further submitted that a decision without benefit of briefs or other opportunity to comment is a denial of substantial procedural due process rights.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the instant case. Rather, your assertion concerning the Assistant Secretary's findings constitutes essentially a disagreement with the Assistant Secretary's conclusion based on the findings of fact of the ALJ and therefore presents no basis for Council review. Moreover, with respect to your assertion that the Assistant Secretary's decision in the instant case is inconsistent with one of his prior decisions, your appeal fails to establish any clear, unexplained inconsistency with the Assistant Secretary's previously published decisions in the circumstances of this case. Your contention in this regard again constitutes mere disagreement with the Assistant Secretary's finding that the activity did not change its prior policy concerning the enforcement of grooming standards, and therefore presents no basis for Council review. Nor, in the Council's view, is a major policy issue presented, as alleged, in the circumstances of this case. In this regard, the Assistant Secretary, pursuant to his authority under section 6(d) of the Order, has prescribed regulations needed to administer his functions under the Order, one of which is to "decide unfair labor practice complaints" under section 6(a)(4).

These regulations provide for the consideration of an Administrative Law Judge's recommended decision and order in an unfair labor practice case, and subsequent affirmation or reversal by the Assistant Secretary, notwithstanding the absence of exceptions. Your appeal fails to establish that the Assistant Secretary's interpretation and application of his regulations were inconsistent with the purposes and policies of the Order in the circumstances of this case, and therefore presents no major policy issue warranting Council review. Finally, the Council has determined that no major policy issue is presented by your alleged denial of substantial

due process rights. In this regard, it is noted that section 203.22 of the Assistant Secretary's regulations provides for the filing of briefs to the Administrative Law Judge and section 203.23(b) provides that such briefs shall be a part of the record transferred to the Assistant Secretary.*⁷ Moreover, under part 2411 of the Council's rules, you had a right to request Council review of the Assistant Secretary's decision, which right you exercised in this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. L. Debardelaben
Office of the Adjutant General

*/ It is also noted in this regard that the Council has recognized that subsequent to the issuance of a decision of the Assistant Secretary a party may request the Assistant Secretary to reopen the record or to reconsider his decision. Cf. Department of the Navy, Naval Air Rework Facility, Naval Air Station, Alameda, California, A/SLMR No. 61, 1 FLRC 141 [FLRC No. 71A-35 (Dec. 15, 1971), Report No. 17].

Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822. The Assistant Secretary, upon a petition filed by the American Federation of Government Employees, AFL-CIO, Local 2607, seeking to consolidate three units for which it was the exclusive representative, found that the petitioned for consolidated unit was appropriate for the purpose of exclusive recognition under the Order. The agency appealed to the Council, contending that the Assistant Secretary's decision raised major policy issues and was arbitrary and capricious. The agency also requested a stay of the Assistant Secretary's decision.

Council action (March 1, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues or appear arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 1, 1978

Honorable Hale Champion
Under Secretary
Department of Health, Education,
and Welfare
330 Independence Avenue, SW.
Washington, D.C. 20201

Re: Education Division, Department of Health,
Education, and Welfare, Washington, D.C.,
A/SLMR No. 822, FLRC No. 77A-88

Dear Mr. Champion:

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

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, AFL-CIO, Local 2607 (AFGE) sought to consolidate three units for which it is the current exclusive representative. The units encompassed employees of the Office of the Assistant Secretary for Education (OASE), the employees of the Office of Education (OE), and the employees of the National Institute of Education (NIE). The petitioner sought for consolidated unit would consist of all professional and nonprofessional General Schedule and Excepted employees of the Education Division, Department of Health, Education, and Welfare (the activity), located in the Washington, D.C. metropolitan area as well as employees of the NIE whose duty station is outside the Washington, D.C. metropolitan area. The activity contended that the proposed consolidated unit was inappropriate because the OASE, the OE, and the NIE are separate and distinct "agencies" with independent programmatic functions and delegations of administrative authority, and that there was therefore only a limited community of interest among the employees of the three education agencies.^{1/} The activity further contended that the proposed consolidation would impair effective dealings and the efficiency of the agency's operation by breaching the legislative intent and the

1/ At the hearing the activity moved that the case be recaptioned because the OASE, the OE and the NIE are separate "agencies." In its brief to the Assistant Secretary, the activity requested reconsideration of the Hearing Officer's denial of the motion, contending additionally that the manner in which the case was captioned was prejudicial. In view of his disposition of the case, the Assistant Secretary denied the activity's request for reconsideration in this regard.

regulations issued by the Secretary of the Department of Health, Education, and Welfare (DHEW) which, in its view, require the separation of the education agencies. The AFGE took the position that the employees in the proposed consolidated unit had a definable community of interest, that the consolidated unit would promote effective dealings, and that the activity's contention that the proposed consolidated unit would impair the efficiency of the agency's operations was unfounded.

The Assistant Secretary, after reviewing at length the mission, function, organization and operations of the Education Division, DHEW, and after stating his view that the Council's 1975 Report and Recommendations which accompanied the issuance of Executive Order 11838 establishes a presumption favoring the appropriateness of proposed consolidated units, found that the petitioned for consolidated unit was appropriate for the purpose of exclusive recognition under the Order. In so finding he noted that the employees in the unit sought constitute all of the eligible employees of the Education Division, DHEW. The Assistant Secretary went on to state:

As such, they share a common mission, common overall supervision, common work classifications, essentially common working conditions, and essentially similar personnel and labor relations practices in accordance with DHEW delegations of authority. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. Furthermore, the evidence establishes that the OE Personnel Office presently services employees in both the OE and OASE; the Memoranda of Agreement signed by the AFGE with the OASE and with the NIE reflect much of the same language contained in the negotiated agreement between the AFGE and the OE; the NIE and the OASE have used the services of the OE's labor relations specialist in preparing their labor relations positions; the scope of labor relations authority in each agency is based on similar DHEW regulations; and promotions within the Division are based on a Division-wide area of consideration. Based on these factors, I further find that the proposed consolidated unit will promote effective dealings. Additionally, as the legislation creating the Education Division provided for the Assistant Secretary to serve as its principal officer and as the evidence shows that, at a minimum, the Assistant Secretary acts to coordinate certain activities of all of the component agencies within the Division, I find that the proposed consolidated unit bears "some rational relationship to the operational and organizational structure" of the Education Division, DHEW, and will therefore promote the efficiency of the agency's operations. Finally, I also find that the petitioned for consolidated unit, which provides for bargaining in a single, rather than in the existing three, bargaining units, will promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order [Footnote omitted.]

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision raises the following major policy issues:

- (1) Is the Assistant Secretary authorized to order the consolidation of bargaining units where the implementation of that decision would effectively force centralization of administrative authorities of agencies whose administrative authorities have, through specific legislation, been separated by the Congress of the United States?
- (2) May the Assistant Secretary order sub-Departmental organizations to consolidate bargaining units when such consolidation would require the parties to act in contravention of Departmental regulations and delegations of authority?
- (3) Did the Council, in its Report and Recommendations which accompanied Executive Order 11838, intend to imply, as the Assistant Secretary has done, that all bargaining unit consolidations will necessarily reduce "fragmentation"?
- (4) Does the Order, as interpreted by the Council, establish a presumption favoring the appropriateness of proposed consolidated units? [Emphasis in original.]
- (5) Is the applicability of consolidation procedures to existing units only to be so tightly construed as to create a unit which is not internally consistent? [Emphasis in original.]

You further allege that the findings of the Assistant Secretary with regard to application of the criteria contained in section 10(b) of the Order are arbitrary and capricious, as is his ruling regarding the activity's objection to the captioning of the case.

In support of the alleged major policy issues, you assert, in essence, that certain statutory provisions and agency regulations provide specifically for separate administrative authorities to each of the education agency heads; that the consolidation of bargaining units would put each of the three agency heads in the position of having to violate Department regulations either by yielding authority for labor relations to a central figure outside the agency or by establishing arrangements for collective bargaining in contravention of the requirement to have a single official responsible for labor relations in each particular organizational element; that the Assistant Secretary failed to deal with whether the three units concerned were indeed fragmented and, if so, whether their consolidation would, in fact, reduce fragmentation; that the Assistant Secretary's presumption of appropriateness of proposed consolidated bargaining units is detrimental to the objectives of the Order; and that the Assistant Secretary has certified a unit which both includes and excludes similarly situated employees. With respect to the allegation that the decision appears arbitrary and capricious, you contend that in virtually all areas where the Assistant Secretary made findings with regard to the appropriateness of the consolidated unit, facts on the record which would mandate contrary findings have been ignored and new unsupported "facts" created.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present any major policy issues or appear arbitrary and capricious.

With respect to your first alleged major policy issue set forth above, the Council is of the opinion that, in the circumstances of this case, no major policy issue is presented warranting review. In this regard, your appeal fails to present any basis to support a contention that meeting the obligations owed by the agency to the union as the exclusive representative of employees in the consolidated unit would force centralization of administrative authorities within the agency in a manner inconsistent with law.^{2/}

Similarly, your further allegation that the Assistant Secretary's consolidation order "would require the parties to act in contravention of Departmental regulations and delegations of authority" does not present a major policy issue warranting review. In this regard, the Council notes that the Assistant Secretary has not directed the parties to act in contravention of regulations and delegations of authority, nor have you shown that a necessary consequence of the Assistant Secretary's decision ordering consolidation would be a violation of such regulations and delegations. Thus, your allegation presents no basis for Council review of the Assistant Secretary's decision.

Your third alleged major policy issue as to whether the Council intended to imply that all bargaining unit consolidations will necessarily reduce fragmentation also does not present a major policy issue warranting review. In this regard, the Council's 1975 Report and Recommendations accompanying the issuance of Executive Order 11838 stated, in pertinent part:^{3/}

[T]he Federal labor-management relations program will be improved by a reduction in the unit fragmentation which has developed over the 12 years of labor-management relations under Executive orders.

The consolidation of units will substantially expand the scope of negotiations as exclusive representatives negotiate at higher authority levels in Federal agencies. The impact of Council decisions holding proposals negotiable will be expanded. In our view, the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest.

^{2/} That is, we do not construe the Assistant Secretary's finding herein that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order as requiring DHEW to restructure its organization or administrative authority in fulfilling its statutory mission and functions. In addition, DHEW retains complete discretion in designating the management representatives responsible for meeting its obligation to negotiate with the exclusive representative of the consolidated unit under the Order.

^{3/} Labor-Management Relations in the Federal Service (1975), at 35.

Your appeal fails to show that the Assistant Secretary's decision herein is inconsistent with the foregoing policies or otherwise inconsistent with the purposes and policies of the Order, and thus does not present any basis for review.

Your fourth alleged major policy issue as to whether the Order establishes a presumption favoring the appropriateness of proposed consolidated units also presents no basis for Council review, noting particularly the Assistant Secretary's affirmative finding (supra p. 2) that the proposed consolidated unit in the instant case satisfies each of the criteria specified in section 10(b) and will promote a more comprehensive bargaining unit structure consistent with the policies of the Order.^{4/}

With respect to your fifth alleged major policy issue that applying the consolidation procedures only to existing units may result, as here, in a consolidated unit being found appropriate which both includes and excludes similarly situated employees, thereby producing a situation which will result in considerable administrative confusion, such allegation presents no basis for Council review of the Assistant Secretary's decision. As the

^{4/} Accordingly, we do not reach and therefore do not adopt the Assistant Secretary's statement that, "given [the] clear policy guidelines in the consolidation of units area, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units [which] presumption may be rebutted only where it is found that the proposed consolidated unit is so inconsistent with the criteria contained in Section 10(b) of the Order that the overriding objective of creating a more comprehensive bargaining unit structure would be undermined by such a finding." In this regard, we do not construe his statement as establishing a "legal" presumption favoring consolidation which must be rebutted by the party opposing the proposed consolidation. Representation proceedings, including consolidation proceedings, are not adversary in nature. This is recognized by the Assistant Secretary's regulations governing representation proceedings, which regulations provide that hearings are investigatory and not adversary in nature and are for the purpose of developing a full and complete factual record (§ 202.9(b)). Rather, we construe his statement as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation such as that under consideration in the present case. Such affirmation accurately reflects the Council's 1975 Report and Recommendations to the effect that "[i]n making his determination on the appropriateness of [a] proposed consolidated unit, the Assistant Secretary should be mindful of the policy of facilitating the consolidation of existing bargaining units." [Labor-Management Relations in the Federal Service (1975), at 35.] As the Council stressed in its Report, "the creation of more comprehensive units is a necessary evolutionary step in the development of a program which meets the needs of the parties in the Federal labor-management relations program and best serves the public interest." Certainly the creation of consolidated units which meet the three criteria in section 10(b) of the Order is consistent with the policy goal which led to the amendments of the Order establishing the consolidation procedures contained in the Order.

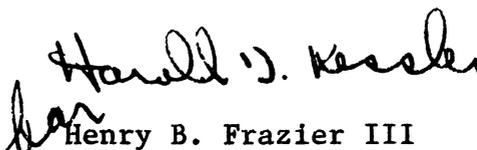
Council noted in its 1975 Report and Recommendations, "[t]he procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation."^{5/} [Emphasis added.] See Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio, A/SLMR No. 706, FLRC No. 76A-151 (Mar. 23, 1977), Report No. 123.

Finally, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. Your contentions to the contrary constitute in actuality a disagreement with the Assistant Secretary's factual findings and therefore do not present a basis for Council review. Nor does it appear that the Assistant Secretary acted without reasonable justification in deciding, pursuant to his regulations, that the activity's motion to recaption the instant case should be denied in the circumstances presented.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.^{6/}

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR S. B. Gray B. H. Kemp
Labor DHEW AFGE

^{5/} In so concluding, the Council notes that the Assistant Secretary's procedures provide mechanisms for the clarification of existing bargaining units and the resolution of questions concerning representation with respect to unrepresented employees. Such separate mechanisms are available to resolve potential issues as to the appropriate inclusions and exclusions in the consolidated unit.

^{6/} Your motion that the case be recaptioned is similarly denied.

Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831. The Assistant Secretary, upon a petition filed by the National Treasury Employees Union (NTEU) on behalf of itself and/or its constituent local chapters, seeking to consolidate 13 bargaining units for which NTEU and/or its local chapters were the exclusive representatives, found, among other things: That NTEU had standing to file the subject petition on behalf of its local chapters; and that the petitioned for consolidated unit was appropriate for the purposes of exclusive recognition under the Order. The agency appealed to the Council, contending that the decision of the Assistant Secretary raised major policy issues and was arbitrary and capricious. The agency also requested a stay of the Assistant Secretary's decision.

Council action (March 1, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues or appear arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 1, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Washington, D.C.
and National Treasury Employees Union,
A/SLMR No. 831, FLRC No. 77A-112

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, the National Treasury Employees Union (NTEU) filed a petition on behalf of itself and/or its constituent local chapters, seeking to consolidate 13 bargaining units in the Internal Revenue Service (IRS) for which the NTEU and/or its constituent local chapters are the current exclusive representatives. The IRS contended before the Assistant Secretary that NTEU is without standing to file the petition on behalf of its exclusively recognized local chapters as, among other things, the Order requires that consolidation may be sought only by exclusive representatives and NTEU has not, as a minimum, sought authorization from its exclusively recognized chapters to file the petition. The IRS further asserted that the proposed consolidated unit is not appropriate because it does not meet the criteria established by section 10(b) of the Order, and that the consolidation of the existing units will not promote the goal of fostering more comprehensive collective bargaining as the parties already have a successful history of multiunit bargaining.

The NTEU took the position that its standing to file the petition on behalf of its constituent local chapters is an internal union matter not subject to challenge by either the IRS or the Assistant Secretary, that the Report and Recommendations of the Council which set forth the consolidation procedures established a presumption favoring consolidation, and that the IRS has not produced evidence which rebuts this presumption. In this latter regard, NTEU contended that the parties' successful history of multiunit bargaining at the level of the Commissioner, IRS, is the best evidence that recognition at this level will promote effective dealings and efficiency of the agency's operations.

As to whether NTEU had standing to file the petition on behalf of its exclusively recognized local chapters, the Assistant Secretary stated:

[I]n my view, there is nothing in the Order, the Report and Recommendations of the Council, or the Assistant Secretary's Regulations, which requires the Assistant Secretary to challenge the constitutional authority of a national labor organization, such as the NTEU, to file a unit consolidation petition on behalf of its exclusively recognized local chapters. While, under certain circumstances, it may be necessary to review the constitutional authority of a national labor organization to take such an action where the constitution of the labor organization involved is unclear in this regard or appears to delimit such authority, there is no contention herein, nor does it appear, that the Constitution and Bylaws of the NTEU precludes the NTEU from filing a consolidation petition on behalf of its constituent local chapters. Moreover, it should be noted that the affected employees would be protected from arbitrary action by a national labor organization in seeking to consolidate the exclusively recognized units of its constituent locals by the provisions of the Executive Order and the Assistant Secretary's Regulations which provide for an election on the question of any proposed consolidation at the request of either party or 30 percent or more of the affected employees. Under all of these circumstances, I find that the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters. [Footnote omitted.]

As to the appropriateness of the proposed consolidated unit, the Assistant Secretary, after reviewing at length the mission, function, organization and operations of the IRS, and, after restating his view (first expressed in one of his recent decisions^{1/}) that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units," found that the petitioned for consolidated unit was appropriate for the purposes of exclusive recognition under the Order. In support of this conclusion as to the appropriateness of the petitioned for consolidated unit, the Assistant Secretary found, after reviewing the record, that:

[T]he employees in the unit sought constitute all of the eligible employees in the IRS's computer oriented Center-type operations. As such, they share a common mission and common supervision on a nationwide level, common job classifications, common types of working conditions, and similar personnel and labor relations practices pursuant to the multi-Center negotiated agreement between the parties. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. Furthermore, as the evidence establishes that the parties have successfully negotiated at the national level two successive

1/ Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145.

multi-unit agreements covering all of the employees sought herein by the NTEU, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting the scope and history of the parties' current collective bargaining relationship, I find that the proposed consolidated unit has already demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's Service Center, Data Center and National Computer Center. Consequently, I find that the proposed consolidated unit will continue to promote the efficiency of the agency's operations. Finally, although the parties have been bargaining voluntarily on a multi-unit basis, I also find that the petitioned for consolidated unit, which will provide bargaining for employees on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order

In your petition for review on behalf of IRS you contend:

1. The Assistant Secretary's finding that NTEU had standing to file its consolidation petition on behalf of exclusively recognized local NTEU chapters raises major policy issues under section 10 of the Order and is arbitrary and capricious, arguing, in summary, that the Order requires that authorization be secured from locals which alone hold exclusive recognition and that the Department of Labor should administratively determine the validity of such a petition.
2. The Assistant Secretary's finding that there exists a presumption favoring the appropriateness of a proposed consolidated unit raises major policy issues and is arbitrary and capricious, arguing that there is no rational basis for such a finding under his rules and regulations, the Order, or any other authority.
3. The Assistant Secretary's finding that the petitioned for unit is appropriate for the purposes of exclusive recognition under section 10(b) of the Order raises major policy issues, arguing that not all consolidations necessarily reduce unit fragmentation and promote more comprehensive bargaining unit structure. Further, you characterize as arbitrary and capricious the Assistant Secretary's findings that "the parties have successfully negotiated at the national level" and that "the petitioned for consolidated unit will provide bargaining for employees on a nationwide basis."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review. That is, the decision of the Assistant Secretary does not present any major policy issues or appear arbitrary and capricious.

With respect to your contentions concerning whether a labor organization is required to secure authorization of locals in order to file a

consolidation petition, the Council is of the opinion that in the circumstances of this case no major policy issue is presented warranting review. In this regard, your appeal fails to present any basis to support a contention that the Order requires local authorization for a labor organization to either enter into a bilateral agreement to consolidate existing units or to petition the Assistant Secretary to hold an election on the issue of a proposed consolidation. In so concluding, we note, as did the Assistant Secretary, that: (1) there was no contention, nor did it appear, that the Constitution and Bylaws of the NTEU precluded it from filing a consolidation petition on behalf of its constituent local chapters; and (2) affected employees would be protected from arbitrary action by a national organization seeking a consolidation by the provisions of the Order and the Assistant Secretary's regulations which provide for an election on the question of any proposed consolidation at the request of either party or 30 percent or more of the affected employees. Similarly, no major policy issue is raised concerning the alleged responsibility of the Assistant Secretary to determine the validity of a consolidation petition, noting that, in this case, the Assistant Secretary reviewed the circumstances surrounding the filing of the petition and concluded that "the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters."

Your allegations concerning the existence of a presumption favoring the appropriateness of proposed consolidated units also presents no basis for Council review. In this regard, the Council notes particularly the Assistant Secretary's affirmative finding (supra, at 2-3) that the proposed consolidated unit in the instant case satisfies each of the criteria specified in section 10(b) of the Order and will promote a more comprehensive bargaining unit structure consistent with the policies of the Order.^{2/} Similarly, your allegations as to whether all consolidations necessarily reduce unit fragmentation and promote a more comprehensive bargaining unit structure present no basis for review, noting that the Assistant Secretary found, on the basis of a review of the circumstances of the instant situation, that the petitioned for consolidated unit "will provide bargaining for employees on a nationwide basis under a single unit structure, will reduce fragmentation, [and] promote a more comprehensive bargaining unit structure"

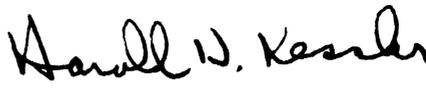
^{2/} In this regard, as the Council stated in Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145, at n.4, we do not construe the Assistant Secretary's statement that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units" as creating a "legal" presumption which must be rebutted by the party opposing the proposed consolidation. Rather, we construe his statement as a recognition and reaffirmation of the strong policy in the Federal labor-management relations program of facilitating the consolidation of existing bargaining units which still conform to the three appropriate unit criteria contained in section 10(b) of the Order. Labor-Management Relations in the Federal Service (1975), at 35.

Finally, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. Your contentions to the contrary constitute in actuality a disagreement with the Assistant Secretary's factual findings and therefore do not present a basis for Council review.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,


for
Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. Angelo
NTEU

Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education, and Welfare, Chicago Region V-A, A/SLMR No. 876. The Assistant Secretary, upon a petition filed by the American Federation of Government Employees, Local 1395, AFL-CIO, seeking to consolidate two units for which it was the exclusive representative, found that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order. The agency appealed to the Council, contending that the decision of the Assistant Secretary presented major policy issues and was arbitrary and capricious.

Council action (March 1, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues or appear arbitrary and capricious. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 1, 1978

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
Room G-402, West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Bureau of Field Operations, Office of Program
Operations, Social Security Administration,
Department of Health, Education, and Welfare,
Chicago Region V-A, A/SLMR No. 876, FLRC
No. 77A-136

Dear Mr. Becker:

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

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, Local 1395, AFL-CIO (AFGE) sought to consolidate two units for which it was the current exclusive representative. The units consisted of all employees in the Champaign, Illinois, Social Security District Office, and all District Office and Branch Office employees, Teleservice Center employees, and Reconciliation and Analysis Unit employees of the Bureau of Field Operations, Social Security Administration Region V-A whose office or parent office is located in Cook County, Illinois (the activity). The activity contended that the proposed consolidated unit would not be appropriate because employees in the existing two units do not share a community of interest and, because of the geographical separation of the employees, the consolidated unit would not promote efficiency of agency operations and effective dealings.

The Assistant Secretary, after reviewing at length the record disclosures concerning the organization, mission and operation of Region V-A of the Bureau of Field Operations, and after restating his view (first expressed in one of his recent decisions^{1/}) that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units," found that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order. In so finding, he noted:

1/ Education Division, Department of Health, Education, and Welfare,
Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978),
Report No. 145.

[A]ll the employees in the proposed consolidated unit share a common mission, common overall supervision, uniform job classifications, essentially common working conditions and uniform personnel and labor relations practices. Based on these considerations, I find that the employees in the proposed consolidated unit share a clear and identifiable community of interest. Further, as all employees of the Region are serviced by the same personnel office, and the Regional Representative has been delegated the ultimate authority for labor relations matters, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting that the Regional Representative coordinates the operations of the components within the proposed consolidated unit, as well as labor relations, grievance and personnel matters, I find that the proposed consolidated unit will promote the efficiency of the agency's operations. Finally, I find that the proposed consolidated unit, which provides for bargaining in a single unit, rather than in the existing two bargaining units, will promote more comprehensive bargaining and reduce fragmentation.

In your petition for review on behalf of the activity, you allege that major policy issues are presented by the Assistant Secretary's use of a "presumption" favoring the appropriateness of a proposed consolidated unit. In this regard you assert that the Assistant Secretary's use of a presumption in any representation proceeding is at variance with the non-adversary nature of such hearings and is therefore in conflict with the Assistant Secretary's own regulations and with policy established by the Council. You further allege that the Assistant Secretary's retroactive application of the "presumption doctrine" to the facts of this case was arbitrary and capricious and violated section 10(b) of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present any major policy issue or appear arbitrary and capricious. With respect to your allegation that the Assistant Secretary's presumption favoring the appropriateness of proposed consolidated units raises a major policy issue, the Council is of the opinion that no basis for review is presented in the circumstances of this case, noting particularly that the Assistant Secretary made affirmative findings, based on the record, that the proposed consolidated unit satisfies each of the criteria specified in section 10(b) of the Order and will promote a more comprehensive bargaining unit structure consistent with the policies of the Order.^{2/}

^{2/} In this regard, as the Council stated in Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145, at n. 4, we do not construe the Assistant Secretary's statement that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units" as creating a "legal" presumption which must be rebutted by the party opposing the proposed consolidation. Rather, we construe his statement as

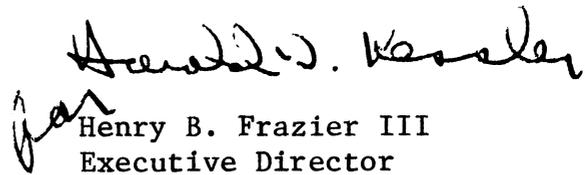
(Continued)

Finally, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. Your contentions to the contrary constitute in actuality a disagreement with the Assistant Secretary's factual findings and therefore do not present a basis for Council review.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. A. Zaltman
AFGE

(Continued)

a recognition and reaffirmation of the strong policy in the Federal labor-management relations program of facilitating the consolidation of existing bargaining units which still conform to the three appropriate unit criteria contained in section 10(b) of the Order. Labor-Management Relations in the Federal Service (1975), at 35.

American Federation of Government Employees, Local 3488 and Federal Deposit Insurance Corporation, New York Region. The dispute involved the negotiability of union proposals concerning (1) the provision of vehicles to employees; and (2) the designation of employees' residences as their "official station."

Council action (March 13, 1978). As to (1), the Council held that the union's proposal was excepted from the agency's obligation to bargain under section 11(b) of the Order. With regard to (2), the Council held that the proposal did not conflict with either section 12(b) or section 11(b) of the Order, and that no "compelling need" existed under section 11(a) of the Order and Part 2413 of the Council's rules for the agency's regulation asserted as a bar to negotiation on the subject proposal. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination of nonnegotiability as to the union's proposal numbered (1) above, and set aside the determination as to (2).

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

American Federation of Government
Employees, Local 3488

(Union)

and

FLRC No. 77A-76

Federal Deposit Insurance Corporation
New York Region

(Activity)

DECISION ON NEGOTIABILITY ISSUES^{1/}

Union Proposal I

Use of Company Car: A company car with radio and air-conditioning will be provided to each employee who requests one in lieu of mileage allowance. FDIC will pay insurance, gasoline and all other maintenance.

^{1/} In this case, the agency alleged that the union did not timely request an agency head determination as to the negotiability of the proposals involved. In this regard, the agency indicated that 7 months elapsed between the time the local parties' negotiations were "concluded" and the time the union requested an agency negotiability determination. The agency therefore requested the Council to dismiss the union's appeal because of the alleged failure by the union to diligently seek such agency determination. We deny this agency request based on the following. The record indicates that the local parties' agreement was not intended to dispose of the unresolved issues concerning the subject proposals and that the union reserved the right to make further attempts to resolve such issues. Moreover, the union states without contradiction that it did undertake further, unsuccessful, efforts with agency representatives to resolve the disagreements during the 7-month period adverted to by the agency. In these particular circumstances we find that the negotiability issues arose, and were referred to the agency head for determination, "in connection with negotiations" as required by section 11(c) of the Order; and that the record does not contain any indication that such referral was rendered improper by the terms of the parties' agreement or by any of their related conduct. See American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania, FLRC No. 76A-128 (Aug. 31, 1977), Report No. 137.

Agency Determination

The agency determined that the company car proposal is nonnegotiable because it is excepted from the obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to negotiate under section 11(b) of the Order.^{2/}

Opinion

Conclusion: The union's proposal is excepted from the agency's obligation to bargain under section 11(b) of the Order. Consequently, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The agency asserts that the union's proposal concerns the technology of performing the agency's work and is therefore outside the agency's bargaining obligation under section 11(b) of the Order.^{3/} We find merit in this position of the agency.

A proposal concerning the providing of vehicles was before the Council in the Immigration and Naturalization Service case.^{4/} There, the proposal in question provided in pertinent part:

(Continued)

The agency further alleged that the union failed to comply with the Council's rules concerning the service of petitions for review. Although the union filed its appeal with the Council on July 11, 1977, the union did not serve a copy of its appeal upon the agency by certified mail until August 4, 1977. However, since the agency was thereafter given an extended time for the filing of its statement of position in accordance with the Council's rules and since there has been no showing that the agency was prejudiced, we deny the agency's motion to dismiss the union's petition for review. See National Federation of Federal Employees, Local 1745 and Veterans Administration Data Processing Center, Austin, Texas, FLRC No. 77A-1 (Aug. 26, 1977), Report No. 135.

^{2/} In view of our decision herein, it is unnecessary to consider the additional agency contentions concerning the negotiability of the proposal.

^{3/} Section 11(b) of the Order provides in relevant part:

[T]he obligation to meet and confer does not include matters with respect to . . . the technology of performing its work

^{4/} Immigration and Naturalization Service and American Federation of Government Employees, 3 FLRC 380 [FLRC No. 74A-13 (June 26, 1975), Report No. 75].

An appropriate number of . . . Patrol vehicles equipped with flashing emergency lights will be assigned to traffic checkpoints. The number of . . . vehicles will be sufficient to provide adequate safety protection.

The Council upheld the agency's contention that the proposal was excepted from the agency's obligation to bargain under section 11(b), stating (at 394):

As to the requirement in the proposal for "Patrol vehicles," section 11(b) also excepts from the agency's obligation to bargain matters with respect to "the technology of performing its work" In this regard . . . the instant proposal would require the agency to negotiate about the use of particular equipment to perform the agency's work at traffic checkpoints. While the agency may negotiate with respect to such matters if it chooses, section 11(b) excepts such matters from its obligation to do so. [Footnote omitted.]

In our opinion, the question of whether to provide a "company car" to each employee who requests one in lieu of mileage allowance, as the instant proposal would require, is likewise a question concerning the adoption of a particular "technology" of performing the agency's work. As such, it is a matter excepted from bargaining under section 11(b) of the Order.^{5/}

Union Proposal II

Official Station: For all purposes an employee's residence is his sole official station. All travel expenses are to be computed from the employee's residence.

Agency Determination

The agency determined that the "official station" proposal is nonnegotiable because it conflicts with management's reserved right under section 12(b)(4) of the Order; is excepted from the agency's obligation to bargain by section 11(b) of the Order; and, violates an internal agency regulation (General Travel Regulation, section 1203(d)) for which a "compelling need" exists.

^{5/} . Accord, National Treasury Employees Union; Chapter No. 22, National Treasury Employees Union; and United States Department of the Treasury, Internal Revenue Service, Philadelphia District, FLRC No. 75A-118 (Nov. 19, 1976), Report No. 118, at 3 of Council decision, and National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98, at 3 of Council decision.

Questions Here Before the Council

The questions are:

- I. Whether the proposal is excluded from bargaining under section 12(b)(4) of the Order; or is excepted from the obligation to negotiate by section 11(b) of the Order; or, if not,
- II. Whether a "compelling need" exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules and regulations for the agency regulation concerning temporary duty travel asserted as a bar to negotiations.

Opinion

A. Conclusion as to Question I: The proposal does not infringe upon management's reserved rights under section 12(b) of the Order; and is not excepted from the obligation to negotiate by section 11(b). Accordingly, the agency determination that the proposal is nonnegotiable under these sections of the Order was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.

Reasons: In order to fully understand the reasons for the above conclusion, as well as for our conclusion concerning Question B, below, some background information concerning the agency's present practice in connection with reimbursing unit employees' daily travel costs is required.^{6/} In this regard, according to the record, unit employees are bank examiners who, necessarily, perform their principal duties at successive "places of temporary assignment," i.e., banks under examination, within the agency's New York Region. Further, the Region designates as an examiner's official station the city (Albany, Rochester or New York, New York; Moorestown, New Jersey; or San Juan, Puerto Rico) in which the examiner's field office is

^{6/} According to the record and the 1977/78 United States Government Manual, the Federal Deposit Insurance Corporation, an independent agency within the executive branch of the Government, was established to promote and preserve public confidence in banks and to protect the money supply through provision of insurance coverage for bank deposits. The FDIC operates on income derived from assessments on deposits held by insured banks and from interest on the required investment of its surplus funds in Government securities. The accumulated net income of the FDIC totaled \$7.3 billion on December 31, 1976. For the most part, the FDIC's field employees consist of about 1850 bank examiners (appointed pursuant to authority contained in title 12 of the U.S. Code) of which approximately 180 are assigned to the New York Region which is involved in the present dispute. The "Federal Travel Regulations" (41 C.F.R. 101-7), which generally apply to executive branch agencies (5 U.S.C. 5701), do not regulate the travel allowances for the FDIC bank examiners. Rather, travel allowances for the FDIC bank examiners are regulated by the FDIC's internal "General Travel Regulations."

located. Based on March-April 1977, statistics compiled by the agency, an examiner in the New York Region travels 40-50 miles each day to and from assignments, on the average. In this connection, it appears from the record that the agency reimburses examiners who reside within a "normally commutable area of the official station (a 30 mile radius; 50 miles from New York City)" for travel expenses to and from their residences. Employees residing outside a "normally commutable area" of the official station are reimbursed on a more limited basis in accordance with the agency's General Travel Regulations, section 1203(d) (See page 7).

We turn now to the grounds for the agency's determining that the proposal is nonnegotiable.

12(b)(4)--The agency asserts that the "official station" proposal would interfere with management's right under section 12(b)(4) of the Order^{7/} to maintain the efficiency of government operations. More particularly, the agency principally contends that the proposal would "remove any assurances" that examiners will live within a reasonable distance of their field office. Further, the agency implies that, there being no incentive for examiners to live close by, their respective residences would become "widely dispersed." Finally, the agency claims that such dispersion would result in the agency's having no control over the amount of regular travel and subsistence reimbursement since the reimbursement would be computed to and from an "unlimited distance."

As we stated in our Little Rock decision,^{8/} section 12(b)(4) of the Order may not be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness

7/ Section 12(b)(4) of the Order provides:

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

.

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

.

(4) to maintain the efficiency of the Government operations entrusted to them

8/ Local Union 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

in operations are inescapable and significant and are not offset by compensating benefits, and no such showing has been made in this case. That is, the agency has failed to demonstrate that under the proposal examiners' residences would become dispersed, as claimed, or that, if such dispersion occurred, it would result in increased costs or reduced effectiveness in agency operations which would be inescapable, significant, and not offset by compensating benefits. Thus, we find in the instant case that the agency has failed to establish that the proposal is violative of section 12(b)(4) of the Order.

11(b)--The agency further contends that under section 11(b) of the Order^{9/} it is "not required to negotiate over its organizational structure and the assignment of employees for administrative purposes." Since the proposal "presents inherent difficulties in organization control" and would have adverse effects on the agency's right to organize administratively and assign employees, the agency claims the proposal is excepted from its obligation to bargain under section 11(b) of the Order.

The purpose of the proposal as reflected in the record is limited solely to being an administrative device applicable to the computation of travel expenses. That is, the proposal, as set forth by the union and construed by the Council for purposes of this decision, is singularly intended to designate an employee's residence as his official station for the exclusive purpose of calculating mileage, and thus computing travel expenses, reimbursable to employees, for travel otherwise authorized by the agency. Consequently, in view of its limited effect, the proposal in no way relates to workshifts or workweeks, nor is it integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the number, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty of the agency, as contended by the agency. On the contrary, the proposal, which merely designates the point to or from which mileage will be computed for authorized travel and which, as already indicated, pertains to no other matters or purposes, places no limits whatsoever on the assignment of duties to employees; does not in any manner involve job content; and does not relate to the overall organization of the agency within the meaning of section 11(b).

Hence, we find that the agency has not supported its contention that the proposal would have a determinative effect on the agency's organization or on the assignment of employees to an organizational unit, work project or tour of duty within the meaning of section 11(b) of the Order.

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

[T]he obligation to meet and confer does not include matters with respect to . . . [an agency's] organization . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

Accordingly, having found no conflict between the proposal and either section 11(b) or section 12(b) of the Order, we proceed to the question of whether the proposal is barred by an agency regulation for which a "compelling need" exists.

B. Conclusion as to Question II: No "compelling need" exists under section 11(a) of the Order^{10/} and Part 2413 of the Council's rules for the agency's General Travel Regulation, section 1203(d), to bar negotiations on the union's proposal. Accordingly, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{11/}

Reasons: This union proposal, as already indicated, provides that an employee's residence is his official station and would require the agency to compute otherwise reimbursable travel expenses based on such official station. The agency's General Travel Regulations, however, establish the policy that reimbursement for travel shall be "for all expenses essential to the transacting of official business"; and, with specific regard to the calculation of allowances based on travel to and from an employee's residence, section 1203(d) of the General Travel Regulations provides as follows:

(d) Employees Residing Outside Normally Commutable Areas.

- (1) Determinations will be made by Division Heads and Regional Directors as to whether places of residence are within normally commutable areas of official stations.
- (2) For travel following completion of assignment periods, except when such completion immediately precedes nonwork

^{10/} Section 11(a) of the Order, as amended, provides in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order.

^{11/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

days for which return to residence is authorized, field employees whose place of residence is determined to be noncommutable will be reimbursed on the basis of returning to the official station or residence whichever involves the least travel expense. When travelers return to their residence and travel expense is limited to the amount allowable for travel to the official station, transportation to the next assignment shall be constructed on the basis of travel from the official station to the next place of temporary assignment. Conversely, when field employees are entitled to travel allowances from their last place of temporary assignment to their residence, travel allowances to the next place of temporary assignment shall be based on travel from the residence.

As to the meaning of this regulation, the agency explains in the record that:

Employees whose residences are located within a normally commutable area of the official station (a 30 mile radius; 50 miles from New York City) are reimbursed for travel expenses to and from their residences. Only when employees choose to reside outside a normally commutable area of the official station are the limitations specified in Section 1203(d)(2) of the travel regulations in effect.

The agency takes the position that a "compelling need" exists for this agency level regulation under section 11(a) of the Order and, in particular, under section 2413.2(b) and (e) of the Council's rules; and, consequently, the proposal is nonnegotiable.

The criteria for determining "compelling need" contained in the Council's rules relied upon by the agency herein provide:

§ 2413.2 Illustrative criteria.

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

.
(b) The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision.

.
(e) The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest. [Emphasis supplied.]

In claiming that the subject regulation is essential to the management of the agency, under section 2413.2(b) of the Council's rules, the agency more particularly asserts that in order to schedule bank examinations "properly and equitably" it must have assurance that an examiner's travel is not "onerous" and that an examiner's availability for travel is not "hindered" by the examiner's living "a great distance from the field office and the banks to be examined." In this regard, according to the agency, the union's proposal would remove "assurances" that examiners would live within "reasonable proximity" to the banks they examine; and, additionally, would increase (to an unspecified extent) "administrative costs and staffing" due to, in effect, a lack of agencywide uniformity in travel reimbursement practice.

Similarly, in claiming that the subject regulation establishes uniformity which is essential to the effectuation of the public interest under section 2413.2(e) of the Council's rules, the agency more particularly argues that the public's interest is in a safe and sound banking system; the agency protects this interest by its examining operations and maintenance of a deposit insurance fund; and, the union's proposal "could result in examiners residing a greater distance from the banks they examine," thereby resulting in greater travel expenses and, thus, increasing the agency's operating costs.

In our opinion, these arguments fail to establish that the regulation either is "essential, as distinguished from helpful or desirable," to the management of the agency, or establishes uniformity which "is essential to the effectuation of the public interest," so as to bar negotiation on the union's proposal.

The Council stated in its decision in the consolidated National Guard cases as follows:^{12/}

[T]he compelling need provisions of the Order were designed and adopted to the end that internal "agency regulations not critical to effective agency management or the public interest" would be prevented from resulting in negotiations at the local level being "unnecessarily constricted." . . .

Thus, the Council's illustrative criteria for determining compelling need, while distinctive from one another in substance, share one basic characteristic intended to give full effect to the compelling need concept: They collectively set forth a stringent standard for determining whether the degree of necessity for an internal agency regulation concerned with personnel policies and practices and matters affecting working conditions warrants a finding that the

^{12/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 11-12.

regulation is "critical to effective agency management or the public interest" and, hence, should act as a bar to negotiations on conflicting proposals at the local level. This overall intent is clearly evidenced in the language of the criteria, several of which expressly establish that essentiality, as distinguished from merely helpfulness or desirability, is the touchstone. [Emphasis in original.]

Although the agency in the instant case has asserted its concerns as already indicated that under the union's proposal examiners might choose not to live within a "reasonable proximity" to the banks they examine and, thereby, render their travel onerous, compromise their availability for travel, and create work scheduling problems; and, that unspecified increased costs to the agency might derive from the lack of agencywide uniformity in travel reimbursement practice under the union's proposal, it has failed to establish in any manner that the "commutable area" basis for reimbursing examiners' travel expenses, as provided for in agency regulations, is of critical significance to either the management of the agency or the effectuation of the public interest in a "safe and sound banking system." In this connection, we think the agency has, in part, improperly assessed the impact of the union's proposal.

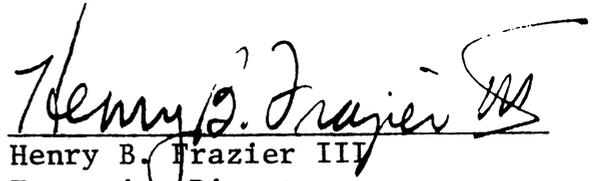
That is, with regard to examiners performing their jobs, including necessary travel, even assuming that under the proposal examiners would move their residences to locations at greater distances from the banks to be examined, the proposal plainly would not have the additional impact implied by the agency of: relieving examiners from their obligation to fully perform the duties assigned to them, including necessary travel; requiring the agency to tolerate to any extent the failure to perform or inadequacy in performing those assigned duties; or, causing the agency to modify any of an examiner's duties or day-to-day work assignments because of where the examiner has chosen to locate his or her residence. Having thus improperly assessed the impact of the proposal, the agency has failed to establish that there is any critical linkage between where examiners choose to reside, on the one hand, and the management of the agency's operations or the effectuation of the public interest in a safe, sound banking system, on the other. Likewise, the agency makes no showing that the unspecified increase in "administrative" and "operating" costs which it claims would result under the proposal are of critical significance.^{13/}

Thus, we find that the agency has not supported its contentions that the subject regulation relied upon by the agency is "essential, as distinguished

^{13/} Cf. American Federation of Government Employees, Local 1626 and General Services Administration, Region 5, FLRC No. 76A-121 (July 13, 1977), Report No. 131, at 6 (mere assertion that regulation prevents "an expenditure of public funds" does not demonstrate essentiality of regulation to bar negotiations).

from helpful or desirable" to the management of the agency or establishes uniformity which "is essential to the effectuation of the public interest," within the intent of section 2413.2(b) and (e) of the Council's rules.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 13, 1978

Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806; and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859. The appeals arose from separate decisions of the Assistant Secretary involving unfair labor practice complaints filed by the National Treasury Employees Union (the union) on behalf of itself and certain of its chapters, alleging violations of section 19(a)(1) and (6) of the Order by the agency and certain of the agency's activities. The Assistant Secretary, based on a standard enunciated in his decisions for determining which provisions of an agreement terminate and which provisions continue in effect upon the expiration of the agreement, found that the agency and its activities had violated section 19(a)(1) and (6) of the Order by unilaterally eliminating certain provisions in the parties' agreement following expiration of that agreement. Upon consideration of the agency's petitions for review and the union's oppositions thereto, the Council determined that both decisions of the Assistant Secretary presented the same major policy issue concerning "the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement", and accepted the agency's petitions for review (Report Nos. 133 and 138).

Council action (March 17, 1978). Inasmuch as both appeals arose out of the same basic circumstances and factual background, involved the same agency and national labor organization, and presented the same major policy issue, the Council consolidated them for decision on the merits. For reasons fully detailed in its decision, including principles set forth therein which address the major policy issue described above, the Council found that the Assistant Secretary's decision and order in each of the cases was inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council remanded the cases to the Assistant Secretary for action consistent with its decision.

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

Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; Internal Revenue Service, National Computer Center; and the Internal Revenue Service

and

A/SLMR No. 806
FLRC No. 77A-40

The National Treasury Employees Union; NTEU Chapter No. 066; NTEU Chapter No. 067; NTEU Chapter No. 070; NTEU Chapter No. 071; NTEU Chapter No. 072; NTEU Chapter No. 073; NTEU Chapter No. 078; NTEU Chapter No. 082; NTEU Chapter No. 097; NTEU Chapter No. 098; and NTEU Chapter No. 099

Department of the Treasury,
Internal Revenue Service,
Brookhaven Service Center

and

A/SLMR No. 859
FLRC No. 77A-92

National Treasury Employees
Union and Chapter No. 099, NTEU

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from two separate decisions of the Assistant Secretary involving unfair labor practice complaints filed by the National Treasury Employees Union (the union) on behalf of itself and certain of its chapters

alleging violations of section 19(a)(1) and (6) of the Order by the Internal Revenue Service (the agency) and certain of its activities.^{1/} Inasmuch as both appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

The pertinent factual background of these cases, as found by the Assistant Secretary, is as follows: The agency and the union were parties to a multi-center collective bargaining agreement (MCA) covering the employees at the activities involved herein. The MCA was due to expire on April 12, 1975. During the course of negotiations for a new MCA, the parties twice extended the expiration date of the agreement. On April 24, 1975, the parties executed a memorandum of agreement providing that the MCA would remain in effect until negotiations were completed or the union invoked the impasse procedures provided in the Order, and that the MCA would terminate five days after receipt by either party of notice of termination. On May 27, 1975, the union notified the agency that it was declaring an impasse, and would file its appeal with the Federal Service Impasses Panel (Panel) on June 2, 1975. By letter dated May 28, 1975, the agency wrote the union that, while it would honor the union's "unilateral decision and right to terminate the agreement and thus give up the institutional benefits contained therein . . . , other benefits in the agreement . . . accrue to individual employees. We wish to advise you that it is our intent to continue these benefits to employees intact." The agency's letter included a detailed list indicating which provisions of the MCA would continue in effect and which ones would not. The next day (May 29), the agency head sent a memorandum to all employees which included the same list terminating certain provisions of the MCA and continuing others described as "applicable to you as an employee" [Emphasis in original.] This memorandum was issued to the employees without notice to or discussion with the union, and the agency subsequently refused to negotiate with the union over the agency's changes in personnel policies and practices and matters affecting working conditions contained in the memorandum.^{2/}

^{1/} Section 19(a) of the Order provides, in pertinent part:

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

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

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

^{2/} On July 18, 1975, the parties signed a new multi-center agreement, effective October 18, 1975, and agreed to reinstate the previous MCA pending the effective date of the new agreement.

In A/SLMR No. 806 (FLRC No. 77A-40), the union filed a complaint on behalf of itself and 11 of its chapters alleging, in pertinent part, that the agency and 11 of its activities violated section 19(a)(1) and (6) of the Order by virtue of their elimination of certain portions of the MCA upon its expiration. The agency contended that it eliminated only those portions of the MCA which were "institutional benefits"; i.e., those benefits which, in the agency's view, pertained to the exclusive representative's rights as an organization and therefore terminated with the agreement's expiration. The union asserted that such rights, once negotiated, became personnel policies and practices and other matters affecting working conditions, and, therefore, any unilateral changes with respect to such matters violated the Order. With respect to this complaint, the Assistant Secretary found:

[T]he unilateral elimination of those agreement provisions characterized by the [agency] as "institutional benefits" accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. [Footnotes omitted.]

Under these circumstances, the Assistant Secretary, citing his decision in U.S. Army Corps of Engineers, Philadelphia District,^{3/} found that the

3/ In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (June 23, 1976), the Assistant Secretary stated that it has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms and conditions of employment which are included within the scope of section 11(a) of the Order. He further determined that, after bargaining to an impasse, agency management does not violate the Order by unilaterally imposing changes in terms and conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are to become effective in order to give the exclusive representative ample opportunity to invoke the services of the Panel before the changes are implemented. The Assistant Secretary concluded that the framers of the Order intended to give parties discretion with respect to seeking the Panel's services under section 17. He went on to state that if a party involved in an impasse requested the services of the Panel, it would effectuate the purposes of the Order to require the parties, in the absence of an overriding exigency, to maintain the status quo and permit the processes of the Panel to run their course before the unilateral change in terms and conditions of employment could be effectuated.

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activities' "unilateral elimination of other agreement provisions related to the [union's] rights, such as posting privileges, etc., constituted an improper unilateral change in personnel policies and practices in violation of section 19(a)(1) and (6) of the Order." [Footnotes omitted.]^{4/}

In A/SLMR No. 859 (FLRC No. 77A-92), the union filed a complaint on behalf of itself and its chapter representing employees at the Brookhaven Service Center which alleged, in pertinent part, that the agency violated section 19(a)(1) and (6) of the Order by unilaterally altering the negotiated grievance procedure after the MCA had expired by eliminating the arbitration provision of such negotiated agreement, and by refusing to process grievances filed thereafter pursuant to the agency grievance procedure. The elimination of the arbitration provision was among the changes contained in the aforementioned memorandum sent to all employees by the agency head which set forth the list of provisions in the MCA that would continue in effect and the ones that would not.

The Assistant Secretary, again citing his decision in U.S. Army Corps of Engineers, Philadelphia District, supra, found that the agency violated section 19(a)(1) and (6) of the Order by unilaterally excluding arbitration from the negotiated grievance procedure following the expiration of the parties' negotiated agreement. In this regard, the Assistant Secretary stated:

Thus, it has been found previously in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806, that, ". . . only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the

(Continued)

The union appealed to the Council. The Council, in denying review of the appeal [FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122], did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes have run their course. The Council noted that such statement, which had been included in the Assistant Secretary's decision merely as dictum, had not been appealed to the Council and therefore, apart from other considerations, was not properly before the Council for review.

^{4/} The union's complaint had also alleged that the agency and activities had violated section 19(a)(1) and (6) of the Order by attempting to deal directly with unit employees by means of the memorandum issued to them by the agency head. However, as a grievance over the memorandum had been filed previously at one of the activities, the Assistant Secretary

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expiration of a negotiated agreement." In my view, arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather, I find that arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment, unless the parties have expressly agreed that it terminates with the expiration of such negotiated agreement.^{5/}

The agency, on behalf of itself and its activities, appealed the Assistant Secretary's decision in each case to the Council. Upon consideration of the petitions for review, and the oppositions filed thereto, the Council determined that both decisions of the Assistant Secretary present the same major policy issue concerning "the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement." The Council also determined that the agency's request for a stay in each case met the criteria for granting stays as set forth in section 2411.47(e)(2) of the Council's rules and granted the requests.

In both cases, the agency and the union filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules.^{6/} The Department of the Interior filed an amicus curiae brief in FLRC No. 77A-40, as provided in section 2411.49 of the Council's rules.

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determined that section 19(d) of the Order precluded his passing upon that aspect of the complaint. The union's petition for review of this portion of the Assistant Secretary's decision was denied by the Council. Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806, FLRC No. 77A-40 (Aug. 12, 1977), Report No. 133.

^{5/} In a footnote to this statement, the Assistant Secretary continued as follows:

This is not to say that an activity may not unilaterally change a term or condition of employment if such change does not exceed the scope of its proposals made in prior negotiations, and if such change is made after the activity has bargained to impasse in good faith, and where the matter involved has not been submitted to the Federal Service Impasses Panel pursuant to Section 17 of the Order. See U.S. Army Corps of Engineers, Philadelphia District, cited above.

^{6/} The union requested oral argument in both cases here consolidated for decision, and the agency requested oral argument in FLRC No. 77A-92. Pursuant to section 2411.48 of the Council's rules, the requests are denied because the positions of the participants in these cases are adequately reflected in the entire record now before the Council.

Opinion

The major policy issue presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. The standard enunciated by the Assistant Secretary for determining which provisions of an agreement terminate and which provisions continue in effect upon the expiration of an agreement, as noted above, is that only those rights and privileges which are based solely on the existence of a written agreement terminate with the expiration of the agreement, whereas other rights and privileges accorded to an exclusive representative continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. Thus, as previously indicated, the Assistant Secretary concluded that, under his standard, for example, negotiated provisions calling for the arbitration of grievances and posting privileges would survive the expiration of the agreement while checkoff privileges would not. For the reasons stated below, we find this standard to be inconsistent with the purposes of the Order.

Section 11(a) of the Order provides that an "agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions" In addition to the obligation to negotiate concerning personnel policies and practices and matters affecting working conditions, section 11(a) comprehends the obligation of the parties to give effect to the terms of their collective bargaining agreement throughout the duration of that agreement.^{7/} Thus, an agency may not breach its obligation owed to an exclusive representative, as set forth in section 11(a) of the Order, by changing personnel policies and practices and matters affecting working conditions contained in the agreement during the term of that agreement.^{8/}

With respect to established personnel policies and practices and matters affecting working conditions which are not specifically provided for in the parties' agreement, the Council stated in its 1975 Report and Recommendations accompanying the issuance of Executive Order 11838:^{9/}

[T]he question is raised as to whether the Order requires . . . that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

^{7/} See, e.g., Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118, at 8 of the Council's decision.

^{8/} Id.

^{9/} Labor-Management Relations in the Federal Service (1975), at 41.

The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct

That is, a party may not unilaterally change established personnel policies and practices and matters affecting working conditions not specifically provided for in the agreement without first fulfilling its obligation to negotiate -- i.e., without first providing notice to the other party of the proposed change and, upon that party's request, negotiating over such proposal. Thus, it is clear that the obligation to negotiate, as set forth in section 11(a) of the Order, requires both parties during the term of an agreement to maintain established personnel policies and practices and matters affecting working conditions, whether or not such terms are incorporated in such agreement, unless and until they are modified in a manner consistent with the Order.

As stated above, the question presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.

Such conclusion implements the recognized policy of the Order to foster stability in the Federal labor-management relations program.^{10/} Further, it is consistent with the established framework of the Order which constricts unilateral changes in current personnel policies and practices and matters affecting working conditions and which provides for the peaceful resolution of bargaining disputes. Finally, our conclusion as to the continuation of established personnel policies and practices and matters affecting working conditions may be readily applied by the

^{10/} See, e.g., Labor-Management Relations in the Federal Service (1975), at 36; Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52 (Sept. 27, 1976), Report No. 112, at 11; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 803 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

parties and facilitates "the maintenance of constructive and cooperative relationships between labor organizations and management officials," which is an underlying objective of the Order.^{11/}

In the Council's view, the standard applied by the Assistant Secretary under which "those rights and privileges . . . based solely on the existence of a written agreement . . . [are] terminated with the expiration of a negotiated agreement" is inconsistent with the purposes and policies of the Order. Thus, the application of this standard would reduce desired stability in that certain personnel policies and practices and matters affecting working conditions previously established by the parties' agreement would automatically terminate upon its expiration. In addition, this standard is unclear as to which personnel policies and practices and matters affecting working conditions "are based solely on the existence of a written agreement" and which are not, and such uncertainty would be potentially disruptive of the relationships between the parties. In the latter regard, as noted above,^{12/} the Assistant Secretary found, for example, that negotiated provisions calling for the arbitration of grievances and posting privileges were not dependent upon the existence of a written agreement and therefore would survive the expiration of an agreement, whereas a provision for dues checkoff was dependent upon the existence of such an agreement and therefore would not survive.

Thus, to repeat, the Order in our opinion requires that existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.^{13/}

^{11/} See paragraph 3 of the Preamble of the Order, and Labor-Management Relations in the Federal Service (1975), at 63.

^{12/} Supra at 6.

^{13/} This requirement includes dues withholding, which clearly falls within the scope of bargaining under section 11(a) of the Order. Section 21 of the Order provides in pertinent part that allotments of dues terminate when "the dues withholding agreement between the agency and the labor organization is terminated" [Emphasis added.] In the Council's opinion, the language of section 21 requires an affirmative act by one or both parties to the agreement in order to effect cancellation of the dues withholding agreement. That is, the occurrence of the expiration date of a negotiated agreement which contains a dues withholding agreement does not, in and of itself, result in termination of dues withholding. As with other personnel policies and practices and matters affecting working

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Of course, just as in the situation where no collective bargaining agreement has previously existed, agency management, upon the expiration of a negotiated agreement, retains the right to unilaterally change provisions contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order,^{14/} and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Consequently, absent the parties' agreement to the contrary, the parties are not obligated to maintain those matters upon the expiration of their agreement.^{15/} Similarly, those agency regulations issued during the term of an agreement and which were not operative with respect to the bargaining unit during such term become

(Continued)

conditions, dues withholding provisions in expired negotiated agreements continue in effect and cannot be unilaterally changed except as consistent with the bargaining obligation under section 11(a) of the Order. Thus, for example, if the parties during negotiations wish to provide clearly and specifically in their collective bargaining agreement that dues withholding will terminate upon the expiration of the agreement, without the necessity of an affirmative act by the parties, such a provision would constitute a valid waiver of the parties' rights and would operate to terminate dues withholding upon the agreement's expiration. Cf. Labor-Management Relations in the Federal Service (1975), at 49-50, and Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 804-806 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

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

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

15/ See, e.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 396 [FLRC No. 74A-48 (June 26, 1975), Report No. 75]. In this regard, the Council has held that a proposal advanced during negotiations for a new agreement is excepted from the obligation to bargain by section 11(b) regardless of the fact that the proposal has been contained in prior agreements between the parties. See International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at note 2.

effective upon the expiration of that agreement.^{16/} Such a result is mandated by section 12(a) of the Order, which, as explained in the Report accompanying the Order, requires that "an agreement must be brought into conformance with current agency policies and regulations at the time it is renegotiated or before it is extended, except where specific exceptions are granted or renewed."^{17/}

Also--just as in the situation where the parties are for the first time negotiating a comprehensive collective bargaining agreement and where upon impasse in those negotiations a party wishes to change otherwise negotiable personnel policies and practices and matters affecting working conditions-- a party to the renegotiation of an agreement may not effect such changes unless it provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advanced by that party during prior negotiations) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Federal Service Impasses Panel. If the processes of the Panel are not invoked within a reasonable time of such notification, the Council finds, in agreement with the Assistant Secretary, that it is consistent with the Order for the party seeking to implement the changes to effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, we further find, in substantial agreement with the Assistant Secretary, that the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.^{18/}

16/ Section 12(a) of the Order provides:

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

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

17/ Labor-Management Relations in the Federal Service (1975), at 72.

18/ See Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra n. 10, at 12 of the decision, in which the phrase "to the maximum extent possible" was indicated to encompass changes consistent with the necessary functioning of the agency.

The above requirements afford a party the opportunity to invoke the impasse resolution machinery of the Order^{19/} and at the same time effectuate the policy of the Order to foster stability in the Federal labor-management relations program. Thus, in our view, it is consistent with the purposes and policies of the Order to require the parties to maintain the status quo to the maximum extent possible once the Panel's processes have been invoked in order to permit the Panel to decide whether to require further negotiations or to exercise jurisdiction over the dispute and, in the latter event, to take the action deemed necessary to settle the dispute.^{20/} In this regard, as the Council has previously noted, the impasse resolution machinery of the Panel established by the Order was intended to be (and has operated as) one aspect of the bargaining process.^{21/}

Summary

Thus, to summarize the principles discussed herein: Upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. However, agency management retains the right upon the expiration of a negotiated agreement to unilaterally change provisions

19/ Sections 16 and 17 of the Order provide:

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

20/ Labor-Management Relations in the Federal Service (1975), at 72-73.

21/ Id., at 58.

contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order, and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement which were not operative with respect to the bargaining unit during such term become effective, as mandated by section 12(a) of the Order, upon the expiration of that agreement. Also, where (as here) the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, a party may not effect changes in otherwise negotiable personnel policies and practices and matters affecting working conditions without first providing the other party with sufficient notice of its intent to implement the changes (which changes cannot exceed the scope of the proposals advanced during prior negotiations by the party seeking to implement the changes) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Panel. If the Panel's processes are not invoked within a reasonable time of such notification, the party seeking to implement the changes may effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency.

Accordingly, as the Assistant Secretary's decisions in A/SLMR No. 806 and A/SLMR No. 859 are based on a standard which the Council has found to be inconsistent with the purposes of the Order, the Council will remand the cases to him for action consistent with the principles set forth herein.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision and order in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we remand the cases to him for action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 17, 1978

American Federation of Government Employees, Local 2814, AFL-CIO and Department of Transportation, Federal Railroad Administration. The dispute involved the negotiability of a provision in the local parties' agreement concerning the transportation under certain conditions of unit employees' dependents incident to such employees using Government vehicles for authorized "official purposes." Upon review of the agreement pursuant to section 15 of the Order, the agency head determined that the provision was nonnegotiable because it contravened 31 U.S.C. § 638a(c)(2); and the union appealed to the Council.

Council action (March 21, 1978). Because the case concerned issues within the jurisdiction of the Comptroller General's Office, the Council, in accordance with established practice, requested a decision from him as to whether the disputed provision conflicted with 31 U.S.C. § 638a(c)(2). Based upon the decision of the Comptroller General, rendered in response to the Council's request, the Council held that the provision in question did not conflict with 31 U.S.C. § 638a(c)(2). Accordingly, the Council set aside the agency head's determination of nonnegotiability.

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

American Federation of Government
Employees, Local 2814, AFL-CIO

(Union)

and

FLRC No. 77A-65

Department of Transportation,
Federal Railroad Administration

(Agency)

DECISION ON NEGOTIABILITY ISSUE

Provision

ARTICLE XIII

TRAVEL

Section E. Employees assigned GSA vehicles will have the right to transport their legal dependents while traveling in GSA vehicles, subject to the following conditions:

1. The immediate supervisor must be notified in writing of such travel by dependents by the submission of a planned itinerary in advance, which identifies the dependents and relationship of the dependents.
2. The employee is on a planned itinerary requiring an absence of more than sixty (60) hours from his duty station.

Agency Determination

The agency head determined, while reviewing the above provision of a negotiated agreement pursuant to section 15 of the Order,^{1/} that the provision is nonnegotiable because it contravenes 31 U.S.C. § 638 a(c)(2).

1/ Section 15 of the Order provides:

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official

(Continued)

Question Here Before the Council

The question is whether the provision contravenes 31 U.S.C. § 638a(c)(2).

Opinion

Conclusion: The provision does not conflict with 31 U.S.C. § 638a(c)(2). Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

Reasons: Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council, in accordance with established practice, requested a Comptroller General decision as to whether the provision conflicts with 31 U.S.C. § 638a(c)(2).

The Comptroller General's decision in the matter, B-190440, January 20, 1978, is set forth below:

This action is in response to a letter dated October 3, 1977, from Mr. Henry B. Frazier, III, Executive Director, Federal Labor Relations Council, requesting our ruling on a negotiability matter concerning the American Federation of Government Employees (AFGE), Local 2814 and the Department of Transportation, Federal Railroad Administration, FLRC No. 77A-65. The matter involves a proposal by AFGE which would permit Federal employees to transport their legal dependents in Government vehicles while performing official business, subject to certain conditions.

The proposal in question is set forth below:

"Section E. Employees assigned GSA vehicles will have the right to transport their legal dependents while traveling in GSA vehicles, subject to the following conditions:

(Continued)

designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

"1. The immediate supervisor must be notified in writing of such travel by dependents by the submission of a planned itinerary in advance, which identifies the dependents and relationship of the dependents.

"2. The employee is on a planned itinerary requiring an absence of more than sixty (60) hours from his duty station."

The AFGE states that a similar provision was included in a Federal Railroad Administration order effective January 20, 1972, following negotiations on that point between the agency and the AFGE. The union believes that the proposal is not in conflict with law.

The Department of Transportation's position is set forth in a July 26, 1977, letter to the Federal Labor Relations Council. The Department states that it is of the opinion that the above-quoted proposal is nonnegotiable because it contravenes 31 U.S.C. § 638a(c) (1970). It further states that the inclusion of a similar provision in prior Federal Railroad Administration regulations does not overcome the prohibition contained in the cited statute. Section 638a(c) states, in pertinent part:

"Unless otherwise specifically provided, no appropriation available for any department shall be expended--

* * * * *

"(2) for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and 'official purposes' shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necessary and then only as to such latter cases when the same is approved by the head of the department concerned.* * *"

Section 638a(c)(2) does not define the term "official purposes." It provides only that the term does not include the transportation of employees between their homes and places of employment, except in certain specified cases not relevant here. In construing section 638a(c)(2), this Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of employees.

The AFGE proposal would allow an employee's dependents to accompany him in a Government vehicle from the employee's residence or

headquarters to his temporary duty station incident to an assignment which would require an absence of more than a specified time period. The proposal does not purport to authorize the transportation of dependents for any purpose when the employee himself would be prohibited from performing travel. Of course, if the employee used the Government vehicle to transport a dependent for other than "official purposes," he would be subject to the sanctions set forth in section 638a(c)(2). See Clark v. United States, 162 Ct. Cl. 477 (1963), in which the Court of Claims held that a 90-day suspension of an employee was sufficient punishment when he permitted his wife to drive a Government vehicle on personal business, on a few occasions. Thus, under the AFGE proposal the Government vehicle could be used only for "official purposes" and the transportation of any dependents could only be made incident to such use.

Determinations concerning Government interest with regard to section 638a(c)(2) are primarily to be made by the administrative agency concerned within the framework of applicable laws. 54 Comp. Gen. 855 (1975) and B-164184, June 21, 1968. However, in making determinations with regard to Government interest, an agency should consider the possible increased liability of the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., for damages suffered by such dependents through any negligence of the employee. Furthermore, employees should be advised that their dependents are not authorized to drive Government vehicles. Since such dependents are not "employees" within the meaning of the Federal Tort Claims Act, the Government would apparently not be liable for damages suffered by a third party occasioned by the negligence of the dependent. Moreover, it appears that should damage result from the negligence of the dependent such person might be held liable not only to the third party, but also to the Government for any damage to the Government vehicle.

Other factors for consideration would be the availability of space in the Government vehicle and the possible disruption in routine which might be caused by a large number of dependents accompanying an employee. Also, since GSA vehicles are involved, the contract agreement should be approved by GSA. The specific conditions of each particular situation will, no doubt, suggest additional factors for consideration. Since determinations should be made on a case-by-case basis, as opposed to a blanket policy, we suggest that the agency retain authority to make the required determination on a case-by-case basis.

Accordingly, where the transportation of a dependent in a Government vehicle is such that the dependent merely accompanies an employee on an otherwise authorized trip scheduled for the transaction of official

business, and the agency involved makes a determination that it is in the Government's interest for the dependent to accompany the employee (for instance, for morale purposes), we do not believe that the provisions of section 638a(c)(2) would be violated. Thus, we are of the view that the provisions of 31 U.S.C. § 638a(c)(2) do not, by themselves, serve to make the AFGE proposal nonnegotiable.

Based on the foregoing decision by the Comptroller General, we find that the provision agreed to by the parties at the local level, concerning the transportation under certain conditions of unit employees' dependents incident to such employees' using Government vehicles for authorized "official purposes," does not conflict with 31 U.S.C. § 638a(c)(2).^{2/} Accordingly, the agency head's determination that the provision is nonnegotiable because it contravenes 31 U.S.C. § 638a(c)(2) was in error and must be set aside.^{3/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 21, 1978

^{2/} We note, in this respect, that the Comptroller General's decision includes specific guidance to the agency as to significant factors to be considered in making "determinations concerning Government interest" in administering this contract provision. That is, the agency must assure on a case-by-case basis that the implementation of the provision is consistent with the framework of applicable laws as well as requirements of outside authorities such as the General Services Administration. Accordingly, such guidance of the Comptroller General is deemed to be subsumed by the provision which was agreed to by the local parties in this case.

^{3/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties and based upon the record before the Council, the provision is properly subject to negotiations by the parties.

U.S. Army Mortuary, Oakland Army Base, Oakland, California, A/SLMR No. 857. Pursuant to section 2411.4 of the Council's rules of procedure, the Assistant Secretary referred the following major policy issue to the Council for consideration: Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

Council action (March 21, 1978). The Council held that the Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation.

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

U.S. Army Mortuary,
Oakland Army Base,
Oakland, California

and

Walter D. Smith

A/SLMR No. 857
FLRC No. 77A-69

and

American Federation of Government
Employees, Local 1157, AFL-CIO

DECISION ON REFERRAL OF MAJOR
POLICY ISSUE FROM ASSISTANT SECRETARY

Background of Case

This case came before the Assistant Secretary on a petition filed by Walter D. Smith, an employee of the U.S. Army Mortuary, Oakland Army Base, Oakland, California (the activity) seeking the decertification of the American Federation of Government Employees, Local 1157, AFL-CIO (the union) as the exclusive representative of certain activity employees. During his consideration of the case, the Assistant Secretary determined that it raised a major policy issue which he has referred to the Council for decision pursuant to section 2411.4 of the Council's rules of procedure.^{1/}

In his order referring the major policy issue to the Council, the Assistant Secretary found that the activity had been a component of

1/ Section 2411.4 of the Council's rules of procedure provides:

Notwithstanding the procedures set forth in this part, the Assistant Secretary or the Panel may refer for review and decision or general ruling by the Council any case involving a major policy issue that arises in a proceeding before either of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Council shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

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7A-69

the Military Traffic Management Command, Western Area (MTMCWA), at which time the union was the exclusive representative of a certified unit of the activity's mortuary employees. He further found that in April 1975, the union and MTMCWA entered into a 2-year negotiated agreement covering the mortuary unit and other units at the Oakland Army Base. In February 1976, the Department of the Army implemented the results of a study it had conducted and transferred the unit of mortuary employees from MTMCWA to the U.S. Army Adjutant General Center (TAGCEN). The duty station of these employees remained at the Oakland Army Base, however. The record further indicates that in May 1976, after the reorganization, an employee of the activity filed a petition (DR) seeking to decertify the union as the exclusive representative for the mortuary unit.

In view of the facts present in the case before him, the Assistant Secretary, referring to the Council's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88], noted that the Council has determined, in part, that an agency or employing entity is a "successor" when: "(1) the recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization." Based on the record before him, the Assistant Secretary found that TAGCEN was a "successor" activity in that the recognized mortuary unit had been transferred substantially intact from MTMCWA to TAGCEN and the appropriateness of the unit had remained unimpaired in the gaining employer following the reorganization. He then questioned the meaning intended by the Council of various aspects of its DSA decision, stating in this regard:

But for a possible conflict in policy, I would, for the purpose of maintaining labor relations stability following a reorganization where a successor employer emerges, allow the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative to continue in effect after the successor employer assumes control so as to afford the successor employer and exclusive representative a stable period free from the raising of questions concerning representation.

In view of the foregoing, the Assistant Secretary referred the following major policy issue to the Council for consideration:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford

the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

The Assistant Secretary concluded:

In my judgment, the purposes of the Order will best be served by not permitting, within the period of the previous negotiated agreement, a questioning of the majority status of the incumbent union. All bar periods represent an accommodation in balancing the interest of employee freedom to choose representatives and the interest of stability in labor relations. The application of the agreement bar period to successorship situations will restore the predictability of periods when representation petitions may be filed. It will reduce administrative confusion in reorganizations; it will enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption; and it will promote effective dealings and efficiency of agency operations.

Opinion

The major policy issue referred to the Council by the Assistant Secretary concerns his application of the agreement bar limitation on the processing of representation petitions in situations where a recognized unit has been transferred substantially intact to a gaining employer and the appropriateness of the unit remains unimpaired in the gaining employer. That is, in such situations, may the agreement bar which existed pursuant to the predecessor's agreement with the exclusive representative or an analogous bar preclude the raising of a question concerning representation as to the representative status of the incumbent labor organization?

The Council has often reaffirmed the Assistant Secretary's authority under section 6(d) of the Order^{2/} to prescribe, interpret and apply regulations in carrying out his functions and responsibilities enumerated in section 6(a) of the Order, including his responsibility to decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues, and to supervise elections in appropriate units and certify

2/ Section 6(d) of the Order provides:

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.

.

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

the results. See, e.g., U.S. Department of Health, Education, and Welfare, Social Security Administration, Grand Rapids, Michigan, Assistant Secretary Case No. 52-5578 (RO), 3 FLRC 841 [FLRC No. 75A-19 (Dec. 31, 1975), Report No. 94], and Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412 (RO), 2 FLRC 246 [FLRC No. 73A-60 (Oct. 30, 1974), Report No. 59]. Moreover, in its 1975 Report and Recommendations, the Council noted with approval certain "bars to elections," either provided for in the Order or fashioned by the Assistant Secretary in his regulations (Section 202.3) or case decisions, relating to the timeliness of representation petitions filed with the Assistant Secretary for processing.^{3/}

The Council stated in this regard:^{4/}

In our view, such bars foster desired stability in labor-management relations in that parties to an existing bargaining relationship have a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation. . . .

Clearly, the Assistant Secretary's authority to prescribe, interpret and apply such bars in carrying out the foregoing responsibilities extends equally to successorship situations such as involved in the instant case before the Assistant Secretary. That is, the Assistant Secretary may, under his section 6 authority, and consistent with the purposes of the Order, interpret and apply his existing agreement bar rules or prescribe analogous rules with respect to the raising of questions concerning representation following a determination that the recognized unit was transferred substantially intact to the gaining employer and remained appropriate. While the gaining employer, as here, may not have

^{3/} More particularly, the Council noted that "a petition is untimely if filed within 12 months of a valid election or within 12 months after the certification of a labor organization as the exclusive representative of employees in an appropriate unit, commonly referred to as an 'election bar' and a 'certification bar' respectively," and that "when there is a signed agreement having a term not to exceed 3 years, a petition for an election among covered employees is untimely unless filed between the 90th and 60th day preceding the expiration of the agreement, commonly called an 'agreement bar.'" Labor-Management Relations in the Federal Service (1975), at 36.

^{4/} Id.

assumed the predecessor agreement^{5/} and therefore no "agreement bar" as such exists, we see no inconsistency with the purposes of the Order in the Assistant Secretary concluding that similar "bar" principles preclude the raising of a rival claim or other question concerning majority status.^{6/} In this regard, we note, as did the Assistant Secretary, that under such a rule "questions concerning representation could be raised only during the 'open period' in the term of the predecessor's agreement."^{7/}

In the Council's opinion, the adoption of such a rule, as indicated by the Assistant Secretary, would maintain the stability of labor-management relations by providing the gaining employer and the exclusive representative a stable period free from the raising of questions concerning representation.^{8/} Specifically, as stated by the Assistant Secretary, a

^{5/} As the Council stated in DSA (3 FLRC at 803), a "successor" is not "required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union." (Rather the successor is enjoined to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible.)

^{6/} The Council declared in DSA (3 FLRC at 802) that a "successor" relationship exists only where, among other things, "a question concerning representation is not timely raised as to the representative status of the incumbent labor organization." [Emphasis added.] The Council further stated in that case (at n. 17) that a new secret ballot election would be required if, after a reorganization, the employees or a rival labor organization "duly" raised a question concerning representation. In our view, such a question may be "duly" raised only where it is "timely" raised under rules established by the Assistant Secretary pursuant to his authority under section 6(d) of the Order.

^{7/} As the Assistant Secretary indicated, following a reorganization in which a recognized unit has been transferred substantially intact to a gaining employer and the appropriateness of the unit remains unimpaired in the gaining employer, a representation petition may be timely filed during the "open period" of the agreement between the predecessor employer and the incumbent labor organization. We construe the Assistant Secretary's statement, and so agree, that even if a new agreement is executed between the gaining employer and the exclusive representative prior to the "open period," such new agreement could not be raised as a bar.

^{8/} We understand the Assistant Secretary's recommended position (namely, that the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative should continue in effect after the gaining employer assumes control) with which we agree is not intended to preclude the raising of questions as to the continued appropriateness of the unit. Rather, the recommended application of the

(Continued)

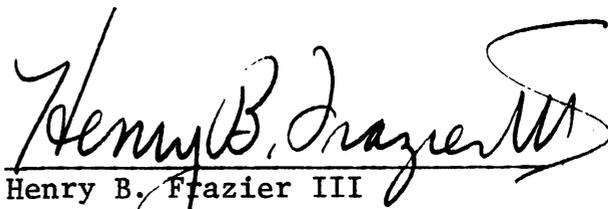
rule so adopted would "restore the predictability of periods when representation petitions may be filed"; "reduce administrative confusion in reorganizations"; "enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption"; and "promote effective dealings and efficiency of agency operations." In our view, such a bar would be consistent with the purposes and policies of the Order previously noted by the Council (supra at 4), namely: To "foster desired stability in labor-management relations [by providing] parties to an existing bargaining relationship . . . a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation."

Conclusion

Therefore, in response to the Assistant Secretary's question:

The Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 21, 1978

(Continued)

agreement bar would only affect the raising of "rival claims or other questions concerning majority status," not questions as to the appropriateness of the unit. We further construe and agree that the recommended bar would not prevent accretion or other unit clarification issues from being raised following a reorganization, since such issues do not present "questions concerning representation."

American Federation of Government Employees, Local 3407 and Defense Mapping Agency, Hydrographic Center, Suitland, Maryland. The dispute involved the negotiability of a union proposal related to agency adjustment of grievances presented by unit employees under the negotiated agreement.

Council action (March 21, 1978). The Council found, contrary to the agency's position, that the disputed proposal did not conflict with section 13(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council set aside the agency's determination that the proposal was nonnegotiable.

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

American Federation of
Government Employees, Local 3407

(Union)

and

FLRC No. 77A-91

Defense Mapping Agency, Hydrographic
Center, Suitland, Maryland

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

A Unit employee or group of unit employees may seek an adjustment without the intervention of the union in accordance with section 13(a) of E.O. 11491 as amended. 'Any such adjustments may not be inconsistent with the terms of this agreement and the Union will be given the opportunity to be present at the adjustment.' If the union contends that the grievant has not been damaged by a contract violation and/or that the relief offered would result in unfair, favored treatment to the grievant and/or damage to other innocent unit members, the Union may invoke arbitration to determine whether the contract was in fact violated. The arbitrator will also determine a fair resolution. [Only the underscored language is in dispute.]

Agency Determination

The agency determined the proposal to be nonnegotiable under section 13(a) of the Order.

Question Here Before the Council

The question is whether the proposal violates section 13(a) of the Order and is thereby nonnegotiable.

Opinion

Conclusion: The proposal does not violate section 13(a) of the Order. Therefore, the agency head's determination that the union's proposal is

nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby set aside.^{1/}

Reasons: Section 13(a) of the Order^{2/} provides for the negotiation by labor organizations and agencies of procedures for the consideration of grievances arising within the bargaining unit. As specifically relevant to the present dispute, section 13(a) expressly provides that individuals or groups of employees may present grievances within the scope of the negotiated grievance procedure to the agency and have them adjusted "without intervention by the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given the opportunity to be present at the adjustment." [Emphasis added.]

The agency contends that the proposal here at issue "would deny the employee's right to a grievance adjustment without the intervention of the union" within the meaning of section 13(a).^{3/} In our view, as detailed below, the agency's contention is without merit.

^{1/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based upon the record before the Council, the proposal is properly subject to negotiations by the parties under section 11(a) of the Order.

^{2/} Section 13(a) of the Order provides:

Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

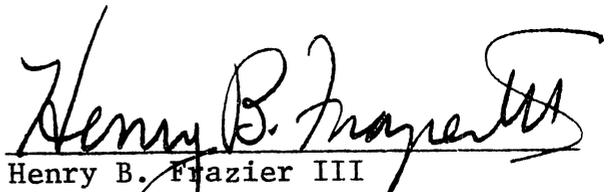
^{3/} In reaching our decision herein, we find it unnecessary to reach and therefore make no ruling with respect to whether, as the agency claims, section 13(a) grants a "right" to employees.

In essence, the union's proposal would merely limit the adjustment which the agency may properly make by reason of an employee's grievance under the negotiated agreement. More specifically, according to the proposal, the agency is precluded from providing relief in those instances where the grievant was not damaged by an agreement violation and/or the relief offered by the agency would result in unfair, favored treatment to the individual grievant and/or damage to other innocent members of the unit. Further, an arbitrator is granted the right to make a fair resolution of any grievance by the union concerning a breach of this requirement, if arbitration is invoked. As indicated by the union in its appeal, the union is thereby seeking merely to protect "the rights and benefits of the unit as a whole."

Contrary to the agency's contention, nothing in section 13(a) of the Order prohibits any such grievance by the union to assure that any adjustments by the agency are consistent with the terms of the agreement.

Accordingly, as it does not conflict with section 13(a) of the Order, we find the proposal is negotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 21, 1978

American Federation of Government Employees, Local No. 1945 and Anniston Army Depot, Anniston, Alabama (Towers, Arbitrator). The arbitrator denied the union's grievance related to the nonselection of the grievant for the particular position involved. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on exceptions alleging (1) that the union was denied a fair opportunity to be heard; (2) that the award violated appropriate regulation; and (3) that the award was based on nonfacts.

Council action (March 21, 1978). As to (1), without passing upon the question of whether the union's exception stated a ground upon which the Council will grant a petition for review of an arbitration award, the Council held that in the circumstances here involved the exception did not provide a basis for Council acceptance of the union's petition. As to (2) and (3), the Council held that the union's petition did not describe facts and circumstances to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 21, 1978

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

Re: American Federation of Government Employees,
Local No. 1945 and Anniston Army Depot,
Anniston, Alabama (Towers, Arbitrator),
FLRC No. 77A-102

Dear Mr. Pellerzi:

The Council has carefully considered the union's petition, and the agency's opposition thereto, for review of the arbitrator's award in the above-entitled case.

According to the arbitrator, the dispute in this matter arose when the activity underwent a planned management reorganization which resulted, pertinently, in the cancellation of the WG-11 position occupied by the grievant and the establishment of a GS-9 position. A vacancy in the GS-9 position was announced by the activity and from a list of applicants eleven employees, including the grievant, were selected as "Best Qualified." However, the grievant was not selected for the position. Thereafter he filed a grievance alleging that the activity had violated the parties' negotiated agreement and the Federal Personnel Manual by denying him priority consideration for the GS-9 position; by failing to "promote" him along with his WG-11 position when it was reclassified to the GS-9 position; and by denying him a promotion because of union activities. The grievance was ultimately submitted to arbitration.

The arbitrator stated that the issues before him were stipulated by the parties as follows:

1. Was grievant properly denied non-competitive promotion to position of Equipment Specialist (General), GS-1670-09, based on the provisions of Anniston Army Depot Regulation 690-3, Paragraph 8K(3)(b), and Federal Personnel Manual, Chapter 335-4-3-b?

2. Was grievant properly denied priority consideration for repromotion to position of Equipment Specialist (General), GS-1670-09, as provided by Section 11, Article XI of the negotiated grievance procedure between Local 1945, and AFGE and Anniston Army Depot?
3. Was grievant's non-selection for promotion to position of Equipment Specialist, GS-1670-09, a violation of Section 17, Article XI of [the] negotiated procedure between Local 1945, AFGE and Anniston Army Depot?^{1/} [Footnote added.]

In the opinion accompanying his award, the arbitrator first discussed the issue of whether the grievant was entitled to a noncompetitive promotion to the GS-9 position based on the provisions of the pertinent activity regulation and FPM Chapter 335, subchapter 4-3(b). The arbitrator stated that under the activity regulation and the FPM provision, one criterion which would allow a noncompetitive promotion is when an occupied position is changed to a higher position with no significant change in duties because of the application of a new standard or the correction of a classification error. However, the arbitrator found that the GS-9 position was a new job and not a successor job to the WG-11 position since the GS-9 position included significant new duties not previously performed. The arbitrator concluded, therefore, that the grievant was not entitled to a noncompetitive promotion on this basis.

The next issue the arbitrator discussed was whether the activity had violated Article XI, Section 11, of the negotiated agreement by denying the grievant priority consideration for promotion to the GS-9 position. The arbitrator noted that, while Section 11 provides for consideration of an employee who has been demoted from a position without personal cause for a vacancy for which he is qualified at the same or an intervening grade level as the one from which he was demoted, there is no express or implied guarantee that such repromotion will occur. The arbitrator found that the activity had "ma[d]e the correct comparison in attempting to determine whether the grievant had actually held a job at the same or intervening grade level" by comparing step 4 of the GS-9 position with step 2 of the WG-11/12 position. Furthermore, the arbitrator quoted from the Council's decision in Francis E. Warren Air Force Base, Cheyenne, Wyoming and American Federation of Government Employees, Local 2354 (Rentfro, Arbitrator), FLRC No. 75A-127 (Sept. 30, 1976), Report No. 114, to the effect that: "While the FPM and agency regulations strongly encourage the repromotion of 'special consideration' candidates . . . there is no express or implied guarantee that such repromotion will occur"

^{1/} The provisions of FPM Chapter 335, subchapter 4-3(b), and Sections 11 and 17 of Article XI of the negotiated agreement are set forth in the Appendix attached hereto.

and that "even had the agency erred in its refusal to accord the grievant 'special consideration,' management still could not have been deprived of its right to select or nonselect him without a violation of Commission instructions." The arbitrator concluded, therefore, that the activity did not violate Section 11 of the agreement.

Finally, the arbitrator concluded that, based on the evidence, the activity did not discriminate against the grievant in violation of Article XI, Section 17 because of his union activities by not selecting him for the GS-9 position.

The arbitrator therefore denied the grievance.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exceptions discussed below. The agency filed an opposition.

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

In its first exception, the union contends that it was denied a fair opportunity to be heard. In support of this exception, the union contends that the arbitrator relied heavily on the agency's Inspector General's report on the issue of discrimination, which was a management report and in no way constituted a bipartisan submission. The union contended that while it was aware of the existence of such a report, no service of the report was made on the union, nor was the union aware that the report had become a part of the record until receipt of the award. The union further asserts, in this regard, that such conduct does not meet the minimum standards of fairness required in arbitration proceedings. The union appears to be, in effect, contending that there was an ex parte communication between the agency and the arbitrator. The agency, on the other hand, specifically disputes such union contention, stating that the Inspector General's report was introduced as evidence during the hearing and that the union acknowledged the report and did not object to its introduction as evidence. In any event, the Council is of the opinion that the union's contentions in its first exception provide no basis for acceptance of its petition. Without passing upon the question of whether the union's exception states a ground upon which the Council will grant a petition for review, the Council notes that, while the arbitrator did refer to the Inspector General's report, he discussed and relied upon

the testimony and evidence adduced at the hearing and concluded from this testimony and evidence, and before his reference in his opinion to the report, that he could "find no evidence of discrimination in the selection process followed by the employer in this case."^{2/} Thus it appears that the arbitrator's finding of no discrimination was based on his reasoning and conclusions from the testimony and evidence adduced at the hearing. The Council has consistently held that an arbitrator's reasoning and conclusion is not subject to Council review. E.g., Department of the Navy and American Federation of Government Employees, AFL-CIO (Larkin, Arbitrator), FLRC No. 77A-108 (Jan. 19, 1978), Report No. 141. Therefore, the union's first exception does not provide a basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception the union contends that the award violates appropriate regulation. In support of its exception the union asserts that the arbitrator's award is contrary to Federal Personnel Manual Chapter 351, subchapter 7-2, which discusses the use of representative rates when comparisons are made between positions in different wage systems. The union asserts, in this regard, that the arbitrator based his award on management's arguments as to the proper representative rate to use for purposes of position comparison and that such representative rate was not the correct rate to use in the circumstances of this case. The union further contends that the Federal Personnel Manual also states that the use of representative rates is not necessary when direct comparisons of grades or levels can be made and that in the instant case such a direct comparison can be made. Thus, the union argues, the agency improperly denied the grievant priority consideration in violation of the Federal Personnel Manual.

The Council will grant review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition for review, that an exception presents grounds that the award violates appropriate regulations. In this case, however, the Council is of the opinion that the union's contentions do not provide facts and circumstances to support its exception that the award violates appropriate regulations. In this regard, the Council notes that the arbitrator, in discussing the use of representative rates, was analyzing the issue of whether the activity had violated Article XI, Section 11 of the negotiated agreement. Thus, while he referred to the activity's use of representative rates, it is clear from the arbitrator's opinion that the basis for his conclusion was his interpretation of the negotiated

^{2/} Arbitrator's Opinion and Award, 11.

agreement. In this regard the arbitrator stated: "[i]n any event, the Arbitrator is convinced that there is no express or implied guarantee, under Section 11 of Article XI of the Agreement, that a repromotion will occur." [Emphasis added.] The arbitrator concluded that "the activity did not violate Section 11 of Article XI of the Agreement in this instance." Thus, the union, in essence, is disagreeing with the arbitrator's interpretation of the negotiated agreement and his reasoning and conclusion in arriving at his determination as to whether the agreement had been violated. As previously indicated, the Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge. Therefore, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

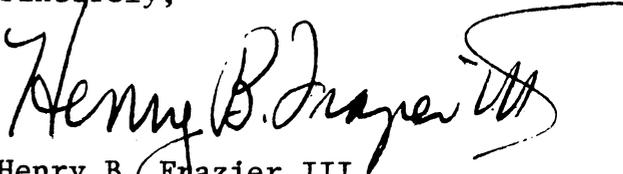
The union's third exception is that the award is based on nonfacts. In support of this exception the union asserts that the GS-9 position does not involve a significant change in duties and, therefore, the grievant should have received it noncompetitively; the arbitrator ignored the union's evidence regarding management's refusal to select the grievant because of his union activities; and the arbitrator relied heavily on the agency's Inspector General's report, although the union was never made aware of the fact that this "one-sided" report had been made a part of the record, and was never given the opportunity to refute it.

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached, . . ." Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81. However, the Council is of the opinion that the union's petition for review does not describe facts and circumstances to support its exception. Thus, when the substance of the union's contentions in support of its exception is examined, it is clear that the union is merely repeating assertions made in support of its other exceptions, which as previously indicated provide no basis for accepting the petition for review, and is, in effect, disagreeing with the arbitrator's findings as to the facts. The Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Thus the union's third exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

Attachment

cc: W. J. Schrader
Army

APPENDIX

Federal Personnel Manual Chapter 335, subchapter 4-3(b) provides:

4-3. PROMOTIONS AS EXCEPTIONS TO COMPETITIVE PROCEDURES

b. Promotion to positions upgraded without significant change in duties and responsibilities. An agency must provide for an exception to competitive promotion procedures to allow for the promotion of an incumbent of a position which has been upgraded without significant change in duties and responsibilities on the basis of either the issuance of a new classification standard or the correction of a classification error. If the incumbent meets the legal and qualification requirements for the higher grade, he must be promoted noncompetitively unless removed from the position by appropriate personnel action.

According to the arbitrator, Article XI (PROMOTIONS, DEMOTIONS AND DETAILS), Sections 11 and 17 provide:

Section 11. An employee who was demoted from a position within the Army without personal cause will be considered for a vacancy for which he is qualified at the same or an intervening grade level from which he was demoted before any attempt is made to fill the position by other means, unless employees entitled to mandatory placement to the position are available. If the employee eligible for repromotion is not selected after this consideration, and is subsequently certified to the selecting official in the Best Qualified Group under competitive promotion procedures for the same position, the selecting official shall either select the employee for the vacancy or furnish written reasons for his non-selection. Such persuasive reasons for non-selection must be made a matter of permanent record.

Section 17. There will be no discrimination in promotions or selection for positions because of age, race, sex, color, religion, national origin, political affiliation, physical handicap, marital status, or membership in or activity on behalf of the union.

U.S. Department of Justice, Bureau of Prisons, Kennedy Youth Center, Morgantown, West Virginia and American Federation of Government Employees, Council of Prison Locals, Local #2441 (Shadden, Arbitrator). The arbitrator denied the union's grievance related to the issuance of a certificate in a promotion action containing more than five best qualified candidates. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging that the award was contrary to appropriate regulation.

Council action (March 21, 1978). The Council held that the union's contentions did not provide the necessary facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 21, 1978

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

Re: U.S. Department of Justice, Bureau of Prisons,
Kennedy Youth Center, Morgantown, West Virginia
and American Federation of Government Employees,
Council of Prison Locals, Local #2441 (Shadden,
Arbitrator), FLRC No. 77A-103

Dear Mr. Pellerzi:

The Council has carefully considered the union's petition for review of the arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when a vacancy announcement was issued which listed one vacancy for a Correctional Treatment Specialist position at the Kennedy Youth Center (the activity). Subsequent to the announcement's closing date, a promotion board consisting of five members including a union representative met and considered all applications for the vacancy. As a result, a promotion certificate containing eight candidates designated as "best qualified" was issued and the activity warden then made his selection for the position from this certificate. The union filed a grievance resulting in the instant arbitration asking that the promotion be rescinded and the same promotion board be reconvened to correct the promotion certificate, listing on that certificate only the three to five best qualified candidates.

The arbitrator stated the issue before him as follows: "Does the fact that the promotion certificate listed more than five best qualified candidates, make the selection . . . invalid and require the reconvening of the promotion board to reconsider the candidates and limit the promotion certificate to five 'best qualified?'" The arbitrator noted that there is a general nationwide practice in the agency of listing less or more than three to five best qualified candidates on promotion certificates. He further noted that the parties to the agreement at the activity level had failed to comply with those standards over a long period of time. In this regard the

arbitrator stated that "[t]he Union, through its national officer, has not only condoned this practice of ignoring the three to five number, but has participated in every promotion board certificate procedure, including the instant case. Under such circumstances it would be manifestly unfair and inequitable to permit the Union to set aside a practice that it approved over a long period of time, and what is even more significant, helped and participated in carrying out the procedure." He thus concluded: "The practice here was not illegal, but only a generally followed modification of the promotion process set up in the Contract" The arbitrator awarded as follows:

The Arbitrator accordingly finds and declares that the grievance be and is hereby denied; and further declares that the Bureau of Prisons and the AFGE Council of Prison Locals hereafter act in strict compliance with the Master Contract with respect to the processing of promotion certificates by future promotion boards.

The union's petition takes exception to the arbitrator's award on the ground discussed below. The agency filed an opposition.

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

The union excepts to the arbitrator's award on the ground that the award is contrary to appropriate regulation, specifically, FPM chapter 335, subchapter 2, Requirement 6, which states parenthetically, as to referring best qualified candidates to the selecting official, that "referral of fewer than three or more than five names for a vacancy may only be done in accordance with criteria specified in the [agency merit promotion] plan." The union asserts that the plan in this case specifies that only three to five candidates may be listed on the certificate. Therefore, the union contends, any promotion action which certifies more than five candidates is contrary to appropriate regulation and must be rerun.

The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulation. In this case, however, the Council is of the opinion that the union's contentions do not provide the necessary facts and circumstances to support its exception that the award violates the Federal Personnel Manual. In this regard, it is noted that, in substance, the union is not contending that the arbitrator's award violates appropriate regulation, but instead that the activity's own failure^{*/} to follow the merit promotion

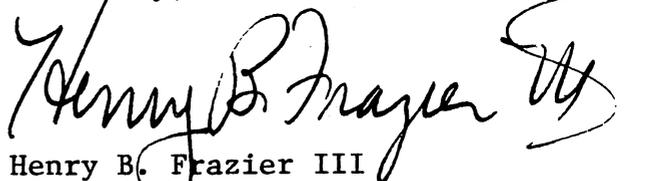
^{*/} It is noted that the arbitrator specifically found that not only did the activity fail to follow the plan but that the union "condoned this practice" and "participated in every promotion board certificate procedure."

plan is contrary to regulation. The Council has previously held that a contention that an agency action, rather than an arbitrator's award, violates appropriate regulation does not support a ground upon which the Council will grant review of an arbitrator's award. The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135, and cases cited therein. Moreover, the Council notes that the arbitrator in the instant case interpreted and applied the merit promotion plan which was part of the parties' agreement and found, in essence, that, in the circumstances before him, the practice was not contrary to the agreement. Council precedent is clear that a challenge to an arbitrator's interpretation of the parties' negotiated agreement does not assert a ground upon which it will grant review of an arbitrator's award under section 2411.32 of the Council's rules. E.g., American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator), FLRC No. 77A-31 (Aug. 26, 1977), Report No. 136. Therefore, the union's exception does not present a ground upon which the Council will grant review of an arbitration award.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A. Ross
DOJ

AFGE [American Federation of Government Employees, AFL-CIO], Local 1923 and Social Security Administration (Rothschild, Arbitrator). The arbitrator found that the agency violated the parties' agreement when it rotated the grievants to perform work of a higher grade level for a period in excess of 30 calendar days, beginning with the time each grievant had accumulated more than 30 days in her respective rotation; and ordered that the grievants be temporarily promoted with backpay for the period of time he defined. The agency appealed to the Council, requesting that the Council accept its petition for review based on exceptions alleging that the arbitrator exceeded his authority; and that the award violated applicable law and appropriate regulation. The agency also requested a stay of the award.

Council action (March 21, 1978). The Council held that the agency's exceptions were not supported by facts and circumstances described in its petition. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 21, 1978

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
Room G-2608
West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: AFGE [American Federation of Government Employees, AFL-CIO], Local 1923 and Social Security Administration (Rothschild, Arbitrator), FLRC No. 77A-107

Dear Mr. Becker:

The Council has carefully considered your petition for review and request for a stay of the arbitrator's award, and the union's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, in October 1975 the Social Security Administration (the agency) began to reorganize, leaving the Director of the Division of Retirement and Survivors Policy (DRSP) without secretarial assistance. It was decided to rotate the two grievants, who held GS-5 secretarial positions in the agency, as the Director's secretary "for periods of approximately 29 days" each. The rotations commenced about May 17, 1976, and continued to about March 25, 1977. However, no new secretarial position was classified or assigned to the Director of DRSP until February 25, 1977, when the position of Secretary Stenographer, the duties of which had been performed alternately by the grievants, was classified as a GS-6 level position in DRSP. On March 27, 1977, another employee was assigned to this new position.

The grievants filed a grievance resulting in the instant arbitration alleging that their rotations were in violation of Article 17, Section C and Article 15, Section E^{1/} of the parties' negotiated agreement and that any "detail of more than 30 days to a higher position should at least result in a temporary promotion."

^{1/} The relevant provisions of Article 17, Section C, and Article 15, Section E, as set forth by the arbitrator, are contained in the Appendix attached hereto.

The arbitrator stated the issues before him as follows:

1. Was the rotation of grievants as secretaries to DRSP for 29 day periods from about May 17, 1976 to on or about March 25, 1977 in violation of the Agreement?
2. And, if so are grievants entitled to temporary promotion and back pay?

As to the first issue, the arbitrator found that the agency had violated "both the spirit and the letter" of the negotiated agreement when it rotated the grievants to perform work of a higher grade level for a period in excess of 30 calendar days. Responding to the agency's argument that there had been no violation because each rotating detail had only been for 29 days, the arbitrator concluded that the relevant provisions in the agreement did not require that the details be for 30 consecutive calendar days and that "if allowed to manipulate employees by rotating 29 day assignments, the competitive bidding provisions in . . . [the agreement] could be emasculated." Therefore the arbitrator determined that the agreement had been violated with respect to each grievant beginning with the time that each had accumulated more than 30 days in her respective rotation.

As to the second issue, the arbitrator, referring to Comptroller General decisions, found that no remedy for the violation of the agreement existed until February 25, 1977, because no secretarial position was classified in DRSP until that date. Accordingly, the arbitrator ordered that the grievants be temporarily promoted with backpay for the period from February 25, 1977, through March 26, 1977, with the total award not exceeding the difference in backpay between a GS-6 and a GS-5 for one person for the above time period.

The agency's petition takes two exceptions to the arbitrator's award on the grounds discussed below. The union filed an opposition.

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

In its first exception, the agency contends that the arbitrator exceeded his authority. In support of this exception the agency asserts that the pertinent provisions of the agreement provide that management may assign employees duties of a higher level for 30 days or less without taking an official personnel action. The agency asserts that since the grievants

only performed the duties of the position for a total of 30 days from the date it was classified, the arbitrator's actions in awarding temporary promotion and backpay for the 30-day period following classification of the GS-6 position and prior to its becoming officially encumbered "could be concluded as adding to and/or modifying the terms of the Agreement."^{2/}

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority by violating a specific limitation or restriction on his authority which is contained in the negotiated agreement. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123.

In this case, however, the Council is of the opinion that the agency's petition for review fails to describe facts and circumstances to support its exception that the arbitrator exceeded his authority. In substance, the agency's arguments constitute nothing more than disagreement with the arbitrator's interpretation of the parties' agreement, that is, his determination that the relevant provisions of the agreement do not require 30 consecutive calendar days on detail and that, therefore, the agency violated the agreement beginning with the time that each grievant had accumulated more than 30 days in her respective rotations. Council precedent is clear that a challenge to an arbitrator's interpretation of the collective bargaining agreement between the parties does not assert a ground upon which the Council will grant review of an arbitrator's award under section 2411.32 of the Council's rules. E.g., Department of the Navy, Navy Aviation Supply Office, Philadelphia, Pennsylvania and American Federation of Government Employees, Local 1698 (Quinn, Arbitrator), FLRC No. 76A-118 (Mar. 31, 1977), Report No. 123. Accordingly, the agency's first exception provides no basis for acceptance of the petition for review.

The agency's second exception alleges that the award violates applicable law and appropriate regulation. In support of this exception, the agency asserts that Civil Service Commission regulations and Comptroller General decisions make it clear that backpay cannot be awarded unless the agency has violated a nondiscretionary agency policy, such as a collective bargaining agreement provision, and such action has directly caused the grievants to suffer a loss or reduction of pay or allowances. The agency concludes that, "since it acted properly in applying the terms of the Agreement" by not utilizing the grievants in higher graded duties for more than 30 days after those duties were classified, "it could possibly become a party to an act not authorized by law" if it were to comply with the backpay directive.

^{2/} The agency refers to Article 24, Section H of the parties' negotiated agreement which provides in part that "[t]he arbitrator shall have no power to add to, subtract from, or modify terms of this Agreement."

The Council will grant a petition for review of an arbitration award in cases where it appears, based on the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception. In this regard it is noted that, contrary to the agency's assertion that it "acted properly in applying the terms of the Agreement," the arbitrator specifically found that the agency had breached the agreement with respect to the details and, in formulating his remedy for that breach, he took note of pertinent Comptroller General decisions^{3/} regarding temporary promotions and backpay for detailed employees. In accordance with those decisions, the arbitrator specifically limited his remedy to the only period of time which the Comptroller General has stated is permitted by law in such cases--that period during which the position in question was classified.^{4/} Therefore the agency's exception contending that the award violates applicable law and appropriate regulation provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.^{5/}

^{3/} In his award the arbitrator cited and discussed the Comptroller General's decisions in Matter of Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975), reconsidered and affirmed, 56 Comp. Gen. 427 (1977); and Matter of Willie W. Cunningham, 55 Comp. Gen. 1062 (1976).

^{4/} See, e.g., the Comptroller General's decision in Matter of Willie W. Cunningham, 55 Comp. Gen. 1062 (1976) wherein the Comptroller General stated:

. . . this case involves promotion to a new position which had not been classified at the time the grievant began to perform the duties thereof. It does not involve assignment to an established higher grade position. . . .

. . . Therefore, until the position was classified upward and she was promoted, the grievant was not entitled to the pay of the higher graded position. Dianish et al. v. United States, 183 Ct. Cl. 702 (1968). . . .

^{5/} In a supplement to its petition for review the agency asserts that the Council's decision in Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky and Professional Air Traffic Controllers Organization (Witney, Arbitrator), FLRC No. 76A-6 (June 7, 1977), Report No. 128, supports its contentions in the present case. However, the Council finds the cited case to be inapposite. In that case the arbitrator found that consecutive 45-day details of three different employees to the same position must be viewed as a continuum and

(Continued)

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council

Sincerely,



Henry B. Frazier III
Executive Director

Attachment

cc: H. D. Roof
AFGE

(Continued)

as constituting a single detail for a 135-day period. He further found that a single detail of such duration to a higher graded position without prior Civil Service Commission approval violated the Federal Personnel Manual and the negotiated agreement. The Council set the award aside based upon a Civil Service Commission interpretation of Commission regulations which held that the proscription in the Federal Personnel Manual against overlong details applied to the assignment of an employee to a position rather than the total time the position itself may be staffed by detailed employees. In the present case, however, the arbitrator specifically found that the agreement was violated because of the total time each employee was detailed to the position.

APPENDIX

According to the arbitrator's award, the relevant portions of Article 17, Section C (Details) are as follows:

Subsection 2. Details are intended only for meeting temporary needs of the Agency's work program when necessary services cannot be obtained by other desirable or practicable means. The Administration is responsible for keeping details within the shortest practicable time limits and assuring that the details do not compromise the open-competitive principle of the merit system or the principles of job evaluation. Except for brief periods, employees should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally the employee should be given a temporary promotion instead. If a detail is made to a higher grade position in accordance with Article 15 Section E.2, or to a position with known promotion potential, it must be made under competitive procedures. Should the requirements of the Agency necessitate an employee's being detailed to a lower-level position, this will in no way adversely affect the employee's salary, classification, or job standing.

Subsection 3. Employees detailed to another position shall be given a job description or functional statement if such assignment is for 30 calendar days or more. Details in excess of 30 calendar days will be reported on Standard Form 52, "Request for Personnel Action," and maintained as a permanent record in the Official Personnel Folders. For details to higher positions of more than 10 consecutive workdays but less than 30 calendar days, the Administration shall provide employees with a memorandum for their Official Personnel Folder.

According to the award, the relevant portions of Article 15, Section E (Applicability of Competitive Procedures) are as follows:

2. Reassignment or Detail: Competitive procedures are required for a reassignment or for a detail of over 30 days, where the reassignment or detail; (a) puts an employee in line for a promotion to a particular job or class of jobs; or (b) may be expected to result in greater opportunity for promotion based upon past patterns of experience.

4. Noncompetitive Actions: The following actions may be taken noncompetitively, unless otherwise provided:

e. details to higher graded jobs which are for 30 days or less[.]

Department of the Treasury, Internal Revenue Service, Milwaukee District Office, Milwaukee, Wisconsin, Assistant Secretary Case No. 51-3911(CA). The Assistant Secretary denied the request for review of National Treasury Employees Union, Chapter 1 (the union), seeking reversal of the Regional Administrator's dismissal of the union's unfair labor practice complaint, which alleged that the activity's conduct in holding in abeyance the processing of grievances concerning particular promotion actions until decisions were made on the related EEO complaints filed by the same grievants was violative of section 19(a)(1) and (6) of the Order. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (March 21, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 21, 1978

Mr. William E. Persina
Associate General Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: Department of the Treasury, Internal Revenue Service,
Milwaukee District Office, Milwaukee, Wisconsin,
Assistant Secretary Case No. 51-3911(CA), FLRC
No. 77A-135

Dear Mr. Persina:

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

In this case, National Treasury Employees Union, Chapter 1 (the union) filed an unfair labor practice complaint against the Internal Revenue Service, Milwaukee District Office (the activity). The complaint alleged that the activity had violated section 19(a)(1) and (6) of the Order when it held in abeyance the processing of grievances filed in connection with certain promotion actions until decisions were made on equal employment opportunity (EEO) complaints regarding these same promotions. As found by the Assistant Secretary, two employees represented by the union filed grievances over certain promotion actions pursuant to the parties' negotiated grievance procedure, and subsequently each employee filed a formal EEO complaint arguably related to the matter grieved. Thereafter, the activity advised the union by letter that the grievances would not be processed beyond the fourth level of the negotiated grievance procedure until decisions were made on the grievants' discrimination complaints. The union then filed the instant unfair labor practice complaint, contending that the refusal of management to process the grievances violated the Order.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that further proceedings in the matter were unwarranted as the evidence did not establish a reasonable basis for the union's allegation that the activity's conduct was inconsistent with its bargaining obligations under the Order. In so concluding, the Assistant Secretary stated:

Thus, the [activity] held in abeyance further processing of the grievances involved pending a decision on EEO complaints filed by the same grievants, which involve, in part, the same subject matter. The [activity's] action was based on procedures contained in the Federal Personnel Manual and in Treasury Personnel Manual, Chapter 713,

Appendix B-4(b). The record also reveals that the [activity] indicated a willingness to proceed with the grievances (if necessary) following the decision on the EEO complaints.

Accordingly, in these circumstances, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision holding that the grievances and the EEO complaints, "involve, in part, the same subject matter" (1) is arbitrary and capricious in that there is no evidence to support it, and (2) presents a major policy issue as to the meaning of section 13(d) of the Order. In the latter regard, you assert that the issues raised in the grievances are completely separate from those raised in the EEO complaints, and therefore do not involve the same "matter" referenced in section 13(d). You further allege that the Assistant Secretary's decision presents a major policy issue as to what standard of proof must be met in order to establish an unfair labor practice involving an agency's refusal to process a contract grievance. In this regard you contend that the Assistant Secretary's dismissal of the instant complaint is contrary to private and Federal sector law and inconsistent with the policy of encouraging parties to arbitrate their disputes.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious or present any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the instant case. In this regard, your contention that the decision is unsupported by any evidence constitutes essentially mere disagreement with the Assistant Secretary's determination, pursuant to his regulations, that no reasonable basis for the union's complaint had been established. Similarly, no major policy issue is presented concerning the meaning of section 13(d), as your allegations in this regard are essentially a disagreement with the Assistant Secretary's conclusion that in this case the EEO complaints involved the same subject matter as the grievances.

Finally, in the Council's view, no major policy issue is presented concerning the standard of proof required to establish an unfair labor practice involving an agency's refusal to process a contract grievance, noting particularly the Assistant Secretary's finding that the agency indicated a willingness to proceed with the grievances (if necessary) following the decision on the EEO complaints. Moreover, as to your contention that the Assistant Secretary acted contrary to private and Federal sector law, your appeal fails to show that the Assistant Secretary's dismissal of the instant complaint pursuant to his regulations was inconsistent with applicable precedent or with the purposes and policies of the Order.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Therefore, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. J. O'Rourke
IRS

Pennsylvania Army and Air National Guard, Philadelphia, Pennsylvania, Assistant Secretary Case No. 20-06031(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator, found that a reasonable basis had not been established for the complaint filed by the Association of Civilian Technicians (the union), which alleged that the activity violated section 19(a)(1), (2), (5) and (6) of the Order by refusing to allow an employee to have union representation at a particular meeting. The union appealed to the Council, in effect contending that the Assistant Secretary's decision presented a major policy issue.

Council action (March 21, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue (particularly, as the Council noted, in view of the Council's Statement on Major Policy Issue, FLRC No. 75P-2), and the union neither alleged, nor did it appear, that the Assistant Secretary's decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 21, 1973

Mr. Bruce E. Endy
Meranze, Katz, Spear and Wilderman
Lewis Tower Building - 12th Floor
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Re: Pennsylvania Army and Air National Guard,
Philadelphia, Pennsylvania, Assistant
Secretary Case No. 20-06031(CA),
FLRC No. 77A-139

Dear Mr. Endy:

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

This case arose as a result of the filing of a 19(a)(1), (2), (5) and (6) complaint by the Association of Civilian Technicians (the union) against the Pennsylvania Army and Air National Guard (the activity). In agreement with the Acting Regional Administrator, the Assistant Secretary found that a reasonable basis for the complaint had not been established and that, consequently, further proceedings were not warranted. According to the Assistant Secretary, insofar as is pertinent here, the gravamen of the complaint concerned an activity refusal to allow an employee representation by his union at a meeting with management called by the employee who wished to further discuss an issue (a disciplinary matter) discussed at an earlier meeting. Noting that he had already found in Pennsylvania Army and Air National Guard, A/SLMR-No. 871, that the earlier meeting was not a formal discussion and that the denial of union representation at that meeting was not improper, the Assistant Secretary concluded that the present meeting in question was not a formal discussion within the meaning of section 10(e) of the Order.

In your petition for review on behalf of the union, you contend, in effect, that the Assistant Secretary's decision is inconsistent with the Council's major policy with regard to union representation for civilian technicians faced with potential disciplinary action. In support of this contention, you assert that informal disciplinary action can be the predicate to formal action or adverse action and that the issue of union representation at disciplinary interviews or predisciplinary interviews is indistinguishable and fundamental under both the Order and the Labor-Management Relations Act (29 U.S.C. 141). Citing the Supreme Court's decision in NLRB v. Weingarten, 420 U.S. 251 (1975), you contend that the Assistant Secretary's decision does

not comport with existing Council policy or with Federal labor policy as expressed in the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the Assistant Secretary's decision does not appear arbitrary and capricious or raise any major policy issues.

In this regard, the Council has previously considered the question of union representation of employees under section 10(e) of the Order and has issued its Statement on Major Policy Issue, FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116, on that question. In its statement the Council held that, although an employee has a protected right to union assistance or representation when summoned to a "formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit," no such right is extended to an employee summoned to a "nonformal investigative meeting or interview." Moreover, in its statement, the Council also expressly considered the Supreme Court's decision in Weingarten, noting that:

The decision of the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251 (1975), upholding the right of an employee to union representation at an investigative interview under section 7 of the Labor-Management Relations Act (29 U.S.C. 157) clearly does not compel [a determination that a similar right obtains under the Order]. Apart from other considerations, the literal provisions and stated purposes of the Order are dissimilar from those of the LMRA relied upon by the Court in its decision. Moreover, the Council, and not the NLRB, is the agency charged by the President under section 4(b) with the authority to "administer and interpret" the provisions of the Order, so the Council is without obligation to accord the special deference to the NLRB ruling in Weingarten which the Court stressed as a basis for its decision upon appeal in that case.

Therefore, since the Council has already issued its statement on the major policy issue which you apparently seek to raise, and since your appeal fails to show that the Assistant Secretary's decision appears inconsistent with applicable Council precedent or otherwise inconsistent with the Order, no basis for Council review is presented. Moreover, you do not allege and it does not otherwise appear that the Assistant Secretary's decision was without reasonable justification.

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the

Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Col. H. S. Niles
PAANG

Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 870. The Assistant Secretary, upon a representation petition filed by the National Treasury Employees Union, concluded that employees in certain job classifications should be included in the unit found appropriate. The agency appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and raised major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (March 28, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 28, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Office of the Regional
Commissioner, Southeast Region, A/SLMR No. 870,
FLRC No. 77A-122

Dear Mr. Simms:

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

In this case, the National Treasury Employees Union (the union) filed a petition seeking to represent employees at the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region (the activity). Insofar as relevant herein, before the Assistant Secretary the activity contended, and the union concurred, that the employees in certain job classifications were management officials and/or confidential employees, and on those bases should be excluded from the petitioned-for unit. The Assistant Secretary found, contrary to the parties' contentions, that the employees in such job classifications should be included in the unit found appropriate. Noting that in a prior case, the eligibility of the employees in the disputed classifications was fully litigated and they were determined by the Assistant Secretary to be included within the unit found appropriate,*/ the Assistant Secretary found that the record in the present case revealed that since the earlier hearing there had been no change in the duties or responsibilities of the employees in these classifications. In the Assistant Secretary's view, it would not effectuate the purposes and policies of the Order to permit the same parties to relitigate the same issues involving the same classifications raised in a prior hearing, in the absence of evidence of some change in circumstances. In the absence of such evidence in this case, and based upon the prior decision, the Assistant Secretary concluded that the employees at issue should be included in the unit found appropriate. (Following a secret ballot election directed by the Assistant Secretary, the union was certified as exclusive representative for the unit involved.)

In your appeal to the Council, you contend that the decision of the Assistant Secretary is arbitrary and capricious and raises major policy issues as follows:

*/ Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 565 (Sept. 30, 1975).

1. Is the Assistant Secretary's decision in a representation case to disregard the parties' stipulation as to the eligibility of particular positions in the petitioned-for unit arbitrary and capricious or present a major policy issue?
2. Is the Assistant Secretary's decision in a representation case to disregard relevant testimonial and documentary evidence of the ineligibility of particular positions in the petitioned-for unit, based upon reliance on an earlier, related case, arbitrary and capricious or present a major policy issue?
3. If issue 2 is determined not to warrant review by the Federal Labor Relations Council, should the Council review A/SLMR No. 565 in addition to A/SLMR No. 870 for the major policy issue of the appropriate definition of "management official"?

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious or present any major policy issues.

With respect to your allegation that the Assistant Secretary improperly disregarded the parties' stipulation concerning the eligibility of certain employees for inclusion in the unit found appropriate, section 6(a)(1) of the Order provides that the Assistant Secretary shall "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration." While the use of stipulations may be a useful tool to ascertain the views of the parties and to dispose of possible issues, the Assistant Secretary's refusal to be bound by such a stipulation in the exercise of his responsibility of deciding appropriate unit and related issues does not, in the circumstances of the case, raise a major policy issue warranting review. Accordingly, in the Council's view, the Assistant Secretary's treatment of the stipulation in the instant case does not present a major policy issue warranting review. See Illinois Air National Guard, 182nd Tactical Air Support Group, A/SLMR No. 105, 1 FLRC 204 [FLRC No. 71A-59 (Nov. 17, 1972), Report No. 30]; Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547, FLRC No. 75A-117 (Mar. 31, 1976), Report No. 102. Similarly, as to your related contention that the Assistant Secretary's decision is arbitrary and capricious in this regard, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case.

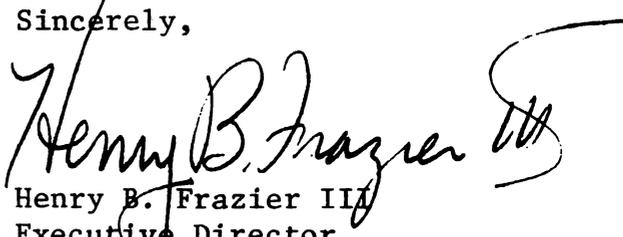
Nor is any basis for Council review presented, as alleged, by the Assistant Secretary's reliance upon the determinations of eligibility reached by the Assistant Secretary in an earlier decision involving the same unit and the same job classifications, noting particularly the Assistant Secretary's reliance on the present record to find that there was no evidence of a change in the duties and responsibilities of the employees in such job classifications since the earlier hearing. Your appeal thus fails to establish that the Assistant Secretary either did not consider any material evidence in reaching his decision or that his decision is inconsistent with the purposes and policies of the Order.

As to your allegation that a major policy issue is presented herein concerning the appropriate definition of "management official," in the Council's opinion, for the reasons stated in our decision letters in Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621, FLRC No. 76A-50 (Aug. 31, 1976), Report No. 111, and in Internal Revenue Service, National Office, Washington, D.C., A/SLMR No. 630, FLRC No. 76A-66 (Sept. 30, 1976), Report No. 114, no basis for Council review is presented in this regard. Moreover, insofar as your appeal takes issue with the manner in which the Assistant Secretary applied his definition of "management official" to the facts of this case, no basis for Council review is presented. See National Science Foundation, A/SLMR No. 487, FLRC No. 75A-109 (Mar. 3, 1976), Report No. 99.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. Flig
NTEU

National Archives and Records Service, Washington, D.C., Assistant Secretary Case No. 22-7746(CA). The Assistant Secretary denied review of the Regional Administrator's dismissal of the section 19(a)(1) and (6) complaint filed by Local 2578, American Federation of Government Employees, AFL-CIO (the union) concerning a decision by the activity that certain portions of a grievance previously filed by the union were not arbitrable and the activity's subsequent refusal to proceed to arbitration. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action (March 31, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: National Archives and Records Service,
Washington, D.C., Assistant Secretary
Case No. 22-7746(CA), FLRC No. 77A-131

Dear Mr. King:

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

In this case the American Federation of Government Employees, Local 2578, AFL-CIO (the union) filed an unfair labor practice complaint alleging that the National Archives and Records Service, Washington, D.C. (the activity) had violated section 19(a)(1) and (6) of the Order. The bases for the complaint were a decision by the activity that certain portions of a grievance filed by the union were not arbitrable and the subsequent refusal of the activity to proceed to arbitration. Sometime after the activity decided that the grievance was not arbitrable and prior to the filing, by the union, of the unfair labor practice complaint in the instant case, the activity filed an Application for Decision on Grievability or Arbitrability on the matter with the Assistant Secretary. The Assistant Secretary sustained the Assistant Regional Director's dismissal of the activity's Application for Decision on Grievability or Arbitrability on the basis that the application was untimely filed under section 205.2(b) of his regulations. In that decision the Assistant Secretary also noted that the negotiated agreement between the activity and the union provided that, where the activity concluded that a grievance was not grievable and/or arbitrable, the union shall make no request for arbitration without first obtaining from the Assistant Secretary an arbitrability determination. The Assistant Secretary stated that "No such decision was sought by the union and, therefore, its invoking of arbitration in this matter appeared to be inconsistent with the terms of the parties' negotiated agreement."1/

1/ National Archives and Records Service, General Services Administration, Washington, D.C., Assistant Secretary Case No. 22-6290(AP), Request for Review No. 653 (Feb. 26, 1976).

In response to the activity's subsequent request for clarification of his decision to dismiss, the Assistant Secretary stated:^{2/}

In the subject ruling, it was found that the instant application was procedurally defective because it was filed untimely. In addition, it was noted that the invoking of arbitration in the matter appeared to be inconsistent with the terms of the parties' negotiated agreement. In reaching the disposition herein, the merits of the application were not considered. Consequently, no finding was made as to the arbitrability of the cited sections of the negotiated agreement.

Following receipt of that clarification of the Assistant Secretary's decision dismissing the Application for Decision on Grievability or Arbitrability, the union filed the unfair labor practice complaint over the activity's decision that, as certain portions of the grievance that had been the subject of the earlier case were not arbitrable, the activity would not proceed to arbitration. This led to the instant case.

In this case the Assistant Secretary found that no reasonable basis for the complaint had been established and that further proceedings therefore were unwarranted. In so concluding, the Assistant Secretary stated:

[I]t is clear from the record in this case that the parties never were able to reach agreement as to the totality of the issues that should be presented to the arbitrator they had chosen; there is no evidence that any clear agreement by the [activity] was breached in this regard.

The [union] had received a final answer from the [activity] that it considered certain matters not arbitrable. Under the Assistant Secretary's Regulations, the [union] had a right, and under the terms of the parties' negotiated agreement the [union] was then obligated, to seek a determination on arbitrability from the Assistant Secretary. It did not do so. The [activity] sought such a determination, but was found by the Assistant Secretary to be untimely. . . . The Assistant Secretary thereafter made it clear that he was not passing on the merits of the arbitrability dispute. . . . Thereafter, while the [activity] could have agreed to nonetheless send those issues to the arbitrator, it did not agree to do so. In deciding on such a course, it was only holding the [union] to the clear requirements of the parties' agreement.

In its complaint, and the instant request for review, the [union] is asking that the Assistant Secretary decide the issue of arbitrability which he has already decided he may not do, as the

^{2/} Request for Review No. 727 (June 17, 1976).

application for such a determination was filed untimely. In all these circumstances, therefore, I find that further proceedings on the subject complaint are unwarranted.

Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the Acting Regional Administrator's dismissal of the unfair labor practice complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious, contending that the decision "is not based upon fixed rules or principles which have been available to be known to the parties as entities under E.O. 11491, as amended," and that "his conclusion that the complainant is asking that the Assistant Secretary decide the issue of arbitrability which he has already decided he may not do, is not based upon any discernible fact or facts in the record." You further allege that the Assistant Secretary's decision raises two major policy issues, namely "whether the remaining issues contained in an initial grievance also containing issues found by the Assistant Secretary to be non-arbitrable, remain as arbitrable," and "whether a party is obligated to seek an arbitrability decision on issues in a grievance not in dispute."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your assertion concerning the principles relied on by the Assistant Secretary and the assertion that his decision was contrary to the evidence constitute, in essence, nothing more than mere disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint had been established inasmuch as the parties never reached agreement as to the totality of the issues to be placed before an arbitrator and inasmuch as there was no evidence that the activity breached a clear agreement in this regard. Nor is a major policy issue presented in the circumstances of this case, as alleged, concerning the arbitrability of those issues in a grievance which are not specifically found by the Assistant Secretary to be non-arbitrable, noting particularly that the Assistant Secretary never passed upon the merits of an arbitrability dispute but found only that a reasonable basis for the 19(a)(1) and (6) complaint had not been established. Similarly, no major policy issue is presented in the circumstances of this case with regard to a party's obligation to seek an arbitrability determination on those grievance issues over which no question of arbitrability has been raised. In this regard, your allegation constitutes, in effect, mere disagreement with the Assistant Secretary's finding "that the parties were never able to reach agreement

as to the totality of the issues that should be presented to the arbitrator they had chosen," and therefore presents no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. K. Mendenhall
GSA

Department of Transportation, Federal Aviation Administration, Midway Airway Facility Sector, Chicago, Illinois, Assistant Secretary Case Nos. 50-15422(RO) and 50-15424(RO). The Assistant Secretary, in agreement with the Regional Administrator (RA) and based on the RA's reasoning, found that dismissal of the two representation petitions filed by the Professional Airways Systems Specialists (PASS) was warranted. (The petitions had been filed after the filing of a unit consolidation (UC) petition by the Federal Aviation Science and Technology Association, NAGE (FASTA), seeking to consolidate the separate units which PASS sought to represent; processing of PASS' petitions was held in abeyance pending resolution of the UC petition; and FASTA was subsequently certified as the exclusive representative of the proposed consolidated unit.) Accordingly, the Assistant Secretary denied PASS' request for review seeking reversal of the RA's dismissal of PASS' representation petitions. PASS appealed to the Council, contending that the Assistant Secretary's decision raised major policy issues.

Council action (March 31, 1978). The Council held that PASS' petition for review failed to meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues, and PASS neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied PASS' petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1978

Mr. William B. Peer
Counsel for PASS
Suite 1002
1101 17th Street, NW.
Washington, D.C. 20036

Re: Department of Transportation, Federal Aviation Administration, Midway Airway Facility Sector, Chicago, Illinois, Assistant Secretary Case Nos. 50-15422(RO) and 50-15424(RO), FLRC No. 77A-133

Dear Mr. Peer:

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

As found by the Assistant Secretary, this case arose upon the filing of two petitions (RO), in March 1977, by the Professional Airways Systems Specialists (PASS), seeking to represent two separate units of technicians within the Federal Aviation Administration, at the Midway Airway Facility Sector and the Aurora Airway Facility Sector, Chicago, Illinois, respectively. Previously, on January 11, 1977, the Federal Aviation Science and Technological Association/NAGE (FASTA), the certified exclusive representative of these units since March 1976, had filed a consolidation petition (UC) seeking to incorporate these units into a nationwide unit for which it had been the certified exclusive representative since September 1976. Inasmuch as the consolidation petition was filed prior to PASS's representation petitions, processing of those petitions was held in abeyance by the Regional Administrator pending resolution of the related consolidation of units petition. On April 27, 1977, FASTA was certified as exclusive representative of the proposed consolidated unit. Thereafter, the Regional Administrator (RA) dismissed the RO petitions filed by PASS, concluding as to each:

Such consolidation renders further consideration of the instant petition by this Office inappropriate inasmuch as the unit sought has been consolidated into a larger existing unit currently represented by FASTA/NAGE and, accordingly, the petition in the instant case, which raised a question concerning representation with respect to a part of the units consolidated and which was filed subsequent to the consolidation of units petition, is hereby dismissed.

The Assistant Secretary, in agreement with the RA and based on his reasoning, found that dismissal of the RO petitions was warranted. Accordingly, he denied review of PASS's request for review seeking reversal of the RA's dismissal of the petitions.

In your petition for review on behalf of PASS, you allege that the decision of the Assistant Secretary raises the following major policy issues:

1. May a unit be consolidated with another when there is pending a representation petition in the former?
2. Is the processing of a representation petition, in the face of a unit consolidation petition, to be determined by which petition was filed first?
3. When is a representation petition timely if there is no bar to its filing under the published rules of the Assistant Secretary, and a unit consolidation petition is pending which affects the unit?
4. May the Assistant Secretary adopt, in a representation proceeding, a "policy" on the timeliness of a representation petition, when that "policy" has not been promulgated in accordance with the Administrative Procedure Act?

With respect to these alleged major policy issues, you assert that the Assistant Secretary's decision is contrary to the Council's intended policy that the procedure for consolidating units is applicable only to situations where there is no question concerning the representation desires of the employees involved. In this regard, relying principally on the Council's 1975 Report and Recommendations,^{1/} you contend that "the Assistant Secretary's decision denied [the employees] their right to choose their representative, precisely what the Council's statement said should not happen." You further assert, in essence, that the Assistant Secretary's position that the petition filed first will be processed first is unfair, irrational and contrary to his published regulations under which PASS's petitions herein were timely filed.

^{1/} Labor-Management Relations in the Federal Service (1975), at 37, wherein the Council stated:

The procedure for consolidating a labor organization's exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not present any major policy issues, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to the major policy issues which you allege are raised by the Assistant Secretary's decision--all relating to the propriety of processing a consolidation petition when a petition seeking a representation election as to part of the proposed consolidated unit is subsequently filed--in the Council's view, no major policy issues warranting review are thereby presented. In this regard, your reliance upon language from the Council's Report and Recommendations is misplaced. That language must be read in the context of the entire paragraph in which it appears. As the Council has previously stated, such passage describes the general approach that the Assistant Secretary should follow when a labor organization seeks to represent unrepresented employees and to include them in a proposed consolidated unit, unlike the circumstances in the instant case. See Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio, A/SLMR No. 706, FLRC No. 76A-151 (Mar. 23, 1977), Report No. 123. Moreover, as to your allegation that the Assistant Secretary's decision herein is unfair and contrary to his published regulations, the Council has previously stated that section 6 (d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and that, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.^{2/} In the instant case, your appeal fails to establish that the Assistant Secretary's application of his regulations in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes and policies of the Order, particularly the strong policy in the Federal labor-management relations program of facilitating the consolidation of existing bargaining units. Labor-Management Relations in the Federal Service (1975), at 35.

Since the Assistant Secretary's decision does not present any major policy issues, and you neither allege, nor does it appear, that his

2/ Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412(RO), 2 FLRC 246 [FLRC No. 73A-60 (Oct. 30, 1974), Report No. 59]; U.S. Civil Service Commission, Atlanta Region, Atlanta, Georgia, Assistant Secretary Case No. 40-6699(CA), FLRC No. 76A-62 (Aug. 31, 1976), Report No. 111.

decision was arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. V. Curran
FAA

S. Lyman
FASTA/NAGE

National Treasury Employees Union, Chapter 8, et al. (Internal Revenue Service, Washington, D.C.), Assistant Secretary Case No. 22-07780(CO). The Assistant Secretary denied the agency's request for review seeking reversal of the Regional Administrator's dismissal of the agency's complaint, which alleged that the union violated section 19(b)(6) of the Order by submitting a non-impasse item to the Federal Service Impasses Panel. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues and was arbitrary and capricious.

Council action (March 31, 1978). The Council held that the agency's petition for review failed to meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and did not appear arbitrary and capricious. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1978

Mr. Michael J. Riselli
Assistant Branch Chief
General Legal Services Division
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW., Room 4562
Washington, D.C. 20224

Re: National Treasury Employees Union, Chapter 8,
et al. (Internal Revenue Service, Washington,
D.C.), Assistant Secretary Case No. 22-07780(CO),
FLRC No. 77A-145

Dear Mr. Riselli:

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

In this case, as found by the Assistant Secretary, National Treasury Employees Union, Chapter 8, et al. (the union) and the Internal Revenue Service, Washington, D.C. (the agency), engaged in 41 negotiating sessions for a new multidistrict agreement, including 10 sessions with the assistance of the Federal Mediation and Conciliation Service. The union considered the negotiations to be at an impasse and requested the assistance of the Federal Service Impasses Panel (the Panel), to which it submitted 15 proposals it considered to be unresolved between the parties. The agency believed that one of the proposals submitted by the union was not at impasse since it had not been discussed in prior negotiations. Accordingly, the agency filed a complaint alleging that the union violated section 19(b)(6) of the Order by submitting a non-impasse item to the Panel, thus violating the parties' ground rules and the union's obligation to bargain in good faith.

The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that a reasonable basis for the complaint had not been established and that, consequently, further proceedings were not warranted. In so finding, the Assistant Secretary stated:

Thus, there was no patent violation of the parties' ground rules, as such ground rules do not specify the parties' obligations before the [Panel]. Furthermore, in the absence of evidence of bad faith, I find that the mere submission by the [union] of a non-impasse item to the

[Panel] did not, standing alone, constitute a violation of Section 19(b)(6) of Executive Order 11491, as amended.

Accordingly, the Assistant Secretary denied the agency's request for review seeking reversal of the ARA's dismissal of the complaint.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision presents two major policy issues:

1. Is a showing of animus necessary in order to establish a reasonable basis for the further processing of a per se refusal to bargain unfair labor practice complaint under Section 19(b)(6) of the Order?
2. Should a party be permitted to submit non-impasse items to the Federal Service Impasses Panel for consideration?

With regard to the first alleged major policy issue, you contend that the Assistant Secretary's decision is inconsistent with private and Federal sector precedent which recognizes that no showing of a union's subjective bad faith is necessary to establish a reasonable basis for further processing of a per se complaint under section 19(b)(6) of the Order. You further assert that his decision sets up a different standard for unions than for agencies in that per se violations of section 19(a)(6) may be established without showing of bad faith. As to the second alleged major policy issue, you argue that the Assistant Secretary's decision permitting the submission of non-impasse items to the Panel is inconsistent with the objective of the Order to promote constructive and cooperative relationships between the parties. Finally, you contend that the Assistant Secretary's decision is arbitrary and capricious for the foregoing reasons.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

Thus, in our view, no major policy issue is raised by the Assistant Secretary's finding, pursuant to his regulations, that a reasonable basis for the complaint had not been established in the particular circumstances of this case. More particularly, your appeal fails to show that the Assistant Secretary's decision--that, in the absence of evidence of bad faith, the mere submission of a non-impasse item to the Panel did not, standing alone, constitute a violation of section 19(b)(6) of the Order--was inconsistent with applicable precedent or with the purposes and policies of the Order. In this regard, nothing in your appeal presents any basis to support your general assumption that applicable precedent or the intent of the Order establishes a per se refusal to bargain under the Order in these or similar circumstances.

Similarly, no major policy issue is presented with respect to the submitting of non-impasse items to the Panel, noting that the Assistant Secretary in

this case found no evidence of bad faith by the conduct of the union.^{*/}
Finally, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in reaching his decision.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. M. Tobias
NTEU

*/ It should be noted that in carrying out its responsibility under section 5(c) of the Order to "prescribe regulations needed to administer its function under this Order," the Panel has issued regulations which ensure that its procedures are not abused. Thus, the Panel's rules provide:

§ 2471.6 Initial procedures of the Panel.

- (a) Upon receipt of a request for consideration of an impasse, the Panel will initiate an informal inquiry covering the issue(s) and the positions of the parties thereon, and will consult when necessary with the parties and the mediation facilities utilized, if any, and then determine whether to:
- (1) Dismiss the request; or
 - (2) Direct that negotiations be resumed; or
 - (3) Direct that negotiations be resumed with mediation assistance;
or
 - (4) Authorize other voluntary arrangements for settlement; or
 - (5) Direct the impasse to factfinding; or
 - (6) Take any other action it deems appropriate.

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FLRC No. 78A-9

Department of the Treasury, U.S. Customs Service, Region I, Boston, Massachusetts, A/SLMR No. 949. The Assistant Secretary dismissed the complaint filed by the union (National Treasury Employees Union and NTEU Chapter 181), which alleged, in pertinent part, that the activity violated section 19(a)(1) and (6) of the Order by refusing, contrary to a past practice, to extend the tours of duty of the employees involved. The union appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (March 31, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and the union neither alleged, nor did it appear, that his decision presented any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1978

Mr. Michael E. Hersher
National Field Representative
National Treasury Employees Union
Suite 1101, 1730 K Street, NW.
Washington, D.C. 20006

Re: Department of the Treasury, U.S. Customs
Service, Region I, Boston, Massachusetts,
A/SLMR No. 949, FLRC No. 78A-9

Dear Mr. Hersher:

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

In this case, the National Treasury Employees Union and NTEU Chapter 181 (the union) filed an unfair labor practice complaint against the U.S. Customs Service, Region I (the activity). The complaint alleged in pertinent part that the activity violated section 19(a)(1) and (6) of the Order in refusing, contrary to past practice, to extend the tours of duty of certain named employees stationed in Toronto, Canada. The Assistant Secretary, in agreement with the Administrative Law Judge, found that the union had failed to meet its burden of proof concerning the activity's alleged unilateral change in a past practice of automatically granting a second 2-year extension of duty in Toronto. In this regard the Assistant Secretary found that the evidence fell considerably short of establishing the existence of such a past practice. Accordingly, he found insufficient evidence to sustain the allegations of the union's complaint and dismissed the union's complaint in its entirety.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary is arbitrary and capricious in concluding that the activity did not violate section 19(a)(1) and (6) of the Order. You assert in this regard that such conclusion "is in direct conflict with uncontroverted facts on the record," which facts establish a change in personnel policy by the activity and a failure to give the union notice of the change.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. Rather, your assertions herein constitute, in effect, nothing more than disagreement with the Assistant Secretary's determination, pursuant to his regulations, that the evidence submitted failed to establish the existence of a past practice, and therefore present no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents any major policy issues, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



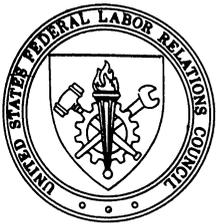
Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. A. Simms
Treasury

American Federation of Government Employees, AFL-CIO, Local 2366 and U.S. Department of Justice, Immigration and Naturalization Service (Britton, Arbitrator). Upon the filing of a petition for review of the arbitrator's award by the union, the Council advised the union that its appeal failed to comply with cited requirements of the Council's rules of procedure, and provided the union with time to effect such compliance. However, the union made no submission in compliance with those requirements within the time limit provided.

Council action (March 31, 1978). The Council dismissed the union's appeal for failure to comply with the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1978

Mr. Glen J. Peterson
National Vice President
10th District
American Federation of Government
Employees, AFL-CIO
6061 N.W. Expressway, Suite 302
San Antonio, Texas 78201

Re: American Federation of Government Employees,
AFL-CIO, Local 2366 and U.S. Department of
Justice, Immigration and Naturalization
Service (Britton, Arbitrator), FLRC No. 78A-23

Dear Mr. Peterson:

By Council letter of March 2, 1978, you were advised that preliminary examination of your appeal in the above-entitled case disclosed apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the Council's rules included: 2411.42, 2411.44 and 2411.46(a), (c) and (d).

You were also advised in the Council's letter:

Further processing of your appeal is contingent upon your compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on March 27, 1978, to take necessary action and file additional materials in compliance with the above provision(s). Moreover, you must serve a copy of the required additional submission on the other parties including all representatives of other parties who entered appearances in the subject proceeding before the Assistant Secretary, the agency head, or the arbitrator, as the case may be, in accordance with section 2411.46(a) of the rules; and you must include a statement of such service with your additional submission to the Council.

Failure to comply with the above requirements will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name and title.

Henry B. Frazier III
Executive Director

cc: J. A. Henry
INS

K. T. Blaylock
AFGE

National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Pennsylvania. The dispute involved provisions in an agreement negotiated by the union's local 6 and the agency's Region 6 as a local supplementary agreement to the agreement of the union and the agency at the national level. The agency disapproved the disputed provisions during review of the local parties' supplementary agreement, having determined that the provisions violated the controlling national agreement, as well as sections 11(b) and 12(b) of the Order. The union, disagreeing with the agency's interpretation of the controlling agreement and with its determination that the disputed provisions were violative of the Order, appealed to the Council pursuant to section 11(c)(4)(i) of the Order, seeking review of the issue as to the negotiability of the provisions under sections 11(b) and 12(b) of the Order.

Council action (April 12, 1978). The Council held that where, as in this case, a negotiability dispute involves issues both as to the interpretation of a controlling agreement (as set forth in section 11(c)(1) of the Order) and as to other bases on which negotiability questions can arise (as set forth in section 11(c)(4) of the Order), the parties should first resolve the issue as to the interpretation of the controlling agreement under section 11(c)(1). For the reasons stated in its decision letter, the Council found that the instant appeal, raising issues as to the negotiability of the disputed provisions under the Order, was prematurely filed and the conditions for Council review of such issues as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure, had not been met. Accordingly, the Council denied the union's appeal, without prejudice to the renewal of its contentions as to the negotiability of the disputed provisions under the Order in a petition duly filed with the Council after it is resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1) of the Order, that those provisions do not conflict with such controlling agreement.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 12, 1978

Mr. Henrik M. Sortun, Chairperson
Local Bargaining Committee
National Labor Relations Board Union
c/o NLRB Region 19
Federal Building, Room 2948
915 Second Avenue
Seattle, Washington 98174

Mr. Bruce D. Rosenstein
Special Counsel to the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW.
Washington, D.C. 20570

Re: National Labor Relations Board Union, Local 6
and National Labor Relations Board, Region 6,
Pittsburgh, Pennsylvania, FLRC No. 77A-109

Gentlemen:

Reference is made to the union's petition for review and the agency's statement of position, and the respective supplemental submissions thereto, in the above-entitled case.

The relevant facts of this case, as set forth in the record, are as follows: The General Counsel of the National Labor Relations Board (the agency) and the National Labor Relations Board Union (the union) are parties at the national level to an agreement covering virtually all of the agency's field office clerical and nonprofessional employees. Article XVIII of this national agreement, entitled "Supplemental and Local Supplementary Agreements" (set forth in the Appendix hereto), permits (in sections 1, 2 and 3) the negotiation of local supplementary agreements, within stated limitations, at certain subordinate field organizational levels; and requires (in section 3) the local parties to obtain approval of such supplementary agreements by the General Counsel and the Executive Committee of the union at the national level. Pursuant to Article XVIII, the union's Local 6 and the agency's Region 6 negotiated a supplementary agreement and sought the requisite approval.

The General Counsel disapproved various provisions of that agreement, including those entitled "Article VI, Clerical Backup" and "Article IX, Bridge Program," which are the subject of the instant appeal to the Council by the union. As to these disputed provisions, the agency takes

the position that they are inconsistent with the controlling national agreement, as well as with sections 11(b) and 12(b) of the Order. The union, disagreeing with the agency's interpretation of the controlling agreement and contending that the disputed provisions do not violate sections 11(b) and 12(b) of the Order, has petitioned the Council, pursuant to section 11(c)(4)(i) of the Order, to review the agency's determination.

As to the asserted conflict between the disputed provisions and the controlling agreement, the agency contends in particular that:

[T]he subjects are covered by the National Agreement, which is the controlling agreement, and, further, that the disputed provisions of the Local Agreement modify the provisions of the National Agreement and are outside the authority of the Regional Director to negotiate. In our view, section 11(c)(1) of Executive Order 11491 requires that such disputes be resolved under the provisions of the National Agreement.

The agency further contends, in this regard, that "the Union has invoked the wrong forum by petitioning the Council instead of invoking the Grievance and Arbitration Articles of the National Agreement." The union contends, on the other hand, that the dispute between the parties in this case principally concerns the negotiability of the provisions of the supplementary agreement here in question under sections 11(b) and 12(b) of the Order and that, therefore, the Council must, under section 11(c)(4) of the Order, resolve that dispute. For the reasons stated hereinafter, we agree with the agency.

Section 11(c) of the Order provides, in pertinent part, as follows:

Sec. 11. Negotiation of agreements.

.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

.

(4) A labor organization may appeal to the Council for decision when --

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order

It is clear that, while section 11(c)(4) of the Order permits an appeal to the Council based upon a union's disagreement with the determination of an agency head that provisions violate the Order, it does not provide for an appeal to the Council to resolve an issue which involves interpretation of a controlling national agreement. Rather, section 11(c)(1) provides expressly that such issues must be resolved through the procedures of the controlling agreement, itself, or if there are no such procedures, under agency regulations. (See National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 25, 1976), Report No. 98 as to the negotiability of proposal 5 at 7-9 of Council decision.)

However, where a negotiability dispute involves both section 11(c)(1) and 11(c)(4) matters, the parties should first resolve the issue as to the controlling agreement under section 11(c)(1). We note, in this connection, that in the sequence of directions for the resolution of issues concerning whether a proposal is nonnegotiable contained in section 11(c) of the Order, the first step adverted to is the resolution of disagreements as to the interpretation of a controlling agreement at a higher agency level. Moreover, in our opinion, there are sound reasons why, in a negotiability dispute involving issues both as to the interpretation of a controlling agreement (as set forth in section 11(c)(1)) and as to other bases on which negotiability questions can arise (as set forth in section 11(c)(4)), the parties should first resolve the issue requiring the interpretation of the controlling agreement. Thus, the resolution of the issue involving the interpretation of the controlling agreement could result in a determination that the matter in dispute is inconsistent with the provisions of the controlling agreement. Hence, such a determination would have the effect of precluding the necessity for a Council decision under section 11(c)(4) of the Order by rendering moot the negotiability issues, thereby avoiding an unwarranted proliferation of cases before the Council. Furthermore, were the Council to decide under section 11(c)(4) that a disputed matter is negotiable, while an issue involving the interpretation of the controlling agreement remained to be resolved, such Council decision would lack finality.*/ In other words, a subsequent determination under the procedures of the parties' controlling agreement pursuant to section 11(c)(1), that the matter is inconsistent with the controlling agreement, would be dispositive of the parties' negotiability dispute, notwithstanding the previous decision of the Council issued pursuant to section 11(c)(4).

*/ In this regard, section 2411.53 of the Council's rules (5 CFR 2411.53) provides that "[t]he Council shall not issue advisory opinions."

Turning to the present case, as previously noted, the agency determined that the provisions at issue herein violate the parties' controlling national agreement, as well as the Order. Thus, the provisions of both section 11(c)(1) and 11(c)(4) are applicable to the instant dispute. In these circumstances, as indicated above, it is our opinion that the appeal to the Council by the union under section 11(c)(4) as to the negotiability of the provisions under sections 11(b) and 12(b), without having first resolved the issue requiring interpretation of the controlling agreement, is premature. In this regard, if, pursuant to the procedures of the parties' controlling agreement, it is determined that the provisions are inconsistent with the controlling agreement--in effect making them non-negotiable--the issues sought to be appealed to the Council by the union in the present case would be rendered moot. Further in this regard, if the Council were to decide the issues appealed by the union under section 11(c)(4), prior to a resolution of the issues as to the interpretation of the controlling agreement, the Council's decision would lack finality. Consequently, the Council will not rule on the negotiability of the disputed provisions under the Order until it is resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1), that those provisions do not conflict with such controlling agreement.

For the reasons stated, we find that the instant appeal, raising issues as to the negotiability of the disputed provisions under the Order, is prematurely filed and the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 CFR 2411.22), have not been met.

Accordingly, the union's appeal is hereby denied, without prejudice to the renewal of its contentions as to the negotiability of the disputed provisions under the Order in a petition duly filed with the Council after it is resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1) of the Order, that those provisions do not conflict with such controlling agreement.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

Attachment:

APPENDIX--Article XVIII

APPENDIX

ARTICLE XVIII
SUPPLEMENTAL AND LOCAL
SUPPLEMENTARY AGREEMENTS

Section 1. The parties agree that Supplemental Agreements involving matters not covered herein may be negotiated and executed from time to time while this General Agreement is in effect. Such Supplemental Agreements shall terminate in the manner specified in Article XXIII herein or on such other expiration dates as may be agreed to by the parties in such Supplemental Agreements.

Section 2. Local Supplementary Agreements may be negotiated between Local Unions and Regional Directors and the Officer-in-Charge in Sub-region 38 (Peoria, Illinois). Any such agreement shall be subject to the approval of the General Counsel and the Executive Committee of the Union and shall be subject to the restrictions listed below:

- (a) All matters covered must be within the administrative authority of the Regional Director;
- (b) Only local conditions affecting the employees of that region will be covered;
- (c) Provisions negotiated may not modify or be in conflict with any provision of this Agreement or any supplement hereto; nor may such provisions be in conflict with applicable law;* and
- (d) Provisions must be consistent with the certification of the Union.

Section 3. The General Counsel and the Executive Committee will approve or disapprove Local Supplementary Agreements within 45 calendar days after submission, exclusive of consultation time under subsection 2(c) above. Such agreements will be rejected only on the basis that one or more of the conditions set forth in Section 2 herein is not satisfied.

Section 4. All Local Supplementary Agreements shall terminate concurrently with termination of this Agreement.

Section 5. Grievances concerning the interpretation or application of any Local Supplementary Agreement entered into pursuant to the provisions of Section 2 of this Article may be processed under the grievance and arbitration procedures set forth in Articles XIII and XIV above.

*/ Any determination by a party to this Agreement that a provision should be rejected pursuant to this subsection will not be made until the other party has been notified and been given an opportunity to consult on the matter.

Department of the Navy, Military Sealift Command, Assistant Secretary Case No. 22-7556(AP). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA) and based on the ARA's reasoning, found that the subject of the grievance filed by the union (International Organization of Masters, Mates and Pilots, International Longshoremen's Association, AFL-CIO) was not grievable or arbitrable under the parties' negotiated agreement. The Assistant Secretary therefore denied the union's request for review seeking reversal of the ARA's Report and Findings on Arbitrability. The union appealed to the Council, alleging, in essence, that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (April 12, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 12, 1978

Mr. Julian H. Singman
Landis, Cohen, Singman and Rauh
Suite 500
1019 19th Street, NW.
Washington, D.C. 20036

Re: Department of the Navy, Military Sealift Command,
Assistant Secretary Case No. 22-7556(AP),
FLRC No. 77A-118

Dear Mr. Singman:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case concerning an application for a decision on arbitrability. In this case, the Assistant Secretary found that the subject matter of the grievance was not grievable or arbitrable under the parties' negotiated agreement.

As found by the Assistant Secretary, the International Organization of Masters, Mates and Pilots, International Longshoremen's Association, AFL-CIO (the union) is the exclusive representative of all Masters and Licensed Deck Officers employed by the Military Sealift Command (the activity). Wages for members of the bargaining unit are established in accordance with 5 USC 5348(a).^{1/} A grievance arose from a dispute over a wage schedule adopted by the Department of Defense Wage Fixing Authority for employees in the bargaining unit. The activity contended that the grievance was not arbitrable because the contractual grievance procedure specifically excluded from its coverage questions as to the interpretation of provisions of law.^{2/} The union contended that the matter in dispute

1/ 5 USC 5348(a) provides, in pertinent part, that the pay of officers and crew members of vessels "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

2/ Article VI, Section A(5) of the agreement provides:

Article VI Grievance and Arbitration

A. Limitations and Conditions

- (5) Questions as to the interpretation of published COMSC policies or regulations, provisions of law, or regulations of appropriate authorities outside the COMSC shall

(Continued)

involved the interpretation and application of the compensation provision of the agreement.^{3/}

In his Report and Findings on Arbitrability, the Acting Regional Administrator (ARA) concluded, in pertinent part:

I find that the language of Article VI, Section A(5) bars consideration of the grievance because the grievance concerns a question as to the interpretation of provisions of law, specifically the interpretation of the term "prevailing rates and practices in the maritime industry" contained in 5 USC 5348(a). There is no allegation or evidence that the exclusionary language in the negotiated grievance procedure was improperly imposed on the parties by a higher authority within the Department of Defense. Since the language was agreed to by the parties, it is a proper and binding limitation on the scope of the negotiated grievance procedure.

Accordingly, the ARA found that "the grievance is not arbitrable under the parties' negotiated agreement." In agreement with the ARA, and based on his reasoning, the Assistant Secretary found that the subject matter of the grievance was not grievable or arbitrable under the parties' negotiated agreement. The union's request for review was therefore denied.

In your petition for review on behalf of the union you request that the Council review the decision of the Assistant Secretary on the grounds that:

- (1) A major policy issue is presented, namely, whether the standard applied by the Assistant Secretary for determining the arbitrability of this dispute was unduly restrictive and therefore itself arbitrary and capricious. You argue in this regard,

(Continued)

not be subject to this negotiated grievance procedure regardless of whether such policies, law or regulations are quoted, cited, or otherwise incorporated or referenced in this agreement.

3/ Article IX of the agreement provides, in pertinent part:

Article IX Compensation

Section 1. 5 USC 5348 provides that the compensation of officers and crews of vessels shall be fixed and adjusted from time to time as nearly as is consistent with the public interest, in accordance with prevailing rates and practices in the maritime industry. Appendix A, hereto, is the current wage schedule of Masters and Deck Officers.

citing the Council's Crane decision,^{4/} that in resolving the matter in dispute, consideration must also extend to the existing legal and regulatory framework created by statute, the Order, and applicable regulations, as well as operative facts.

- (2) The Assistant Secretary's denial according to the standard employed was inconsistent with his own prior decision and rulings of the Council. In this regard you rely on a decision of the Assistant Secretary^{5/} which cited the Council's decision in Crane^{6/} and which allegedly involved the relationship between the regulatory structure and prevailing industry practice.
- (3) The Assistant Secretary's denial violated section 13 of the Order, contending that although section 13 provides for arbitration, an exclusive procedure in most cases, the Assistant Secretary acted in a manner which guarantees that it will not be available in any case.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the standard applied by the Assistant Secretary was unduly restrictive in that the Council's Crane decision requires that consideration must be extended to the existing legal and regulatory framework, it does not appear that the arbitrability determination presents a major policy issue concerning the proper application of the principles set forth in the Council's Crane decision.^{7/} In this regard,

4/ Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, 3 FLRC 120 [FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63].

5/ U.S. Department of Commerce, National Ocean Survey, National Oceanic and Atmospheric Administration, A/SLMR No. 703, FLRC No. 76A-112 (May 16, 1977), Report No. 123, at n. 5.

6/ N. 4, supra.

7/ In Crane, supra n. 4, the Council stated:

[T]he Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. [3 FLRC at 124]

(Continued)

the Council notes particularly that the Assistant Secretary resolved the issue of arbitrability on the basis of provisions contained in the parties' negotiated agreement which describe the scope and coverage of their negotiated grievance procedure, i.e., the general scope of such procedure as well as specific exclusions contained therein. Similarly, as to your contention that the standard applied by the Assistant Secretary was arbitrary and capricious, it does not appear that he acted without reasonable justification in reaching his decision in the circumstances of this case.

With regard to your assertion that the decision is inconsistent with prior decisions of the Assistant Secretary and the Council, your appeal fails to establish any clear, unexplained inconsistency with applicable precedent in the circumstances of this case. In this regard, as previously noted, the Assistant Secretary resolved the question on the basis of provisions of the parties' negotiated agreement, which describe the scope and coverage of their negotiated grievance procedure.

Similarly, as to your allegation that the decision violates section 13 of the Order in that "it guarantees that [arbitration] will not be available in any case," no major policy issue is presented, noting again that the Assistant Secretary found that the subject matter of the grievance was not grievable or arbitrable under the provisions of the parties' negotiated agreement, which establish the scope and coverage of their negotiated grievance procedure.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet

(Continued)

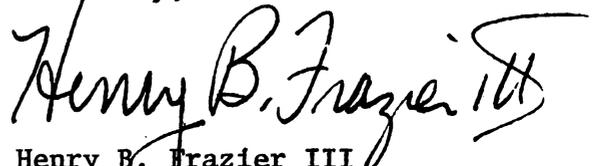
In Community Services Administration, A/SLMR No. 749, FLRC No. 76A-149 (Aug. 17, 1977), Report No. 133, the Council explained:

This language in the Council's decision in Crane describes the Assistant Secretary's responsibilities under the Order in deciding whether a grievance is on a matter subject to a negotiated grievance procedure. In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such procedure as well as any specific exclusions contained therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector (or as an arbitrator or the Federal courts would in the private sector) whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure.

the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. J. Haycock
DOD

Department of the Navy, Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Oldham, Arbitrator). The arbitrator found that the disciplinary action taken by the activity against the grievant was justified and denied the grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon two exceptions, alleging (1) essentially, that particular findings of the arbitrator were erroneous; and (2) that the award sustaining the penalty imposed by the activity was in error.

Council action (April 12, 1978). The Council held that the union's exceptions provided no basis for Council acceptance of the union's petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 12, 1978

Mr. Richard F. Lake, President
Tidewater Virginia Federal Employees
Metal Trades Council, AFL-CIO
P.O. Box 3371
Portsmouth, Virginia 23702

Re: Department of the Navy, Norfolk Naval
Shipyards and Tidewater Virginia Federal
Employees Metal Trades Council, AFL-CIO
(Oldham, Arbitrator), FLRC No. 78A-13

Dear Mr. Lake:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, this case arose when the grievant was given a 5-day suspension by the Norfolk Naval Shipyards (the activity) for two separate alleged violations of the "Standard Schedule of Disciplinary Offenses." The union grieved the suspension, and, following the processing of the grievance under the parties' agreement, the grievance was submitted to arbitration.

The issue at arbitration, as stated by the arbitrator, was "whether or not the grievant . . . was issued a five-day disciplinary suspension by the [activity] for just cause." In the discussion accompanying his award the arbitrator found that the activity had failed to substantiate one of the alleged violations, but that it did substantiate the other alleged violation. However, he noted, that "since the discipline imposed was within the range of discipline permitted for the offenses which were established, according to standard federal procedures, it is not appropriate for the arbitrator to order a reduction in penalty." Therefore the arbitrator found that the disciplinary action taken was justified and his award was that "the grievance in this case is denied."

The union requests that the Council accept its petition for review of the arbitrator's award based upon the exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulations, or the order, or other grounds similar to those upon

which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception the union asserts, with respect to the alleged violation found by the arbitrator to be substantiated, that the finding in this regard is contrary to the testimony adduced at the hearing and, as a result, that the arbitrator erred in his evaluation of the evidence. Additionally, the union asserts that "[t]he Arbitrator erred in ruling that the grievant misled management officials," and that this finding "is contrary to the evidence in this case." These assertions do not present a ground upon which the Council will grant a petition for review of an arbitration award. The Council has consistently held that arbitral determinations as to the credibility of witnesses and the weight to be given to their testimony are not matters subject to Council review. E.g., Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), 3 FLRC 569 [FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82]. Moreover, the Council has consistently held that an exception, as here, which essentially contends that the arbitrator's findings of facts are erroneous does not state a ground upon which the Council will accept a petition for review of an arbitration award. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception, the union contends that the arbitrator's award, which sustains the penalty imposed by the activity, is in error in view of the fact that, although the arbitrator recognized that the activity had improperly merged the two separate alleged violations, he did not order a reduction in the penalty imposed by the activity. In essence, the union appears to be disagreeing with the reasoning behind the arbitrator's award. In this respect, the Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge, e.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111, and, as a result, this exception also provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Brazier III
Executive Director

cc: T. J. Haycock
Navy

P. J. Burnsky
MTD

Department of the Air Force, Grissom Air Force Base, Peru, Indiana, A/SLMR No. 852. This appeal arose from a decision and order of the Assistant Secretary, upon a complaint filed by Local 1434, National Federation of Federal Employees (NFFE), the exclusive representative of a unit of employees at the activity. The Assistant Secretary found that the activity violated section 19(a)(3) (and based on the same conduct, section 19(a)(1)) of the Order by permitting the publication of an advertisement by Local 3254, American Federation of Government Employees, AFL-CIO (AFGE), in a newspaper over which the Assistant Secretary determined the activity exercised control. The Council accepted the agency's and AFGE's petitions for review, concluding that the Assistant Secretary's decision raised a major policy issue as to the interpretation and application of section 19(a)(3) of the Order under the circumstances of this case (Report No. 138).

Council action (May 2, 1978). For the reasons fully detailed in its decision, the Council concluded that the Assistant Secretary's finding of a violation of section 19(a)(3) of the Order, in the circumstances of this case, was inconsistent with the purposes of the Order. (The Council noted that, similarly, the conduct of the activity did not constitute a violation of section 19(a)(1) of the Order.) Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for action consistent with its decision.

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

Department of the Air Force
Grissom Air Force Base
Peru, Indiana

and

Local 1434, National Federation
of Federal Employees

A/SLMR No. 852
FLRC No. 77A-77

and

Local 3254, American Federation
of Government Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary, based upon an unfair labor practice complaint filed by Local 1434, National Federation of Federal Employees (NFFE) against the Department of the Air Force, Grissom Air Force Base, Peru, Indiana (the activity). The Assistant Secretary found that the activity violated section 19(a)(3) (and based on the same conduct section 19(a)(1)) of the Order^{1/} by permitting the publication of an advertisement in a newspaper over which the activity exercised control by a union which was not in equivalent status with NFFE, the exclusively recognized representative of certain of its employees.

1/ Section 19(a) of the Order provides in pertinent part:

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

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

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]

The pertinent factual background of this case, as found by the Assistant Secretary and based upon the entire record, is as follows: Local 3254, American Federation of Government Employees, AFL-CIO (AFGE)^{2/} placed an advertisement, promoting the benefits of AFGE membership, in the Grissom Contact (hereinafter referred to as the "Contact"), a weekly unofficial newspaper published in the interests of personnel at the activity by a private Publisher not connected with the Air Force. Publication is governed by a contract between the Publisher and the activity. The advertisement appeared prior to the expiration of the negotiated agreement between the activity and NFFE, the exclusive representative of a unit of the activity's employees. The advertisement appeared at a time when a representation petition could have been timely filed, but no such petition had yet been filed by AFGE.^{3/}

The activity furnishes the news content, headlines, editorials, captions and pictures of the Contact; the Publisher solicits and sells advertising and prepares advertising copy. The Publisher's sole revenue is derived from the sale of advertisements. Copies of the Contact are deposited at various places on the base where personnel may, without charge, pick up a copy. The editor of the Contact is an airman detailed by the activity for such duty.

2/ AFGE was designated an "Interested Party" by the Assistant Secretary in this proceeding.

3/ The relevant provisions of the Assistant Secretary's regulations state:

§ 202.3 Timeliness of petition.

.

(c) When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows:

- (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three
- (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative[.]

As noted by the Assistant Secretary, the advertisement appeared during the 30-day "open period" specified in the above-quoted regulation, and subsequently during the same open period AFGE did file a petition seeking to represent the activity's employees.

The contract between the activity and the Publisher provides certain specified limitations on the type of advertisements permitted to be published in the Contact.^{4/} The contract between the activity and the Publisher further provides that each edition of the Contact must contain a statement that "[t]he appearance of advertisements . . . in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised."^{5/} All dealings which led

4/ The contract between the activity and the Publisher provides, in part, in Paragraph III, ADVERTISING, as follows:

c. "Control." The Publisher shall not accept for publication advertisements that are in conflict with the principles of the Air Force character guidance program. The Publisher shall not solicit advertising or publish advertisements from establishments that have been declared to be "Off Limits" to military personnel by the Base Commander or by the Armed Forces Disciplinary Control Board In addition, the Publisher may request the Information Officer or designated representative(s) to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base. Advertisements which are essentially political in nature or which have political connotations will not be carried in the GRISSOM CONTACT. No advertisement will be carried that is unlawful, detrimental to discipline, that undermines loyalty, or is otherwise contrary to the best interests of Grissom Air Force Base, to the United States Air Force or any part thereof, or to the United States of America. All advertisements shall conform to principles of good taste. In this regard, the Publisher shall not advertise any motion picture or other form of film entertainment which is rated "X" In the event of disagreement over advertising content, the commander of Grissom Air Force Base shall have the final authority for determination.

5/ The edition of the Contact at issue herein contained the following statement as required by the contract:

The Contact is an unofficial newspaper published weekly in the interests of personnel at Grissom AFB of the Strategic Air Command. It is published by James Bannon, an individual, in no way connected with the Air Force. Opinions expressed by publishers and writers are their own and are not to be considered an official expression by the Department of the Air Force. The appearance of advertisements, including supplements and inserts, in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised. Everything advertised in this publication must be made available for purchase, use or patronage without regard to the race, creed, color, national origin or sex of the purchaser, user or patron. A confirmed violation of this policy of equal opportunities by an advertiser will result in the refusal to print advertising from that source.

to the purchase and preparation of the advertisement here involved were between AFGE officials and a sales representative of the Publisher. The advertisement was solely the product of AFGE and was paid for by AFGE. And, as already indicated, it promoted AFGE membership; and it did not mention NFFE in any manner.^{6/}

The Assistant Secretary, in agreement with the Administrative Law Judge, held that the activity violated section 19(a)(1) and (3) of the Order. In reaching this conclusion, the Assistant Secretary stated as follows:

[T]he publication in the newspaper, the Grissom Contact, of an advertisement by the AFGE constituted a violation of Section 19(a)(3) and (1) of the Order by the Respondent Activity in that its conduct, in permitting such publication, in effect, constituted the furnishing of services and facilities to a labor organization, the AFGE, which was not in equivalent status with the exclusively recognized representative of the Respondent Activity's employees, Local 1434, National Federation of Federal Employees, hereinafter called NFFE. In reaching this conclusion, it was noted particularly that the evidence established that the Respondent Activity exercised control over the Grissom Contact and that the newspaper was, in effect, an instrumentality of the Respondent Activity. In this regard, I view it as immaterial to the finding of a violation herein that the Respondent Activity's contract with the publisher of the Grissom Contact did not specifically forbid an advertisement such as that involved in the subject case. Thus, in my view, as Section 19(a)(3) of the Order prohibits agency management from providing assistance to a labor organization such as the AFGE, not in equivalent status, permitting the publication of an advertisement by the AFGE in a newspaper which it controls is violative of the Order irrespective of the specific contractual agreements entered into with the publisher.

The activity and AFGE appealed the Assistant Secretary's decision and order to the Council. The Council accepted the petitions for review, concluding that a major policy issue was raised as to the interpretation and application of section 19(a)(3) of the Order under the circumstances of the present case. The Council also granted requests by the activity and

^{6/} The activity had no knowledge of the AFGE advertisement until its airman editor saw the galley proofs containing the advertisement. The airman did not bring the advertisement to the attention of his superior because the airman concluded that it was not deemed in conflict with agency regulations or the contract.

AFGE for a stay, having determined that the requests met the criteria set forth in section 2411.47(e)(2) of its rules. The parties filed briefs with the Council as provided in section 2411.16 of the Council's rules.^{7/}

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case raised a major policy issue as to the interpretation and application of section 19(a)(3) of the Order under the circumstances herein. More specifically the question is whether the Assistant Secretary's finding of a 19(a)(3) violation is consistent with the purposes of the Order or, to state it alternatively, whether a finding that the activity violated section 19(a)(3) of the Order by permitting the publication of an advertisement by the AFGE in a newspaper which it controls is consistent with the purposes of the Order.^{8/} For the reasons stated below, we conclude that the Assistant Secretary's finding of a violation, in the circumstances of this case, is not consistent with such purposes.

The proscription in section 19(a)(3), namely that agency management shall not sponsor, control or otherwise assist a labor organization, was an adoption of the identical wording of section 3.2(a)(3) of the Code of Fair Labor Practices, the antecedent of the current 19(a)(3) provision. (3 CFR, 1959-63, Comp. at 852.) Section 19(a)(3) was clearly intended,

^{7/} NFFE requested oral argument. Pursuant to section 2411.48 of the Council's rules, this request is denied because the positions of the participants in this case are reflected adequately in the entire record now before the Council.

^{8/} Section 19(a)(3) provides that agency management shall not sponsor, control or otherwise assist a labor organization. The remaining language contained in the section is a proviso to the otherwise absolute ban. That is, an agency may furnish customary and routine services and facilities when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status. In view of our conclusion herein that agency management has not sponsored, controlled or otherwise assisted AFGE in the circumstances of the case, it is unnecessary to apply the proviso permitting the furnishing of customary and routine services and facilities, under described conditions, to organizations having equivalent status.

as was stated with regard to the Code provision, to prevent agency management from dominating or controlling a labor organization by contributing financial or other support to it and to preserve the independence of such organizations from agency manipulation.^{9/} In the Council's view, this proscription was not intended to reach the conduct of agency management such as is at issue in the circumstances of the instant case.

The extent of management conduct here involved was a failure to prevent the selling of an advertisement by a private individual not connected with the Air Force to appear in an unofficial newspaper published in the interests of personnel at the activity. Agency management took no affirmative action in any manner beneficial to the AFGE in this endeavor. There was no agency management involvement in the sale, preparation or distribution of the advertisement. And all dealings which led to the purchase and preparation of the advertisement were between AFGE officials and a sales representative of the Publisher.

Moreover, not only was the advertisement totally free from any hint of management endorsement, but such endorsement was expressly disavowed by the clear policy statement contained in the newspaper, i.e., that "[t]he Contact is an unofficial newspaper published weekly in the interests of personnel at Grissom AFB of the Strategic Air Command. It is published by James Bannon, an individual, in no way connected with the Air Force. Opinions expressed by publishers and writers are their own and are not to be considered an official expression by the Department of the Air Force. The appearance of advertisements, including supplements and inserts, in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised. . . ."

Further, it is clear that NFFE, like AFGE, was completely free to buy an advertisement in the Contact and, if it had sought to do so, the advertisement would have been treated no differently from that purchased by AFGE. Likewise, there is no evidence whatsoever of any other conduct by agency management which might be perceived by employees as an indication of support for AFGE or opposition to NFFE.

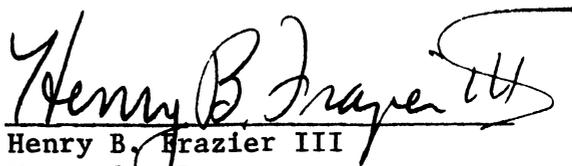
In the Council's opinion, the proscription that agency management shall not sponsor, control or otherwise assist a labor organization was not intended to cover such circumstances as here involved. That is, a finding of a 19(a)(3) violation based merely on the failure to prevent

^{9/} See Explanation of Provisions of the Standards of Conduct for Employee Organizations and Code of Fair Labor Practices in Employee-Management Cooperation in the Federal Service, United States Civil Service Commission, Attachment to FPM Let. 711-2 (Aug. 30, 1963), at 16.

the publication of the subject advertisement by AFGE is inconsistent with the purposes of the Order.^{10/}

Conclusion

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.



Henry B. Brazier III
Executive Director

Issued: May 2, 1978

^{10/} Similarly, such conduct plainly does not constitute interference with, restraint or coercion of an employee in the exercise of the rights assured by the Order in violation of section 19(a)(1).

Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, A/SLMR No. 912. The Assistant Secretary, upon a complaint filed by American Federation of Government Employees, Local 987, AFL-CIO, concluded that the activity violated section 19(a)(1) and (6) of the Order by unilaterally implementing its last negotiation offer regarding official time while the issue was pending before the Federal Service Impasses Panel. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision and order.

Council action (May 2, 1978). The Council held that the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1978

Mr. Robert T. McLean, Chief
Labor & Employee Relations Division
Directorate of Civilian Personnel
Department of the Air Force
Washington, D.C. 20314

Re: Warner Robins Air Logistics Center, Robins
Air Force Base, Georgia, A/SLMR No. 912,
FLRC No. 77A-138

Dear Mr. McLean:

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

In this case, as found by the Assistant Secretary, Warner Robins Air Logistics Center, Robins Air Force Base (the activity) and American Federation of Government Employees, Local 987, AFL-CIO (the union) were parties to a collective bargaining agreement containing a provision regarding the amount of official time available to union stewards in the performance of their representational duties. When the parties initiated renegotiation of their agreement, management proposed, among other things, a change in the amount of official time available for use by union stewards. After lengthy negotiations, the parties agreed that they had reached impasse on the issue of official time, among others, and agreed to seek the services of the Federal Service Impasses Panel (Panel) on all impassed issues. Subsequently, after expiration of the collective bargaining agreement, the activity informed the union that it proposed to unilaterally implement its last negotiation offer regarding official time. The union took issue with the activity's proposed action, stating that the parties had agreed to submit the impassed items to the Panel, and requested that management not implement its proposals until the Panel had an opportunity to act. The parties thereafter submitted their positions to the Panel, and a few days later the activity unilaterally implemented its last negotiation offer regarding official time.

The union filed an unfair labor practice complaint alleging, as relevant herein, that the activity's implementation of its last offer regarding official time while the issue was pending with the Panel violated the Order. The Administrative Law Judge (ALJ), applying the standard set

forth by the Assistant Secretary in U.S. Army Corps of Engineers, Philadelphia District,^{1/} found that the activity failed to establish that the situation regarding the use of official time "was of such an overriding and emergency nature that it warranted unilateral action, while the very matter was before the Impasses Panel." The ALJ further found that "[a]lthough the parties had reached impasse on the issues

1/ See consolidated decision in Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806, FLRC No. 77A-40, and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859, FLRC No. 77A-92 (Mar. 17, 1978), Report No. 147, wherein the Council stated at note 3:

In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (June 23, 1976), the Assistant Secretary stated that it has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms and conditions of employment which are included within the scope of section 11(a) of the Order. He further determined that, after bargaining to an impasse, agency management does not violate the Order by unilaterally imposing changes in terms and conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are to become effective in order to give the exclusive representative ample opportunity to invoke the services of the Panel before the changes are implemented. The Assistant Secretary concluded that the framers of the Order intended to give parties discretion with respect to seeking the Panel's services under section 17. He went on to state that if a party involved in an impasse requested the services of the Panel, it would effectuate the purposes of the Order to require the parties, in the absence of an overriding exigency, to maintain the status quo and permit the processes of the Panel to run their course before the unilateral change in terms and conditions of employment could be effectuated.

The union appealed to the Council. The Council, in denying review of the appeal [FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122], did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes have run their course. The Council noted that such statement, which had been included in the Assistant Secretary's decision merely as dictum, had not been appealed to the Council and therefore, apart from other considerations, was not properly before the Council for review.

here, they had obligated themselves to use the services of the Impasses Panel. Thus, they were not free to engage in unilateral self-help action until the Panel's processes had been allowed to run its course." The ALJ concluded that the activity had violated section 19(a)(1) and (6) of the Order, and the Assistant Secretary adopted the ALJ's findings, conclusions, and recommendations.

In your petition for review on behalf of the activity, you contend that the Assistant Secretary's decision presents the following issues:

I. Whether the decision of the Assistant Secretary is arbitrary and capricious and presents a major policy issue, in that said decision holds that implementation of management's last offer on an item impasse in good faith negotiations is a violation of Sections 19(a)(6) and (1) of the Order if said impasse item is being submitted to the Federal Service Impasses Panel?

II. Assuming, arguendo, that the Council takes action with regard to Issue I, which has the effect of affirming the dictum of A/SLMR No. 673 with regard to bargaining topics in general, whether the application of said dictum in the circumstances of the instant case is arbitrary and capricious and raises a major policy issue which the Council should consider?

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

With respect to your allegations that the decision of the Assistant Secretary is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. As to your further allegations that the Assistant Secretary's decision presents major policy issues, in the Council's view no major policy issues are presented warranting review. In this regard, on March 17, 1978, the Council issued its consolidated decision in the Ogden Service Center and Brookhaven Service Center cases (note 1, supra), wherein the Council stated in pertinent part:

Upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. . . . Also, where (as here) the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, a party may not

effect changes in otherwise negotiable personnel policies and practices and matters affecting working conditions without first providing the other party with sufficient notice of its intent to implement the changes (which changes cannot exceed the scope of the proposals advanced during prior negotiations by the party seeking to implement the changes) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Panel. If the Panel's processes are not invoked within a reasonable time of such notification, the party seeking to implement the changes may effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible--i.e., to the extent consistent with the necessary functioning of the agency.

Therefore, as the major policy issues alleged to be presented have been^{2/} resolved by the Council, the instant case presents no basis for review.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12

^{2/} The Council's consolidated decision in the Ogden Service Center and Brookhaven Service Center cases requires the parties to maintain the status quo "to the maximum extent possible"--i.e., to the extent consistent with the necessary functioning of the agency--once the Panel's processes have been timely invoked. In the instant case, the Assistant Secretary relied on an "overriding exigency" test (which the Council did not adopt in the consolidated decision) in determining that the agency herein violated the Order by unilaterally implementing its last negotiation offer regarding official time while the matter was before the Panel. However, based on the particular record before the Council in the present case, there is no indication that application of the "maximum extent possible" test would prompt a different result from that reached by the Assistant Secretary. Thus, the agency's appeal to the Council does not warrant acceptance of the agency's petition for review or remand of the Assistant Secretary's decision.

of the Council's rules of procedure. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. D. Roth
AFGE

Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908. The Assistant Secretary, upon a complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council (the union), concluded that the meetings involved, called for the explicit purpose of terminating four probationary employees, were formal discussions within the meaning of section 10(e) of the Order, and, consequently, the activity's refusal to allow the union the right to represent the employees in such discussions violated section 19(a)(6) of the Order. Further, noting "the vested derivative right of representation at formal meetings under section 10(e) when the employee deems such representation imperative for the protection of his employment interests," the Assistant Secretary found that the activity's denial of the employees' request for union representation at the meetings here involved was violative of section 19(a)(1) of the Order. As a remedy, the Assistant Secretary directed the activity to cease and desist from the above unfair labor practices and to post appropriate notices. However, the Assistant Secretary decided that, under the particular circumstances of this case, in view of the nature of the violation found, the status quo ante remedy sought by the union was unwarranted. Both the agency and the union filed petitions for review of the Assistant Secretary's decision. The agency contended, among other things, that the subject decision raised major policy issues. The union alleged that the Assistant Secretary's decision with respect to his remedial order was arbitrary and capricious and presented a major policy issue.

Council action (May 2, 1978). With regard to the agency's petition for review, the Council held that the decision of the Assistant Secretary raised a major policy issue, namely: Whether the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of this case are consistent with the purposes and policies of the Order. Accordingly, pursuant to section 2411.15 of its rules of procedure, the Council accepted the agency's petition for review and so notified the parties. The Council also granted the agency's request for a stay.

With regard to the union's petition for review, the Council held that the petition did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary with respect to his remedial order did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1978

Mr. Stuart M. Foss
Office of Civilian Personnel
Policy, OASD (MRA&L)
The Pentagon, Room 3D968
Washington, D.C. 20301

Mr. James R. O'Connell
O'Donoghue and O'Donoghue
1912 Sunderland Place, NW.
Washington, D.C. 20036

Re: Department of Defense, U.S. Navy, Norfolk
Naval Shipyard, A/SLMR No. 908, FLRC
No. 77A-141

Gentlemen:

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

In this case, as found by the Assistant Secretary, four probationary employees in their first year of employment at the Norfolk Naval Shipyard (the activity) were discovered sleeping on the job. The activity thereafter scheduled individual meetings with the probationary employees for the purpose of terminating their employment. The Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (the union), exclusive representative of the employees involved, was given advance notice of these meetings. The union was told that because the men were probationary employees they were not entitled to be represented at the meetings but that the union steward could represent the union as an observer. The activity superintendent met with each employee individually and in each case informed the employee that he was not entitled to representation but that the union was entitled to an observer. During the course of the meetings, the union representative tried to speak several times but the superintendent stopped him each time and told him that he was only an observer and could make a statement for the union at the end of the meeting. Each meeting took about five minutes and resulted in the termination of all four probationary employees because they failed the standards for satisfactory performance. The union subsequently filed an unfair labor practice complaint alleging, in pertinent part, that the activity had violated section 19(a)(1) and (6) of the Order by denying union

representation to the four probationary employees at meetings where disciplinary action was discussed and imposed.*/

The Assistant Secretary concluded that the meetings, called for the explicit purpose of terminating the probationary employees, were formal discussions within the meaning of section 10(e), and, consequently, the activity's refusal to allow the union, the exclusive representative of the unit employees involved, the right to participate in such discussions violated section 19(a)(6). Further, noting "the vested derivative right of representation at formal meetings under section 10(e) when the employee deems such representation imperative for the protection of his employment interests," the Assistant Secretary found that the activity's denial of the employees' request for union representation was violative of section 19(a)(1) of the Order. In support of this conclusion the Assistant Secretary noted particularly that the meetings involved the termination of probationary employees "who except in a limited number of instances not relevant here, have no statutory appeal rights and, therefore, no right of representation upon appeal from an agency action." The Assistant Secretary further stated:

[T]he meetings which were held herein were called specifically for the purpose of terminating the probationary employees and not for investigatory purposes. Such meetings not only substantially affected personnel policies and practices as they related to the specific employees' job security, but they also substantially affect personnel policies and practices as they pertain to other employees in the bargaining unit. Thus, the union representative whose representation the probationary employees were seeking would, in effect, be safeguarding not only interests of the particular employees involved, but also the interests of others in the bargaining unit by exercising vigilance to make certain that the agency does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other probationary employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like meeting where such discipline is imposed. [Footnote omitted.]

As a remedy, the Assistant Secretary directed the activity to cease and desist from the above unfair labor practices and to post appropriate notices. However, he found that, "[u]nder the particular circumstances of this case, in view of the nature of the violation herein, . . . a remedial order requiring a return to a status quo ante is unwarranted."

Both the agency and the union filed petitions for review of the Assistant Secretary's decision.

In its petition for review, the agency contended in summary that the decision of the Assistant Secretary raises major policy issues and is

*/ Allegations of a violation of section 19(a)(2) and (5) growing out of the same fact situation were dismissed by the Assistant Secretary and are not before the Council.

arbitrary and capricious. Upon careful consideration of the agency's petition for review and the opposition filed by the union, the Council is of the opinion that the subject decision of the Assistant Secretary raises a major policy issue, namely: Whether the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of this case are consistent with the purposes and policies of the Order.

Accordingly, pursuant to section 2411.15 of the Council's rules of procedure, you are hereby notified that the Council has accepted the agency's petition for review, and you are reminded that briefs may be filed as provided in section 2411.16(a) of the rules.

The Council has also carefully considered the agency's request for a stay of the Assistant Secretary's decision and order pending Council resolution of the instant appeal, and the union's opposition thereto. Pursuant to section 2411.47(e)(2) of its rules, the Council has decided that issuance of a stay is warranted in the circumstances of this case. Accordingly, the agency's request for a stay is granted.

In its petition for review, the union alleged that the Assistant Secretary's failure to issue a remedial order requiring the activity to reinstate the probationary employees with backpay, and the absence of an explanation for such failure, render his decision arbitrary and capricious. The union further alleges that "the Assistant Secretary's failure to order make-whole relief presents a major policy issue with respect to the extent of his discretion under [s]ection 6(b) of the Order."

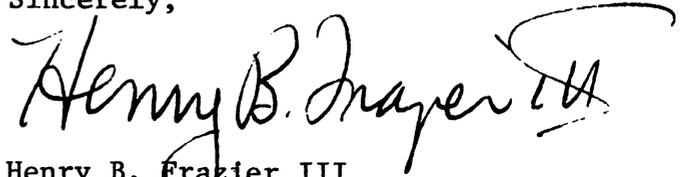
In the Council's opinion, the union's petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue with respect to the remedial order.

With respect to the union's allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that, "[u]nder the particular circumstances of this case, in view of the nature of the violation herein, . . . a remedial order requiring a return to a status quo ante is unwarranted." Nor does this aspect of the Assistant Secretary's decision raise a major policy issue, as alleged, noting particularly that section 6(b) of the Order, by its express terms, confers considerable discretion on the Assistant Secretary to fashion a remedy "he considers appropriate to effectuate the policies of [the] Order." In the Council's view, your appeal fails to show that the Assistant Secretary has either exceeded the scope of his authority under section 6(b) or that his remedial order in the circumstances of this case is inconsistent with the purposes and policies of the Order. See Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486, 3 FLRC 529 [FLRC No. 75A-59 (Aug. 14, 1975), Report No. 80]; The Adjutant General, State of Illinois, Illinois Air National Guard, and National Guard Bureau, Washington, D.C., A/SLMR No. 598, FLRC No. 76A-1 (Apr. 23, 1976), Report No. 105.

Since that part of the Assistant Secretary's decision related to the union's petition for review does not appear arbitrary and capricious and presents no major policy issue, the union's appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of the union's appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Department of the Air Force, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 935. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, dismissed the unfair labor practice complaint filed by Ms. Marie C. Brogan as then President of National Federation of Federal Employees, Local 1001. Ms. Brogan appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action (May 2, 1978). The Council held that Ms. Brogan's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied Ms. Brogan's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1978

Ms. Marie C. Brogan
4074 Stardust Road
Lompoc, California 93436

Re: Department of the Air Force, 4392nd
Aerospace Support Group, Vandenberg Air
Force Base, California, A/SLMR No. 935,
FLRC No. 78A-1

Dear Ms. Brogan:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, as supplemented, and to the agency's opposition thereto, as supplemented.^{1/}

According to the Assistant Secretary, you, as the then President of the National Federation of Federal Employees, Local 1001 (the union), filed an unfair labor practice complaint against Department of the Air Force, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California (the activity) alleging violations of section 19(a)(1), (2) and (6) of the Order. The issues presented were whether certain actions by the activity violated the Order (1) by unilaterally modifying the terms of an existing collective bargaining agreement regarding the procedure to be taken by a union officer for obtaining official time for union-related duties, (2) by changing the union president's past practice with respect to the securing of official time, and (3) by interfering with or restraining the union president in the exercise of a right assured her under the Order.

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge, concluded as to (1), that there was no evidence of record of a flagrant and deliberate breach of the negotiated agreement by the activity, and it could not be said that the activity violated the Order by unilaterally changing the terms of the agreement; and noted in that regard that the proper forum for resolving this issue was within the grievance machinery of the agreement rather than through unfair labor practice procedures. Further, as to (2), the Assistant Secretary concluded that the activity did not unilaterally change the union

^{1/} In its opposition and supplement thereto, the agency, among other things, challenged your standing to file the instant appeal, and further contended that you failed to properly serve the agency with a copy of your appeal. In your supplemental submissions, you contend, among other things, that the agency's opposition was untimely filed. However, in view of our decision herein we find it unnecessary to reach or pass upon these contentions.

president's past practice. Finally, as to (3), the Assistant Secretary concluded that the union failed to sustain its burden of proof.^{2/}

In your petition for review, you contend that the Assistant Secretary's decision is arbitrary and capricious, principally because "it blanketedly adopted the clearly erroneous ALJ's recommended decision and order without dealing with the issues involved [,]" and that, therefore, the Assistant Secretary did not properly review the case but in effect granted the activity's motion to quash and dismiss, even though he claimed to have denied the motion. You also contend that the decision of the Assistant Secretary presents five major policy issues, which you do not specifically identify. Rather, you describe assertedly relevant background information and reiterate, or incorporate by reference in your petition, numerous contentions previously raised in this case or in other proceedings in which you were involved.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious nor does it present any major policy issues.

As to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in adopting the findings, conclusions and recommendations of the ALJ in deciding to dismiss the subject complaint, noting particularly that such adoption and decision were expressly based upon consideration of the entire record in the case, including the exceptions to the ALJ's recommended decision and order, and supporting brief. Further in that regard, it does not appear that the Assistant Secretary failed to consider any relevant issues in reaching his decision. Moreover, with regard to your allegations that the Assistant Secretary in effect granted the activity motion to quash and dismiss the exceptions to the ALJ's recommended decision and order, as already stated, the Assistant Secretary expressly denied the motion and considered the exceptions. Thus, your contention constitutes, in essence, a disagreement with the findings and conclusions adopted by the Assistant Secretary, as well as with his decision, and, therefore, presents no basis for Council review.

With respect to your contention that the Assistant Secretary's decision presents major policy issues, as stated above and contrary to your contention, the Council is of the opinion that no major policy question is presented by the subject decision. Moreover, the background information which you

^{2/} In a footnote to his decision the Assistant Secretary denied an activity-filed motion to quash and dismiss the exceptions submitted by you on behalf of the union. The activity's motion was based, in part, on the contention that you had been displaced as a union officer. The Assistant Secretary stated that "[i]n the absence of a disclaimer by any representative of NFFE Local 1001 that Brogan had standing to file exceptions on its behalf, the [activity's] Motion is hereby denied."

describe and the contentions which you reiterate appear to be advanced in support of your allegations that an unfair labor practice was committed by the activity in the circumstances of this case, and therefore constitute, in essence, nothing more than disagreement with the findings and conclusions adopted by the Assistant Secretary. As such, and apart from other considerations, the information and contentions provide no basis for Council review of the Assistant Secretary's decision.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. T. McLean
F. Sprague
Air Force

D. Walker
NFFE

General Services Administration, Region 4, A/SLMR No. 911. The Assistant Secretary, upon a representation petition filed by National Federation of Federal Employees, Local 1766, seeking an election in a regionwide unit of all Federal Protective Officers and guards employed by the activity, and contrary to the activity's contention that a regionwide residual unit of all the activity's unrepresented employees was the only appropriate unit in the circumstances involved, found that the unit sought by the union was appropriate for purposes of exclusive recognition. The agency appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (May 2, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1978

Ms. Janice K. Mendenhall
Director of Administration
General Services Administration
Washington, D.C. 20405

Re: General Services Administration, Region 4,
A/SLMR No. 911, FLRC No. 78A-3

Dear Ms. Mendenhall:

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

In this case, as found by the Assistant Secretary, a representation petition (RO) was filed by the National Federation of Federal Employees, Local 1766 (the union), seeking an election in a unit of all Federal Protective Officers (FPO's) and guards employed by the General Services Administration, Region 4 (the activity).

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In his view, such a regionwide unit constituted a functionally distinct group of employees within the meaning of section 10(b) of the Order who share a clear and identifiable community of interest separate and distinct from other employees of the activity. In this regard, he noted that FPO's and guards share a common mission, perform the same job functions, share common supervision, and are subject to common personnel policies which are administered by the activity's Personnel Division. He further noted that FPO's receive special training and, along with guards, wear uniforms and (if qualified) carry firearms in the performance of their duties. The Assistant Secretary further found that such a regionwide unit would promote effective dealings and efficiency of agency operations. In this connection, he noted that a regionwide unit of FPO's and guards was previously represented exclusively by another union (which subsequently had disclaimed interest in the unit) and was covered by a negotiated agreement. The Assistant Secretary, noting the absence of evidence that the scope and character of this preexisting unit had changed by virtue of events subsequent to the initial certification, rejected the activity's contention that the only appropriate unit in these circumstances would consist of a regionwide residual unit of all the activity's currently unrepresented employees. Rather he found that the bargaining history in this unit demonstrated that it would promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary

directed an election in the unit found appropriate. (The union was thereafter certified as exclusive representative of the foregoing unit.)

In your petition for review on behalf of the agency, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that it relied too heavily on prior bargaining history, and presents a major policy issue concerning the extent to which the Assistant Secretary should "consider prior bargaining history for separate units of guards when, prior to January 1975, units of guards had to be separate." In this regard you contend that the unit sought by the union is not an appropriate unit since it will not promote effective dealings and efficiency of agency operations, arguing that the Assistant Secretary relied too heavily on prior bargaining history, whereas the current Federal labor relations policy is based on reducing a proliferation of bargaining units. (Citing the Council's 1975 Report and Recommendations. Labor-Management Relations in the Federal Service (1975), at 30.) You further contend that there is no clear and identifiable community of interest separate and distinct from other unrepresented employees in the activity.

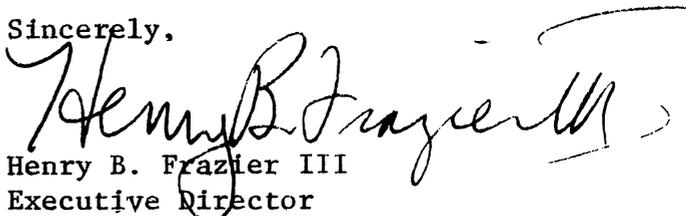
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the unit sought was appropriate for the purpose of exclusive recognition in the facts and circumstances of this case. Nor is a major policy issue presented, as alleged, regarding the extent of the Assistant Secretary's reliance on prior bargaining history in reaching his decision. In this regard, we note particularly the Assistant Secretary's finding that such a regionwide unit constituted a functionally distinct group of employees within the meaning of section 10(b) of the Order who share a clear and identifiable community of interest separate and distinct from other employees of the activity, and that such unit would promote effective dealings and efficiency of agency operations. Your appeal fails to show that the foregoing decision of the Assistant Secretary is inconsistent with the purposes and policies of the Order. See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, FLRC No. 76A-91 (Nov. 5, 1976), Report No. 115.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR W. J. Corn
Labor NFFE

American Federation of Government Employees, AFL-CIO, Local 1617 and Department of the Air Force, Kelly Air Force Base, Texas. The agency declined to render a negotiability determination as to a particular proposal as requested by the union, on the ground that the issue as to the negotiability of the proposal had been rendered moot as a result of bargaining and agreement by the local parties subsequent to the union's request, including agreement on a reopener clause which the agency claimed did not reserve the issue or provide for reopening of the subject agreement in that regard. The union appealed to the Council, contending, in essence, that the agency had misinterpreted the reopener clause.

Council action (May 2, 1978). The Council found that the circumstances here involved did not give rise to a negotiability dispute which the Council may properly review under section 11(c)(4) of the Order; that is, the agency and the union principally disagree as to the meaning of the local parties' agreement. Consequently, the Council held that the union's appeal for review of a negotiability issue with respect to the disputed proposal was prematurely filed and thereby failed to meet the conditions for review under section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure. Accordingly, the Council denied the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 2, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, Local 1617
and Department of the Air Force,
Kelly Air Force Base, Texas,
FLRC No. 78A-6

Dear Mr. King:

The Council has carefully considered your petition for review, and the agency's statement of position, in the above-entitled case. For the reasons indicated below, the Council has determined that your appeal must be denied.

The relevant facts, as set forth in the record, are as follows: During negotiations between Local 1617, American Federation of Government Employees (the union) and Kelly Air Force Base (the activity)^{1/} on a new activity-wide, multi-unit agreement, issues arose as to the negotiability of a union proposal providing for the union's use of activity office space without compensation to the activity and a separate proposal providing for the union's use of certain other facilities at the activity, particularly the AUTOVON (Automatic Voice Network) telephone system. On October 31, 1977, the union requested an agency head determination from the Department of the Air Force (the agency) as to the negotiability of the subject office space and AUTOVON proposals. Subsequently, on November 9, 1977, the local parties executed an agreement including the following provisions: Article VIII, entitled "Use of Official Facilities," and Article XXXIII, Section 5.c., which provides for the reopening of Article VIII under certain circumstances. Specifically, Section 5.c. provides that:

In the event that the Union's request for office space is determined to be negotiable, the Union may reopen Article VIII.

^{1/} Kelly Air Force Base is a field activity within the Air Force Logistics Command.

The Air Force Logistics Command approved this local agreement on December 21, 1977. The agency, by letter of the same date, issued its negotiability determination. With regard to the office space proposal, the agency found that the proposal conflicts with agency regulations, but granted the union's request for an exception to those regulations, thereby in effect rendering the proposal concerning office space negotiable. However, the agency declined to render a negotiability determination as to the AUTOVON proposal or to rule on the union's request for an exception to the agency regulation relied on by the activity as a bar to negotiations. Instead, the agency took the position that the negotiability issue as to the AUTOVON proposal had been rendered moot as a result of the subsequent bargaining and agreement by the local parties (including the reopener clause of Article XXXIII, quoted above), which the agency claims did not reserve the AUTOVON issue or provide for reopening the agreement in that regard.^{2/} Specifically, the agency contends that:

[the reopener] provides for further negotiations on office space only, contingent upon that proposal being declared negotiable. This reopener provision does not mandate or allow further negotiations concerning union access to AUTOVON by its express terms. . . . This being the case, there appears to be no issue appropriate for resolution by means of the negotiability dispute procedures set forth in the Order. If there is an issue between the parties concerning interpretation of their agreement, it would appear that the established procedures to implement section 19 of the Order should be resorted to or such other procedures as the parties might jointly determine to be appropriate (e.g., arbitration). [Emphasis in original.]

In your appeal to the Council you request that the Council review "the Department of the Air Force denial of an agency head determination" with respect to the AUTOVON proposal, contending, in essence, that the Air Force has misinterpreted the reopener clause. In particular, you argue, contrary to the agency's position, that the AUTOVON proposal is comprehended in Article VIII, that the agency's determination that the office space proposal is negotiable satisfies the stated precondition to reopening Article VIII and that, consequently, as the union has the option to reopen Article VIII, including the "telephone issue," the agency cannot find "that the subject of AUTOVON is moot."

^{2/} The agency also indicates in its statement of position, that, subsequent to the union's appeal in the instant case, all appropriated fund units within the Air Force Logistics Command represented by the American Federation of Government Employees (AFGE), including the units involved in the instant case, were consolidated at the command level. Based on this fact, the agency argues that "no . . . obligation to negotiate now exists between Kelly Air Force Base and AFGE Local 1617 as a result of the issuance of the certification of the consolidated units." However, in view of our decision herein, we do not reach or pass upon this additional contention of the agency.

In our view, these circumstances do not give rise to a negotiability dispute which the Council may properly review under section 11(c)(4) of the Order.^{3/} That is, the agency and the union principally disagree as to the meaning of the local agreement. More particularly, they disagree as to whether such agreement precludes further bargaining and, thereby, effectively renders moot the negotiability issue with respect to the AUTOVON proposal. Thus, the dispute herein between the union and the agency does not involve an issue as to whether a proposal is contrary to law, regulation, or the Order, as would characterize a negotiability issue which the Council may resolve under section 11(c)(4). Rather, in the present case, such an issue could arise only after a finding, in other appropriate proceedings, that the agency has misinterpreted the agreement and a determination is then rendered by the agency on the negotiability dispute. Consequently, the union's appeal to the Council for review of a negotiability issue with respect to the AUTOVON proposal is prematurely filed and thereby fails to meet the conditions for review under section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure.^{4/}

3/ Section 11(c)(4) of the Order provides, in relevant part, as follows:

Sec. 11. Negotiation of agreements.

(4) A labor organization may appeal to the Council for a decision when--

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order

4/ American Federation of Government Employees, Local 916 and Tinker Air Force Base, Oklahoma, FLRC No. 77A-38 (June 21, 1977), Report No. 129.

Accordingly, because your petition for review fails to meet the conditions for review prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure (5 CFR 2411.22), your appeal is hereby denied.

By the Council

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: R. T. McLean
Air Force

General Services Administration, Automated Data and Telecommunications Service, Assistant Secretary Case No. 22-08026(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA) and based upon the RA's reasoning, found that a reasonable basis had not been established for the section 19(a)(1) and (6) complaint filed by the National Federation of Federal Employees (the union) related to the activity's issuance of a memorandum to particular management representatives concerning grievances. Consequently, the Assistant Secretary concluded that further proceedings in the matter were unwarranted and denied the union's request for review seeking reversal of the RA's dismissal of the complaint. The union appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (May 4, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's , rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of
Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: General Services Administration, Automated Data and
Telecommunications Service, Assistant Secretary Case
No. 22-08026(CA), FLRC No. 78A-10

Dear Mr. Englehart:

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

In this case, the National Federation of Federal Employees (the union) filed an unfair labor practice complaint against General Services Administration, Automated Data and Telecommunications Service (ADTS) Washington, D.C. (the activity) alleging violation of section 19(a)(1) and (6) of the Order. The complaint alleged that a memorandum issued by the activity altered the contents of the grievance procedure contained in the parties' collective bargaining agreement and that the alteration was made without any negotiations being held with the employees' exclusive representative.

The Assistant Secretary found, based on the reasoning of the Regional Administrator and in agreement with him, that a reasonable basis for the complaint had not been established. Consequently, he concluded that further proceedings in the matter were unwarranted and denied the union's request for review, seeking reversal of the Regional Administrator's dismissal of the complaint. In so doing, the Assistant Secretary found that the memorandum in dispute was issued to Assistant Commissioners, the Executive Director, and the Director, Management Policy and Planning of the activity. The memorandum required these agency management representatives to advise the Director, Management and Systems Division, of any grievance coming to their attention, and, for those grievances that require written responses, to secure his concurrence.*/

*/ Subsequently, following the filing of the union's pre-complaint charge, the agency amended the memorandum to provide:

The sole purpose of his review and concurrence is to assure that the proper grievance procedure is being utilized. He will not comment nor concur on the relative merits of either the grievance or the response.

The Assistant Secretary found that no evidence had been adduced which would form a basis to conclude that the memorandum was distributed to employees but instead the evidence adduced disclosed that the memorandum was distributed solely to activity management representatives. He further concluded that no evidence was adduced to form a basis to conclude that unilateral changes had been made to the negotiated grievance procedure, or to form a basis to conclude that the activity implemented the memo in such a manner that a unilateral change took place. He concluded that time limits for processing a grievance remain the same; the deciding official at each step remains the same; and the number of steps remain the same.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's finding is so unreasonable as to be arbitrary and capricious and that a major policy issue is presented as to what constitutes a unilateral change prohibited by section 19(a)(1) and (6) of the Order. In support of this contention, you set forth certain alleged circumstances surrounding the memorandum and argue that "it is a change with substantive impact on the employees."

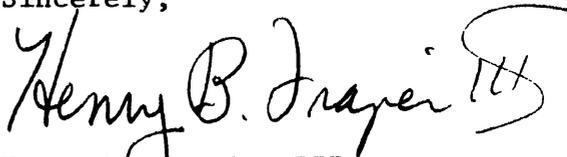
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. Your contentions in this regard, as well as those concerning your allegation that the Assistant Secretary's decision raises a major policy issue as to what constitutes a unilateral change prohibited by section 19(a)(1) and (6) of the Order, appear to be essentially a disagreement with his determination that a reasonable basis for the complaint had not been established and, therefore, do not present a major policy issue warranting review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR W. E. Burton
Labor ADTS

National Labor Relations Board Union (NLRBU) and NLRBU Local 19; and National Labor Relations Board (NLRB) and NLRB Region 19. The dispute involved proposals which the union's Local 19 sought to negotiate with the agency's Region 19 as a local supplementary agreement to the national level agreement between the agency and the union. Upon referral, the agency determined that the proposals were nonnegotiable under both the parties' controlling national agreement and section 11(a) and (b) of the Order. The union appealed to the Council pursuant to section 11(c)(4)(i) of the Order, seeking resolution of the issues of the negotiability of the disputed proposals under section 11(a) and (b) of the Order, prior to resolution of the issues raised as to the interpretation of the controlling agreement.

Council action (May 18, 1978). The Council found that the instant appeal was not materially different from one recently denied by the Council, NLRBU, Local 6, FLRC No. 77A-109. Accordingly, for the reasons set out more fully in its decision in the NLRBU, Local 6 case, the Council held that the instant appeal raising issues as to the negotiability of the disputed proposals under the Order, was prematurely filed and the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure, had not been met. The Council therefore denied the union's appeal, without prejudice to the renewal of its contentions as to the negotiability of the disputed proposals under the Order in a petition duly filed with the Council after it is resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1) of the Order, that those proposals do not conflict with such controlling agreement.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1978

Mr. Henrik M. Sortun,
Designee of the President and
District V Vice President
National Labor Relations Board Union
c/o NLRB, Region 19
Federal Building, Room 2948
915 Second Avenue
Seattle, Washington 98174

Mr. Bruce D. Rosenstein
Special Counsel to the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW.
Washington, D.C. 20570

Re: National Labor Relations Board Union (NLRBU) and
NLRBU Local 19; and National Labor Relations Board
(NLRB) and NLRB Region 19, FLRC No. 77A-144

Gentlemen:

Reference is made to the union's petition for review and the agency's statement of position, and the respective supplemental submissions thereto, in the above-entitled case.

The relevant facts of this case, as set forth in the record, are as follows: The General Counsel of the National Labor Relations Board (the agency) and the National Labor Relations Board Union (the union) are parties at the national level to an agreement covering the agency's field office professional employees excluding supervisors. Article XVIII of this national agreement, entitled "Supplemental and Local Supplementary Agreements" (set forth in the Appendix attached hereto), permits (in sections 1, 2 and 3) the negotiation of local supplementary agreements, within stated limitations, at certain subordinate field organizational levels; and requires (in section 2), among other things, that all matters to be negotiated in such supplementary agreements be within the administrative authority of the Regional Director. Pursuant to Article XVIII, the union's Local 19 requested that the Regional Director of the agency's Region 19 enter into negotiations on two proposals concerning "Acting Supervisory Assignments." The Regional Director responded in effect that he did not have the administrative authority to bargain about the matters involved in the proposals. Thereupon, the union referred the matter to the General Counsel of the agency, requesting a negotiability determination

as to the proposals. The General Counsel determined that the proposals were nonnegotiable under both the parties' controlling national agreement and section 11(a) and (b) of the Order. The union, contending that the proposals are within the bargaining obligation under section 11(a) and are not excepted from that obligation by section 11(b), has petitioned the Council, pursuant to section 11(c)(4)(i) of the Order to review the agency's determination.

As to the asserted conflict between the disputed proposals and the controlling agreement, the agency contends, in particular, that the proposals involve matters not within the administrative authority of the Regional Director and that agreement on such matters at the local level would modify the national agreement. In this regard, the agency further states:

We are uncertain as to whether the NLRBU has followed the proper procedure in petitioning the Council for the negotiability determination. . . . Since the Agency's position is in part based on the conclusion that the Regional Director does not have authority to negotiate concerning these subjects under Article XVIII of the National Agreement, the Union could have followed the procedures of the National Agreement pursuant to section 11(c)(1) of the Order to resolve the contract interpretation issues.

The union contends that the dispute between the parties in this case principally concerns the negotiability of these proposals under section 11(a) and (b) of the Order and that, therefore, the Council must, under section 11(c)(4) of the Order, resolve that dispute.

The instant appeal by the union under section 11(c)(4) of the Order, requests the Council to decide the negotiability of the disputed proposals under section 11(a) and (b) of the Order, prior to a resolution of the issues raised as to the interpretation of the controlling agreement. In this regard, the instant appeal bears no material difference from one recently denied by the Council in National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Penn., FLRC No. 77A-109 (Apr. 10, 1978), Report No. 149. In that case, the Council stated that it would "not rule on the negotiability of the disputed provisions under the Order until it [was] resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1), that those provisions do not conflict with such controlling agreement." The Council consequently found that the union's appeal to the Council as to the negotiability of the proposals under the Order, was prematurely filed and the conditions for Council review of such issues as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 CFR 2411.22) had not been met, and denied the appeal.

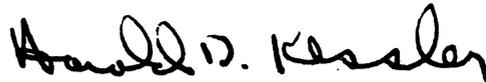
Accordingly, for the reasons set out more fully in the NLRBU, Local 6 case, we find that the instant appeal raising issues as to the negotiability

of the disputed proposals under the Order, is prematurely filed and the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 CFR 2411.22), have not been met.

Therefore, the union's appeal is denied, without prejudice to the renewal of its contentions as to the negotiability of the disputed proposals under the Order in a petition duly filed with the Council after it is resolved, pursuant to the procedures of the controlling agreement under section 11(c)(1) of the Order, that those proposals do not conflict with such controlling agreement.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

Attachment:

APPENDIX-Article XVIII

APPENDIX

ARTICLE XVIII SUPPLEMENTAL AND LOCAL SUPPLEMENTARY AGREEMENTS

Section 1. The parties agree that Supplemental Agreements involving matters not covered herein may be negotiated and executed from time to time while this General Agreement is in effect. Such Supplemental Agreements shall terminate in the manner specified in Article XXIV herein or on such other expiration dates as may be agreed to by the parties in such Supplemental Agreements.

Section 2. Local Supplementary Agreements may be negotiated between Local Unions and Regional Directors and the Officer-in-Charge in Subregion 38 (Peoria, Illinois). Any such agreement shall be subject to the approval of the General Counsel and the Executive Committee of the Union and shall be subject to the restrictions listed below:

- (a) All matters covered must be within the administrative authority of the Regional Director;
- (b) Only local conditions affecting the employees of that region will be covered;
- (c) Provisions negotiated may not modify or be in conflict with any provision of this Agreement or any supplement hereto; nor may such provisions be in conflict with applicable law;* and
- (d) Provisions must be consistent with the certification of the Union.

Section 3. The General Counsel and the Executive Committee will approve or disapprove Local Supplementary Agreements within 45 calendar days after submission, exclusive of consultation time under subsection 2(c) above. Such agreements will be rejected only on the basis that one or more of the conditions set forth in Section 2 herein is not satisfied.

Section 4. All Local Supplementary Agreements shall terminate concurrently with termination of this Agreement.

Section 5. Grievances concerning the interpretation or application of any Local Supplementary Agreement entered into pursuant to the provisions of Section 2 of this Article may be processed under the grievance and arbitration procedures set forth in Articles XIII and XIV above.

*/ Any determination by a party to this Agreement that a provision should be rejected pursuant to this subsection will not be made until the other party has been notified and been given an opportunity to consult on the matter.

Internal Revenue Service, Washington, D.C., A/SLMR No. 853. The Assistant Secretary, upon a petition filed by the National Treasury Employees Union (NTEU) on behalf of itself and/or its constituent local chapters, seeking to consolidate 79 units for which NTEU and/or its constituent local chapters were the then current exclusive representatives, found, among other things: That NTEU had standing to file the subject petitions on behalf of its exclusively recognized local chapters; and that the petitioned for consolidated unit was appropriate for the purpose of exclusive recognition under the Order. The agency appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and raised major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (May 18, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415
May 18, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Washington, D.C.,
A/SLMR No. 853, FLRC No. 78A-12

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, the National Treasury Employees Union (NTEU), on behalf of itself and/or its constituent local chapters, sought to consolidate 79 units for which NTEU and/or its constituent local chapters are the current exclusive representatives at 57 of the 58 Internal Revenue Service (IRS) District Offices, 6 of the 7 IRS Regional Offices, and the IRS National Office. The consolidated unit sought would consist of all the professional and nonprofessional employees of the IRS's District Offices, Regional Offices, and National Office who are currently represented exclusively by NTEU and/or its constituent local chapters.

The Assistant Secretary, rejecting the agency's contention that NTEU lacked standing to file the instant petition on behalf of its exclusively recognized local chapters, found that NTEU had such standing. He further found that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order, again rejecting the agency's contentions to the contrary. As to the appropriateness of the proposed consolidated unit, the Assistant Secretary, after reviewing at length the mission, function, organization and operations of the IRS and after restating his view (first expressed in one of his recent decisions)^{1/} that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units," went on to state:

[T]he employees in the unit sought constitute all of the eligible employees of the IRS except for those in the IRS's specialized, computer-oriented Center-type operations. They are part of an integrated organization in which they share a common mission and common supervision on a nationwide level, common job classifications,

1/ Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145.

common types of working conditions, and similar personnel and labor relations practices pursuant to the essentially similar multi-District, multi-Regional and National Office negotiated agreements between the parties. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest.

As the evidence also establishes that the parties have successfully negotiated at the national level multi-unit agreements covering the District and Regional Office employees sought herein, and that these agreements are essentially similar to the National Office agreement between the parties, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting the scope and history of the parties' current multi-unit collective bargaining relationship, I find that there has already been demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's District Offices, Regional Offices and National Office. In these circumstances, I find that the proposed consolidated unit will promote the efficiency of the agency's operations. Although the parties have been voluntarily bargaining for some of the employees sought herein on a multi-unit basis, I also find that the petitioned for consolidated unit, which will provide bargaining for all of the employees sought herein on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth above.

In your petition for review on behalf of the IRS, you allege that the decision of the Assistant Secretary is arbitrary and capricious and raises major policy issues. Specifically, you set forth three grounds upon which review is requested:

1. The Assistant Secretary's finding that NTEU had standing to file its consolidation petition on behalf of exclusively recognized local NTEU chapters raises major policy issues under Section 10 of the Order and is arbitrary and capricious.
2. The Assistant Secretary's finding that there exists a presumption favoring the appropriateness of a proposed consolidated unit raises major policy issues and is arbitrary and capricious.
3. The Assistant Secretary's finding that the petitioned for unit is appropriate for the purpose of exclusive recognition under Section 10(b) of the Order raises major policy issues and, in part, is arbitrary and capricious.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review. That is, the decision of the Assistant Secretary does not present any major policy issues or appear arbitrary and capricious.

With respect to your allegation that the Assistant Secretary's finding that NTEU had standing to file its consolidation petition on behalf of exclusively recognized local NTEU chapters raises major policy issues, such allegation was previously raised by the IRS in its appeal of Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831. The Council, in denying review [FLRC No. 77A-112 (Mar. 1, 1978), Report No. 145], noted in this regard that the agency's appeal "fails to present any basis to support a contention that the Order requires local authorization for a labor organization to either enter into a bilateral agreement to consolidate existing units or to petition the Assistant Secretary to hold an election on the issue of a proposed consolidation." In the instant case, your appeal again fails to present any basis to support such contention and therefore provides no basis for Council review.

As to your assertion that the Assistant Secretary's finding of a presumption favoring the appropriateness of a proposed consolidated unit raises major policy issues, no basis for Council review is thereby presented, noting particularly the Assistant Secretary's affirmative finding (supra pp. 1-2) that the proposed consolidated unit in the instant case satisfies each of the criteria specified in section 10(b) and will promote a more comprehensive bargaining unit structure consistent with the policies of the Order.^{2/}

With respect to your third alleged major policy issue concerning the finding that the petitioned for unit is appropriate under section 10(b) of the Order, you question, essentially, whether all consolidations necessarily reduce unit fragmentation and promote a more comprehensive bargaining unit structure in accordance with the policy of the Order. In the Council's view, no major policy issue is thereby presented warranting

2/ In this regard, as the Council stated in Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145, at n. 4, and restated in Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831, FLRC No. 77A-112 (Mar. 1, 1978), Report No. 145, at n. 2, and Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education, and Welfare, Chicago Region V-A, A/SLMR No. 876, FLRC No. 77A-136 (Mar. 1, 1978), Report No. 145, at n. 2, we do not construe the Assistant Secretary's statement that "there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units" as creating a "legal" presumption which must be rebutted by the party opposing the proposed consolidation. Rather, we construe his statement as a recognition and reaffirmation of the strong policy in the Federal labor-management relations program of facilitating the consolidation of existing bargaining units which still conform to the three appropriate unit criteria contained in section 10(b) of the Order. Labor-Management Relations in the Federal Service (1975), at 35.

review. In this regard, the Council's 1975 Report and Recommendations accompanying the issuance of Executive Order 11838 stated, in pertinent part: 3/

[T]he Federal labor-management relations program will be improved by a reduction in the unit fragmentation which has developed over the 12 years of labor-management relations under Executive orders.

The consolidation of units will substantially expand the scope of negotiations as exclusive representatives negotiate at higher authority levels in Federal agencies. The impact of Council decisions holding proposals negotiable will be expanded. In our view, the creation of more comprehensive units is a necessary evolutionary step in the development of a program which best meets the needs of the parties in the Federal labor-management relations program and best serves the public interest.

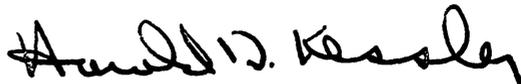
Your appeal fails to show that the Assistant Secretary's decision herein is inconsistent with the foregoing policies or otherwise inconsistent with the purposes and policies of the Order, and thus does not present any basis for review.

Finally, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. Your contentions to the contrary constitute essentially nothing more than a disagreement with the Assistant Secretary's factual findings and therefore present no basis for Council review.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR T. Angelo
Labor NTEU

3/ Labor-Management Relations in the Federal Service (1975), at 35. See also Education Division, Department of Health, Education, and Welfare, Washington, D.C., supra n. 1.

Marine Corps Logistics Support Base Pacific, Barstow, California and American Federation of Government Employees, Local 1482, AFL-CIO (Lennard, Arbitrator). The arbitrator sustained the grievance, finding that the promotion of a particular employee by the activity to a GS-5 position was effected in violation of Federal law and Civil Service Commission regulations dealing with promotion of relatives. In a three-part award, the arbitrator (I) held that by such action the activity had violated the parties' agreement and thereby caused the nonselection of the grievant; (II) vacated and set aside the promotion of the other employee effective by a certain date; and (III) directed that the grievant be promoted to the subject position effective on that same date. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception that part II of the award violated applicable law and appropriate regulation, and insofar as it related to the agency's exception that part III of the award violated appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 130)

Council action (May 25, 1978). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertained to the questions raised in the case. Based upon the interpretation subsequently rendered by the Commission, the Council found that part II of the arbitrator's award may not be implemented except in compliance with applicable Commission instructions and regulations, and that part III of the award violated appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by adding a condition to part II concerning its implementation and by setting aside part III. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Marine Corps Logistics Support Base Pacific,
Barstow, California

and

FLRC No. 77A-30

American Federation of Government Employees,
Local 1482, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the activity established 15 GS-5 firefighter positions. To fill these positions, the names of 19 eligible GS-4 firefighters were submitted to the fire chief, the selecting official. The applicants were then individually interviewed by a panel consisting of the fire chief and two assistant chiefs. One of the assistant chiefs, Mr. Dominguez, was the father-in-law of one of the applicants, Mr. Reese. After the panel had interviewed the applicants, the chief asked his assistants whether they knew of any reason why any of the 19 applicants should not be promoted, and they responded in the negative. The chief selected 15 of the applicants for promotion. Included among those promoted was the son-in-law of the assistant chief who had participated in the interviewing panel; the grievant here was one of the four applicants not selected for promotion. The grievant subsequently filed a grievance related to his nonselection and the grievance was ultimately submitted to arbitration.^{1/}

The parties jointly submitted the following issue to the arbitrator:
"Did the Base violate Article 19, Sections 1 and 2 of the Agreement thereby causing nonselection from Promotion List #84 of 28 May 1975,

^{1/} One of the three other individuals not selected for promotion filed a separate grievance and was subsequently promoted. The other two joined with the grievant in this case in filing the grievance. However, the award issued in the instant case did not apply to these two other individuals as they were no longer employed by the activity at the time of the arbitration award.

in the case of [the grievant]?"^{2/} The arbitrator sustained the grievance, finding that the promotion of Mr. Reese to GS-5 firefighter was effected in violation of Federal law and Civil Service Commission regulations dealing with promotion of relatives. The arbitrator issued a three-part award which provided:

I.

The Base did violate Article 19, Sections 1 and 2 of the Agreement thereby causing non-selection [f]rom Promotion List No. 84 of 28 May 1975, in the case of [the grievant].

II.

The promotion of [Mr.] Reese to Firefighter, GS-081-05 . . . on or about June 22, 1975 is hereby vacated and set aside effective January 31, 1977; and such promotion will have no further lawful force or effect on and after that date.

III.

[The grievant] shall be promoted to Firefighter GS-081-05 . . . effective January 31, 1977.

Agency's Appeal to the Council

The agency filed a petition for review with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception that part II of the award violates applicable law and appropriate

2/ Article 19, Section 1 of the parties' agreement provides:

Promotions will be effected as provided in the Center promotion policies established in consonance with the provisions of Civil Service Commission rules and regulations, Navy Department regulations, and the provisions of this Agreement.

Article 19, Section 2 of the parties' agreement provides:

The Center agrees to avoid such practices as last-minute additions to promotion certificates, reappraisal of candidates, unreasonable delays in selection, and personal favoritism in selecting employees for promotion.

regulation and insofar as it related to the agency's exception that part III of the award violates appropriate regulation.^{3/} The union filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the petition for review insofar as it related to the agency's exception that part II of the award violates applicable law and appropriate regulation and insofar as it related to the agency's exception that part III of the award violates appropriate regulation. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

The grievant in this case alleges that his non-selection for a GS-5 firefighter position in June 1975 resulted from an agency violation of the negotiated agreement. He claims that participation of one of the Assistant Fire Chiefs (Mr. Dominguez) in a panel which interviewed his son-in-law (Richard L. Reese), the grievant, and 17 other candidates for promotion was in violation of Civil Service Commission rules and regulations and therefore in violation of Article 19 of the negotiated agreement. The son-in-law was one of 15 firefighters selected for promotion; the grievant was not selected. In part I of his award, the arbitrator found that Reese's promotion was in violation of the Federal law and regulations relating to nepotism (Section 3110 of title 5, U.S. Code and Part 310 of the Commission's regulations). In parts II and III of the award, he ordered that Mr. Reese's promotion be vacated as of January 31, 1977, and that the grievant be promoted to the resulting vacancy as of the same date.

You did not request our opinion concerning part I of the arbitrator's award and it is not our intent to consider the arbitrator's finding as to the alleged violation of the agreement. Nevertheless, it is necessary to determine the consistency of the arbitrator's finding with law and applicable Civil Service Commission regulations and

^{3/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council granted the agency's request for a stay of the award pending determination of the appeal.

directives before we address the appropriateness of the corrective action ordered in parts II and III. In that regard, section 3110 of title 5, United States Code, restricts the employment of relatives of a public official in the official's own agency or in an agency over which he/she exercises jurisdiction or control. The statute specifically prohibits public officials from promoting or recommending a relative for promotion. The Commission's implementing instructions define a public official as "anyone who by law, rule, regulation, or delegation has appointment or promotion authority within his organization, or authority to recommend employees for appointment or promotion." (FPM Chapter 310, S1-2b.) In addition, the definition of relative includes "son-in-law."

Because the antinepotism provision is complex and the penalty for its violation can be severe, the Commission has advised agencies to leave a wide margin of safety insofar as advocating, recommending, or referring relatives is concerned. Agencies are to avoid potential conflicts of interest, favoritism or even the appearance of favoritism. Page 4 of the attachment to Civil Service Commission Bulletin 310-2, dated July 15, 1968 and entitled Restrictions on Employment of Relatives, instructed agencies that a relative of a public official may not be promoted if the public official was a member of the promotion panel that selected the relative for promotion unless the public official disqualified him or herself and did not participate in the decision affecting the relative.

Mr. Dominguez was included in the panel which interviewed the applicants and his opinion was sought concerning whether any of the candidates should be denied promotion. His presence on the panel and the fact that his opinion was sought indicate that he had the authority to recommend candidates for promotion. In our view, the file clearly points to a violation of the law and our instructions. Because section 3110 of title 5, U.S.C., specifically prohibits payment of salary to persons appointed or promoted to positions in violation of that section the agency should contact the General Accounting Office to determine whether the additional salary received by Mr. Reese since his June 1975 promotion must be repaid.

The second part of the arbitrator's award orders Mr. Reese's position vacated effective January 31, 1977. Mr. Reese's promotion was in violation of law and Commission instructions as of the date that it was effected. The procedures for correcting regulatory promotion violations found in FPM Chapter 335, section 6-4b, must be followed. That section provides that in the case of a regulatory violation an employee may be retained in the position only if the necessary requirements are met and the Commission gives approval. It does not appear that either of these conditions were met in the case of Mr. Reese's appointment. If the agency cannot regularize this appointment, Mr. Reese must be removed from the position by a method (lateral reassignment, return to former position, etc.) to be

determined by the agency and in accordance with law, regulations, and negotiated agreements. For example, if removal is to be made through adverse action, his rights under Part 752 of the Commission's regulations must be respected, e.g., he must be given at least 30 days written notice of the proposed adverse action. Therefore, part II of the arbitrator's award which ordered that Mr. Reese's promotion be vacated as of January 31, 1977, may not be implemented except in compliance with the applicable civil service regulations and instructions cited above.

In the third part of his award, the arbitrator ordered that the grievant be promoted to the vacancy created by vacating Mr. Reese's promotion. As we stated in our advisory opinion to the Council in Veterans Administration Center, Temple, Texas and AFGE, Local 2109, FLRC No. 74A-61, Report No. 99, the only circumstance under which an agency may be required to promote a particular person and to accord that person backpay is when a finding has been made by an arbitrator or other competent authority that such person would have been promoted at a particular point in time but for an administrative error, or a violation of a Commission or agency regulation or of a provision of a negotiated agreement. Four other candidates would have been eligible to compete for the vacancy left by Mr. Reese. The fact that one of those four was selected subsequently for promotion and the other two left the agency before the arbitration hearing does not establish a direct, causal connection between the violation and the failure to promote the grievant. Furthermore, Requirement 6 of FPM Chapter 335, Subchapter 2, gives management the right to select or non-select candidates for promotion, including the right to not fill a vacancy. This right can be abrogated only when the "but for" test has been met.

In summary, part II of the arbitrator's award may not be implemented except in compliance with Civil Service Commission instructions found in FPM Chapter 335, Section 6-4b, and Part 752 of the Commission's regulations. Part III of the award is inconsistent with the principles enunciated in Comptroller General decisions dealing with retroactive promotion (decisions numbered B-180010).

Based upon the interpretation of the Civil Service Commission, we find that part II of the arbitrator's award may not be implemented except in compliance with applicable Civil Service Commission instructions and regulations, and that part III of the award violates appropriate regulation.

Conclusion

In consideration of the Commission's advice herein, and pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby modify the arbitrator's award as follows:

The following sentence is added to part II: "This part of the award may not be implemented except in compliance with the applicable civil service regulations and instructions."

Part III of the award is set aside.

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 25, 1978

Lyndon B. Johnson Space Center, National Aeronautics and Space Administration and American Federation of Government Employees, AFL-CIO, Local 2284 (Britton, Arbitrator). The arbitrator found that a changed or reclassified position was one that was amenable to being filled, and was therefore vacant; and that except for the activity's violation of the parties' agreement, the grievant would have been promoted. In his award, the arbitrator sustained the grievance and directed the activity (1) to promote the grievant to the first vacant GS-13 position for which the grievant met the basic qualifications; and (2) to provide the union an opportunity to examine and consult on all new and changed position descriptions prior to the filling of such positions. The Council accepted the agency's petition for review of the arbitrator's award insofar as it alleged that the direction to promote the grievant violated Civil Service Commission regulations, and that with respect to the direction to provide the union with an opportunity to examine and consult, the arbitrator exceeded his authority. The Council also granted the agency's request for a stay of the award. (Report No. 130)

Council action (May 25, 1978). As to that portion of the award directing the activity to promote the grievant, the Council, in accordance with established practice, requested from the Civil Service Commission an interpretation of Commission regulations relating to selection and promotion. Based upon the interpretation subsequently rendered by the Commission, the Council concluded that the disputed portion of the award violated appropriate regulation. With regard to that part of the award directing the activity to provide the union with an opportunity to examine and consult, however, the Council held that the arbitrator did not exceed his authority. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by striking the portion thereof found violative of appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Lyndon B. Johnson Space Center,
National Aeronautics and Space
Administration

and

FLRC No. 77A-37

American Federation of Government
Employees, AFL-CIO, Local 2284

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, the dispute in this matter arose when the Lyndon B. Johnson Space Center (the activity) reclassified a position from GS-13 Supervisory Quality Assurance Specialist position to GS-13 Supervisory Aerospace Engineer position and reassigned the incumbent of the former position to the newly classified position. The grievant was a GS-12 activity employee entitled to special consideration for repromotion to his original grade of GS-13 from which he had been demoted by RIF action and without personal cause. He filed a grievance alleging that a new position had been created by the reclassification, that it should have been filled competitively, and that the grievant should have been entitled to compete for it so that he could be given repromotion consideration. ^{1/} The activity, while admitting that the

^{1/} According to the arbitrator, provisions of the agreement "considered pertinent to this grievance by the parties" include:

Article 29 (Reduction in Force), Section 7. An employee demoted in NASA in a reduction in force will be given special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means.

Article 39 (Position Classification), Section 2. Each employee in the units will be provided with a description of his duties and responsibilities in the form of a position description. Position

(Continued)

grievant was entitled to special consideration for repromotion, denied the grievance on the basis that it was not required to consider the grievant for the reclassified position because no vacancy existed to which the grievant could have been promoted. The activity pointed out that such actions to reclassify employees, along with their positions, without treating the positions as vacant is a well established practice. In its denial of the grievance the activity stated that the action taken was solely for the purpose of documenting a change in emphasis in the same basic position and did not involve the filling of a vacancy. The grievance was ultimately submitted to arbitration.

The arbitrator stated the issue before him as:

Whether a vacancy existed for which the grievant should have been given special consideration for repromotion? If so, what should be the remedy?

In the opinion accompanying his award the arbitrator discussed the testimony and evidence before him and found that "a changed or reclassified position is one that is amenable to being filled, therefore vacant, and that except for the contractual violation by the Employer the Grievant would have been promoted." The arbitrator awarded as follows:

For the reasons given, the grievance is sustained. As the Arbitrator does not find the alleged existence of Union animus to be satisfactorily established or that the Employer's violation of the Agreement was otherwise than inadvertent and not specifically directed at depriving the Grievant of his promotional opportunity, it is not directed that the Grievant be promoted retroactively as of June 6, 1976, but that in the alternative it is directed that the Employer be required to promote the Grievant to the first vacant GS-13 position for which he meets the basic qualifications. It is further directed that the Employer provide an opportunity to the Union to examine and consult on all new and changed position descriptions prior to the filling of such positions.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the

(Continued)

descriptions contain the principal duties, responsibilities, and supervisory relationships for the purpose of classification. The position description can also be used to identify training, qualification, and performance requirements of the position. Identical positions will be covered by the same position description.

award on the grounds that the award violates Civil Service Commission regulations and that the arbitrator exceeded his authority. ^{2/} The parties filed briefs.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review which took exception to the award on the grounds that the award violates Civil Service Commission regulations and that the arbitrator exceeded his authority. For purposes of discussion, we first consider the allegation that the award violates Civil Service Commission regulations. The agency contends that the arbitrator's requirement that the grievant be promoted to the first vacant GS-13 position for which he meets the basic qualifications violates Chapter 335, Subchapter 2 (Requirement 6) of the Federal Personnel Manual.

Since the Civil Service Commission is authorized to prescribe regulations relating to selection and promotion in the Federal service, the Council requested from the Commission an interpretation of Civil Service Commission regulations as they pertain to the above-referenced portion of the arbitrator's award. The Commission replied in relevant part as follows:

In this case the grievant alleges that he was not given the special consideration for repromotion to which he was entitled when a GS-13 supervisory quality assurance specialist position was reclassified to supervisory aerospace engineer and the incumbent reassigned to the new position. The agency reclassified the position because the incumbent had attained the requisite professional qualifications for the engineering position. The duties of the positions were almost identical and their organizational location and title the same. The agency claims that it was not required to consider the grievant for the reclassified position because no vacancy existed to which the grievant could have been promoted. The arbitrator found that a vacancy did exist when the position in question was reclassified and that except for the activity's violation of the negotiated agreement, the grievant would have been promoted. As a remedy, the arbitrator ordered in part that the activity promote the grievant to the first vacant GS-13 position for which he meets the basic qualifications.

^{2/} The agency also requested, and the Council granted pursuant to section 2411.47(f) of its rules of procedure, a stay of the award pending determination of the appeal.

The agency alleges that this portion of the award violates Civil Service Commission regulations.

FPM Chapter 335, Subchapter 2 (Requirement 6) sets forth the management right to select or non-select. This right (derived from Rule 7.1 of the Civil Service Rules) means that management must retain the freedom to decide which candidate it will select for a given position, or in fact, to make no selection at all. Furthermore, while management is required by Requirement 1 of Chapter 335 to give non-competitive consideration to special consideration candidates (like the grievant) prior to filling vacancies under competitive procedures, it is not required to select such candidates. Section 4-3(c)(2) of Chapter 335 describes what is meant by "special consideration". That section reads as follows:

Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade...for which he has demonstrated that he is well qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means... If a selecting official considers an employee entitled to special consideration for repromotion under this paragraph but decides not to select him for promotion and then the employee is certified to the official as one of the best qualified under competitive promotion procedures for the same position, the official must state his reasons for the record if he does not then select the employee.*

The arbitrator's award appears to be based on an interpretation of Article 29 of the negotiated agreement which requires the agency to grant special consideration to entitled employees prior to attempts to fill vacancies by any other means. Whether or not a bonafide vacancy existed to which the grievant was entitled to special consideration, the corrective action ordered by the arbitrator--promotion to the first GS-13 position for which he qualifies--violates Requirement 6 cited above. Therefore, we find that the arbitrator's award in this case violates mandatory Civil Service Commission instructions.

*In Kirk Army Hospital, FLRC No. 72A-18, the Council had occasion to cite FPM subchapter 4-3(c)(2), and commented that "With respect to the repromotion rights of such employees, the FPM plainly states that even though they are entitled to 'special consideration', they are 'not guaranteed promotion.' In other words, a selection decision remains to be made by the selecting official." See also Commission opinions in Warren Air Force Base, FLRC No. 75A-127, and Tooele Army Depot, FLRC No. 75A-104. [Footnote in original.]

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the part of the arbitrator's award directing that the grievant be promoted to the first vacant GS-13 position for which he qualifies violates appropriate regulation and, therefore, must be set aside.

As to the second ground on which the Council accepted the agency's petition for review, the question is whether the arbitrator exceeded his authority by directing that the activity "provide an opportunity to the Union to examine and consult on all new and changed position descriptions prior to the filling of such positions." The agency contends that after finding that a vacancy existed and directing that the grievant be promoted, the arbitrator went beyond the stipulated issue^{3/} and thus exceeded his authority by directing the activity to consult with the union prior to filling new or changed positions. The agency also contends that this part of the arbitrator's award in effect amends the bargaining agreement between the parties by imposing an obligation upon the activity to which the activity never consented and which is not in the agreement.

The Council will sustain a challenge to an arbitration award where it is shown that the arbitrator exceeded his authority by determining an issue not included in the subject matter submitted to arbitration. American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479, 485 [FLRC No. 72A-3 (July 31, 1973), Report No. 42]. However, the Council has made it clear that, in addition to determining those issues specifically included in the particular question submitted, an arbitrator may extend his award to issues which necessarily arise therefrom. Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), 3 FLRC 83 [FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62]. Further, as to allegations with respect to the arbitrator's authority when the parties have agreed as to the issue submitted to the arbitrator, "the Council, in accordance with private sector precedent, will construe an agreement broadly with all doubts resolved in favor of the arbitrator when a question is presented to the Council as to whether an arbitrator exceeded his authority in a particular matter." Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101, at 8. Finally, the Council has stated that in the Federal sector, as in the private sector, arbitrators have considerable discretion in fashioning remedies. Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), 2 FLRC 185, 188 [FLRC No. 74A-12 (Sept. 9, 1974), Report No. 56].

Applying these principles to the present case, the question which the parties presented to the arbitrator, and which he answered affirmatively,

3/ As previously indicated, the issue before the arbitrator was:

Whether a vacancy existed for which the grievant should have been given special consideration for repromotion? If so, what should be the remedy?

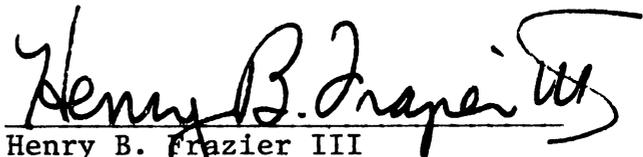
was whether a vacancy existed for which the grievant should have been given special consideration for repromotion. Further, the issue before the arbitrator expressly included the question of what should be the remedy if the activity were found to have violated the parties' negotiated agreement. The arbitrator, finding a contractual violation, sustained the grievance and accordingly fashioned his remedy which included direction to the activity to consult with the union prior to filling new or changed positions. The Council is of the opinion, noting particularly that there is no indication in the record that the parties specifically intended or attempted to deny or restrict the arbitrator's authority in fashioning any remedy which he deemed appropriate if he sustained the grievance, that the arbitrator in this case did not exceed his authority^{4/} by deciding an issue not before him.^{5/}

Conclusion

For the reasons discussed above, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion which directs the activity to promote the grievant to the first vacant GS-13 position for which he meets the basic qualifications.

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 25, 1978

4/ Cf. Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sinclitico, Arbitrator), FLRC No. 77A-52 (Jan. 27, 1978), Report No. 142, wherein the Council found that the arbitrator had exceeded his authority when he found the agency to be "in compliance" with the agreement, thereby answering the precise question submitted to him, but then went on to direct the agency to take certain remedial actions even though he had found the agency to be "in compliance."

5/ The agency also states in support of this exception that the arbitrator has required the activity to relinquish the right, among others, to establish "types . . . of positions" reserved to it by section 11(b) of the Order and not bargained away by the activity in the agreement. However, the Council believes the agency has misinterpreted the arbitrator's award as infringing upon a right reserved to the activity under section 11(b) of the Order and upon which the activity has chosen not to negotiate. Instead, the Council only reads the award as requiring the activity to "consult" (rather than negotiate) with the union after the activity has established new or changed position descriptions but prior to the filling of such positions.

American Federation of Government Employees, National Council of Meat Graders and U.S. Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch. The dispute involved the negotiability of union proposals concerning (1) protective clothing; (2) mileage payments and rates for unit employees using their private vehicles in the performance of their work (first and second paragraphs of the proposal, respectively), and payment for travel time (third paragraph); (3) speed of conveyor chains in private sector plants where unit employees perform meat grading duties; and (4) the time to be provided to meat graders, as well as when it will be provided, to perform particular assigned duties.

Council action (May 25, 1978). As to proposal (1) concerning protective clothing and the first and second paragraphs of proposal (2) concerning mileage payments and rates, the Council, based upon a decision of the Comptroller General rendered in response to the Council's request, found that proposal (1) did not conflict with applicable law, but that the two disputed paragraphs of proposal (2) violated applicable law and regulation. As to the third paragraph of proposal (2) concerning payment for travel time, based upon an interpretation rendered by the Civil Service Commission in response to the Council's request, and upon the intent of the union as to the meaning of the disputed paragraph, the Council found that this paragraph of the proposal did not conflict with applicable laws or regulations of appropriate authority outside the agency. Moreover, the Council found with respect to this paragraph of proposal (2) that the agency had misinterpreted the proposal and thus failed to establish that its internal regulations were applicable so as to preclude negotiations on the subject paragraph under section 11(a) of the Order. With regard to proposal (3), concerning the speed of conveyor chains in private sector plants, the Council held that the union's proposal was outside the obligation to bargain established by section 11(a) of the Order. Finally, as to proposal (4) concerning time for performing particular assigned duties, the Council held that the proposal was excepted from the agency's obligation to bargain by section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determinations as to the nonnegotiability of proposal (1) and the third paragraph of proposal (2); and sustained the determinations as to the nonnegotiability of the first and second paragraphs of proposal (2) and of proposals (3) and (4).

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

American Federation of Government
Employees, National Council of Meat
Graders

(Union)

and

FLRC No. 77A-63

U.S. Department of Agriculture,
Food Safety and Quality Service,
Meat Grading Branch

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

The Employer agrees to furnish all necessary protective clothing such as gloves, frocks, and cooler coats, special tools and equipment such as bacon bombs, ham-triers, meat thermometers, and other such equipment which the Employer determines is necessary for the employees of the unit to perform their duties. [Only the underlined portion of this proposal is in dispute.]

Agency Determination

The agency determined that the disputed portion of the proposal is nonnegotiable because it contravenes 5 U.S.C. §§ 5901 and 7903.

Question Here Before the Council

The question is whether the disputed portion of the proposal conflicts with applicable law.

Opinion

Conclusion: The proposal does not conflict with applicable law. Thus, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{1/}

1/ This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide

Reasons: Because the case concerns issues within the jurisdiction of the General Accounting Office, the Council, in accordance with established practice, requested a decision from the Comptroller General as to whether the proposal violates applicable law.

The Comptroller General's decision in the matter, B-190292, March 28, 1978, is set forth, in pertinent part, below:

This action is in response to a request of September 27, 1977, from the Federal Labor Relations Council (FLRC) for a ruling by the General Accounting Office on certain proposed collective-bargaining agreement provisions involved in American Federation of Government Employees, National Council of Meat Graders and U.S. Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch, FLRC No. 77A-63. The agreement provisions were proposed to the Meat Grading Branch, United States Department of Agriculture, by the National Council of Meat Graders, American Federation of Government Employees (AFGE). They were determined to be non-negotiable by the Secretary of Agriculture. The AFGE then requested the FLRC to review the Secretary's determination and FLRC now seeks our opinion as to whether the proposed provisions are in conflict with applicable law, regulations, or Comptroller General decisions.

FIRST UNION PROPOSAL

The portion of the first union proposal determined to be non-negotiable by the Secretary of Agriculture provides:

"Section 22. 'The employer agrees to furnish all necessary protective clothing such as gloves, frocks, and cooler coats * * *.' "

The FLRC has asked us to rule on:

"* * * (1) whether the portion of the proposal pertaining to protective clothing such as gloves and cooler coats, as intended to be implemented, conflicts with the holding in 51 Comp. Gen. 446 (1972) and applicable statutes; and (2) whether the portion of the proposal pertaining to protective clothing such as frocks, as intended to be implemented, conflicts with 5 U.S.C. § 5901 (1970)."

At the outset we should point out the limits of our jurisdiction with regard to this matter. Our function is not to decide the broad question of which issues are, or are not, negotiable, because this is the responsibility of the FLRC. However, we are required by 31 U.S.C. § 74 to rule on the legality of expending appropriated funds. Hence, we shall confine our consideration to the latter question.

(Continued)

only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

The Department of Agriculture considered cooler coats and gloves as protective clothing under occupational health and safety laws and regulations and considered frocks as uniforms under laws and regulations governing the furnishing of uniforms to employees. We believe this categorization is appropriate and we shall also consider them in this context.

Cooler Coats and Gloves

The Department of Agriculture found that cooler coats and gloves could not be considered as "uniforms" for the meat graders because such items did not satisfy the criteria established in Department of Agriculture Personnel Manual, chapter 594 (June 14, 1974), governing uniform allowances. The Department also found, relying on our decision, B-174629, 51 Comp. Gen. 446 (1972), that cooler coats and gloves could not be considered as "protective clothing" inasmuch as they are personal items of clothing and are not required to protect an employee engaged in hazardous work. The Department points out that, although there is a variance of temperatures from meat plant to meat plant, it believes the work environments of the employees of the Meat Grading Branch easily satisfy the standards prescribed by the Occupational Safety and Health Administration, Department of Labor, for safe and healthful working conditions.

Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 668 (1970), Federal agency heads are required to establish and maintain a comprehensive occupational safety and health program consistent with the standards set forth in the Act. Section 668(a) of title 29 of the United States Code explicitly provides that:

"* * * The head of each agency shall (after consultation with representatives of employees thereof)--

"(1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;

"(2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees * * *."

Pursuant to authority contained in the above-quoted statute and Executive Order 11807, September 28, 1974, 39 F.R. 35559, the Secretary of Labor has promulgated Safety and Health Regulations for Federal Employees in 29 C.F.R. Part 1960. The regulations specify that "it is the responsibility of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standard promulgated under section 6 of the Act." Section 1960.1(a). Executive Order 11807 requires the heads of agencies to consult with employee unions and to provide for employee participation in the operation of agency safety and health

programs. Such participation is to be consistent with Executive Order 11491, as amended. 29 C.F.R. § 1960.2(d). Each agency head is also required by Executive Order 11807 to designate an agency official to administer the agency's program and to give that official sufficient authority to represent the interest and support of the agency head. The designated official assists the agency head in taking steps to provide sufficient funds for necessary staff, equipment, material, and training to ensure an effective agency occupational safety and health program. 29 C.F.R. § 1960.16.

Our decision in B-174629, January 31, 1972, published at 51 Comp. Gen. 446, does not bar negotiations between an agency and a union with respect to safety and health programs. On the contrary, that decision makes it clear that protective clothing and equipment may be furnished by the Government if determined to be necessary under the Occupational Safety and Health Act of 1970, regardless of whether or not the purchase satisfies the requirements of 5 U.S.C. § 7903. We pointed out that the Secretary of Labor's general standard for personal protective equipment, in 29 C.F.R. § 1910.132(a), provides that protective equipment and protective clothing shall be provided, used, and maintained whenever necessary because hazards of processes or environment could cause injury or physical impairment.

Therefore, if the head of an executive agency or department, or an official designated by him, determines that certain items of equipment or clothing are required to protect employees from the aforementioned hazards, the agency or department may expend its appropriated funds to procure such items. See B-187507, December 23, 1976.

Nothing in the law and regulations discussed above or our decisions, including 51 Comp. Gen. 446, supra, would serve to preclude negotiations on the determination required by the Secretary of Agriculture or his designee to procure cooler coats and gloves for the meat grader employees. In fact, 29 U.S.C. § 668(a) requires him to consult with representatives of his employees about the safety and health program of the Department and the implementing regulations of the Secretary of Labor further emphasize that this shall be done consistently with the labor management relations program set up under Executive Order 11491. We conclude that the proposal as to cooler coats and gloves is not in conflict with the law, regulations, or our decisions, provided the required determination is made.

Frocks

We shall next examine the conditions under which frocks may be provided for meat grader employees as uniforms. Entitlement of Federal employees to uniforms and uniform allowances is governed by 5 U.S.C. § 5901 (1970). The implementing regulations for 5 U.S.C. § 5901 are contained in Bureau of the Budget (now Office of Management and Budget) Circular No. A-30, Revised August 20, 1966. Paragraph 4b of that circular provides:

"b. Deciding whether to furnish uniforms or to pay allowances. Whenever the agency head determines that a group of employees is required to wear a uniform, he shall determine whether the best interests of the Government will be served by furnishing Government-owned uniforms to employees, or by paying uniform allowances for uniforms procured by employees or by a combination of both methods. In making his decision he shall consider the comparative cost, including administrative costs, of each alternative to the Government, as well as the comparative advantages of each alternative to employees. The decision may be effective as of the date it is made provided funds usable for this purpose are available; otherwise, the decision may be effective when funds become available."

From the foregoing, it is clear that an agency or department head must make a determination that a group of employees are required to wear uniforms before appropriated funds may be expended for this purpose. See 48 Comp. Gen. 678 (1969).

As with protective clothing discussed above, neither the law, regulations, or our decisions governing employee uniform allowances would serve to preclude negotiations on this matter. If the appropriate determination is made, we would interpose no objection to the proposed agreement provision regarding frocks. In this connection, we note that the Department's letter of July 12, 1977, states that the employer has determined that frocks do meet the criteria for uniforms and has requested authority to provide an allowance for frocks under 5 U.S.C. § 5901.

Based on the foregoing decision by the Comptroller General, we find that the proposal, concerning the furnishing of necessary protective clothing such as gloves, frocks, and cooler coats, does not conflict with applicable law.^{2/} Accordingly, the agency determination that the proposal is nonnegotiable because it contravenes 5 U.S.C. §§ 5901 and 7903 was in error and must be set aside.

Union Proposal II

Employees using their private vehicles in the performance of their work will be paid mileage portal to portal when work is performed at one or more duty points.

^{2/} We note, in this connection, that the Comptroller General's decision includes specific guidance to the agency, pointing out, respecting frocks, that the regulations implementing 5 U.S.C. § 5901 provide, "The decision [to furnish uniforms or to pay allowances] may be effective as of the date it is made provided funds usable for this purpose are available; otherwise, the decision may be effective when funds become available." That is, the agency's decision to furnish frocks, arrived at through negotiations or

(Continued)

The maximum mileage rate will be paid regardless of the number of miles an employee drives in the performance of their work.

Employees will be paid for all time traveling in the performance of their work including travel during weekends for the purpose of relief work.

Agency Determination

The agency determined, principally, that (1) the first two paragraphs of the proposal are nonnegotiable because they conflict with the Federal Travel Regulations promulgated by the General Services Administration,^{3/} and with certain Comptroller General decisions;^{4/} and (2) the third paragraph of the proposal is nonnegotiable because it conflicts with statute^{5/} and implementing regulations issued by the Civil Service Commission and the agency.

Questions Here Before the Council

A. The question is whether the first two paragraphs of the proposal violate applicable law or regulation.^{6/}

B. The question is whether the third paragraph of the proposal violates applicable law or regulations of appropriate authority or of the agency.

Opinion

Conclusion as to Question A: The first two paragraphs of the proposal conflict with applicable law and regulation. Thus, the agency determination that the paragraphs are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

(Continued)

otherwise, is effective only when funds usable for that purpose are available. Accordingly, such guidance of the Comptroller General is deemed to be subsumed by the union's proposal in this case.

^{3/} Federal Travel Regulations, GSA Bulletin FPMR A-40, as supplemented, incorporated by reference in 41 C.F.R. § 101-7.003(a) (1976).

^{4/} 36 Comp. Gen. 450 (1956) and 36 Comp. Gen. 795 (1957).

^{5/} The Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1970) and unspecified provisions of title 5, United States Code.

^{6/} In view of our decision herein, we find it unnecessary to consider the agency's remaining contentions concerning the negotiability of these paragraphs of the proposal.

Reasons: Because this case concerns issues within the jurisdiction of the General Accounting Office, the Council, in accordance with established practice, requested a decision from the Comptroller General as to whether the first two paragraphs of the proposal, concerning mileage payments and rates for unit employees, could legally be implemented.

The Comptroller General's decision in the matter, B-190292, March 28, 1978, is set forth, in pertinent part, below:

SECOND UNION PROPOSAL

The first and second paragraphs of the second union proposal determined by the Secretary of Agriculture to be non-negotiable provide:

"Section 27.1. 'Employees using their private vehicles in the performance of their work will be paid mileage portal to portal when work is performed at one or more duty points.

" 'The maximum mileage rate will be paid regardless of the number of miles an employee drives in the performance of their work.' "

The FLRC requests us to rule on:

"* * * whether these paragraphs of the proposal, as intended to be implemented, conflict with the Federal Travel Regulations or with prior Comptroller General decisions.* * *"

Portal to Portal Mileage

The matter covered by the first paragraph of the second proposal, concerning mileage allowances from residence to official duty station and return for employees who use their private vehicles in connection with their work, has been the subject of several decisions of our Office. We have consistently held that employees must place themselves at their regular places of work and return to their residences at their own expense, absent statutory or regulatory authority to the contrary. 55 Comp. Gen. 1323, 1327 (1976); 36 id. 450 (1956); and B-185974, March 21, 1977.

Because the above-quoted proposal concerning portal-to-portal mileage allowances could be construed as making the Government responsible for providing travel expenses to meat grader employees for travel between their residences and their official headquarters without exception, we hold that the above-quoted proposal is contrary to law and our decisions and, therefore, may not be included in an agreement. 54 Comp. Gen. 312, 318 (1974). However, we are of the opinion that the law, regulations and our decisions governing such travel expenses would not serve to preclude the negotiation of an agreement provision that would conform to the guidance set forth in our

decision Matter of Department of Agriculture Meat Graders - Mileage, B-131810, January 3, 1978, covering travel expenses for meat grader employees.

Maximum Mileage Rate

We turn now to the proposal that requires the Department of Agriculture to pay meat grader employees the maximum mileage rate regardless of the number of miles they drive their privately owned vehicles in connection with their work. Pursuant to paragraphs 1-2.2c(3), 1-4.2a and 1-4.4 of the Federal Travel Regulations (FPMR 101-7), as revised May 1977, agency and department heads have been restricted as to the rates they may authorize in certain situations. These regulations require that the determination as to the mileage rate to be paid depends upon whether the use of the private vehicle is advantageous to the Government.

Accordingly, this proposed agreement provision is contrary to the Federal Travel Regulations and, therefore, may not legally be included in an agreement.

Based on the foregoing decision by the Comptroller General, we find that the first two paragraphs of the proposal, concerning mileage payments and rates, violate applicable law and regulation and are therefore nonnegotiable.

Conclusion as to Question B: The third paragraph of the proposal does not conflict with applicable laws or with regulations of the Civil Service Commission. Moreover, the agency misinterpreted the proposal, and thus failed to establish that its internal regulations are applicable so as to preclude negotiations on the paragraph. Accordingly, the agency determination that this paragraph of the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{7/}

Reasons: Applicable law and regulations of appropriate authority outside the agency. Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including those implementing the provisions of the Fair Labor Standards Act in the Federal service, and those implementing title 5, United States Code, which pertain to travel pay, that agency was requested, in accordance with established practice, to interpret Commission directives as they pertain to the third paragraph of this proposal, concerning payment for travel time. The Commission responded, in pertinent part, as follows:

Payment for time spent traveling in the performance of work is governed by Chapter 55 of title 5, U.S. Code, the Fair Labor

^{7/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide

Standards Act, and the Commission's implementing regulations and instructions. Certain conditions must be met before time spent traveling can be considered "hours of work," and hence compensable.

Section 5542(b)(2) of title 5, U.S. Code, describes the conditions under which travel away from the official duty station is considered "hours of work." That section requires either that the travel be performed within the days and hours of the employee's regularly scheduled administrative workweek, including regularly scheduled overtime hours, or meet one of the following four conditions:

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

Therefore, any time spent traveling outside regular working hours which does not meet one of the above four conditions is not compensable under title 5.

Federal employees who are covered by the provisions of the Fair Labor Standards Act (nonexempt employees) are entitled to receive the greater of the benefit payable under title 5 pay provisions or the FLSA. Federal Personnel Manual Letters 551-10, dated April 30, 1976, and 551-11, dated October 4, 1977, provide instructions for considering time spent traveling as "hours of work" under the Act. In general, nonexempt employees shall be compensated for: (1) all travel that is in a day's work, from the commencement of principal activities at the beginning of the workday until the cessation of principal activities at the end of the workday; (2) work performed while traveling, including travel as the driver of a passenger vehicle; (3) travel as a passenger on a one-day assignment; (4) travel as a passenger on an overnight assignment which is performed during regular working hours, including travel during those hours which correspond to regular working hours on nonworkdays.

It should be noted that normal home to work travel performed by employees prior to or subsequent to the workday is not "hours of work" under the FLSA. Of course, if an employee performs work while traveling from home to work (e.g., transporting grading equipment to a job site), such time is compensable as "hours of work" under the FLSA.

(Continued)

only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

To the extent the union proposal would require payment for time spent traveling which exceeds the conditions outlined above, the proposal conflicts with the FLSA, the pay provisions in Chapter 55 of title 5 of the U.S. Code, and the Commission's implementing regulations and instructions. [Footnote omitted.]

As previously indicated, the third paragraph of the union's proposal at issue provides, "Employees will be paid for all time traveling in the performance of their work including travel during weekends for the purpose of relief work." [Emphasis supplied.] Based on the language of the proposal and the union's stated intent that the proposal concerns only employees' time traveling "in the performance of their work," it does not appear that the proposal would require payment for time spent traveling, which payment would conflict with the conditions outlined in the Commission's response, set forth above. That is, in our view, the proposal merely would require that unit employees will be paid for travel time "in the performance of their work," within the "hours of work" concept set forth in the Commission's interpretative letter, quoted herein, i.e., in a manner consistent with applicable provisions of title 5, United States Code, the Fair Labor Standards Act, and the Commission's implementing regulations.

Accordingly, based on the foregoing interpretation of its own directives and related statutes by the Civil Service Commission, and on the expressed intent of the union as to the meaning of its own proposal, the Council finds that the third paragraph of the proposal is not in conflict with applicable law or regulations of appropriate authority outside the agency.

Internal agency regulations. In the record before the Council, the agency construes the disputed paragraph of the proposal as requiring payment of travel "regardless of activity or conditions of travel." Based on this interpretation of the proposal, the agency determined that the proposal violates internal agency regulations implementing the FLSA and related provisions of title 5, United States Code, and is thereby rendered nonnegotiable under section 11(a) of the Order.^{8/} We find this agency contention to be without merit.

8/ Section 11(a) of the Order provides in relevant part:

(a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order.

As indicated above, this paragraph of the union's proposal applies only to those travel situations meeting the criteria for "hours of work" under applicable law and regulation. Thus, since the agency plainly has misconstrued the meaning of the third paragraph of the proposal, we hold, consistent with established Council precedent, that the agency has failed to establish that its regulations are applicable so as to preclude negotiations on the subject paragraph of the proposal under section 11(a) of the Order.^{9/}

Accordingly, for the reasons set forth above, we find that the third paragraph of the union's second proposal is negotiable.

Union Proposal III

In plants where employees work in front of conveyor chains while grading, these chains will be limited to a maximum speed of 180 beef per hour.

Agency Determination

The agency determined that the proposal is nonnegotiable under the Order.

Question Here Before the Council

The question is whether the proposal concerns a matter within the bargaining obligation established by section 11(a) of the Order.^{10/}

Opinion

Conclusion: The proposal is outside the obligation to bargain established by section 11(a) of the Order.^{11/} Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

^{9/} See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 3 of Council decision. In view of our determination that the agency has not established that its regulations are applicable so as to preclude negotiations on the disputed proposal, it is unnecessary to further consider the remaining contention of the agency that a "compelling need" exists for these regulations.

^{10/} In view of our decision herein, we find it unnecessary to consider the contentions of the agency as to the nonnegotiability of the proposal under sections 11(b) and 12(b) of the Order.

^{11/} See note 8, supra.

Reasons: The record before the Council indicates that the proposal would apply to Federal employees, namely, meat graders performing work at assignments in private sector meat packing plants.^{12/} These assignments are performed at locations on conveyor chains which are part of the operations of the meat packing plants. The proposal would attempt to regulate the speed at which carcasses would move on the conveyor chains. In this regard, the agency states without contradiction by the union, "The speed of these chains is controlled by [private sector] plant management, and not by agency management. . . . Controls such as those proposed by the Union does [sic] not fall within the authority of agency management" Thus, the agency claims, in effect, that it is without authority under applicable laws to exercise control over chain speeds. Our own research has not disclosed anything inconsistent with the agency's assertion.

Thus, the speed at which chains convey carcasses in these privately owned and operated meat packing plants is an integral part of the methods by which private sector management exercises its discretion in conducting plant operations and, as the record herein indicates, is a matter controlled by private sector plant management. Hence, as chain speeds are not within the authority of the agency to determine, they clearly do not fall within the scope of bargaining under section 11(a) of the Order, namely, within "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations." A holding to the contrary would, in effect, oblige the agency to bargain over a matter under the control of the management of a private sector operation. Accordingly, we hold that, pursuant to section 11(a) of the Order, the agency is not obligated to bargain over this proposal, concerning matters under the control of the private employer, and the agency's determination of nonnegotiability is sustained.

Union Proposal IV

Sufficient duty time will be provided at the end of each workweek for the purpose of preparing travel vouchers, filing instructions kept at home and repairing equipment.

12/ The Council notes that the meat grading function of the agency, to which this proposal relates, is to classify certain meat products into commercially significant categories, such as the quality grades "prime," "choice," "good," and "standard." This function is a reimbursable service which statute requires the agency to make available to private industry for use on a voluntary basis. The proposal is not related to the agency's meat inspection program, which is primarily concerned with the protection of consumers from meat in such condition as to be detrimental to the health and safety of consumers. See generally, 7 U.S.C. §§ 1621 and 1622 (1970), and 42 Fed. Reg. 53,921 et seq. (1977) (to be codified in 7 C.F.R. § 2853 et seq.), as to meat grading; and 21 U.S.C. § 601 et seq. (1970), and 9 C.F.R. § 301.1 et seq. (1977), as to meat inspection.

Agency Determination

The agency determined that the proposal is nonnegotiable under the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the agency's bargaining obligation by section 11(b) of the Order.^{13/}

Opinion

Conclusion: The proposal concerns matters with respect to job content and is excepted from the agency's obligation to bargain by section 11(b) of the Order.^{14/} Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The proposal is concerned with the time which will be provided to meat graders, as well as when it will be provided, to perform certain assigned duties. In the Dependents Schools case^{15/} the Council held an analogous proposal nonnegotiable under section 11(b) of the Order, finding that the proposal, which would have required the agency "to set aside certain periods of time . . . which would be reserved for the performance of certain [recordkeeping] duties[,] . . . would, in effect, negate management's discretion to assign [unit employees] other duties to be performed during those periods of time."^{16/} As the proposal in this case is materially indistinguishable from the proposal held to be outside the

^{13/} In view of our decision herein that the proposal essentially concerns matters with respect to determining job content, section 12(b) of the Order is inapplicable and it is unnecessary to consider the remaining contention of the agency that the proposal conflicts with section 12(b) of the Order.

^{14/} Section 11(b) of the Order provides in pertinent part, "the obligation to meet and confer does not include matters with respect to . . . [an agency's] organization . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty"

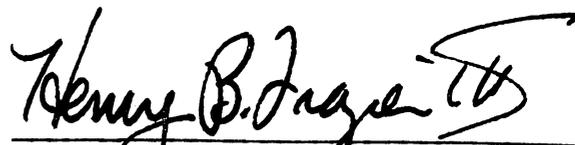
^{15/} Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, FLRC No. 76A-142 (Feb. 28, 1978), Report No. 143.

^{16/} Id., at 7-8 of Council decision. The referenced proposal provided, in relevant part:

(Continued)

bargaining obligation in Dependents Schools, in terms of its effect on the agency's discretion in determining job content, for the reasons more fully set out in our decision in Dependent Schools, we hold that the instant disputed proposal is excepted from the agency's obligation to bargain under section 11(b) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 25, 1978

(Continued)

School Calendar

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Section 2. The calendar(s) for each of the three regions shall include but not be limited to the following:

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B. One full day at the end of each semester, for the purposes of recordkeeping.

C. One half day for recordkeeping at the end of each marking period other than the semester.

Council of American Federation of Government Employees and Department of Health, Education, and Welfare, Social Security Administration Field Operations (Marshall, Arbitrator). The arbitrator dismissed the union's grievance related to the activity's denial of a within-grade salary increase for the grievant, and the maintaining of documentation concerning job performance by the grievant's immediate supervisor. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon three exceptions, alleging: (1) the award violated appropriate regulations; (2) the arbitrator exceeded his authority; and (3) the award did not draw its essence from the parties' agreement.

Council action (May 25, 1978). The Council held that the union's contentions did not provide facts and circumstances to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 25, 1978

Ms. Bernice E. Levy
Chief Steward
Council of District Office Locals
American Federation of Government
Employees, AFL-CIO
230 Spruce Street
Inglewood, California 90301

Re: Council of American Federation of
Government Employees and Department of
Health, Education, and Welfare, Social
Security Administration Field Operations
(Marshall, Arbitrator), FLRC No. 78A-15

Dear Ms. Levy:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose as a result of the activity's denial of a within-grade salary increase for the grievant because his work was not at an acceptable level of competence. Ultimately, the grievant filed a grievance contending that the activity violated the negotiated agreement by maintaining a second file on the grievant which contained records of his alleged bad performance.

The issues before the arbitrator, as stated in the award, were as follows:

1. Was grievance . . . filed in accordance with Article #25, Section F of Master Agreement?^{1/}
2. Was there a violation of Article 7, Section D of the Master Agreement?^{2/} [Footnotes added.]

^{1/} According to the arbitrator's award, Article 25, Section F, states in pertinent part, "Within ten (10) workdays after awareness of an incident or action leading to an alleged grievance . . . employee . . . shall present the grievance . . . to the immediate supervisor . . . [.]" [Omissions by arbitrator.]

^{2/} According to the arbitrator, Article 7, Section D states in pertinent part, "Only one (1) file may be maintained on any employee in the District."

The arbitrator dismissed the union's grievance, holding that, although the grievance was timely filed in accordance with the agreement, there was no violation of Article 7, Section D. In so holding, the arbitrator found that the grievant's immediate supervisor was maintaining documentation in a file on her desk relating to grievant's and other employees' job performance. The arbitrator determined that "[t]echnically such conduct . . . constitutes a violation of the Master Agreement . . . however . . . it cannot be argued or successfully established that this constitutes the maintenance of a second file on a single employee." He concluded that "the Grievant had knowledge of his shortcomings and of all information which was contained in the file maintained on his immediate supervisor's desk, and he should have been able to adequately prepare a defense to any of the charges"

The union's petition takes three exceptions to the arbitrator's award on the grounds discussed below. The agency did not file an opposition.

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

In its first exception, the union alleges that the award violates appropriate regulations. In support of this exception, the union refers to the Federal Personnel Manual, cites various regulatory provisions and the Privacy Act of 1975, and states that Civil Service Commission regulations require that only one Official Personnel Folder be maintained for each employee.^{3/} The fact was established, according to the union, that a second file existed, and it was in this second file that evidence documenting the grievant's unsatisfactory performance was maintained.

The union's specific exception, that the award violates appropriate regulations, asserts a ground upon which the Council will grant review of an arbitration award. However, in this case, the union's contentions in support of this exception do not provide facts and circumstances to support the exception. In this regard, it is noted that the union is not contending that the arbitrator's award, that there was no violation of the agreement, violates appropriate regulation; instead the substance of the union's contention is that the activity's action in keeping separate documentation on the grievant's job performance is contrary to

^{3/} While the union refers to the Federal Personnel Manual, the specific regulatory provisions it cites are apparently provisions of an agency Instruction (submitted by the union as part of its petition for review) which, by its terms, "supplements FPM requirements on Official Personnel Folder." The union's contentions have been viewed as alleging that the award violates the Federal Personnel Manual.

regulation. The Council has previously held that a contention that an agency action, rather than an arbitrator's award, violates appropriate regulation does not support a ground upon which the Council will grant review of an arbitrator's award. The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135, and cases cited therein. Moreover, the Council notes that the specific question before the arbitrator in the instant case was whether maintenance of the second file violated the parties' negotiated agreement and that the arbitrator interpreted and applied the agreement and found that, in the circumstances before him, the activity's practice was not contrary to the agreement.

Council precedent is clear that a challenge to an arbitrator's interpretation of the parties' negotiated agreement does not assert a ground upon which it will grant review of an arbitrator's award. E.g., American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator), FLRC No. 77A-31 (Aug. 26, 1977), Report No. 136. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

In its second exception, the union asserts that the arbitrator exceeded his authority by rewriting Article 7, Section D of the agreement. In support of this exception, the union argues that "[t]he Arbitrator's derivation of the Award seems to be a play on words to muddle the issue." The union contends that the arbitrator's award can be read to mean that management cannot maintain a second file on one employee but can on a group of employees.

The union's specific exception, that the arbitrator exceeded his authority, asserts a ground upon which the Council will grant review of an arbitration award. However, in this case the union's contentions in support of this exception do not provide facts and circumstances to support the exception. In this regard, the union's contentions are, in essence, nothing more than mere disagreement with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by the arbitrator that is subject to challenge. E.g., Department of the Navy and American Federation of Government Employees, AFL-CIO (Larkin, Arbitrator), FLRC No. 77A-108 (Jan. 19, 1978), Report No. 141. Therefore, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

The union's third exception alleges that the award does not draw its essence from the agreement. The union argues in this regard that "[i]t is not clear from what source the Arbitrator drew the essence of the Award," and refers again, as in its previous exception, to the arbitrator's distinction between a file kept on a group of employees and one kept on a single employee.

The union's specific exception, that the award does not draw its essence from the agreement, asserts a ground upon which the Council grants review of an arbitration award. However, the union's assertions do not provide the necessary facts and circumstances to support its exception. Again, the union in essence is merely disagreeing with the arbitrator's reasoning and conclusion in arriving at his award which, as previously stated, does not assert a ground for review.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedures.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: W. Schuerholz
SSA

Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 1033. The Federal Employees Metal Trades Council (FEMTC) filed a petition for review and request for a stay of the Assistant Secretary's decision directing an election in the unit found appropriate, in which election the FEMTC was to be provided a place on the ballot. However, such election had not been conducted and no certification of the results or certification of representative had issued.

Council action (May 26, 1978). Since a final decision had not been rendered by the Assistant Secretary on the entire proceeding before him, the Council, pursuant to section 2411.41 of its rules of procedure, denied review of FEMTC's interlocutory appeal, without prejudice to the renewal of FEMTC's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied FEMTC's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 26, 1978

Mr. Robert Matisoff
O'Donoghue and O'Donoghue
1912 Sunderland Place, NW.
Washington, D.C. 20036

Re: Department of the Navy, Portsmouth
Naval Shipyard, A/SLMR No. 1033,
FLRC No. 78A-52

Dear Mr. Matisoff:

This refers to your petition for review and request for a stay of the Assistant Secretary's decision of May 1, 1978, in the above-entitled case, which you filed with the Council on May 9, 1978, on behalf of the Federal Employees Metal Trades Council (FEMTC); and to the opposition thereto filed with the Council on May 16, 1978, by the National Association of Government Employees.

In his subject action, from which you are appealing, the Assistant Secretary, among other things, directed a representation election among the employees in the unit found appropriate, in which election the FEMTC is to be provided a place on the ballot. Such election has not been conducted and no certification of the results or certification of representative has issued. Thus, no final disposition of the entire case has been rendered.

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

Since a final decision has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice to the renewal of your contentions in a petition duly filed with the Council after

a final decision on the entire case by the Assistant Secretary. Likewise, your request for a stay is also denied.

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. J. Canavan
NAGE

G. Niro
Navy

California Nurses' Association and Veterans Administration Hospital, Long Beach, California, et al. The dispute involved union proposals concerning (1) the assignment of newly hired registered nurses to particular tours of duty; and (2) authorized absence for educational purposes.

Council action (June 6, 1978). As to (1), the Council held that the union's proposal conflicted with a published agency regulation, as interpreted by the agency and, further, that a "compelling need" existed within the meaning of section 11(a) of the Order and section 2413.2(a) of the Council's rules for the regulation to bar negotiations on the disputed proposal. As to (2), the Council found that the agency had misinterpreted the union's proposal and thereby failed to establish the applicability of its regulations as a bar to negotiation on the union's proposal; and, further, that neither statute, nor sections 12(b) or 11(b) of the Order prevented negotiations on the disputed proposal. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination as to the nonnegotiability of proposal (1), and set aside the determination with regard to proposal (2).

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

California Nurses' Association

(Union)

and

FLRC No. 77A-89

Veterans Administration Hospital,
Long Beach, California, et al.^{1/}

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

All newly hired Registered Nurses shall be assigned to either the evening or night Tour of Duty following the completion of their orientation provided there are no vacancies on the day tour which cannot otherwise be filled by existing staff.

Agency Determination

The agency determined, inter alia, that the proposal is nonnegotiable because it conflicts with a published agency regulation (DM&S Supplement to Veterans Administration Manual MP-5, part II, chapter 7, paragraph 7.04) for which a "compelling need" exists under section 11(a) of the Order and part 2413 of the Council's rules.

Questions Here Before the Council

The questions are whether the disputed proposal violates the above-referenced agency regulation; and, if so, whether a "compelling need" exists for such regulation within the meaning of section 11(a) of the Order and part 2413 of the Council's rules.^{2/}

^{1/} In addition to the VA Hospital in Long Beach, the VA hospitals in Brentwood, Sepulveda, and Wadsworth, and the VA Outpatient Clinic in Los Angeles, California, are also involved in the present case.

^{2/} In view of our decision herein it is unnecessary to pass upon the merits of the remaining contentions of the agency concerning the negotiability of

(Continued)

Opinion

Conclusion: The subject proposal conflicts with the cited regulation, as interpreted by the agency. Further, a "compelling need" exists within the meaning of section 11(a) of the Order and section 2413.2(a) of the Council's rules for this agency regulation to bar negotiation on the disputed union proposal. Accordingly, the agency determination that the disputed proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The union's proposal in this case would require that newly hired registered nurses, upon completion of their orientation, be assigned to the evening or night tour of duty, rather than to the day tour, unless vacancies on the day tour could not be filled from the existing nursing staff. The agency contends that "the [disputed] proposal would substitute

(Continued)

the proposal. However, a procedural matter which arose both in connection with this proposal, and with union proposal II, infra, will be discussed below.

The agency originally determined that the proposals in this case are nonnegotiable relying, in part, as to union proposal I, on DM&S Supplement to VA Manual MP-5, part II, chapter 7, paragraph 7.04, referred to above. Subsequently, in its statement of position filed with the Council in this case, the agency raised, for the first time, additional internal regulations as bars to negotiation on both union proposals, which action by the agency necessitated the filing of supplemental submissions by both parties and considerably extended the time for case processing. The union moved to strike these additional regulations on the ground that they were untimely raised. We find it unnecessary to pass upon this motion because the additional regulations are not dispositive herein. However, as stated in our Information Announcement of September 24, 1975 (3 FLRC 887, 890):

The Council . . . admonishes agency heads to provide full and specific grounds for determinations that a matter is not negotiable. Determinations should specify applicable sections, subsections and subparts of laws, regulations, or the Order upon which the agency head relies to support his decision

Failure of an agency to render such complete determination, as in the present case, causes unwarranted delays and constitutes a disservice to the effective operation of the Federal labor-management relations program. Therefore, we repeat our admonishment that an agency should set forth all grounds, upon which it relies, in its negotiability determination, rather than, as here, advancing new grounds in its statement of position.

the consideration of seniority status for the range of factors, notably the proper care and treatment of patients . . . , which have to be considered under the regulation in making tour of duty assignments," contending thereby that the proposal conflicts with a published agency regulation.^{3/} The agency further asserts that a "compelling need" exists for the subject regulation under section 11(a) of the Order^{4/} and section 2413.2(a) of the Council's rules,^{5/} to bar negotiation on the union's proposal. Thus, the agency

3/ As indicated above, the agency relies upon DM&S Supplement to Veterans Administration Manual MP-5, part II, chapter 7, paragraph 7.04, which provides in relevant part:

Para. 7.04. The proper care and treatment of patients shall be the primary consideration in scheduling hours of duty and granting of leave under these instructions. . . .

.

Para. 7.04(b). Because of the continuous nature of the services rendered at hospitals, the Hospital Director, or the person acting for him (in no case less than a chief of service), has the authority to prescribe any tour of duty to insure adequate professional care and treatment to the patient [Emphasis in original.]

4/ Section 11(a) of the Order provides, as here relevant:

(a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order.

5/ Section 2413.2(a) of the Council's rules provides:

A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

(Continued)

contends that the union's proposal is nonnegotiable under section 11(a) of the Order. We agree with the agency's position.

Under the disputed proposal, as claimed by the agency, the assignment of individual nurses to tours of duty would be based primarily upon the seniority of the nurses involved. That is, newly hired registered nurses would be assigned only to the evening or night tour of duty (except if vacancies exist on the day tour which vacancies cannot otherwise be filled by previously hired nurses) and, as the agency contends, no consideration whatsoever would be accorded such factors as the agency might deem necessary to assure adequate professional care and treatment to the patient. The agency has interpreted its subject regulation as precluding such a provision, and, as the Council has frequently held, an agency's interpretation of its own regulations with respect to a proposal is binding on the Council in a negotiability dispute, under section 11(c)(3) of the Order.^{6/} Therefore, we find that the disputed proposal conflicts with the cited regulation, as interpreted by the agency.

Turning then to the "compelling need" for the subject regulation to bar negotiation on the proposal at issue, the recent VA Hospital, Altoona case is dispositive.^{7/} In that case, the union's proposal would have established seniority as the primary consideration in effecting the assignment of individual nurses to overtime work, and the agency, relying on the same pertinent provisions of the regulation as here involved, asserted that a "compelling need" existed for this regulation to bar negotiation on the union's proposal, under section 2413.2(a) of the Council's rules. The Council upheld the agency's position, stating (at 6 of the Council's supplemental decision):

(Continued)

(a) The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or the primary national subdivision[.]

The agency also relies upon the "compelling need" criteria in section 2413.2(d) and (e) of the Council's rules. However, in view of our decision herein, we find it unnecessary to pass upon the applicability of these criteria to the the subject regulation.

6/ E.g., American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey, FLRC Nos. 77A-18 and 77A-21 (Jan. 27, 1978), Report No. 142, at 22 of Council decision.

7/ American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania, FLRC No. 76A-128 (Aug. 31, 1977), Report No. 137; id., (Supplemental Decision)(Feb. 28, 1978), Report No. 144.

[T]he more likely situation in a hospital, wherein more serious or unusual circumstances will arise, is that the various factors personal to the particular employees (in this case, nurses) assigned, such as specialized experience, demonstrated skill, judgment or alertness, will be absolutely crucial to and determinative of the quality of medical care provided. It follows that the discretion to take account of such qualitative factors when assigning individual nurses to overtime in such serious or unusual circumstances is essential to maintaining management's ability to provide the best available medical care to patients. However, as already indicated, the disputed provision would negate such discretion and require nurses to be assigned to tours of overtime duty solely on the basis of seniority within "job categories." Hence, we must conclude that the regulation reserving such discretion to hospital management is essential to the accomplishment of the mission of the agency within the meaning of section 2413.2(a) of the Council's rules.

In our view, the proposal in dispute here, which would make seniority a primary consideration in assigning newly hired registered nurses to tours of duty, is not materially different from that involved in VA Hospital, Altoona. Accordingly, for the reasons more fully set out in that case, we find that a "compelling need" exists for DM&S Supplement to Veterans Administration Manual MP-5, part II, chapter 7, paragraph 7.04 within the meaning of section 11(a) of the Order and section 2413.2(a) of the Council's rules to bar negotiation on the union's conflicting proposal.^{8/}

Thus, we sustain the agency's determination that the proposal is nonnegotiable.

Union Proposal II

All nurses who apply for educational AA [authorized absence] shall be entitled to a minimum of 3 days (AA) per anniversary year to attend courses, institutes, workshops or classes of an educational nature which meet the established criteria for such offerings with the following exclusions:

- (1) Nurses presently enrolled in school for whom priority scheduling is currently in effect.
- (2) Part-time nurses.
- (3) Nurses with less than 1 year continuous service.

8/ Cf., American Federation of Government Employees, Local 2953, AFL-CIO and Nebraska National Guard, FLRC No. 77A-106 (Feb. 14, 1978), Report No. 143 (issue of the "compelling need" for agency regulation to bar negotiation on union's proposal disposed of on basis of prior Council decision reaching the same conclusion as to materially identical proposal and regulation). See also Statement on Major Policy Issue, FLRC No. 77P-1 (Aug. 17, 1977), Report No. 134.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates agency regulations, statute, and section 12(b) of the Order, and because it is excepted from the agency's obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is barred from negotiation by reason of either agency regulations, statute, or section 12(b) or 11(b) of the Order.

Opinion

Conclusion: The agency misinterpreted the union's proposal and thereby failed to establish the applicability of its regulations as a bar to negotiation. Further, neither statute, nor section 12(b) or 11(b) of the Order prevents negotiation of the proposal. Accordingly, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{9/}

Reasons: The agency asserts that the proposal violates agency regulations and statute, and interferes with management's prerogatives to determine assignments of employees under section 12(b), and job content under section 11(b), of the Order. We find the agency's contentions to be without merit.

As to its regulations, the agency asserts that the proposal violates cited agency regulations,^{10/} and is thereby nonnegotiable under section 11(a) of the Order, by preventing the agency from considering various factors in evaluating applications for educational AA provided in those regulations.

The agency has clearly misinterpreted the union's proposal. Contrary to the agency's contention, the proposal would not bar the agency from evaluating applications for educational AA under considerations which by its regulations are relevant to such evaluations. For the proposal only

^{9/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposal. We decide only that, in the circumstances presented, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{10/} Veterans Administration Manual M-3, part II, chapter 3 and DM&S Supplement to Veterans Administration Manual MP-5, part II, chapter 7, paragraphs 7.04 and 7.08(h).

applies, according to its express language, to "courses, institutes, workshops or classes of an educational nature which meet the established criteria for such offerings" [Emphasis supplied.] Further, as the union states in its appeal concerning the intent of the proposal:

The proposal itself speaks to the fact that in order to receive AA the offering must meet the established criteria for such offerings. That established criteria deals with the very areas questioned by [the agency]. The criteria requires that the educational offering benefit the agency and has specific provisions for adequacy of staff coverage.

Since the agency has misinterpreted the meaning of the union's proposal we hold, consistent with established Council precedent, that the agency has failed to demonstrate the applicability of its regulations as a bar to negotiation on the union's proposal under section 11(a) of the Order.^{11/}

As to the agency's assertion that the proposal contravenes a statute, the agency argues that 5 U.S.C. § 4108(a)(1) and (2) requires that employees selected for training execute certain agreements,^{12/} and that the union's

11/ See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 3 of Council decision. In view of our determination that the agency has not established the applicability of its regulations to the disputed proposal, we do not reach the question of the "compelling need" for those regulations.

12/ 5 U.S.C. § 4108(a)(1) and (2) (1970) provides:

(a) An employee selected for training by, in, or through a non-Government facility under this chapter shall agree in writing with the Government before assignment to training that he will—

(1) continue in the service of his agency after the end of the training period for a period at least equal to three times the length of the training period unless he is involuntarily separated from the service of his agency; and

(2) pay to the Government the amount of the additional expenses incurred by the Government in connection with his training if he is voluntarily separated from the service of his agency before the end of the period for which he had agreed to continue in the service of his agency.

proposal would improperly necessitate the agency's waiver of such requirements. This contention is similarly in error. Apart from other considerations, while the proposal does not recite the statute's requirements, nevertheless, nothing in the proposal itself or in the expressed intent of the union as to the meaning of the proposal precludes the agency's enforcement of these statutory requirements in implementing the proposal.^{13/} Moreover, as the Council has previously stated,^{14/} "[U]nder section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws" ^{15/} Thus, since the proposal does not conflict with the statute, this agency contention also fails to state a ground for finding the proposal nonnegotiable.

As to the agency's contentions that the proposal infringes the agency's right to assign employees under section 12(b)(2) of the Order, and the agency's argument that the proposal relates to the determination of job content, a matter excepted from the obligation to bargain under section 11(b) of the Order,^{16/} both contentions reflect a similar misconception of the proposal, and are therefore in error.

^{13/} See, e.g., Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, FLRC No. 76A-142 (Feb. 28, 1978), Report No. 143, at 3-4 of Council decision.

^{14/} Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy, 2 FLRC 55, 63 [FLRC No. 73A-21 (Jan. 31, 1974), Report No. 48].

^{15/} Section 12(a) of the Order provides in relevant part, "Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws"

^{16/} Section 12(b)(2) of the Order provides:

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

.

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

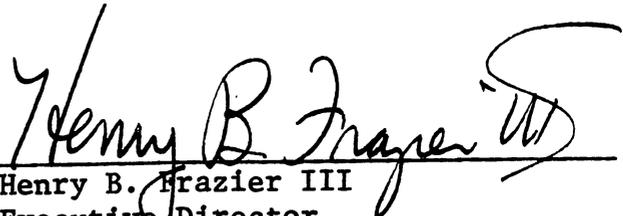
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(Continued)

The proposal does not affect the agency's section 12(b)(2) right "to . . . assign . . . employees in positions within the agency . . .," i.e., to determine which employees will be assigned to registered nurse positions within the agency.^{17/} Nor does the proposal relate to the agency's determination of the duties constituting the job content of members of its nursing staff. Instead, the proposal pertains merely to the granting of authorized absences to nurses to attend educational activities as sanctioned in agency regulations. Thus, the proposal is not rendered nonnegotiable by section 12(b) or 11(b) of the Order.

In summary, we hold that the union's second proposal is not barred from negotiation by agency regulations, statute, or section 12(b) or 11(b) of the Order. Accordingly, we find it negotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 6, 1978

(Continued)

(2) to . . . assign . . . employees in positions within the agency

Section 11(b) provides in relevant part that, "[T]he obligation to meet and confer does not include matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty"

17/ See Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 5 of Council decision.

American Federation of Government Employees, Local 1485 and Department of the Air Force, Norton Air Force Base, California. The dispute involved a union proposal concerning the evaluation of employees for merit promotion purposes.

Council action (June 6, 1978). Based upon an interpretation of the Federal Personnel Manual (FPM) rendered by the Civil Service Commission in response to the Council's request, the Council held that the union's proposal conflicted with provisions of the FPM. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the disputed proposal was nonnegotiable.

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

American Federation of Government
Employees, Local 1485

(Union)

and

FLRC No. 77A-110

Department of the Air Force, Norton
Air Force Base, California

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

The annual performance rating will be substituted for the Air Force "Supervisory Appraisal" of current performance in ranking employees for Merit Promotion.

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with provisions of the Federal Personnel Manual contained in FPM chapter 335, subchapters 2, 3, and 4, and FPM Supplement 335-1, subchapter S-4.

Question Here Before the Council

The question is whether the proposal conflicts with provisions of the FPM.^{1/}

Opinion

Conclusion: The proposal conflicts with FPM chapter 335 and FPM Supplement 335-1. Accordingly, the agency's determination that the proposal is non-negotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including the FPM, that

^{1/} In its appeal, the union requested permission to present oral argument before the Council. Pursuant to section 2411.48 of the Council's rules

agency was requested, in accordance with Council practice, to interpret Commission directives as they pertain to the instant proposal.

The Commission responded, in pertinent part, as follows:

Several Civil Service Commission requirements relating to the evaluation of candidates for merit promotion impact on this proposal. Federal Personnel Manual Chapter 335, section 3-6b, requires in part that agency methods for evaluating candidates for promotion provide adequate measure of the qualifications needed for the particular position and make meaningful distinctions among the candidates. Subsection d of section 3-6 further requires that supervisory appraisals be used in evaluating eligible candidates for promotion and that the appraisals be objective, relevant, and carefully tailored to factors in the employee's job that are important for success in higher-level work. FPM Supplement 335-1, section 4-5(1)--also cited by the agency--requires that the supervisory appraisal center around "significant factors of the employee's present job that are significant in the job to be filled."

Use of the annual performance rating instead of the supervisory appraisal for ranking purposes as contemplated by the union would be inconsistent with the mandatory Civil Service Commission requirements described above. The rating is an annual agency assessment of how well an employee's work performance compares with the established performance requirements of his/her current position and is expressed by use of an adjective--outstanding, satisfactory, or unsatisfactory. (Most employees are rated as satisfactory.) Because almost all candidates for promotion would have identical ratings and because the rating bears no relationship to an employee's potential to perform the duties of another position, the annual performance rating can not make meaningful distinctions among the candidates for merit promotion as required by section 3-6. In addition, the knowledges, skills, and abilities and other characteristics (KSAO) of the positions occupied by candidates for promotion would rarely be the same as those factors in the position to be filled by merit promotion.

Based on the above considerations, we find that the union proposal in the instant case is inconsistent with the mandatory requirements of FPM Chapter 335 and FPM Supplement 335-1.

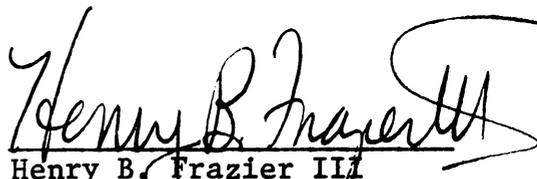
Based on the foregoing interpretation by the Civil Service Commission of its own directives, we find that the disputed proposal conflicts with

(Continued)

(5 C.F.R. § 2411.48), this request is denied because the positions of the parties in this case are adequately reflected in the entire record now before the Council.

provisions of the FPM. Accordingly, the agency's determination to that effect is sustained.^{2/}

By the Council.


Henry B. Frazier II
Executive Director

Issued: June 6, 1978

2/ The union also contends that the "Air Force Supervisor's Appraisal of Employee's Performance" currently in use by the agency "does not meet legal and regulatory requirements," citing, inter alia, provisions of the Federal Personnel Manual. However, the legality of the agency's supervisory appraisal process is not before the Council for decision. Therefore, we do not address the merits of this union contention.

In this regard, the only question before the Council concerns the negotiability of the union's proposal. In this case, the agency determined that the union's proposal was contrary to the FPM and we have sustained that determination, based upon an interpretation by the Civil Service Commission of the pertinent provisions of the FPM.

Furthermore, section 11(c)(4) of the Order authorizes the Council to determine whether agency regulations violate applicable law and regulation of appropriate authority outside the agency only where such agency regulations have been interpreted by the agency head as barring negotiations on a disputed proposal. Specifically, section 11(c)(4) provides:

- (4) A labor organization may appeal to the Council for a decision when--
- (i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or
 - (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under [section 11(a) of the Order].

The agency did not rely on its own regulations to hold the union's proposal nonnegotiable in this case. Therefore, to repeat, we find that the issue of the legality of any agency regulations pertaining to the supervisory appraisal process is not properly before us, and our decision in this case should not be read as expressing or implying any opinion on that subject.

National Association of Government Employees, Local R8-22 and Michigan National Guard. The dispute involved a union proposal which would establish a procedure for civilian technicians to appeal from appraisals of military performance rendered by military supervisors; and would also establish military appeal boards comprised solely of military personnel for the purpose of hearing such appeals.

Council action (June 6, 1978). The Council held that the union's proposal was outside the obligation to bargain established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the disputed proposal was nonnegotiable.

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

National Association of Government
Employees, Local R8-22

(Union)

and

FLRC No. 78A-11

Michigan National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

5-3 Factors Affecting Retention

e. Reference NGB Form 351-2
Section II - Add - "If a technician does not agree with his
military appraisal (Reduction-in-Force) he may appeal the rating
within fifteen (15) days to a Military Rating Appeal Board.
There will be three Military Rating Appeal Boards for the three
categories of technicians.

The Officer Appeal Board shall consist of:

1. The State IG
2. The State JAG
3. A non-technician officer to be selected by mutual agreement
of the IG and JAG.

The WO Appeal Board shall consist of:

1. The State IG
2. The State JAG
3. A senior non-technician Warrant Officer to be selected by
mutual agreement of the IG and JAG.

The Enlisted Appeal Board shall consist of:

1. The State IG
2. The State JAG
3. A senior non-technician non commissioned officer (E8 or E9)
selected by mutual agreement of the IG and JAG.

5-4b Performance Rating

Technicians current official performance rating shall be the current official notice on the date of the issuance of a General Notice to a reduction-in-force.

Agency Determination

The agency head determined that the proposal concerned only a matter relating to the military aspects of technician employment^{1/} and is, therefore, outside the obligation to bargain established by section 11(a) of the Order.

Question Here Before the Council

Whether the proposal concerns a matter within the bargaining obligation established by section 11(a) of the Order.

Opinion

Conclusion: The proposal is outside the obligation to bargain established by section 11(a) of the Order.^{2/} Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The union represents a bargaining unit of employees who are National Guard technicians. Such technicians must, as a condition of their civilian employment be members of the National Guard in a military capacity.^{3/} As a consequence of this statutory mandate, the National Guard

1/ Pursuant to 32 U.S.C. § 709(b) and (e), National Guard technicians must maintain National Guard military status as a condition of continued technician employment.

2/ Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations

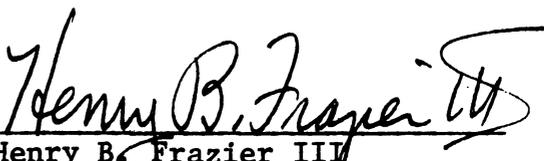
3/ See note 1 supra. See generally National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120.

Bureau (NGB) has promulgated reduction in force (RIF) procedures which include an evaluation of a technician's military (National Guard) performance as well as his technician performance to ensure that in a RIF situation the statutory mandate is implemented, i.e., that only those technicians qualified for the military grade corresponding to a technician position as well as for the technician position are retained in a RIF.^{4/}

The union's proposal in this case would establish a procedure for a technician to appeal from an appraisal of his military performance, rendered by his military supervisor. It would also establish three military appeal boards comprised solely of military personnel and created exclusively, based on the record before us, for the purpose of hearing such appeals.

Although, as already mentioned, National Guard technicians are required by law to maintain military status in the National Guard as a condition of their civilian technician employment relationship (which relationship is, of course, subject to the Order), the military relationship itself is not covered by the Order but is totally mandated by statute. Consequently, since the union's proposal concerns a matter in connection with the military aspects of technician employment for members of the bargaining unit, it concerns a subject which is not a working condition arising under or controlled by the Order. Accordingly, it is outside the obligation to bargain under section 11(a) of the Order^{5/} and, is nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 6, 1978

4/ See American Federation of Government Employees, Local 2953, AFL-CIO and Nebraska National Guard, FLRC No. 77A-106 (Feb. 14, 1978), Report No. 143; National Association of Government Employees, Local R5-100 and Adjutant General, State of Kentucky; and National Association of Government Employees, Local R14-76, and Adjutant General, State of Wyoming, FLRC No. 76A-109 (July 20, 1977), Report No. 132.

5/ See Association of Civilian Technicians, Inc. and State of New York National Guard, 1 FLRC 615a [FLRC No. 72A-47 (Aug. 13, 1973), Report No. 47].

Federal Aviation Administration and Professional Air Traffic Controllers Organization (Ables, Arbitrator). The arbitrator, in part of his award, directed that the performance evaluation record reports of air traffic controllers who had received approved OJT (on-the-job-training) instructor training could include a category for the performance of such training, but only if a controller's supervisor intended to recommend the controller for a special award for work as an OJT instructor. The Council accepted the agency's petition for review insofar as it related to the agency's exceptions alleging that the subject portion of the award violated applicable law and appropriate regulation (Report No. 140).

Council action (June 22, 1978). The Council requested an interpretation from the Civil Service Commission of relevant Commission regulations as they related to that part of the arbitrator's award here involved. Based upon the interpretation subsequently rendered by the Commission, the Council found that the disputed portion of the award violated applicable law and appropriate regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside that part of the arbitrator's award.

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

Federal Aviation Administration

and

FLRC No. 77A-100

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, the basic question in this dispute was whether the agency "had the unilateral right under the agreement of the parties to add a requirement in the position description of air traffic controllers requiring them to train other less experienced controllers and to add training as a major category on employee performance reports [PER's]." More specifically, the arbitrator stated the issue to be:

Did the employer violate the agreement in Article 5, Section 1 by adding the requirement in the job description of air traffic controllers to provide training to others and by changing the PER from "Collateral Duties" to "Training, O-J-T" because such changes were in conflict with the agreement?^{1/} [Footnote added.]

In the opinion accompanying his award, the arbitrator referred to Article 53, Section 1,^{2/} of the parties' negotiated agreement and stated that "the agency order changing the job description to include training of others was too broad and was applied to controllers who were not, by agreement of

1/ Article 5, Section 1 of the parties' agreement provides:

ARTICLE 5--CHANGES IN AGREEMENT AND PAST PRACTICES

Section 1. It is agreed that personnel policies, practices and matters affecting working conditions which are within the scope of the Employer's authority will not be changed or implemented without prior negotiations when they are in conflict with this agreement.

2/ Section 1 of Article 53 (entitled "ON-THE-JOB TRAINING") provides:

Section 1. Only controllers who have received approved OJT instructor training may provide OJT.

the parties, . . . required to give OJT [on-the-job training]." He also referred to Article 53, Section 5,^{3/} of the agreement which, he stated, "provides only that the employer shall consider the employee's performance in providing OJT 'to determine whether [it is] deserving of special recognition for an award.'" [Emphasis by arbitrator.] The arbitrator went on to state that "[a]s to whether or not negotiations actually took place before [the agency] made the changes in dispute, . . . there were no such negotiations in any sense of the word." Thus, the arbitrator reached the conclusion that "the agency violated the agreement (Article 53) and . . . in part at least the agency violated Article 5 by not entering into negotiations before changes were made in the performance evaluation records." He specifically found that:

On balance therefore, the agency violated the spirit and letter of Article 5 in that it changed "personnel policies" and "practices" and "matters affecting working conditions" which are in conflict with the agreement, and accordingly, should have been negotiated with the union.

The arbitrator thereupon entered the following award:

On the record, it is decided:

(1) that the agency is authorized to include in the position description of those controllers who have received approved OJT instructor training a requirement that they provide training to other controllers;

(2) that, as to such controllers, performance evaluation record reports may include a category for training OJT, but only if the supervisor intends to recommend that the controller get a special award for his work as an OJT instructor; and

(3) that with respect to position descriptions or PERs, for those controllers who have not received approved OJT instructor training, the agency was in violation of Article 5, Section 1. when it added the requirement in the job description to train others and make instruction a main category for performance rating in the PER, thus all references in position descriptions and PERs with respect to such controllers shall be removed from their records.

Agency's Appeal to the Council

The agency filed with the Council a petition for review of part 2 of the arbitrator's award (parts 1 and 3 not being in dispute). Under section 2411.32

3/ Section 5 of Article 53 provides:

Section 5. The Employer shall consider the employee's performance in providing on-the-job training when assessing an employee's performance to determine whether it is deserving of special recognition for an award.

of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions alleging that part 2 of the award violates applicable law and appropriate regulation. Neither party filed a brief.^{4/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exceptions which alleged that part 2 of the award violates applicable law and appropriate regulation.

Since the Civil Service Commission is authorized to issue regulations pertaining to the matters involved in this appeal, the Council requested from the Commission an interpretation of the relevant Commission regulations as they relate to part 2 of the arbitrator's award in this case. The Commission replied in relevant part as follows:

This case arose when the agency added instructor (OJT) duties to the job descriptions of a number of air traffic controllers and began rating OJT as a specific element of job performance without prior negotiation with the union. The arbitrator found that the agency's failure to negotiate on this matter violated article 5, section 1 of the negotiated agreement. He decided, in part two of his award, that while performance evaluation record reports of air traffic controllers who had received approved OJT training could include a category for performance of training, the controllers could be rated for performance of OJT only when the supervisor intended to recommend that the controller get a special award for his performance. You asked for our opinion as to whether or not this portion of the award violates applicable law and Civil Service Commission regulations.

Chapter 43 of title 5, U.S. Code, establishes performance rating requirements. Specifically, section 4303 of that chapter requires that agency performance rating plans provide:

^{4/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the arbitration award (insofar as an appeal was taken), pending determination of the appeal.

- (1) that performance requirements be made known to all employees;
- (2) that performance of the employee be fairly appraised in relation to the requirements;
- (3) for use of appraisals to improve employee performance;. . .

Agency compliance with the above cited requirements necessitates that an employee be rated on performance of all established requirements of his/her position. Once the requirements of a position have been determined, the law requires the agency to evaluate the incumbent on performance of all aspects of his/her position, whether those requirements are stated specifically or are categorized as collateral duties.

As the agency contended in its petition for review, section 531.407 of the Commission's regulations, issued pursuant to section 5335 of title 5, U.S. Code, requires that when the head of an agency or his/her designee determines whether an employee's work is of an acceptable level of competence for the purpose of granting or withholding a within-grade increase, that decision must be based on an evaluation of the performance of all essential requirements of the employee's position.

In summary, part two of the arbitrator's award -- which limits management's ability to evaluate the performance of OJT -- is inconsistent with 5 U.S.C. 4303. While we have not and cannot reach here the question of whether OJT is an "essential" job requirement as contemplated by 5 U.S.C. 5335 and section 531.407 of the Commission's regulations, insofar as that had been determined by appropriate authority, part two of the award would also be inconsistent with those provisions of law and regulation.

Based upon the foregoing interpretation and conclusion by the Civil Service Commission, we find that part 2 of the arbitrator's award violates applicable law and appropriate Civil Service Commission regulations.

Conclusion

For the foregoing reasons, we conclude that part 2 of the arbitrator's award violates applicable law and appropriate Civil Service Commission regulations.

Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside part 2 of the arbitrator's award.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 22, 1978

American Federation of Government Employees, Local No. 51 and Bureau of the Mint, U.S. Assay Office (Eaton, Arbitrator). The arbitrator found that the reconstituted promotion action here involved--reconstituted pursuant to a previous award by the same arbitrator--remained "infected" with the favoritism for the successful candidate and bias against the grievant, which the arbitrator had, in effect, found to be violative of the parties' agreement in his previous award. The arbitrator therefore directed that the grievant be promoted retroactively to the position in question with backpay. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exceptions which alleged that the award violated the Federal Personnel Manual and the Back Pay Act of 1966 (Report No. 147).

Council action (June 23, 1978). Based upon Civil Service Commission interpretations of applicable legal requirements and Commission regulations previously received and applied by the Council in like arbitration cases, the Council held that in the circumstances of this case the arbitrator's award of retroactive promotion and backpay violated the Federal Personnel Manual. Accordingly, without passing upon the question of whether the award violated the Back Pay Act of 1966, the Council, pursuant to section 2411.37(b) of its rules of procedure, set aside the arbitrator's award directing that the grievant be promoted retroactively with backpay.

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

American Federation of Government
Employees, Local No. 51

and

FLRC No. 78A-2

Bureau of the Mint,
U.S. Assay Office

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the dispute in this matter arose when the activity posted a merit promotion announcement for the position of air conditioning equipment mechanic leader. The grievant and two other activity employees applied for the job, and all three were rated as highly qualified. One of the other employees was subsequently selected for the position. The grievant filed a grievance alleging, essentially, that in the promotion of the other employee the activity discriminated in favor of that employee and against the grievant, in violation of the parties' collective bargaining agreement. The grievance was ultimately submitted to arbitration. In the opinion accompanying his award, the arbitrator determined that the selected employee was, in effect, preselected for the position at issue and that this preselection "tainted the entire rating and selection process." The arbitrator found that the agency had denied the grievant a consistent and equitable application of merit promotion principles and had given the selected employee an undue opportunity to gain qualifying experience, thus preventing the grievant from gaining similar experience, all in violation of the negotiated agreement. As his award the arbitrator directed that the promotion process be reconstituted. He also "retain[ed] jurisdiction of the dispute until the promotion process has been reconstituted and completed, . . . [and] until the terms of this Award shall have been effected"

The activity subsequently reconstituted the promotion process with the result that the originally selected employee was again selected for the promotion. The union contended that the reconstituted procedure was a violation of the arbitrator's prior award and of the promotion procedures of the parties' agreement. The arbitrator held a hearing pursuant to the retention of jurisdiction contained in his first award.

Arbitrator's Award

In his "DECISION" in his second award in the matter, the arbitrator found and awarded as follows:

1. The reconstituted selection process remains, in its entirety, infected with favoritism towards the successful candidate . . . , and bias against the Grievant
2. Under the circumstances prevailing it would be futile to order yet another reconstituted promotion process.
3. Without an effective remedy, the rights of the Grievant herein, and of all the others who might in the future apply under the provisions of the Negotiated Agreement, to fair treatment would be rendered a nullity.
4. Grievant . . . is therefore awarded the position of air conditioning equipment mechanic leader effective December 12 1975, the date of the original defective action, and is further awarded the increment of back pay which he would have received had he been promoted.
5. The Arbitrator continues to retain jurisdiction of the dispute until the amount owing the Grievant shall have been determined and paid, and all other terms of this Award shall have been effected.

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions which allege that the award violates the Federal Personnel Manual and the Back Pay Act of 1966, 5 U.S.C. § 5596.^{1/} The union filed a brief on the merits.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously indicated, the Council accepted the agency's petition for review of the arbitrator's award on the ground that the award violates the

^{1/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

Federal Personnel Manual and the Back Pay Act of 1966. With respect to the issue presented by acceptance of the agency's exception which alleged that the award violates the Federal Personnel Manual, the Council has previously sought and received from the Civil Service Commission interpretations of applicable legal requirements and Commission regulations pertaining to arbitration awards which, as here, direct an agency to select a particular individual for a particular position. The Civil Service Commission has advised the Council, among other things, that:

FPM Chapter 335, Subchapter 2 (Requirement 6)^{2/} sets forth the management right to select or nonselect. This management right can only be abridged if a direct causal connection between the agency's violation(s) and the failure to select a specific employee or from a specific group of employees is established. It must be determined by competent authority that but for the violation(s) that occurred, the employee in question would definitely (and in accordance with law, regulation, and/or negotiated agreement) have been selected.^{3/} [Footnotes added.]

In the instant case, however, there has been no finding by the arbitrator that a direct causal relationship exists between the agency's violation of the negotiated agreement and the grievant's failure to be promoted, a finding essential to sustaining as consistent with the Federal Personnel Manual an award of a retroactive promotion. Although the arbitrator in the present case found that the reconstituted selection process continued to be "infected" with the favoritism he, in effect, had found to be a violation of the negotiated agreement in his first award, nowhere in his second award does the arbitrator make the requisite finding that but for this favoritism the grievant would definitely have been selected for promotion. In this regard the Council notes that the promotion certificate had three candidates on it--the grievant, the selected employee, and one other employee, and all three were rated as highly qualified. Accordingly, we conclude that the arbitrator's award of retroactive promotion to the grievant, with backpay is, under the

2/ Requirement 6. Each plan shall provide for management's right to select or nonselect. Each plan shall include a procedure for referring to the selecting official a reasonable number of the best qualified candidates identified by the competitive evaluation method of the plan (referral of fewer than three or more than five names for a vacancy may only be done in accordance with criteria specified in the plan).

3/ Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (July 7, 1976), Report No. 108 at 3-4 of the Council's decision. See also Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99; Francis E. Warren Air Force Base, Cheyenne, Wyoming and American Federation of Government Employees, Local 2354 (Rentfro, Arbitrator), FLRC No. 75A-127 (Sept. 30, 1976), Report No. 114.

circumstances of this case, violative of the Federal Personnel Manual and cannot be sustained.^{4/}

Conclusion

For the foregoing reasons, we find that the arbitrator's award, which orders the grievant to be promoted and accorded backpay, violates the Federal Personnel Manual, and the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award which directs that the grievant be awarded the position of air conditioning mechanic leader effective December 12, 1975, and awarded the increment of backpay he would have received had he been promoted.^{5/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 23, 1978

^{4/} In view of our decision herein, it is not necessary to pass upon the other ground upon which the Council accepted the petition for review, that is, that the award violates the Back Pay Act of 1966.

^{5/} In its petition for review the agency states that it "takes no issue with the finding in the award that the reconstituted selection action was infected with favoritism towards the successful candidate and was biased against the grievant." It further states that it believes another promotion action in this matter could properly be reconstituted outside the activity and "urges the Council to modify the award along these lines." However, since the arbitrator, in his second award, specifically rejected as a remedy the ordering of a second reconstitution of the promotion process, the Council, if it were to do as requested by the agency, would in effect be fashioning a new award in the matter. Although the Council's rules clearly authorize the Council to modify, set aside, or remand an award in certain circumstances, there is no authority therein under which the Council could fashion a new award. Nothing, however, would appear to preclude the agency from reconstituting the selection action on its own accord in order to remove the favoritism found by the arbitrator.

Pennsylvania Army and Air National Guard, A/SLMR No. 969. The Assistant Secretary, upon a complaint filed by the Pennsylvania State Council, Association of Civilian Technicians, found that the activity's conduct in issuing a particular memorandum in the circumstances of this case constituted an improper unilateral change in employee working conditions and thereby violated section 19(a)(1) and (6) of the Order. The agency appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious. The agency also requested a stay of the Assistant Secretary's decision and order.

Council action (June 26, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the agency neither alleged, nor did it appear, that the decision raised a major policy issue. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 26, 1978

Mr. Wayne A. Robertson
Director of Personnel
National Guard Bureau
Departments of the Army
and Air Force
Washington, D.C. 20310

Re: Pennsylvania Army and Air National Guard,
A/SLMR No. 969, FLRC No. 78A-18

Dear Mr. Robertson:

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

In this case the Pennsylvania State Council, Association of Civilian Technicians (the union) filed an unfair labor practice complaint alleging, in pertinent part, that the Pennsylvania Army and Air National Guard (the activity) violated section 19(a)(1) and (6) of the Order by issuing a memorandum without consultation with the recognized exclusive representative (the union). The memorandum required civilian technicians, in signing a form showing that they had corrected a defect in equipment, to indicate their military grade.

The Assistant Secretary, contrary to the Administrative Law Judge (ALJ), found that, "under the particular circumstances of this case, the [activity's] conduct constituted an improper unilateral change in employee working conditions and thereby violated Section 19(a)(1) and (6) of the Order." In so concluding, he stated:

Thus, it is undisputed that the purpose of the memorandum involved herein was to clarify the [activity's] position on the use of military titles, a subject which previously has been found to be within the ambit of Section 11(a) of the Order. In this regard, the evidence establishes that if there was any policy prior to the memorandum, the [activity's] attempts to enforce such "policy" were irregular and ambiguous. Thus, confusion over the issue was so widespread that the officer who issued the memorandum in question had himself used his civilian grade in completing at least one document. In this context, I find that by issuing the memorandum herein, the [activity] unilaterally established what heretofore had been an ambiguous, irregularly enforced personnel policy covering unit employees without affording their exclusive representative the opportunity to bargain on such matter. [Footnotes omitted.]

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision is arbitrary and capricious in that "important findings of the Administrative Law Judge are ignored and an unwarranted conclusion is drawn from certain facts presented." In this regard, you contend that "[t]he facts of this case show clearly that no change in policy triggering a bargaining obligation occurred and even if it had[,] the exclusive representative was afforded sufficient opportunity [to bargain] but chose instead to file an [u]nfair [l]abor [p]ractice."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that the decision raises a major policy issue.

Thus, with regard to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your assertions that his decision ignored certain important findings of the ALJ and drew an erroneous conclusion from the facts presented constitute, in essence, nothing more than disagreement with the Assistant Secretary's factual determinations that the activity changed employee working conditions "without affording [the] exclusive representative [an] opportunity to bargain on such matter," and therefore provide no basis for Council review.*

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that the decision raises a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied. Your request for a stay is likewise denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. Spear
ACT

*/ In so concluding, the Council does not reach and consequently does not pass upon the Assistant Secretary's statement that the use of military titles is "a subject which previously has been found to be within the ambit of Section 11(a) of the Order."

U.S. Department of Air Force, Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio, Assistant Secretary Case Nos. 53-10078(GA), 53-10090(GA), 53-10114(GA), and 53-10115(GA). The Assistant Secretary denied the request for review of the union (International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge 2065) seeking reversal of the Regional Administrator's action dismissing, as procedurally defective, the separate applications for Decision on Grievability or Arbitrability filed by the union. The union appealed to the Council, contending, in effect, that the decision of the Assistant Secretary was arbitrary and capricious or presented a major policy issue.

Council action (June 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 27, 1978

Mr. Louis P. Poulton
Associate General Counsel
International Association of
Machinists and Aerospace Workers
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

Re: U.S. Department of Air Force, Aeronautical Systems
Division, Wright-Patterson Air Force Base, Ohio,
Assistant Secretary Case Nos. 53-10078(GA), 53-10090
(GA), 53-10114(GA), and 53-10115(GA), FLRC No. 78A-19

Dear Mr. Poulton:

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

In this case, as found by the Assistant Secretary, the International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge 2065 (the union) and U.S. Department of Air Force, Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio (the activity) are parties to a collective bargaining agreement which provides for a four-step grievance procedure, following which arbitration may be invoked. The union filed four separate grievances which the activity declared nongrievable. Subsequently, the union filed four separate Applications for Decision on Grievability or Arbitrability which were dismissed by the Regional Administrator (RA) as procedurally defective.

In a single decision on the four cases, the Assistant Secretary denied the union's requests for review seeking reversal of the RA's dismissal of the Applications for Decision on Grievability or Arbitrability. In so ruling, the Assistant Secretary stated:

The evidence reveals that the grievances involved herein were not processed through all the steps of the negotiated procedure. Thus, in agreement with the [RA], I find that the instant applications are procedurally defective. While Section 205.2(a) of the Assistant Secretary's Regulations does not require a party to invoke arbitration as to whether or not a grievance is on a matter for which a statutory appeal procedure exists (Cf. General Services Administration, Region 9, San Francisco, California, FLRC No. 77A-45), it nevertheless has been interpreted to require that all steps of the grievance procedure must be exhausted before the Assistant Secretary will consider an application filed pursuant thereto. See Report on a Ruling No. 61.

In your petition for review on behalf of the union, you contend, in effect, that the decision of the Assistant Secretary appears arbitrary and capricious or presents a major policy issue. In essence, your petition asserts that the Assistant Secretary improperly applied his regulations by requiring the union to process four grievances "involving the same type of action" through all the steps of the negotiated grievance procedure even though the activity had raised the same defense of nongrievability at the preliminary stages in each case. In this regard, you assert that the reason for the regulation relied upon by the Assistant Secretary herein "is to give the agency an opportunity to change the decision of its lower echelon people," not to require the performance of "useless acts" before he will rule upon an Application for Decision on Grievability or Arbitrability.*

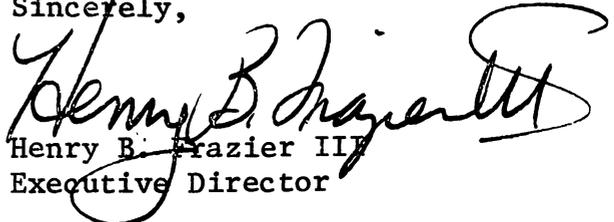
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

Thus, your contention as set forth above relates to the propriety of the Assistant Secretary's interpretation and application of his own regulations. As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation. In the instant case, the Assistant Secretary's decision was based upon the interpretation and application of his regulations, specifically Section 205.2, and your appeal fails to show that the Assistant Secretary's decision in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes of the Order. U.S. Army Training Center, Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-4875(GA), FLRC No. 77A-19 (June 6, 1977), Report No. 127; General Services Administration, Region 9, San Francisco, California, Assistant Secretary Case No. 70-5123(GA), FLRC No. 77A-45 (June 21, 1977), Report No. 128.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, your petition is review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR D. Buck
Labor Air Force

*/ As previously stated, the Assistant Secretary found that the union had failed to process any of the grievances through all four steps of the negotiated grievance procedure.

FLRC No. 78A-28

Birmingham District, Internal Revenue Service, Birmingham, Alabama,
Assistant Secretary Case No. 40-8090(CA). The Assistant Secretary denied the request of the union (National Treasury Employees Union) for review of the partial dismissal of the union's unfair labor practice complaint by the Regional Administrator (RA), insofar as the complaint alleged a violation of section 19(a)(2) of the Order. The union filed a petition for review of the Assistant Secretary's decision with the Council. However, insofar as the union's complaint alleged a violation of section 19(a)(1) of the Order, the matter was still pending before the RA.

Council action (June 27, 1978). Since a final decision on the entire unfair labor practice complaint had not been rendered by the Assistant Secretary, the Council, pursuant to section 2411.41 of its rules of procedure, denied review of the union's interlocutory appeal, without prejudice to the renewal of the union's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 27, 1978

Mr. William Harness
Associate General Counsel
National Treasury Employees Union
3445 Peachtree Road, NE., Suite 930
Atlanta, Georgia 30326

Re: Birmingham District, Internal Revenue
Service, Birmingham, Alabama, Assistant
Secretary Case No. 40-8090(CA), FLRC
No. 78A-28

Dear Mr. Harness:

This refers to your petition for review of the Assistant Secretary's decision of February 16, 1978, in the above-entitled case.

In his decision, the Assistant Secretary denied your request for review of the partial dismissal by the Regional Administrator (RA) of the union's unfair labor practice complaint, insofar as the complaint alleged a violation of section 19(a)(2) of the Order. However, as the Council has been administratively advised, insofar as the complaint alleged a violation of section 19(a)(1) of the Order, the matter is still pending before the RA.

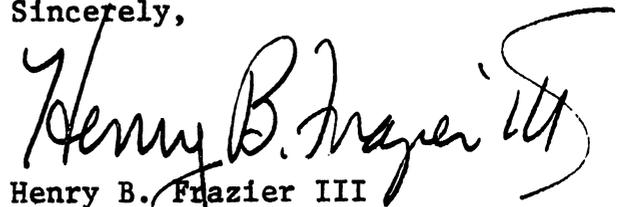
Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a decision on the entire unfair labor practice complaint has issued, or after other final disposition has been made of the entire matter by the Assistant Secretary. (See, Department of the Air Force, 2750th Air Base Wing, Wright-Patterson Air Force Base, Assistant Secretary Case No. 53-09517(CA), FLRC No. 77A-137 (Dec. 12, 1977), Report No. 139.)

Since a final decision on the entire unfair labor practice complaint has not been so rendered in the present case, your appeal is interlocutory

and is hereby denied, without prejudice to the renewal of your contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

H. G. Mason
IRS

American Federation of Government Employees, Local 1749 and Laughlin Air Force Base, Texas. The dispute involved the negotiability of agency proposals concerning (1) union promotion of such matters as productivity, motivation, cost effectiveness and reduction in tension and conflict on the job; (2) the amount of official time that may be used by employees in their capacities as union representatives in performing representational activities; (3) notification procedures for use of such official time; (4) a union obligation to abide by limitations on use of official time established by the parties in their agreement; (5) union support for agency-conducted charity, bond and blood donation drives (first paragraph) and for alcohol and drug abuse prevention and treatment programs for employees (second paragraph); (6) service charge for dues deductions; and (7) union discouragement of grievances in particular circumstances.

Council action (June 29, 1978). As to (1), the first paragraph of (5), and (7), the Council held that the agency's proposals were outside the bargaining obligation established by section 11(a) of the Order. With regard to (2), (3), (4), the second paragraph of (5), and (6), the Council found the agency's proposals negotiable under the Order. Accordingly, pursuant to section 2411.28 of its rules of procedure, the Council set aside the agency's determinations as to the negotiability of (1), the first paragraph of (5), and (7), and sustained the determinations with regard to the remaining proposals.

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

American Federation of Government
Employees, Local 1749

(Union)

and

FLRC No. 77A-86

Laughlin Air Force Base, Texas

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Agency Proposal I

The Union and the Employer will make every effort to promote productivity, motivation; cost effective operations and reduce on-the-job tensions and conflict whenever possible throughout the workforce. The Union will actively promote similar effort through its membership, stewards, and officials.

Agency Determination

The agency determined the proposal is negotiable under section 11(a) of the Order.

Question Here Before the Council

The question is whether the agency's proposal is within the scope of bargaining under section 11(a) of the Order.

Opinion

Conclusion: The agency's proposal is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that the proposal is negotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

Reasons: Section 11(a) of the Order^{1/} establishes, within specified limits not here in issue, an obligation to bargain concerning personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions. In our opinion, the proposal here in dispute is outside the union's obligation to bargain; it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order.

The agency proposal would require the union to promote through its membership, stewards and officials such matters as "productivity, motivation, cost effectiveness and reduction of tensions and conflict on the job whenever possible." Such requirement does not directly concern the personnel policies and practices and matters affecting working conditions of employees in the bargaining unit within the meaning of section 11(a) of the Order. Rather, it only indirectly concerns such personnel policies and practices and matters affecting working conditions, which concern is proposed to be implemented through specified internal direction by the union to its membership, stewards and officials. The requirement is predicated on relationships within the union and hence, in our view, is concerned with internal union activities.

Of course, cooperative efforts between the union and management to promote productivity, motivation and cost effective operations, and to reduce tension and conflict are, of themselves, totally consistent with the broad purposes of the Order^{2/} and may be negotiated by the parties. However, such goals, which are the primary responsibility of management, do not immediately

1/ Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order. . . .

2/ The preamble of the Order reads as follows:

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

(Continued)

impact on specific personnel policies, practices and matters affecting working conditions. Moreover, the proposal herein seeks to achieve these goals by mandating internal actions within the union vis-a-vis its own members, stewards and officials. Thus, a basic thrust of the proposal, taken as a whole, is concerned with internal union activities to be effected through its officers and members. In summary, the proposal involves matters which are not within the scope of bargaining established by section 11(a) of the Order but which the parties may voluntarily negotiate.^{3/} Accordingly, the agency determination to the contrary must be set aside.

Agency Proposals II-III^{4/}

Proposal II:

Union officers may be granted official duty time not to exceed a collective total of two (2) hours per week (noncumulative) to prepare for and conduct employer-Union business, i.e., formulation of replies to management request for Union opinion on policy and/or procedure; formulation of written formal request for hearings, meetings, required by this Agreement between the Union and Management, mutually agreed upon subjects.

(Continued)

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

3/ See, National Federation of Federal Employees, Local 1745 and Veterans Administration Data Processing Center, Austin, Texas, FLRC No. 77A-1 (Aug. 26, 1977), Report No. 135; National Treasury Employees Union and Internal Revenue Service, FLRC No. 76A-132 (Aug. 17, 1977), Report No. 133 and National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, Calif., FLRC No. 76A-111 (July 13, 1977), Report No. 131.

4/ The proposals are considered together for convenience of decision since essentially the same issues and contentions are involved.

Proposal III

The Employer will be notified by the Union in writing, a minimum of four (4) days in advance for any official duty time the Union desires to use for Employer-Union business. The written notification will include the nature of the business to be conducted, name(s) and organizational element(s) of the Union representative(s) and the proposed time for conducting the business. The Employer will provide the Union with a response within two (2) days after receipt of the notification. In mutually agreed upon cases of emergency, the above procedures may be conducted by telephone.

Agency Determination

The agency determined the proposals are negotiable under the Order.

Question Here Before the Council

The question is whether the agency's proposals are negotiable under the Order.

Opinion

Conclusion: The agency's proposals, involving official time for representational activities and notification procedures for the use of such official time, are negotiable under the Order. Thus, the agency head's determination that the proposals are negotiable under the Order was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{5/}

Reasons: The proposals at issue involve (1) the amount of official time that may be used by employees in their capacity as union representatives in performing certain representational activities, e.g., administration of the agreement between the parties, and (2) specific notification procedures for the use of such official time.^{6/}

^{5/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agency proposals. We decide only that, as submitted by the agency and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{6/} It is clear from both the language of the proposals and the submissions of the parties that the proposals do not involve time for either the conduct of internal union business or the negotiation of a contract between the parties. For a discussion of the negotiability of official time for these

(Continued)

The Council has previously interpreted the Order with respect to the negotiability of proposals for official time for union representatives to engage in various representational activities.^{7/} In its interpretation the Council said:^{8/}

. . . nothing in the Order prohibits an agency and a labor organization from negotiating provisions . . . which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.

Since Proposal II, here at issue, involves solely the amount of official time that may be used by employees in performing representational functions, the Council determination, quoted above, obviously is applicable to it: nothing in the Order bars negotiation of Proposal II. Further, since official time to be used by union representatives for representational activities is, itself, a negotiable matter under the Order, it is clear that nothing in the Order prohibits negotiation of specific notification procedures as preconditions to the use of such time. Thus, Proposal III is also negotiable.^{9/}

(Continued)

purposes, see Interpretation of the Order and Statement on Major Policy Issue, 3 FLRC 874 [FLRC No. 75P-1 (Dec. 17, 1975), Report No. 90]; Local 2151, American Federation of Government Employees, AFL-CIO and General Services Administration, Region 3, FLRC No. 76A-106 (May 18, 1977), Report No. 125 and Philadelphia Metal Trades Council and Philadelphia Naval Shipyard, 1 FLRC 287 [FLRC No. 72A-16 (Apr. 3, 1973), Report No. 36].

7/ Interpretation of the Order and Statement on Major Policy Issue, supra note 6. See also, FPM Supplement 711-1, Book II, subch. S5 and Comptroller General decision B-156287 (Sept. 15, 1976).

8/ Interpretation of the Order and Statement on Major Policy Issue, supra note 6, at 878-79.

9/ The union asserts also that these agency proposals violate section 10(e) of the Order. However, the union advances no persuasive reasons to support its assertion. Hence, we find this unsupported claim to be without merit.

Accordingly, we sustain the agency head's determination of negotiability as to these two proposals.^{10/}

Agency Proposal IV

It is understood by the parties that in accordance with the Executive Order, Section 20, no internal Union business will be conducted during these hours.^{11/} The Union will insure that official duty time used under this and other provisions of this Agreement is kept within the prescribed limits and does not decrease or affect the work productivity of Union members on their primary job. Employer-Union business must and will be conducted at the convenience of the mission. In the event the Union has used or will exceed the official duty time granted for Employer-Union business, the Employer will make every effort to either defer the business until the following week or allow Union representatives to attend such meetings in a non-official duty time status (annual leave or leave without pay). [Footnote added.]

Agency Determination

The agency determined the proposal is negotiable under the Order.

Question Here Before the Council

The question is whether the agency's proposal is negotiable under the Order.

^{10/} The union asserted in its petition to the Council that the first of these two proposals should be held nonnegotiable because it violates section 19(a)(1) and (6) of the Order in that it reflects an intent by the employer to offer "the exclusive representative less than is provided employees not represented thereby attempting to demonstrate that less benefits will result when employees choose to bargain collectively." Such an assertion, however, does not state a ground for setting aside an agency determination of negotiability. Rather, it appears to conjecture an unfair labor practice by management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case. National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98, at 2, n. 2 and AFGE Local 2151 and General Services Administration, Region 3, 3 FLRC 668, 674, n. 5 [FLRC No. 75A-28 (Oct. 8, 1975), Report No. 86].

^{11/} The agency states that the term "these hours" as used in the first sentence of the proposal is understood by the parties to "refer to hours of official time for the performance of representational functions [by union representatives], as mutually agreed upon by the parties and set forth in the agreement."

Opinion

Conclusion: The agency's proposal involves a negotiable matter under the Order. Thus, the agency head's determination that the proposal is negotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{12/}

Reasons: The union contends inter alia that the proposal involves "internal union business" and that it would require the union "to enforce work productivity standards among union members or other employees," and therefore, the proposal is not within its obligation to bargain under the Order.^{13/} In our view, the union's interpretation of the meaning and requirements of the proposal is not borne out by either the language of the proposal or its purpose as reflected in the record before the Council.

The union clearly has misinterpreted the agency's proposal. The meaning and intent of the proposal, as reflected by its language and the record before the Council, are essentially (1) to insure that official time authorized elsewhere in the agreement (see Proposal II, supra) be used solely for the performance of representational activities and not for internal union business; (2) to insure that such representational activities take place during the time allotted for such activities and not during the employee's duty status time;^{14/} and (3) to provide basic procedures for the conduct of employer-union business where the amount of official time allotted for the performance of representational functions by union representatives would be exceeded. Thus, contrary to the union's contentions, the proposal in dispute would not directly involve internal union affairs. It merely

^{12/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agency proposal. We decide only that, as submitted by the agency and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{13/} The union also contends that the proposal violates (1) section 10(e) and (2) section 19(a)(6) of the Order "in that it is patently offensive on its face and is designed to frustrate bargaining rather than to achieve agreement." As to (1), the union advances no persuasive reasons to support its assertion. Hence, we find this unsupported claim to be without merit. As to (2), such a contention, in essence, conjectures an unfair labor practice by agency management and, thus, does not state a ground for setting aside an agency determination of negotiability; therefore, we do not pass upon this claim here. See notes 9 and 10, supra.

^{14/} That is, there is no stated intent on the part of the agency and we do not interpret the proposal as requiring that union members who perform representational functions on official time do the same amount of work as if they had spent no official time in the performance of such representational functions. See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118.

would require the union to abide by the limitations on the use of official time established by the parties in the negotiated agreement, e.g., that official time negotiated by the parties for the performance of representational activities not be used by union representatives to conduct internal union business.^{15/} Furthermore, the language of the proposal would not call for any union involvement in the performance of assigned duties by employees and, hence, would not require the union "to enforce work productivity standards of employees on the job." Thus, the union's contentions reflect a misconception of the agency's proposal and are not supported by the language of the proposal itself or by its intent as reflected in the record before the Council. Accordingly, since the union has misinterpreted the meaning and intent of the proposal and for the reasons indicated above, we sustain the agency head's determination of negotiability as to this proposal.

Agency Proposal V

The Union agrees to actively support the Employer in conducting voluntary charity drives in the interest of the community and base, and to encourage its membership to contribute on a fair share basis, to such worthwhile activities as the Combined Federal Campaign. The Union also agrees to actively encourage its members to participate in Savings Bond Programs and Blood Donation Drives. Publicity will be given through Union Newsletters to members and at Union Meetings to encourage members to participate in drives and campaigns as described above. Union leadership will keep aware of the progress in these activities and will encourage participation of all unit employees as citizens of the community in which they work and live.

The Union agrees to actively support and actively encourage its members for voluntary participation in the Civilian Personnel Drug and Alcohol Abuse Program for anyone that might need or benefit from this program. Union officials and stewards will continually support supervisors and management in the identification and treatment of individuals needing help under these programs.

Agency Determination

The agency determined that the proposal involves matters within the scope of bargaining under section 11(a) of the Order and, therefore, is negotiable.

^{15/} In this regard, section 20 of the Order provides in relevant part:

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned.

Question Here Before the Council

The question is whether the agency's proposal is within the scope of bargaining under section 11(a) of the Order.

Opinion

Conclusion: The first paragraph of the agency's proposal does not involve matters within the scope of bargaining established by section 11(a) of the Order. The second paragraph of the proposal, however, does involve a matter within the scope of bargaining under section 11(a). Thus, the agency determination that the proposal is negotiable was improper as to the first paragraph and proper as to the second paragraph. Accordingly, pursuant to section 2411.28 of the Council's rules and regulations, the agency determination as to the first paragraph of the proposal is set aside and as to the second paragraph of the proposal is sustained.

Reasons: As noted before in connection with Proposal I (at 2, supra), the section 11(a) bargaining obligation extends to personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions. The first paragraph of the proposal here at issue concerns union support for agency-conducted charity, bond, and blood donation drives, and would require the union to give publicity to such drives in its internal union publications and at internal union meetings. Clearly, as with Proposal I above, this proposal, which would mandate actions within the union, also concerns the union's internal activities. Furthermore, such voluntary drives are undertaken "in the interest of the community and base" as the language of the proposal expressly states. Moreover, as indicated by the specific language of the proposal, it is directed at and involves employees "as citizens of the community in which they work and live" rather than as bargaining unit employees. Consequently, it is clear that the first paragraph of the proposal does not involve a personnel policy or practice or matter affecting working conditions within the meaning of section 11(a), and, therefore, it is not within the scope of required bargaining under the Order.^{16/}

The second paragraph of the proposal, however, involves programs essentially different in nature. Alcohol and other drug abuse prevention and treatment programs established specifically for employees directly relate to personnel policies and practices and matters affecting working conditions within the

16/ See Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, FLRC No. 76A-142 (Feb. 28, 1978), Report No. 143, at 12-13 and American Federation of Government Employees, Local 3006 and Idaho National Guard, FLRC No. 77A-70 (Dec. 20, 1977), Report No. 139.

meaning of section 11(a) of the Order.^{17/} The proposal at issue merely calls for the bargaining unit representative to provide support and general encouragement for such programs. The union contends that a necessary consequence of this part of the proposal will be the development of a conflict of interest for the union between its adherence to the requirements of the proposal and its duty to represent members of the bargaining unit who may have a grievance relating to the program(s). We see no such consequence of the proposal. As we noted above, the language of the proposal simply calls for general union support and encouragement for the program and in no way requires the union to compromise its responsibility under the Order to employees in the bargaining unit. That is, for example, the proposal would neither require the union to identify individual employees who might benefit from the program nor require the union to agree with management's assessments concerning the needs of individuals.^{18/} Indeed, the proposal appears to be nothing more than an attempt to effect guidance of the Civil Service Commission, concerning the development and maintenance of alcohol and other drug abuse prevention and treatment programs for Federal employees, namely:^{19/}

The support and active participation of labor organizations will be a key element to the success of the program. Union officers and stewards who represent the employee concerning working conditions and personnel policy will also be influential in creating employee confidence in management's policy. It is therefore essential that labor organizations understand management's sincere commitment to assist the employee with his or her problem. Management should make it clear to union officials that an employee will be extended maximum assistance toward rehabilitation.

However, it must also be understood that, if the employee is unable to raise his or her job performance to an acceptable level, appropriate action will be taken.

^{17/} Of course, although not at issue here, negotiation as to whether there will be alcohol and other drug abuse prevention and treatment programs for Federal employees is precluded since such programs were established by statute in 1970 and 1972, respectively. Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1849 (codified at 42 U.S.C. § 4561 (1970)) and Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, 86 Stat. 84 (codified at 21 U.S.C. § 1180 (Supp. IV 1974)).

^{18/} The Council views the agency's proposal as consistent, on its face, with the strict confidentiality requirements of both the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act Amendments of 1974, the Drug Abuse Office and Treatment Act of 1972 and those regulations issued pursuant thereto, and notes, of course, the proposal may not be implemented so as to violate the statutes or regulations. See 42 U.S.C. § 4582 (1970 & Supp. IV 1974), 21 U.S.C. § 1175 (1970 & Supp. IV 1974) and 42 C.F.R. Part 2 (1976).

^{19/} FPM Supplement 792-2, subch. S3.

To assure the cooperation and support of labor organizations, management should deal with union representatives on program policy formulation, and maintain open lines of communication with union leaders. Union representatives, for example, could be included in briefing sessions or other training and orientation programs so that there will be mutual understanding of policy, referral procedure and other elements of the program.

Accordingly, we hold that the second paragraph of the proposal, calling for union support and cooperation for Alcohol and Drug Abuse Prevention and Treatment programs for employees, is within the scope of bargaining required under section 11(a) of the Order.^{20/}

Agency Proposal VI

Dues Deduction

(5) Total amount of service fee: \$.14 per member deductions plus \$.12 for the remittance as a whole.

(6) Net amount remitted.

Agency Determination

The agency determined the proposal to be negotiable under the Order.

Question Here Before the Council

The question is whether the agency's proposal is negotiable under section 21 of the Order.

Opinion

Conclusion: The agency's proposal involving service charges by the agency for union dues deductions is negotiable under section 21 of the Order. Thus, the agency head's determination that the proposal is negotiable was

^{20/}This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the activity's proposal. We decide only that, as submitted by the agency and based on the record before the Council, the second paragraph of this proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{21/}

Reasons: The issue presented by this management proposal is whether agency service charges to a labor organization for payroll dues deductions for that labor organization's members is a negotiable matter under the Order.^{22/} In this regard, the Council in its 1971 Report and Recommendations^{23/} stated, in connection with section 21 of the Order,^{24/} "The question of a service charge for payroll deductions is a meaningful economic item suitable for bargaining between the parties in the same way as other matters governing the labor-management relationship."^{25/} Further, in this regard, the Council

21/ This decision should not be construed as expressing or implying any opinion of the Council as to either the merits of the agency proposal or the consistency of the amounts to be charged as set forth in the proposal with the requirements established by the FPM regarding agency service charges for payroll dues deductions (See n. 27, infra). We decide only that, as submitted by the agency and based on the record before the Council, such proposal seeking to establish agency service charges to a labor organization for payroll dues deductions for that labor organization's members is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

22/ The union contends that this agency proposal, taken together with Proposals II, III, and V, violates sections 10(e) and 19(a)(1) and (6) of the Order. As to its contentions relating to section 10(e), the union advances no persuasive reasons to support its assertion. Hence, we find this unsupported claim to be without merit. As to the union's contention relating to section 19(a)(1) and (6), such contention, conjecturing in essence, unfair labor practices by agency management, does not state a ground for setting aside an agency determination of negotiability. Accordingly, we do not pass upon this claim here. See notes 9, 10, and 13, supra.

23/ Labor-Management Relations in the Federal Service (1975), at 53-59.

24/ Section 21 of the Order provides in relevant part:

Sec. 21. Allotment of dues. (a) When a labor organization holds exclusive recognition, and the agency and the labor organization agree in writing to this course of action, an agency may deduct the regular and periodic dues from the pay of the members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when--

- (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or
- (2) the employee has been suspended or expelled from the labor organization.

25/ Labor-Management Relations in the Federal Service (1975), at 58.

has consistently held proposals on the matter of service charges for payroll dues deductions to be negotiable,^{26/} subject only to the requirements of the Federal Personnel Manual^{27/} and section 21 of the Order. Accordingly, we find this proposal concerned with service charges for payroll dues deductions to be negotiable to the extent that it is consistent with the requirements of FPM chapter 550, subchapter 3-5.

Agency Proposal VII

Union representation

Stewards who solicit grievances, improperly utilize, abuse or excessively use official time for representational or similar duties, demonstrate continuing disrespect or conflict with supervisors will be

26/ See, e.g., Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110 and National Federation of Federal Employees, Local 476 and Joint Tactical Communications Office, Fort Monmouth, New Jersey, 1 FLRC 499 [FLRC No. 72A-42 (Aug. 8, 1973), Report No. 43].

27/ FPM chapter 550, subch. 3-5. In this connection, we note that, although the matter is not relevant to the disposition of the basic question presently before the Council of whether service charges for dues deductions are negotiable, the parties to the present dispute disagree as to what would be the actual amount of the service charge per union member under the agency's proposal. With regard to this matter, we refer the parties to FPM chapter 550, subch. 3-5(1), which provides:

(i) Costs. The amount of the fee, or no fee, an agency shall charge a labor organization for recovering the costs of making each deduction is a matter which is subject to negotiation between the agency and the labor organization; however, the actual cost of the service is the maximum the agency may charge. [Emphasis supplied.]

Hence, as previously mentioned herein at note 21, our decision with respect to the negotiability of the agency's proposal must not be construed as expressly or impliedly ruling on the question, which is not before us in this case, as to whether the amount of the service charge under the proposal is consistent with the requirement of the FPM, quoted and underscored above.

We, further, refer the parties to the Council's Information Announcement of September 17, 1973, (1 FLRC 676, 677-79), regarding the matter of cost of dues deductions, where the Council stated:

. . . Agencies and unions are advised that in the interest of responsible collective bargaining they should not permit negotiations over the matter of a charge for dues withholding to interfere with consideration of more substantial issues. Again, the relative importance of this matter shall be judged in relation to the scope of the total labor-management relationship.

replaced by the Union at the Employer's request. In addition, repeated instances of grievances that are not upheld will be prima facie evidence of misconduct. Employees who grieve repeatedly and are not upheld will be actively discouraged from grieving by the Union in similar reasonably non-productive areas.

Agency Determination

The agency determined the phrase "will be replaced by the Union at the Employer's request," which appears in the first sentence of the proposal, to be nonnegotiable and the remainder of the proposal to be negotiable under the Order.

Question Here Before the Council

The question is whether the last sentence of the agency's proposal^{28/} is within the scope of bargaining under section 11(a) of the Order.

Opinion

Conclusion: The last sentence of the agency's proposal is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that this part of the proposal is negotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

Reasons: As noted earlier in this decision with respect to Proposals I and V (at 2 and 9, supra), the bargaining obligation under section 11(a) of the Order extends to personnel policies and practices affecting the bargaining unit and matters affecting working conditions of bargaining unit employees. As indicated with respect to Proposal I, however, it does not extend to proposals which do not directly relate to such personnel policies and practices and matters affecting working conditions. In our opinion, this proposal, like Proposal I, does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order and is, therefore, outside the union's obligation to bargain.

^{28/} By determining that the phrase "will be replaced by the Union at the Employer's request" is nonnegotiable, in effect deleting it from the first sentence of the proposal, the agency has effectively rendered the remainder of that sentence meaningless. Furthermore, inasmuch as the second sentence of the proposal is made dependent upon the first sentence by the connecting phrase, "In addition," the second sentence of the proposal, also, is rendered in effect meaningless. Hence, we do not consider these sentences of the proposal to be at issue herein and, therefore, confine our decision to the question of the negotiability of the last sentence of the proposal.

This agency proposal would require that "Employees who grieve repeatedly and are not upheld will be actively discouraged by the Union in similar reasonably non-productive areas." Thus, the proposal would require the union, as the representative of the employees, actively to discourage grievances by employees who have been repeatedly unsuccessful with respect to their grievances in the past even though such grievances fell within the scope of the negotiated grievance procedure. Under the proposal, therefore, the union would be required, prior to the first stage of the grievance procedure, that is prior to deciding whether to invoke the grievance procedure, actively to discourage a potential grievant from pressing his grievance. This requirement is predicated upon the relationships within the union as well as between the union and the members of the bargaining unit it represents and, clearly as with Proposal I, herein, concerns internal union affairs.^{29/} It is, in our view, only indirectly concerned with personnel policies and practices and matters affecting working conditions of employees in the bargaining unit within the meaning of section 11(a) of the Order. Therefore, we find the proposal does not involve a matter within the scope of required bargaining under section 11(a) of the Order and hold that the agency determination to the contrary must be set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 29, 1978

29/ See text and accompanying notes, Proposal I, supra.

American Federation of Government Employees, AFL-CIO, Local 2054 and Veterans Administration Hospital, Little Rock, Arkansas. The dispute involved the negotiability of the union's proposal which, in substance, was a proposal for a grievance procedure free of express contractual limitations.

Council action (June 30, 1978). The Council held that the agency had misinterpreted the union's proposal and thereby failed to establish that its cited regulations were applicable so as to preclude negotiation of the proposal; and, further, that the proposal was not barred from negotiation by the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determination that the proposal was nonnegotiable.

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

American Federation of Government
Employees, AFL-CIO, Local 2054

(Union)

and

FLRC No. 77A-125

Veterans Administration Hospital,
Little Rock, Arkansas

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

During negotiations between the parties on a grievance procedure as required by section 13 of the Order,^{1/} the activity demanded that four exclusions from the procedure's scope be expressly stated in the agreement.^{2/} In response, the union proposed "to not include the . . . exclusions [demanded by the agency] within the grievance procedure" [emphasis in original], thus proposing for negotiation, in substance, a grievance procedure free of express contractual limitations.

Agency Determination

The agency determined, in essence, that the union's proposal would establish that the scope of the parties' negotiated grievance procedure would cover

^{1/} Section 13(a) of the Order provides in part that "An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances."

^{2/} The express exclusions demanded by the agency were:

1. Disciplinary actions proposed and taken by authority higher than Hospital Director and/or Canteen Manager in accordance with published VA policies and regulations.

2. Grievances over matters considered excluded from negotiations by Article 4(b) and 5(b) of this Agreement.

(Articles 4(b) and 5(b) are restatements of Sections 11(b) and 12(b) of the Order)

(Continued)

matters which are nonnegotiable under agency regulations for which a "compelling need" exists,^{3/} and under sections 11(b), 12(b), and 13 of the Order, and, hence, that the proposal is nonnegotiable.

Question Here Before the Council

The question is whether the union's proposal for, in effect, a negotiated grievance procedure containing no express contractual limitations on its scope, is barred from negotiation by either published agency regulations or the Order.

Opinion

Conclusion: The agency misinterpreted the proposal and thereby failed to establish that its regulations are applicable so as to preclude negotiation of the proposal.^{4/} Furthermore, the proposal is not barred from negotiation by the Order.^{5/} Therefore, the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{6/}

(Continued)

3. The content of Agency policies and regulations.
4. Termination of temporary and probationary employees.

^{3/} The matters determined to be nonnegotiable by the agency are those described in the exclusions from the scope of the grievance procedure demanded by the agency, listed in note 2, supra. Other provisions of the parties' agreement, including those relating to the negotiated grievance procedure, are not before us.

^{4/} In view of our decision herein, we find it unnecessary to reach the additional contention of the agency that the authority of the Council delegated by the President under section 11(a) of the Order to rule on the "compelling need" for agency regulations to bar negotiations infringes upon the regulatory authority of the Administrator of the Veterans Administration pursuant to 38 U.S.C. § 4202 (1970).

^{5/} Since, as discussed hereinafter, we do not view the union's proposal as including within the proposed scope of the parties' negotiated grievance procedure the matters demanded to be excluded by the agency, we do not reach the question of whether the inclusion of any of these matters within a grievance procedure negotiated under the Order is barred by statute or the Order.

^{6/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposal. We decide only that, in the circumstances presented, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

Reasons: The agency claims in substance that the union's proposal, in essence for a negotiated grievance procedure free of express contractual limitations, would establish that the scope of the negotiated grievance and arbitration procedure would cover certain matters (set forth in note 2, supra) which, in the agency's view, are nonnegotiable under agency regulations for which a "compelling need" exists and under sections 11(b), 12(b), and 13 of the Order. Thus, the agency contends that the union's proposal is, itself, nonnegotiable under agency regulations and the Order. We find the agency's contentions to be without merit.

Turning first to the agency's assertion of its regulations as a bar to negotiation, we find that the agency has misinterpreted the meaning of the proposal. The union's proposal to omit the exclusions demanded by the agency would merely dispense with express contractual limitations on the scope of the negotiated grievance procedure; it would not, by itself, provide a basis for any claim that particular matters were intended by the parties to be included within the procedure's scope. For example, as to the inclusion of grievances over matters covered by agency regulations, the Order clearly envisions an affirmative provision in the negotiated agreement to effect such coverage. Thus, the Council stated in its Report and Recommendations which led to the amendment of section 13 of the Order to read as it currently provides:

[T]he parties may, through provisions in their negotiated agreement, agree to resolve grievances over matters covered by agency regulations and within the discretion of agency management through their negotiated grievance procedure. In fact, . . . the parties may make their negotiated grievance procedure the exclusive procedure for resolving grievances of employees in the bargaining unit over agency policies and regulations not contained in the agreement. If the parties should agree to make the negotiated procedure the exclusive procedure, grievances over agency policy and regulation, to the extent covered thereby, would no longer be subject to grievance procedures established by agency regulations.^{7/}

Thus, the agency's contrary interpretation of the union's proposal as establishing that the coverage and scope of the parties' grievance procedure will cover matters assertedly nonnegotiable under agency regulations is erroneous.

Accordingly, consistent with established Council precedent, we hold that the agency has failed to demonstrate the applicability of its regulations as a bar to negotiation of the union's proposal under section 11(a) of the Order.^{8/}

7/ Labor-Management Relations in the Federal Service (1975) at 43-44.

8/ See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 3 of Council decision. In view

As to the agency's contentions that the Order renders the union's proposal nonnegotiable, we find that the proposal, in substance that the negotiated grievance procedure be free of express contractual limitations, is consistent with the Order's requirements. In this regard, section 13 of the Order, as amended, provides in relevant part as follows:

Sec. 13. Grievance and arbitration procedures. (a) . . . The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. . . .
[Emphasis supplied in part.]

In its Report and Recommendations the Council stated as to the intended meaning of section 13:

The Council has carefully considered whether the Order should contain any specific limitations upon the scope and coverage of negotiated grievance procedures other than the exclusion of matters covered by statutory appeal procedures. It has concluded that the Order should not contain any other specific limitations. Instead, the coverage and scope of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. This will give the parties greater flexibility at the negotiating table to fashion a negotiated grievance procedure which suits their particular needs. For example, it will permit them to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from the negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures.^{9/}

Thus, in general, it is clear that under section 13, agreements subject to the Order must contain a grievance procedure whose coverage and scope is negotiated by the parties. However, while the Order requires the parties to negotiate the coverage and scope of their grievance procedure, the Order also specifically limits that procedure, to the extent that it "may not cover matters for which a statutory appeal procedure exists and so long as

(Continued)

of our determination that the agency has not established the applicability of its regulations to the disputed proposal, we do not reach the question of the "compelling need" for those regulations.

^{9/} Labor-Management Relations in the Federal Service (1975) at 43.

it does not otherwise conflict with statute or this Order." Furthermore, although the Order does not require that these prescribed limitations be expressly recited as restrictions on the coverage and scope of the negotiated grievance procedure in each agreement negotiated under the Order,^{10/} nevertheless such limitations on negotiated grievance procedures plainly apply whether or not the provisions describing an agreement's grievance procedure recite them. Hence, failure to repeat such restrictions established by the Order in an agreement does not render an otherwise negotiable grievance procedure nonnegotiable.

It is also clear, generally, that under section 13 of the Order the parties may agree to contractual limitations on the coverage and scope of their negotiated grievance procedure which limitations are more restrictive than those prescribed by the Order.^{11/} However, it is equally obvious that such additional limitations must be negotiated and may not be unilaterally imposed by either party.

Applying the foregoing principles to the instant proposal, we have found that the union merely proposes for negotiation a grievance procedure without any express contractual limitations (i.e., either reflecting those limitations set forth in the Order or including additional limitations more restrictive than those prescribed by the Order). As is apparent from the discussion above, such a proposal is consistent with the Order. That is, the Order does not require that the prescribed limitations set forth in the Order be expressly recited in the negotiated grievance procedure. As to additional limitations more restrictive than those prescribed by the Order, the Order requires that they be negotiated, not unilaterally imposed by either party. Of course, while the proposal for a negotiated grievance procedure free of express contractual limitations is, thus, negotiable, we emphasize that the restrictions established by the Order apply whether or not the provisions of the negotiated grievance procedure recite them. Hence, we set aside the agency's determination that the Order bars negotiation of the union's proposal.

In summary, we hold that the union's proposal is not barred from negotiation by agency regulations or the Order. Accordingly, we find the proposal negotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 30, 1978

^{10/} Of course, the Order provides that the requirements of section 12 be expressly stated in all agreements negotiated under the Order.

^{11/} See generally Labor-Management Relations in the Federal Service (1975) at 42-44.

American Federation of Government Employees, AFL-CIO, Local 15 and Internal Revenue Service, North-Atlantic Regional Appellate Office, New York. The dispute involved proposals which the union sought to negotiate concerning supervisory observation or monitoring of Appeals Officers' conferences with taxpayers, which the agency determined to be nonnegotiable under section 12(b) of the Order. However, at the time of the union's appeal to the Council from the agency's determination, an unfair labor practice complaint which the union had previously filed in the dispute was pending before the Assistant Secretary for resolution under his procedures.

Council action (July 7, 1978). The Council found that the union's appeal, attempting to raise issues as to the negotiability of the disputed proposal under the Order, was prematurely filed and that the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules, had not been met. Accordingly, the Council denied the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 7, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees,
AFL-CIO, Local 15 and Internal Revenue
Service, North-Atlantic Regional Appellate
Office, New York, FLRC No. 78A-4

Dear Mr. King:

The Council has carefully considered your petition for review and the agency's statement of position, in the above-entitled case. For the reasons indicated below, the Council has determined that your appeal must be denied.

The basic facts, as set forth in the record, are as follows: During the term of an agreement between the Regional Commissioner, North-Atlantic Region, Internal Revenue Service (the activity) and the American Federation of Government Employees, AFL-CIO, Local 15 (the union), supervisors in the activity's Appellate Division several times attended and observed taxpayer conferences with Appeals Officers. The union expressed its concerns over such supervisory observation of Appeals Officers, alleging such observation was a change in past practice and was negotiable. The activity took the position that this evaluation technique had always been available to a supervisor at the option of the chief of each Appellate Office, although it had been utilized only sporadically in recent years in the North-Atlantic Region, and that, even if not a past practice, the matter was exempted from the activity's obligation to negotiate. The parties attempted unsuccessfully to resolve their differences and simultaneously were engaged in negotiations for a new contract. Thereafter, the activity, reaffirming its position that there had been no change in past practice and that the matter is not subject to negotiation, solicited and offered to discuss "any specific questions or concerns" of the union in this area.

Subsequently, the union filed an unfair labor practice charge with the activity alleging that its refusal to negotiate with the union on the subject matter of the activity's right to have supervisors monitor Appeals Officers' conference technique violated section 19(a)(1) and (6) of the Order, and requested negotiations on this matter. At the same time,

as an alternative to its primary position that the activity's failure to negotiate the propriety of the supervisory observations was an unfair labor practice, the union submitted four proposals, including the three involved in the present appeal, to the activity and requested negotiations "as to the manner in which the subject observations will, if ultimately deemed proper, be conducted." The union alleges that at a meeting held in an attempt to resolve the issues, the activity withdrew its position that supervisory monitoring of conferees was established practice, but still maintained that the issue was nonnegotiable while allowing for negotiations over the impact of the decision. Thereafter, the activity notified the union that the request to negotiate over the impact of the activity's decision to monitor conferees was not timely and that the proposals which are the subject of the instant appeal are nonnegotiable under section 12(b) of the Order. The union then filed an unfair labor practice complaint alleging that the activity violated section 19(a)(1) and (6) of the Order by instituting "a new working condition (namely monitoring of conferees) without notifying the Union," and by refusing "to negotiate the act of monitoring." Seven months after the activity asserted that the union's proposals were nonnegotiable, the union requested an agency head negotiability determination on its proposals.

The Internal Revenue Service (the agency) determined that the three proposals here in dispute are nonnegotiable because they deny management "the effective means to exercise rights and to discharge responsibilities" reserved in section 12(b)(1), (2), (4) and (5) of the Order. Further, the agency head agreed with the conclusion reached by the activity that a fourth proposal, not before the Council, was negotiable. He stated, however, that since the "existing regular term agreement between the parties" addresses the subject of that fourth proposal in detail, the agency's "determination on the strict question of whether the fourth proposal is negotiable, therefore, should not necessarily be construed as acknowledging that there is presently an obligation to bargain over it." The agency also stated in its determination that since nearly seven months elapsed between the activity's assertion of nonnegotiability and the union's request for an agency head negotiability determination it is:

. . . unreasonable to hold management open to a mid-contract duty to bargain for such a long time in circumstances where it could reasonably have been concluded that the union had dropped the matter, especially where the proposal was always acknowledged to be negotiable and where it was, in fact, addressed in major part during simultaneous regular term bargaining.

The union subsequently appealed this determination of nonnegotiability to the Council and the agency filed a statement of its position.

In your appeal to the Council, you assert that the proposals are negotiable and further that "[t]he parties were involved in unfair labor practice charges concerning this issue but also came to a resolution of those charges." The agency, however, maintains that the "referred-to unfair labor

practice complaint has not been resolved."^{1/} The agency also asserts that the present negotiability appeal and the unfair labor practice complaint arise out of the same alleged unilateral change in policy and are inextricably related. Thus, especially in view of the pending unfair labor practice complaint regarding the activity's alleged refusal to negotiate, the agency requests the Council to deny the union's petition for review of negotiability issues arising in an unfair labor practice context. More particularly, the agency claims "that the union is primarily concerned with the [activity's] alleged refusal to negotiate, as opposed to the negotiability of the union's proposals, and that the proper forum for the entire matter is presently before the Assistant Secretary."

The Council is of the opinion that the negotiability issues attempted to be raised by the union in its appeal are premature.^{2/} As previously indicated, a union unfair labor practice complaint was filed with the Assistant Secretary alleging that the activity violated the Order by instituting "a new working condition (namely monitoring of conferees) without notifying the Union" and by refusing "to negotiate the act of monitoring." The agency contends, in regard to this unfair labor practice complaint, among other things, that the supervisory observation of Appeals Officers was a past practice and thus the activity has made no change in working conditions and has no obligation to bargain. Thus, the issue of whether the activity fulfilled any bargaining obligation it may have had under the Order in regard to the monitoring of conferees is currently before the Assistant Secretary for resolution in accordance with his procedures. Hence, a determination by the Assistant Secretary that the activity had no obligation to bargain, or had fulfilled any bargaining obligation which did exist, under the Order in regard to the monitoring of conferees would have the effect of precluding the necessity for a Council decision under section 11(c)(4) of the Order^{3/} by rendering moot the negotiability issues, thereby avoiding an unwarranted proliferation of cases before the Council.

^{1/} The Council has been administratively advised by the Labor-Management Services Administration that the union unfair labor practice complaint was being processed under the Assistant Secretary's procedures during the pendency of this case.

^{2/} In view of the Council's decision herein, it is unnecessary for the Council to pass upon the other contentions raised by the agency.

^{3/} Section 11(c)(4) of the Order provides as follows:

Sec. 11. Negotiation of agreements.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(Continued)

Furthermore, were the Council to decide under section 11(c)(4) that the union's proposals are negotiable, while the issue as to the activity's fulfillment of any obligation to bargain which may exist in regard to the monitoring of conferees remained to be resolved, such Council decision would lack finality as to the underlying dispute between the parties in this case.^{4/} In other words, if the Assistant Secretary subsequently determined under his procedures, that the activity had no obligation to bargain or had fulfilled any bargaining obligation which did exist under the Order in regard to the monitoring of conferees, that decision would be dispositive of the parties' underlying dispute, notwithstanding the previous decision of the Council issued pursuant to section 11(c)(4).^{5/}

Moreover, it appears that the factual determinations required to be made by the Assistant Secretary in order to resolve the unfair labor practice complaint; viz., whether the monitoring of conferees was a past practice or a unilateral change, determinations with respect to the effect of bargaining history and the parties' agreement, and the circumstances of the activity's actions underlying the dispute, are "inextricably intertwined" with disputed issues of fact which must be determined in order to resolve the negotiability issues sought to be raised in this instant appeal.^{6/} "Such disputed issues of fact are best resolved through the adversary process of a formal hearing."^{7/}

(Continued)

(4) A labor organization may appeal to the Council for a decision when --

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order

^{4/} In this regard, section 2411.53 of the Council's rules (5 C.F.R. 2411.53) provides that "[t]he Council shall not issue advisory opinions."

^{5/} National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Midwest Regional Office, Chicago, Illinois, FLRC No. 78A-8 (July 7, 1978), Report No. 152. See also National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Pennsylvania, FLRC No. 77A-109 (Apr. 22, 1978), Report No. 149.

^{6/} See National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice, FLRC No. 76A-47 (Sept. 29, 1976), Report No. 114.

^{7/} Labor-Management Relations in the Federal Service (1975) at 48.

Therefore, for the reasons stated, we find that the instant appeal, attempting to raise issues as to the negotiability of the disputed proposals under the Order, is prematurely filed and the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 C.F.R. 2411.22), have not been met.

Accordingly, because your petition for review fails to meet the conditions for review prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure (5 C.F.R. 2411.22), your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A. B. Horn
IRS

National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Midwest Regional Office, Chicago, Illinois. The dispute involved proposals which the union sought to negotiate concerning the realignment of work and related procedures, and which the activity declared to be nonnegotiable. The agency rejected the union's subsequent request for a negotiability determination as both untimely and moot; and at the same time, issued its final decision with respect to the related unfair labor practice charge which the union had filed in the dispute. The union thereupon filed the instant petition for review of negotiability issues with the Council and, during the pendency of its appeal before the Council, filed an unfair labor practice complaint with the Assistant Secretary.

Council action (July 7, 1978). The Council found that the union's appeal, attempting to raise issues as to the negotiability of the disputed proposals under the Order, was prematurely filed and that the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules, had not been met. Accordingly, the Council denied the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 7, 1978

Mr. Alan S. Hersh
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
Bureau of Alcohol, Tobacco and Firearms,
Midwest Regional Office, Chicago, Illinois,
FLRC No. 78A-8

Dear Mr. Hersh:

The Council has carefully considered your petition for review and supplement thereto, and the agency's statement of position in the above-entitled case. For the reasons indicated below, the Council has determined that your appeal must be denied.

The basic facts, as set forth in the record, are as follows: During the term of the national agreement between the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (the agency) and the National Treasury Employees Union (the union), management proposed certain changes in employment conditions which would affect bargaining unit employees. In response, the union submitted bargaining proposals to the agency's Midwest Regional Office (the activity) concerning the realignment of work and the procedures thereof in the Firearms/Explosives Licensing Section of the region's Technical Services Division. On October 25, 1977, the activity declared the union's proposals nonnegotiable, alleging that they infringed management's reserved rights under the Order and conflicted with the controlling national agreement. On November 28, 1977, the union requested an agency head negotiability determination on its proposals. The agency head rejected this request as both "untimely and moot," alleging that it was the agency's "understanding" that the proposed changes, which had recently been implemented, were instituted only after the union "had been provided with notice, had been afforded an opportunity to negotiate, and had acquiesced to the determination by [activity] regional officers that

[the union's] proposals regarding the changes, were nonnegotiable.^{1/} The union thereafter timely filed its instant appeal with the Council.^{2/}

In your appeal to the Council, you assert that: the request for an agency head negotiability determination within approximately 1 month of the activity's taking the position that the proposals are nonnegotiable was not untimely; no authority is cited by the agency to support the activity's conclusions as to untimeliness and mootness, thereby making it impossible for the union to adequately respond; and, the "understanding" on the part of the agency is "completely without foundation." In this latter regard, you challenge the agency to produce any evidence signed by the union which would indicate its "acquiescence" in the determination at the local level that the proposals were nonnegotiable.

The Council is of the opinion that the negotiability issues attempted to be raised by the union in its appeal are premature. The essence of the contentions and arguments of the parties principally relates to whether, under the particular circumstances here presented, the agency has met its obligation to bargain over the union's proposals.^{3/} Hence, the substance of the parties' allegations raises unfair labor practice issues appropriate for resolution under the procedures set forth under section 6(a)(4) of the Order.^{4/} As previously indicated (note 1, supra), the issue of the agency's fulfillment of its bargaining obligation under the Order is currently before the Assistant Secretary for resolution in accordance with his procedures.

Moreover, a determination by the Assistant Secretary that the activity had fulfilled its bargaining obligation under the Order in regard to the union's proposals would have the effect of precluding the necessity for a Council

1/ In its rejection of the union's request for an agency head negotiability determination, the activity also issued its final decision with respect to unfair labor practice charges filed by the union alleging that the activity acted unilaterally when it made the subject changes, asserting that "the record indicates that the [activity] fulfilled its bargaining obligations with [the union] on this matter." The Council has been administratively advised by the Labor-Management Services Administration that the union filed an unfair labor practice complaint during the pendency of this case.

2/ The agency additionally contends that the union's petition to the Council was not filed within the time limits prescribed in the Council's rules of procedure. Apart from other considerations, such contention is based on a misinterpretation of section 2411.24(c)(2) of the Council's rules (5 C.F.R. 2411.24(c)(2)) and is totally without merit.

3/ None of the parties' submissions to the Council address the negotiability of the union's proposals.

4/ National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice, FLRC No. 76A-47 (Sept. 29, 1976), Report No. 114.

decision under section 11(c)(4) of the Order^{5/} by rendering moot the negotiability issues, thereby avoiding an unwarranted proliferation of cases before the Council. Furthermore, were the Council to decide under section 11(c)(4) that the union's proposals are negotiable, while the issue as to fulfillment of the agency's obligation to bargain under the Order remained to be resolved, such Council decision would lack finality as to the underlying dispute between the parties in this case.^{6/} In other words, if the Assistant Secretary subsequently determined under his procedures, that the agency had fulfilled its bargaining obligation under the Order in regard to the union's proposals, that decision would be dispositive of the parties' underlying dispute, notwithstanding the previous decision of the Council issued pursuant to section 11(c)(4).^{7/}

Therefore, for the reasons stated, we find that the instant appeal, attempting to raise issues as to the negotiability of the disputed proposals under the Order, is prematurely filed and the conditions for Council

5/ Section 11(c)(4) of the Order provides as follows:

Sec. 11. Negotiation of agreements.

.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

.

(4) A labor organization may appeal to the Council for a decision when --

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order

6/ In this regard, section 2411.53 of the Council's rules (5 C.F.R. 2411.53) provides that "[t]he Council shall not issue advisory opinions."

7/ American Federation of Government Employees, AFL-CIO, Local 15 and Internal Revenue Service, North-Atlantic Regional Appellate Office, New York, FLRC No. 78A-4 (July 7, 1978), Report No. 152. See also National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Pennsylvania, FLRC No. 77A-109 (Apr. 12, 1978), Report No. 149.

review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 C.F.R. 2411.22), have not been met.

Accordingly, because your petition for review fails to meet the conditions for review prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure (5 C.F.R. 2411.22), your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: J. Panagis
ATF

Internal Revenue Service, Jacksonville District and National Treasury Employees Union, Florida Joint Council (Smith, Arbitrator). The arbitrator found that the two GS-9 grievants should have been temporarily promoted by reason of their performance of a substantial amount of GS-11 work during the period of time in question and awarded them appropriate backpay for the period. The Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that the arbitrator's finding that the grievants performed GS-11 work was inconsistent with and in violation of classification requirements of the Civil Service Commission, and that the backpay award may not be legally implemented. The Council also granted the agency's request for a stay. (Report No. 140)

Council action (July 12, 1978). Because this case and the backpay award concerned issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violated applicable law. Based upon the decision of the Comptroller General, rendered in response to the Council's request, the Council concluded that the arbitrator's award did not violate applicable law. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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

Internal Revenue Service,
Jacksonville District

and

FLRC No. 77A-97

National Treasury Employees Union,
Florida Joint Council

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, this matter arose after a general reallocation of case assignments among revenue officers at the activity. As a result of this reassignment, the grievants, two GS-9 Revenue Officers, were assigned responsibility for substantial numbers of cases that were computer coded as Level 2 which indicated that the cases met the predicted work requirements of GS-11. Each of the grievants filed a grievance requesting a temporary promotion to GS-11 for the period during which they were assigned the duties of a GS-11 Revenue Officer--assertedly the period during which they were assigned computer coded Level 2 cases--on the basis that this constituted a detail to a position of higher grade within the meaning of the negotiated agreement which thereby entitled them to a temporary promotion.

The activity determined that in order to effectively evaluate the grievances, it was necessary to review the case inventories of the grievants to determine the grade level of the assigned cases. This review was conducted on January 29, 1976, and it was concluded that the assignment of computer coded Level 2 cases to the grievants did not result in a higher classified level of work. The grievances were denied by the activity and ultimately were submitted to arbitration.

The Arbitrator's Award

To resolve the grievances, the arbitrator first questioned whether the "grievants did in fact perform GS-11 work during the period or periods claimed." In this respect the arbitrator concluded the proper inquiry was "whether the job duties thus assigned are of a quantity or magnitude beyond that normally expected of 'developmental' work assignments, and, so far as appears, have been performed at least at the minimum range of skill and responsibility properly to be expected of the officer." He determined that

the computer code levels presumptively established the grade level of the work involved, subject to reasonable review and reevaluation by management. It was also clear to the arbitrator that each grievant had a preponderance of Level 2 cases, presumably involving GS-11 work, that was beyond the developmental level. He observed that prior to the review of January 29, 1976, the activity took no action to revise the assigned case level of the grievants or to question the quality of their job performance and that more than 30 consecutive days elapsed between the initial assignments to the grievants and the January 29 review. In view of these circumstances, the arbitrator held:

[F]or purposes of application of Article 8, Section 1, . . . [the grievants] were doing a substantial amount of GS-11 work on the cases to which they were assigned such as to have entitled them to a temporary promotion and to be paid the GS-11 rate of pay during that period. . . .

.
. . . On the evidence of record, however, and especially in view of the reviews of January 29, there is no basis for holding that from January 29 onward they were performing significant amounts of such work.

In view of these conclusions respecting the level of work performed by the grievants, the arbitrator next questioned whether the detail provision of the negotiated agreement applied to the factual circumstances surrounding these grievances. In the arbitrator's judgment such provision applied and

should be construed to mean that if a lower graded employee is assigned to perform higher graded work, in properly significant proportions, and does so for a consecutive period of at least 30 days, he thereby becomes entitled to a "temporary promotion" and, more importantly, to be paid for such period the rate of pay normally associated with the higher level work.

Accordingly, the arbitrator upheld the grievances and awarded the grievants backpay based on the rate differential between GS-9 and GS-11 for the period commencing on the date each grievant was, respectively, first assigned the GS-11 duties, in properly significant proportions, and ending for both grievants on January 29, 1976, the date of the review by management of the case inventories of the grievants.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the arbitrator's finding that the grievants performed GS-11 work is inconsistent with and in violation of classification requirements of the Civil Service Commission and the agency's exception which alleged that the backpay award may not be legally implemented.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the arbitrator's finding that the grievants performed GS-11 work is inconsistent with and in violation of classification requirements of the Civil Service Commission and the agency's exception which alleged that the backpay award may not be legally implemented. Because this case and its award of backpay concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law. The Comptroller General's decision in this matter, B-191266, June 12, 1978, is set forth below.

The background of this case, as presented in the arbitrator's award and opinion dated July 21, 1977, is as follows. The grievants, Roy F. Ross and Everett A. Squire, were employed as Revenue Officers, grade GS-9, by the Internal Revenue Service Jacksonville District, and were assigned to the Collection Division in the IRS office in St. Petersburg, Florida. The principal duties of a Revenue Officer in the Collection Division are to arrange for the collection of delinquent taxes and to secure delinquent returns. Each case is assigned a numeric indicator supplied by the IRS computer on the basis of selected objective criteria. Pursuant to the "Case Assignment Guide for Revenue Officers" of the IRS Manual, the numeric level assigned indicates the predicted grade level of the case and is the primary consideration in the assignment of cases for field contact. Numeric Level 1 cases meet the predicted work requirements of grade GS-12; Level 2 cases meet such requirements of grade GS-11; and Level 3 cases are for lower grades. The general objective is that Level 1 and 2 cases are to be assigned to Revenue Officers in grades GS-12 and GS-11 to the maximum extent feasible, but they may be assigned as developmental work to lower graded officers to enable them to gain experience in higher grade work. Such developmental work normally should be no more than 25 percent of their work. Finally, group managers are authorized to review the cases and make changes in the numeric level indicators.

On or about November 24, 1975, there was a general reallocation of case assignments to Revenue Officers in the St. Petersburg office. As a result of that action, Messrs. Ross and Squire filed grievances in late January, 1976, requesting temporary promotions to grade GS-11 for the period from November 24, 1975, to January 26, 1976, in the case of

Mr. Ross and from December 9, 1975, to January 26, 1976, in the case of Mr. Squire. The grievants also requested permanent promotions to grade GS-11, but it appears that they later withdrew that request.

The grievants sought these temporary promotions under the provisions of Article 8 (Details), Section 1, of the Multi-District Agreement between Internal Revenue Service and National Treasury Employees Union, on the ground that more than 50 percent of their case load and completed work had been classified Level 2 (GS-11) work for a period of more than 30 working days. Almost immediately after the two grievances were filed, the agency conducted a review of the grievants' case inventories in order to evaluate the grievances. The review was conducted on January 29, 1976, by two management officials and a union representative. They concluded that only a small portion of the cases then assigned to Messrs. Ross and Squire actually belonged in Level 2 and, therefore, that the prior assignment of Level 2 cases to them did not constitute a detail to a higher grade position. They did not, however, change the coded level of the cases to Level 3 or reassign the cases to other officers at that time. Then, on March 1, 1976, there was another reshuffling of assignments and the bulk of the Level 2 cases assigned to the grievants were transferred to Revenue Officers of grade GS-11 classification.

The Acting District Director of IRS denied the grievances on the ground that Messrs. Ross and Squire were not assigned or detailed to a position of a higher grade since no vacant position of a higher grade existed, and therefore, there was no violation of Article 8, Section 1, and no basis for the relief requested.

ARBITRATOR'S OPINION AND AWARD

The arbitrator first addressed the issue of whether the grievants did in fact perform grade GS-11 work during the periods claimed. The standard he applied is whether the higher level duties assigned are greater than normally expected of "developmental" work and have been performed at least at the minimum range of skill and responsibility expected.

He found that, on November 24, 1975, each grievant was assigned to preponderance of cases that were coded Level 2 and thus presumably involved grade GS-11 work. Mr. Squire received 75 cases, of which 62 (84 percent) were coded at Level 2. Mr. Ross received 26 cases, of which 22 (85 percent) were Level 2. After November 24, 1975, Mr. Squire testified that a preponderance of his work was on Level 2 cases and that in the next weeks he closed 36 cases, of which 30 were Level 2. Mr. Ross testified that, between November 24, 1975 and January 28, 1976, he received 92 more cases, of which 58 (62 percent) were Level 2, and an additional 42 cases by transfer, of which 33 were coded Level 2. He closed 33, of which 21 were Level 2.

This data was not challenged by the IRS nor was there any evidence submitted that, prior to the file review of January 29, 1976, the agency revised the level of any assigned case or questioned the job performance of grievants. As to the January 29 review, the arbitrator noted that it did not focus on the cases closed after November 24 and prior to the filing of the grievances and should not be given retro-active effect as an evaluation of the work performed prior to January 29.

On the basis of the foregoing analysis, the arbitrator found that the grievants had performed a substantial amount of grade GS-11 level work during the period November 24, 1975 to January 29, 1976, such as to warrant a finding that they had been assigned to grade GS-11 work for that period within the meaning of Article 8, Section 1, assuming its applicability. He further found that the proportion of such higher level work far exceeded the normal maximum of 25 percent properly assignable for "developmental" purposes. After January 29, he found that the grievants did not perform a significant amount of grade GS-11 work.

The arbitrator then turned to the issue of whether Article 8, Section 1, of the agreement applies to the facts of this case. It reads as follows:

"The Employer agrees that an employee who is assigned to a position of higher grade for thirty (30) consecutive work days or more will be temporarily promoted and receive the rate of pay for the position to which he is temporarily promoted. The Employer further agrees to refrain from rotating assignments of employees to avoid compensation at the higher level."

The arbitrator concluded that this provision applied to the grievance on the basis of an analysis of the nature of work performed, without regard to whether there had been a formal assignment or detail of the employee to the higher graded position or whether a vacancy existed in the higher graded position, provided that the job duties assigned at the higher level were of a quantity or magnitude beyond that normally expected of "developmental" work assignments and were performed at the minimum level of skill and responsibility properly expected. In so holding, he rejected the agency's contention that Article 8, Section 1, applies only when an employee has been detailed to a position for which there is a funded vacancy.

The arbitrator also rejected the agency's contention that the grievances involving Messrs. Ross and Squire must be considered under Article 9, Section 2, of the agreement dealing with Evaluations of Performance. That section provides, in pertinent part, as follows:

"* * *Where it has been administratively determined that an employee has performed:

1. higher graded duties for 50% or more of the previous 12 month period,
2. in a manner which fully meets the performance requirements of the higher graded duties,

such performance will be recognized by a Special Achievement Award.* * *"

The arbitrator stated that Article 9, Section 2, can be read as dealing with a situation where, over a long-term period, the employee intermittently performs higher graded duties aggregating 50 percent or more of his time, while Article 8, Section 1, can be read as dealing with a situation where the employee for a shorter period of time (but at least 30 consecutive days) performs such duties as a significant portion of his total work load.

The arbitrator also rejected the agency's contention that the grievant's complaint involves a classification error for which a statutory appeal procedure exists. He found that, since the complaint dealt with the temporary assignment of higher graded work which was normally assigned to someone in an established grade GS-11 Revenue Officer position, the Civil Service Commission (CSC) classification appeals procedure would not be available. Finally, he ruled that backpay was not precluded by rulings of the Supreme Court or the Comptroller General.

Therefore, the arbitrator sustained the grievances and awarded the grievants backpay based upon the pay differential between grades GS-9 and GS-11 for the applicable periods.

On appeal to the Federal Labor Relations Council, the agency contends that the arbitrator's award is inconsistent with and in violation of the classification requirements of the CSC since the arbitrator ignored the position classification standards promulgated by the CSC for the Internal Revenue Officer Series, GS-1169-0, and substituted the agency's "case assignment guide" in determining whether the grievants had actually performed higher level duties. The agency also argues that the issue is essentially a classification question, that is, whether the duties which the grievants were assigned should have been classified at the grade GS-11 level. Thus, the agency concludes: (1) that the award may not be implemented since the issue involves classification appeals which are subject to a statutory appeals procedure and are, therefore, outside the scope of arbitration; (2) that backpay may not be awarded for classification errors; and (3) that the decisions of our Office concerning extended details are not applicable.

The union contends that the arbitrator's finding that the grievants performed grade GS-11 work is a finding of fact which is not reviewable by the Council and is not otherwise in contravention of CSC classification standards. The union also argues that the classification appeals procedure is inappropriate in this case since the grievants do not seek to have their positions reclassified but rather seek only higher pay for temporarily assuming the duties of a higher graded position. Finally, the union states that the award of backpay is appropriate under decisions of our Office since there has been a violation of a collective bargaining agreement.

DISCUSSION

Because of the Comptroller General's authority over the expenditures of appropriated funds (31 U.S.C. §§ 74, 82d,), the Federal Labor Relations Council has requested our decision as to whether the arbitrator's award violates applicable law. In deciding the issue, we fully agree with the Council's view that courts and agencies authorized to review an arbitration award must be reluctant to interfere with it. At the same time, we must carry out our statutory duty to make sure that Federal funds are spent only in accordance with the laws passed by the Congress. Accordingly, our duty is to determine whether the award made by the arbitrator is consistent with applicable laws, regulations, and Comptroller General decisions so that it may be validly implemented through the expenditure of appropriated funds for backpay.

We have held that the violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. See Annette Smith, et al., 56 Comp. Gen. 732 (1977) and decisions cited therein. The Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H, are the appropriate authorities for compensating employees for such violations of a negotiated agreement assuming there is a finding that the denial or loss of pay or allowances is a result of and would not have occurred but for the unjustified or unwarranted personnel action. Smith, supra. See also 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Fed. Reg. 16125.

In ruling upon the legality of appropriated fund expenditures incident to arbitration awards, we generally will not rule upon any exceptions to the arbitrator's award relating to the facts, and thus, in the present case, we shall limit our consideration to the legality of implementing the award based on the facts as found by the arbitrator that the grievants had performed a substantial amount of grade GS-11 work during the period in question.

In the case before us, the IRS, in effect, maintains that the arbitrator misinterpreted Article 8, Section 1, of the agreement. The agency's view is that the section applies only to details to higher grade positions and not to the assignment of higher level duties. Thus, according to the agency, the section does not apply to the instant case because the grievants were not "detailed" to vacant, budgeted positions within the meaning of the Federal Personnel Manual, but were merely assigned higher graded duties.

The arbitrator carefully considered the IRS arguments on this issue. He posed the question and answered it as follows (Opinion, p. 24):

"In view of the conclusions reached above, it is necessary to determine whether Article 8, Section 1, applies to a fact situation such as that posed in the instant cases. The material interpretative question is whether it has application on the basis alone of an analysis of the nature of the work performed during a consecutive 30-day period, without regard to whether there has been a formal assignment or 'detailing' of the employee to the higher GS grade and whether or not there exists a 'vacancy' in the GS 11 position. In my judgment, although the question is not free from doubt, a proper interpretation is that it has application in the former circumstance provided the employee's performance of job duties of the higher grade level is such as to meet the standards outlined in the analysis in Part I of this Opinion, i.e., where the job duties assigned are of a quantity or magnitude beyond that normally expected of 'developmental' work assignments and have been performed at least at the minimum level of skill and responsibility properly to be expected."

He, therefore, determined that Article 8, Section 1, of the agreement applied to the grievances before him based on the nature of the work performed, without regard to whether there had been a formal assignment or detail to the higher grade or whether there was a vacancy in the higher grade position. He stated (Opinion, p. 27) that "[i]f the proper performance of higher graded work of significant amounts constitutes, in effect, an 'assignment' of the employee to the classification to which such work is normally assigned, then it follows that there was a temporary assignment to a 'position', namely that of the classification. The GS-11 Revenue Officer classification obviously is a 'position'."

In our consideration of an arbitration award, we will give great weight to the arbitrator's interpretation of the collective bargaining agreement. If it represents a reasonable interpretation of the negotiated agreement under the circumstances of the case, we will accept the arbitrator's interpretation, even if more than one interpretation could be made or we might have interpreted the agreement differently in the first instance.

In the present case, the negotiated agreement clearly could be interpreted to apply only to formal details to vacant higher level positions, as the IRS has interpreted it. But the agreement must be looked at in the context of the facts of the case. Here, the difference between the grades of Revenue Officers is based in large part on the level of difficulty of the cases assigned. As stated above, the IRS has established a system of coded numeric levels for case assignments equated to grade levels, as well as a procedure for revising the coded level if necessary. Under such a system it seems clear that assigning all or substantially all higher grade work to a Revenue Officer would be tantamount to a detail to the higher grade position. The arbitrator found that 84 percent and 85 percent, respectively, of the cases assigned to the grievants on November 24, 1975, were higher grade work.

We note that in the last sentence of Article 8, Section 1, the agency has agreed "to refrain from rotating assignments of employees to avoid compensation at the higher level." We think it is reasonable to interpret Article 8, Section 1, as also applying to prohibit the agency from assigning a significant amount of higher level cases to a Revenue Officer for 30 days or more to avoid compensation at the higher level. In our opinion, therefore, the arbitrator's interpretation of the collective bargaining agreement between IRS and NTEU is reasonable and proper and we will accept it for purposes of determining whether his award is valid.

We have considered the objections to the award raised by IRS and have concluded that the award does not violate law or regulation for the reasons set forth below.

The award is consistent with prior decisions of this Office. We have upheld prior awards of retroactive temporary promotions with backpay based on the assignment of higher level duties to employees. Thus, in Annette Smith, 56 Comp. Gen. 732 (B-183903, June 22, 1977), the arbitrator had found that, in addition to periods of formal details, the agency had on numerous occasions assigned custodial employees to perform higher grade duties for extended periods without officially recording such details. We upheld the award of backpay for both periods based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which permitted backpay for details of more than 120 days to higher grade positions.

Although our Turner-Caldwell decisions are based on the 120 day period for details to higher grades specified in the Federal Personnel Manual, they do not preclude retroactive promotions for shorter periods when specified in agency regulations or in negotiated agreements. In Kenneth Fenner, B-183937, June 23, 1977, where nondiscretionary agency regulations provided for temporary promotions for details of more than 60 days to higher grade positions, we held that the agency had a mandatory duty to promote an employee beginning on the 61st day of such a detail. See also Burrell Morris, 56 Comp. Gen. 786 (B-187509, July 11, 1977), where we held that an 8-day detail of a prevailing rate employee

to perform the duties of a higher level General Schedule position was a violation of a collective bargaining agreement provision. We concluded that the violation constituted an unwarranted personnel action which entitled the employee to corrective action under the Back Pay Act.

Accordingly, in the present case, the 30-day period specified in Article 8, Section 1, of the agreement is not precluded by Turner-Caldwell. Since the Federal Personnel Manual (Chapter 300, § 8-4e) permits an agency to provide for temporary promotions for brief periods of service, an agency may enter into a collective bargaining agreement making such promotions mandatory for periods of less than 120 days.

Another decision of this Office involved facts very similar to those involved in the present grievance of Ross and Squire. In B-181173, November 13, 1974, two grade GS-5 voucher examiners, who normally worked on travel vouchers, were requested to process more difficult employee relocation vouchers because the office has accumulated a backlog of this work. The relocation vouchers were normally assigned to grade GS-6 voucher examiners. After a period of training they spent five and a half months processing the relocation vouchers before they were returned to their regular duties. The employees filed a grievance, through their union, under a negotiated agreement provision requiring temporary promotions for details to higher grade positions of 60 days or more. Even though there had been no formal detail, the arbitrator found that the two employees had been "detailed" to a temporary assignment of performing higher level duties and that the agency had violated the agreement by failing to compensate them as "temporarily promoted" to grade GS-6 during the five-and-a-half-month period. We upheld the award on the ground that the agency's failure to temporarily promote in violation of the agreement was an unjustified personnel action under the Back Pay Act which entitles the employees to backpay. See also 54 Comp. Gen. 263 (1974).

This case does not involve the situation of a detail to a position which has not been established or classified. See Willie W. Cunningham, 55 Comp. Gen. 1062 (1976). It is clear in the record before us that the position of Revenue Officer, grade GS-11, is an established and classified position with position classification standards which describe the nature and complexity of assignments as presenting a wider range of problems than those encountered at the grade GS-9 level.

The agency has not denied the existence of an established grade GS-11 position, but it argues there were no vacant, funded positions at grade GS-11 to which the grievants could be assigned. We are unaware of any requirement that a position be vacant in order for an employee to be detailed to that position, and we would point out that the definition of a detail as set forth in the FPM Manual, Chapter 300, Subchapter 8, states that a position is not filled by a detail since the employee continues to be the incumbent of the position from which he is detailed.

Finally, the agency contends that the grievance actually involves a classification appeal which is outside the scope of arbitration and that the award violates classification requirements of the CSC. Classification appeals to the Civil Service Commission are subject to the procedures set forth in 5 U.S.C. § 5112 (1976) and 5 C.F.R. Part 511, Subpart F (1977). These provisions establish the right of an employee to have his current position reviewed and classified based upon those duties officially assigned to the employee at the time the appeal is filed. However, we believe that grievances or claims concerning temporary assignments of higher level duties or details do not involve improper classification and are not cognizable under the classification appeal procedure. The rule against retroactive entitlements to backpay for classification errors was reaffirmed by the United States Supreme Court in United States v. Testan, 424 U.S. 392 (1976), but it is our view that the Testan case is limited to improper classification and does not affect entitlement to temporary promotions for improper details. See Reconsideration of Turner-Caldwell, supra. Moreover, we do not agree with IRS that the arbitrator disregarded the CSC's classification standards. It appears to us that he followed the agency's own practices implementing the classification standards by assigning numerical levels to the cases assigned to Revenue Officers, representing the predicted degree of difficulty of each case.

This decision is not intended to change the general rule that the mere accretion of duties in a position does not entitle the occupant to a promotion. We simply hold that where there is a mandatory provision requiring temporary promotion for assignments to higher level positions and where the fact-finder has determined that the assignment of higher level work is of such magnitude as to be equivalent to a "detail" to the established higher level position, an award of a retroactive temporary promotion with backpay may be proper depending upon the circumstances of the case.

CONCLUSION

We believe the arbitrator's interpretation of the contract and his award are reasonable and consistent with law, regulations, and prior decisions of our Office. Accordingly, we conclude that the arbitrator's award is valid and may be implemented.

Based upon the foregoing decision by the Comptroller General, we conclude that the arbitrator's award does not violate applicable law.

Conclusion

For the foregoing reasons, we find that the award of backpay to the grievants does not violate applicable law. Pursuant to section 2411.37(b) of the

Council's rules of procedure, we therefore sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Brazier III
Executive Director

Issued: July 12, 1978

Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR No. 1024. The Assistant Secretary, upon complaints filed by Local 2107, American Federation of Government Employees, AFL-CIO, found, contrary to the agency's exceptions to the recommended decision and order of the Administrative Law Judge (ALJ), that the conduct of the ALJ in the proceeding did not constitute bias, or in any way prejudice the activity; and further, in agreement with the ALJ and based upon the ALJ's reasoning, that the activity violated section 19(a) (1), (2) and (4) of the Order in terminating the named employee. Accordingly, the Assistant Secretary denied the agency's motion for a new hearing, and ordered the activity to cease and desist from the conduct found violative of the Order and to take certain affirmative actions. The agency appealed to the Council, contending that the Assistant Secretary's denial of its motion for a new hearing was arbitrary and capricious and raised a major policy issue. The agency also requested a stay of the Assistant Secretary's decision and order.

Council action (July 12, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or raise any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 12, 1978

Mr. Stephen L. Shochet
Attorney
Office of the General Counsel
Veterans Administration
Washington, D.C. 20420

Re: Veterans Administration, North Chicago
Veterans Hospital, North Chicago, Illinois,
A/SLMR No. 1024, FLRC No. 78A-59

Dear Mr. Shochet:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto,^{*/} in the above-entitled case.

In this case, as found by the Assistant Secretary, Local 2107, American Federation of Government Employees, AFL-CIO (the union) filed unfair labor practice complaints, as amended, alleging that the Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois (the activity) violated section 19(a)(1), (2) and (4) of the Order. The complaints alleged essentially that the activity interfered with Dr. Oksana Mensheha's duties as a shop steward, infringed upon her protected right to join and assist a labor organization, discriminated against her because of her union activities, and improperly terminated her, in part because of asserted union animus and in part as a reprisal for an earlier unfair labor practice charge filed in connection with the first complaint in this case. The activity contended that Dr. Mensheha was discharged for valid reasons unrelated to her union activities.

The Administrative Law Judge (ALJ) found that the activity violated section 19(a)(1), (2) and (4) of the Order. The activity, in filing exceptions to the ALJ's Recommended Decision and Order with the Assistant Secretary, moved for a new hearing before another Administrative Law Judge based on its contention that certain conduct and statements by the ALJ at the hearing indicated that he was biased against the activity and raised serious doubts as to whether he was able or willing to fairly weigh the evidence. The Assistant Secretary denied the motion, stating: "Upon

^{*/} The union also filed a "motion for partial dissolution of temporary stay" and a "motion for expedited consideration" with the Council. In view of the disposition reached herein, it is unnecessary for the Council to rule upon these motions.

evaluating the entire record herein, I conclude that the conduct of the Administrative Law Judge did not constitute bias, or in any way prejudice the [activity] in this matter." The Assistant Secretary then found, in agreement with the ALJ and based upon his reasoning, that the activity violated section 19(a)(1), (2) and (4) of the Order in terminating Dr. Mensheha. Thus, he concluded, "upon a review of the entire record," that "but for the exercise of her rights assured under the Order, Dr. Mensheha would not have been discharged." Accordingly, the Assistant Secretary ordered that the activity cease and desist from the conduct found violative of the Order, and that it take certain affirmative actions.

In your petition for review on behalf of the agency, you contend "that the Assistant Secretary's action in denying the motion for a new trial based upon the conduct of the [ALJ] denied fundamental due process to the [activity] and, therefore, was arbitrary and capricious and presents a major policy issue regarding the rights of a party to a hearing before a Judge who reaches an unalterable conclusion before being presented with any of [the activity's] evidence." In this regard, you assert that the activity was denied a full and fair hearing of its evidence before the Administrative Law Judge, and quote several passages from the transcript of proceedings in this case to support your assertion.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

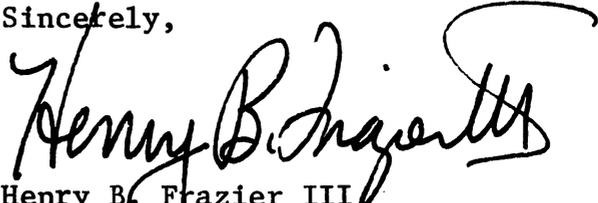
As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision and in denying the agency's motion for a new trial in the circumstances of this case. In this regard, your appeal does not disclose the manner in which the Assistant Secretary's denial of your motion was a denial of fundamental due process nor does your appeal disclose any probative evidence or relevant arguments which he failed to consider. With regard to your assertion that the Assistant Secretary's action in denying the motion for a new trial presents a major policy issue regarding a party's rights to a fair hearing before an Administrative Law Judge, in the Council's view no basis for review is thereby presented, noting particularly the Assistant Secretary's conclusion, "[u]pon evaluating the entire record herein, . . . that the conduct of the Administrative Law Judge did not constitute bias, or in any way prejudice the [activity] in this matter." Further, the appeal contains no basis to support your imputation of bias or other impropriety in the circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet

the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

P. Broida
AFGE

National Archives and Records Service, A/SLMR No. 965. The Assistant Secretary dismissed the unfair labor practice complaint filed by the union (Local 2578, American Federation of Government Employees, AFL-CIO), which alleged, in pertinent part, that the activity violated section 19(a)(1) and (6) of the Order by failing to negotiate in good faith with the union. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raises a major policy issue.

Council action (July 13, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 13, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: National Archives and Records Service,
A/SLMR No. 965, FLRC No. 78A-24

Dear Mr. King:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 2578, AFL-CIO (the union) and the National Archives and Records Service (the activity) were involved in negotiations for a new agreement to replace their expiring agreement. The parties established ground rules which provided, among other things, a limit of 40 hours of official time for negotiations during duty hours for each member of the union's negotiating team. Negotiating sessions were held during the next several months until they were suspended by mutual agreement. Negotiations thereafter resumed and continued until most of the union negotiators had exhausted their 40 hours of official time. At that time, after a series of informal discussions between the parties' chief negotiators, the union negotiators neither appeared for further meetings nor responded to the activity's request for bargaining sessions. The activity then filed an unfair labor practice complaint alleging that the union violated section 19(b)(6) of the Order by failing to negotiate a new agreement, and shortly thereafter the union filed a complaint alleging, in pertinent part, that the activity violated section 19(a)(1) and (6) of the Order by failing to negotiate in good faith.

The Assistant Secretary found that the union's conduct did not violate section 19(b)(6) of the Order.*/ Further, the Assistant Secretary found that the activity had not violated section 19(a)(6) of the Order. In his view, "the record does not establish that the [activity] engaged in a course of conduct which was violative of the Order." In this regard, the

*/ The Assistant Secretary's dismissal of the activity's 19(b)(6) complaint has not been appealed to and is therefore not before the Council for review.

Assistant Secretary stated that "[a]lthough the [a]ctivity negotiators engaged in 'hard bargaining' with the [union], the totality of their conduct did not . . . reflect a closed mind and the absence of a desire to reach agreement." He noted that the parties had reached tentative agreement on some 11 articles and that the activity, "at no time, made any take it or leave it demands. Rather, it continued to make proposals and counter-proposals throughout the course of negotiations and it displayed a willingness to consider alternative proposals in order to reach agreement." With respect to certain of the activity's proposals concerning the grievance procedure, union representatives and disciplinary actions, the Assistant Secretary concluded that "they were not so inherently onerous or burdensome that, standing alone, they would evidence an intent not to reach agreement on the part of the activity negotiators." He further noted that the activity did not refuse to consider union proposals concerning these matters and that the activity's original proposals were modified in the course of negotiations. As to the activity's assertion that certain proposals were nonnegotiable, the Assistant Secretary found that this did not constitute bad faith bargaining in the circumstances of the case, noting among other things that the union failed to utilize the procedures established by the Order to seek determinations of negotiability. Accordingly, the Assistant Secretary dismissed the union's unfair labor practice complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious because it is not consistent with fixed rules or standards and deviates from established private sector practice. In this regard you assert that the Assistant Secretary's decision, by declaring each management action to be not violative of the Order "standing alone," contravenes the "totality of conduct" concept. You further allege that "the Assistant Secretary's decision raises a major policy issue by establishing an impossible to meet standard by which to judge inferred bad faith."

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

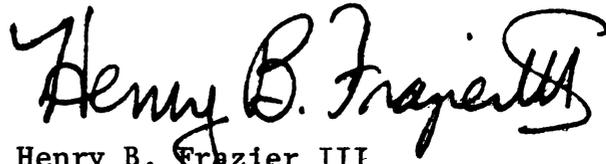
As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in concluding that the union's complaint should be dismissed. In this regard, while you assert that the Assistant Secretary's decision deviates from private sector practice by failing to apply the "totality of conduct" test in determining whether or not the activity bargained in good faith, your appeal fails to establish any clear, unexplained inconsistency with prior published decisions of the Assistant Secretary or other applicable precedent. See, e.g., U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620, FLRC No. 76A-42 (Aug. 31, 1976), Report No. 111. Moreover, your assertion constitutes, in essence, mere disagreement with the Assistant

Secretary's determination that "the record does not establish that the [activity] engaged in a course of conduct which was violative of the Order" but that "the totality of [the activity's] conduct did not . . . reflect a closed mind and the absence of a desire to reach agreement." [Emphasis added.] With respect to your allegation that a major policy issue is presented in that the Assistant Secretary has established "an impossible to meet standard by which to judge inferred bad faith," again noting that such allegation constitutes disagreement with the Assistant Secretary's finding that the evidence failed to establish that the totality of the activity's conduct was violative of the Order, no basis for Council review is thereby presented.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. K. Mendenhall
GSA

Naval Air Rework Facility, Marine Corps Air Station, Cherry Point, North Carolina and International Association of Machinists and Aerospace Workers, Lodge 2297 (Cantor, Arbitrator). The arbitrator determined that the reclassification of the positions of the employees here involved was accomplished without the negotiation and consultation required by the parties' agreement and the Order. As his award, the arbitrator set aside the activity's reclassification action, and directed the affected employees be restored to their former status and pay system with backpay pending negotiation and consultation with the union on the reclassification. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exceptions which alleged that the award violated applicable law and appropriate Civil Service Commission regulations. The Council also granted the agency's request for a stay. (Report No. 143)

Council action (July 25, 1978). The Council requested an interpretation from the Civil Service Commission of Commission regulations as they pertained to the arbitrator's award. Based upon the Commission's response to the Council's request, the Council held that the part of the arbitrator's award directing that the affected employees be restored to their former status with backpay pending consultation with the union on the reclassification was violative of applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Naval Air Rework Facility,
Marine Corps Air Station,
Cherry Point, North Carolina

and

FLRC No. 77A-127

International Association of
Machinists and Aerospace Workers,
Lodge 2297

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the dispute in this matter arose when the Department of the Navy (the agency) issued instructions which stated that certain Wage Grade positions were to be reclassified as General Schedule positions. Thereafter the supervisor of the employees whose positions were affected at the Naval Air Rework Facility (the activity) met with the employees and the chief steward of the union. That meeting was followed by a rewriting of the employees' job description by a management team and two employee representatives. The resulting document, signed by all the affected employees, was forwarded to the local wage and classification unit, and ultimately returned with the specification that the positions would be designated as "GS-9," in lieu of the former WG-14 classification.

When the administrative action had been completed, a meeting was held, at which time the union steward undertook to discuss the matter, but he was advised that the meeting had not been called for discussion, but simply to announce the administrative action. Ultimately, a grievance was filed resulting in the instant arbitration.

According to the arbitrator, the union grievance submitted to him asserts as follows:

Unit members of the Automatic Test Set Programmer, WG-14 were changed to Electronics Engineering Technicians GS-856-9 without discussing the proposed change with the Union.

The arbitrator determined that:

A review of the facts of this case reveals very clearly that, while the original job description was discussed at some length, and even at a time which might be called "a meeting with the Union", nevertheless, the actual change, and the final invocation of a pay rate, as

it went into the "graded" jobs was not supported by that type of negotiation, consultation and joint and mutual review that was required, either in the contract or the Executive Order.

Accordingly, the arbitrator granted the union's grievance and pertinently awarded as follows:

The action taken by Management with regard to the jobs referred to in this grievance, having been taken without consultation as required by the Executive Order and the contract, is hereby set aside. The respective employees are restored to their former status and system of pay, all subject to the further results of negotiations and consultations once those requirements have been met according to the Executive Order and the contract.

The employees, to the extent that they have been paid less than they could have been paid in their original status, recognizing all proper increases, shall be paid the difference between the wages they would have received if they had been kept in their original status and what they did receive, and shall continue to be so paid until such time as changes may be properly made after negotiation and consultation as required by the Executive Order and the contract.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.35 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions which alleged that the award violates applicable law and appropriate Civil Service Commission regulation.^{1/} Neither party filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that the award, insofar as it directs restoration of the affected employees to their former status with backpay pending consultation with

^{1/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

the union on the reclassification, violates applicable law and appropriate Civil Service Commission regulations.

Since the Civil Service Commission is authorized to prescribe regulations relating to the matters involved herein, the Council requested from the Commission an interpretation of Civil Service Commission regulations as they pertain to the arbitrator's award in the present case. The Commission replied in relevant part as follows:

The grievants allege that management's implementation of its decision to reclassify their positions from Automatic Test Set Programmer, WG-2601-14, to Electronics Engineering Technician, GS-856-9, without prior discussion with the employees and the union was in violation of article XVIII, section 1 of the negotiated agreement. The arbitrator found for the grievants and ordered that the reclassification of the positions in question be set aside. He further ordered that the employees be paid the difference between what they would have received if their positions had not been reclassified and what they did receive retroactive to March 13, 1977 (the effective date of the reclassification action).

The Civil Service Commission has final and binding authority regarding the classification of positions under both the General Schedule and prevailing rate systems. That authority is found in sections 5110 and 5346 of title 5, U.S. Code. While agencies are authorized to place positions in occupations and grades in conformance with or consistently with published job standards, and to determine whether a position is properly included under the General Schedule, such agency actions are subject to correction by the Civil Service Commission when it acts on appeals filed by affected employees or agencies under the procedures described in parts 511 and 532 of the Commission's Regulations (5 CFR), or as a result of a Commission review conducted under its statutory authority. Hence, although the arbitrator could properly determine whether the agency met its contractual obligations in the way that it reclassified the affected employees' jobs, he was without authority to order restoration of the employees to their former positions. That remedy is available only when the Commission, in acting on an employee appeal filed under Part 772 of the Commission's regulations, determines that the circumstances described in sections 511.703 and 532.702 of the Commission's regulations apply.

The arbitrator awarded backpay to the affected employees beginning March 13, 1977. Section 5596 of title 5, U.S. Code, authorizes backpay to employees who are found by competent authority to have undergone an unjustified or unwarranted personnel action that resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. In its January 6, 1976, decision in response to a request from the Federal Labor Relations Council in FLRC No. 74A-64, the Comptroller General held that a violation of a mandatory provision in a negotiated agreement, whether by an act of

omission or commission, which causes an employee to suffer a reduction in pay is an unjustified or unwarranted personnel action. However, before any monetary payment may be made under the provisions of section 5596, there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a reduction in pay. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may be considered to be an unjustified or unwarranted personnel action, backpay can not be authorized unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. In 54 Comp. Gen. 760, 763 (1975), the Comptroller General stated the general rule that:

"...failure-to-consult actions, in the absence of a requirement that the agency carry out the advice received as a result of the consultation, are not likely to result in the necessary 'but for' relationship between the wrongful act and the harm to the individual employee for which the Back Pay Act is the appropriate remedy."

The arbitrator in this case did not find that the agency's failure to consult with the union as required by the contract directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials (i.e., he did not find that if the agency had consulted with the union, it would not have reclassified the employees' jobs). Therefore, there is no legal authority for the backpay awarded by the arbitrator.

Based on the foregoing, we conclude that the arbitrator's award in the instant case is inconsistent with applicable law and Civil Service Commission regulations relating to classification and backpay.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the part of the arbitrator's award directing that the affected employees be restored to their former status with backpay pending consultation with the union on the reclassification is violative of applicable law and appropriate regulation and cannot be sustained.

Conclusion

For the foregoing reasons and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion which directs the restoration of the affected employees to their former status with backpay pending consultation with the union on the reclassification.^{2/}

^{2/} In modifying the award on the basis discussed herein, the Council does not pass upon and in no manner adopts any of the arbitrator's reasoning or conclusions concerning the extent of negotiation and consultation required by the Order.

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

By the Council.

A handwritten signature in cursive script that reads "Harold D. Kessler". The signature is written in black ink and is positioned above a horizontal line.

Harold D. Kessler
Acting Executive Director

Issued: July 25, 1978

FLRC No. 77A-130

Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools. The dispute involved the negotiability of a union proposal which would require bargaining on position classification standards.

Council action (July 25, 1978). The Council held that the disputed proposal was excepted from the agency's obligation to bargain by section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

Overseas Education Association, Inc.

(Union)

and

FLRC No. 77A-130

Department of Defense,
Office of Dependents Schools

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Management shall not establish classification standards until such standards, implementation procedures, and impact have been negotiated with the Association. [Only the underscored portion is in dispute.]

Agency Determination

The agency determined that the disputed proposal is outside management's obligation to bargain under section 11(b) of the Order and is therefore nonnegotiable.

Question Here Before the Council

The question is whether the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The disputed proposal, which would require bargaining on position classification standards, is integrally related to and thereby determinative of grades and types of positions, and for this reason is excepted from the agency's obligation to bargain by section 11(b) of the Order. Accordingly, the agency's determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The union proposal under consideration in this case would subject the position classification standards for teacher and teaching positions in the bargaining unit to negotiation between the union and the activity. The agency asserts that the union proposal for negotiation of such position classification standards concerns matters which are integrally related to and directly determinative of the activity's staffing patterns and, hence, is excepted from the agency's obligation to bargain by section 11(b) of the Order.^{1/} We agree with this contention of the agency.

The teacher and teaching positions here involved are excepted from the General Schedule classification system established under the provisions of the Classification Act, including those provisions related to position classification standards.^{2/} However, the educator positions, which are covered by the Defense Department Overseas Teachers Pay and Personnel Practices Act,^{3/} are subject thereunder to position classification standards developed, prescribed, and published by the head of the activity, pursuant to delegation of authority by the Department of Defense;^{4/} and, according to the record, the phrase "position classification standards" as so employed by the agency has the usual meaning and purpose of the language as used in Federal personnel matters.

More particularly, as indicated in the record, "position classification standards" define the duties, responsibilities and qualification requirements for each class of positions within the activity; distinguish the various classes of positions; and set forth the grade levels for the respective classes of positions. In other words, positions established by the activity are placed in their proper classes and are likewise accorded their proper grade levels consistent with the levels designated in the standards.

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

Sec. 11. Negotiation of agreements.

(b) . . . [T]he obligation to meet and confer does not include matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

2/ 5 U.S.C. § 5102(c)(22) (1970).

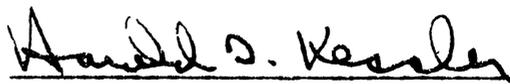
3/ 20 U.S.C. § 901 (1970).

4/ DoD Directive 1400.13, Part V, para. B.2 (July 8, 1976).

Section 11(b) of the Order, as previously indicated, excepts from an agency's obligation to bargain matters with respect to the "types, and grades of positions . . . assigned to an organizational unit, work project or tour of duty."^{5/} Obviously, based on the intent and purpose of the position classification standards, such standards promulgated by the activity with respect to educator positions directly impact upon and determine both the types (i.e., classes) and the grades of the teacher and teaching positions employed to staff its overseas teaching operations. Indeed, as stated by the agency without contradiction, the union's proposal in this case was submitted in response to the activity's "plan to develop and issue position classification standards which will result in a uniform grading structure throughout [the activity], and which, upon implementation, will have the effect of downgrading two types of [activity] employees, i.e., Guidance Counselors (from Class II to Class I) and School Psychologists (from Class IV to Class III)."^{6/} [Emphasis supplied.]

It is thus clear, in our opinion, that the position classification standards sought to be negotiated by the union in the instant case are integrally related to and thereby determinative of the staffing patterns of the activity, i.e., the types and grades of positions of the activity. Accordingly, we uphold the agency's determination that the union's proposal is outside the agency's obligation under section 11(b) of the Order and is nonnegotiable.^{7/}

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: July 25, 1978

^{5/} n. 1, supra.

^{6/} The agency does not dispute that the impact of the issuance of position classification standards is negotiable, but controverts only the union's proposal to negotiate the establishment of those standards.

^{7/} See American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 3 FLRC 324, 338-43 [FLRC No. 73A-36 (June 10, 1975), Report No. 73]. See also Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), 2 FLRC 164, n. 3 [FLRC No. 73A-42 (July 31, 1974), Report No. 55] and International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322, 325-27 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

FLRC No. 78A-25

Professional Air Traffic Controllers Organization, MEBA, AFL-CIO and Federal Aviation Administration, Department of Transportation (Walt, Arbitrator). The arbitrator denied the union's grievance related to the cancellation of scheduled overtime assignments by the activity. The union appealed to the Council, requesting that the Council accept its petition for review based upon an exception alleging that the arbitrator exceeded his authority and jurisdiction.

Council action (August 3, 1978). The Council held that the union's petition failed to describe facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 3, 1978

Mr. William B. Peer
General Counsel, PATCO
Barr & Peer
1101 17th Street, NW., Suite 1002
Washington, D.C. 20036

Re: Professional Air Traffic Controllers
Organization, MEBA, AFL-CIO and Federal
Aviation Administration, Department of
Transportation (Walt, Arbitrator), FLRC
No. 78A-25

Dear Mr. Peer:

The Council has carefully considered the union's petition, and the agency's opposition thereto, for review of the arbitrator's award in the above-entitled case.

According to the arbitrator, the dispute in this matter arose when the activity posted a work schedule for a particular week, reflecting both regular and overtime work assignments as well as scheduled annual leave for that week for various employees. After the schedule was posted, some employees notified the scheduler that they had changed their minds and would not be using their scheduled leave. The scheduler therefore revised the work schedules, cancelling overtime assignments for some employees, including the two grievants. The grievants were not consulted concerning the cancellations, and neither consented to it. Thereafter, they filed grievances seeking "8 hours overtime pay at true time and a half" for the cancelled overtime assignments. The grievances were submitted to arbitration.

The arbitrator described the grievances before him as "challeng[ing] the Agency's right to cancel scheduled overtime." He denied the grievances, finding that the agency had given timely notice concerning the cancellation of the overtime assignments. In doing so he concluded that:

[T]he contract [will not] support an argument that the Agency may not cancel a posted overtime assignment previously scheduled for the employee's regular day off without that employee's approval. While

notice is necessary prior to cancellation of scheduled and posted overtime, local understandings in contravention of the negotiated national agreement cannot stand. The Agency's right to cancel scheduled and posted overtime upon notice given in accordance with Article 33, § 2,^{1/} does not require approval of the affected employee. [Footnote added.]

The union's petition takes exception to the arbitrator's award on the ground discussed below. The agency filed an opposition.

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

In its petition, the union contends that the arbitrator exceeded his authority and jurisdiction by basing the award upon a ground "which was not contested by the parties, which was not in issue at the hearing, and which the parties never had an opportunity to adjudicate." In support of this exception, the union asserts that it is challenging that portion of the arbitrator's award "wherein the arbitrator, on his own and without any authorization or authority whatsoever, rules that (a) the local agreement^{2/} is 'in contravention of the negotiated national agreement' and (b) that

^{1/} According to the arbitrator, Article 33, Section 2 of the parties' negotiated agreement provides as follows:

ARTICLE 33 - WATCH SCHEDULES AND SHIFT ASSIGNMENTS

.

Section 2. Assignments to the watch schedule shall be posted at least fourteen (14) days in advance, or for a longer period where local conditions permit. When it is necessary to change an employee's posted shift assignment, the Employer shall use the following alternatives to the extent feasible prior to making the change:

- (a) overtime;
- (b) personnel on detail assignment;
- (c) personnel on permanent assignments that are required to maintain currency;
- (d) line supervisors or staff;
- (e) rescheduling of training.

In the event the above alternatives are found not to be feasible, the employees's posted shift assignment can be changed.

^{2/} According to the arbitrator, the parties at the Chicago Air Traffic Control Center "agreed" to the following:

(Continued)

local agreement 'cannot stand.'" [Footnote added.] The union further states that "[a]pparently, the activity was taken by surprise by the Union's reliance upon and citation of a local agreement" and "the activity did not challenge the validity of the local agreement," and "never claimed that the local agreement violated the national agreement or was inconsistent therewith."

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, the Council will grant a petition for review where it appears that the exception presents grounds that an arbitrator exceeded his authority by, for example, determining an issue not included in the question submitted to arbitration. Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sinclitico, Arbitrator), FLRC No. 77A-52 (Jan. 27, 1978), Report No. 142.

In this case, however, the Council is of the opinion that the union's petition fails to describe facts and circumstances to support its exception. In this regard, the union's exception that the arbitrator "bas[ed] the award upon a ground which was not contested by the parties" is directed toward the arbitrator's reference in the opinion accompanying his award to the "local agreement" (referred to by the arbitrator as a "local understanding"). However, the union itself states in its petition for review that it relied upon both the national agreement and the "local agreement" in presenting its case to the arbitrator. Thus it is clear from the petition for review that both documents were submitted to and before the arbitrator in his resolution of the matter. The essence of the union's exception appears to constitute nothing more than disagreement with the arbitrator's reasoning and conclusion with respect to the "local agreement" in the course of resolving the dispute as to the agency's right to cancel scheduled overtime. The Council has steadfastly held that it is the arbitrator's award rather than his conclusion or specific reasoning that is subject to challenge. National Association of Air Traffic Specialists, Southwest Region and Department of Transportation, Federal Aviation Administration, Southwest Region, Fort Worth, Texas (Sisk, Arbitrator), FLRC No. 77A-8 (May 18, 1977), Report No. 126.

Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

(Continued)

. . . assignments to the basic watch schedule will be posted at least four weeks in advance and will not be changed, except as specified in Article 33, Section 2, of the PATCO/FAA labor agreement.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a prominent loop for the letter 'H' and a horizontal line at the end.

Henry B. Frazier III
Executive Director

cc: R. S. Smith
Transportation

Non-Appropriated Fund Activity, Headquarters, 24th Infantry Division, Fort Stewart, Georgia, Assistant Secretary Case No. 40-7841(RO). The Assistant Secretary found that dismissal of the activity's objection to the election (which alleged that the number of employees who had voted was insufficient to be representative of the wishes of a majority of employees in the unit) by the Regional Administrator (RA) was warranted. Accordingly, the Assistant Secretary denied the activity's request for review seeking reversal of the RA's Report and Findings on Objections. The union (Local 1922, American Federation of Government Employees, AFL-CIO) was subsequently certified as the exclusive representative of the unit involved. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue. The agency also requested a stay.

Council action (August 3, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the agency's petition for review. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 3, 1978

Mr. W. J. Schrader, Chief
Labor and Employee Relations Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: Non-Appropriated Fund Activity, Headquarters,
24th Infantry Division, Fort Stewart, Georgia,
Assistant Secretary Case No. 40-7841(RO),
FLRC No. 78A-27

Dear Mr. Schrader:

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

In this case, as found by the Assistant Secretary, a representation petition (RO) was filed by the American Federation of Government Employees, Local 1922, AFL-CIO (the union), which sought to represent a unit of all non-professional Non-Appropriated Fund (NAF) Activity employees (excluding those ineligible under the Order) employed at Headquarters, 24th Infantry Division, Fort Stewart, Georgia (the activity). Following a secret ballot election, the activity filed a timely objection requesting that the election be invalidated and set aside on the basis that the "percentage of eligible employees voting in this election (14.38%) was extremely low and therefore not a true representation of the majority of the appropriate unit employees."

The Assistant Secretary, stating the activity's sole contention to be "that the number of employees casting ballots was insufficient to be representative of the wishes of the entire unit, and that, therefore, the Assistant Secretary should declare the election invalid pursuant to [s]ection 6(a) (2) of [the Order]," found that dismissal of the objection by the Regional Administrator (RA) was warranted. Accordingly, he denied the activity's request for review seeking reversal of the RA's Report and Findings on Objections.^{1/} (The union was thereafter certified as exclusive representative of the unit involved herein.)

^{1/} In so finding that dismissal of the objection was warranted, the Assistant Secretary indicated agreement with the RA's reasoning. In this regard the RA had found:

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision raises a major policy issue concerning "what constitutes a representative election." In this regard, you contend that the Assistant Secretary's application of his rules in this case is not in consonance with the provisions of the Order or with the Council's 1975 Report and Recommendations.^{2/} You further allege that the Assistant

(Continued)

There is no contention by the Activity, or any other party, that the Notice of Election does not adequately reflect the details of the election. Nor is there any contention or evidence that an insufficient number of Notices were posted or that the Notices were not conspicuously posted for an adequate period of time. The Activity has advanced no reason why so few employees voted. There is no evidence that the polls did not remain open in accordance with the Notice of Election. There is no evidence that the polls were inaccessible to employees, and there is no evidence that employees were denied an ample opportunity to participate in the balloting or that any employee was otherwise disenfranchised. In light of the above, there is no basis for not applying the provisions of Section 202.17(c). Accordingly, the objection is found to have no merit and is hereby dismissed.

Section 202.17 of the Assistant Secretary's rules provides, in pertinent part:

(c) All elections shall be by secret ballot. An exclusive representative shall be chosen by a majority of valid ballots cast

2/ You specifically refer to Labor-Management Relations in the Federal Service (1975), at 34, wherein the Council stated:

. . . it was recommended during the general review that the Order be amended to require that a certain percentage of eligible voters cast ballots in an election before that election is viewed as representative of the views of a majority of the employees in the unit and therefore valid. While it appears that there have been elections where a relatively small percentage of the eligible voters cast ballots, there was no evidence that such circumstances are a recurring problem and the Council has no desire to return to the 60 percent rule developed under Executive Order 10988. However, pursuant to his section 6(a)(2) responsibility to supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit, the Assistant Secretary already has the authority to find invalid an election where the number of employees casting ballots is insufficient to be representative of the wishes of the entire unit. Accordingly, the Council sees no need for changes in the Order regarding this matter.

Secretary acted in an arbitrary and capricious manner in that he failed "to determine whether [the union] is the choice of the majority of the employees in an appropriate unit. . . ." In this connection you assert that the Assistant Secretary, by relying exclusively upon the standard set forth in Section 202.17(c) of his rules, failed to carry out his responsibility to assure that the election herein was representative.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision raises a major policy issue concerning "what constitutes a representative election," in the Council's view no major policy issue is present in the circumstances of the case. Thus, while the Assistant Secretary has authority to find invalid an election where the number of employees casting ballots is insufficient to be representative of the wishes of the entire unit, no major policy issue is raised by his failure to do so in the circumstances of the case, noting particularly the Assistant Secretary's finding that there was no evidence that employees were denied an ample opportunity to participate in the balloting or that any employees were otherwise disenfranchised. Similarly, as to your allegation that the Assistant Secretary acted in an arbitrary and capricious manner in his reliance upon the standard set forth in his regulations, it does not appear that the Assistant Secretary acted without reasonable justification in the circumstances of the case, noting again the Assistant Secretary's finding that there was no evidence that employees were denied an opportunity to participate in the election or were otherwise disenfranchised.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR M. D. Roth
 Labor AFGE

Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1028. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge (ALJ), dismissed the section 19(a)(1) and (6) complaint filed by the American Federation of Government Employees, Local 3615, AFL-CIO (the union), related to an encounter and ensuing conversation between management's chief negotiator and one of the union's negotiators concerning the reopening of negotiations between the parties. The union appealed to the Council, alleging that the Assistant Secretary acted arbitrarily and capriciously in adopting the recommended decision of the ALJ.

Council action (August 3, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 3, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration,
Bureau of Hearings and Appeals,
A/SLMR No. 1028, FLRC No. 78A-55

Dear Mr. King:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed an unfair labor practice complaint against the Social Security Administration, Bureau of Hearings and Appeals (the activity). The complaint alleged in pertinent part that the activity violated section 19(a)(1) and (6) of the Order when its chief negotiator approached an assistant chief steward of the union concerning the reopening of contract negotiations, contrary to ground rules for negotiations and/or the directives of the president of the local that only the president or her designee be contacted concerning contract negotiations. The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge (ALJ) who found that the activity did not violate section 19(a)(1) and (6) of the Order because the chance encounter and ensuing conversation between management's chief negotiator and one of the union's negotiators approximately a month after negotiations between the parties had come to a complete halt was not an attempt by the activity to bypass the exclusive representative and communicate directly with unit employees regarding the collective bargaining matters or to undermine the status of the exclusive representative.*/ Accordingly, he ordered that the complaint be dismissed.

*/ In arriving at this conclusion, consideration was given to the Council's decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, 3 FLRC 697 [FLRC No. 74A-80 (Oct. 24, 1975), Report No. 87] (A/SLMR No. 432 supplemented following Council's decision in A/SLMR No. 587), wherein the Council stated in pertinent part:

(Continued)

In your petition for review on behalf of the union, you allege that the Assistant Secretary acted arbitrarily and capriciously in adopting the recommended decision of the ALJ. In this regard, you argue that the Assistant Secretary ignored or failed to weigh carefully certain testimony in reaching his decision. You further allege that he "failed to acknowledge certain precedent decisions . . . ," and that the decision in this case "will permit federal agencies to bypass the exclusive representative and . . . deal directly with members of the bargaining unit while such negotiations are pending before the . . . FSIP."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case. In this regard, your appeal fails to set forth any material evidence that the Assistant Secretary did not consider in reaching his decision, but instead constitutes essentially disagreement with the Assistant Secretary's conclusion based upon the ALJ's factual determinations and therefore provides no basis for Council review. With respect to your further allegation that the Assistant Secretary failed to acknowledge certain precedent decisions, your appeal fails to establish either that there is a clear, unexplained inconsistency between this decision and the previously published decisions of the Assistant Secretary or other applicable authority, or that the Assistant Secretary's decision was inconsistent with the purposes and policies of the Order. Finally, the appeal contains no basis to support your assertion that the Assistant Secretary's decision in this case will permit Federal agencies to bypass

(Continued)

In determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered. More specifically, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative. Rather communications which, for example, amount to an attempt to bypass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order.
[Footnote omitted.]

the exclusive representative and deal directly with unit employees while negotiations are pending before the FSIP, again noting that your assertion in this regard merely constitutes disagreement with the Assistant Secretary's finding that the activity's conduct was not violative of the Order in the circumstances of this case, more particularly that it was not an attempt to undermine the status of the exclusive representative.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents any major policy issues, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. J. Toner
SSA

Department of the Army [U.S. Army Missile Materiel Readiness Command, Redstone Arsenal, Alabama] and American Federation of Government Employees, AFL-CIO, Local 1858 (Knight, Arbitrator). Upon the filing of a petition for review of the arbitrator's award by the union, the Council advised the union that its appeal failed to comply with cited requirements of the Council's rules of procedure, and provided the union with time to effect such compliance. However, the union made no submission in compliance with those requirements within the time limit provided.

Council action (August 7, 1978). The Council dismissed the union's appeal for failure to comply with the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 7, 1978

Mr. William R. Murray
Staff Attorney
Local 1858, American Federation
of Government Employees, AFL-CIO
Building 7132
Redstone Arsenal, Alabama 35809

Re: Department of the Army [U.S. Army Missile Materiel Readiness Command, Redstone Arsenal, Alabama] and American Federation of Government Employees, AFL-CIO, Local 1858 (Knight, Arbitrator), FLRC No. 78A-75

Dear Mr. Murray:

By Council letter of July 12, 1978, you were advised that preliminary examination of your petition for review of the arbitration award in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included: 2411.42 and 2411.44.

You were also advised in the Council's letter:

Further processing of your appeal is contingent upon your compliance with the above-designated provisions of the Council's rules. Accordingly, you are hereby granted until the close of business on July 31, 1978, to take action and complete your appeal by filing additional materials with the Council in compliance with those provisions, namely: a statement of approval by the National President of the American Federation of Government Employees, or his designee, of the submission of your appeal; and two additional copies of your appeal and all attachments.

Moreover, in accordance with section 2411.46 of the Council's rules, you must serve a copy of the approval of your submission on the representative of the other party to the case, and you must include a statement of such service with your additional submission to the Council. Failure to comply with the above requirements within the time limit prescribed will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: N. Foster
Army

R. D. King
AFGE

Department of the Navy, Navy Commissary Store Region, Norfolk, Virginia, A/SLMR No. 1030. The Assistant Secretary dismissed the section 19(a)(1) and (6) complaint of the National Association of Government Employees, Local R4-45 (the union) as untimely filed. The union appealed to the Council contending, in substance, that the Assistant Secretary's decision was arbitrary and capricious.

Council action (August 9, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 9, 1978

Mr. Robert M. White
White and Selkin
1500 Virginia National Bank Building
One Commercial Place
Norfolk, Virginia 23510

Re: Department of the Navy, Navy Commissary
Store Region, Norfolk, Virginia, A/SLMR
No. 1030, FLRC No. 78A-53

Dear Mr. White:

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

In this case, as found by the Assistant Secretary, the National Association of Government Employees, Local R4-45 (the union) filed an unfair labor practice complaint against the Department of the Navy, Navy Commissary Store Region, Norfolk, Virginia (the activity) alleging violations of section 19(a)(1) and (6) of the Order. The Assistant Secretary found that, under the particular circumstances of this case, the complaint was untimely filed. Thus, he noted that the activity issued its final decision on the union's initial pre-complaint charge within a month after it was filed; that under the Assistant Secretary's Regulations, the union then had a period of 60 days after the date of service of such final decision within which to file a complaint;^{1/} that the union did not file a timely complaint based on its initial pre-complaint charge but instead "filed a second charge which, in essence, reiterated the first charge"; and that when the union later filed the complaint in this case, it was "timely with regard to [the] second pre-complaint charge but clearly untimely with regard to [the] first pre-complaint charge." The Assistant Secretary concluded:

In my view, a complainant may not, in effect, extend the period for the filing of a timely complaint beyond the prescribed period of

1/ Section 203.2(b)(2) of the Assistant Secretary's Regulations provides:

If a written decision expressly designated as a final decision on the charge is served by the respondent on the charging party, that party may file a complaint immediately but in no event later than sixty (60) days from the date of such service.

60 days by filing a second pre-complaint charge which essentially reiterates the same allegations as its first pre-complaint charge. To hold otherwise would, in my view, render the 60 days timeliness requirement of Section 203.2(b)(2) of the Assistant Secretary's Regulations a nullity. Accordingly, based on the circumstances set forth above, I find the complaint herein to be untimely filed and shall, therefore, order that it be dismissed in its entirety. [Footnotes omitted.]

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision was "erroneous" as well as "arbitrary, capricious, unreasonable and without substantial supporting evidence" in that "the Assistant Secretary ruled that the subject complaint was untimely filed." In this regard, you contend that "there has been a continued violation" and that certain acts by the activity after the union had filed its initial pre-complaint charge constituted a further violation of the Order.^{2/}

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue.

With respect to your allegation that the Assistant Secretary acted erroneously in finding the complaint untimely, pursuant to the authority of the Assistant Secretary under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, the Assistant Secretary has promulgated regulations which provide, in pertinent part, that a complaint must be filed within 60 days after the date of service of respondent's final written decision on the pre-complaint charge. His decision in the instant case was based on the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such a regulatory requirement or that he applied these regulations to the facts and circumstances of this case in a manner inconsistent with the purposes

^{2/} You further allege that the Assistant Secretary erroneously, arbitrarily and capriciously ruled in a footnote of his decision that, even assuming the complaint was timely filed, the activity's position reflected a good faith interpretation (as distinguished from a clear unilateral breach) of the negotiated agreement and would therefore be a proper subject for the parties' negotiated grievance procedure rather than the unfair labor practice procedures under the Order. However, as previously stated, the Assistant Secretary decided to dismiss the union's complaint in this case as untimely filed under his Regulations. Accordingly, the Assistant Secretary's additional comments based upon the hypothetical assumption that the complaint had been timely filed were mere dicta and therefore, apart from other considerations, provide no basis for your appeal.

and policies of the Order. Rather, your contentions set forth above constitute essentially disagreement with the Assistant Secretary's application of his Regulations to the facts and circumstances of this case and thus provide no basis for Council review. Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3246, 3 FLRC 522 [FLRC No. 75A-47 (Aug. 14, 1975), Report No. 80]; Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3560(CA), 4 FLRC 312 [FLRC No. 76A-21 (May 14, 1976), Report No. 105].

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. Arkin
Navy

U.S. Department of Justice, Bureau of Prisons, Washington, D.C., Assistant Secretary Case No. 22-08489(GA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that the matter in dispute (related to the activity's practice of using prison inmates to keep time and attendance records of employees) was subject to the negotiated grievance and arbitration procedure of the parties' agreement. Accordingly, the Assistant Secretary denied the activity's request for review seeking reversal of the ARA's Report and Findings on Grievability and Arbitrability. The agency appealed to the Council, contending that the Assistant Secretary's decision raised major policy issues. The agency also requested a stay.

Council action (August 10, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 10, 1978

Mr. Austin E. Ross, Chief
Labor-Management Relations Group
U.S. Department of Justice
Washington, D.C. 20530

Re: U.S. Department of Justice, Bureau of Prisons,
Washington, D.C., Assistant Secretary Case
No. 22-08489(GA), FLRC No. 78A-32

Dear Mr. Ross:

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

In this case, as described in the Report and Findings on Grievability and Arbitrability, American Federation of Government Employees Council of Prison Locals C-33 (the union) filed a grievance over the practice within the Department of Justice, Bureau of Prisons (the activity) of using prison inmates to keep time and attendance records of employees, contending that the practice violated Article 14(e) of the parties' negotiated agreement.^{1/} The activity rejected the grievance as nonarbitrable, and the union then filed the instant Application for Decision on Grievability or Arbitrability.

In his Report and Findings on Grievability and Arbitrability, the Acting Regional Administrator (ARA) found the matter in dispute grievable and arbitrable, concluding in pertinent part:

Section 12(b)(5) is a relevant provision of the Order to be considered. However, it should not . . . preclude the utilization of the negotiated grievance procedure and arbitration provisions wherein the facts do not clearly show that Article 14(e) clearly contravenes the provisions of Section 12(b) of the Order. In this respect, I note that the Activity does not contend that Article 14(e) contravenes the purposes of Section 12(b) of the Order, but rather, contends that time and attendance records are not encompassed by the wording and intent of [Article] 14(e).

^{1/} Article 14(e) provides:

Inmates shall not have access to any evaluation, performance rating or other confidential data pertaining to employees as well as personnel files and medical records.

Therefore, I find that the matter in dispute is arbitrable and grievable. I make no findings as to the merits of the grievance. In this respect, I note that arbitrators as a matter of necessity must consider applicable laws and regulations when rendering a decision, including the provisions of the Order and published agency policies and regulations.

The Assistant Secretary, in agreement with the ARA, found that "the matter herein is subject to the negotiated grievance and arbitration procedure, as the dispute involves the interpretation and application of Article 14(e) of the parties' negotiated agreement." Accordingly, he denied the activity's request for review seeking reversal of the ARA's Report and Findings on Grievability and Arbitrability.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision "raises a major policy issue concerning [his] obligation under [s]ections 6(a)(5) and 13(d) of the Order to decide questions of grievability-arbitrability referred to him in accordance with those sections." You argue in this regard that the Assistant Secretary seriously misconstrued Council decisions regarding the scope of his authority in making threshold arbitrability determinations,^{2/} and thus improperly failed to decide whether the grievance herein was barred by section 12(b) of the Order but instead left the resolution of that question to the arbitrator. You further allege "as a corollary" that a major policy issue is raised regarding the Assistant Secretary's "adherence to the Council's guidance as to his obligations under [s]ection 13(d) where the remedy . . . sought would arguably violate the Order." In this respect, you contend that the Assistant Secretary must consider, in finally deciding grievability-arbitrability questions, that the relief sought by the union herein (in contravention of section 12(b)) would require the activity to discontinue its practice of using inmates to keep employees' time and attendance records.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present a major policy issue and you neither allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious.

With respect to your contention, in effect, that the Assistant Secretary's failure to consider the applicability of section 12(b) to the grievability-arbitrability questions before him was inconsistent with his obligation under the Order as enunciated in Council decisions and thus presents a major policy issue, in our view no basis for Council review is thereby

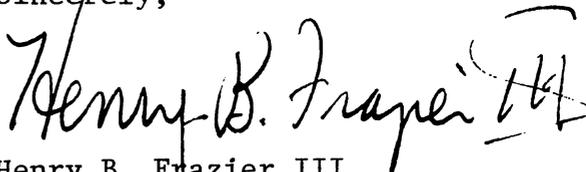
^{2/} In this regard, the agency principally relies on the Council decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, 3 FLRC 120 [FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63], but also cites several other Council decisions.

presented. Thus, the Council has indicated in Crane (supra n. 2) that, in resolving questions as to whether a grievance is subject to a negotiated grievance procedure, the Assistant Secretary must consider, among other things, "related provisions of . . . the Order" The Assistant Secretary did consider related provisions of the Order in concluding that the instant grievance was arbitrable under the parties' negotiated agreement. In this regard we note the ARA's finding that "the facts do not clearly show that Article 14(e) clearly contravenes the provisions of [s]ection 12(b) of the Order" and that "the [a]ctivity does not contend that Article 14(e) contravenes the purposes of [s]ection 12(b) of the Order." Thus, your appeal fails to establish that the Assistant Secretary's decision presents a major policy issue, i.e., it fails to establish that his decision is either contrary to the Order or inconsistent with applicable Council precedent. As to your "corollary" alleged major policy issue concerning the Assistant Secretary's obligations under section 13(d) of the Order "where the remedy sought would arguably violate the Order," as the Council stated in its 1975 Report and Recommendations, ". . . where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulations or the Order, the Council, under its rules, will grant review of the award. For example, should the Council find . . . that an award violates section 12(b) of the Order, the Council would modify or set aside that award."^{3/} Accordingly, no major policy issue is presented at this time warranting Council review.

Since the Assistant Secretary's decision does not present a major policy issue and you neither allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied, and your request for a stay is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR R. King
 Labor AFGE

3/ Labor-Management Relations in the Federal Service (1975), at 44.

American Federation of Government Employees, AFL-CIO, Local 1592 and Army-Air Force Exchange Service, Hill Air Force Base, Utah. The dispute involved the negotiability of union proposals related to (1) utilization of intermittent employees; (2) requests for advanced sick leave; and (3) purchase of merchandise from the Exchange by military dependents who are also employees.

Council action (August 14, 1978). As to (1) and (3), the Council held that the union's proposals were excepted from the agency's obligation to bargain by section 11(b) of the Order. As to (2), the Council held that the proposal was outside the obligation to bargain established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules of procedure, the Council sustained the agency's determination that the proposals were nonnegotiable.

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

American Federation of Government
Employees, AFL-CIO, Local 1592

(Union)

and

FLRC No. 77A-123

Army-Air Force Exchange Service,
Hill Air Force Base, Utah

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

Article 9, Section 7.

Prior to utilizing intermittent employees, the employer agrees to the following:

1. All regular fulltime employees will be permitted to work a forty (40) hour workweek.
2. All regular parttime employees will be permitted to work at least thirty-four (34) hours in a workweek.

Agency Determination

The agency head determined that the proposal is nonnegotiable on the ground that it would have a direct bearing on activity staffing patterns and thus is outside management's obligation to bargain under section 11(b) of the Order. The agency head also determined that the proposal infringes upon management's authority to determine the personnel by which agency operations are to be conducted thereby conflicting with section 12(b)(5) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal concerns matters with respect to the agency's staffing patterns and is excepted from the obligation to bargain by section 11(b) of the Order.^{1/} Thus, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The proposal at issue herein would have substantially the same effect on the agency's staffing pattern as one which the Council held to be outside the obligation to bargain in McClellan Air Force Base.^{2/}

The Council concluded that the disputed proposal in McClellan Air Force Base was outside the agency's obligation to negotiate under the provision of section 11(b) of the Order. Section 11(b), in pertinent part, provides that:

. . . the obligation to meet and confer does not include matters with respect to the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty [of an agency].

1/ In view of our decision that the proposal essentially concerns matters with respect to determining staffing patterns, section 12(b) is inapplicable and it is unnecessary further to consider the remaining contention of the agency that the proposal conflicts with section 12(b)(5).

2/ NAGE Local R12-183 and McClellan Air Force Base, California, 4 FLRC 353 [FLRC No. 75A-81 (June 23, 1976), Report No. 107.] The proposal in that case read as follows (only the underscored portions were in dispute):

Article VIII, Hours of Work/Tours of Duty

Section 2. The basic workweek will be five consecutive days with two consecutive days off. The hours of work for employees will be as follows:

- a. Full-time employees will have the opportunity to work a forty hour week unless the workload is such that it will not support forty hours. However, in no instance will the full-time employees have their hours reduced by using part-time or intermittent employees. At no time shall the hours for full-time employees go below thirty-five hours per workweek.

- b. Part-time employees will have the opportunity to work a thirty-four hour week unless the workload is such that it will not support thirty-four hours. However, in no instance will the part-time employees have their hours reduced by using intermittent employees. At no time shall the hours for part-time employees go below twenty hours per workweek.

In reaching its decision the Council reasoned as follows (at 3-4 of Council decision):

[The proposal] plainly concerns matters which are integrally related to and consequently determinative of the staffing patterns in the bargaining unit. Specifically among other effects, it would prevent the agency from changing established staffing patterns unless the conditions prescribed in the proposal could be met: that is, the use of, and hence an increase in the number of, part-time or intermittent employees would be prohibited whenever their use would reduce the hours of full-time employees below 40; the use of, and hence an increase in the number of intermittent employees would be prohibited whenever their use would reduce the hours of full-time employees below 40 or the hours of part-time employees below 34. Thus, it is clear that this proposal would limit the agency's discretion in allocating the total number of employees assigned to an organizational unit, work project or tour of duty (as well as the proportions of and numbers within that total which would be full-time, part-time or intermittent employees). The fact that the present proposal does not prescribe a particular number of employees which the agency must assign to an organizational unit, work project or tour of duty is without controlling significance. It is well established that proposals which require an agency to assign a specific number of employees are excluded from the bargaining obligation under the staffing patterns provision of section 11(b). It is equally well established under prior Council decisions that proposals which are integrally related to and hence determinative of the numbers of employees that the agency might assign to a particular organizational unit, work project or tour of duty also are encompassed by the exclusion of staffing patterns from the bargaining obligation under section 11(b) of the Order. [Footnotes omitted.]

We find that the disputed proposal before the Council herein is integrally related to and consequently determinative of the numbers of employees that the activity might assign to a particular organizational unit, work project or tour of duty in a materially identical manner as the proposal before the Council in McClellan Air Force Base. Accordingly, for the reasons more fully set forth in McClellan, we find that the instant proposal is excluded from the agency's obligation to bargain under section 11(b) of the Order.^{3/}

^{3/} See also American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey, FLRC Nos. 77A-18 and 21 (Jan. 27, 1978), Report No. 142 at 14-16 of Council's decision.

Union Proposal II

Article 11, Section D, 4. e.

All requests for advanced sick leave will be processed through the employee's immediate supervisor. Approval/disapproval will be accomplished by the medical authorities and the Civilian Personnel Office. [Only the underlined sentence is in dispute.]

Agency Determination

The agency head determined that the second sentence of this proposal is nonnegotiable primarily on the ground that it purports to require bargaining unit management to assign certain of its responsibilities to offices not under its jurisdiction or control.

Question Here Before the Council

The question is whether the proposal is outside the activity's obligation to bargain under section 11(a) of the Order.

Opinion

Conclusion: The proposal would require bargaining with respect to matters which are outside the obligation to bargain under section 11(a) of the Order.^{4/} Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reason: As indicated, the agency contends that this proposal is nonnegotiable because, among other reasons, the "medical authorities" and the "Civilian Personnel Office" wherein the proposal would require the responsibility of approving or disapproving certain sick leave requests of unit employees to be "accomplished" are not under the authority of the Exchange Manager. In particular, the agency states that:

The medical office and Civilian Personnel Office at Hill Air Force Base are under the jurisdiction and authority of the Department of the Air Force; thus the Exchange Manager at the Hill Air Force Base Exchange, an AAFES activity, exercises no control over them and cannot make commitments at the bargaining table with respect to their actions or authority.

^{4/} In view of our decision that the proposal is outside the scope of mandatory bargaining under section 11(a) of the Order, it is unnecessary to further consider the remaining contention of the agency that the proposal is excepted from such bargaining by section 11(b).

The union does not specifically dispute this contention but merely disagrees with the determination of nonnegotiability. It argues only that the proposal is intended to get "a competent medical opinion on the medical aspects of an employee's request for sick leave."

Clearly the union proposal would require (as the union tacitly concedes) that certain of the responsibilities of AAFES management will be accomplished by persons or offices outside AAFES. Hence, under the proposal, those responsibilities would be assigned to persons or offices not under the direction of, or responsible to, AAFES management. That is, it would assign the approval of requests for "advanced" sick leave to persons or offices outside the organization which is a party to the negotiations. It is fundamental, in our view, that the scope of mandatory bargaining on personnel policies and practices and matters affecting bargaining unit working conditions does not include such a proposal. Accordingly, we find the proposal to be outside the scope of required bargaining under section 11(a) of the Order and, therefore, sustain the agency's determination of nonnegotiability.^{5/}

Union Proposal III

Article 12.

Military dependents who are employees of AAFES [Army, Air Force Exchange Service] will not be restricted from buying marked down merchandise.

Agency Determination

The agency head determined that the proposal is nonnegotiable on the ground that it concerns a policy matter involving the agency's internal security practices and, therefore, is excepted from the agency's obligation to negotiate by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal would require the agency to negotiate matters with respect to its internal security practices within the meaning of section 11(b) of the Order.

5/ Cf. Philadelphia Metal Trades Council and Philadelphia Naval Shipyard Employees' Cafeteria Association, 1 FLRC 509 [FLRC No. 73A-5 (Aug. 10, 1973), Report No. 43].

Opinion

Conclusion: The proposal concerns matters with respect to the internal security practices of the Army and Air Force Exchange Service, and thus is excepted from the agency's obligation to negotiate under section 11(b) of the Order. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: According to the agency, the internal security program of the post exchange system provides, inter alia, that:^{6/}

Exchange employees, including military dependent employees, will not be permitted to purchase any item of retail merchandise marked down for clearance until it has been on sale for at least one full day.

^{6/} As stated by the agency, the quoted rule appears, along with others forming a part of the internal security program of post exchanges, in Exchange Service Manual 40-11, Chapter 2. Examples of such rules cited by the agency are as follows:

Cashiers/checkers will not check out purchases of their relatives in any branch which is staffed by two or more employees.

[Employee] purchases will be paid for and bagged/packaged in the presence of the branch manager.

The bags/packages identified with the employee's name will be stored in the manager's office, customer layaway area or other designed location which limits employee access.

All employees will leave the facility from one designated exit only and will be observed by the manager or his designated representative. Packages will be inspected periodically by the manager or his representative.

Since the agency does not assert the published policy, itself, as a bar to negotiations under section 11(a) of the Order, it did not address the union's request for a waiver of the regulation as a bar to negotiation. Accordingly, no issue as to whether a "compelling need" exists for the published policy is before us in the present case and we therefore do not pass upon it.

The agency contends that the disputed union proposal, that certain AAFES employees will not be restricted from buying marked down merchandise, is nonnegotiable because it concerns a matter with respect to the foregoing asserted internal security practice which practice is "a condition of employment" for AAFES exchange employees "designed to prevent or discourage the situation in which an employee with markdown authority is tempted to use this discretion to his or her own advantage or that of a fellow-employee." The union for its part tacitly concedes that its proposal concerns a matter with respect to the quoted Exchange Service policy and characterizes the thrust of the policy as going "toward insuring employee honesty and safeguarding against thefts of the employer's property by employees." The union in effect claims, however, that such policy and, hence, the union proposal is not a matter with respect to "internal security practices" within the meaning of section 11(b) of the Order because, in essence: such policy only indirectly applies to security by prohibiting "an employee action which might contribute to the loss of property"; and the policy is not "meant to enforce the security of the employer's property . . . but instead attempts to prevent loss by indirectly limiting the occasions for such [employee] misconduct." [Emphasis in original.]

Section 11(b) of the Order provides in relevant part that "the obligation to meet and confer does not include matters with respect to . . . internal security practices." The meaning of "internal security" practices is not defined in the Order. Consistent with the general rules of statutory construction,^{7/} words in the Order are given their common meaning in the absence of a "legislative intent" to the contrary.^{8/}

No intent is evident in the Order, or in the various reports and recommendations which accompanied the Order and its subsequent amendments, that the phrase "internal security" practices is to be accorded any meaning other than the common meaning ascribed to it. The common meaning of the phrase as indicated by the dictionary definitions of the terms which comprise it is as follows:^{9/} "Internal" denotes origin, existence and application within the limits of something. In the organizational context with which the Order is concerned it means, therefore, within the limits of a particular organization. "Security" relates to defending, protecting, making safe or secure. Hence, as used in the Order with respect to an agency and its subordinate organizations, the term "security" practices includes, inter alia, those policies, procedures and actions that are established and undertaken to defend, protect, make safe or secure (i.e., to render relatively less subject to danger, risk or apprehension) the property of an organization.

^{7/} 73 Am. Jur. Statutes § 206 (1974).

^{8/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41], at 436.

^{9/} Webster's Third New International Dictionary (1966).

Clearly, the specific nature of the "internal security" practices which would best accomplish these objectives for a particular organization generally will depend upon the functions of that organization and its derivative goals, activities and processes; the character and vulnerability of what is being protected; and whether security is sought against a risk or danger from within or from outside the organization. Hence, such practices might include any of a wide range of measures intended to render secure the physical property of an organization. As a consequence of the variety of risks which might be involved, the specific methods employed, i.e., the security practices themselves, will of necessity differ according to the particular circumstances. Thus, depending upon the circumstances, they may involve one or a combination of practices, for example, guard forces, barriers, alarms and special lighting. Further, they may involve procedures to be followed by employees, which procedures are designed to eliminate or minimize particular risks to the property of an organization from such employees.^{10/}

Turning to the present case, it involves an agency operation which is in effect a retail sales outlet and, as previously set forth, an agency policy establishing as an asserted security practice a procedure to be followed by agency employees intended to eliminate or minimize a particular risk from such employees to agency property. In these circumstances, in our view, the union proposal, which would contravene such procedure, clearly is concerned with the agency's "internal security practices" (even though the proposal on its face, standing alone, does not appear to involve internal security matters). In particular, the proposal would negate the agency's adoption of a practice designed to prevent, or to render the Exchange Service relatively less subject to the risk of an employee abusing his or her "markdown authority" with respect to agency property held for sale, for personal benefit or the advantage of a fellow employee. In this regard, as indicated before, the union agrees that the Exchange Service practice is concerned with "insuring employee honesty and safeguarding against thefts of the employer's property by employees."

We, therefore, find that this union proposal concerns a matter with respect to the internal security practices of the agency within the common meaning of the phrase and, hence, within the meaning of the Order.^{11/} In this connection, we find no merit in the union's assertion that its proposal does not fall within the phrase "internal security practices" in section 11(b) of the Order because the agency practice involved does not "enforce security" but only seeks to "prevent loss by indirectly limiting the occasions for . . . misconduct." Even assuming that the practice established by the agency is "indirect" as claimed by the union, nothing in section 11(b) of

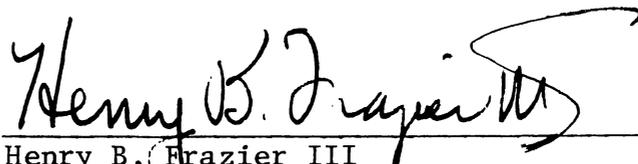
^{10/} See generally, R. S. Post and A. A. Kingsbury, Security Administration, An Introduction (1970).

^{11/} Id., 187-92, for a discussion of analagous problems and preventive controls in private sector businesses.

the Order renders the exception from the obligation to bargain on matters with respect to internal security practices dependent in any manner on the degree of directness or indirectness of the practices involved, so long as they have a significant impact on the internal security of the agency.

Accordingly, as the proposal concerns a matter with respect to the internal security practices of the Exchange Service, it is excepted from the agency's obligation to bargain.

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 14, 1978

DHEW, Social Security Administration, Bureau of Retirement and Survivors Insurance, Assistant Secretary Case No. 22-07882(GA). The final decision of the Assistant Secretary in this case was dated September 27, 1977, and was served on the American Federation of Government Employees, AFL-CIO (AFGE) by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, AFGE's appeal was due in the office of the Council no later than the close of business on November 1, 1977. However, AFGE's appeal was not filed with the Council until June 9, 1978, and no extension of time for such filing was requested by AFGE or granted by the Council.

Council action (August 21, 1978). Since AFGE's appeal was untimely filed with the Council, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 21, 1978

Mr. James R. Rosa
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: DHEW, Social Security Administration,
Bureau of Retirement and Survivors
Insurance, Assistant Secretary Case
No. 22-07882(GA), FLRC No. 78A-63

Dear Mr. Rosa:

This refers to your petition for review and request for a stay in the above-entitled case, filed with the Council on June 9, 1978; and the agency's opposition thereto, filed on August 11, 1978. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.^{1/}

In this case, the Regional Administrator (RA), upon an Application for a Decision on Grievability or Arbitrability filed by the activity, found, among other things, that the activity's grievance (concerning the union's refusal to meet its alleged obligation to pay one-half the cost of a transcript in an advisory arbitration proceeding) was on a matter subject to the arbitration provisions of the parties' agreement. In his Report and Findings on Arbitrability, the RA also advised the parties of their right to obtain review of his decision from the Assistant Secretary, by request for review filed with the Assistant Secretary on or before August 22, 1977. The union obtained an extension of time from the Assistant Secretary to file such a request, until September 12, 1977. However, the union's request, dated September 14, 1977, was filed subsequent to the due date established by the Assistant Secretary. By decision

^{1/} In your appeal, you also request permission to present oral argument before the Council. Pursuant to section 2411.48 of the Council's rules, this request is denied because your position is adequately reflected in your appeal and the documents submitted therewith.

dated September 27, 1977, which was served upon the parties by mail on the same date, the Assistant Secretary denied the union's request for review as untimely filed. It appears that thereafter the union sought reconsideration from the Assistant Secretary of his subject decision, which request was denied by the Assistant Secretary on November 2, 1977.

Subsequently, by letter of January 4, 1978, the union requested an interpretation from the Civil Service Commission (CSC) of CSC regulations as they pertained to the issue of responsibility for payment of transcripts in advisory arbitration proceedings such as here involved. Contemporaneously, the union, by letter of January 5, 1978, also notified the Assistant Secretary of its submission to the CSC, and asked that the Assistant Secretary delay his response to, or deny, a request from the activity seeking union compliance with the RA's decision. By letter of February 2, 1978, the Assistant Secretary notified the activity that he was deferring action on the compliance matter pending a response from the CSC to the union's January 4, 1978, request.

On February 28, 1978, in response to the union's request, the CSC rendered an interpretation of the regulations in question, emphasizing that the CSC did not construe or treat the union's request as involving an interpretation of any provision of the parties' agreement and that its response was not to be so construed.

By motion dated March 21, 1978, the union requested that the Assistant Secretary reconsider and dismiss the RA's decision, based upon the CSC's February 28, 1978, response. On May 5, 1978, the Assistant Secretary denied the union's motion, noting that the CSC's opinion addressed only the proper interpretation of CSC regulations and did not interpret the parties' agreement, and noting further that the union had failed to file a timely request for review of the RA's decision. The Assistant Secretary also directed the union to comply with the RA's decision. The union thereafter, on June 9, 1978, filed the instant appeal and request for a stay with the Council.

In your appeal, in addition to raising a number of substantive issues, you recognize the existence of the procedural issue with respect to the timeliness of your appeal to the Council and contend that your appeal was timely filed. More specifically, you claim, in essence, that your appeal is timely because it is an appeal from the Assistant Secretary's "final" decision of May 5, 1978; and because it raises issues as to the jurisdiction of the Assistant Secretary, which issues may assertedly be raised at any time. We cannot agree with your contentions.

Sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure provide that a petition for review of a final decision of the Assistant Secretary must be received in the office of the Council before the close of business 35 days from the date the decision is served by mail upon the party seeking Council review. Further, section 2411.45(d)

of the Council's rules expressly provides that a request for reconsideration of a decision of the Assistant Secretary shall not operate to extend the Council's time limits for filing a petition for review of such decision.

The Assistant Secretary's final decision in this case was that of September 27, 1977, wherein he denied the union's request for review of the RA's Report and Findings. While you claim that May 5, 1978, should be regarded as the date of the "final" decision of the Assistant Secretary, in his action of that date the Assistant Secretary merely denied, without material change to his decision of September 27, 1977, the union's further request of March 21, 1978, for reconsideration in the case.

Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules, your petition for review of the subject decision of the Assistant Secretary was due in the office of the Council no later than November 1, 1977. However, as already mentioned, your appeal was not filed with the Council until June 9, 1978, or more than 7 months late, and no extension of time for such filing was requested by the union or granted by the Council. Further, under section 2411.45(d) of the Council's rules, the union's initial request for reconsideration did not operate to extend the prescribed time limits for the filing of the appeal. Likewise, the union's subsequent request of March 21, 1978, for reconsideration of the RA's decision did not operate to extend those time limits. Cf., American Federation of Government Employees, AFL-CIO (Marine Corps Recruit Depot Exchange, San Diego, California), Assistant Secretary Case No. 72-5382(CO), + FLRC 309 [FLRC No. 76A-49 (May 13, 1976), Report No. 105].^{2/}

As to your additional claim that your appeal is timely because it raises issues as to the jurisdiction of the Assistant Secretary, which issues may assertedly be raised at any time, your contention is without merit. Even assuming your petition raises jurisdictional issues, such issues must be raised in a timely manner. As already indicated, your appeal from the Assistant Secretary's decision in this case was not filed with the Council until June 9, 1978, or more than 7 months late. Therefore, the alleged jurisdictional issues are not properly raised before the Council.

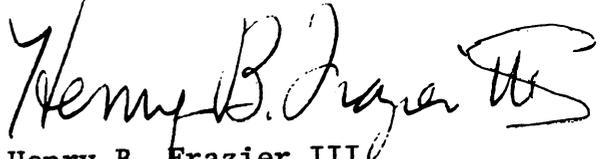
Moreover, while you have not requested a waiver of the expired time limit for the filing of your appeal, as provided for in section 2411.45(f) of the Council's rules, your instant submission advances no persuasive reason for granting such a waiver. See, e.g., U.S. Army Materiel Readiness Command, Redstone Arsenal, Alabama, Assistant Secretary Case No. 40-7979(CA), FLRC No. 77A-116 (Oct. 28, 1977), Report No. 138.

^{2/} The union's request to the CSC did not, of course, toll the Council's prescribed time limits since, apart from other considerations, such request was submitted to the CSC after the period for the timely filing of an appeal from the Assistant Secretary's decision.

Accordingly, since your appeal is untimely filed and without passing on the merits of the substantive issues raised in your appeal, it is hereby denied. Your request for a stay is likewise denied.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

I. L. Becker
SSA

Marine Corps Logistics Support Base Pacific, Barstow, California and American Federation of Government Employees, Local 1482, AFL-CIO (Lennard, Arbitrator). The union requested reconsideration of the Council's decision of May 25, 1978 (Report No. 150), setting aside part of the arbitrator's award, and sought, in effect, to have the Council fashion a new award in the case.

Council action (August 25, 1978). The Council held that the union's request failed to advance any persuasive reason upon which reconsideration is warranted. Accordingly, for reasons fully detailed in its decision letter, the Council denied the agency's request for reconsideration.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 25, 1978

Mr. William J. Stone
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Marine Corps Logistics Support Base Pacific,
Barstow, California and American Federation of
Government Employees, Local 1482, AFL-CIO
(Lennard, Arbitrator), FLRC No. 77A-30

Dear Mr. Stone:

The Council has carefully considered the union's request for reconsideration of the Council's May 25, 1978, decision in the above-entitled case. Specifically, the union requests that the Council modify its determination setting aside part III of the arbitrator's award^{1/} on the basis that the grievant, as a result of the Council's decision, is without "any personal relief under the arbitrator's award." (Although the agency was given an opportunity to respond to the union's request, no response was received by the Council.)

In this case, the arbitrator sustained the grievance, finding that, in effecting a particular promotion, the activity had violated provisions of the parties' negotiated agreement pertaining to promotions. The arbitrator directed in part III of his award that the grievant be promoted to the position in question. Subsequently, the agency appealed the award to the Council and, insofar as is pertinent herein, the Council accepted the petition for review on the ground that part III of the award violates appropriate regulation. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertain to the question raised by part III of the award.

In response the Civil Service Commission ruled that "[p]art III of the award is inconsistent with the principles enunciated in Comptroller General decisions dealing with retroactive promotion" in that there had not been established in this case "a direct, causal connection between the violation and the failure to promote the grievant." Accordingly, the Council set aside part III of the award.

In the request for reconsideration, the union contends that the Council's decision denies the grievant a remedy. Specifically, the union contends that,

^{1/} Part III of the arbitrator's award provided: "[The grievant] shall be promoted to Firefighter GS-081-05 . . . effective January 31, 1977."

had there been no violation by the activity, the grievant might have received the promotion in question. The union states that it does not take issue with "the Council's implicit finding that the arbitrator's award failed to establish 'a direct, causal connection between the violation and a failure to promote the grievant,'" and that it recognizes that "unless a 'but for' connection can be established, the Council is constrained to modify or set aside an award directing a promotion." However, the union urges, in order to provide the grievant with a remedy, that the Council modify part III of the award either by requiring that the agency rerun the promotion procedure or at least by directing that the grievant receive "special promotion consideration" under the Federal Personnel Manual. In so doing the union relies on cases in which it alleges that "[t]he Council previously has recognized the appropriateness of a determination ordering an agency to rerun an improper selection procedure in situations where an arbitrator has not made a 'but for' finding."^{2/}

In effect, the union is requesting that the Council reconsider its decision for the purpose of fashioning a new award as a substitute for part III which was found to violate appropriate regulation. However, as the Council recently stated: "Although the Council's rules clearly authorize the Council to modify, set aside, or remand an award in certain circumstances, there is no authority therein under which the Council could fashion a new award."^{3/} Moreover, this case is clearly distinguishable from the cases relied upon by the union in that the remedies fashioned by the arbitrator are quite different. In the cases cited by the union, the arbitrator specifically directed that a promotion action be rerun. Here the arbitrator did not order a rerun of the promotion procedure; instead, he specifically awarded the grievant the promotion in dispute. If the Council were to order the agency in this case to rerun the promotion action, such an order would clearly involve the fashioning of a new award. Thus, under its rules of procedure the Council is precluded from granting the grievant the relief he seeks in this matter, because, as stated above, the Council is without authority to fashion a new award.^{4/}

^{2/} The union cites Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees, Local 3407 (Ables, Arbitrator) 4 FLRC 289 [FLRC No. 75A-33 (Apr. 27, 1976), Report No. 104]; Social and Rehabilitation Service, Department of Health, Education and Welfare and American Federation of Government Employees, Local 41, AFL-CIO (Mallet-Prevost, Arbitrator), 4 FLRC 296 [FLRC No. 75A-42 (Apr. 27, 1976), Report No. 104].

^{3/} American Federation of Government Employees, Local No. 51 and Bureau of the Mint, U.S. Assay Office (Eaton, Arbitrator), FLRC No. 78A-2 (June 23, 1978), Report No. 151 at 4, n. 5 of the Council's decision.

^{4/} Of course, the parties could jointly fashion a new award themselves or they could jointly agree to submit to arbitration the question of an appropriate remedy in this case.

In the Council's opinion, the union's request of June 26, 1978, for reconsideration, which, as indicated, seeks in effect to have the Council fashion a new award in this case, fails to advance any persuasive reason upon which reconsideration is warranted. Accordingly, your request is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: M. Arkin
Navy

Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Eigenbrod, Arbitrator).

The arbitrator determined that an alleged violation by the agency of its published policies and regulations was subject to the parties' negotiated grievance procedure by reason of section 12(a) of the Order which was incorporated in the parties' agreement. Accordingly, the arbitrator held that the union's grievance (which alleged that the activity had failed to comply with an agency regulation pertaining to the furnishing of tools and equipment to employees) was arbitrable. As to the merits of the grievance, the arbitrator directed the agency to comply with the regulation in accordance with the interpretation of the regulation by the arbitrator. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception that the award violates the Order. The Council also granted the agency's request for a stay. (Report No. 143.)

Council action (August 31, 1978). The Council found that the arbitrator's award, by finding the grievance arbitrable, violated section 13(a) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award in its entirety.

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

Federal Aviation Administration,
Department of Transportation

and

FLRC No. 77A-124

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the dispute in this matter arose when a grievance was filed alleging that the Federal Aviation Administration (the agency) had not complied with paragraph 56 of DOT/FAA Order 4900.1^{1/} (Housing and Employee Support Services). More specifically, the grievance alleged that the agency failed to furnish employees occupying agency-owned housing on St. Thomas Island with necessary lawn tools and equipment for ground care around such houses and thereby violated the agency order.^{2/} The grievance was ultimately submitted to arbitration.

In the opinion accompanying his award, the arbitrator first dealt with the agency's contention that the grievance was not arbitrable under the provisions of the negotiated grievance procedure, specifically Article 7,

1/ According to the arbitrator, FAA Order 4900.1, paragraph 56, Tools and Equipment provides:

Necessary tools and equipment for ground care will be made available by the maintenance activity to the extent that occupants do not have adequate equipment. Such items will be issued to occupants as personally charged property.

2/ The arbitrator set forth as "pertinent" the following articles of the parties' negotiated agreement:

Article 5 (Changes in Agreement and Past Practices) which provides:

Section 1. It is agreed that personnel policies, practices and matters affecting working conditions which are within the scope of the

(Continued)

Section 1.^{3/} The arbitrator stated, in this regard, that section 12(a)^{4/} of the Order was incorporated into the parties' agreement by Article 42, thus placing the obligation and responsibility on both parties to be governed by FAA regulations. The arbitrator stated further that in

(Continued)

Employer's authority will not be changed or implemented without prior negotiations when they are in conflict with this agreement.

Section 2. The Parties agree to consult prior to implementing changes in personnel policies, practices and matters affecting working conditions that are within the scope of the Employer's authority and that are not specifically covered by this agreement.

Article 7 (Disputes Settlement Procedure), Section 1 which provides:

This Article provides the procedure for the timely consideration of grievances over the interpretation or application of this agreement. This procedure does not cover any other matters for which statutory appeals procedures exist and shall be the exclusive procedure available to the Parties and the employees in the unit for resolving grievances over the interpretation or application of this agreement. Any employee, group of employees or the Parties may file a grievance under this procedure. The Parties shall cooperate to resolve grievances informally at the earliest possible time and at the lowest possible supervisory level.

Article 42 (Employer Rights) which sets forth sections 12(a) and 12(b) of Executive Order 11491, as amended.

3/ Article 7, Section 1 is set forth in note 2, supra.

4/ Section 12(a) provides:

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

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

conformity with section 13(a) of the Order,^{5/} the parties set forth a grievance procedure in their negotiated agreement that provided for the consideration of grievances "over the interpretation or application of this agreement." Thus, the arbitrator concluded that if the agency allegedly violates its own regulations, an employee may file a grievance under the negotiated grievance procedure to determine whether or not the agency's interpretation or application of its own regulation is proper in light of the provisions of the agreement. The arbitrator concluded, therefore, that the grievance was arbitrable.

As to the merits of the grievance, the arbitrator determined that "the position of the Agency [regarding the furnishing of tools and equipment for ground care] is contra to the clear and unambiguous language of said FAA Order 4900.1" The arbitrator also concluded that the condition upon which the agency stated it would furnish tools and equipment ("when employees are located in areas where facilities are not available for purchasing such equipment") was "a change" and "[fell] within Article 5 . . . Section 1"^{6/} of the agreement.

The arbitrator made the following award:

1. The Grievance is arbitrable.
2. That the Agency comply with FAA Order No. 4900.1, paragraph 56, dated 24 July, 1968, as written and set forth in that paragraph 56 of said Order and in accordance with the interpretation of this paragraph 56 as set forth by the Arbitrator.

^{5/} Section 13(a) provides:

Sec. 13. Grievance and arbitration procedures.

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

^{6/} Article 5, Section 1 is set forth in note 2, supra.

The agency filed a petition for review (opposed by the union) of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that the award violates the Order.^{7/} Neither party filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously indicated, the Council accepted the agency's petition for review of the arbitrator's award on the ground that the award violates the Order. In its petition the agency contended that the arbitrator's determination that the grievance was arbitrable violates section 13(a) of the Order.

In the instant case, in resolving the issue of arbitrability, the arbitrator stated that section 12(a) of the Order was incorporated into the parties' agreement as Article 42, "thus placing the obligation and responsibility on both parties of being governed by . . . FAA Regulations." On this basis, the arbitrator therefore concluded that if the agency allegedly violates such regulations, an employee may file a grievance under the negotiated grievance procedure "to determine whether or not the Agency's interpretation of its own regulation is . . . proper . . . in light of the provisions of the Agreement." Accordingly, the arbitrator held in his award that the grievance was arbitrable. In the Council's opinion, such award violates the Order.

The Council has consistently held that the mandatory inclusion of section 12(a) of the Order^{8/} in an agreement does not operate to extend the

^{7/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

^{8/} Section 12 provides, in part:

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

coverage and scope of a negotiated grievance procedure to include grievances over matters enumerated in section 12(a). In Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), 4 FLRC 93, 98-99 n. 8 [FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96], the Council noted with regard to an interpretation of section 12(a) asserted by the union in that case, which interpretation was similar to the interpretation given to section 12(a) by the arbitrator in the instant case:

The theory which appears to underlie the union's contention is that by operation of section 12(a) of the Order, which is incorporated in . . . the subject agreement, the coverage and scope of the negotiated grievance procedure is extended to include grievances alleging violations of all laws, regulations of appropriate authorities and policies, including agency policies and regulations. However, section 13 of Executive Order 11491 provides "[t]he coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." The union's theory concerning the interpretation of section 12(a) of the Order would render section 13 meaningless. The scope of the negotiated grievance procedure is to be negotiated by the parties. Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements. [Emphasis in original.]

Thus, to repeat, the mandatory inclusion of section 12(a) in a negotiated agreement does not operate to extend the scope and coverage of a negotiated grievance procedure to grievances over those matters enumerated in section 12(a). To extend the scope and coverage of a negotiated grievance procedure to grievances over those matters enumerated in section 12(a), an affirmative provision to that effect must be included in the parties' negotiated agreement. As the Council stated in its recent decision in American Federation of Government Employees, AFL-CIO, Local 2054 and Veterans Administration Hospital, Little Rock, Arkansas, FLRC No. 77A-125 (June 30, 1978), Report No. 152, with respect to the scope of a negotiated grievance procedure:

For example, as to the inclusion of grievances over matters covered by agency regulations, the Order clearly envisions an affirmative provision in the negotiated agreement to effect such coverage. Thus, the Council stated in its Report and Recommendations which led to the amendment of section 13 of the Order to read as it currently provides:

[T]he parties may, through provisions in their negotiated agreement agree to resolve grievances over matters covered by agency regulations and within the discretion of agency management through

their negotiated grievance procedure. In fact, . . . the parties may make their negotiated grievance procedure the exclusive procedure for resolving grievances of employees in the bargaining unit over agency policies and regulations not contained in the agreement. If the parties should agree to make the negotiated procedure the exclusive procedure, grievances over agency policy and regulation, to the extent covered thereby, would no longer be subject to grievance procedures established by agency regulations.^{7/}
Id. at 3 of the decision. [Footnote in original.]

7/ Labor-Management Relations in the Federal Service (1975) at 43-44.

Thus, section 13(a) of the Order currently provides that "[t]he coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." [Emphasis added.] In summary, while the parties may, in negotiating a grievance procedure under section 13(a), agree to include an affirmative provision extending the scope and coverage of that procedure to grievances over matters covered by agency regulations, the mandatory inclusion of section 12(a) in an agreement, standing alone, does not effect such coverage.

As previously noted, the arbitrator, in the present case, determined that by operation of section 12(a) of the Order, which is incorporated in the parties' agreement as Article 42, the coverage and scope of the parties' negotiated grievance procedure is extended to include grievances alleging violations of all FAA regulations. On this basis alone, the arbitrator determined that the grievance, alleging a violation of FAA Order 4900.1, paragraph 56, was arbitrable. Thus, the sole basis expressed by the arbitrator for rendering this grievance arbitrable was his perceived intent of section 12(a) of the Order which had been incorporated in the agreement as Article 42. However, applying the foregoing principles concerning sections 13(a) and 12(a) of the Order to the facts of this case, it is clear that the arbitrator's award, holding this grievance alleging a violation of FAA Order 4900.1 to be arbitrable under the terms of the parties' negotiated grievance procedure, is inconsistent with the requirement in section 13(a) that the coverage and scope of the grievance procedure be negotiated by the parties, and hence the award clearly violates section 13(a) of the Order.^{9/}

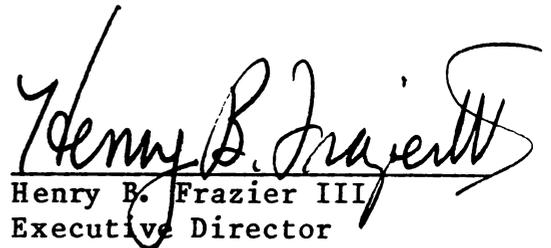
9/ In its petition, the union further contends that the arbitrator, in addition to premising his authority and decision upon Article 42, also premised his decision upon Article 5 of the parties' agreement. Thus, the union argues that the meaning of section 12(a) is not at issue. However, in reviewing the arbitrator's opinion and award, it is clear that he

(Continued)

Conclusion

For the foregoing reasons, we conclude that the arbitrator's award, by finding the grievance arbitrable, violates section 13(a) of the Order. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award which found the grievance arbitrable and which went on to direct the agency to furnish necessary tools and equipment for ground care to employees occupying agency housing on St. Thomas Island.

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 31, 1978

(Continued)

relied on Article 42 of the agreement and not on Article 5 to resolve the issue of arbitrability. The arbitrator, himself, concedes that his consideration of Article 5 was solely the result of his interpretation of Article 42 which has been found by the Council to be contrary to the Order. Thus, the union's contention with regard to Article 5 is without merit.

Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Eigenbrod, Arbitrator). The arbitrator determined that an alleged violation by the agency of its published policies and regulations was subject to the parties' negotiated grievance procedure by reason of section 12(a) of the Order which was incorporated in the parties' agreement. Accordingly, the arbitrator held that the union's grievance (which alleged that the activity had failed to comply with an agency regulation pertaining to quality standards for agency owned housing which was leased to employees) was arbitrable. As to the merits of the grievance, in his award the arbitrator found that the agency had not complied with the regulation in question and directed that immediate steps be taken to correct the housing maintenance deficiencies complained of in the union's grievance. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception that the award violates the Order. The Council also granted the agency's request for a stay. (Report No. 143.)

Council action (August 31, 1978). The Council found that the arbitrator's award, by finding the grievance arbitrable, violated section 13(a) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award in its entirety.

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

Federal Aviation Administration,
Department of Transportation

and

FLRC No. 77A-129

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the dispute in this matter arose when a grievance was filed alleging that the Federal Aviation Administration (the agency) had not complied with DOT/FAA Order 4900.1 (Housing and Employee Support Services)^{1/} by failing to properly maintain agency housing leased to employees on St. Thomas Island; that the agency changed this FAA Order without negotiating the change; and that the agency violated Article 42, Section 1 of the agreement by not complying with the FAA Order.^{2/} The grievance was ultimately submitted to arbitration.

In the opinion accompanying his award, the arbitrator first dealt with the agency's contention that the grievance was not arbitrable under the

^{1/} The pertinent provisions of the FAA Order 4900.1 entitled "Housing and Employee Support Services," relate generally to quality and quantity standards for FAA housing provided FAA employees.

^{2/} The arbitrator set forth as "pertinent" the following articles of the parties' negotiated agreement:

Article 5 (Changes in Agreement and Past Practices) which provides:

Section 1. It is agreed that personnel policies, practices and matters affecting working conditions which are within the scope of the Employer's authority will not be changed or implemented without prior negotiations when they are in conflict with this agreement.

Section 2. The Parties agree to consult prior to implementing changes in personnel policies, practices and matters affecting working conditions that are within the scope of the Employer's authority and that are not specifically covered by this agreement.

Article 7 (Disputes Settlement Procedure), Section 1 which provides:

This Article provides the procedure for the timely consideration of grievances over the interpretation or application of this agreement.

provisions of the negotiated grievance procedure, specifically, Article 7, Section 1.^{3/} The arbitrator stated in this regard, that section 12(a)^{4/} of Executive Order 11491 was incorporated into the parties' agreement by Article 42, thus placing the obligation and responsibility on both parties to be governed by FAA regulations. The arbitrator stated further that in conformity with section 13(a) of the Order,^{5/} the

(Continued)

This procedure does not cover any other matters for which statutory appeals procedures exist and shall be the exclusive procedure available to the Parties and the employees in the unit for resolving grievances over the interpretation or application of this agreement. Any employee, group of employees or the Parties may file a grievance under this procedure. The Parties shall cooperate to resolve grievances informally at the earliest possible time and at the lowest possible supervisory level.

Article 42 (Employer Rights) which sets forth sections 12(a) and 12(b) of Executive Order 11491, as amended.

3/ Article 7, Section 1 is set forth in note 2, supra.

4/ Section 12(a) provides:

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

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

5/ Section 13(a) provides:

Sec. 13. Grievance and arbitration procedures.

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as

(Continued)

parties set forth a grievance procedure in their negotiated agreement that provided for the consideration of grievances "over the interpretation or application of this agreement." Thus, the arbitrator concluded that if the agency allegedly violates its own regulations, an employee may file a grievance under the negotiated grievance procedure to determine whether or not the agency's interpretation or application of its own regulation is proper in light of the provisions of the agreement. The arbitrator concluded, therefore, that the grievance was arbitrable.

As to the merits of the grievance, the arbitrator determined that maintenance discrepancies did exist at the time of the filing of the grievance and at the date of the hearing.

Accordingly, the arbitrator made the following award:

1. That the Grievance is arbitrable.
2. That the Agency has not complied with its own order, FAA Order 4900.1 pertaining to those housing units owned by it on St. Thomas Island and made issue of in this Grievance.
3. Immediate steps should be taken to correct those maintenance deficiencies complained of by the Grievance.

The agency filed a petition for review (opposed by the union) of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that the award violates the Order.^{6/} Neither party filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(Continued)

it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

^{6/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously indicated, the Council accepted the agency's petition for review of the arbitrator's award on the ground that the award violates the Order. In its petition the agency contended that the arbitrator's determination that the grievance was arbitrable violates section 13(a) of the Order.

In our view, the arbitrator's award in the instant case, to the extent that it held the grievance arbitrable based upon the arbitrator's interpretation of section 12(a) of the Order, incorporated in the parties' agreement as Article 42, bears no material difference from the arbitrator's award which the Council has set aside this date in Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Eigenbrod, Arbitrator), FLRC No. 77A-124. In that case the Council held that "while the parties may, in negotiating a grievance procedure under section 13(a), agree to include an affirmative provision extending the scope and coverage of that procedure to grievances over matters covered by agency regulations, the mandatory inclusion of section 12(a) in an agreement, standing alone, does not effect such coverage." There, as here, the sole basis expressed by the arbitrator for rendering this grievance arbitrable was his perceived intent of section 12(a) of the Order which had been incorporated in the agreement as Article 42.

Accordingly, based on the applicable discussion and conclusion in Federal Aviation Administration, supra, the Council concludes that the arbitrator's award in the instant case, which holds this grievance arbitrable under the terms of the parties' negotiated grievance procedure, is inconsistent with the requirements in section 13(a) that the coverage and scope of the grievance procedure be negotiated by the parties, and thus violates section 13(a) of the Order and cannot be sustained.

Conclusion

For the foregoing reasons, we conclude that the arbitrator's award, by finding the grievance arbitrable, violates section 13(a) of the Order. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award which found the grievance arbitrable and which went on to direct the agency to correct maintenance deficiencies in agency housing units leased to employees on St. Thomas Island.

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 31, 1978

Veterans Administration Hospital, Danville, Illinois and American Federation of Government Employees, Local Union No. 1963 (Daugherty, Arbitrator). The arbitrator determined that a supervisor, by failing to take action with regard to a derogatory remark concerning the grievant which had been made by a coworker of the grievant, was, in effect, guilty of the same offense as the coworker; and that the hospital had misapplied a relevant agency requirement by imposing a different penalty on the supervisor from that imposed on the coworker. As a remedy, the arbitrator directed the hospital to, among other things, impose a penalty on the supervisor like that imposed on the coworker. The agency appealed to the Council, requesting that the Council accept its petition for review based on an exception alleging that the award violated section 12(b)(2) of the Order. The agency also requested a stay.

Council action (August 31, 1978). The Council held that the agency's petition for review failed to describe facts and circumstances to support its exception. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the stay request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1978

Mr. James E. Adams
Attorney
Veterans Administration
810 Vermont Avenue, NW.
Washington, D.C. 20420

Re: Veterans Administration Hospital, Danville,
Illinois and American Federation of Government
Employees, Local Union No. 1963 (Daugherty,
Arbitrator), FLRC No. 78A-5

Dear Mr. Adams:

The Council has carefully considered the agency's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator, the grievance in this matter arose out of "a condition of mutual distaste" between the grievant and one of her coworkers and between the grievant and one of her supervisors. In her grievance, the grievant alleged, among other things, that the supervisor preferred the coworker over the grievant in making work assignments; that he showed favoritism to the coworker regarding training for advancement; and that he offered overtime to the coworker but not to the grievant, which contributed to the coworker's higher performance evaluation. The grievance also referred to an incident in which the coworker had made a derogatory remark about the grievant to a patient of the hospital. When the grievant discovered that the coworker had made the remark, she complained to the supervisor. After a period of some four months had passed, the grievant came to believe that the supervisor was not doing anything about the matter nor would he do anything about it. In her grievance, the grievant requested, among other things, that both the supervisor and coworker receive at least a reprimand for their conduct.

During the processing of the grievance, the parties reached a tentative settlement of the grievance which included the hospital's agreement to impose discipline in the form of an admonishment on both the coworker and supervisor. However, in reviewing the tentative settlement, the hospital's assistant director determined that the supervisor should receive a "counseling" document^{1/} for his conduct. Following this determination, the

^{1/} According to the arbitrator, "what upper management said in [the "counseling"] document about [the supervisor's] deficiencies and errors of commission and omission was anything but soft; the counseling used tough language. . . . It ended with a paragraph which said in substance that (a) [the supervisor] should desist in the future from acting in a biased or favoritistic fashion in respect to his subordinate employees; and (b) failure to eliminate said discrimination 'could result in disciplinary action.'"

grievant pursued her grievance through the grievance procedure protesting the hospital's decision to "counsel" the supervisor. The hospital maintained, however, that its action with respect to the supervisor was not grievable or arbitrable. In response, the union submitted the grievance to the Assistant Secretary's Regional Administrator for the Chicago Region for an arbitrability determination. The Regional Administrator found the grievance to be arbitrable,^{2/} whereupon the parties proceeded to arbitration.

In arbitration, the parties agreed that the following issue was before the arbitrator:

Under the probative facts of record in this case, under the nature of the subject grievance, and under the relevant documents binding the Parties' relations, was the Hospital's treatment of [the coworker's supervisor] legally proper? If not, what shall the remedy be?

Based on his analysis of a Hospital Memorandum, which contained an appendix entitled "Table of Examples of Offenses and Penalties," the arbitrator determined that the supervisor "by his conceded failure to take action on that part of [the grievant's] grievance dealing with the [coworker's remark], gave support and credibility to [the coworker's] slander, [and] was in effect guilty of the same offense as [the coworker] was." Having made this determination, the arbitrator then found that, by imposing a different penalty on the supervisor from that imposed on the coworker, the hospital was "guilty of disregarding or misapplying" VA Employee Letter 00-75-2 which provides that "the principle of like penalties for like offenses will be followed with due consideration for circumstances in individual cases." Thus, the arbitrator sustained the grievance, directing the hospital to:

(1) train and evaluate the performance of [the] grievant . . . adequately, fairly, and without discrimination; and (2) place in the personnel folder of [the] supervisor . . . an admonishment commensurate with (a) the found seriousness of his participation in the belittlement of the grievant [by the remark] and (b) the sort of admonishment originally levied on [the coworker] for her guilt in violating the rule against that offense.

^{2/} In finding the grievance arbitrable in Case No. 50-15427(GA) (May 16, 1977), the Regional Administrator stated:

The issue before me in this matter is not the appropriateness of disciplining a supervisor by the Respondent, but rather the arbitrability of a grievance which was initially accepted under the negotiated grievance procedure. With regard to this issue, I note that no substantive arguments have been advanced which would indicate that the matters raised in the initial grievance were not grievable and/or arbitrable under the negotiated procedure. Accordingly, having carefully considered the Application and all materials submitted by the parties in interest, I find that the grievance concerning a number of complaints made by a bargaining unit employee against two (2) supervisors and another bargaining unit employee is arbitrable under the terms of the negotiated agreement.

The agency requests that the Council accept its petition for review of the arbitrator's award on the ground that the award violates section 12(b)(2) of the Order.^{3/} The agency also requests that the Council grant a stay of the award. The union did not file an opposition.

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

In support of its exception that the arbitrator's award violates section 12(b)(2) of the Order, the agency contends that the award interferes with management's right to decide and act concerning the imposition of employee discipline, that it interferes with management's right to decide not to take action concerning employee discipline, and that it interferes with management's right to change such a decision once it has already been made.^{4/} Thus, in this case, management contends that because it ultimately decided to counsel the supervisor even though it had earlier contemplated admonishing him, the arbitrator's award compels management to change a decision concerning a disciplinary matter that it had made, in effect directing management not to take one action and to take another instead. Such an award, in the agency's view, violates section 12(b)(2) of the Order.

The Council will accept a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. However, in the particular circumstances

^{3/} The applicable portion of section 12(b)(2) of Executive Order 11491 provides:

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

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

.
(2) to . . . take . . . disciplinary action against employees[.]

^{4/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 297 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

under consideration in this case, the Council is of the opinion that the agency has not presented sufficient facts and circumstances to support its exception that the portion of the award sustaining the grievance and directing the hospital in this case to admonish the supervisor rather than "counsel" him violates section 12(b)(2) of the Order. In VA Research Hospital,^{5/} the Council said:

Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel actions, i.e., to hire, promote, etc. The emphasis is on the reservation of management authority to decide and act on these matters

Further, the Council has consistently held that the rights reserved to agency management under section 12(b) may not be infringed by an arbitrator's award under a negotiated agreement.^{6/} However, the agency has not shown in what way the arbitrator's award, under the facts of the instant case, interferes with its authority "to decide and act" with respect to its 12(b)(2) right to take disciplinary action against employees.

In this regard, the hospital management, in the course of attempting to resolve a grievance, determined that the supervisor should be disciplined. Initially, management contemplated imposing one penalty, namely an admonishment, but later concluded that an admonishment was inappropriate and substituted a counseling document. It is clear that the hospital management decided and acted with respect to the supervisor's conduct, i.e., it decided that the supervisor should be disciplined and acted to so discipline the supervisor. Thereafter, when the grievance was pursued, and following a determination by the Regional Administrator that the grievance was arbitrable, the hospital agreed to have the appropriateness of the imposition of the counseling document upon the supervisor reviewed by the arbitrator.^{7/} Thus, after the hospital had decided and acted with respect

^{5/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

^{6/} U.S. Immigration and Naturalization Service, Burlington, Vermont and American Federation of Government Employees, Local No. 2538, AFL-CIO (Purcell, Arbitrator), FLRC No. 76A-131 (July 13, 1977), Report No. 131.

^{7/} The hospital apparently acquiesced in the arbitrability of the dispute over the appropriateness of the penalty imposed upon a supervisor. The hospital apparently did not appeal the Regional Administrator's decision to the Assistant Secretary, and, further, in the "unofficial transcript" of the proceedings before the arbitrator submitted by the agency, it is stated that "[t]he parties have agreed that during the course of the proceeding on this grievance that this case is prepared before the arbitrator to be decided on its merits."

to a 12(b)(2) matter, it went to arbitration on the question of whether "the Hospital's treatment of [the coworker's] immediate supervisor . . . [was] legally proper" and, if not, "what . . . the remedy [should] be." The arbitrator thereafter applied agency and hospital regulations dealing with the treatment of employees determined by management to have engaged in misconduct and to warrant discipline for such misconduct. Thus, the arbitrator simply resolved a dispute submitted to him by the parties concerning the severity of the treatment accorded an employee following management's decision under section 12(b)(2) to take disciplinary action against that employee. Therefore, the Council is of the opinion that the agency has not presented facts and circumstances to support its contention that the award violates section 12(b)(2) of the Order and the agency's exception thus provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay of the award is also denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: C.E. Drake
AFGE

Department of Transportation, Federal Aviation Administration, O'Hare Airway Facility Sector, Chicago, Illinois, A/SLMR No. 927. The Assistant Secretary, upon a representation petition filed by the Professional Airways Systems Specialists, found appropriate a unit of employees assigned to the activity. The agency appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (August 31, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, or present a major policy issue. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1978

Mr. Robert S. Smith
Director of Personnel
and Training
Office of the Secretary
Department of Transportation
Washington, D.C. 20590

Re: Department of Transportation, Federal
Aviation Administration, O'Hare Airway
Facility Sector, Chicago, Illinois,
A/SLMR No. 927, FLRC No. 78A-22

Dear Mr. Smith:

The Council has carefully considered your petition for review, and the union's opposition thereto, of the Assistant Secretary's decision in the above-entitled case.^{1/}

In this case, upon a petition filed by the Professional Airways Systems Specialists (PASS) the Assistant Secretary found appropriate a unit of all General Schedule and Wage Grade employees assigned to the Airway Facility Sector, O'Hare Airport, excluding, in addition to certain standard exclusions, "employees classified clerk stenographer, GS-0312 and Secretary, GS-0318." In ruling on the unit the Assistant Secretary concluded:

Based on all the foregoing circumstances, I find that the unit sought herein constitutes a comprehensive grouping of employees who share a clear and identifiable community of interest. Thus, as noted above, all employees of the Activity share in a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. In addition, the claimed unit constitutes, in effect, a residual region-wide unit

^{1/} The Federal Aviation Science and Technological Association of the National Association of Government Employees (FASTA/NAGE) was permitted to file an amicus curiae submission in support of the agency's petition for review.

of all unrepresented nonprofessional employees of the Activity.^{2/} I find also that such unit will promote effective dealings and efficiency of agency operations. Thus, as noted above, there has been a long bargaining history in the petitioned for unit,^{3/} and a recent experience of successful and fruitful negotiations involving sector-wide units elsewhere. [Footnotes added.]

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious "in that it is totally inconsistent with applicable Council precedent" and presents a major policy issue "in that it is inconsistent with and fails to promote the purposes of the Order, specifically Section 10(b)." In support of your petition you contend that the Assistant Secretary's decision in the instant case is inconsistent with his previous decision in FAA, Eastern Region^{4/} and fails to give proper consideration to the specific unit determination criteria of section 10(b) of the Order as

^{2/} In this regard, the Assistant Secretary stated: "I have been administratively advised that at the time of the filing of the instant petition the employees in the claimed unit were the only unrepresented Division employees within the Region."

^{3/} According to the Assistant Secretary, Local 401 of the National Association of Broadcast Employees and Technicians (NABET) was certified in 1970 as exclusive representative of the unit. In December 1975, Teamsters Local 781 replaced NABET as the certified representative of the same unit. In 1976, after failing to obtain member ratification of an agreement negotiated with the activity, the Teamsters disclaimed interest in the unit. The unit employees were still unrepresented when PASS filed its petition in March 1977.

^{4/} Federal Aviation Administration and Federal Aviation Administration, Eastern Region, A/SLMR No. 600 (Dec. 18, 1975). In that case the Assistant Secretary found appropriate and directed an election in a unit of all employees of the Airway Facilities Division located in the regions of the FAA, with certain specified exclusions. The unit constituted a nationwide residual unit of all regional Airway Facilities Division employees. In that case the Assistant Secretary also found appropriate various regionwide and sectorwide existing bargaining units which were encompassed within the more comprehensive nationwide unit. The employees in the existing separately appropriate units were given a self-determination election as to whether they wished to be represented by a labor organization in the smaller unit or by FASTA/NAGE in the more comprehensive unit. At the time of the filing of the petitions in that case the employees in the claimed unit in the present case were included in an exclusively recognized unit which was subject to an agreement bar. Therefore, the employees in the claimed unit at O'Hare were expressly excluded from the units found appropriate in that case.

well as to the general policy of the Order, expressed in previous Council decisions,^{5/} which seeks to reduce the existing fragmentation of bargaining units through unit consolidation and to prevent their further fragmentation through new appropriate unit determinations. Thus, you assert that the employees of the activity "have no distinguishable community of interest" apart from the employees of the nationwide unit established in the FAA, Eastern Region case and that this nationwide unit, once established, "is the only one which will promote effective dealings and efficiency of agency operations."^{6/} You additionally assert that, contrary to the Assistant Secretary's finding, the proposed unit would not constitute a residual unit of all unrepresented nonprofessional employees at the activity because it expressly excludes, and, you contend, leaves unrepresented, clerk stenographers and secretaries.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification under the facts and circumstances of this case in reaching his decision that the unit sought was appropriate for exclusive recognition. More particularly, with respect to your assertion that the Assistant Secretary's decision is inconsistent with applicable Council precedent, your appeal fails to establish any clear, unexplained inconsistency between the instant decision and previously published decisions of the Council, noting in this regard that in the case upon which you rely, namely, FAA Eastern Region, the Assistant Secretary found appropriate either a comprehensive nationwide unit or the previously existing units (See note 4, supra).

5/ In this regard, the agency cites the Council's decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, Consolidated For Decision 4 FLRC 668 [FLRC Nos. 75A-14, 75A-128 and 76A-4 (Dec. 30, 1976), Report No. 119] and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, A/SLMR No. 687, FLRC No. 76A-97 (July 20, 1977), Report No. 131.

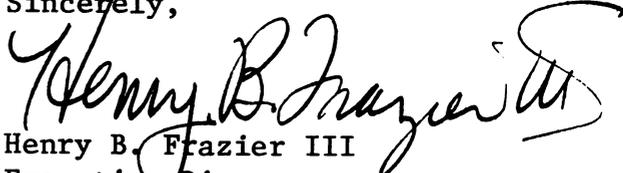
6/ FASTA/NAGE, which is the exclusive representative for the nationwide unit, sought to intervene in the present case. However, the Assistant Secretary found that its request was untimely pursuant to his regulations and consequently denied the request to intervene.

Furthermore, in our opinion, the decision of the Assistant Secretary does not present a major policy issue. In this regard, your allegations that the Assistant Secretary's decision is inconsistent with and fails to promote the purposes of section 10(b) of the Order essentially reflect your disagreement with the Assistant Secretary's determination that the proposed unit comprises "a comprehensive grouping of employees who share a clear and identifiable community of interest" and that the unit "will promote effective dealings and efficiency of agency operations." Further, your appeal fails to establish that the Assistant Secretary's decision is inconsistent with the purposes and policies of the Order, noting particularly the Assistant Secretary's finding that the proposed unit constitutes, in effect, a residual unit of all unrepresented nonprofessional employees of the activity.^{7/} See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, 4 FLRC 581 [FLRC No. 76A-91 (Nov. 5, 1976), Report No. 115].

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. B. Peer
Barr & Peer

G. W. Welcome
FASTA/NAGE

^{7/} As to the contention that the unit would not constitute a residual unit because of the exclusion of employees classified as clerk stenographer and secretary, it is noted that the Assistant Secretary found that the unit was the same unit as that which previously existed and that he was administratively advised that at the time of the filing of the petition the employees in the claimed unit were the only unrepresented division employees within the Region. Such a finding raises the possibility that these employees are included in the nationwide residual unit found appropriate in A/SLMR No. 600 and for which FASTA/NAGE was subsequently certified as the exclusive bargaining representative. Any question in this regard can be resolved by the Assistant Secretary's unit clarification procedures.

National Association of Government Employees and Adjutants General of North Carolina and Tennessee. The dispute involved two union proposals which concerned the point values of civilian technicians' military performance ratings and the establishment of a procedure for technicians to appeal from appraisals of their military performance to appeal boards created exclusively to hear such appeals.

Council action (August 31, 1978). The Council held that the union's proposals were outside the obligation to bargain established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the disputed proposals were nonnegotiable.

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

National Association of
Government Employees

(Union)

and

FLRC No. 78A-37

Adjutants General of North Carolina
and Tennessee

(Activities)

DECISION ON NEGOTIABILITY ISSUES

Union Proposals

Each of the two union proposals at issue in this appeal (set forth in the appendix hereto) would modify the reduction in force (RIF) procedures for National Guard technicians^{1/} set out in a National Guard Bureau (NGB) regulation.^{2/} In essence, the proposals would require that the point values of the military performance rating be given the same weight as those of the civilian performance rating and, in addition, establish a procedure for a technician to appeal from an appraisal of his military performance to one of three appeal boards created exclusively to hear such appeals.

Agency Determination

The agency head determined that the proposals concerned only matters related to the military aspects of technician employment and are, therefore, outside the obligation to bargain established by section 11(a) of the Order.

^{1/} Pursuant to 32 U.S.C. § 709(b) and (e), National Guard technicians must maintain National Guard military status as a condition of continued technician employment.

^{2/} The regulation, Technician Personnel Manual (TPM) 351, currently provides that a technician's retention standing in a RIF is based on the combined total of his civilian performance rating and his military performance rating. In this regard, the civilian performance rating point values range from 25 points for satisfactory performance to 75 points for outstanding performance while the military performance rating point values range from 5 points for satisfactory performance to 25 points for outstanding performance.

Question Here Before the Council

Whether the proposals concern a matter within the bargaining obligation established by section 11(a) of the Order.

Opinion

Conclusion: The proposals are outside the obligation to bargain established by section 11(a) of the Order.^{3/} Accordingly, the agency's determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The union represents a bargaining unit of employees who are National Guard technicians. Such technicians must, as a condition of their civilian employment, be members of the National Guard in a military capacity.^{4/} As a consequence of this statutory mandate, the NGB has promulgated RIF procedures which include an evaluation of a technician's military (National Guard) performance as well as his technician's performance to ensure that in a RIF situation the statutory mandate is implemented, i.e., that only those technicians qualified for the military grade corresponding to a technician position as well as for the technician position are retained in a RIF.^{5/}

The union proposals in this case would, as previously indicated, change the point values utilized in the military performance appraisal to measure levels of military performance and establish a procedure for a technician to appeal from such appraisal of his military performance rendered by his

3/ Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations

4/ See note 1 supra. See generally National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120.

5/ See American Federation of Government Employees, Local 2953, AFL-CIO and Nebraska National Guard, FLRC No. 77A-106 (Feb. 14, 1978), Report No. 143; National Association of Government Employees, Local R5-100 and Adjutant General, State of Kentucky; and National Association of Government Employees, Local R14-76 and Adjutant General, State of Wyoming, FLRC No. 76A-109 (July 20, 1977), Report No. 132.

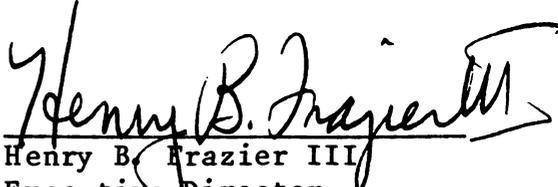
military supervisor to one of three military appeal boards comprised solely of military personnel and created exclusively, based on the record before us, for the purpose of hearing such appeals.

In the Michigan National Guard case,^{6/} the Council determined that a proposal which similarly would have established a procedure for National Guard technicians to appeal from an appraisal of their military performance to one of three appeal boards created to hear such appeals was outside the obligation to bargain under section 11(a) of the Order. In determining that the proposal was nonnegotiable the Council stated:

Although . . . National Guard technicians are required by law to maintain military status in the National Guard as a condition of their civilian technician employment relationship (which relationship is, of course, subject to the Order), the military relationship itself is not covered by the Order but is totally mandated by statute. Consequently, since the union's proposal concerns a matter in connection with the military aspects of technician employment for members of the bargaining unit, it concerns a subject which is not a working condition arising under or controlled by the Order. Accordingly, it is outside the obligation to bargain under section 11(a) of the Order and, is nonnegotiable. [Footnote omitted.]

In our opinion, the reasoning of the Michigan National Guard case clearly is applicable to the proposals involved in this case, which proposals, by their express terms, concern only matters related to the military aspects of technician employment. Accordingly, since the union's proposals concern matters in connection with the military aspects of technician employment, which matters are not working conditions arising under or controlled by the Order, they are outside the obligation to bargain under section 11(a) of the Order and are nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 31, 1978

6/ National Association of Government Employees, Local R8-22 and Michigan National Guard, FLRC No. 78A-11 (June 6, 1978), Report No. 151.

APPENDIX

Union Proposal I^{1/}

Amend TPM 351 as follows:

Subchapter 5-3

e. Relative Retention Standing

2nd para - delete

replace with

The retention rating is determined by the combined cumulative totals of the Annual Technician Performance Rating NGB Form 2, prepared in accordance with TPP 902, and the Appraisal by Immediate Military Supervisor using the same NGB Form 2. Military appraisals will be completed at the time of a RIF only for those technicians who do not have a current military appraisal in their official personnel folders. The weighted value of both ratings will be as follows: satisfactory, 25 points; excellent, 50 points; outstanding, 75 points.

Add

f. A technician may appeal a military appraisal within ten (10) days of its receipt. The appeal will be to one of three Military Appeal Boards. The Boards will be established in the following manner:

Officer Appeal Board-

- a. J.A.G. Officer
- b. Chaplain
- c. A non-technician officer to be selected by mutual agreement of the JAG and Chaplain.

Warrant Officer Appeal Board -

- a. J.A.G. Officer
- b. Chaplain
- c. A non-technician Warrant Officer to be selected by mutual agreement of the J.A.G. and Chaplain.

Enlisted Appeal Board -

- a. J.A.G. Officer

^{1/} This proposal was submitted in negotiations with the Adjutant General of North Carolina.

b. Chaplain

c. A non-technician senior NCO E8 or E9 to be selected by mutual agreement of the JAG and Chaplain.

g. The Board shall have the authority to hold a hearing on any appeal and to render a decision which will be final.

Union Proposal II^{2/}

Amend TPM 351 as follows:

Subchapter 5-3

(e) Relative Retention Standing - delete second paragraph replace with -

The retention rating is determined by the combined cumulative totals of the annual Technician Performance Rating NGB Form 2, prepared in accordance with TPP 902 and the appraisal by immediate military supervisor - reduction-in-force, using NGB Form 2, and prepared in the same manner as the Technician Performance Rating. Military appraisals will be prepared at the time of a RIF only for those technicians who do not have a current military appraisal in their official personnel folders. The weighted value of both annual technician and military performance ratings will be as follows: satisfactory, 25 points, excellent, 50 points, outstanding, 75 points.

(f) If excellent or outstanding military performance ratings are awarded a narrative giving the basis for the rating will accompany the rating.

(g) If a technician does not agree with his military appraisal he has the right of appeal prior to the establishment of the reduction-in-force register. This appeal must be within ten (10) days to the following boards which will be established by the Adjutant General:

Officer Technician Appeal Board to consist of the following:

a. Chaplain

b. JAG Officer

^{2/} This proposal was submitted in negotiations with the Adjutant General of Tennessee.

- c. Third officer to be chosen by mutual agreement of the Chaplain and JAG. All three must be non-technician officers.

Warrant Officer Technician Appeal Board to consist of the following:

- a. Chaplain
- b. JAG Officer
- c. A senior Warrant Officer to be chosen by mutual agreement of the Chaplain and JAG. All three must be non-technicians.

Enlisted Technician Appeal Board to consist of the following:

- a. Chaplain
- b. JAG Officer
- c. Senior NCO E8 or E9 to be chosen by mutual agreement of the Chaplain and JAG. The NCO to be a non-technician.

- (h) The decision of the Board shall be final and not subject to appeal or review.

Delete Figure 5-1 and replace with NGB Form 2.

General Services Administration, Region 5, Public Buildings Service, Chicago, Illinois, Assistant Secretary Case No. 50-15477(RO). The Assistant Secretary, in agreement with the Acting Regional Administrator (RA) and based on the RA's reasoning, found that the evidence was insufficient to establish that the activity gave improper assistance to the American Federation of Government Employees, AFL-CIO (AFGE) during the election campaign in question, as alleged in the objections filed by GSA Region 5 Council of National Federation of Federal Employees Locals (NFFE). Accordingly, the Assistant Secretary denied NFFE's request for review seeking reversal of the RA's Report and Findings on Objections. AFGE was subsequently certified as the exclusive representative of the unit involved. NFFE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious. NFFE also requested a stay of the Assistant Secretary's decision.

Council action (August 31, 1978). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and NFFE neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied NFFE's petition for review. The Council likewise denied NFFE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1978

Mr. Robert J. Gorman
Chief Negotiator
GSA Region 5 Council of National
Federation of Federal Employees Locals
8 East Delaware Place, #3R
Chicago, Illinois 60611

Re: General Services Administration, Region 5,
Public Buildings Service, Chicago, Illinois,
Assistant Secretary Case No. 50-15477(RO),
FLRC No. 78A-38

Dear Mr. Gorman:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the American Federation of Government Employees, AFL-CIO, in the above-entitled case.

In this case, GSA Region 5 Council of National Federation of Federal Employees Locals (NFFE) filed objections to conduct alleged to have improperly affected the results of an election. NFFE alleged, in substance, that General Services Administration, Region 5, Public Buildings Service, (the activity) gave improper assistance throughout an election campaign to the incumbent labor organization, American Federation of Government Employees, AFL-CIO (AFGE) by permitting bargaining unit employees to deliver and distribute campaign literature at the work place and otherwise to solicit support for AFGE and to use activity equipment and facilities for AFGE's campaign purposes. The Acting Regional Administrator (RA), in his Report and Findings on Objections, overruled the objections, concluding that NFFE had submitted no probative evidence: (1) that agency management participated in the allegedly improper conduct; (2) that employees allegedly using activity facilities and equipment were acting as agents, or even with the knowledge, of the activity; or (3) that the activity gave improper assistance to AFGE. In this regard, he noted that "[w]hile a labor organization does not have a right under the Order to solicit support for organizational purposes in work areas during work time, under certain circumstances such conduct, standing alone, does not warrant setting the election aside," citing, General Services Administration, Region 5, Public Buildings Service, Milwaukee Field Office, Milwaukee, Wisconsin, Assistant Secretary Case

No. 50-13016(RO), 4 FLRC 413 [FLRC No. 76A-32 (July 30, 1976), Report No. 109]. The Assistant Secretary, in agreement with the RA, and based on his reasoning, found that the evidence was insufficient to establish that the activity gave improper assistance to AFGE during the election campaign in question. Accordingly, he denied NFFE's request for review seeking reversal of the RA's Report and Findings on Objections, and directed the RA to issue an appropriate certification. (Hereafter, AFGE was certified as the exclusive representative of the unit.)

In your petition for review on behalf of NFFE, you allege that the Assistant Secretary's decision is arbitrary and capricious in that it condones the violation of Federal statutes and the failure or refusal of activity officials to take disciplinary action when such offenses were brought to their attention early in the election campaign. In this regard you contend that the massive use of facilities and equipment permitted by the activity makes this a "precedent case" because it is so different from the circumstances involved in General Services Administration, Region 5, Public Buildings Service, Milwaukee Field Office, Milwaukee, Wisconsin, supra, and that, in these circumstances, you should not be precluded from using evidence developed or revealed after the filing of the initial objections.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious and you neither allege, nor does it appear, that the decision raises a major policy issue.

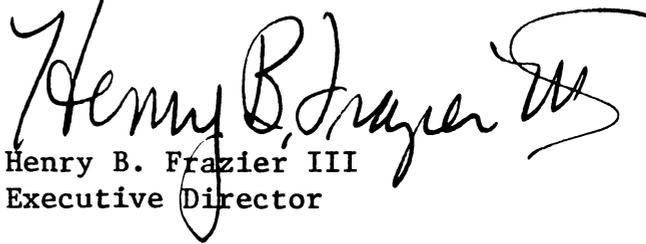
With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Thus, as to your contention that the activity permitted massive use of its facilities and equipment by AFGE, thereby making this a precedent case, your appeal essentially constitutes mere disagreement with the Assistant Secretary's conclusion that the evidence was insufficient to establish that the activity improperly assisted AFGE during the election campaign. Further, your appeal provides no basis to support an assertion that the Assistant Secretary failed to consider any probative evidence which you submitted in reaching his conclusion. Moreover, you neither allege nor does it appear that the Assistant Secretary's decision raises a major policy issue warranting Council review.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that the decision presents a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of

procedure, and therefore your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. A. Clark
GSA

A. H. Kaplan
AFGE

Equal Employment Opportunity Commission, Washington, D.C., Assistant Secretary Case No. 22-07926(RO). The Assistant Secretary found, contrary to the Regional Administrator (RA), that the agency's conduct did not improperly affect the results of the election in question, as alleged in the objections filed by the National Alliance of Postal and Federal Employees (the Alliance). Accordingly, the Assistant Secretary granted the requests for review filed by the agency and the American Federation of Government Employees, AFL-CIO (AFGE), seeking reversal of the RA's Report and Findings on Objections, thereby dismissing the Alliance's objections. AFGE was subsequently certified as the exclusive representative of the unit involved. The Alliance appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action (August 31, 1978). The Council held that the Alliance's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the Alliance's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1978

Mr. Wesley Young
Vice President
National Alliance of Postal
and Federal Employees
1644 11th Street, NW.
Washington, D.C. 20001

Re: Equal Employment Opportunity Commission,
Washington, D.C., Assistant Secretary
Case No. 22-07926(RO), FLRC No. 78A-51

Dear Mr. Young:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the American Federation of Government Employees, AFL-CIO (AFGE), in the above-entitled case.

In this case, according to the Assistant Secretary's decision, the National Alliance of Postal and Federal Employees (the Alliance) filed objections to conduct alleged to have improperly affected the results of an election. In his Report and Findings on Objections, the Regional Administrator (RA) found that improper conduct by the Equal Employment Opportunity Commission (agency) as set forth in two of the objections was sufficient in scope to affect the results of the election. Specifically, the RA concluded that a memorandum distributed by management personnel in the agency's San Francisco Region interfered with the rights of employees to distribute literature on behalf of the Alliance in non-work areas during off-duty hours, and that while the memorandum was later rescinded, notice of such action was not sufficiently communicated to the employees to dispel the effects of the conduct found violative. Thus, he concluded that the agency had failed to maintain a neutral posture during the campaign, and had consequently improperly affected the results of the election. The RA also sustained an objection concerning a telegram which was received and thereafter distributed by a supervisor in the agency's Atlanta District Office. The RA found that the telegram contained information pertinent to the election campaign of AFGE, the incumbent union, and that the supervisor's distribution of the telegram belied the agency's neutral posture and thereby improperly influenced the results of the election.

The Assistant Secretary granted requests for review seeking reversal of the RA's Report and Findings on Objections filed by the agency and AFGE,

and thereby dismissed both objections to the election. In so dismissing the objections to the election, the Assistant Secretary stated:

With regard to the first objection, while I agree with the Regional Administrator that the original memorandum, as worded, could possibly have been misleading to employees, the last paragraph of the memorandum clearly indicated that once the Alliance had attained a 30 percent showing of interest, the restrictions placed upon its activities would be modified. Upon being notified that the Alliance had filed a representation petition, the Agency's San Francisco Regional Director issued a rescission of his original memorandum, to which was attached an explanation of what treatment was to be accorded to the Petitioner. This rescission was distributed well before the election at issue herein. In view of these facts, and noting that no employee was disciplined or charged with leave for any actions taken on behalf of the Petitioner, I find that the Agency's conduct with regard to the instant memorandum was not of such a nature to have affected the results of the election. I am therefore dismissing this objection.

With respect to the distribution of the telegram in the Atlanta District Office, the evidence establishes that the Atlanta District Office ordered that all copies be retrieved. Evidence shows that this action was taken immediately, and that all copies that had been distributed by the supervisor were, in fact, retrieved within several hours. Under these circumstances, I find that the Agency's conduct herein was not sufficient in scope to improperly affect the results of the election, and therefore this objection must also be dismissed.

Accordingly, the Assistant Secretary directed the RA "to cause an appropriate certification to be issued." (Hereafter, AFGE was certified as the exclusive representative of the unit.)

In your petition for review on behalf of the Alliance, you allege that the Assistant Secretary's decision is arbitrary and capricious since it ignores the evidence developed by the RA's exhaustive investigation concerning two of the Alliance's objections, and instead is based on the size of AFGE's margin of victory as negating the effects of these incidents on the election. You further contend that the Assistant Secretary's decision raises three major policy issues: (1) whether conduct occurring before the filing of a petition (such as the memorandum issued by the agency's San Francisco Region herein) can be used as part of objections to an election when such conduct significantly affected the results of the election; (2) whether conduct violative of the Order (such as the agency's distribution of AFGE literature in Atlanta) is condoned if corrected in time and the Assistant Secretary is satisfied that no harm has resulted from such conduct; and (3) whether employees may distribute or read union campaign literature during their nonduty time while on the agency's premises without being disciplined or threatened with discipline by the agency.

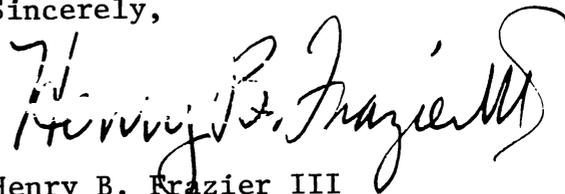
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Rather, your contentions in this regard constitute essentially disagreement with the Assistant Secretary's finding that the agency's conduct was not of such a nature or scope to improperly affect the results of the election. Such a disagreement with findings of the Assistant Secretary does not provide a basis for Council review of Assistant Secretary decisions. See, e.g., General Services Administration, Region 5, Public Buildings Service, Milwaukee Field Office, Milwaukee, Wisconsin, Assistant Secretary Case No. 50-13016(RO), 4 FLRC 413 [FLRC No. 76A-32 (July 30, 1976), Report No. 109]; Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, A/SLMR No. 613, 4 FLRC 417 [FLRC No. 76A-35 (July 30, 1976), Report No. 109]. Similarly, your appeal raises no major policy issues warranting Council review. Thus, each of the alleged major policy issues set forth above again constitutes, in essence, disagreement with the Assistant Secretary's finding, for the reasons set forth in his decision, that the agency's conduct herein did not improperly affect the results of the election.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. B. Curtis
EEOC

J. N. Sturdivant
AFGE

Association of Civilian Technicians and Michigan National Guard. The dispute involved nine union proposals which, in essence, concerned various aspects of the method by which a civilian technician's military performance will be measured and recorded including the establishment of a procedure for a technician to appeal from an appraisal of his military performance by his military supervisor to an appeal board created exclusively to hear such appeal.

Council action (September 1, 1978). The Council held that the union's proposals were outside the obligation to bargain established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the disputed proposals were nonnegotiable.

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

Association of Civilian Technicians

(Union)

and

FLRC No. 78A-33

Michigan National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposals

The nine union proposals at issue in this appeal (set forth in an attachment hereto) would modify the reduction-in-force (RIF) procedures for National Guard technicians^{1/} set out in a National Guard Bureau (NGB) regulation. In essence, the proposals concern various aspects of the method by which a technician's military performance will be measured and recorded including the establishment of a procedure for a technician to appeal from an appraisal of his military performance to an appeal board created exclusively to hear such appeals.

Agency Determination

The agency head determined that the proposals concern only matters related to the military aspects of technician employment and are, therefore, outside the obligation to bargain established by section 11(a) of the Order.

Question Here Before the Council

Whether the proposals concern a matter within the bargaining obligation established by section 11(a) of the Order.

^{1/} Pursuant to 32 U.S.C. § 709(b) and (e), National Guard technicians must maintain National Guard military status as a condition of continued technician employment.

Opinion

Conclusion: The proposals are outside the obligation to bargain established by section 11(a) of the Order.^{2/} Accordingly, the agency's determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The union represents a bargaining unit of employees who are National Guard technicians. Such technicians must, as a condition of their civilian employment, be members of the National Guard in a military capacity.^{3/} As a consequence of this statutory mandate, the NGB has promulgated RIF procedures which include an evaluation of a technician's military (National Guard) performance as well as his technician performance to ensure that in a RIF situation the statutory mandate is implemented, i.e., that only those technicians qualified for the military grade corresponding to a technician position as well as for the technician position are retained in a RIF.^{4/}

In the Michigan National Guard case,^{5/} the Council determined that a proposal which similarly would have established a procedure for National Guard technicians to appeal from an appraisal of their military performance to one of three appeal boards created to hear such appeals was outside the obligation to bargain under section 11(a) of the Order. In determining that the proposal was nonnegotiable the Council stated:

2/ Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations

3/ See note 1 supra. See generally National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120.

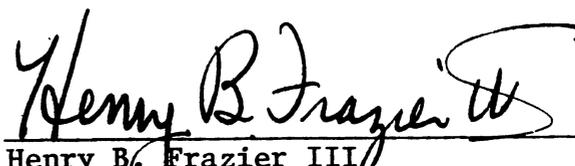
4/ See American Federation of Government Employees, Local 2953, AFL-CIO and Nebraska National Guard, FLRC No. 77A-106 (Feb. 14, 1978), Report No. 143; National Association of Government Employees, Local R5-100 and Adjutant General, State of Kentucky; and National Association of Government Employees, Local R14-76, and Adjutant General, State of Wyoming, FLRC No. 76A-109 (July 20, 1977), Report No. 132.

5/ National Association of Government Employees, Local R8-22 and Michigan National Guard, FLRC No. 78A-11 (June 5, 1978), Report No. 151. Accord, National Association of Government Employees and Adjutants General of North Carolina and Tennessee, FLRC No. 78A-37 (Aug. 31, 1978), Report No. 155.

Although . . . National Guard technicians are required by law to maintain military status in the National Guard as a condition of their civilian technician employment relationship (which relationship is, of course, subject to the Order), the military relationship itself is not covered by the Order but is totally mandated by statute. Consequently, since the union's proposal concerns a matter in connection with the military aspects of technician employment for members of the bargaining unit, it concerns a subject which is not a working condition arising under or controlled by the Order. Accordingly, it is outside the obligation to bargain under section 11(a) of the Order and, is nonnegotiable. [Footnote omitted.]

In our opinion, the reasoning of the Michigan National Guard case clearly is applicable to the proposals involved in this case, which proposals, by their express terms, concern only matters related to the military aspects of technician employment. Accordingly, since the union's proposals concern matters in connection with the military aspects of technician employment, which matters are not working conditions arising under or controlled by the Order, they are outside the obligation to bargain under section 11(a) of the Order and are nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: September 1, 1978

Attachment

ATTACHMENT

Union Proposals

Proposal I

The Employer agrees that the employee's Military Appraisal Form (NGBF 351-2) will be completed concurrent with the employee's annual Technician Performance Rating. If the employee's rating military supervisor is other than his civilian supervisor then the next higher civilian/military supervisor, who is knowledgeable of the employee's performance, will rate the technician. This provision applies also when the employee's military supervisor is in the same competitive level as the employee being rated.

Proposal II

Should an employee's military rating result in an adverse action, as defined in this Agreement, then the employee may appeal the appraisal under the provisions of this Agreement and TPM 753.2.

Proposal III

When utilizing the Military Appraisal Form the Employer agrees to use the values reflected in Appendix A of this agreement when applying points in the appropriate categories. These values will be attached to all military appraisal forms prior to distribution to rating supervisors.

Proposal IV

A notice to all military appraisers will be attached to NGB Form 351-2 which will enhance proper implementation of the appraisal and will include the following factors:

- a. Importance of the appraisal to the employee.
- b. Advise the appraiser that he may be required to substantiate the rating given the employee during the review process if necessary.
- c. Appraiser must inform the employee that if unsatisfied with his appraisal he may appeal the appraisal as per the provisions set forth in this Article.

Proposal V

Preceding military supervisory appraisals will be removed from the employee's Official Personnel Folder when a new appraisal is initiated.

Proposal VI

The completed military supervisor appraisal (NGB Form 351-2) is to be seen only by the appraiser; the technician being appraised and/or his representative; the Technician Personnel Office; and by such personnel who need to know when a RIF occurs, when a dispute is initiated, or in the course of inspections or reviews of personnel management activities. This will be accomplished by transmittal in sealed envelopes. Disclosure of this material to other persons is not to be permitted.

Proposal VII

Initial military supervisor appraisals will be conducted within 30 days after Agency approval of this Article. Subsequent appraisals must be accomplished at the time of the technician's next civilian performance rating. Tenure I employees with no previous record of appraisal will have one completed at the time of the RIF notice. New employees (other than Tenure I) will have their military appraisal completed to coincide with their supervisory evaluation after 120 of employment.

Proposal VIII

Because of the unusual nature of rating technicians on their military performance, and because this rating could adversely affect a technician's civilian retention status in a Reduction in Force procedure, the Employer agrees to establish an employee appellate review board to consider any contested military appraisal ratings. The review board shall be convened by the Adjutant General and shall consist of the appellant and his designated representative, the Technician Personnel Officer or his designee, the appellant's supervisor and a subject matter specialist. The board shall convene within ten days after the request for appeal is made by the technician. The Employer shall make available upon request of either party all pertinent documents and data relative to the appeal. The employee may present any relative evidence, either written or oral, for consideration by the panel. The employee's request for review must be made within ten (10) working days of receipt of the appraisal in question. The review board's investigation will include, but is not limited to, (1) a review of the issues and facts and, (2) the procedures and/or compliance with the provisions of this Article. The review board must render a recommendation within ten (10) days after all arguments have been heard. The review board will make their recommendation to the Adjutant General who in turn will consider the recommendation and make his decision based on that recommendation. The Adjutant General must render his decision within ten (10) days after the review board submits their findings. The Adjutant General's decision will be final.

Proposal IX

The Employer agrees to attach the letter reflected in Appendix B of this Agreement to all Military Appraisal Forms (NGBF 351-2) prior to distribution to rating supervisors.

APPENDIX A

DRAFT APPRAISAL FACTORS FOR USE IN PREPARING FORM 351-2,
APPRAISAL BY MILITARY SUPERVISOR

CATEGORY: KNOWLEDGE OF ASSIGNMENT

This factor encompasses possession of the following knowledges and skills necessary to do the technicians present job:

An understanding of the specialty and/or other technical knowledge and procedures applicable to the work - A knowledge of techniques and skills needed to perform the work - Adequate and relevant research skills - Appropriate recognition of and ability to cite applicable procedures - An awareness of the scope of responsibility and authority in performing assignments.

(5) Materially exceeds accepted standards. Consistently has demonstrated knowledge to perform independently with a high degree of effectiveness and proficiency in the characteristic activities of the assigned position.

(4) Performs above accepted standards. Has demonstrated the knowledge required to perform assigned duties with only infrequent guidance being required in the more unusual or complex areas.

(3) Fulfills all the requirements of successful operation. Has demonstrated adequate knowledge in performing average assignments without guidance. Occasionally, unusual or more difficult assignments will require detailed guidance.

(2) Considered marginal. While satisfactory, improvement is needed. Knowledge demonstrated is sometimes less than that required to satisfactorily perform in the normal aspects of the assignment. Frequent evidence of marginal job knowledge.

(1) Fails to meet normal requirements for successful operation. Often fails to demonstrate knowledge and understanding required to effectively perform assignments. Frequent evidence of poor job knowledge.

CATEGORY: UTILIZATION OF TIME

This factor encompasses the following characteristics:

The ability to plan and organize work effectively - Does not overwork or underwork assignment - Keeps non-productive time to a minimum - Avoids work that should properly be done by lower graded technicians - Does not unnecessarily utilize or waste time of others - Works assignments in order of their importance and priority - Makes corrections and revisions in work assignments without delay.

(5) Materially exceeds accepted standards. Maximizes effective and efficient use of time. Does not substitute office approach for needed field action. Plans and organizes actions in an exceptionally effective manner. Consistently ahead of deadlines.

(4) Performs above accepted standards. Exceeds expectations frequently. Rarely fails to meet deadlines. Uses time effectively. Emphasizes needed field and/or office action.

(3) Fulfills all the requirements of successful operation within the position. Meets expectations. Plans, organizes, carries out actions with a reasonable investment of time. Sufficiently emphasizes needed activity on assignments.

(2) Considered marginal. While satisfactory, improvement is needed. Marginally effective in utilizing time on assignments. Frequently substitutes office approach for needed field action. Actions are delayed, deadlines frequently overlooked. Involved with unnecessary details.

(1) Fails to meet normal requirements for successful operation. Wastes time, fails to meet deadlines. Effort or action on assignments is frequently ineffective and time-consuming.

CATEGORY: DEPENDABILITY & COOPERATION

This factor encompasses the following characteristics:

Carries out instructions in a reliable manner - Performs well under pressure - Meets deadlines and target dates - Follows established procedures - Keeps supervisor informed - Makes decisions or completes assignments without unnecessary delay - Initiates timely follow-up actions when needed - Meets and deals effectively with subordinates, peers, supervisors - Participates in and contributes to group efforts - Accepts instructions and work assignments willingly - Helps others in appropriate situations - Gracefully admits errors or concedes arguments - Accepts organizational or procedural changes.

(5) Materially exceeds accepted standards. Sustains motivation over a long period of time to do the best possible job. Fully carries out instructions, assumes complete responsibility for all assignments, frequently assumes a supportive role within the group.

(4) Performs above accepted standards. Responds positively to organizational goals, assignments, and counseling. Work habits are usually sound and effective. Only occasional guidance is needed.

(3) Fulfills all the requirements of successful operation. Requires little follow up on assignments. Employs good work habits, assumes responsibility in an acceptable, predictable manner.

(2) Considered marginal. While satisfactory, improvement is needed. Need to become more reliable. Frequently fails to follow instructions. Frequently negative or rarely displays any genuine interest in improving deficiencies. Erratic work habits.

(1) Fails to meet normal requirements for successful operation. Unreliable. Negative attitude is exhibited when changes occur or guidance is offered.

Cannot accept constructive criticism. Cannot be counted on to carry out responsibilities without excessive supervisory guidance.

CATEGORY: INITIATIVE & JUDGEMENT

This factor encompasses the following characteristics:

Recognizes what needs to be done and proceeds to do it without being told - Applies ingenuity and imagination in handling assignments - Originates ideas and suggestions - Undertakes to extend his technical job-related knowledge - Evaluates alternative actions or solutions, weighs pertinent factors and makes sound decisions - Distinguishes between relevant and irrelevant matters - Uses discretion in consulting with superiors about assignments, important developments, problems, etc.

(5) Materially exceeds accepted standards. Solves difficult problems related to assignments where no specific instructions are available. Innovative, industrious, and energetic in approach to difficult assignments. Has insight necessary to determine true causes of problems, resulting in sound conclusions and actions.

(4) Performs above accepted standards. Frequently employs innovative techniques in solving assignment-related problems. Makes suggestions, contributions to group effort is [sic] substantial.

(3) Fulfills all the requirements of successful operation. Routine situations are dealt with effectively. Occasionally demonstrates originality when confronted with unusual circumstances. Decisions are generally sound and realistic.

(2) Considered marginal. While satisfactory, improvement is needed. Slow to proceed on own and frequently must be urged to deal with problem assignments. Cannot be relied upon to reach well-reasoned conclusions. Does not recognize the need to seek advice.

(1) Fails to meet normal requirements for successful operation. Seldom takes action on his own. Pertinent facts are not weighed appropriately. Does not anticipate consequence of actions taken. Passive in approach to normal duties. Never has constructive suggestions.

CATEGORY: QUALITY OF WORK

This factor encompasses the following characteristics:

Analysis, research and supporting reasoning are adequate - Recognizes need for exceptions, conditions, and alternatives and properly acts upon them - Technical conclusions are sound and accurate - Completed assignments are acceptable and within prescribed directives.

(5) Materially exceeds accepted standards. Work is always exceptional in completeness and accuracy and in compliance with applicable directives. Necessity for review of work is minimized. Full compliance objectives are applied.

(4) Performs above accepted standards. Consistently accurate and thorough. Errors are minimal, minor in nature, and seldom repeated.

(3) Fulfills all the requirements of successful operation. Work is fully acceptable. Procedures, priorities, deadlines are adhered to. Errors are infrequent throughout routine demands of position.

(2) Considered marginal. While satisfactory, improvement is needed. Work frequently requires correction. Procedural defects are frequently evidenced in work submitted for review or approval. Pattern of performance is erratic and frequently unacceptable.

(1) Fails to meet normal requirements for successful operation. Work is unacceptable. Repetitive and excessive errors.

APPENDIX B

LETTER OF ACKNOWLEDGEMENT FOR TECHNICIANS WHO
ARE RATED ON MILITARY APPRAISAL FORM 351-2

I acknowledge that I have been afforded the opportunity to review the rating attached hereto. My signature does not indicate that I agree or disagree with this appraisal. I understand that if I disagree with this appraisal I must make my disagreement specifically known to my technician supervisor within 10 (ten) working days after the effective date below so as to establish my right, to higher level review as applicable.

(signature of technician)

(date signed)

Department of Treasury, Bureau of Engraving and Printing, Washington, D.C., Assistant Secretary Case No. 22-7554(AP). This appeal arose from a decision by the Assistant Secretary holding that the matter in dispute (i.e., whether, as alleged by the Electrolytic Plate Makers of Washington in its grievance, the activity had violated a particular provision of the parties' agreement by assigning to another union jurisdiction over work that had been historically performed in the unit) was grievable and arbitrable under the agreement. The Council accepted the agency's petition for review, concluding that the Assistant Secretary's decision raised a major policy issue as to the nature of his responsibility to consider the existing legal and regulatory structure in resolving grievability and arbitrability disputes under section 13(d) of the Order, namely, in the circumstances of the present case, to consider section 12(b) of the Order in resolving the instant dispute. (Report No. 143.)

Council action (September 5, 1978). The Council concluded that the Assistant Secretary, in resolving the instant grievability-arbitrability dispute, failed properly to consider section 12(b) of the Order in a manner consistent with his responsibility under section 13(d) of the Order in the facts and circumstances of this case. The Council further concluded, for the reasons fully detailed in its decision and contrary to the decision of the Assistant Secretary, that the dispositive provision of the parties' agreement relied upon by the union in support of its grievance was violative of section 12(b)(5) of the Order, and hence the dispute was neither grievable nor arbitrable. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for action consistent with the Council's decision.

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

Department of Treasury,
Bureau of Engraving and Printing,
Washington, D.C.

and

Assistant Secretary Case
No. 22-7554(AP)
FLRC No. 77A-132

Electrolytic Plate Makers of Washington,
Local 24, the International Plate Printers,
Die-Stampers and Engravers Union of North
America, AFL-CIO, CLC

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary holding that "the matter in dispute herein is grievable and arbitrable under the negotiated grievance and arbitration procedures of the parties' negotiated agreement." The grievance, which was filed by Electrolytic Plate Makers of Washington, Local 24, the International Plate Printers, Die-Stampers and Engravers Union of North America, AFL-CIO, CLC (the union), alleged that the Department of Treasury, Bureau of Engraving and Printing, Washington, D.C. (the activity), violated Article XVI of the parties' negotiated agreement which provides that nonunit personnel "shall not be assigned work that has been historically performed in the Unit and any equipment [over] which the Union has been granted jurisdiction shall be operated by Electrolytic Plate Makers"^{1/} Specifically, the union

^{1/} Article XVI (Trade Jurisdiction) provides in full as follows:

Section 1. The Employer agrees that supervisors and other employees of the Employer not covered by the Agreement shall not be assigned work that has been historically performed in the Unit and any equipment [over] which the Union has been granted jurisdiction shall be operated only by Electrolytic Plate Makers except for purposes of training or instruction, in cases of emergencies, or where authorized by appropriate regulations.

For the purpose of this section, an emergency is defined as an unforeseen combination of circumstances or unexpected situations calling for immediate action.

(Continued)

alleged that the activity had assigned to another labor organization jurisdiction over certain gravure cylinder plating and dechroming operations which Electrolytic Plate Makers had been performing since the introduction of the gravure cylinder plating process at the activity. The activity rejected the grievance as nonarbitrable, arguing in part that section 12(b) of the Order^{2/} precluded the use of the negotiated grievance and arbitration procedure to resolve the dispute. The union then filed with the Assistant Secretary an Application for Decision on Grievability or Arbitrability.

The Acting Regional Administrator (RA) found that the grievance challenged "management's right to determine the personnel by which operations will be conducted" under section 12(b)(5) of the Order, and therefore was not subject to arbitration.^{3/} The Assistant Secretary, however, upon the union's request

(Continued)

Section 2. The Employer agrees, prior to implementation, to discuss with appropriate Union Representatives any significant changes regarding basic and fundamental trade or craft jurisdiction, including major journeyman or apprentice training programs. The Employer further agrees to consider the views and recommendations of the Union, including the International, in matters relating to trade or craft jurisdiction.

Section 3. The Employer agrees to meet with Union Officers to discuss trade jurisdiction with respect to introduction and application of new materials and new processes of a significant nature.

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

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

.

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

.

(5) to determine the methods, means, and personnel by which [Government] operations are to be conducted;

3/ In so finding, the RA stated:

Precedent [Council] decisions have established that the decision as to what group of employees will perform a particular operation is

(Continued)

for review of the RA's Report and Findings on Grievability and Arbitrability, found the matter in dispute grievable and arbitrable under the parties' negotiated agreement. In this regard he stated:

I agree that Section 12(b)(5) of the Order is a relevant provision of the Order to be considered here in accordance with the doctrine of the Crane case.^{4/} However, in my view, under the facts and circumstances of this case, it is inconsistent with the goals and purposes of the Order to interpret Section 12(b) as precluding the utilization of the negotiated and agreed upon grievance and arbitration procedures to resolve a dispute as to the interpretation of the agreement. I note particularly in this case that the dispute is in a craft where work jurisdiction provisions are common in the private sector, and that the Activity agreed to the inclusion of the disputed provision in the agreement. Although Section 12(b) reserves certain rights to management, it cannot be definitely stated whether Article XVI of the parties' agreement contravenes that section before the interpretation of the Article has been made clear. Clarification of that Article is to be resolved, under the parties' agreement, through the grievance-arbitration procedure. [Footnote added.]

The activity appealed the Assistant Secretary's decision to the Council. The Council accepted the activity's petition for review, concluding that the decision raised a major policy issue as to the nature of the Assistant Secretary's responsibility to consider the existing legal and regulatory structure in resolving grievability and arbitrability disputes under section 13(d) of the Order, namely, in the circumstances of this case, to consider section 12(b) of the Order in resolving the dispute herein. The Council also determined that the activity's request for a stay met the criteria for granting stays set forth in section 2411.47(e)(2) of

(Continued)

reserved to management by virtue of section 12(b)(5) of the Order. This right may not be waived nor may any rights accorded to unions under the Order be permitted to interfere with authority so reserved. Thus a grievance over a matter reserved to management under section 12(b) is outside the scope of the contractual arbitration procedure.

I am of the opinion that with respect to the grievance in the instant application, the decision by the Activity on the assignment of jurisdiction is [a] reserved right under section 12(b)(5). Inasmuch as the grievance challenges the substance of that decision and hence management's right to determine the personnel by which operations will be conducted, I find that it is not subject to arbitration. [Footnotes omitted.]

^{4/} Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, 3 FLRC 120 [FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63].

the Council's rules and granted the request. Only the union filed a brief on the merits with the Council, as provided for in section 2411.6 of the Council's rules.

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case raised a major policy issue as to his responsibility in considering the existing legal and regulatory structure in resolving grievability and arbitrability disputes under section 13(d) of the Order. In the particular circumstances of this case, the issue presented concerns the Assistant Secretary's responsibility properly to consider section 12(b) of the Order in resolving the dispute herein. We discuss first the general responsibility of the Assistant Secretary under section 13(d).

1. The Assistant Secretary's Responsibility Under Section 13(d).

Section 13(d) of the Order provides, in pertinent part, as follows:

[Q]uestions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

The Council has previously enunciated certain principles implicit in the Order concerning the Assistant Secretary's responsibility in deciding whether a grievance is on a matter subject to a negotiated grievance procedure within the meaning of section 13(d). Thus, in Crane (supra note 4), the Council stated in pertinent part:

[I]n any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. Further, the Assistant Secretary must also consider ". . . existing . . . laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual" [Footnotes omitted.]

In Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-4939(GA), 3 FLRC 178, 186 [FLRC No. 74A-8 (Mar. 17, 1975), Report No. 65], the Council further stated:

Clearly, the Assistant Secretary cannot give effect to any agreement provision that is contrary to the Order. Hence, where the Assistant Secretary finds a conflict between the language of a particular agreement provision and the Order, the Assistant Secretary must apply the agreement in conformity with the Order. The obverse is also true, i.e., the Assistant Secretary must give effect to a particular agreement provision involved in a matter before him to the extent that it is consistent with the Order, and, of course, with applicable law and regulation. . . . Specifically, where a question of an agreement provision's conformity to the Order is raised in a grievability or arbitrability issue before him, the Assistant Secretary must consider the question--and any related arguments--and make a determination concerning its relevance and impact on the issue before him. Where the Assistant Secretary finds that the question is relevant to the grievability or arbitrability issue before him, and, further, that the language of the disputed agreement provision does conflict with the Order, the Assistant Secretary must resolve the grievability or arbitrability issue in a manner consistent with the Order.

Thus, where the Assistant Secretary is presented with a grievability or arbitrability dispute and it is alleged, for example, that a substantive provision of the agreement relied upon by the grievant is inconsistent with section 12(b) of the Order, the Assistant Secretary must consider that allegation and, where he finds that the agreement provision is relevant and unambiguous, he must determine whether such provision conflicts with the Order.^{5/} If he determines that the subject provision of the agreement is violative of the Order, and if such determination is dispositive, the Assistant Secretary must accordingly render his decision that the grievance is nongrievable or nonarbitrable. In the latter regard, as stated in the Report accompanying the Order, the substantive provisions of an agreement which are found to conflict with section 12(b) are "void and unenforceable."^{6/}

2. The Assistant Secretary's Grievability or Arbitrability Determination in the Circumstances of this Case.

In the instant case, as previously stated, the union's grievance challenging the activity's assignment of jurisdiction over certain work to another

^{5/} Cf. Community Services Administration, A/SLMR No. 749, FLRC No. 76A-149 (Aug. 17, 1977), Report No. 133, in which the Council indicated that issues as to the proper interpretation of substantive provisions fall within the province of the arbitrator.

^{6/} See Labor-Management Relations in the Federal Service (1975), at 45; likewise, see id at 44, where the Council stated that, in the event an arbitrator's award violated section 12(b) of the Order, "the Council would modify or set aside that award."

labor organization was based upon a provision in the parties' negotiated agreement (Article XVI) which preserves for Electrolytic Plate Makers in the unit "work that has been historically performed" by them. The relevant meaning and intent of this provision are not disputed in any manner by the parties. According to its express terms and contrary to the decision of the Assistant Secretary, the agreement clearly establishes a preservation-of-work requirement, i.e., with minor exceptions, it mandates the assignment of work traditionally performed by the union solely to unit employees represented by the union. Moreover, as appears from the record, the relief sought by the union in its grievance is the reassignment of its claimed jurisdictional work to the unit employees, based on this express language of the agreement.

The Council has previously held that such a preservation-of-work requirement is proscribed by section 12(b)(5) of the Order.^{7/} While the Assistant Secretary recognized that section 12(b)(5) was "a relevant provision of the Order to be considered here in accordance with the doctrine of the Crane case," he failed properly to apply that section of the Order to the express and unambiguous language of the agreement sought to be invoked by the union in support of its grievance, and thereby erred in his conclusion that the matter is grievable and arbitrable.

Thus, in our view, under the particular facts and circumstances of this case, the decision was inconsistent with the responsibility of the Assistant Secretary under section 13(d) of the Order properly to consider section 12(b) in resolving the instant dispute. More particularly, it

^{7/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41]. In Tidewater, the Council found that a union proposal which would have prevented the agency from assigning to military personnel or other employees excluded from the bargaining unit work "regularly and historically assigned to and performed by bargaining unit employees" clearly contravened section 12(b)(5) of the Order because it sought to establish a "work-preservation" principle for the bargaining unit. Specifically, the Council stated that:

[N]egotiation within the Federal sector of a proposal, such as the proposal in this case, which attempts to establish a work preservation principle is proscribed by section 12(b)(5) inasmuch as that section requires agency management to reserve on a continuing basis the right to decide what methods, means, and personnel will be utilized to accomplish its work.

According to the agency in the present case, the preservation-of-work provision here involved was entered into by the parties immediately before the Council's issuance of its Tidewater decision.

is inconsistent with the purposes and policies of the Order to find a dispute grievable or arbitrable where, as here: The matter in dispute involves "work preservation"; the parties are not in dispute as to the meaning and intent of the pertinent substantive provision of the agreement, i.e., it is undisputed that the substantive provision upon which the grievant relies is a "work preservation" clause; the evident relief sought by the grievant to be accorded by an arbitrator in resolving the grievance under the disputed provision is the reassignment of such work; and applicable Council precedent (supra, note 7) clearly establishes that the "work preservation principle is proscribed by section 12(b)(5)" of the Order.^{8/}

Accordingly, we conclude that the Assistant Secretary, in resolving the instant grievability-arbitrability dispute, failed properly to consider section 12(b) of the Order in a manner consistent with his responsibility under section 13(d) of the Order in the facts and circumstances of this case. We further conclude, based on the reasons fully set forth above and contrary to the decision of the Assistant Secretary, that the dispositive provision of the agreement relied upon by the union in support of its grievance is violative of section 12(b)(5) of the Order and hence the dispute is neither grievable nor arbitrable.^{9/}

^{8/} This is not to say that the Assistant Secretary may not, under any circumstances, refer a grievance to arbitration where section 12(b) of the Order is asserted as a defense. Thus, unlike here, he might find for example that section 12(b) is not relevant to the grievability or arbitrability issue before him, or, where the substantive provision of the agreement upon which the grievant relies is ambiguous and subject to an interpretation which would render it lawful, he may refer the matter to the arbitrator for action consistent with law, regulations and the Order.

^{9/} We also note that the Assistant Secretary's decision herein was inconsistent with applicable Council precedent to the extent that he relied upon the factor that "in this case . . . the dispute is in a craft where work jurisdiction provisions are common in the private sector" As the Council stated in its Tidewater decision (supra note 7, 1 FLRC 431 at 438):

Turning to [the union's] contentions, it relies on "private sector" practice, where the National Labor Relations Board has held proposals to define unit work and to restrict its assignment to nonunit personnel as being subject to mandatory bargaining under the National Labor Relations Act. However, such "private sector" practice is without controlling significance in the Federal sector. There is no counterpart in private sector statute to the absolute reservation of authority in agency management which is mandated by section 12(b) of the Order and which must be included verbatim in agreements negotiated in the Federal

(Continued)

Conclusion

For the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: September 5, 1978

(Continued)

sector. Moreover, the NLRA, unlike the Order, acknowledges a "preservation-of-work" principle by providing procedures for the determination of "work jurisdiction disputes" between competing groups of employees. [Footnotes omitted.]

Department of the Treasury, Internal Revenue Service and IRS Chicago District, Chicago, Illinois, A/SLMR No. 987. The Assistant Secretary dismissed the unfair labor practice complaint filed by the union (Chapter 010, National Treasury Employees Union) which alleged that the agency and the activity violated section 19(a)(1) and (6) of the Order by failing to allow a union representative to continue speaking while engaged in representing unit employees at a formal meeting with management. The union appealed to the Council, contending that the Assistant Secretary's decision presented a major policy issue.

Council action (September 5, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue, and the union neither alleged, nor did it otherwise appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 5, 1978

Mr. Kenneth A. Davis
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: Department of the Treasury, Internal
Revenue Service and IRS Chicago
District, Chicago, Illinois, A/SLMR
No. 987, FLRC No. 78A-36

Dear Mr. Davis:

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

According to the Assistant Secretary's decision, the case grew out of a meeting called by officials of the Chicago District Office of the Internal Revenue Service (the activity) to inform the employees about a management proposal concerning space utilization and to obtain employee suggestions and opinions concerning the proposal. In attendance was the chief steward of National Treasury Employees Union, Chapter 010 (the union), the exclusive representative of the activity's employees. At the meeting the chief steward was at first allowed to speak, but was thereafter twice stopped by the activity manager, being told the first time that his remarks did not deal with the issue under discussion and the second time that he had overstepped the bounds of appropriate comments. The union filed an unfair labor practice complaint alleging that the agency and the activity violated section 19(a)(1) and (6) of the Order by failing to allow a union representative to continue speaking while engaged in representing unit employees at a formal meeting with management.

The Assistant Secretary found that the meeting in question was a "formal discussion" under section 10(e) of the Order,^{1/} and that the union

1/ Section 10(e) provides:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees

therefore "had the right to be represented at the meeting." He nevertheless found the evidence insufficient to establish a violation of the Order. In this regard, he concluded:

[T]he Respondents restricted the participation of the NTEU representative in the meeting only to the extent that his remarks were extraneous to its subject matter, and there was no evidence that the representative was prevented from representing the unit employees or stating the position of the NTEU regarding space utilization plans of the Respondents. Indeed, the evidence reflects that [the chief steward], after he was first interrupted by management, in effect, conceded that his remarks were not on point. Moreover, there was no allegation that [the chief steward], after being told to return to his seat, attempted to or was prevented from making any further comment in connection with the subject at issue. Accordingly, under these circumstances, I find that the evidence was insufficient to establish that the Respondents' conduct was violative of Section 19(a)(1) and (6) of the Order, and, therefore, I shall order that the subject complaint be dismissed in its entirety.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision presents a major policy issue as to "[w]hether a Union representative attending a 'formal discussion' within the meaning of Section 10(e) of the Order may, in the exercise of his official duties, offer his opinion, make comparisons and suggestions and otherwise enter into uninhibited open debate without restriction, regarding proposals currently being advocated by management." In this connection, you assert that the chief steward's "conduct at the subject meeting was the kind of conduct permissible for a union representative at a 'formal discussion' within the meaning of Section 10(e)" and that the activity, in interrupting his remarks and in directing him back to his seat, violated section 19(a)(1) and (6) of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege,

(Continued)

in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

nor does it otherwise appear, that his decision was arbitrary and capricious. With respect to your contention that the Assistant Secretary's decision presents a major policy issue relating to section 10(e) of the Order, the Council is of the opinion that no major policy question is presented by his decision. In this regard, we note that the Assistant Secretary found that the meeting in question was a "formal discussion" under 10(e) and that the union therefore "had the right to be represented at the meeting." He went on to find that the management conduct complained of was not violative of the Order. In our view, your contentions constitute, in essence, mere disagreement with the Assistant Secretary's finding that the evidence was insufficient to establish that the activity's conduct was violative of section 19(a)(1) and (6) and fails to raise a major policy issue such as to warrant Council review.^{2/}

Since the Assistant Secretary's decision does not present any major policy issues warranting review, and since you do not allege and it does not otherwise appear that the decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

D. Murphy
IRS, Chicago

^{2/} In your appeal you also contend, in effect, that the activity, in interrupting the chief steward's remarks and in directing him back to his seat, also denied rights assured him under the first amendment of the constitution. Thus, you state that "[i]t is significant to note the constitutional issue involved, more specifically, the abridgement of the [chief steward's] First Amendment right when management initially interrupted his remarks and characterized them as 'improper' and culminated in [his] being told to return to his seat." We find it unnecessary to pass upon this contention because the Council is not the proper forum in which to raise such constitutional issues. Cf. National Treasury Employees Union and Internal Revenue Service, Department of the Treasury, A/SLMR No. 536, 4 FLRC 170 [FLRC No. 75A-96 (Mar. 3, 1976), Report No. 97].

General Services Administration, Regional Office, Region 4, A/SLMR No. 575. Before deciding whether to accept or deny the agency's petition for review of the Assistant Secretary's decision, the Council, on February 4, 1977, requested the Assistant Secretary to clarify his decision in light of the Council's consolidated DCASR decision (4 FLRC 668). After a further hearing was conducted in the case, the Assistant Secretary issued a supplemental decision, in effect reversing his initial decision and dismissing the union's representation petition.

Council action (October 4, 1978). Since the agency's petition for review had been rendered moot by the Assistant Secretary's supplemental decision, the Council denied the petition. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 4, 1978

Mr. Thomas N. Gasque
Assistant General Counsel
Labor Law Division
U.S. General Services Administration
Washington, D.C. 20405

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

Re: General Services Administration, Regional
Office, Region 4, A/SLMR No. 575, FLRC
No. 76A-64

Gentlemen:

Reference is made to the petition for review filed with the Council by the agency in the above-entitled case.

In this case, the Assistant Secretary initially found that a unit sought by the union of all professional and nonprofessional employees of the Regional Office, General Services Administration, Region 4 was appropriate for the purpose of exclusive recognition under the Order. The agency filed a petition for review of the Assistant Secretary's decision with the Council contending, among other things, that the decision disregarded section 10(b) of the Order and published Council decisions. Before determining whether to accept or deny the petition for review, the Council on February 4, 1977, requested the Assistant Secretary to clarify his decision in light of the Council's consolidated decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4; 4 FLRC 668 (Dec. 30, 1976). The Council also stated in its request (copies of which were served upon the parties) that "[f]ollowing the issuance of such clarification, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from

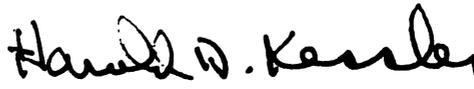
the dates of service of such supplemental submissions to file respective responses thereto."

After a further hearing was conducted in the case, the Assistant Secretary on June 23, 1978, issued his supplemental decision herein (A/SLMR No. 1067) in which he found that "[u]nder the particular circumstances of this case, and based on the rationale of the Council as expressed in its DCASR decision," the unit sought in the instant case did not satisfy equally each of the three criteria set forth in section 10(b) of the Order and thus was not appropriate for the purpose of exclusive recognition under the Order. Accordingly, the Assistant Secretary ordered that the Certification of Representative previously issued to the union be revoked and the union's representation petition be dismissed.

Neither party has timely filed a supplemental submission with the Council following the issuance of the Assistant Secretary's decision as clarified. Since the Assistant Secretary has in effect reversed his initial decision in this case, and ordered the dismissal of the union representation petition, it is clear that the agency's petition for review has been rendered moot. Accordingly, the Council denies the agency's petition for review. Likewise, the Council denies the agency's request for a stay.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sabella, Arbitrator). The arbitrator determined that a supervisor performed unit work essentially on an "overtime" basis so far as the parties' agreement was concerned; that the grievant should have been selected for such overtime under the relevant provision of the agreement; and that the grievant was therefore entitled to 8 hours of overtime pay. The Council accepted the agency's petition for review which excepted to the arbitrator's award on the ground that it violated section 12(b)(5) of the Order (Report No. 140).

Council action (October 4, 1978). The Council held that the arbitrator's award violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award in its entirety.

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

Federal Aviation Administration

and

FLRC No. 77A-101

Professional Air Traffic Controllers
Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that on May 20, 1976, the Daytona, Florida, Air Traffic Control Tower (activity) had scheduled five employees to work the 4 p.m. to midnight shift. At about noon, one of the employees who had been scheduled to work called in sick. Management decided to adjust to that absence by staffing the shift with the four remaining scheduled employees plus a holdover employee from a previous shift. One of the employees on the 4 p.m. to midnight shift was scheduled to serve as "controller-in-charge."^{1/} However, the employee designated to serve as controller-in-charge refused the assignment assertedly because of operational safety conditions. Management then called in a supervisor, who had not been scheduled to work on May 20, for service on this shift. The supervisor, who was provided another day as an off day, worked the 4 p.m. to midnight shift on a straight-time basis.

The grievant initiated a grievance, contending that management's action resulted in his loss of 8 hours of overtime pay because, as he was next on the overtime list, he should have been called in to work instead of the supervisor, under the parties' agreement.^{2/} Ultimately, the matter went to arbitration. The arbitrator sustained the grievance, noting that "the work involved was overtime which could not be erased by the simple method of changing an off day," and concluding that "[t]he use of a supervisor for overtime on unit work is violative of the agreement." As a remedy, the arbitrator awarded the grievant 8 hours of overtime pay.

^{1/} According to the arbitrator, the "controller-in-charge" is generally a unit employee who performs unit work, though he may exercise supervisory power.

^{2/} The grievant relied principally on Article 40, section 2 of the parties' agreement which provided:

Whenever overtime work is to be performed, it shall be made available to qualified employees on an equitable basis.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which excepted to the arbitrator's award on the ground that the award violates section 12(b)(5) of the Order.^{3/} Neither of the parties filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review which excepted to the arbitrator's award on the ground that it violates section 12(b)(5) of the Order.^{4/}

To repeat, the pertinent circumstances are briefly as follows: An employee on the 4 p.m. to midnight shift objected to his assignment as "controller-in-charge," an assignment which may involve supervisory functions but is generally performed by a unit employee. The activity then called in a supervisor to complete the needed personnel complement. Although the supervisor was on his offday, this offday was switched to another day and

^{3/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council also granted the agency's request for a stay of the award pending determination of the appeal.

^{4/} Section 12(b)(5) of the Order provides:

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

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

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

the supervisor was called in and worked on a straight-time basis. The arbitrator determined that the supervisor performed unit work essentially on an "overtime" basis so far as the parties' agreement is concerned; that the grievant should have been selected for such overtime work under the provision of the agreement requiring that, whenever overtime work is to be performed, it shall be made available to qualified unit employees on an equitable basis; and that the grievant was therefore entitled to 8 hours of overtime pay. In the circumstances of this case, we find that the arbitrator's award clearly violates section 12(b)(5) of the Order.

The Council has frequently held that management has the reserved right to determine "who" will conduct its operations under section 12(b)(5) of the Order. More specifically, as ruled by the Council, management has the right to decide which personnel--e.g., unit or nonunit--will conduct particular agency operations, and this right may not be either relinquished or diluted by a bargaining agreement or by the award of an arbitrator.^{5/} Further, in addition to the right under section 12(b)(5) to decide whether particular agency operations shall be performed by unit personnel, management also has the right under section 11(b) of the Order to establish such matters as the number of shifts (including overtime shifts) which will be used to perform its operations, and hence to determine whether work will be performed on an overtime, or on a regular time, basis.^{6/} If management has decided to utilize unit personnel to conduct particular operations, and if management has further determined (or, in its discretion, agreed) that such work will be performed not only on regular time but also on an overtime basis, the bargaining parties may then properly agree to limit such assignment

5/ See, for instance, Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 437 [FLRC No. 71A-56 (June 29, 1973), Report No. 41]; and U.S. Immigration and Naturalization Service, Burlington, Vermont and American Federation of Government Employees, Local No. 2538, AFL-CIO (Purcell, Arbitrator), FLRC No. 76A-131 (July 13, 1977), Report No. 131. Management's right to decide which personnel will conduct particular operations also includes, of course, the right to change such decision after it is made. Cf. National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 297 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

6/ E.g., National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123, at 10-11 of Council decision. See also, Federal Aviation Administration and Professional Air Traffic Controllers Organization (Epstein, Arbitrator), FLRC No. 76A-122 (June 30, 1977), Report No. 129. Unless management has, in its discretion, agreed to the contrary, it may likewise decide at any time to eliminate previously established overtime shifts. AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., 1 FLRC 100 [FLRC No. 71A-11 (July 9, 1971), Report No. 11].

of overtime to unit employees rather than assigning the work to nonunit employees on an overtime basis, and the agreement may be implemented by an arbitrator's award.^{7/}

In the present case, the agency decided that work which was previously assigned to particular unit personnel on the 4 p.m. to midnight shift would be performed not by unit personnel on that shift (either on a straight-time or overtime basis), but by nonunit personnel, that is, by a supervisor, on a straight-time basis.^{8/} In other words, the agency exercised its reserved right under section 12(b)(5) of the Order to decide "who" would conduct the operations previously assigned to unit personnel on that shift. The arbitrator's award which would deny such right to management and would require instead that the work be assigned to unit personnel on an overtime basis plainly violates management's right to determine the "personnel" by which its operations are to be conducted under section 12(b)(5) of the Order.

Our conclusion in the above regard conforms with the result reached in the Council's recent decision in the Immigration and Naturalization Service case (note 5, supra). In that case, the Council found violative of section 12(b)(5) an arbitrator's application of an agreement, which prevented an agency from assigning immigration inspectors employed on a "when-actually-employed" basis to perform work during their regular tour of duty, which work was customarily assigned to full-time immigration examiners on an overtime basis.^{9/} As stated by the Council (at p. 4 of its decision):

7/ E.g., Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, 4 FLRC 420, 425-427 [FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110]; American Federation of Government Employees, Local 2017 and Department of the Army, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia (Dallas, Arbitrator), FLRC No. 76A-127 (June 6, 1977), Report No. 127.

8/ As previously indicated, the arbitrator determined that the supervisor in effect performed work, previously assigned to unit personnel, on "overtime" within the meaning of the parties' agreement. The arbitrator reasoned that, although the supervisor received straight-time pay, there was an exchange of the supervisor's day off, and this exchange did not "erase" the "overtime" nature of the supervisor's employment. While we do not pass upon the arbitrator's interpretation of the agreement, the supervisor obviously neither received, nor was found entitled to receive, statutory overtime pay or its equivalent and, therefore, for purposes of section 12(b)(5) of the Order, the supervisor cannot be regarded as employed on an overtime basis.

9/ The overtime provision in the Immigration and Naturalization Service case provided as follows:

A. Overtime assignments will be distributed and rotated equitably among eligible employees. Supervisors shall not assign overtime work to employees as a reward or penalty, but solely in accordance with the Agency's need. Complaints or disagreements on distribution of overtime shall be processed in accordance with the negotiated grievance procedure.

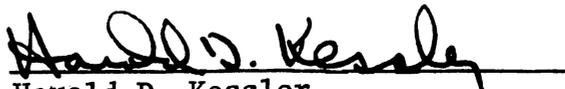
Such an award, by ordering that the activity maintain its past practice of assigning the Immigration Examiners to the inspections, thereby negating the activity's determination to assign WAE Immigration Inspectors to the inspections during the latter's regular tour of duty, contravenes the right reserved to management by section 12(b)(5) of the Order to determine the "personnel" by which operations are to be conducted and therefore may not be sustained.^{10/} [Footnote added.]

Similar to the circumstances in the Immigration and Naturalization Service case, the supervisor in the present case was employed on straight-time pay to perform work previously assigned to unit personnel on the shift involved, which thereby avoided the necessity of overtime pay for such work. As previously indicated, the arbitrator's award, which would constrict such employment, contravenes management's right to determine the "personnel" by which its operations are to be conducted, under section 12(b)(5) of the Order.

Conclusion

For the foregoing reasons, we find that the arbitrator's award violates section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award in its entirety.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: October 4, 1978

10/ To like effect, see NAGE, Local R12-58 and McClellan Air Force Base, 4 FLRC 523, 534 [FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114], in which the Council ruled that a union proposal which would prohibit management from using other types of personnel from working on a particular project on straight-time to avoid the necessity of overtime altogether on that project was violative of section 12(b)(5) of the Order.

FLRC No. 77A-114

American Federation of Government Employees, AFL-CIO, Council 127 and State of Ohio Air National Guard. The dispute involved the negotiability of a union proposal that National Guard technicians have the option of not wearing the military uniform during the portion of agency-conducted organizational readiness inspections which occur during the technicians' civilian workweek.

Council action (October 4, 1978). The Council held that the union's proposal violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

American Federation of Government
Employees, AFL-CIO, Council 127

(Union)

and

FLRC No. 77A-114

State of Ohio Air National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

While the exact language of the union's proposal is not before the Council, the record before us clearly indicates that the union proposed in bargaining with the agency that National Guard technicians will have the option of not wearing the military uniform^{1/} during that portion of an agency-conducted "organizational readiness inspection" (ORI) which occurs during the technician's civilian workweek.

Agency Determination

The agency head determined that the wearing of the military uniform is an essential ingredient of the means by which an ORI is conducted and, consequently, the union's proposal, by proscribing management's right to determine the means by which agency operations are conducted, violates section 12(b)(5) of the Order.

Question Here Before the Council

Whether the proposal violates section 12(b)(5) of the Order.

Opinion

Conclusion: The proposal violates section 12(b)(5) of the Order. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and,

^{1/} Pursuant to 32 U.S.C. § 709(b) and (e), National Guard technicians must maintain National Guard military status as a condition of continued technician employment.

pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(5) of the Order, as here controlling, provides:

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

.

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

.

(5) to determine the . . . means . . . by which such operations are to be conducted

The Council has frequently emphasized that section 12(b) expressly reserves to management certain rights under any negotiated agreement. The mandatory nature of this reservation was underscored in the VA Research Hospital decision where, interpreting and applying section 12(b)(2), the Council said:^{2/}

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

The Council determined in its Tidewater decision that this reasoning is equally applicable to section 12(b)(5) of the Order.^{3/} Furthermore, with particular regard to the meaning of the term "means" in section 12(b)(5), the Council, in Tidewater, examined the "precise scope of the rights reserved to management" and determined that:^{4/}

2/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

3/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 436 [FLRC No. 71A-56 (June 29, 1973), Report No. 31].

4/ Id. at 436-37.

"Mean" is "something by the use or help of which a desired end is attained or made more likely: an agent, tool, device, measure, plan or policy for accomplishing or furthering a purpose." Synonyms for mean include instrument, agent, instrumentality, organ, medium, vehicle and channel. The term "means," as used in the Order, therefore includes the instruments (e.g., an in-house, Government facility or an outside, private facility; centralized or decentralized offices) or the resources (e.g., money, plant, supplies, equipment or materiel) to be utilized in conducting agency operations--in short, what will be used in conducting operations. [Additional emphasis supplied.]

Turning to the negotiability dispute in this case, the agency states, without contradiction by the union, that an ORI is an evaluation of a National Guard unit's military effectiveness and readiness to function in a wartime operational mode. The ORI, which normally lasts from 2 to 5 days, is conducted by a team from the cognizant operational command, e.g., the Strategic Air Command, and is an evaluation of various factors contributing to unit readiness such as the level of individual proficiency, knowledge of mission tactics and procedures, condition of equipment, military courtesy and discipline, unit management, etc. Further, in order to provide the best practicable test of the unit's readiness to perform its wartime military mission, realism is sought so that the unit being inspected approximates to the maximum extent possible its wartime operational mode. The union merely argues, on the other hand, that any need to inspect the military uniform can be accomplished during the weekend drill days when the entire unit, technicians and non-technicians, is present.

We find the agency's position to be persuasive in the circumstances presented in this case. That is, in our opinion, the requirement to wear the military uniform during an ORI falls within the scope of the rights reserved to management under section 12(b)(5): it is a "means" by which an agency operation is conducted--as realistic a test as is possible of the ability of a particular National Guard unit to perform its wartime military mission--within the definition of "means" set forth in the previously mentioned Tidewater decision. The union's proposal requiring the agency to grant the option to not wear the uniform in these narrow circumstances clearly would negate this reserved right of management and, hence, violates section 12(b)(5).

This conclusion is clearly consistent with the result which the Council reached in its decision in Department of Justice, INS.^{5/} In that case the union proposed that a conspicuous union affiliation patch be affixed to the official uniform of law enforcement personnel within INS. The agency contended that the proposal was nonnegotiable because it violated section 12(b)(5) of the Order in that it interfered with management's right to determine the means by which its operations are conducted. In support the

5/ AFGE, National Immigration and Naturalization Service Council and Department of Justice, INS, FLRC No. 76A-26 (Jan. 18, 1977), Report No. 120 at 4-5.

agency established a close functional relationship between the uniform and the conduct of agency operations, stating that the principal purpose of the uniform was the ready identification of the wearer as a representative of Governmental authority, because such identifiability is needed to accomplish or further the purpose of promoting safe, effective law enforcement operations. The Council concluded that, in the circumstances of that case, "management's requirement that the law enforcement officers involved wear a uniform is an exercise of management's right under section 12(b)(5) of the Order to determine the 'means' by which such law enforcement operations of the agency are to be conducted." It further concluded that the wearing of such a patch would negate the means chosen by management to conduct its law enforcement functions.

The circumstances in the instant case, like those in the INS case, are clearly distinguishable from the circumstances which were present in the consolidated National Guard cases.^{6/} In the National Guard cases the Council found negotiable union proposals which, as relevant here, would permit National Guard technicians to wear clothing other than military uniforms while performing technician duties. The Council found no "compelling need" for agency regulations establishing the requirement that National Guard technicians must wear military uniforms while performing technician duties in virtually all circumstances, in part because of the absence of any functional relationship between the day-to-day work performed by technicians and the requirement to wear military dress. Specifically as to section 12(b)(5) the Council stated in its supplemental denial of the agency request to reconsider that decision:^{7/}

With regard to your last contention that the union proposals violate section 12(b)(5) of the Order, the Council, consistent with established practice, considered the applicability of section 12(b)(5) to the disputed proposals and found that such proposals were not violative of that section of the Order. In this regard, the Council in its decision in the consolidated cases distinguished the Department of Justice, INS case from the instant cases, stating:

In deciding that no compelling need exists for the NGB regulation requiring all National Guard technicians working in their technician status under virtually all circumstances to wear military uniforms and, as interpreted by the agency head, to observe military grooming standards, we must emphasize that no questions are raised in the instant cases as to whether or not the military uniform can be

^{6/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, request for reconsideration denied (May 18, 1977), Report No. 125.

^{7/} Id. at 3-4 of Council decision denying agency request for reconsideration.

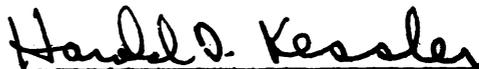
prescribed by management with respect to particular instances of assigned technician duties. Hence, we make no ruling as to whether requiring technicians to wear the military uniform in those more limited circumstances would, e.g., constitute a determination under section 12(b)(5) of the Order of the "means" by which such operations are to be conducted. [Footnotes omitted; emphasis in original.]

Here, similar to the INS case, the agency has established a close functional relationship between the wearing of the uniform and the conduct of the particular agency operations involved, namely, the ORI. Moreover, the required wearing of the uniform is confined to particular instances of assigned technician duties, namely, during an ORI conducted by the military unit's cognizant operational command.

While we conclude that the specific proposal involved herein violates section 12(b)(5) and is nonnegotiable, we must emphasize that our determination that the agency retains the right under section 12(b)(5) to require the wearing of military uniforms by National Guard technicians during an ORI conducted by the unit's cognizant operational command is limited to the precise circumstances presented. That is, our decision should not be interpreted as extending to a requirement that National Guard technicians wear the military uniform in other circumstances that have not been considered herein.

Accordingly, for the reasons stated above, we hold that the union's proposal violates section 12(b)(5) of the Order and is nonnegotiable.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: October 4, 1978

Department of the Army, Fort Richardson, Alaska and American Federation of Government Employees, Local 1712 (Jackson, Arbitrator). The arbitrator found that the selection process followed by the activity in filling the particular position involved was violative of the parties' agreement and the activity's Merit Placement and Promotion Program regulation, incorporated by reference in the agreement. As an award, the arbitrator directed that the selection made be rescinded and, in effect, that the activity rerun the promotion action in accordance with the regulation in question. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon two exceptions, contending (1) that the award violated appropriate regulation and (2) that the award violated section 12(b)(2) of the Order. The agency also requested a stay of the arbitrator's award.

Council action (October 4, 1978). The Council held that the agency did not present facts and circumstances to support its exceptions. Accordingly, the Council denied the agency's petition for review because it failed to meet the requirements of section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 4, 1978

Mr. W. J. Schrader, Chief
Labor and Employee Relations Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: Department of the Army, Fort Richardson,
Alaska and American Federation of Government
Employees, Local 1712 (Jackson, Arbitrator),
FLRC No. 78A-45

Dear Mr. Schrader:

The Council has carefully considered your petition for review and request for a stay of the arbitrator's award filed in the above-entitled case.

According to the arbitrator's award, in July 1977 an Electrician Leader position became open at Fort Richardson (the activity). Under the procedures of the activity's Merit Placement and Promotion Program, which is incorporated by reference in the negotiated agreement between the activity and American Federation of Government Employees, Local 1712 (the union), a selection roster for the position was required to be prepared by the Civilian Personnel Office (CPO), which ranks applicants according to published standards and criteria. Once the roster of best qualified applicants for a position is prepared by the CPO, it is then referred to the selecting supervisor,^{1/} who must interview all applicants and make a selection within 15 days after receipt of the roster.

With respect to the position at issue, a selection roster was prepared by the CPO for referral to the supervisor, with five names listed alphabetically.

1/ As set forth by the arbitrator, Section 11 of the Merit Placement and Promotion Program (REFERRAL OF APPLICANTS) provides:

- a. All candidates from all sources will be referred on one selection roster listed in alphabetical order.
- b. Normally, three to five of the best qualified of the highly qualified group will be referred to the supervisor. ... Supervisors will not refuse to make selection from the initial referral list (containing at least three names) without presenting justification acceptable to the CPO and stating specific reason for nonselection. ... [Emphasis added by arbitrator.]

Subsequently, prior to the formal interviews, one of the individuals withdrew his name from the list. The supervisor then called the CPO and asked for guidance, since the list now contained only four names. The name of the person who was next in line for the list was then added by hand alphabetically to the list as the fifth candidate. Thereafter all applicants were interviewed, and the last individual, whose name had been added to the list, was selected. The union grieved, contending that the action of the employer in adding that individual's name to the list after it had been sent to the selecting supervisor and the subsequent selection of that individual for the job at issue constituted a breach of the collective bargaining agreement.

The arbitrator stated the issue before him as "whether the employer violated . . . the agreement and failed to follow the provisions of its own Merit Placement and Promotion Program." The arbitrator then referred to various provisions of the Merit Placement and Promotion Program, noting that Section 11 provides that "[s]upervisors will not refuse to make selection from the initial referral list (containing at least three names) without presenting justification acceptable to the CPO." The arbitrator stated that, with the additional applicant's name added to the list, "[t]he list now was no longer the 'initial referral list,'" and concluded:

As a result of adding a name to the selection roster after knowledge was had of the names thereon and just before the interviews were commenced, and thereafter selecting the added person, resulting in the rejection of highly qualified individuals, some of whom had been lead men before, the selection system was made suspect in the minds of other applicants regardless of the innocence of the mistake made.

He therefore found that "the selection process in this case was in violation of the agreement and the regulations" and awarded as follows:

The selection of the electrician leader reported in this case shall be rescinded and the initial list of four remaining names resubmitted to the selection supervisor who shall make his choice from that list. No additional names shall be added to the list unless it falls below three names.

The agency's petition takes two exceptions to the arbitrator's award on the grounds discussed below. The union did not file an opposition.

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

In its first exception, the agency contends that the award violates appropriate regulations. In support of this exception, the agency asserts that the portion of the award which states that the selecting supervisor "shall make his choice" from the initial list of four remaining names violates Federal Personnel Manual (FPM) chapter 335, subchapter 2 (Requirement 6), which sets forth the agency's right to select or nonselect a particular candidate for a position. The agency further asserts that the award is in violation of FPM chapter 335, subchapter 3-7(c) which states that the selecting official is not required to select a candidate for a position from the referral list. The agency argues that the award is in "clear violation" of this FPM provision in that it requires the selecting supervisor to make his choice from the initial referral list and would not permit the selecting official to return the certificate unused.

The Council will grant a petition for review of an arbitration award in cases where it appears, based on the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulation. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception. In this regard the Council notes that, contrary to the contentions of the agency, nothing in the agency's petition demonstrates that the arbitrator's award would appear to infringe upon the activity's right to select or nonselect a particular candidate or to choose not to select at all from the initial referral list in filling the position at issue. Instead, the arbitrator, in his award, found that the activity violated the agreement and directed that it rescind the selection and resubmit the initial referral list with the four remaining names to the selecting supervisor, in effect directing the activity to do nothing more than rerun the promotion in accordance with the provisions of the Merit Placement and Promotion Program incorporated into the parties' negotiated agreement. And while the arbitrator directed that the selecting official should "make his choice" from the initial referral list, nothing in the agency's petition for review supports the contention that the award infringes upon the agency's right in making that choice, to choose to "nonselect" in accordance with the Merit Placement and Promotion Program,^{2/} any of the candidates on the list or to choose to return the certificate unused and go outside the initial referral list to make a selection after consideration of designated candidates. Thus, as indicated, rather than directing action contrary to provisions of the FPM, the arbitrator's award only directs the activity to rerun the promotion action in accordance with the Merit Placement and Promotion Program as a remedy for the activity's violation of the agreement. Therefore, since the agency's petition fails to present facts and circumstances to support its exception that the award violates

^{2/} As previously indicated, note 1 supra, the arbitrator set forth the pertinent provisions of the Merit Placement and Promotion Program, which provide in pertinent part that "[s]upervisors will not refuse to make selection from the initial referral list (containing at least three names) without presenting justification acceptable to the CPO and stating specific reason for nonselection."

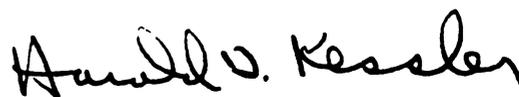
the Federal Personnel Manual, the agency's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

The agency's second exception is that the award violates section 12(b)(2) of the Order. The agency asserts, in support of this exception, that under section 12(b)(2) management retains the right to take certain personnel actions and that, by mandating that management "shall select," the arbitrator's award in this case limits management's right under section 12(b)(2) to determine not to fill the position at issue. The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. However, the Council is of the opinion that the agency has not presented facts and circumstances to support its exception. Thus nothing in the agency's petition demonstrates that the award would prevent the activity, in the course of rerunning the promotion action and making a "choice" with regard to the initial referral list, from choosing not to fill the position. We conclude, therefore, that the agency's petition fails to present the necessary facts and circumstances to support its second exception and, thus, this exception provides no basis for acceptance under the Council's rules.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: D. Hefner
AFGE

FLRC No. 78A-64

National Association of Government Employees, Local R7-60 and Illinois National Guard. The dispute involved the negotiability of two union proposals that would modify the reduction-in-force procedures for National Guard technicians set out in a National Guard Bureau regulation.

Council action (October 4, 1978). The Council held that the proposals were outside the obligation to bargain established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the proposals were nonnegotiable.

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

National Association of Government
Employees, Local R7-60

(Union)

and

FLRC No. 78A-64

Illinois National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposals

Each of the two union proposals at issue in this appeal (set forth in the appendix hereto) would modify the reduction-in-force (RIF) procedures for National Guard technicians^{1/} set out in a National Guard Bureau (NGB) regulation. In essence, the first proposal would establish a procedure for a technician to appeal from an appraisal of his military performance to one of three appeal boards created exclusively to hear such appeals while the second proposal would require that the point values of the military performance rating be given the same weight as those of the civilian performance rating.

Agency Determination

The agency head determined that the proposals concern only matters related to the military aspects of technician employment and are, therefore, outside the obligation to bargain established by section 11(a) of the Order.

Question Here Before the Council

Whether the proposals concern matters within the bargaining obligation established by section 11(a) of the Order.

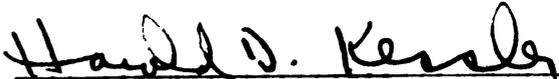
^{1/} Pursuant to 32 U.S.C. § 709(b) and (e), National Guard technicians must maintain National Guard military status as a condition of continued technician employment.

Opinion

Conclusion: The proposals are outside the obligation to bargain established by section 11(a) of the Order.^{2/} Accordingly, the agency's determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The proposals here in dispute which would, as previously indicated, establish a procedure for a National Guard technician to appeal from an appraisal of his military performance to one of three appeal boards created exclusively to hear such appeals and require that the point values of the military performance rating be given the same weight as those of the civilian performance rating bear no material difference from the union proposals which were before the Council and held nonnegotiable in the Adjutants General of North Carolina and Tennessee case.^{3/} In that case, the Council determined that union proposals which would have established a procedure for technicians to appeal from appraisals of their military performance to one of three appeal boards created exclusively to hear such appeals and, in addition, would have required that the point values of the military performance rating be given the same weight as those of the civilian performance rating were outside the bargaining obligation established by section 11(a) of the Order. Therefore, based on the applicable discussion and analysis in the Adjutants General of North Carolina and Tennessee decision, the proposals here in dispute must also be held to be outside the obligation to bargain by section 11(a) of the Order.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: October 4, 1978

2/ Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations

3/ National Association of Government Employees and Adjutants General of North Carolina and Tennessee, FLRC No. 78A-37 (Aug. 31, 1978), Report No.

APPENDIX

Union Proposal I

A technician may appeal a military appraisal within ten (10) days of its receipt. The appeal will be to one of three Military Appeal Boards. The Boards will be established in the following manner:

Officer Appeal Board:

- a. J.A.G. Officer
- b. Chaplain
- c. A non-technician officer to be selected by mutual agreement of the J.A.G. and Chaplain

Warrant Officer Appeal Board:

- a. J.A.G. Officer
- b. Chaplain
- c. A non-technician Warrant Officer to be selected by mutual agreement of the J.A.G. and Chaplain

Enlisted Appeal Board:

- a. J.A.G. Officer
- b. Chaplain
- c. A non-technician senior NCO E8 or E9 to be selected by mutual agreement of the J.A.G. and Chaplain

The Board shall have the authority to hold a hearing on any appeal and to render a decision which will be final.

Union Proposal II

The retention rating is determined by the combined cumulative totals of the Annual Technician Performance Rating NGB Form 2, prepared in accordance with TPP 902, and the Appraisal by Immediate Military Supervisor using the same NGB Form 2. Military appraisals will be completed at the time of a RIF only for those technicians who do not have a current military appraisal in their official personnel folders. The weighted value of both ratings will be as follows: satisfactory, 25 points; excellent, 50 points; outstanding, 75 points.

Social Security Administration, Northeastern Program Service Center, Flushing, New York, Assistant Secretary Case No. 30-07822(CA). Upon the filing of a petition for review of the Assistant Secretary's decision by the union (American Federation of Government Employees), the Council advised the union that its appeal failed to comply with cited requirements of the Council's rules of procedure, and provided the union with time to effect such compliance. However, the union made no submission in compliance with those requirements within the time limit provided.

Council action (October 13, 1978). The Council dismissed the union's appeal for failure to comply with the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 13, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration,
Northeastern Program Service Center,
Flushing, New York, Assistant
Secretary Case No. 30-07822(CA),
FLRC No. 78A-115

Dear Mr. King:

By Council letter of September 7, 1978, you were advised that preliminary examination of your petition for review of the decision of the Assistant Secretary in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included: 2411.44 and 2411.46(d).

You were also advised in the Council's letter:

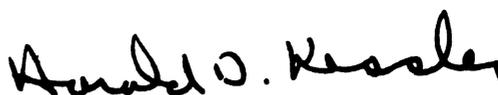
Further processing of your appeal is contingent upon your compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on September 25, 1978, to take necessary action and file additional materials in compliance with the above provision(s). Moreover, you must serve a copy of the required additional submission on the other parties including all representatives of other parties who entered appearances in the subject proceeding before the Assistant Secretary, the agency head, or the arbitrator, as the case may be, in accordance with section 2411.46(a) of the rules; and you must include a statement of such service with your additional submission to the Council.

Failure to comply with the above requirements will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,

A handwritten signature in black ink that reads "Harold D. Kessler". The signature is written in a cursive style with a large, prominent initial "H".

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

W. F. Kuntz
SSA

Federal Aviation Science and Technological Association, National Association of Government Employees and Federal Aviation Administration, Department of Transportation. The dispute involved the negotiability of union proposals concerning (1) employee travel by privately owned vehicles and per diem in connection with agency training at the FAA Academy; (2) administrative leave; and (3) scheduling of travel away from an employee's duty station.

Council action (October 16, 1978). As to (1) and (2), based upon a decision of the Comptroller General rendered in response to the Council's request, the Council found that the union's proposals did not conflict with applicable law and, further, that (1) did not conflict with applicable regulation. As to (3), based upon an interpretation of its own directives and related statutes by the Civil Service Commission, the Council held that the union's proposal did not conflict with applicable law and regulation. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council set aside the agency's determinations as to the nonnegotiability of the union's proposals.

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

Federal Aviation Science and
Technological Association, National
Association of Government Employees

(Union)

and

FLRC No. 78A-26

Federal Aviation Administration,
Department of Transportation

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I^{1/}

All in-agency training shall be construed to be advantageous to the government. When such training requires the employee to be away from his duty station for two weeks or more, the employee may choose to travel by privately owned conveyance. Such travel by P.O.V. shall be advantageous to the government, and adequate travel time for such travel shall be authorized. Per diem and mileage monies shall be paid for travel accomplished under this section to the full amount authorized by law. [Footnote omitted.]

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with Federal Travel Regulations^{2/} and a related Comptroller General decision.^{3/}

Question Here Before the Council

The question is whether the proposal violates applicable law and regulation.

^{1/} The union filed a supplement to its appeal in this case in which, among other things, it revised the subject proposal to apply only to in-agency training. The agency did not object to the union's revision of the proposal and such revision does not significantly change the nature of the dispute presented by the parties.

^{2/} Federal Travel Regulations, 41 C.F.R. 101-7.003(a) (1977).

^{3/} 56 Comp. Gen. 131 (1976).

Opinion

Conclusion: This proposal, as intended to be implemented, does not conflict with applicable law and regulation. Thus, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{4/}

Reasons: Because the case concerns issues within the jurisdiction of the General Accounting Office, the Council, in accordance with established practice, requested a decision from the Comptroller General as to whether the proposal violates applicable law and regulation.

The Comptroller General's decision in the matter, B-192258, September 25, 1978, is set forth, in pertinent part, below:

This action involves the request of June 22, 1978, by the Executive Director of the Federal Labor Relations Council (FLRC) for a ruling by the General Accounting Office on certain proposed collective-bargaining agreement provisions involved in Federal Aviation Science and Technological Association, National Association of Government Employees and Federal Aviation Administration, Department of Transportation, FLRC No. 78A-26. The agreement provisions were proposed to the Federal Aviation Administration (FAA), Department of Transportation (DOT), by the Federal Aviation Science and Technological Association (FASTA), a division of the National Association of Government Employees (NAGE). They were determined to be non-negotiable by DOT. FASTA then requested the FLRC to review DOT's determination, and FLRC now seeks our opinion as to whether the proposed provisions are in conflict with the Federal Travel Regulations (FTR) (FPMR 101-7) and applicable Comptroller General decisions.

At the outset we point out the limits of our jurisdiction with regard to this matter. Our function is not to decide the question of which issues are, or are not, negotiable. This is the responsibility of the FLRC. However, we are required by 31 U.S.C. § 74 to rule on the legality of expending appropriated funds. Hence, we shall confine our consideration to whether the proposed provisions would result in an expenditure of appropriated funds not authorized by law.

FIRST UNION PROPOSAL

The first union proposal determined to be non-negotiable provides:

"All in-agency training shall be construed to be advantageous to the government. When such training requires the employee to be

^{4/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

away from his duty station for two weeks or more, the employee may choose to travel by privately owned conveyance. Such travel by P.O.V. shall be advantageous to the government, and adequate travel time for such travel shall be authorized. Per diem and mileage monies shall be paid for travel accomplished under this section to the full amount authorized by law."

The FLRC has asked us to rule on:

" * * * whether this section of the proposal, as intended to be implemented, conflicts with the Federal Travel Regulations (FPMR 101-7), the decision in 56 Comp. Gen. 131 (1976), and other applicable Comptroller General decisions."

As intended to be implemented the above-quoted section would require that the FAA determine that use of a privately owned vehicle is advantageous to the Government for those employees attending mandatory training at the FAA Academy in Oklahoma City, Oklahoma, which lasts 2 weeks or longer.

It is our understanding that the training periods generally extend from 3 to 12 weeks. Employees attending the training courses must arrange for their lodging commensurate with reduced per diem and subsistence granted by the FAA. The choice of lodging is restricted by the lack of public transportation in Oklahoma City. Employees in effect are limited to choosing lodging along a specially designated FAA bus route which in the absence of public transportation operates between Oklahoma City and the FAA Academy from 6 to 6:30 a.m. and at 4:30 p.m. Monday through Friday. However, lodging along the FAA bus route often is not within walking distance of restaurants, stores, and churches.

For the reasons stated below we find that the first union proposal as intended to be implemented does not conflict with the Federal Travel Regulations or decisions of the Comptroller General. However, the wording of the proposal is not restricted to training at the FAA Academy and nothing in this decision is meant to suggest that an agency could make a blanket determination that use of a privately owned vehicle is advantageous to the Government for all in-agency training. Our decision is limited to the circumstances of this case involving training at the FAA Academy.

Mileage for official use of privately owned vehicles authorized at 5 U.S.C. § 5704 (1976) provides for payment if the use of the vehicle is authorized or approved as more advantageous to the Government or the cost to the Government is limited to the cost of transportation which otherwise would have been used.

Paragraph 1-2.2c of the Federal Travel Regulations (Temporary Regulation A-11, Supplement 4, April 29, 1977), which implements 5 U.S.C. § 5704, provides in pertinent part:

"c. Presumptions as to most advantageous method of transportation.

"(1) Common carrier. Since travel by common carrier (air, rail, or bus) will generally result in the most efficient use of energy resources and in the least costly and most expeditious performance of travel, this method shall be used whenever it is reasonably available. Other methods of transportation may be authorized as advantageous only when the use of common carrier transportation would seriously interfere with the performance of official business or impose an undue hardship upon the traveler, or when the total cost by common carrier would exceed the cost by some other method of transportation. The determination that another method of transportation would be more advantageous to the Government than common carrier transportation shall not be made on the basis of personal preference or minor inconvenience to the traveler resulting from common carrier scheduling.

* * * * *

"(3) Privately owned conveyance. Except as provided in 1-2.2d, the use of a privately owned conveyance shall be authorized only when such use is advantageous to the Government. A determination that the use of a privately owned conveyance would be advantageous to the Government shall be preceded by a determination that common carrier transportation or Government-furnished vehicle transportation is not available or would not be advantageous to the Government. To the maximum extent possible, these determinations and the authorization to use a privately owned conveyance shall be made before the performance of travel."

In our decision 56 Comp. Gen. 131 (1976) we pointed out that the purpose of para. 1-2.2c was to prohibit the use of privately owned vehicles as being advantageous to the Government unless the specific conditions contained in the regulation have been determined to be met. However, 56 Comp. Gen. 131 does not bar negotiations between an agency and a union with respect to the use of a privately owned vehicle. That decision was limited to a holding that a departmental regulation as interpreted by an arbitrator contradicted the express requirements of FTR para. 1-2.2c. Additionally, we note that the wording of para. 1-2.2c has been changed since 56 Comp. Gen. 131 to permit consideration of hardship to the traveler as a factor in determining advantage to the Government. The basic intent of the regulation has not been changed, however. A determination of advantage to the Government may be made only after consideration of the criteria set forth in the regulation.

The determination of advantage to the Government is primarily the responsibility of the agency concerned after consideration of the factors contained in FTR para. 1-2.2c. We stated in 56 Comp. Gen. 865 (1977) that an agency's determination of whether:

"* * * an employee's use of his privately owned vehicle for travel is or is not advantageous to the Government will not generally be questioned by this Office. 26 Comp. Gen. 463 (1947); B-161266, March 24, 1970; B-160449, February 8, 1967. The particular determination that privately owned vehicle travel of FAA employees to the FAA Academy in Oklahoma from distant locations is not advantageous to the Government is not questioned here. If the FAA found such method of transportation to be to the Government's advantage, then traveltime during regular duty hours of work, would be allowed, and per diem and mileage expenses would be payable, without regard to the constructive cost of travel by common carrier."

Therefore, if the FAA should determine that travel by FAA employees in a privately owned vehicle to the FAA Academy is advantageous to the Government, the FAA may expend appropriated funds to pay for such travel.

In considering whether a determination of advantage to the Government should be made, it appears that consultation and negotiation with employees as represented by their labor organizations would be appropriate. In that connection we noted in National Council of Meat Graders, 57 Comp. Gen. 379 (1978), that the responsibility of an agency head or his designee to make a determination does not, in itself, require the conclusion that the item involved is not negotiable.

Accordingly, we conclude that the proposal, as intended to be implemented, is not in conflict with the Federal Travel Regulations or our decisions, provided the required determination is made.

Based on the foregoing decision by the Comptroller General, we find that the proposal, concerning travel and per diem in connection with in-agency training, does not conflict with applicable law and regulation.^{5/} Accordingly, the agency determination that the proposal is nonnegotiable because it contravenes the Federal Travel Regulations and applicable Comptroller General decisions was in error and must be set aside.

^{5/} We note, in this regard, that the Comptroller General's decision is expressly limited to the circumstances of this case involving travel in connection with training at the FAA Academy and does not extend to other circumstances involving in-agency training. We interpret the union's proposal as subsuming this limitation.

Union Proposal II

One day of administrative leave will be provided to each employee attending the FAA Academy for the purpose of finding living accommodations.

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with an applicable Comptroller General decision.^{6/}

Question Here Before the Council

The question is whether the proposal conflicts with applicable law.

Opinion

Conclusion: The proposal does not conflict with applicable law. Thus, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{7/}

Reasons: Because this case concerns issues within the jurisdiction of the General Accounting Office, the Council, in accordance with established practice, requested a decision from the Comptroller General as to whether the proposal violates applicable law.

The Comptroller General's decision in the matter, B-192258, September 25, 1978, is set forth, in pertinent part, below:

SECOND UNION PROPOSAL

The second union proposal determined to be non-negotiable provides:

"One day of administrative leave will be provided to each employee attending the FAA Academy for the purpose of finding living accommodations."

^{6/} 56 Comp. Gen. 865 (1977).

^{7/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

The FLRC requests us to rule on:

"* * * whether this section of the union proposal, as intended to be implemented, conflicts with the holding in 56 Comp. Gen. 865 (1977), and other applicable Comptroller General decisions."

As intended to be implemented, the above-quoted section would require the FAA to provide 1 day of administrative leave to find housing to employees upon arrival in Oklahoma City, Oklahoma, to attend the FAA Academy, as accommodations are not provided by the Government and per diem is reduced due to the extended temporary duty.

Our decision 56 Comp. Gen. 865 (1977) does not bar negotiations between an agency and a union with regard to the granting of administrative leave to find housing upon arrival at a temporary site when Government accommodations are not furnished and per diem is reduced due to extended temporary duty. That decision held that administrative leave could not be granted to employees for excess traveltime resulting from the use of a privately owned vehicle for the employee's personal convenience. Such a result was consistent with prior Comptroller General decisions and FPM Supplement 990-2 chapter 630, subchapter S3-4, which states in pertinent part:

"* * * Absences because of excess travel time resulting from the use of privately owned motor vehicles for personal reasons on official trips is generally chargeable to annual leave. * * *"

In 56 Comp. Gen. 865 we pointed out that there is no general statutory authority under which Federal employees can be excused from their official duties without charge to leave. However, excused absences have been authorized in specific situations by law and Executive order. In addition, over the years it has been recognized that in the absence of a controlling statute the head of an agency may in certain situations excuse an employee for brief periods of time without charge to leave or loss of pay. Decisions of the Comptroller General addressing the scope of agency discretion to grant administrative leave have generally drawn a distinction between absences connected with activities which further an agency's function and those which, though for a worthy cause, do not.

In the context of official travel we have recognized several situations in which administrative leave may appropriately be granted. In 55 Comp. Gen. 510 (1975) and in 56 Comp. Gen. 629 (1977), we recognized that employees may be granted brief periods of rest following air travel necessarily performed during hours normally allocated to rest. Where a transferred employee delayed his travel an additional day through no choice of his own but awaiting the tardy arrival of a moving company, we upheld the granting of 8 hours administrative leave. 55 Comp. Gen. 779 (1976).

Similarly, in B-180693, May 23, 1974, we held that an employee could be granted administrative leave for the purpose of complying with agency cancellation of an imminent and previously authorized transfer. See also B-160278, December 13, 1966, B-160838, March 10, 1967, and 56 Comp. Gen. 865 at 868.

The Federal Travel Regulations in Part 2 recognize the problems encountered by employees who are transferred in locating suitable quarters by providing for a house hunting trip and a temporary quarters and subsistence allowance.

Consistent with that concept, our view is that the Federal Aviation Administration is not precluded by our decisions, including 56 Comp. Gen. 865, from granting one day's administrative leave to employees on extended temporary duty at the FAA Academy in order to secure suitable lodgings at a reduced cost.

Based on the foregoing decision by the Comptroller General, we find that the proposal, concerning administrative leave, does not conflict with applicable law. Accordingly, the agency determination that the proposal is nonnegotiable because it contravenes applicable Comptroller General decisions was in error and must be set aside.

Union Proposal III

The employer shall plan activities and schedule travel so that the employee performs necessary travel during his regularly scheduled tour of duty. When travel must be accomplished outside of the employee's regularly scheduled tour of duty the employer shall record his reasons for scheduling travel during non-duty hours and shall furnish a copy to the employee involved. When travel results from an event which cannot be controlled administratively, it is to be considered hours of duty for pay purposes.

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with Civil Service Commission regulations implementing 5 U.S.C. 5542(b) and 6101(b)(2).^{8/}

Question Here Before the Council

The question is whether the proposal violates applicable law and regulation.

^{8/} 5 C.F.R. 550.112(e) and 610.123 (1978).

Opinion

Conclusion: The proposal does not conflict with applicable laws or regulations of the Civil Service Commission. Accordingly, the agency determination that this proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{9/}

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including those which implement title 5, United States Code, which pertain to scheduling the time to be spent by an employee in a travel status within the employee's regularly scheduled workweek and payment of an employee for time spent traveling outside of regular duty hours, that agency was requested, in accordance with established practice, to interpret Commission directives as they pertain to this proposal.

The Commission responded, in pertinent part, as follows:

You ask whether the above proposal by the union conflicts with Civil Service Commission regulations implementing sections 6101(b) and 5542(b) of title 5, United States Code, which pertain to scheduling the time to be spent by an employee in a travel status within the employee's regularly scheduled workweek and payment of an employee for time spent traveling outside of regular duty hours.

Section 6101(b)(2) of title 5, United States Code, requires that "(t)o the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee." Inasmuch as the law provides the head of an agency with the flexibility to schedule the time spent by an employee in a travel status, we find no conflict between this portion of the proposal and existing law. We do not, of course, reach the issue of the applicability of agency regulations or Executive Order 11491, as amended. It should also be pointed out that travel, whenever it is performed, to be compensable must meet the conditions of 5 USC 5542(b)(2), as stated in paragraph 3 below.

The second sentence of the proposal closely resembles a provision found in section 610.123 of title 5, Code of Federal Regulations, which prescribes that the reasons for requiring an employee to travel during nonduty hours will be recorded when the travel time is not payable under 5 CFR 550.112(e). We find no conflict between this portion of the proposal and existing regulation.

^{9/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

Section 5542(b)(2) of title 5, United States Code, specifies the conditions for considering time spent in a travel status as hours of employment and relates only to travel away from an employee's official duty station. That section of the law requires either that the travel be performed within the days and hours of the employee's regularly scheduled administrative workweek, including regularly scheduled overtime hours, or meet one of the following four conditions:

the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

While the third sentence of the proposal appears to restate the fourth condition of 5 USC 5542(b)(2) for compensable travel time, the proposed language could be construed to include travel to or within an employee's official duty station, which is not compensable travel time. To the extent the proposal applies only to travel away from an employee's official duty station, this portion of the proposal would not conflict with applicable statute or Civil Service Commission regulations.

Based on the foregoing interpretation of its own directives and related statutes by the Civil Service Commission, we find that the proposal which, as appears from the record in the present case, concerns only travel away from an employee's official duty station, does not conflict with applicable law and regulation of appropriate authority outside the agency. Accordingly, the agency determination that the proposal is nonnegotiable because it contravenes Civil Service Commission directives implementing title 5, United States Code, was in error and must be set aside.

By the Council.



Henry B. Frazier III
Executive Director

Issued: October 16, 1978

Ouachita National Forest, U.S. Department of Agriculture and National Federation of Federal Employees, Local No. 796 (Moore, Arbitrator).

The arbitrator found that the selection of the successful applicant for promotion to the particular position here involved was based on nepotism; and concluded that the activity had thereby violated agency regulations and the parties' agreement. The arbitrator therefore sustained the grievance and, as part of his award, directed the activity to vacate the position and in effect to then rerun the promotion action. The Council accepted the agency's petition for review on the ground that the award violated appropriate regulation, namely the Federal Personnel Manual. The Council also granted the agency's request for a stay. (Report No. 143)

Council action (October 27, 1978). Based upon an interpretation rendered by the Civil Service Commission in response to the Council's request, the Council found that the portion of the award that directed the activity to "vacate the position" prior to the rerunning of the promotion action could be implemented only if a determination was made that the individual selected could not meet the basic qualifications for the position without the improperly gained training and experience. Accordingly, in consideration of the Commission's advice and pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by adding a sentence thereto so as to ensure that its implementation would conform to the Commission's regulations. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Ouachita National Forest,
U.S. Department of Agriculture

and

FLRC No. 77A-121

National Federation of
Federal Employees, Local No. 796

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the grievant in this case applied for the position of Range Management Technician. When he was not selected for the position, the grievant challenged management's decision to select another employee, contending, in effect, that the position was filled in violation of the activity's merit promotion plan^{1/} because the employee who was selected for the position had received special treatment resulting from family connections. In this regard, the arbitrator found:

[T]he record is permeated with nepotism. The evidence indicates nepotism with Eugene Norvell's [the successful applicant's] employment and special training and commences with his employment and continues through his special training and the promotion involved herein. Evidence indicates that the selection for promotion made herein can only be justified on the basis of a friendship for the father and uncle of Eugene Norvell. Eugene Norvell was patently and purposely provided with training and opportunities which would enhance his possibility for future promotion.

The arbitrator went on to conclude that the activity violated agency regulations and the negotiated agreement between the parties. Thus, he sustained the grievance, directing that the activity "vacate the position of Range Management Technician and that the vacancy be resubmitted to the competitive process in accordance with the vacancy notice issued and that

^{1/} Article 19.1 of the parties' negotiated agreement provides that "promotion of Forest employees will be in accordance with criteria set forth in the Forest Service Merit Promotion Plan." In pertinent part, that Plan provides that "discrimination is prohibited for any non-merit reason such as . . . personal relationship The Department's regulations on nepotism . . . likewise apply to promotions." According to the arbitrator, the parties stipulated that the following issue was before him: "Was Article 17 and/or 19 of the negotiated contract violated by the selection of Mr. Norvell for the Range Management Technician position on the Choctaw Ranger District? If so, what is the remedy?"

a selection be made on the basis of qualification," and that "none of the witnesses in this matter . . . be prejudiced in any manner for filing this grievance."

Agency's Appeal to the Council

The agency filed a petition for review with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review on the ground that the award violates appropriate regulation, namely the Federal Personnel Manual.^{2/} Only the union filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the petition for review on the ground that the award violates appropriate regulation, namely the Federal Personnel Manual. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

This case relates to the filling of a range technician position in the Ouachita National Forest. The grievant alleged that his non-selection for the position at issue was based upon experience and training that the selectee received as a result of his family connections. The arbitrator sustained the grievance, finding that when taken in its entirety, the record was permeated with nepotism.* He noted as follows:

*The file indicates that the arbitrator used the term "nepotism" in its generic sense (i.e., favoritism because of family connections). He did not find nepotism as it is defined by § 3110 of title 5, U.S. Code. Therefore, we do not address the consistency of the arbitrator's award with the requirements of that section.

^{2/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council granted the agency's request for a stay of the award pending determination of the appeal.

The evidence indicates nepotism with Eugene Norvell's employment and special training and commences with his employment and continues through his special training and the promotion involved herein. Evidence indicates that the selection for promotion made herein can only be justified on the basis of a friendship for the father and uncle of Eugene Norvell.

The arbitrator's award ordered the agency to vacate the affected position, re-run the promotion action, and make a selection on the basis of qualifications. The agency appealed that part of the award that ordered the agency to vacate the position prior to re-running the promotion action.

Section 6-4(b) of Federal Personnel Manual Chapter 335 states that an erroneously promoted employee may be retained in the position only "if the promotion action can be corrected to conform essentially to all Commission and agency requirements as of the date the action was taken." The employee should not be removed from the position in advance of the re-running of the promotion action, however, unless it has been determined by an arbitrator or other competent authority that he could not properly have been considered for the position in the first place and hence, should not be allowed to compete in the second round. In the absence of such a determination, no action should be taken with regard to the employee pending the outcome of the re-running. (See Civil Service Commission advisory opinion in FLRC Case No. 75A-33, Council Report No. 104.) In re-running the action, it would be improper to credit any competitor, including the incumbent, with experience or training gained since the disputed selection. (See Civil Service Commission Bulletin 335-22, Review of Arbitrator's Authority and CSC Policy with Respect to Corrective Action for Promotion Violations.)

The arbitrator in this case determined that Mr. Norvell's selection resulted from specialized training and experience that he received because of family connections. Therefore, consistent with Civil Service Rule 7.1 which requires that personnel actions be based solely on merit and fitness, it was improper to consider Mr. Norvell's ill-gotten experience in rating and ranking him for the position at issue here. Because there has been no finding that Mr. Norvell could not have been considered absent that experience and training, he can be removed from the position prior to the re-running only if it is determined by an arbitrator or other competent authority that he did not otherwise meet the basic qualifications for the position.* Such

*If the incumbent must be removed from the position either because he did not meet the qualifications for the position or because he is not selected in the re-running of the action, he must be removed by a method (lateral reassignment, return to former position, etc.) to be determined by the agency and in accordance with law, regulations, and negotiated agreements. Thus, for example, if removal is to be made through adverse action, the incumbent's rights under Part 752 must be respected.

a determination would have to be consistent with the controlling qualification standards issued by the Commission under authority of 5 USC 3301, 5105, and Civil Service Rule II in order to be legally implementable. (See Civil Service Commission advisory opinion in FLRC Case No. 74A-99, Council Report No. 104.)

Based on the foregoing, we conclude that the arbitrator's order to vacate the position prior to the re-running of the promotion action is consistent with Commission regulations and established policy only if a determination is made that Mr. Norvell could not meet the basic qualifications for the position without the improperly gained training and experience. Unless such a determination is made, Mr. Norvell should be left in the position pending the outcome of the new competition.

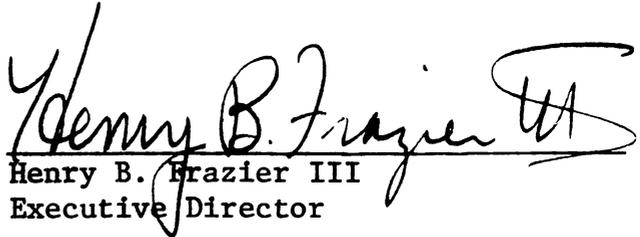
Based upon the foregoing interpretation of the Civil Service Commission, we find that the portion of the award that directs the activity to "vacate the position" at issue prior to resubmitting it to competitive procedures may be implemented "only if a determination is made that Mr. Norvell could not meet the basic qualifications for the position without the improperly gained training and experience. Unless such a determination is made, Mr. Norvell should be left in the position pending the outcome of the new competition."

Conclusion

In consideration of the Commission's advice herein, and pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby modify the arbitrator's award by adding the following sentence: "The position of Range Management Technician shall not be vacated, however, prior to the rerunning of the promotion action unless a determination is made that Mr. Norvell could not meet the basic qualifications for the position without the improperly gained training and experience."

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

By the Council.


Henry B. Brazier III
Executive Director

Issued: October 27, 1978

Commissioner of Social Security for the Headquarters Bureaus and Offices of the Baltimore Standard Metropolitan Statistical Area (SMSA) and SSA Local #1923 American Federation of Government Employees (AFL-CIO) (Groner, Arbitrator). In his award, the arbitrator held, among other things, that the grievance, concerning the exclusion of the grievant from the best qualified list in a particular promotion action, was arbitrable. The agency filed exceptions to that part of the award with the Council alleging that (1) the award violated the Order; (2) the arbitrator exceeded his authority; (3) the award failed to draw its essence from the parties' agreement; (4) the award was based on a nonfact; and (5) the award lacked entirety. The agency also requested a stay of the award.

Council action (October 27, 1978). As to (1), (2), (3) and (4), the Council held that the agency's petition did not provide the necessary facts and circumstances to support its exceptions. As to (5), the Council held that this exception did not state a ground upon which the Council has previously granted review of an arbitration award and apparently did not assert a ground similar to that upon which a challenge to a labor arbitration award is sustained by courts in private sector cases. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
Room G-402, West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Commissioner of Social Security for the
Headquarters Bureaus and Offices of the
Baltimore Standard Metropolitan Statistical
Area (SMSA) and SSA Local #1923 American
Federation of Government Employees (AFL-CIO)
(Groner, Arbitrator), FLRC No. 77A-142

Dear Mr. Becker:

The Council has carefully considered your petition for review of the arbitrator's award and the union's opposition to it in the above-entitled case.

According to the award and the record before the Council, the grievant filed a grievance objecting to his exclusion from the best qualified list for selection to fill permanently a vacancy in a particular GS-14 position. The grievance was processed through the steps of the negotiated grievance procedure without satisfactory resolution and was ultimately submitted to arbitration. A hearing was held by the arbitrator.

On the morning of the hearing, the activity for the first time contended that the grievance was not arbitrable because it concerned promotion to a "management official" position. The activity argued that "management official" positions were excluded from the bargaining unit by Article 1, Section B^{1/} of the parties' negotiated agreement, and consequently the

1/ Article 1 (Parties to the Agreement and Definition of Unit), Section B provides:

This Agreement covers all nonsupervisory General Schedule and Wage Grade employees of the Social Security Administration Headquarters Bureaus and Offices, including professionals, in the Baltimore SMSA, collectively making up the bargaining unit and hereinafter referred to as employees or group of employees, but excluding guards, supervisors, management officials, employees engaged in personnel work in other than a purely clerical capacity, and investigative personnel. Those employees excluded from the bargaining unit may join and as individuals be represented by the Union.

grievance was nonarbitrable because it concerned promotion to such a position. The arbitrator reserved the issue of arbitrability and proceeded to a hearing on the merits of the grievance. During the closing arguments at the arbitration hearing, the activity again contended that the grievance was not arbitrable. The basis for the contention differed from the earlier argument. The activity now contended that at the time the vacancy announcement for the contested position was posted, the grievant occupied a supervisory position which was excluded from the bargaining unit.^{2/}

In discussing the arbitrability of the grievance in the opinion accompanying his award, the arbitrator initially noted that Article 24 (Arbitration), Section A of the negotiated agreement pertinently provides that a "grievance processed under Article 22 . . . if unresolved may be referred to arbitration as provided for in this Article."^{3/} Further, noting the delay of the activity in objecting to the arbitrability of the grievance, the arbitrator stated that it would be "just and proper to draw the inference" that the activity "recognized throughout the processing of this grievance that it was indeed subject to the grievance procedures established in the Agreement."

^{2/} On the basis of the record before the Council, it appears that the grievant held the position of Health Inquiries Management Specialist, GS-13, when he initiated his grievance. He continued to hold that position until it was reclassified to Supervisory Health Insurance Inquiries Specialist, GS-13, while the grievance was in process. The grievant remained in the position as reclassified and held that position at the time of the arbitration hearing. Although the position occupied by the grievant was reclassified to a supervisory position while the grievance was in process, there is nothing in the record to indicate that the Assistant Secretary had determined that the grievant was a supervisor as that term is used in the Order. In this regard it should be noted that the Council has previously considered the relationship between the definition of the term supervisor in the Order and the definition used for position classification purposes. In the Report accompanying the 1975 Amendments, the Council said:

[T]he Council considered proposals that the definition be made uniform with definitions of the term used for other purposes in the Government, such as position classification. The definition of "supervisor" in the Order reflects the special purposes which the term serves. For example, it has special significance in determining community of interest and conflict of interest in establishing appropriate units and in determining interference with the rights of employees and labor organizations in unfair labor practice proceedings. The Council concluded that any advantages to be gained through uniformity were clearly outweighed by the importance of having expert determinations made for the special purposes of the labor relations program under a definition which has been painstakingly developed over a period of time to meet those purposes.

Labor-Management Relations in the Federal Service (1975), at 32.

^{3/} Article 22 of the parties' negotiated agreement sets forth the procedure for the adjustment of grievances that do not involve disciplinary action.

He observed that "the conduct of the parties throughout the grievance procedure is strong evidence as to what the Agreement means." Finding that the activity's arguments that the grievance was not arbitrable could not be sustained, the arbitrator pertinently concluded that

[t]he Agreement covers employees . . . and there is little doubt on this record that the Grievant was an employee within the bargaining unit at the time that he filed the grievance [with a] right to have the grievance processed through the contractual procedures including arbitration

Thus, the arbitrator held in his award that the grievance was arbitrable.

With respect to the merits of the grievance, the arbitrator determined that the grievant had been improperly excluded from the best qualified list. Therefore, in accordance with the parties' negotiated agreement, the arbitrator ordered in his award that the grievant "shall receive priority consideration to an appropriate GS-14 position."

The agency takes exception only to that part of the arbitrator's award which found the grievance arbitrable and requests, on the basis of its five exceptions discussed below, that the Council accept its petition for review. The union filed an opposition.

In its first exception to the award of arbitrability, the agency contends that such award violates the Order. In support of this exception, the agency expands upon the activity's closing argument at arbitration by maintaining that the grievant qualified as a supervisor at the time he initiated his grievance, and therefore he was excluded from the bargaining unit and precluded from use of the negotiated grievance procedure. Thus, the agency argues that to implement the entire award based upon the arbitrability award would violate section 2(c) of the Order.

Although the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order, the Council is of the opinion that the agency's petition does not contain a description of facts and circumstances necessary to support this exception. In resolving the issue of arbitrability submitted to him by the parties, the arbitrator held that the grievance was arbitrable on the basis of his determination that "[t]he Agreement covers employees . . . and there is little doubt on this record that the Grievant was an employee within the bargaining unit at the time he filed the grievance [with a] right to have the grievance processed through the contractual procedures including arbitration" In the Council's opinion the agency has failed to present facts and circumstances to demonstrate in what manner such award violates the Order.

In this regard the Council observes that section 2(c) of the Order, which the agency asserts will be violated by implementation of the award in this case, defines the term "supervisor" as that term is used in the Order. Thus, section 2(c) is applied by the Assistant Secretary in deciding whether

certain positions may be included within an appropriate unit for purposes of exclusive recognition under section 10(b) of the Order.^{4/} Since resolution of the issue of arbitrability in this case only required the arbitrator to determine the extent of the activity's obligation under the negotiated agreement to submit the unresolved grievance to arbitration, the agency's arguments concerning section 2(c) do not appear to provide support for its exception contending that the arbitrability award of the arbitrator violates the Order. The agency contended in its closing arguments at the arbitration hearing and contends again in this exception to the award that the grievant was a supervisor at the time the vacancy announcement for the contested position was posted. In support of this contention, it points out that the grievant's position was reclassified to a supervisory position while the grievance was in process. However, as has been noted, the determinations of whether an individual is a supervisor, as that term is defined in the Order, are "expert determinations made for the special purposes of the labor relations program under a definition which has been painstakingly developed over a period of time to meet those purposes."^{5/} It was for that reason that the Report accompanying the 1975 Amendments to the Order^{6/} rejected the proposal that the definition of supervisor be made uniform with that used for position classification purposes. Furthermore, the agency provides no facts and circumstances to demonstrate that such an expert determination with respect to the grievant's position had been made by the Assistant Secretary as a result of the filing, for example, of an application for decision on grievability or arbitrability or in a petition for clarification of unit. Further, nothing in the agency's petition for review indicates that the issue submitted to the arbitrator, or the arbitrator's award in this matter, involved a question as to whether the grievant was a supervisor, as that term is defined in section 2(c) of the Order. Nor does it appear that the arbitrator considered such a question. Thus, the agency's petition for review does not present facts and circumstances to demonstrate that the arbitrator, in the course of answering the question submitted to him regarding the arbitrability of the grievance, interpreted the agreement in a manner violative of the Order or rendered an

4/ Section 10(b) of the Order pertinently provides:

A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be established if it includes--

(1) any management official or supervisor, except as provided in section 24[.]

5/ Supra note 2.

6/ Labor-Management Relations in the Federal Service (1975), at 25-52.

award violative of the Order.^{7/} Accordingly, the agency's first exception provides no basis for acceptance of its petition under the Council's rules of procedure.

In its second exception to the arbitrability award, the agency contends that the arbitrator exceeded his authority under the negotiated agreement. In support of this exception, the agency principally asserts that the grievant, as a supervisor, was excluded from the bargaining unit and precluded from use of the negotiated procedure, and thus the arbitrator's actions in permitting arbitration of this grievance were in excess of his authority under the negotiated agreement which admonished him not to "add to, subtract from, or modify" the agreement. Although the Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition for review, that the exception presents a ground that the arbitrator exceeded his authority by violating a specific limitation or restriction on his authority contained in the negotiated agreement, e.g., Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123, the Council is of the opinion that the agency's petition fails to provide the necessary facts and circumstances in support of its exception that the arbitrator exceeded his authority under the negotiated agreement. The agency again merely asserts that the grievant was a supervisor and thus was not entitled to any rights under the negotiated agreement. As previously indicated, the activity processed the grievance through the negotiated grievance procedure to arbitration before it challenged the status of the grievant; at no time did the activity ever seek a determination as to the status of the grievant from the Assistant Secretary; and the activity specifically submitted the precise question of arbitrability to the arbitrator, the resolution of which it now challenges as in excess of his authority under the negotiated agreement. Thus, in the circumstances of this case and for reasons more fully outlined under the first exception, this exception and such assertions provide no basis for acceptance of the agency's petition under the Council's rules.

In its third exception the agency contends that the award fails to draw its essence from the negotiated agreement. In support of this exception, the agency maintains that the arbitrator failed to address the question of whether the grievant, as a supervisor, was excluded from the bargaining unit and precluded from use of the negotiated grievance procedure, and thus the award does not draw its essence from the negotiated agreement. Although the agency's exception states a ground upon which the Council grants review of an arbitration award, e.g., National Federation of Federal Employees Local 273 and U.S. Army Field Artillery Center and Fort Sill (Williams,

^{7/} Nothing herein in any manner infringes upon the jurisdiction of the Assistant Secretary or would now prevent the parties from petitioning the Assistant Secretary to determine prospectively the status of the grievant's present position with respect to the bargaining unit.

Arbitrator), FLRC No. 77A-44 (Aug. 23, 1977), Report No. 135, in support of this exception the agency primarily reiterates the arguments asserted in support of its previous exceptions. Thus, the agency does not provide the necessary facts and circumstances in support of this exception, especially since it does not appear how the award fails to draw its essence from the negotiated agreement when the arbitrator answered precisely the issues presented by the parties on the basis of his interpretation of the parties' negotiated agreement. Accordingly, this exception provides no basis for acceptance of the agency's petition.

In its fourth exception the agency contends that the award is based on a nonfact. In support the agency asserts that the arbitrator's determination that the grievant was a unit employee is contrary to the evidence of record. However, while the agency's exception states a ground upon which the Council grants review of an arbitration award, the Council is of the opinion that the agency has failed to provide the necessary facts and circumstances to support this exception. The Council will accept a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that the central fact underlying the award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. However, in support of this exception, the agency again merely repeats its previous assertions that the grievant was a supervisor which, as previously indicated, provide no basis for acceptance of the agency's petition in the circumstances of this case.

In its final exception the agency contends that the award lacks entirety. In support the agency refers to its previous exceptions and again asserts that the arbitrator failed to resolve the central issue of the grievant's supervisory status. This exception does not state a ground upon which the Council has previously granted review of an arbitration award and apparently does not assert a ground similar to that upon which a challenge to a labor arbitration award is sustained by courts in private sector cases, American Federation of Government Employees, Local 3239, AFL-CIO and Social Security Administration, Cleveland Region, Area One Office, Southfield, Michigan (Ott, Arbitrator), 4 FLRC 469 [FLRC No. 76A-67 (Aug. 31, 1976), Report No. 111]. Moreover, the agency is again merely reiterating its previous assertions. As indicated, such assertions provide no basis for acceptance of the agency's petition under the Council's rules.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: H. Roof
AFGE

American Federation of Government Employees, AFL-CIO, Local 2154 and Department of the Army, Headquarters Fort Sam Houston, Camp Stanley Storage Facility, Texas. The dispute involved the negotiability of management proposals concerning (1) union representation in discussion of grievances at a particular stage of the parties' negotiated grievance procedure; and (2) official time for representational activities under the Order.

Council action (October 27, 1978). The Council held that the proposals were negotiable under the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determinations as to the negotiability of the proposals.

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

American Federation of Government
Employees, AFL-CIO, Local 2154

(Union)

and

FLRC No. 78A-34

Department of the Army,
Headquarters Fort Sam Houston,
Camp Stanley Storage Facility, Texas

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Agency Proposal I

Once a grievance is advanced to the formal third step, an additional union officer may be included in discussions regarding the grievance, if desired by the employee.

Agency Determination

The agency determined that the proposal is negotiable under the Order.

Question Here Before the Council

The principal question is whether this management proposal is negotiable under section 13(a) of the Order.

Opinion

Conclusion: The agency proposal concerning the parties' negotiated grievance procedure is negotiable under section 13(a) of the Order. Accordingly, the agency determination of negotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.^{1/}

^{1/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agency proposal. We decide only that, as submitted by the agency and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

Reasons: Section 13(a) of the Order^{2/} mandates that each negotiated agreement between an agency and a labor organization provide a procedure for the consideration of grievances arising in the bargaining unit. The policy underlying section 13(a) is that the parties should have great flexibility at the bargaining table to fashion a negotiated grievance procedure to suit their particular needs.^{3/} Thus, the parties are free to negotiate concerning any aspect of the grievance procedure, so long as that which is negotiated does not conflict with statute or the Order, and so long as the negotiated procedure itself does not cover matters for which a statutory appeal procedure exists.^{4/} For example, the parties may negotiate such aspects of the grievance procedure as the number of steps, time limits for processing grievances or the number of union and management participants at the various steps of the procedure.

The management proposal, here at issue, by its plain language and the agency's statement of its intended meaning, merely would establish a procedure for including an additional union representative in discussions of a grievance at the formal third step of the parties' negotiated grievance procedure. The determination of whether there would be such an additional union representative would be left to the employee being represented by the union in the grievance procedure. Thus, should a grievant elect to request the presence of an additional union officer, nothing in the language of the proposal or in the agency's stated intent as reflected in the record before the Council would limit the union in the selection of the particular officer to be included in the discussion.

2/ Section 13(a) of the Order provides:

Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

3/ Labor-Management Relations in the Federal Service (1975), at 43.

4/ See, e.g., Graphic Arts International Union, Local 234 and ERDA, Technical Information Center, Oak Ridge, Tenn., FLRC No. 76A-65 (Aug. 2, 1977),

(Continued)

Such a proposal concerns a part of the overall procedure which, as already indicated, the parties are required to negotiate and are provided considerable discretion in negotiating under section 13(a) of the Order. Moreover, there is no showing that any aspect of the procedure conflicts with statute or the Order.^{5/} Finally, since the proposal itself does not address the coverage of the negotiated grievance procedure, it does not deal with matters for which a statutory appeal procedure exists.

Accordingly, the proposal is negotiable under section 13(a) of the Order as part of the negotiated grievance procedure.

Agency Proposal II

It is not intended that official time will be granted to any one employee for repeated service as a union representative when such

(Continued)

Report No. 132 at 2-3; Bureau of Prisons and Federal Prisons Industries, Inc., Washington, D.C. and Council of Prison Locals, AFGE, 3 FLRC 352 [FLRC No. 74A-24 (Aug. 15, 1975), Report No. 74].

^{5/} While the union contends that the proposal is an "attempt by management to interfere with the union's right to determine who will represent it in formal discussions" under section 10(e) of the Order, such contention is not borne out by the proposal itself. The proposal, as indicated by its plain language and in the record before the Council, merely provides a procedure regarding the number of union representatives includable in discussions at the formal third stage of the parties' negotiated grievance procedure. As already indicated, should a grievant elect to request the presence of an additional union officer, nothing in the language of the proposal or in the agency's stated intent as reflected in the record before the Council would limit the union in the selection of the particular officer to be included in the discussion. Accordingly, apart from other considerations, we find the agency's proposal does not relate to such a determination and, hence, find the union's contention to be without merit with regard to the proposal at issue here.

The union also asserted in its petition to the Council that the proposal should be held nonnegotiable because it violates section 19(a) of the Order. Such an assertion, in the circumstances herein, does not provide a basis for setting aside the agency determination of negotiability. Rather, it appears to conjecture an unfair labor practice by management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. American Federation of Government Employees, Local 1749 and Laughlin Air Force Base, Del Rio, Texas, FLRC No. 77A-86 (June 29, 1978), Report No. 151, n. 10 at 6, and AFGE Local 2151 and General Services Administration, Region 3, 3 FLRC 668, 674, n. 5 [FLRC No. 75A-28 (Oct. 8, 1975), Report No. 86].

repeated service would interfere with the performance of regular duties.

Agency Determination

The agency determined that the proposal is negotiable under the Order.

Question Here Before the Council

The question is whether this management proposal is negotiable under the Order.

Opinion

Conclusion: The agency proposal involving official time for representational activities is negotiable under the Order. Thus, the agency head's determination that the proposal is negotiable under the Order was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{6/}

Reasons: The union contends inter alia that this proposal is "the employer's attempt to minimize the effectiveness of the top [local] union officer" by preventing such officer "from using all, or a majority, of her time to represent employees of the bargaining unit." Without deciding that such an interpretation of the agency's proposal would render the proposal non-negotiable,^{7/} we are of the opinion that the union's interpretation of the meaning and intent of the proposal is not borne out by either the language of the proposal or its intended meaning as reflected in the record before the Council.

The proposal, as reflected by its language and the record before the Council, merely would establish a standard of "reasonableness" with regard to the

^{6/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agency proposal. We decide only that, as submitted by the agency and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{7/} This union contention that management is attempting to minimize the effectiveness of local union officials appears to conjecture an unfair labor practice by management. Such an assertion, in the circumstances herein does not provide a basis for setting aside an agency determination of negotiability. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. See cases cited note 5, supra.

amount of official time that may be used by union representatives for the performance of representational functions.^{8/}

The Council has previously interpreted the Order with respect to the negotiability of proposals concerning official time for union representatives to engage in various representational activities, ruling that:^{9/}

. . . nothing in the Order prohibits an agency and a labor organization from negotiating provisions . . . which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" union business.

Likewise, in its decisions on negotiability issues, the Council has consistently held proposals involving the amount of official time to be used by union representatives for the performance of representational activities as well as proposals establishing procedures for the use of such time to be negotiable under the Order.^{10/} Since the proposal here in dispute involves solely the establishment of a standard for determining the amount of official time to be granted under the parties' agreement, the Council interpretation and decisions referred to above are applicable to it. Accordingly, we sustain the agency head's determination of negotiability as to this proposal.

By the Council.


Henry B. Frazier III
Executive Director

Issued: October 27, 1978

^{8/} There is no stated intent on the part of the agency and we do not interpret the proposal as requiring that union members who perform representational functions on official time do the same quantity of work as if they had spent no official time in the performance of such representational functions. See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118.

^{9/} Interpretation of the Order and Statement on Major Policy Issue, 3 FLRC 874, 878 [FLRC No. 75P-1 (Dec. 17, 1975), Report No. 90].

^{10/} See, e.g., American Federation of Government Employees, Local 1749 and Laughlin Air Force Base, Del Rio, Texas, FLRC No. 77A-86 (June 29, 1978), Report No. 151, at 3-8.

U.S. Army, Europe and Seventh Army and Army and Air Force Exchange Service, Europe, A/SLMR No. 1006. The Assistant Secretary dismissed the section 19(a)(1) complaint against USAREUR and the section 19(a)(1) and (6) complaint against AAFES related to a RIF affecting unit employees, which complaints were filed by the union (Local 2348, American Federation of Government Employees, AFL-CIO). The union appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (October 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. James R. Rosa
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Army, Europe and Seventh Army
and Army and Air Force Exchange
Service, Europe, A/SLMR No. 1006,
FLRC No. 78A-41

Dear Mr. Rosa:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 2348, AFL-CIO (the union) was the exclusive representative of the regular U.S. citizen civilian employees employed by the Army and Air Force Exchange Service, Europe (AAFES) at Munich, Germany. The AAFES also employs German local national employees (LN's); however, the LN's are not represented by the union. AAFES and the union are parties to an agreement which was in effect at all times material herein. Among other things, the agreement contained the following provisions:

Article IV, AUTHORITY, LEGAL AND REGULATORY APPLICATIONS

Section 2. In the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in AAFES Personnel Regulations; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

Article XIV, REORGANIZATION AND REDUCTION IN FORCE

Section 2. Notwithstanding the provisions of Article IV, it is agreed that the provisions of AR 60-21/AFR 147-15, on

reduction-in-force (RIF) in effect at the time of a reduction-in-force action shall apply.*/ [Footnote added.]

The U.S. Army, Europe (USAREUR), a military command under Headquarters, U.S. European Command, has, as part of its mission, responsibility for establishing policies and negotiating agreements with trade unions throughout the Federal Republic of Germany covering wages and other conditions of employment for LN's. USAREUR reached an understanding with the representatives of the Federal Republic of Germany that, in the event of a reduction-in-force (RIF), LN's would be given preference over U.S. civilian employees occupying positions designated or set aside for LN's. To implement this understanding the USAREUR issued Regulation 690-84. The following year, the AAFES was required to initiate a RIF action involving positions designated for LN's. Under the provisions of Regulation 690-84, by which the RIF was implemented, certain LN's were retained in preference to certain U.S. citizen civilian employees whom the union represented. Thereafter, AAFES and the union representatives had discussions concerning the RIF. At that time, AAFES formally notified the union that it had conducted the RIF pursuant to Regulation 690-84, that it was required to do so by virtue of a command policy, and that some unit employees would be displaced by LN's. The union objected to the RIF procedure set forth under Regulation 690-84, and contended that the RIF should be conducted pursuant to the provisions set forth in AR 60-21/AFR 147-15. The AAFES responded that the USAREUR had determined which personnel should receive preference during the RIF involving AAFES employees and that there was no latitude for renegotiating retention rights of those U.S. citizens involved in the RIF.

The union then filed unfair labor practice complaints alleging that the USAREUR violated section 19(a)(1) of the Order by promulgating Regulation 690-84 which required AAFES to utilize the provisions of that regulation rather than the RIF procedures of AR 60-21/AFR 147-15 incorporated in the negotiated agreement between AAFES and the union in conducting a RIF affecting unit employees; and that AAFES violated section 19(a)(1) and (6) of the Order by conducting the RIF affecting unit employees in a manner inconsistent with the terms of the agreement between AAFES and the union.

The Assistant Secretary found that, under the particular circumstances involved, USAREUR did not violate the Order by promulgating and requiring AAFES to implement the provisions of Regulation 690-84. In so finding, the Assistant Secretary stated:

Thus, in Article XIV of the negotiated agreement between the AAFES and the [union], the parties specifically incorporated by reference

*/ Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15 states:

Treaties and overseas command policy. Employees in oversea foreign areas will be subject to the terms and conditions of applicable treaties, agreements, laws and over sea command policies as well as to this regulation. . . . [Emphasis added.]

the provisions of AR 60-21/AFR 147-15 with respect to RIF matters, which necessarily included Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15 provid[ing], in part, that "Employees in oversea foreign areas will be subject to the terms and conditions of applicable treaties, agreements, laws and over sea command policies . . ." Under these circumstances, from a reading of AR 60-21/AFR 147-15 in its entirety, I conclude that employees located in oversea foreign areas such as those involved in the instant case, were subject to overseas command policies of the USAREUR, an overseas command. Consequently, in my opinion, the actions of the USAREUR in issuing an oversea command policy--i.e.--Regulation 690-84--and requiring the implementation of the provisions thereof by the AAFES in the latter's conducting a RIF action affecting employees exclusively represented by the [union], did not result in an improper unilateral modification of the terms and conditions established in the negotiated agreement between AAFES and the [union], as such agreement was made expressly subject to oversea command policies.^{4/} Accordingly, I shall order that both complaints herein be dismissed in their entirety.

^{4/} Whether or not the promulgation and implementation of Regulation 690-84 was violative of law, as argued by the [union], is not an appropriate matter for resolution under the unfair labor practice procedures of the Executive Order.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that he dismissed the unfair labor practice charges in this case on the basis of contract provisions which specifically bind the parties to obey applicable future and existing law while refusing to interpret and apply the law which both the Order and the parties' agreement provide shall govern the administration of the agreement. Further, you allege that the Assistant Secretary's decision presents two major policy issues: (1) "May the Assistant Secretary refuse to interpret and enforce the language of [s]ection 12 of the Executive Order as incorporated in collective bargaining agreements[?]" and (2) "Must a party to a collective bargaining agreement resort to court action to enforce contract provisions guaranteed by statute, section 12 of the Executive Order, and a collective bargaining agreement which provides that the parties' contract will be administered in accordance with applicable law[?]"

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review. That is, the decision of the Assistant Secretary does not present any major policy issues or appear arbitrary and capricious.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision

in the circumstances of this case. Your contentions in this regard, and your stated major policy issues all go to the Assistant Secretary's alleged refusal to interpret and enforce applicable law in resolving the unfair labor practice complaint. However, nothing in your petition for review discloses any basis to support such a contention. Moreover, the Council notes particularly the Assistant Secretary's finding that the issuance of an oversea command policy (Regulation 690-84) by USAREUR and the implementation thereof by AAFES in conducting the RIF herein "did not result in an improper unilateral modification of the terms and conditions established in the negotiated agreement between AAFES and the [union], as such agreement was made expressly subject to oversea command policies."

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

LTC R. M. Mittlstaedt
Army

R. Edwards
AAFES

FLRC No. 78A-44

Local 2578, American Federation of Government Employees, AFL-CIO and National Archives and Records Service, General Services Administration. The dispute involved the negotiability of union proposals that would, in effect, permit employees to eat or drink at their desks without regard to the presence in the office of archival materials; and would preclude the agency from requiring employees to perform work with archives in at least three offices located in stack areas.

Council action (October 27, 1978). The Council held that the union's proposals were excepted from the agency's obligation to bargain by section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determinations that the proposals were nonnegotiable.

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

Local 2578, American Federation of
Government Employees, AFL-CIO

(Union)

and

FLRC No. 78A-44

National Archives and Records Service,
General Services Administration

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I^{1/}

That employees will not eat or drink at their desks in their offices if and when there are archives on their desks.

Agency Determination

The agency determined in part that the proposal is nonnegotiable because it is excepted from the agency's obligation to negotiate under section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order.

^{1/} In January 1978, the National Archives and Records Service informed the union that due to the acquisition of new stack space at the Washington National Records Center Building some employees' desks would be relocated. The union was also informed that smoking, drinking, and eating would not be permitted in the offices located in the stack areas. Subsequently, the union requested, and was granted, an opportunity to negotiate with agency management regarding the "impact and implementation" of these management actions. The union made certain proposals (in the nature of "counter-proposals" to the agency's intended actions) which, upon referral, were determined by the agency to be nonnegotiable. Those proposals form the substance of the instant dispute.

Opinion

Conclusion: The proposal concerns matters related to the technology of performing the agency's work and is excepted from the agency's obligation to bargain by section 11(b) of the Order.^{2/} Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The mission of the National Archives and Records Service of the General Services Administration (NARS) includes the preservation of the records of the Federal Government.^{3/} In the instant case, NARS has adopted and utilizes various protective and preventive measures designed to maintain an environment suitable to carrying out the records preservation aspect of its mission. For example, all accessioned paper records are required, among other things, to be fumigated and made free of dust, stored in areas maintained at a constant temperature of 70 degrees and humidity of 50 percent, and kept free of insects, rodents, and other paper-destroying pests.^{4/} In complementary manner, smoking, eating, and drinking are prohibited in offices which are located in stack areas and which are used in part as research rooms or for records storage^{5/} because of the potentially harmful effect of these activities on paper records.

The agency contends that the prohibition on smoking, eating, and drinking in employee offices where records are stored or used is a part of its records preservation "technology," i.e., the technology of performing the work of the agency, which is excepted from the obligation to bargain under section 11(b)

2/ In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal or to reach the procedural issue raised by the agency.

3/ 44 U.S.C. 2105 provides, in relevant part, as follows:

The Administrator of General Services shall provide for the preservation, arrangement, repair and rehabilitation, duplication and reproduction . . . description, and exhibition of records or other documentary material transferred to him as may be needful or appropriate

4/ See generally National Archives Procedures, NAR P 1848.1A, chap. 3.

5/ National Archives Procedures, NAR P 1848.1A, chap. 3, para. 4g provides, in relevant part, as follows:

Do not smoke, eat, or drink in any area in which records are stored or used. This prohibition does not apply to offices except those located in stack areas used in part as research rooms or for the storage of records.

of the Order;^{6/} and that the union's proposal is nonnegotiable because it would require the agency to negotiate with respect to that technology. In the circumstances of this case, we agree with the agency.

The union's proposal provides that employees will not eat or drink in their offices when archival records are present on their desks. That is, the proposal would, in effect, permit an employee to eat or drink in his or her office without regard to the presence in the office of archival materials so long as those materials are not on the employee's desk. However, as indicated above, the prohibition on eating and drinking in offices located in stack areas where records are stored or used is a part of the group of protective and preventive measures which the agency utilizes to maintain an environment suitable to the preservation of records. As such, it is a part of the technology of performing the agency's work. Accordingly, since the union's proposal would require the agency to negotiate regarding the technology by means of which the agency accomplishes its mission of preserving archival records, which is a matter excepted from the agency's obligation to bargain by section 11(b) of the Order, we find that the proposal is nonnegotiable.^{7/}

Union Proposals II and III

That three offices (rather than just one, as management proposes) be used as a combination work and lounge area, exclusive of any work done with archives in order to continue to permit the convenience of a cigarette or a cup of coffee without having to go into the bathroom lavatory;

That archives, rather than smoking/drinking/eating, be excluded from the offices to permit the employees working in a dismal warehouse a modicum of convenience.

Agency Determination

The agency determined in part that the proposals are nonnegotiable because they are excepted from the agency's obligation to bargain under section 11(b) of the Order.

^{6/} Section 11(b) of the Order provides, in relevant part, that "the obligation to meet and confer does not include matters with respect to . . . the technology of performing [the agency's] work"

^{7/} We emphasize that our decision is limited to the particular circumstances of this case and should not be construed as expressing any opinion on the negotiability of proposals regarding the right of employees to smoke, eat, or drink in their offices in other circumstances, not here present.

Question Here Before the Council

The question is whether the proposals are excepted from the agency's obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposals concern matters related to the technology of performing the agency's work and are excepted from the obligation to bargain by section 11(b) of the Order.^{8/} Thus, the agency determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: These two union proposals would preclude the agency from requiring employees to perform work with archives in at least three of the offices located in the stack areas. That is, the proposals would prohibit the agency from deciding to use its office workspace for the purpose of performing work with archives. The agency argues that, because these proposals relate to the use of agency workspace, they are excepted from the agency's obligation to bargain on matters related to the technology of performing the agency's work within the meaning of section 11(b) of the Order,^{9/} as interpreted and applied in Council decisions. We find merit in this contention.

The issue of the agency's right to determine the use of office workspace for purposes related to the work of the agency was resolved by the Council in the IRS, Chicago District and IRS, Philadelphia District cases.^{10/} These cases involved union proposals which would have required the agency to provide confidential office space and conference rooms for certain specified groups of employees. That is, the proposals would have required the agency to provide workspace to be used for a specific purpose related to the performance of the agency's work. The Council found that the proposals regarding the use of agency workspace would require the agency to negotiate concerning the adoption of a particular technology of performing the work of the agency, and, therefore, that the proposals were nonnegotiable under section 11(b) of the Order. Similarly, the proposals in the present case would preclude the agency from determining that work on archives will be performed in at least three offices located in the stack areas. The

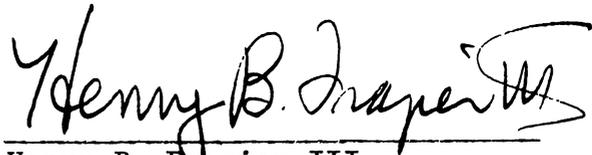
^{8/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of these proposals.

^{9/} See n. 6 supra.

^{10/} National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, 4 FLRC 125 [FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98]; National Treasury Employees Union; Chapter No. 22, National Treasury Employees Union; and United States Department of the Treasury, Internal Revenue Service, Philadelphia District, 4 FLRC 597 [FLRC No. 75A-118 (Nov. 19, 1976), Report No. 118].

proposals thereby would require the agency to negotiate on the technology adopted by the agency, i.e., the use of its workspace for specific purposes related to the performance of the agency's work. Thus, based on our decisions in IRS, Chicago District and IRS, Philadelphia District, we conclude that the subject proposals concern the technology of performing the agency's work and, hence, are excepted from the agency's obligation to bargain by section 11(b) of the Order. Accordingly, we sustain the agency head's determination that the proposals are nonnegotiable.^{11/}

By the Council.



Henry B. Frazier III
Executive Director

Issued: October 27, 1978

^{11/} We do not decide in the present case that a proposal to provide an employee lounge area in other than office workspace, or concerning other matters relating to the impact and implementation of the management actions here involved, would be excepted from the agency's obligation to bargain under section 11(b) of the Order.

General Services Administration, Public Buildings Service, Louisville, Kentucky, and Region IV, GSA, Assistant Secretary Case No. 41-5685(CA). The Assistant Secretary denied the request for review filed by the union (National Federation of Federal Employees), seeking reversal of the Regional Administrator's dismissal of the union's section 19(a)(1), (2) and (6) complaint against the activity (concerning the activity's denial of union representation to an employee during the oral reply stage of an adverse action proceeding). The union appealed to the Council, contending that the Assistant Secretary's decision raised a major policy issue.

Council action (October 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue and the union neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: General Services Administration, Public Buildings Service, Louisville, Kentucky, and Region IV, GSA, Assistant Secretary Case No. 41-5685(CA), FLRC No. 78A-48

Dear Mr. Englehart:

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

In this case, as found by the Assistant Secretary, an official of the General Services Administration, Public Buildings Service, Louisville, Kentucky (the activity) notified an employee in a bargaining unit represented by the National Federation of Federal Employees (the union) that the activity intended to terminate him for cause and that he had 10 days to reply. The employee designated the union as his representative. Thereafter the union requested an opportunity for an oral reply. When the oral reply meeting was subsequently held, the local union president accompanied the employee as his representative. However, the union official was asked to leave the meeting and did so. The union filed an unfair labor practice complaint alleging that the activity violated section 19(a)(1), (2) and (6) of the Order by refusing to allow the union to represent the unit employee during the oral reply stage of an adverse action proceeding, even though the employee had designated the union as his representative. In this regard, you alleged that the oral reply stage of an adverse action proceeding constituted a formal discussion under section 10(e) of the Order.

The Regional Administrator (RA) dismissed the union's complaint, concluding that the activity's conduct in denying the employee union representation during the oral reply stage of the adverse action proceeding was not in violation of the Order. The Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint, stating as follows:

With regard to the only issue raised in your complaint--an employee's right to representation in an adverse action proceeding, and the

union's right to act as such a representative--I concur with the Regional Administrator's conclusions. Thus, having noted particularly that the parties' negotiated agreement contains no provisions giving either an individual employee or the union any representational rights during an adverse action proceeding, I find that no such absolute right exists under the Order. Naval Ordnance Station, Louisville, Kentucky, FLRC No. 74A-54.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision raises a major policy issue "concerning the proper interpretation and application of section 10(e) of [the] Order," more specifically "[w]hether the agency's denial of the union's request to represent [the employee] in the agency phase of a removal action after [the employee] had requested such representation constitutes an unfair labor practice." Citing the Assistant Secretary's decision in Norfolk Naval Shipyard,^{1/} you assert that his reasoning in that case for finding that a right of union representation under section 10(e) obtained, is equally applicable to the facts of the instant case.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present a major policy issue and you neither allege, nor does it appear, that his decision is arbitrary and capricious. As to the alleged major policy issue concerning the proper interpretation and application of section 10(e) to the circumstances of the instant case, in the Council's view no basis for Council review is presented. In this regard the Council notes the Assistant Secretary's conclusion, with respect to an employee's right to representation in an adverse action proceeding, ". . . that no such absolute right exists under the Order."^{2/} Moreover, you do not allege and it does not otherwise

^{1/} Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908, (Sept. 23, 1977), review granted, FLRC No. 77A-141 (May 2, 1978), Report No. 149. In Norfolk, the Assistant Secretary concluded, in pertinent part, that meetings called for the explicit purpose of terminating four probationary employees were formal discussions within the meaning of section 10(e) of the Order and, consequently, the activity's refusal to allow the union the right to represent the employees in such discussions violated section 19(a)(6) of the Order. The Council held that the decision of the Assistant Secretary raised a major policy issue, namely: Whether the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of the case are consistent with the purposes and policies of the Order.

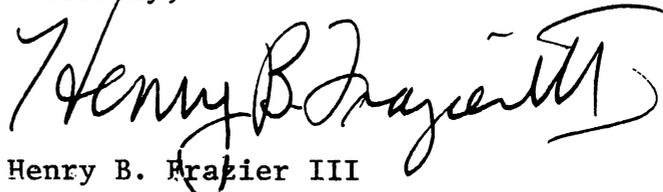
^{2/} United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, 3 FLRC 686 [FLRC No. 74A-54 (Oct. 23, 1975), Report No. 87]. See also Statement on Major Policy Issue, 4 FLRC 709 [FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116].

appear that the Assistant Secretary's decision was arbitrary and capricious.

Since the Assistant Secretary's decision does not present a major policy issue and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. A. Gresham
GSA

FLRC No. 78A-56

American Federation of Government Employees, Local 1963 and Veterans Administration Hospital, Danville, Illinois. The dispute involved the negotiability of a union proposal concerning the appointment of a nonsupervisory member of the bargaining unit to serve in an advisory capacity on certain management committees.

Council action (October 27, 1978). The Council held that the union's proposal was outside the bargaining obligation established by section 11(a) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

American Federation of Government
Employees, Local 1963

(Union)

and

FLRC No. 78A-56

Veterans Administration Hospital,
Danville, Illinois

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

One fully qualified nonsupervisory member of the bargaining unit will be appointed in an advisory capacity to each of the following committees:

1. Clinical Advisory
2. Professional Equipment
3. Health Standards Review
4. Administrative Accreditation

The agency, local management shall determine the qualifications, the same as with other committee members, the union will nominate qualified candidates and management will select one from each list of qualified nominees from the appropriate list for that committee.

Agency Determination

The agency determined that the proposal is nonnegotiable because it is outside the scope of bargaining under section 11(a) of the Order.

Question Here Before the Council

The question is whether the union's proposal is within the scope of bargaining under section 11(a) of the Order.

Opinion

Conclusion: The union's proposal is outside the bargaining obligation established by section 11(a) of the Order.^{1/} Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules (5 C.F.R. 2411.28) is hereby sustained.

Reasons: Section 11(a) of the Order^{2/} establishes, within specified limits not here in issue, an obligation to bargain concerning personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions. In our opinion, the proposal here in dispute is outside the agency's obligation to bargain; it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order.

The Clinical Advisory Committee, to which the disputed proposal relates, is characterized in the record as a body composed of management officials, established to work toward collective planning and evaluation of the hospital's overall mental health program and medical-surgical program. The committee functions exclusively to advise management in the development of procedures by which the hospital can provide quality patient care, and is involved with determining the standards of care, planning and evaluation of the hospital's overall health program, and promoting effective interprofessional communications (see attached APPENDIX A). The Equipment Committee, to which the disputed proposal also relates, is also a body composed of high level management officials. The committee is concerned, in essence, with the purchase and utilization of equipment necessary for the operation of the hospital. It reviews departmental requests for equipment purchases or replacements and assigns priorities to the requests which, to the extent that funds are available, determine the hospital equipment purchases to be made (see attached APPENDIX B).

^{1/} According to the uncontroverted contentions of the agency, a Clinical Advisory Committee and a Professional Equipment Committee have been established at the hospital; however, neither a Health Standards Review Committee nor an Administrative Accreditation Committee is in existence nor is the establishment of either one contemplated. Therefore, our decision herein is limited to the question of participation by bargaining unit members on the Clinical Advisory Committee and the Professional Equipment Committee. We do not pass upon the union proposal herein insofar as it concerns the Health Standards Review Committee and the Administrative Accreditation Committee for such a ruling would be advisory in nature. Such advisory opinions are expressly precluded by section 2411.53 of the Council's rules (5 C.F.R. 2411.53).

^{2/} Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order.

The proposal in dispute, by its expressed terms and as explained by the union in its submissions to the Council, is concerned exclusively with the appointment of a nonsupervisory member of the bargaining unit in an advisory capacity to the Clinical Advisory and Professional Equipment Committees.

In our opinion, as already indicated, the proposal in dispute is outside the agency's obligation to bargain because it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Clearly, appointment of a bargaining unit member in an advisory capacity to the Clinical Advisory Committee (a management body established to advise management in the development of procedures by which the hospital can provide quality patient care) and the Equipment Committee (a management body which advises management in the purchase and utilization of equipment necessary for the operation of the hospital) does not, of itself, involve such personnel policies or practices or matters affecting working conditions of bargaining unit employees.^{3/} Furthermore, the activities of the committees, in advising management on various matters relating to the hospital's mission of providing quality patient care and developing a health care system capable of meeting the changing needs of veteran patients, do not themselves involve personnel policies and practices, or other matters affecting working conditions.^{4/}

Accordingly, since the union's proposal falls outside the scope of required bargaining under section 11(a) of the Order, we must hold that the proposal is not one on which the agency is obligated to negotiate.

By the Council.


Henry B. Frazier III
Executive Director

Attachments

Issued: October 27, 1978

3/ Cf. National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, California, FLRC No. 76A-111 (July 13, 1977), Report No. 131, and cases cited therein; and National Federation of Federal Employees, Local 1745 and Veterans Administration Data Processing Center, Austin, Texas, FLRC No. 77A-1 (Aug. 26, 1977), Report No. 135.

4/ The impact on personnel policies and practices concerning bargaining unit members and on bargaining unit working conditions of a determination of any of the committees or a decision of management, based on a committee recommendation, would, of course, be a proper matter for negotiation under section 11(a) of the Order.

APPENDIX A

VAH, Danville, Illinois, Hospital Memorandum #11-32, dated January 14, 1977, provides:

CLINICAL ADVISORY COUNCIL

- I. PURPOSE: To develop a multidisciplinary committee of Service Chiefs which would work toward collective planning and evaluation of the hospital's overall mental health program and medical-surgical program.
- II. POLICY: The purpose and goal of our hospital is to provide quality patient care. To accomplish this mission, plans, treatment programs, and utilization of personnel and space must be developed to meet the changing needs of our veteran patients.
- III. PROCEDURES:
 - A. Membership:

Associate Chief of Staff for Ambulatory Care
Chief, Medical Administration Service
Chief, Nuclear Medicine Service
Chief, Nursing Service
Chief, Psychiatry Service
Chief, Psychology Service
Chief, Social Work Service

The chairperson will be elected by the Council and will serve for a period of six months.
 - B. When the programs under study indicate the need for additional resource personnel, or concern a Service not represented on the Council, the Chairperson has the authority to request their assistance.
 - C. The council will meet monthly and at the call of the Chairperson. Minutes of meetings will be maintained. Special reports of studies and recommendations will be submitted to the Chief of Staff and, as appropriate, to the Clinical Executive Board.
- IV. FUNCTIONS:
 - A. Integrate the professional services objectives with the goals of the Chief Medical Director, thereby developing an overall operating plan.
 - B. Develop procedures for achieving designated goals and objectives.
 - C. Develop standards and reporting methods to provide the Chief of Staff with reliable records and current information.

D. Promote efficiency by improving communication between Services, resolving interdisciplinary differences, and avoiding duplication of effort.

E. Present a thorough analysis of problems, issues or programs so that the Chief of Staff will be in a position to make appropriate decisions.

F. Function as a monitoring group to assess, on a continuing basis, the quality of patient care services being provided.

V. RESCISSION: Hospital Memorandum #11-32 dated 6/23/75.

VI. REVIEW DATE: January 1979.

APPENDIX B

VAH, Danville, Illinois, Hospital Memorandum #134, dated September 17, 1976, provides:

REPLACEMENT AND ADDITIONAL EQUIPMENT PROGRAM

- I. PURPOSE: To set forth the policies and procedures for the procurement of new and replacement equipment.
- II. GENERAL: The Veterans Administration's replacement program provides for the orderly replacement of equipment within prescribed standards and facilitates the projection of requirements for budget and planning purposes. Although the need for additional equipment is not always predictable, requirements should be planned annually. Purchase can usually be funded for new or expanding programs, when the items cost can be amortized through its use, or if the item will materially improve efficiency of patient care.
- III. POLICY:
- A. Equipment may be replaced if its life expectancy has been reached and if it cannot be effectively used an additional period of time without excessive repair or maintenance cost. There must be a continuing need for the item and it must meet prescribed use standards.
 - B. Equipment may be replaced prematurely because of abnormal usage, technical changes, obsolescence, technological advances, or if a safety hazard exists which cannot be economically corrected.
 - C. Additional and replacement equipment will be purchased in accordance with priorities established by the Equipment Committee and the availability of funds.
- IV. EQUIPMENT COMMITTEE: The committee will meet at least quarterly at the call of the chairman and will consist of regular and rotating membership.
- A. The "regular" members of the committee will be appointed for an indefinite period by position and will consist of the following:
- | | |
|---------------------------------|---------------------|
| Chief, Supply Service | Chairman |
| Asst. Hospital Director | Member |
| Chief of Staff | " |
| Chief, Fiscal Service | " |
| Chief, Engineering Service | " |
| Adm. Asst. to Chief of Staff | " (Ex-Officio) |
| Special Asst. to Hosp. Director | " (" ") |
| Secretary to Chief, Supply Svc. | Recording Secretary |

B. Each six months, rotating members will be nominated by the Assistant Hospital Director and Chief of Staff. Appointments will be made by the Hospital Director.

V. PROCEDURE - Replacement Equipment:

A. To utilize replacement funds, the new item must serve the same or similar purpose as the replaced item and the replaced item must be on the CMR. The replaced item must be turned in to Supply for disposal upon receipt and acceptance of the new item. The replaced item cannot be reused in any other department of the hospital.

B. Supply maintains comprehensive records reflecting acquisition dates, life expectancy and projected fiscal year of replacement for every piece of nonexpendable property on the station. A replacement equipment operating plan is also maintained to show the projected cost of our equipment requirements for a five-year period. This data is the basis for fund allocations.

C. Approximately six months before the beginning of each fiscal year, Supply will review a computer listing of all items for which the life expectancy has expired or is due to expire in the next fiscal year with the department to which the equipment is assigned. The items will be inspected for condition by a knowledgeable employee of the using department. A determination will be made if its useful life can be extended or whether replacement should be made as scheduled.

D. The listing will then be annotated to reflect items requiring replacement, the new fiscal year of replacement on items whose life expectancy has been extended, items excess to needs, those that have to be replaced because of program changes and those that must be replaced prior to reaching their life expectancy.

E. Each department will then prepare a separate VA Form 07-2237 for each item assigned to that department for which replacement has been determined to be required in the next fiscal year. The request must comply with the procedures established in Hospital Memorandum 134-12. Each request must be assigned a priority number and should contain sufficient justification to enable the Equipment Committee to determine the need. A turn-in slip for each item to be replaced must accompany the request for procurement.

F. All requests for procurement and turn-ins must be submitted to the Chief, Supply Service, along with the annotated computer listings. When the notice of our fund allocation has been received, the Equipment Committee will meet and decide which items will be replaced, cancelled, or deferred and placed in backlog status. As a result of the above actions, Supply in coordination with the using service, and Engineering where utilities or installation are involved, will develop a procurement schedule for the following fiscal year.

VI. PROCEDURES - Additional Equipment: A call for additional equipment needs will usually be made at the same time requests are solicited for replacement equipment. A VA form 07-2237 will be prepared with justification for these items with special emphasis on labor saving potentials, improved efficiency and patient care, and forwarded to the Chief, Supply Service. While it is desirable from a budgeting and procurement planning standpoint to know our requirements in advance, replacement or additional equipment requests should be submitted to the Chief, Supply Service as soon as the need is apparent.

VII. REFERENCE: VA Manual MP-2, Subparts 108-25.3, 108-25.4 and 108-25.99, FPMR 101-28.4.

VIII. RESCISSION: Hospital Memorandum # 134-7 dated August 5, 1974.

IX. REVIEW DATE: August 1978

Social Security Administration, Schenectady District Office, Schenectady, New York, Assistant Secretary Case No. 35-4602(CA). The Assistant Secretary denied the request for review filed by the union (Local 3343, American Federation of Government Employees, AFL-CIO), seeking reversal of the Regional Administrator's dismissal of the union's section 19(a)(1) and (4) complaint, which related to a supervisor's memorandum concerning an employee. The union appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and raised a major policy issue.

Council action (October 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration,
Schenectady District Office,
Schenectady, New York, Assistant
Secretary Case No. 35-4602(CA),
FLRC No. 78A-60

Dear Mr. King:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, AFL-CIO, Local 3343 (the union) filed an unfair labor practice complaint against the Social Security Administration, Schenectady District Office, Schenectady, New York (the activity). The complaint alleged that the activity violated section 19(a)(1) and (4) of the Order when a supervisor prepared a memorandum concerning an alleged error made by one of his subordinate employees less than a week after an arbitration hearing was held based upon a grievance filed by the employee. The complaint characterized the issuing of this memorandum as discriminatory.

The Regional Administrator (RA) dismissed the complaint in its entirety, stating:

Except for the proximity of the date of issue of the memorandum and the date of the arbitration hearing, the [union] has failed to furnish any evidence that the memorandum interfered with any of [the employee's] protected rights or constituted discrimination or discipline against him under Section 19(a)(4) of the Order.

In agreement with the Regional Administrator, and based on his reasoning, the Assistant Secretary denied the union's request for review seeking reversal of the dismissal of the complaint, finding that a reasonable basis

for the complaint had not been established and consequently that further proceedings were not warranted. The Assistant Secretary further concluded:

Inasmuch as your allegation that the Activity violated Section 19(a) (1) of the Order by changing a past practice, and the alleged public reprimand incident, are raised for the first time in the request for review, they are not properly before the Assistant Secretary and, therefore, have not been considered. See Report on a Ruling No. 46*/ [Footnote added.]

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision raises a major policy issue concerning the intent of section 19(a)(1) and is arbitrary and capricious. In this regard you assert that the Assistant Secretary misinterpreted and misapplied section 19(a)(1) and Report on a Ruling No. 46, contending that the Assistant Secretary disregarded the facts of the case and that the union's arguments which are supported by case law should be considered on their own merits. Additionally you contend that the unfair labor practice complaint stated that the issuance of the memorandum was contrary to past practice of the activity.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

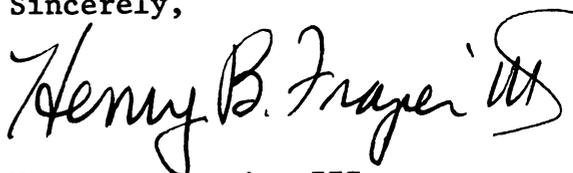
As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Thus, as to your contention that the Assistant Secretary disregarded the facts in this case, your appeal fails to set forth any probative evidence the Assistant Secretary did not consider herein. Rather, your assertions in this regard constitute essentially mere disagreement with the Assistant Secretary's conclusion, based upon the interpretation and application of his regulations, that dismissal of the union's complaint was warranted in the circumstances of the instant case. Similarly, your allegation that a major policy issue is presented, in that the Assistant Secretary misinterpreted and misapplied section 19(a)(1) and Report on a Ruling No. 46, again constitutes nothing more than disagreement with the Assistant Secretary's dismissal of the union's complaint pursuant to his regulations herein.

*/ Assistant Secretary Report on a Ruling No. 46 provides that "evidence or information . . . that is furnished for the first time in a request for review, where a Complainant has had adequate opportunity to furnish it during the investigation period . . . and prior to the issuance of the Regional Administrator's decision, shall not be considered by the Assistant Secretary." Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations, 2 A/SLMR 638.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

I. L. Becker
SSA

Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1040. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, dismissed the complaint of the union (Local 3615, American Federation of Government Employees, AFL-CIO), which alleged that the activity had engaged in bad faith bargaining in violation of section 19(a)(1) and (6) of the Order. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (October 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration,
Bureau of Hearings and Appeals,
A/SLMR No. 1040, FLRC No. 78A-61

Dear Mr. King:

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

In this case, American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed an unfair labor practice complaint against the Social Security Administration, Bureau of Hearings and Appeals (the activity). The complaint alleged, in pertinent part, that the activity violated section 19(a)(1) and (6) of the Order. Specifically, the issue defined was whether the activity engaged in bad faith bargaining by reopening points on which agreement had been reached and by unilaterally making changes on the typewritten form of the contract. Upon consideration of the Administrative Law Judge's (ALJ) recommended decision and order and the entire record, the Assistant Secretary adopted the findings, conclusions and recommendations of the ALJ that there was no violation of section 19(a)(1) and (6) of the Order.^{1/} In agreeing with the ALJ's recommendation, the Assistant Secretary noted, "I find that the complainant presented insufficient evidence to prove that such changes as were alleged to have been made by the [activity] in the final typewritten draft of the negotiated agreement were substantive in nature."

^{1/} In finding that no prejudicial error was committed by the ALJ, the Assistant Secretary referenced an exception which related to the absence of a witness whose appearance had been approved by the Regional Administrator. The Assistant Secretary noted that at the hearing the ALJ took cognizance of the failure of the witness to appear and stated that he would weigh the evidence consistent with his obligations under the Assistant Secretary's regulations where a party fails to comply with a Request for Appearance of Witnesses.

In your petition for review on behalf of the union, you allege that the Assistant Secretary was arbitrary and capricious in adopting the ALJ's recommended decision "in view of the prejudicial errors of record." In support of this allegation you cite numerous alleged incorrect conclusions by the ALJ concerning what you believe the record shows. You further allege that the Assistant Secretary's decision "will permit Federal agencies to disregard the 'good faith' provisions of section 11(a) . . . and will allow agency management officials to disregard requests of the Regional Administrator to attend the hearings on unfair labor practice charges." Finally, you allege that the Assistant Secretary's decision "will permit agencies to change wording in negotiated agreements after both parties have agreed to the wording and have initialled the agreement."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, your contention that the record contains "prejudicial errors of record" constitutes essentially mere disagreement with the findings and conclusions of the Assistant Secretary. Similarly, with respect to your allegations that the Assistant Secretary's decision would permit agencies to disregard the good faith obligation and permit agencies to change wording in negotiated agreements, such contentions again appear to be essentially a disagreement with the Assistant Secretary's conclusion that the activity did not violate section 19(a)(1) and (6) of the Order and that there was insufficient evidence to prove that such changes as were alleged to have been made were substantive in nature. As to your contention that the Assistant Secretary's decision would permit agencies to disregard requests by Regional Administrators that agency officials appear as witnesses at unfair labor practice hearings, in the Council's opinion no basis for Council review is thereby presented. In this connection the Council notes particularly the Assistant Secretary's finding that the ALJ, at the hearing, "took cognizance of [the agency official's] failure to appear and stated that he would weigh the evidence consistent with his obligation under Section 206.7(e) of the [Assistant Secretary's] Regulations where a party fails to comply with a Request for Appearance of Witnesses."^{2/} As the Council has previously stated,

^{2/} Section 206.7(e) of the Assistant Secretary's regulations provides, in pertinent part, as follows:

. . . If any party, officer, or official of any party fails to comply with the Request(s), . . . the . . . Administrative Law Judge or the Assistant Secretary may disregard all related evidence offered by the party failing to comply, or take such other action as may be appropriate.

section 6(d) of the Order not only empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, but also, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation, and your petition presents no persuasive reasons to establish that the Assistant Secretary's application of his regulations to the facts and circumstances of this case is inconsistent with the purposes of the Order or with other applicable authority.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. J. Toner
SSA

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1045. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, found that the activity violated section 19(a)(1) and (6) of the Order by failing to negotiate with the union (National Treasury Employees Union, Chapter 88) on the impact and implementation of its decision to reassign a number of employees, and by failing to furnish relevant and necessary information sought by the union. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue. The agency also requested a stay.

Council action (October 27, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Department of the Treasury, Bureau
of Alcohol, Tobacco and Firearms,
A/SLMR No. 1045, FLRC No. 78A-66

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, National Treasury Employees Union, Chapter 88 (the union), and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (the activity) were parties to a collective bargaining agreement. During the life of that agreement, the activity informed the union's president that some involuntary transfers were to occur and suggested a meeting to discuss the matter. A meeting was held at which time the activity informed the union of the anticipated transfers and its criteria to be used for determining who would be selected for transfer. In response to the union's statement that it had the right to negotiate on the matter and wanted to make suggestions and proposals on the transfer situation, the activity informed the union that it felt no obligation to consult on the transfer or matters concerning the implementation or impact thereof, but nevertheless invited the union to make suggestions on the subject. There followed exchanges of correspondence between the parties with respect to union requests to negotiate on what it described as "relative to matters concerning implementation and impact of the reassignments." Additionally, the union sought certain information which it felt was necessary for negotiations and representation. However, the activity reaffirmed its earlier position that the reassignment or transfer was a nonnegotiable matter, that it had already bargained to the extent required by the Order, and that the union was not entitled to the information requested. More particularly, the activity took the position that the union's request was inconsistent with Article 28 ("Reassignments") of the parties' negotiated agreement, since they were "dealing with employees who have less than 10 years ATF service." The union then filed an unfair

labor practice complaint alleging that the activity violated section 19(a)(1) and (6) of the Order by failing to negotiate with the union on the impact and implementation of various employee reassignments and by denying the union's request for certain staffing information.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ) that the activity's conduct "constituted a failure to meet and confer on the implementation of its decision to reassign employees and the impact on employees adversely affected by that decision thereby violating [s]ections 19(a)(1) and (6) of the Order." In so concluding, the activity's contention that negotiations were precluded by the terms of Article 28 of the parties' agreement was rejected, since "neither the express terms of Article 28 nor the testimony relative to negotiations on that provision establish that the [u]nion clearly and unmistakably waived any further right to negotiate on the reassignment of employees with less than ten years service." Additionally, it was determined that since "the information sought [by the union] was 'relevant and necessary' to the [u]nion's duty to properly represent unit employees regarding the implementation and impact of the reassignments, the [a]ctivity's failure to furnish the information violated [s]ections 19(a)(1) and (6) of the Order."

In your petition for review on behalf of the agency you allege that a major policy issue exists "as to whether the negotiation of a subject in an overall agreement, which is a retained management right, the negotiation of which is therefore limited to impact and implementation, fulfills the obligation to negotiate impact and implementation during the life of the agreement." In this regard you essentially allege that Article 28 of the agreement should constitute a waiver and that the Assistant Secretary acted arbitrarily and capriciously in ignoring evidence and arguments in support thereof.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues. In this regard, your alleged major policy issue, along with your allegation that the Assistant Secretary acted arbitrarily and capriciously, constitutes essentially disagreement with the Assistant Secretary's conclusion that the activity violated the Order by failing to meet and confer on the implementation of its decision to reassign employees and that "neither the express terms of [the parties' agreement] nor the testimony relative to negotiations on that provision establish that the [u]nion clearly and unmistakably waived any further right to negotiate on the reassignment of employees"

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's

rules of procedure. Accordingly, your petition for review is hereby denied. Likewise, your request for a stay of the Assistant Secretary's decision is denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

G. Palast
NTEU

Federal Aviation Administration, Oakland Airway Facilities Sector, Oakland, California, A/SLMR No. 1010. The Assistant Secretary, upon a representation petition filed by the Professional Airways Systems Specialists, found the claimed unit of employees assigned to the activity appropriate for purposes of exclusive recognition. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue. The agency also requested a stay.

Council action (October 27, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. Robert S. Smith
Director of Personnel
and Training
Office of the Secretary
of Transportation
Department of Transportation
Washington, D.C. 20590

Re: Federal Aviation Administration, Oakland Airway
Facilities Sector, Oakland, California, A/SLMR
No. 1010, FLRC No. 78A-69

Dear Mr. Smith:

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

In this case, upon a petition filed by the Professional Airways Systems Specialists (PASS), the Assistant Secretary found appropriate a unit of all unrepresented nonprofessional employees, except for certain standard exclusions, assigned to the Airway Facilities Sector, Oakland, California (the activity). In ruling on the unit the Assistant Secretary concluded:

Based on all the foregoing circumstances, I find the claimed unit of all unrepresented employees of the Activity is appropriate for the purpose of exclusive recognition. Thus, the petitioned for unit is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity who share a clear and identifiable community of interest. Further, all of the unrepresented employees of the Activity share a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. I find also that such unit will promote effective dealings and efficiency of agency operations and will prevent further fragmentation of units at the Activity. Thus, where, as here, the petitioned for employees constitute a residual unit of all unrepresented employees and, indeed, such employees have a prior bargaining history,^{1/}

^{1/} According to the Assistant Secretary, the National Association of Broadcast Employees and Technicians (NABET) was certified in 1971 as exclusive representative of the unit. In 1972 NABET negotiated an

in my view, such a unit will lessen the potential for further fragmentation of units and will promote effective dealings as it is consistent with the established bargaining experience of the parties. [Original footnotes omitted; Council footnote added.]

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious "in that it is inconsistent with applicable Council precedent" and presents a major policy issue "in that it violates Section 10(b)" of the Order. In support of your petition you contend that the employees in the proposed unit "are absolutely indistinguishable from their 8,000 peers in the nationwide unit established by A/SLMR 600,"^{2/} which nationwide unit already includes certain employees at the activity,^{3/} and that, by in effect making possible the certification of two exclusive representatives at the activity, the Assistant Secretary has established a completely artificial barrier dividing the activity's employees which will "severely undermine both efficient agency operations and effective dealings with both labor organizations." You also contend that the Assistant Secretary's

(Continued)

agreement with the activity, which continued in effect until April 1977, when NABET disclaimed interest in the unit shortly after PASS filed its petition for election in the instant case.

2/ Federal Aviation Administration and Federal Aviation Administration, Eastern Region, A/SLMR No. 600 (Dec. 18, 1975). In that case the Assistant Secretary found appropriate and directed an election in a nationwide, residual unit of all employees of the Airway Facilities Division located in the regions of the FAA, with certain specified exclusions. In that case the Assistant Secretary also found appropriate various regionwide and sectorwide existing bargaining units which were encompassed within the more comprehensive nationwide unit. The employees in the existing separately appropriate units were given a self-determination election as to whether they wished to be represented by a labor organization in the smaller unit or by the National Association of Government Employees (NAGE) in the more comprehensive unit. At the time of the filing of the petitions in that case the employees in the claimed unit in the present case were included in an exclusively recognized unit which was subject to an agreement bar and therefore were expressly excluded from the units found appropriate in that case.

3/ According to the Assistant Secretary's decision herein, "as a result of the election ordered in A/SLMR No. 600 all of the Oakland Sector employees, except those in NABET's exclusively recognized unit [now sought to be represented by PASS], were included in the NAGE's nationwide unit." (NAGE was granted permission by the Assistant Secretary to intervene in the instant proceeding.)

findings in this case are inconsistent with those of prior, similar cases and that his decision does not conform to the general policy of the Order, expressed in previous Council decisions,^{4/} which seeks to reduce the existing fragmentation of bargaining units through unit consolidation and to prevent their further fragmentation through new appropriate unit determinations.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification under the facts and circumstances of this case in reaching his decision that the unit sought was appropriate for exclusive recognition. More particularly, with respect to your assertion that the Assistant Secretary's decision is inconsistent with applicable Council precedent, your appeal fails to establish any clear, unexplained inconsistency between the instant decision and previously published decisions of the Council. It is noted in this regard that in the case upon which you rely, namely FAA, Eastern Region (see note 2), the Assistant Secretary found appropriate either a comprehensive nationwide unit or the previously existing units.

Furthermore, in our opinion, the decision of the Assistant Secretary does not present a major policy issue. In this regard, your allegation that the Assistant Secretary's decision violates section 10(b) of the Order essentially reflects your disagreement with the Assistant Secretary's determination that the employees of the proposed unit "share a clear and identifiable community of interest," and that the unit itself "will promote effective dealings and efficiency of agency operations and will prevent further fragmentation of units at the Activity." Further, your appeal fails to establish that the Assistant Secretary's decision is inconsistent with the purposes and policies of the Order, it being particularly noted

4/ In this regard the agency cites the Council's decisions in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, A/SLMR No. 687, FLRC No. 76A-97 (July 20, 1977), Report No. 131; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, consolidated for decision 4 FLRC 668 [FLRC Nos. 75A-14, 75A-128, and 76A-4 (Dec. 30, 1976), Report No. 119].

that the Assistant Secretary found that the proposed unit constitutes, in effect, a residual unit of all unrepresented nonprofessional employees of the activity. See Department of Transportation, Federal Aviation Administration, O'Hare Airway Facility Sector, Chicago, Illinois, A/SLMR No. 927, FLRC No. 78A-22 (Aug. 31, 1978), Report No. 155.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied. Likewise, your request for a stay of the Assistant Secretary's decision is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. B. Peer
PASS

S. Q. Lyman
FASTA

FLRC No. 78A-103

Birmingham District, Internal Revenue Service, Birmingham, Alabama, Assistant Secretary Case No. 40-8090(CA). The Assistant Secretary denied the request for review filed by the union (National Treasury Employees Union), seeking reversal of the Regional Administrator's dismissal of the section 19(a)(2) portion of the union's complaint as untimely filed. The union appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and raised a major policy issue.

Council action (October 27, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 27, 1978

Mr. William Harness
Associate General Counsel
National Treasury Employees Union
3445 Peachtree Road, NE., Suite 930
Atlanta, Georgia 30326

Re: Birmingham District, Internal Revenue Service, Birmingham, Alabama, Assistant Secretary Case No. 40-8090(CA), FLRC No. 78A-103

Dear Mr. Harness:

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

In this case, the National Treasury Employees Union (the union) filed an unfair labor practice complaint against the Birmingham District, Internal Revenue Service, Birmingham, Alabama (the activity). The complaint alleged that the activity violated section 19(a)(1) and (2) of the Order by not selecting an employee for promotion because of his union activities. The Regional Administrator (RA) dismissed that portion of the complaint alleging violation of section 19(a)(2), finding that it was untimely filed. The Assistant Secretary found, in agreement with the RA, that the section 19(a)(2) portion of the complaint was procedurally defective since the precomplaint charge was not filed within 6 months of the occurrence of the alleged unfair labor practice as required by Section 203.2(a)(2) of the Assistant Secretary's regulations.^{1/} Accordingly, he denied the

1/ Section 203.2 provides, in pertinent part:

(a) Action to be taken before filing a complaint. A party desiring to file a complaint alleging an unfair labor practice under section 19 of the Order, other than section 19(b)(4), must take the following action first:

(2) The charge must be filed within six (6) months of the occurrence of the alleged unfair labor practice[.]

union's request for review seeking reversal of the RA's dismissal of the section 19(a)(2) allegation of the complaint.^{2/}

In your petition for review on behalf of the union, which is related solely to the dismissal of the section 19(a)(2) allegation, you allege that the Assistant Secretary was arbitrary and capricious in applying the 6-month limitation as he did and failing to take cognizance of the unusual circumstances in this case. In this regard, you contend that the employee involved herein filed a precomplaint charge within 6 months of the date when he learned of the activity's real basis for the nonselection, i.e., "anti-union motivation." On the same basis, you further allege that the decision of the Assistant Secretary raises a major policy issue in that it fails to consider any exceptions to the application of Section 203.2(a)(2) of his regulations.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Nor does it appear that a major policy issue is presented warranting Council review. Thus, pursuant to his authority under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, the Assistant Secretary has promulgated regulations which provide, in pertinent part, that a precomplaint charge must be filed within 6 months of the occurrence of the alleged unfair labor practice. His decision herein was based on the application of this regulation, specifically Section 203.2(a)(2), and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such a regulatory requirement or that he applied his regulations to the facts and circumstances of this case in a manner inconsistent with the purposes of the Order or with other applicable authority. Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4068, 2 FLRC 177 [FLRC No. 74A-27 (July 31, 1974), Report No. 55]; Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3560(CA), 4 FLRC 312 [FLRC No. 76A-21 (May 14, 1976), Report No. 105]; Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3246, 3 FLRC 522 [FLRC No. 75A-47 (Aug. 14, 1975), Report No. 80].

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the

^{2/} As to the section 19(a)(1) allegation of the complaint, the RA and the activity reached a Settlement Agreement which the union neither challenged before the Assistant Secretary nor raises as an issue in its appeal to the Council herein.

requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

H. Mason
IRS

Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974. The Assistant Secretary, upon a complaint filed by the union (National Treasury Employees Union, Chapter 1), found that the activity violated section 19(a)(1) and (6) of the Order by refusing to furnish the union with necessary and relevant evaluation materials which had been considered in connection with a particular promotion action; and ordered the activity to take certain affirmative actions. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues. The agency also requested a stay.

Council action (October 31, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 31, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974, FLRC No. 78A-31

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, a promotion certificate was issued for a GS-12 Revenue Agent position in an Area Office of the Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin (the activity). Of the five candidates eligible for the position, only one was found highly qualified. He was selected. Thereafter, pursuant to the parties' negotiated agreement, the National Treasury Employees Union, Chapter 1 (the union) was given a copy of the promotion certificate and was informed of the cut-off score for the highly qualified list. One of the nonselected eligible candidates filed a grievance under the negotiated grievance procedure concerning his non-selection. The union, in connection with the performance of its duty to represent the grievant, requested the evaluation materials which had been considered by the ranking panel. The activity supplied materials on all individuals considered for the position except for the selected candidate. It declined to submit the materials relating to the selected candidate, claiming that he could be readily identified even if his name were deleted because the union had been given the cut-off score for the highly qualified list and the selected candidate was the only one listed as highly qualified. The activity also contended that the materials were not necessary and relevant to the processing of the grievance.

The union filed a complaint alleging that the activity violated section 19 (a)(1) and (6) of the Order by refusing to make available to a union representative the evaluation materials at issue. The Assistant Secretary, after determining that "such evaluation materials on a selected candidate are clearly necessary and relevant to the effective processing of a grievance which questions the particular selection involved," found that the activity violated section 19(a)(1) and (6) of the Order by refusing to produce materials necessary and relevant to the union in performing

its representational duties.^{1/} The Assistant Secretary then went on to discuss the conflict in this case between an employee's right to privacy of his personnel records and the exclusive representative's right to adequately perform its representational functions:

A determination that material sought is necessary and relevant, and that it could be sanitized to protect the subject's privacy, normally would result in an order to produce the material. Here, however, it is now impossible to conceal the subject's identity. Thus, the issue is raised as to what weight is to be accorded an employee's right to have his personnel records kept private when this right conflicts with other rights, such as an exclusive representative's right to information necessary and relevant to the performance of its representational functions?

In my view, an individual's right to privacy of his records must be balanced against the conflicting rights in each case. Here the conflicting rights are broad and involve a paramount public interest. In such a case, the mere identification of the subject of certain documents is not a violation of an individual's privacy so significant as to bar disclosure of the material. The identified employee would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

The instant case involves several rights which are broad enough to warrant disclosure of the subject's identity herein. Thus, involved are the right of an exclusive representative to adequately perform its representational functions as well as the broad public interest in having the Federal government operate within its merit promotion system so that qualified candidates are given equitable treatment, while encouraging the use of nondisruptive grievance procedures to resolve employee disputes.

Accordingly, the Assistant Secretary ordered "that, upon request, the [activity] make available to the [union] evaluation materials regarding [the selected candidate] used in connection with his selection for promotion pursuant to a . . . promotion certificate, which are necessary and relevant to the [union's] processing of the grievance . . . , after removing therefrom any personal information of a sensitive or damaging personal nature."

In your petition for review on behalf of the agency, you contend that the Assistant Secretary's decision is arbitrary and capricious in that his "conclusion that an agency is obligated to provide a [union] representative with information which may be available to that representative from another

^{1/} In this regard, the Assistant Secretary noted as to the contention that the complaint should be dismissed because the union could have obtained the desired information directly from the selected candidate, "The question herein, however, is whether the [activity] was obligated to provide the requested information, not whether the [union] could have obtained it through some other means."

source is inconsistent with his own prior decisions."^{2/} You also contend that his decision presents the following major policy issues:

1. Does an agency have an obligation to provide an exclusive representative with information even though that information may be readily available to the representative from some other source?
2. If it is not possible to both protect employee privacy through sanitization and provide an exclusive representative with necessary and relevant information, which right takes precedence?
3. Does compliance with the Assistant Secretary's remedial order expose agency officials to potential civil or criminal liability?
4. Is it necessary for the Assistant Secretary to issue some guidelines to determine the nature of sanitization required in the present case?

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, your appeal fails to establish that there is any clear, unexplained inconsistency between this decision and the previously published decisions of the Assistant Secretary. Thus, nothing in your appeal supports your assertion that the Assistant Secretary's conclusion in the instant case that the activity was obligated to provide the requested information in the circumstances presented is contrary to the cited decisions upon which you rely. Similarly, no major policy issue is raised by your related allegation regarding an agency's obligation to provide an exclusive representative with information even though that information may be available from another source. Thus, your appeal fails to allege or contain any support for a contention that the Assistant Secretary's decision is inconsistent with the purposes and policies of the Order, and therefore presents no basis for Council review.

Nor is any basis for Council review presented by your second alleged major policy issue relating to which right takes precedence where it is not possible to both protect employee privacy through sanitization and provide

^{2/} The agency cites Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411 (July 10, 1974) and Department of Justice, Immigration and Naturalization Service, A/SLMR No. 902 (Sept. 21, 1977).

an exclusive representative with necessary and relevant information. In this regard, the Council notes particularly that the Assistant Secretary's remedial order requires that "upon request, the [activity] make available to the [union] evaluation materials . . . which are necessary and relevant to the [union's] processing of the grievance . . . , after removing therefrom any personal information of a sensitive or damaging personal nature."^{3/}

^{3/} In so concluding, the Council notes particularly the relevance of the Privacy Act (5 U.S.C. § 552a) with respect to the disclosure of personnel information to recognized labor organizations. The Act, in general, prohibits an agency from disclosing information, which is contained in a system of records maintained by the agency, pertaining to an individual unless that individual expressly consents to, or requests, such disclosure. However, information may be disclosed by an agency without the consent or request of an individual in certain situations, such as where disclosure is required under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) or where disclosure would be for a "routine use." Generally, personnel information must be released under the FOIA unless disclosure "would constitute a clearly unwarranted invasion of personal privacy" within the meaning of the sixth exemption of the FOIA, or unless some other specific exemption of the Act applies and is invoked. In addition, the Civil Service Commission (CSC), pursuant to its authority, has published a "routine use" statement which permits disclosure of certain employee information to duly recognized labor organizations representing Federal employees, without the advance written consent of the employee who is the subject of the record, when such information is "relevant and necessary to their duties of exclusive representation concerning personnel policies and practices and matters affecting working conditions." Federal Personnel Manual Supplement 711-1, Appendix C: Disclosing Information Covered Under the Freedom of Information Act and the Privacy Act to Labor Organizations Recognized Under Executive Orders 11636 and 11491, As Amended. The CSC further stated therein that "[p]ersonal information of such a sensitive and personal nature that its disclosure would be a clearly unwarranted invasion of privacy is not disclosable under the Freedom of Information Act and should be withheld in the absence of that individual's written consent." In the instant case, the Assistant Secretary, after first finding that the materials sought were necessary and relevant to the union in performing its representational duties, directed the activity to make the materials available to the union after removing therefrom any personal information of a sensitive or damaging personal nature. Thus, even though the Assistant Secretary failed specifically to cite or discuss the relevant provisions of law and regulations governing disclosure of the requested information before applying a "balancing test" to the particular circumstances of the instant case, his decision nevertheless in this regard does not appear inconsistent with relevant statute or regulation, including the Privacy Act and decisions of various Federal courts interpreting and applying that Act, and therefore does not present a major policy issue warranting Council review.

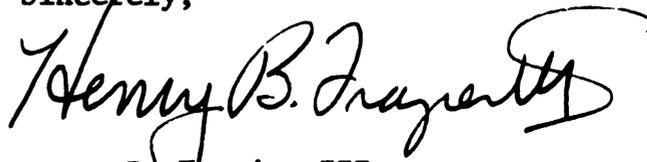
With respect to your alleged major policy issue regarding the possibility that under the Privacy Act agency officials could be exposed to potential civil or criminal liability for complying with the Assistant Secretary's remedial order, in the Council's opinion such assertion presents no basis for Council review. Thus, as the Council has noted previously (supra n. 3), there is no showing that the Assistant Secretary's decision herein is inconsistent with relevant statute or regulation and therefore no major policy issue is presented warranting Council review.

Finally, as to whether the Assistant Secretary should issue guidelines to determine the nature of sanitization required in the present case, in the Council's opinion no major policy issue is thereby presented, again noting that the Assistant Secretary's order requires that the agency make available to the union the necessary and relevant materials at issue "after removing therefrom any personal information of a sensitive or damaging personal nature."^{4/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. Persina
NTEU

^{4/} As already noted, the Civil Service Commission has issued guidelines with respect to the disclosure of personnel information to recognized labor organizations. There is no indication that the Assistant Secretary's decision in the instant case is inconsistent with such guidelines. Clearly, future decisions in this regard must be consistent with the Privacy Act and regulations implementing the Act.

Department of the Air Force, Griffiss Air Force Base, New York and Local 2612, American Federation of Government Employees (Jensen, Arbitrator). The arbitrator determined that the activity's reasons for not selecting the grievant for promotion to the position involved were not persuasive, and, in his award, directed the activity to assign the grievant to the position. The Council accepted the agency's petition for review which took exception to the award on the ground that it violated appropriate regulations, specifically the Federal Personnel Manual (Report No. 151).

Council action (October 31, 1978). The Council found that the arbitrator's award in this case was not materially different from the award before the Council in the NASA case, FLRC No. 76A-130, which the Council set aside based upon the Civil Service Commission's interpretation of the relevant statutes and implementing Commission regulations as they pertained to that award. Based upon its decision in the NASA case, the Council concluded that the arbitrator's award in this case was, under the circumstances, violative of the Federal Personnel Manual and may not be implemented. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, the Council set aside the arbitrator's award.

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

Department of the Air Force,
Griffiss Air Force Base, New York

and

FLRC No. 78A-35

Local 2612, American Federation
of Government Employees

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, the dispute in this matter arose when Griffiss Air Force Base (the activity), attempted to upgrade a particular position from Procurement Analyst, GS-11, to Procurement Analyst, GS-12, and the supervisor of the incumbent in the position proposed and prepared a new job description for the position. However, the activity's personnel office determined that a new position had been created, that of Contract Specialist, GS-12, and that the position therefore had to be filled as a vacant position using competitive procedures. The names of two qualified activity employees appeared on the promotion referral list for the new position: that of the incumbent of the GS-11 Procurement Analyst position, and that of the grievant, a GS-11 employee with repromotion rights to his former grade of GS-12. The incumbent of the Procurement Analyst position was eventually selected for the new position. Thereafter the grievant filed a grievance which was ultimately submitted to arbitration.

The Arbitrator's Award

According to the arbitrator, the issue before him was:

[W]hether or not the Department of the Air Force . . . violated Article 23, Section 10^{1/} of the Agreement when it failed to promote [the grievant] to the position of Contract Specialist, GS-12.
[Footnote added.]

^{1/} Article 23 (Promotions), Section 10, of the parties' collective bargaining agreement provides:

The Employer agrees, as an exception to the competitive provisions of the promotion program, to give special consideration for repromotion to employees who have been downgraded without personal cause; i.e., without misconduct or inefficiency and not at their request. Although not guaranteed repromotion, ordinarily such an employee should be

(Continued)

In the opinion accompanying his award, the arbitrator stated that "[t]he dispute has to turn on the . . . question . . . [of] whether there were persuasive reasons for denial of the promotion [to the grievant]." The arbitrator determined that, even though the selected employee had received a higher rating than the grievant, the activity's reasons for not selecting the grievant were "not persuasive." The arbitrator concluded, therefore, that the grievant should be assigned the position and, if it is possible for him to obtain a "warrant" (a requirement for the position), then "the job should be his." Accordingly, the arbitrator made the following award:

[The grievant] is to be assigned the job of Contract Specialist, GS-12, but will hold it only conditionally upon obtaining a warrant within a reasonable time; a thing he would have had to have had he been assigned to it originally. Claim to back pay is rejected.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that the award violates appropriate regulations, specifically the Federal Personnel Manual.^{2/} The union filed a brief on the merits.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review on the ground that the award violates appropriate regulations, specifically the Federal Personnel Manual.

(Continued)

repromoted when he appears on a repromotion referral list for a position at his former grade (or intervening grade) for which he has demonstrated that he is well qualified unless there are persuasive reasons for not doing so. If an employee eligible for repromotion is not selected for a position and later appears on a promotion referral list for the same position, the selecting supervisor must state his reasons for the record if he does not then select the employee.

^{2/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

In our view, the arbitrator's award in the instant case, to the extent that it directed that the grievant be assigned to the position of Contract Specialist, GS-12, based upon the arbitrator's determination that the activity's reasons for not selecting the grievant were "not persuasive," bears no material difference from the arbitrator's award which was set aside by the Council in National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama and Marshall Engineers and Scientists Association Local 27, International Federation of Professional and Technical Engineers, AFL-CIO (Johnston, Arbitrator), FLRC No. 76A-130 (Aug. 23, 1977), Report No. 135.

In NASA, the arbitrator determined that the failure to promote the grievant to a particular vacancy as a repromotion eligible after he was certified as one of the best qualified candidates under competitive promotion procedures was arbitrary and capricious under the facts of the case since the selecting official's reasons for the nonselection were "not . . . persuasive." In that case the Council sought and received from the Civil Service Commission an interpretation of the relevant statutes and implementing Commission regulations as they pertained to the award. In its response the Commission cited Federal Personnel Manual Chapter 335, section 4-3(c) (2),^{3/} which is substantially the same as the contract provision involved in the instant case,^{4/} and replied in pertinent part:

It is clear that the [provisions of FPM Chapter 335, section 4-3(c)(2)] strongly encourage the repromotion of "special consideration" candidates. They do not, however, mandate that such repromotion occur. Therefore, this chapter may not be the basis for an arbitrator's award that a particular person be promoted. [Footnote omitted.]

3/ Section 4-3(c)(2) of the FPM Chapter 335 provides:

- (2) Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade . . . for which he has demonstrated that he is well-qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means If a selecting official considers an employee entitled to special consideration for repromotion under this paragraph but decides not to select him for promotion and then the employee is certified to the official as one of the best-qualified under competitive promotion procedures for the same position, the official must state his reasons for the record if he does not then select the employee.

4/ See note 1, supra.

The arbitrator also relied upon an interpretation of the negotiated agreement and NASA's merit promotion plan in fashioning his award. Specifically, he determined that these documents require the selection of "special consideration" candidates who are certified to selecting officials as best qualified unless there are persuasive reasons (subject to evaluation under the grievance procedure) for not selecting them. The arbitrator evaluated the selecting official's reasons for not selecting the grievant, found them non-persuasive, and ordered the agency to offer the position at issue to the grievant. Pertinent here is FPM Chapter 335, Subchapter 2 (Requirement 6)^{5/} which sets forth the management right to select or non-select. This right (derived from Rule 7.1 of the Civil Service Rules) means that management must retain the freedom to decide, without interference, which candidate it will select from among those referred for a given position under established procedures, or in fact, to make no selection at all. Whether or not the arbitrator's interpretation of the agreement and the merit promotion plan was correct, the parties could not have appropriately agreed to subject management's reasons for selecting one candidate over another to review by a third party because it would contravene management's right to make final selections for promotions. Hence, the arbitrator's interpretation of the parties' intentions is moot since the embodiment of such an intention in the negotiated agreement violates civil service rules and instructions. FLRC No. 76A-130 at 5 of the decision. [Footnotes added; emphasis in original.]

In the instant case, as in NASA, the arbitrator evaluated the selecting official's reasons for not selecting the grievant, found them nonpersuasive, and, based on that determination, directed the activity to assign the grievant the position of Contract Specialist, GS-12. However, the Civil Service Commission has made it clear that an arbitrator's award directing that a particular person be selected for a particular position in such circumstances, based on the arbitrator's findings that the selecting official's reasons for not selecting the person originally were "nonpersuasive," interferes with management's right to select or nonselect, and is therefore contrary to civil service rules and instructions. Accordingly, based on the Council's decision in NASA, we conclude that the arbitrator's award in this case, under the circumstances herein, is violative of the Federal Personnel Manual and cannot be sustained.^{6/}

^{5/} Requirement 6. Each plan shall provide for management's right to select or nonselect. Each plan shall include a procedure for referring to the selecting official a reasonable number of the best qualified candidates identified by the competitive evaluation method of the plan (referral of fewer than three or more than five names for a vacancy may only be done in accordance with criteria specified in the plan.)

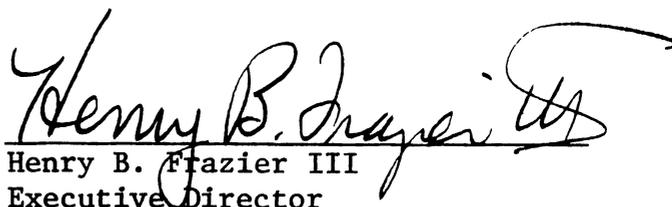
^{6/} In its brief, the union attempts to distinguish NASA on the basis that in NASA the arbitrator directed that the grievant be given a retroactive promotion with backpay. However, a careful reading of NASA indicates that

(Continued)

Conclusion

For the foregoing reasons, we find that the arbitrator's award, which orders the grievant to be promoted, violates the Federal Personnel Manual, and the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award which directs that the grievant be assigned the position of Contract Specialist, GS-12.

By the Council.


Henry B. Frazier III
Executive Director

Issued: October 31, 1978

(Continued)

the Civil Service Commission's response and conclusion therein, upon which the Council's decision was based, is predicated, not upon the award of retroactive promotion and backpay, but primarily upon the Commission's determination that the arbitrator's finding that the selecting official's reasons for nonselection were nonpersuasive was violative of Civil Service Commission requirements.

Internal Revenue Service, Chicago District Office, A/SLMR No. 1004. The Assistant Secretary, upon a complaint filed by the union (National Treasury Employees Union, Chapter 10), found that the activity violated section 19(a)(1) and (6) of the Order by refusing to make available to the union necessary and relevant evaluation materials used in connection with a particular promotion action; and ordered the activity, among other things, to take certain affirmative actions. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues. The agency also requested a stay.

Council action (October 31, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 31, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Chicago District
Office, A/SLMR No. 1004, FLRC No. 78A-40

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, a vacancy announcement was posted for a position as an Audit Accounting Aide, GS-4, in the Waukegan facility of the Internal Revenue Service, Chicago District Office (the activity). There were three applicants. Two were found to be highly qualified, and one of these two candidates was selected. National Treasury Employees Union, Chapter 10 (the union) requested the evaluation materials considered by the ranking panel in the course of this selection. The request was made in connection with the union's duty to represent the employees in the unit. The activity declined to supply the materials on the ground that, since only two individuals were involved, sanitization would not protect the privacy of the selected candidate. The union subsequently filed a grievance on behalf of a nonselected employee pursuant to the parties' negotiated grievance procedure, and the grievance ultimately went to arbitration.

The union filed a complaint alleging that the activity violated section 19 (a)(1) and (6) of the Order by refusing to make available to a union representative the evaluative material considered during the selection process. The Assistant Secretary stated:

In Department of the Treasury, Internal Revenue Service, Milwaukee, Wisconsin, A/SLMR No. 974 (1978), I found that an employee's right to privacy of his records must be balanced against the conflicting rights in each case. And where, as here, the conflicting rights are broad and involve the paramount public interest of an exclusive representative's right to adequately perform its representational functions, of having the Federal government operate within its merit promotion system equitably, and of encouraging the use of nondisruptive grievance procedures, I have determined that the mere

identification of the subject of certain documents is not a violation of privacy so significant as to bar disclosure of the material and that the identified employee(s) would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

Under these circumstances, I conclude that the information sought herein, which I find to be necessary and relevant to the performance of the [union's] representational function, should have been disclosed to the [union]. Accordingly, by refusing to make available to the [union] the evaluation material used in connection with the selection for promotion made pursuant to [the vacancy announcement], I find that the [activity] violated Section 19(a)(1) and (6) of the Order.

The Assistant Secretary accordingly ordered the activity to cease and desist from the conduct found violative and to take certain affirmative actions including, upon request, providing the union "access to such documents and materials as are necessary and relevant to the [union's] processing of [the] grievance. . . ."

In your petition for review on behalf of the agency, you contend that the Assistant Secretary's decision is arbitrary and capricious and presents the following major policy issues:

1. If it is not possible to both protect employee privacy through sanitization and provide an exclusive representative with necessary and relevant information, which right takes precedence?
2. Does compliance with the Assistant Secretary's remedial order expose agency officials to potential civil or criminal liability?
3. Is it necessary for the Assistant Secretary to issue guidelines concerning implementation of this decision?

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

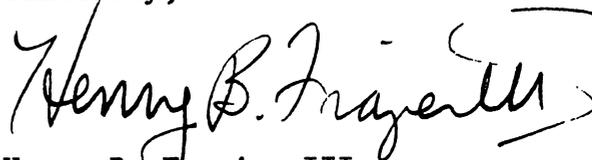
As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. With respect to the alleged major policy issues set forth above, the Council notes that substantially the same issues under analogous circumstances were raised in your petition for review of the Assistant Secretary's decision in Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974. On this date, the Council has denied review of that appeal (FLRC No. 78A-31). For the reasons set forth

in IRS, Milwaukee District, we find that no major policy issues are presented in the instant case warranting review of the Assistant Secretary's decision.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. Persina
NTEU

Internal Revenue Service, Atlanta District Office, Atlanta, Georgia, A/SLMR No. 1014. The Assistant Secretary, upon a complaint filed by the union (National Treasury Employees Union, Chapter 26), concluded that the activity violated section 19(a)(1) and (6) of the Order by failing to notify and afford the union an opportunity to be represented at a particular meeting. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue. The agency also requested a stay.

Council action (October 31, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 31, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Atlanta
District Office, Atlanta, Georgia,
A/SLMR No. 1014, FLRC No. 78A-58

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, a Group Manager of the Internal Revenue Service, Atlanta District Office, Atlanta, Georgia (the activity) met with certain activity employees. Neither the Group Manager nor any other official of the activity notified the National Treasury Employees Union, Chapter 26 (the union), the exclusive representative of the employees, about, or afforded the union the opportunity to attend, the meeting. Although the subject matter of the meeting was not divulged to either the employees or the union prior to the meeting, one of the employees requested that a representative of the union attend the meeting. The Group Manager, however, refused to allow the union representative to attend the meeting, stating, in essence, that no changes in personnel policies and practices or other matters affecting working conditions were to be discussed. Thereafter, during the meeting with the employees, the Group Manager, among other things, distributed copies of three memoranda from the activity addressed to all employees. These memoranda were variously entitled, "Restoration of Annual Leave," "Open Season for Health Benefits" and "Employee's Responsibilities in Timekeeping." She also discussed the subject matter of each of these memoranda with the employees during the meeting.

The union thereafter filed an unfair labor practice complaint alleging, in essence, that the activity violated section 19(a)(1) and (6) of the Order when it failed to notify and afford the union an opportunity to attend a meeting conducted by management with employees concerning personnel policies and practices affecting working conditions of employees in the unit.

The Assistant Secretary found that "because the . . . meeting involved a discussion between management and unit employees concerning personnel policies and practices and matters affecting the employees' working conditions, . . . such a meeting constituted a formal discussion within the meaning of [s]ection 10(e) of the Order," and concluded that the activity's "failure to notify and afford the [union] the opportunity to be represented at the . . . meeting constituted a violation of [s]ection 19(a)(1) and (6) of the Order." In so concluding, the Assistant Secretary stated:

While formal discussions under [s]ection 10(e), in many instances, have involved discussions between management and unit employees concerning proposed changes in existing personnel policies and practices and other matters affecting general working conditions of unit employees, I do not view the scope of [s]ection 10(e) so narrowly as to encompass only discussions concerning changes or proposed changes in such matters. Rather, I view [s]ection 10(e) as requiring that an exclusive representative be afforded the opportunity to be represented at discussions between management and unit employees where, as here, the subject matter being discussed concerns personnel policies and practices and working conditions of the employees in the bargaining unit. In such circumstances, the exclusive representative has, in my opinion, a legitimate interest in representing the interests of the unit employees with regard to their terms and conditions of employment, including matters in an existing negotiated agreement. The exclusion of the exclusive representative from such discussions, in effect, would result in the bypassing of the exclusive representative with regard to the very matters for which it was chosen by the unit employees to act as their spokesman. [Footnote omitted.]

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious as to his findings that the memoranda concerning open season for health benefits and restoration of annual leave are "personnel policies and practices" and that the meeting was a "formal discussion" within the meaning of section 10(e) of the Order. You further allege that the Assistant Secretary's decision raises the following major policy issue: "Does the exclusive representative have a right under [s]ection 10(e) of the Order to be present at a meeting of employees conducted by management where no changes in personnel policies, practices, or other matters affecting general working conditions are discussed?" In this regard, you contend that the Assistant Secretary's decision herein is inconsistent with one of his prior decisions and in derogation of the guidelines set forth by the Council in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, 3 FLRC 697 [FLRC No. 74A-80 (Oct. 24, 1975), Report No. 87].

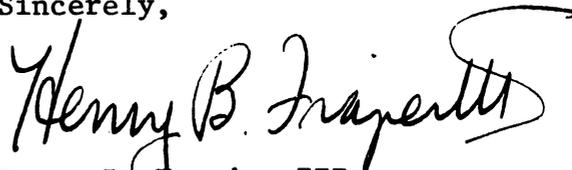
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Thus, your contrary assertions constitute, in essence, mere disagreement with the Assistant Secretary's conclusion in the facts and circumstances of this case that the memoranda in question herein involved "personnel policies and practices" and that the meeting was a "formal discussion" within the meaning of section 10(e) of the Order. Further, as to your allegation that the Assistant Secretary's decision presents a major policy issue, as set forth above, in the Council's view, no basis for review is thereby presented. In this regard, your appeal fails to establish that the Assistant Secretary's decision is in any manner inconsistent either with applicable precedent*/ or the purposes and policies of the Order. In the latter regard, we note that section 10(e) makes no reference to "changes" in personnel policies and practices or other matters affecting employees' general working conditions as a precondition to a labor organization's right to be represented at formal discussions between management and unit employees with respect thereto.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the standards for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. P. Flig
NTEU

*/ In so concluding, we note that your reliance upon the Council's decision in Fallon, supra, is misplaced. Thus, Fallon did not involve any issue under section 10(e) of the Order as to whether the labor organization holding exclusive recognition had been denied "the opportunity to be represented at [a] formal discussion between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1049. The Assistant Secretary, upon a complaint filed by the union (National Treasury Employees Union), found that the activity violated section 19(a)(1) and (6) of the Order by unilaterally terminating various provisions of the parties' agreement upon the expiration of that agreement. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues. The agency also requested a stay.

Council action (October 31, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 31, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Department of the Treasury, Bureau of
Alcohol, Tobacco and Firearms, A/SLMR
No. 1049, FLRC No. 78A-67

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, the National Treasury Employees Union (the union) and the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (the activity) were parties to a negotiated agreement. After negotiations for a new agreement had been going on for some time, the union notified the Federal Service Impasses Panel that an impasse had been reached. By its terms, the previous agreement expired when the parties reached impasse in their negotiations for the new agreement. The activity thereupon declared terminated certain provisions of the expired agreement by a memorandum to its supervisors of unit employees which stated, in part, that "the Bureau will not be bound to provide those privileges which were contractually accorded to the union and union members." The memorandum specifically stated that time should not be provided to union representatives to pursue contract matters and that grievance procedures, disciplinary actions and adverse actions should not be processed according to the negotiated procedure since the agreement no longer existed, but rather should be processed in accordance with agency procedures.

The union filed an unfair labor practice complaint alleging in pertinent part that the activity violated section 19(a)(1) and (6) of the Order when it unilaterally declared terminated certain provisions of the parties' expired nationwide negotiated agreement. The Assistant Secretary, applying the principles enunciated in the Council's consolidated decision in Ogden Service Center and Brookhaven Service Center,^{1/} stated:

1/ Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806, FLRC No. 77A-40 and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859, FLRC No. 77A-92; (Mar. 17, 1978), Report No. 147.

. . . I find . . . that the [activity's] conduct in unilaterally terminating various agreement provisions at the expiration of the agreement violated Section 19(a)(1) and (6) of the Order, as, clearly, many of the provisions terminated involved personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order. For example, among the clauses declared terminated by the [activity] were the parties' negotiated grievance procedure, those dealing with facilities and services supplied by the [activity] to the Union, and those granting the right of the Union representative and an affected employee to be on official time for a reasonable period to present grievances and appeals, clearly mandatory subjects of bargaining within the ambit of Section 11(a) of the Order.

Under these circumstances, I find that the [activity's] unilateral conduct in terminating Section 11(a) terms and conditions set forth in certain provisions of the parties' expired agreement was in derogation of its bargaining responsibilities under the Order.
[Footnotes omitted.]

Accordingly, the Assistant Secretary ordered the activity to cease and desist from such violative conduct and to take certain affirmative remedial actions.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious in that his decision: (1) in part is not supported by the record^{2/}; (2) constitutes a misapplication of the Council's guidelines as to the obligation of the parties when their negotiated agreement terminates; and (3) ignores his past decisions where actions resulted from a good faith application of the terms of a negotiated agreement. You also allege that the Assistant Secretary's decision raises two major policy issues: "[W]hether a negotiated grievance procedure is a personnel policy, practice and/or matter affecting working conditions within the ambit of Section 11(a), which therefore survives the termination of the contract for which it was negotiated"; and "[W]hether the negotiated article which provided union representatives with a specified bank of administrative leave to administer the collective bargaining agreement was a personnel policy, practice or matter affecting working conditions within the ambit of Section 11(a) and therefore should have survived the termination of the 1974 ATF-NTEU Agreement."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the

^{2/} In this regard, you assert that the activity's memorandum terminating certain provisions of the parties' expired agreement did not terminate the provision dealing with the activity's furnishing facilities and services to the union as found by the Assistant Secretary.

decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. More specifically, with respect to your contention that the Assistant Secretary's decision in part is not supported by the record, such contention constitutes, in effect, mere disagreement with the Assistant Secretary's conclusion that the activity violated section 19(a)(1) and (6) of the Order in the facts and circumstances of this case.^{3/} Similarly, your appeal fails to contain any support for your further assertion that the Assistant Secretary misapplied Council guidelines in reaching his decision herein. Rather your contention in this regard constitutes, in effect, only disagreement with the Assistant Secretary's conclusion that the activity unilaterally terminated section 11(a) terms and conditions set forth in the expired agreement. With regard to your contention that the Assistant Secretary did not follow his past decisions in the instant case, your appeal fails to establish any clear, unexplained inconsistency between this decision and the previously published decisions of the Assistant Secretary.^{4/} With respect to your allegation that the Assistant Secretary's decision raises major policy issues as set forth above, in the Council's view no major policy issues are presented warranting review in the circumstances of this case. Thus, your appeal fails to show that the Assistant Secretary's decision is inconsistent with applicable Council precedent (supra n. 1) or with the purposes and policies of the Order.^{5/}

^{3/} In so concluding, the Council does not pass upon whether the Assistant Secretary properly found that "among the clauses declared terminated by the [activity] were . . . those dealing with facilities and services supplied by the [activity] to the [union] . . .," noting particularly that the Assistant Secretary cited that clause as merely illustrative of a number of negotiated provisions which the activity concededly terminated when the parties' agreement expired.

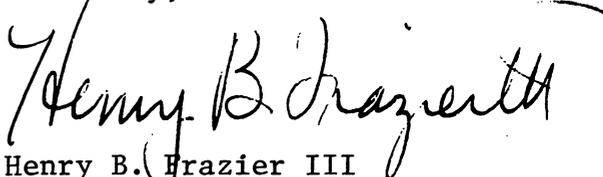
^{4/} In this regard, as previously noted, the Assistant Secretary, in finding that the activity violated the Order herein, relied upon the principles enunciated in the Council's consolidated decision in Ogden Service Center and Brookhaven Service Center (supra n. 1), wherein the Council stated that "upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions . . . continue . . . absent an express agreement by the parties that [they] terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order."

^{5/} More particularly, as to "whether a negotiated grievance procedure is . . . within the ambit of section 11(a)," the Council has previously stated:

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. Rogers
NTEU

(Continued)

Section 11(a) of the Order establishes an obligation to bargain concerning personnel policies and practices and matters affecting working conditions Included within the obligation to bargain are negotiated grievance procedures under section 13(a) of the Order. [Footnotes omitted.]

National Treasury Employees Union and Internal Revenue Service, FLRC No. 76A-132 (Aug. 17, 1977), Report No. 133.

Further, with respect to whether a negotiated provision granting union representatives administrative leave to administer the parties' agreement is within the scope of section 11(a), the Council, citing its previous statement and interpretation of the Order in FLRC No. 75P-1, 3 FLRC 874 [(May 23, 1975), Report No. 90], at 878-879 of Council ruling, has determined that a provision similarly involved with the use of official time for contract administration was "subject to negotiation by the parties concerned under section 11(a) of the Order." See National Federation of Federal Employees, Local 1485 and Coast Guard Base, Miami Beach, Florida, FLRC No. 76A-58 (June 6, 1977), Report No. 127.

General Services Administration, Region 3, Washington, D.C., A/SLMR No. 996. The Assistant Secretary, upon a complaint filed by the union (Local 2151, American Federation of Government Employees, AFL-CIO), found that the activity violated section 19(a)(1) and (6) of the Order by rescinding its authorization of environmental differential pay in the circumstances here involved; and ordered the activity, among other things, to reimburse the affected employees to the extent consonant with law, regulations and Comptroller General decisions. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues. The agency also requested a stay.

Council action (November 6, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 6, 1978

Ms. Janice K. Mendenhall
Director of Administration
General Services Administration
Washington, D.C. 20405

Re: General Services Administration, Region 3,
Washington, D.C., A/SLMR No. 996, FLRC
No. 78A-39

Dear Ms. Mendenhall:

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

In this case, as found by the Assistant Secretary, General Services Administration, Region 3, Washington, D.C. (the activity) and American Federation of Government Employees, AFL-CIO, Local 2151 (the union) were parties to a collective bargaining agreement which contained provisions authorizing additional pay for employees exposed to various degrees of hazards, physical hardships, and working conditions of an unusual nature at the activity's facilities. The Assistant Secretary noted that such payments are authorized by statute and by the implementing regulations of the Civil Service Commission (CSC) which are found in Federal Personnel Manual (FPM) Supplement 532-1. He found that the relevant directives, which appear in subchapter S8-7 and Appendix J of the FPM Supplement, were incorporated by reference in the negotiated agreement. The Assistant Secretary also noted that the FPM indicates that the situations listed in Appendix J, which contains a schedule of specific differential rates and categories for employees working under adverse conditions, are illustrative only, and the parties may negotiate additional coverage for local situations or negotiate additional categories not included in Appendix J.^{1/}

1/ FPM Supplement 532-1, subchapter S8-7g(3) specifically provides as follows:

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above.

The union filed a grievance under the parties' negotiated grievance procedure alleging that certain employees in the activity's Central Heating Plant were entitled to environmental differential pay. Thereafter, the parties engaged in prolonged negotiations concerning the resolution of the grievance. As a result of the grievance, the activity initiated a study of hazardous working conditions at the plant. As the grievance was being processed under the grievance procedure, the activity sent a letter to the union concerning resolution of the grievance. In that letter the activity stated that "if the study indicates that certain employees in the Central Heating Plant are eligible for hazardous duty pay, employee claims will be honored including claims for retroactive pay" After the study was completed, the activity informed the union in writing that it was authorizing payment of "high work" differential to the affected employees. Shortly thereafter, however, the activity rescinded its authorization after obtaining from the CSC a verbal interpretation of "high work" as the term is used in the FPM. The union then filed a pre-complaint charge in this matter. Thereafter, the activity rescinded its decision not to pay the environmental differential and asked the union to meet and confer before the activity reached a final decision. The parties subsequently met but were unable to resolve the issue. The activity then informed the union that differential pay for "high work" could not be authorized.

The union filed the complaint herein alleging, in essence, that the activity violated section 19(a)(1) and (6) of the Order when it unilaterally changed an established term and condition of employment by not implementing the grievance settlement agreement, reached under the parties' negotiated grievance procedure, authorizing the differential pay. The Assistant Secretary found that the activity, by "rescinding its authorization to pay environmental differential for 'high work,' unilaterally terminated the partial settlement of a grievance which was the product of the parties' negotiated grievance procedure in violation of [s]ection 19(a)(1) and (6) of the Order." In so finding, the Assistant Secretary stated in pertinent part:

It has been held previously that a valid arbitration award constitutes an extension of the parties' negotiated agreement, which may be modified only by the mutual agreement of the parties, and that a unilateral termination or alteration of such award constitutes a violation of the Order. In my view, a grievance settlement agreement reached by the parties in the operation of their negotiated grievance procedure has the same standing as an award by an arbitrator, and, in effect, such agreement constitutes an extension of the parties' negotiated agreement and an established term and condition of employment. [Footnote omitted.]^{2/}

^{2/} With respect to the effect of the CSC's interpretation of the FPM, the Assistant Secretary further stated:

(Continued)

Accordingly, the Assistant Secretary ordered the activity to cease and desist from the foregoing conduct, to post appropriate notices, and, "to the extent consonant with law, regulations, and decisions of the Comptroller General, [to] reimburse each of the affected employees all monies withheld from them . . . by reason of the refusal to pay the environmental differential authorized pursuant to the grievance settlement agreement regarding 'high work.'"

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary failed to consider or address the issue as to the validity of the activity's original authorization of, and the entitlement of affected employees to, the environmental differential payment under the FPM. You further allege that the Assistant Secretary's decision presents major policy issues as to (1) "[w]hether the issuance of a remedial order by the Assistant Secretary which, in part, directs the payment of Federal funds, without consideration of whether such payment is consistent with law, regulation, and decision of the Comptroller General, effectuates the purposes of the Order," and (2) "[w]hether a grievance settlement based on a mistake of fact becomes an extension of the agreement which may not be rescinded unilaterally."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in concluding that the activity violated section 19(a)(1) and (6) of the Order in the circumstances of this case. In this regard, the Council notes particularly the Assistant Secretary's findings that the parties had incorporated by reference in their negotiated agreement the relevant provisions of the FPM, the activity had agreed that "high work" differential pay was authorized under the parties' agreement

(Continued)

Nor am I persuaded to a contrary result by the [activity's] argument that it was required by law to withhold payment of the environmental differential as a result of the verbal opinion solicited by the [activity] from the CSC. Thus, there is no showing that the CSC's response to [the activity's] inquiry was intended to reflect a CSC policy interpretation that the settlement reached by the parties herein was invalid under the pertinent provisions of the FPM. Rather, noting the informal nature of the inquiry, I find that the response of the CSC merely reflected a possible interpretation of the guidelines established by the FPM, and was not intended to reflect a CSC policy interpretation in this specific case.

in resolving the grievance thereunder in the circumstances of this case,^{3/} and there was no showing that the CSC intended to declare the settlement reached by the parties herein invalid under the pertinent provisions of the FPM.^{4/}

With regard to your allegation that a major policy issue is presented in that the Assistant Secretary issued a remedial order requiring the payment of Federal funds without considering whether such payment is consistent with law, regulation, and decisions of the Comptroller General, in the Council's opinion no basis for review is thereby presented. Thus, your

3/ In this regard the Council has noted that FPM Supplement 532-1, subchapter S8-7, and Appendix J thereto do "not enumerate specific work situations for which an environmental differential is payable. Rather, the FPM only defines in appendix J categories of work situations, 'each of an unusually severe nature,' for which payment of an environmental differential may be authorized. FPM Supplement 532-1, subchapter S8-7e points out that the examples listed under the categories in appendix J 'are illustrative only and are not intended to be exclusive of other exposures which may be encountered under the circumstances which describe the listed category.' Further, subchapter S8-7g(2) provides that each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether and which local work situations are covered by the defined work categories. Thus, specific work situations for which an environmental differential is payable are left to local determination. The Council further notes that FPM Supplement 532-1 provides for the collective bargaining process as one specific means of locally determining whether a particular disputed local work situation warrants payment of an environmental differential." [Emphasis added; footnotes omitted.] Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator), FLRC No. 76A-71 (Jan. 12, 1977), Report No. 121, at 4 of the decision.

4/ In this regard the Council has previously noted that in a decision of the Comptroller General, B-180010.03, October 7, 1976, it was stated that "the Commission's regulations delegate authority to determine local coverage to each agency and expressly permit the collective bargaining process to determine additional coverage under appropriate categories of Appendix J" In that decision the Comptroller General quoted a letter from the Civil Service Commission which said in part that "the Commission has consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases, rather, this authority has been delegated to the agencies." See Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator), FLRC No. 76A-71 (Jan. 12, 1977), Report No. 121 at n. 6 of the decision.

appeal fails to contain any support for the assertion that the Assistant Secretary's decision in this regard is inconsistent with the purposes and policies of the Order or applicable Council precedent. See Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, 3 FLRC 188 [FLRC No. 74A-46 (Mar. 20, 1975), Report No. 67].^{5/}

Nor is a major policy issue presented, as alleged, with regard to whether the activity could properly rescind the grievance settlement agreement unilaterally based upon a mistake of fact. In the Council's view, such allegation constitutes essentially a restatement of the activity's earlier contention that the Assistant Secretary failed to consider whether the payment of environmental differential pursuant to the parties' grievance settlement agreement would be valid in the circumstances of this case and thus presents no basis for Council review.^{6/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the

^{5/} In so ruling, we do not construe the Assistant Secretary's remedial order directing reimbursement of the affected employees "to the extent consonant with law, regulations, and decisions of the Comptroller General" as an indication that the Assistant Secretary lacked reasonable assurance herein as to the propriety of the monetary payment remedy. In this regard, the Council has stated that "[w]hen a remedy involves the possible payment of monies by an agency, the Assistant Secretary, consistent with his responsibilities under the Order, must be reasonably assured that such payment is proper pursuant to law and decisions of the Comptroller General. In most situations, established precedent will provide the Assistant Secretary with reasonable assurance as to the propriety of a monetary remedy and the Assistant Secretary can issue such a remedy without prior authorization." Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C., A/SLMR No. 608, FLRC No. 76A-37 (May 4, 1977), Report No. 125, at 7 of the decision. In any event, should a question as to the legality of such payments subsequently arise, it may be resolved at the compliance stage of the case pursuant to the Assistant Secretary's regulations.

^{6/} In so deciding, the Council does not pass upon or adopt the Assistant Secretary's statement that "a grievance settlement agreement reached by the parties in the operation of their negotiated grievance procedure has the same standing as an award by an arbitrator, and, in effect, such agreement constitutes an extension of the parties' negotiated agreement and an established term and condition of employment."

Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III". The signature is written in black ink and is positioned above the printed name and title.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Rosa
AFGE

National Federation of Federal Employees, Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia. The dispute involved the negotiability of provisions in the parties' agreement which were disapproved by the agency during review of the agreement under section 15 of the Order. The disputed provisions related to (1) grievances over disciplinary actions; (2) assignment of duties; (3) temporary promotions; and (4) health and safety conditions.

Council action (November 8, 1978). As to (1), the Council held that the published agency policy raised as a bar to negotiation on the union's proposal was violative of the Order and, therefore, cannot stand as a bar to negotiation on the disputed proposal under section 11(a) of the Order. As to (2), concerning assignment of duties, the Council found that insofar as the disputed provision precluded the general assignment of substantial duties to an employee outside an employee's "regular field of work," such provision was not violative of section 12(b)(5) of the Order, but was outside the agency's obligation to bargain under section 11(b) of the Order. However, since the agency exercised its option to bargain on the matter, it was foreclosed during the section 15 review process from determining that the provision was nonnegotiable under section 11(b) of the Order. The Council further found with respect to this provision, that insofar as it prohibited the general assignment of substantial duties to an employee which might result in injury to an employee, because of lack of knowledge of the task involved, such provision was not violative of section 12(b)(5), or otherwise nonnegotiable under the Order. With regard to (3), concerning temporary promotion, the Council found that insofar as the provision called for temporary promotion upon assignment of an employee for more than 60 days to a "higher-grade position," it was not violative of section 12(b)(2) of the Order or legal time-in-grade requirements; but that insofar as the provision called for a temporary promotion upon assignment for more than 60 days to a group of duties warranting a higher grade, the provision violated applicable law as interpreted by the Comptroller General. Finally, as to (4), concerning health and safety conditions, the Council found that the disputed portion of the provision did not violate section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determination as to the nonnegotiability of (1), (2), (3), to the extent that the Council found the provision to be negotiable, and (4); and sustained the agency's determination as to (3), to the extent that the Council found the provision to be nonnegotiable.

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

National Federation of Federal
Employees, Local 122

(Union)

and

FLRC No. 77A-94

Veterans Administration,
Atlanta Regional Office,
Atlanta, Georgia

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Provision I^{1/}

Article XI of the agreement sets out provisions governing "disciplinary and adverse actions." The agency disapproved this article insofar as it would permit an employee to grieve a disciplinary action through the negotiated grievance procedure. [The complete text of Article XI is set out in the Appendix to this decision.]

Agency Determination

The agency determined that Article XI of the negotiated agreement, as indicated above, violates a published agency policy for which a "compelling need" exists.

^{1/} The provisions in question in the present case were disapproved by the VA Chief Benefits Director, upon review of the bargaining agreement between the local parties, under section 15 of the Order. The agency admits that an agency head determination was rendered on Provision I, concerning which an exception to an internal agency regulation relied upon by the Chief Benefits Director was requested from, and denied by, the VA Administrator. However, the agency claims that an agency head determination was not rendered on Provisions II-IV, infra (which were disapproved as violative of the Order, applicable law, or regulation of appropriate authority outside the agency), because the Chief Benefits Director, while authorized to disapprove provisions of agreements under section 15, was not authorized to render negotiability determinations under section 11(c) of the Order. Accordingly, the agency

(Continued)

Question Here Before the Council

The question is whether the disputed provision is barred from negotiation by a published agency policy under section 11(a) of the Order.^{2/}

Opinion

Conclusion: The published agency policy in question is violative of the Order and, therefore, cannot serve to bar negotiation on the disputed provision under section 11(a) of the Order.^{3/} Accordingly, the agency's

(Continued)

claims that the present negotiability appeal on Provisions II-IV is premature and should be denied. We cannot agree with the agency's position.

The grounds for disapproval of an agreement under section 15 and for a determination of nonnegotiability under section 11(c) are substantially the same, and the Order in each instance places ultimate responsibility on precisely the same individual, i.e., the agency head, to make the critical determination. While the agency head is free to delegate his responsibility under each section if he so desires, such delegation obviously does not alter the identity of ultimate responsibility imposed upon the agency head under sections 11(c) and 15 of the Order. To require duplicate consideration of the same disputed provisions by this same responsible official, would, as occurred in the present case, be productive of extended and unwarranted delays in resolving negotiability disputes and would thereby contravene the underlying purposes of the Order. See Labor-Management Relations in the Federal Service (1975) at 45-46. Accordingly, we hold that the disapproval action by the VA Chief Benefits Director under section 15 likewise constituted an agency head determination for purposes of section 11(c) of the Order. The union's appeal on the disputed provisions here involved is therefore properly before the Council under section 11(c)(4) of the Order.

2/ Section 11(a) of the Order provides in part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order

3/ In view of our decision herein, it is unnecessary for the Council to reach the agency's argument that the provision violates a published agency policy for which a "compelling need" exists under section 11(a) of the Order and Part 2413 of the Council's rules and regulations.

determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{4/}

Reasons: Article XI of the agreement sets forth procedures for disciplinary and adverse actions and specifically provides that ". . . an employee shall be advised that he or she may grieve the [disciplinary] action under the negotiated procedure contained herein" ^{5/} The agency, without contradiction by the union, interprets this article of the agreement as permitting grievances over a disciplinary action directed and accomplished by an official of the agency at a level above the activity head and over which the activity head has no discretion or authority. ^{6/} As so interpreted, the disputed provision, according to the agency, conflicts with a published agency policy limiting the negotiating authority of officials at the levels of exclusive recognition to those matters within the administrative discretion and authority of those local officials, ^{7/} and is claimed to be nonnegotiable on this ground. We find such contention to be without merit.

The published agency policy relied upon by the agency in the present case (VA Manual MP-5, Part I, Chapter 711, Section E, paragraph 3(a)) is identical

^{4/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agreement provision. We decide only that, as agreed to by the local parties and based on the record before the Council, the provision is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{5/} See Article XI, paragraph 4.c. in the Appendix to this decision.

^{6/} The agency concedes that, as here pertinent, the activity head "has authority to take disciplinary and adverse actions against employees in that Regional Office"; and that "any such action taken by a Regional Office Director or one of his subordinates can be made subject to a negotiated grievance procedure as the local parties have done in this case."

^{7/} VA Manual MP-5, Part I, Chapter 711, Section E, paragraph 3(a) provides in relevant part:

Section E. RELATIONSHIPS UNDER EXCLUSIVE RECOGNITION

.
3. SCOPE OF NEGOTIATION

a. Subjects appropriate for negotiation with labor organizations having exclusive recognition, must be within the administrative discretion and authority of the station head

to that relied upon by the agency in the Veterans Administration Hospital, Sheridan, Wyoming case.^{8/} The latter case concerned an agreement provision similar to that here involved, under which disciplinary actions taken with respect to hospital employees in the bargaining unit, by officials who are above the level of Hospital Director, were made subject to the local negotiated grievance and arbitration procedures. The agency contended that the disputed provision was outside the bargaining authority of the Hospital Director, because it would subject disciplinary actions taken above the station level to the agreement negotiated at the station level, thereby violating VA Manual MP-5, Part I, Chapter 711, Section E, paragraph 3(a). The Council, relying on its decision in the Merchant Marine case,^{9/} rejected the agency's contention that the disputed provision was barred from negotiation by this published agency policy and held the provision negotiable under the Order, stating:^{10/}

. . . [D]isciplinary actions taken against unit employees obviously concern "personnel policies and practices and matters affecting working conditions" of the unit employees, and grievance procedures relating to such disciplinary actions clearly fall within the ambit or required bargaining under section 11(a) of the Order. While the agency, in its discretion, may delegate the authority to initiate and accomplish these disciplinary actions to officials above the unit level, such delegation does not alter in any manner the agency's duty to bargain with the exclusive representative of the unit employees on grievances concerning the disciplinary actions as they impact on individual unit employees. Therefore, as in the Merchant Marine case, we find initially that the disputed provision is within the scope of required bargaining by the agency.

Turning then to the agency's published policy which limits the authority of unit officials to negotiate on the disputed provision, the Order, as emphasized in Merchant Marine, requires the agency to provide representatives authorized to bargain and enter into agreement on all matters falling within the scope of negotiations in the bargaining unit. Although the agency, in its discretion, may limit the authority of unit officials to conduct such negotiations, it cannot, as claimed by the agency, thereby constrict the scope of bargaining mandated by section 11(a) of the Order. Rather, other appropriate officials must be designated by the agency to fulfill its section 11(a) obligations.

^{8/} American Federation of Government Employees, AFL-CIO, Local 1219 and Veterans Administration Hospital, Sheridan, Wyoming, FLRC No. 77A-126 (Nov. 8, 1978), Report No. 159

^{9/} United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30].

^{10/} American Federation of Government Employees, AFL-CIO, Local 1219 and Veterans Administration Hospital, Sheridan, Wyoming, FLRC No. 77A-126 (Nov. 8, 1978), Report No. 159 at 4-5 of Council decision.

Therefore, to the extent that the subject agency policy is intended by the agency to forestall negotiation on the disputed provision (which provision we have held falls within the required scope of bargaining under section 11(a) of the Order), the agency policy is inconsistent with the language and purposes of the Order, and, for the reasons detailed in the Merchant Marine case, may not stand as a bar to negotiation on the provision. [Footnotes omitted.]

The Council decision in the Veterans Administration Hospital, Sheridan, Wyoming case is plainly dispositive of the dispute in the present case. Accordingly, for the reasons more fully set out in the Veterans Administration Hospital, Sheridan, Wyoming case, we reject the agency's contention that Article XI of the agreement is barred from negotiation by published agency policy (VA Manual MP-5, Part I, Chapter 711, Section E, paragraph 3(a)) and find that the disputed provision is negotiable under the Order. The agency's contrary determination is set aside.

Provision II

ARTICLE XII: POSITION CLASSIFICATION

1. Each employee is entitled to a copy of his/her current position description which shall be reviewed annually. This position description must be accurate and should include all major duties that occur on a regular and recurring basis. Major duties are those of such weight that their inclusion is necessary for the proper classification of the position. The Employer will not routinely and chronically require the employee to perform substantial duties outside his/her regular field of work or which might result in injury to the employee or fellow employees due to lack of knowledge of task. [Underscoring indicates portion of agreement provision in dispute.]

Agency Determination

The agency determined that the provision in dispute violates section 12(b)(5) of the Order and is, therefore, nonnegotiable.

Question Here Before the Council

The question is whether the portion of the provision is violative of section 12(b)(5) of the Order.

Opinion

Conclusion: (1) We find that, insofar as the disputed provision precludes the general assignment of substantial duties to an employee outside an

employee's "regular field of work," such provision is not violative of section 12(b)(5), but is outside the agency's obligation to bargain under section 11(b) of the Order; however, since the activity exercised its option to bargain on this matter, the agency was foreclosed during the section 15 review process from determining the disputed provision to be nonnegotiable under section 11(b) of the Order. (2) We further find that, insofar as the disputed provision prohibits the general assignment of substantial duties to an employee which might result in injury to an employee, because of lack of knowledge of the task involved, such provision is not violative of section 12(b)(5), or otherwise nonnegotiable under the Order.

Accordingly, the agency determination that the disputed provision is non-negotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{11/}

Reasons: 1. Assignment of duties outside the employee's regular field of work. The first portion of the disputed provision prohibits the agency from generally assigning to an agency employee substantial duties outside the employee's regular field of work. The agency argues that such provision impairs management's right under section 12(b)(5) of the Order to determine the personnel by which agency operations are to be conducted.^{12/} We disagree with this position of the agency.

The subject provision by its express language simply relates to limitations on the assignment of particular duties to agency employees in the bargaining unit. In substance, therefore, the provision concerns only the job content

^{11/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the agreement provision. We decide only that, as agreed to by the local parties and based on the record before the Council, the provision is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{12/} Section 12(b)(5) of the Order provides:

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

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

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

of the employees involved. The Council has consistently held^{13/} that such provisions fall not within the ambit of section 12(b), but within the meaning of the terms agency "organization" and "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" in section 11(b) of the Order.^{14/} Hence, the provision in question here clearly is not violative of section 12(b)(5) of the Order as determined by the agency. Rather, to the extent that the provision prohibits the agency from assigning an employee substantial duties outside the employee's regular field of work, the provision, as a matter concerning job content, is excepted from the agency's obligation to bargain under section 11(b) of the Order.

Under section 11(b) the agency may, but need not, bargain on job content. In this case, however, the agency's bargaining representative at the local level exercised the option to bargain and entered into an agreement on the disputed provision. Therefore, consistent with established Council precedent, the agency lacked authority during the section 15 review process to determine this provision nonnegotiable on the basis of section 11(b) of the Order.^{15/}

2. Assignment of duties which might result in injury. The second portion of the disputed provision relates to the assignment of duties "which might result in injury to the employee or fellow employees due to the lack of knowledge of task." Again, the agency claims that such provision interferes with management's right to determine the personnel by which its operations are conducted under section 12(b)(5) of the Order. We reject this contention.

In substance, this part of the disputed provision merely prescribes that agency employees will not be required to work under conditions which are hazardous to themselves or their fellow employees. The Council has repeatedly

13/ See, e.g., International Brotherhood of Electrical Workers, AFL-CIO, Local 640 and Parker-Davis Project Office, Bureau of Reclamation, United States Department of the Interior (Irwin, Arbitrator), 5 FLRC 562, 566-67 [FLRC No. 76A-44 (July 12, 1977), Report No. 130].

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

Sec. 11. Negotiation of agreements.

.

(b) . . . [T]he obligation to meet and confer does not include matters with respect to . . . [the agency's] organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

15/ See, e.g., IAFF Local F-103 and U.S. Army Electronics Command, 5 FLRC 198, 202 [FLRC No. 76A-19 (Mar. 22, 1977), Report No. 122] and cases cited therein at n. 4 of Council decision.

held that such provisions, relating to health and safety standards for unit employees, are not violative of section 12(b) of the Order or otherwise nonnegotiable under the Order.^{16/} Consistent with this established precedent, we find that Article XII, section 1, of the parties' agreement is negotiable under section 11(a) of the Order.

To repeat, then, we hold that the agency's determination that the disputed portions of Article XII, section 1, are violative of section 12(b)(5) of the Order and thereby nonnegotiable was in error and must be set aside.

Provision III

ARTICLE XVII

.

9. TEMPORARY PROMOTION: An employee temporarily placed in a higher grade position or assignment to a group of duties warranting a higher grade will be temporarily promoted, if the assignment is to exceed 60 days.

Agency Determination

The agency determined that (1) insofar as the provision calls for a temporary promotion upon assignment of an employee for more than 60 days to a "higher grade position," it violates section 12(b)(2) of the Order and time-in-grade requirements under law;^{17/} and (2) insofar as the provision calls for such a promotion upon assignment to a "group of duties warranting a higher grade," it also violates applicable law as interpreted by the Comptroller General. Accordingly, the agency determined the provision is nonnegotiable.

16/ See, e.g., National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, 5 FLRC 249, 255-56 [FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123] and cases cited therein at n. 10 of Council decision.

17/ The time-in-grade requirements relied upon by the agency were those in the Whitten Amendment (5 U.S.C. § 3101 note), which provided:

.

(c) The Civil Service Commission shall make full use of its authority to prevent excessively rapid promotions in the competitive civil service and to require correction of improper allocations to higher grades of

(Continued)

Questions Here Before the Council

The questions are: (1) Whether the provision for a temporary promotion upon assignment of an employee for more than 60 days to a higher-grade position violates section 12(b)(2) of the Order or legal time-in-grade requirements; and (2) whether the provision for a temporary promotion upon assignment of an employee for more than 60 days to a group of duties warranting a higher grade further violates applicable law as interpreted by the Comptroller General.

Opinion

Conclusion: (1) Insofar as the provision calls for a temporary promotion upon assignment for more than 60 days to a higher-grade position, it is not violative of section 12(b)(2) of the Order or legal time-in-grade requirements. Accordingly, the agency's determination of nonnegotiability in this regard was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{18/}

(2) Insofar as the provision calls for a temporary promotion upon assignment for more than 60 days to a group of duties warranting a higher grade, it violates applicable law as interpreted by the Comptroller General. Therefore, the agency's determination of nonnegotiability in this regard was proper and, pursuant to section 2411.28 of the Council's rules, must be sustained.

Reasons: 1. Temporary promotion of employees assigned to a higher-grade position. The agency claims, first, that the required temporary promotion

(Continued)

positions subject to the Classification Act of 1949, as amended. . . .
No person in any executive department or agency whose position is
subject to the Classification Act of 1949, as amended, . . . shall be
promoted or transferred to a higher grade subject to such Act . . .
without having served at least one year in the next lower grade

On September 14, 1978, after the date of the agency determination, the Whitten Amendment terminated under section 101 of Pub. L. 94-412, Sept. 14, 1976 (90 Stat. 1225). However, the pertinent requirements of the Whitten Amendment are continued by regulation of the Civil Service Commission (5 C.F.R. § 300.601 et. seq. (1978)) and for purposes of our decision herein, we shall regard the agency as relying on the current legal requirement reflected in the regulations of the Commission.

^{18/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the agreement provision. We decide only that, as agreed to by the local parties and based on the record before the Council, the provision is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

of an employee assigned to a higher-grade position after 60 days violates management's reserved right to "promote" employees under section 12(b)(2) of the Order.^{19/} We cannot agree with this contention.

The "temporary promotion" called for by the disputed provision is simply a ministerial act which implements the decision and action taken by the agency itself in selecting and assigning the particular employee to the higher-grade position. Nothing in the provision interferes in any manner with the right of the agency to make such decision or accomplish such action, and thus nothing in the provision impairs the agency's right to determine whether and whom temporarily to promote. Accordingly, we find that the disputed provision is not violative of section 12(b)(2) of the Order.^{20/}

The agency further argues that the disputed provision conflicts with legal time-in-grade requirements,^{21/} since the provision for temporary promotion of an employee placed in a higher-grade position does not specifically make the provision subject to such requirements. This argument is without merit. Although the provision itself does not specifically advert to time-in-grade requirements, nothing in the provision, nor in the union's stated intent, precludes the agency from enforcing such requirements in the implementation

^{19/} Section 12(b)(2) of the Order provides in part:

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

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

.
(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees

^{20/} Cf. International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145, at 11-12 of decision (union proposal concerning timing of the ministerial act of effectuating promotions not violative of section 12(b)(2) of the Order). See also Social Security Administration, Headquarters Bureaus and Offices in Baltimore, Maryland and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Feldesman, Arbitrator), 4 FLRC 254, 261 [FLRC No. 75A-119 (Apr. 13, 1976), Report No. 103].

^{21/} See n. 17, supra.

of the provision. Further, as the Council has previously indicated,^{22/} under section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual.^{23/} Therefore, since the agreement provision does not conflict with the legal time-in-grade requirements, the agency's contention fails to state a ground for finding the provision nonnegotiable.^{24/}

To repeat, therefore, we find, insofar as the disputed provision calls for a temporary promotion upon assignment of an employee for more than 60 days to a higher-grade position, it is negotiable and the agency's contrary determination is set aside.

2. Temporary promotion of employee assigned to a group of duties warranting a higher grade. This portion of the disputed provision, as already mentioned, would require that a temporary promotion be made for an employee temporarily assigned for more than 60 days to a group of duties warranting a higher grade. The agency claims that such a temporary promotion, predicated on a group of duties which had not been classified as a higher-grade position, would be violative of a decision of the Comptroller General (B-180010.08, May 4, 1976), which decision was rendered upon referral by the Council in the Louisville Naval Ordnance Station case,^{25/} and is therefore nonnegotiable. We agree with this position of the agency.

In the Louisville Naval Ordnance Station case, the Council considered the legality of an arbitrator's award of retroactive promotion and backpay to

22/ Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy, 2 FLRC 55, 63 [FLRC No. 73A-21 (Jan. 31, 1974), Report No. 48].

23/ Section 12(a) of the Order provides in relevant part:

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

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual

24/ See California Nurses' Association and Veterans Administration Hospital, Long Beach, California, et. al., FLRC No. 77A-89 (June 6, 1978), Report No. 151, at 7-8 of Council decision.

25/ Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thompson, Arbitrator), 4 FLRC 322 [FLRC No. 75A-91 (June 14, 1976), Report No. 106].

a grievant who was assigned higher-level duties but was not given a temporary promotion as provided for in the negotiated agreement. At the time of the subject assignment, the higher-level duties had not been classified into a higher-grade position. The Council accepted for review the agency's exceptions alleging that the award violated applicable law and regulation as set forth in the Federal Personnel Manual^{26/} and as interpreted by the Comptroller General, and requested from the Comptroller General a decision as to whether the award violated applicable law and regulation. The Comptroller General decided, as here relevant, that "until the position was classified upward and [the grievant] was promoted, the grievant was not entitled to the pay of the higher graded position."^{27/} (Emphasis added.) The Council, relying on the Comptroller General's decision, held that so much of the arbitrator's award as ordered the employee to be promoted retroactively to the period when the employee was assigned higher-level duties, but before the position was classified upward, violated applicable law and could not be implemented.

The Comptroller General's decision, as relied upon by the Council in the Louisville Naval Ordnance Station case, is clearly dispositive in the present case.^{28/} Accordingly, we hold, as previously stated, that insofar as the disputed provision calls for a temporary promotion upon assignment of an employee for more than 60 days to a group of duties warranting a higher grade it violates applicable law as interpreted by the Comptroller General. The agency's determination of nonnegotiability of this portion of the provision in question is therefore upheld.

Provision IV

ARTICLE XXII

4.g. If any reasonable doubt regarding the safety of existing conditions is raised by either the supervisor or steward, the supervisor and steward will jointly inspect the work area to insure

^{26/} The Federal Personnel Manual (Chapter 511, subchapter 1-6) provides, among other things, that, for an employee to be promoted under the General Schedule, ". . . there must be a position available which has been described, evaluated, and classified according to series, title, and grade so that the proper rate of pay and the qualifications necessary to perform the work may be determined." See also Federal Personnel Manual, Chapter 335, subchapter 1.

^{27/} Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thompson, Arbitrator), 4 FLRC 322, 328 [FLRC No. 75A-91 (June 14, 1976), Report No. 106].

^{28/} See also Internal Revenue Service, Jacksonville District and National Treasury Employees Union, Florida Joint Council, FLRC No. 77A-97 (July 12, 1978), Report No. 152, at 10 of Council decision.

it is safe. If the Union believes that work is being required under conditions which are unsafe or unhealthy beyond the normal hazards inherent in the operations in question, it may request a ruling from the Safety Committee and/or have the right to file a grievance. When short-term exposure requires immediate solution and it is not possible to obtain employer concurrence beforehand, then the employee may at his discretion terminate his/her on duty action and so notify the employer. [Underscoring indicates portion of the agreement provision in dispute.]

Agency Determination

The agency determined that the disputed provision violates section 12(b)(2) of the Order and is therefore nonnegotiable.

Question Here Before the Council

The question is whether the provision violates section 12(b)(2) of the Order.

Opinion

Conclusion: The disputed portion of Article XXII, section 4.g., does not violate section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{29/}

Reasons: Article XXII, section 4.g., to the extent here in question, provides essentially that, in the event of imminent danger to an employee's health or safety and in the event a management representative is not immediately available, the employee may leave his work site and promptly notify management of the emergency conditions which have arisen. The agency claims that such provision violates management's right to "assign" employees under section 12(b)(2) of the Order^{30/} and is therefore nonnegotiable. We cannot agree with this contention of the agency.

The disputed provision concerns health and safety conditions and, in substance, merely permits an employee, when faced with imminent danger and

^{29/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the agreement provision. We decide only that, as agreed to by the local parties and based on the record before the Council, the provision is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{30/} See n. 19, supra.

with the unavailability of management, to leave his work site and promptly to notify management of the hazardous conditions which have arisen. Nothing in the provision interferes in any manner with management's reserved right to assign an employee to any position which it desires within the agency under section 12(b)(2) of the Order. Moreover, the provision is closely analogous to the proposal found negotiable in the Customs Service case, 31/ which provided that employees would not be required to work where "conditions or practices exist . . . which could reasonably be expected to cause death or physical harm immediately, or before the imminence of such danger can be eliminated through normal abatement procedures"32/

For the foregoing reasons, we set aside the agency's determination that Article XXII, section 4.g., is nonnegotiable.

By the Council.


Henry B. Brazier III
Executive Director

Attachment

Issued: November 8, 1978

31/ National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, 5 FLRC 249, 255-56 [FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123].

32/ See also AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 396, 401-403 [FLRC No. 74A-48 (June 26, 1975), Report No. 75]; AFGE Local 2456 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 439 [FLRC No. 74A-63 (July 21, 1975), Report No. 77].

ARTICLE XI: DISCIPLINARY AND ADVERSE ACTIONS

1. **GENERAL:** The basic procedures and rights of employees, as outlined in appropriate regulations, shall be observed in handling disciplinary and adverse actions. Such actions must be based on just cause, be consistent with applicable laws and regulations, and be fair and equitable.
2. **NOTICE:** In the event an employee is issued a disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights and privileges. In all cases, the employee and/or representative shall be given the opportunity to review any and all evidence used and to reply to the charges orally and/or in writing, using the assistance of the Union as desired. Evidence against an employee shall be made available to the employee and representative and both shall be given reasonable time to review such evidence and to prepare a reply. The Union recognizes that an evidence file is not formally established in other than adverse actions.
3. **PRELIMINARY INQUIRY:** Prior to making a determination as to whether a disciplinary or adverse action is warranted, the supervisor shall make a preliminary inquiry and/or have discussion with the employee(s) concerned. Employees of the Unit are entitled to union representation at any time on request, and in any event shall be notified of this right to representation at the time the employer determines that a disciplinary or adverse action may be necessary.
4. **DISCIPLINARY ACTIONS**
 - a. **Definition:** A disciplinary action is an admonishment, reprimand, or any action detrimental to an employee which results in a penalty not more severe than a suspension of 30 days.
 - b. The employer shall provide the Union with a copy of all disciplinary actions against any employee of the Unit except in cases where the affected employee does not authorize in writing the release of the information.
 - c. The employee shall be advised that he or she may grieve the action under the negotiated procedure contained herein and of the time limit for filing the grievance.
5. **ADVERSE ACTIONS**
 - a. **Definition:** For purposes of this agreement, an adverse action is a removal, suspension, furlough without pay, or reduction in rank or pay. It includes a resignation, optional retirement, or requested reduction in rank or pay which was secured by duress, intimidation, or deception. It does not include any action directed by or subject to the approval of the Civil Service

Commission, a reduction-in-force action, an action based on security determinations, or an action terminating a temporary promotion within a period of two (2) years and returning the employee to the position from which temporarily promoted or to an equivalent or intervening position. The grievance rights of probationary or trial period type employees will terminate upon separation of the employee(s).

b. The employer shall provide the union with a copy of all proposed adverse actions against any employee of the Unit except in cases where the affected employee does authorize in writing the release of the information.

c. The notice of decision shall advise the employee that he/she has fifteen (15) calendar days from the effective date of the action in which to file an appeal with the Civil Service Commission, Federal Employee Appeals Authority (FEAA). The notice shall include the address of the appropriate FEAA Field Office.

American Federation of Government Employees, AFL-CIO, Local 1219 and Veterans Administration Hospital, Sheridan, Wyoming. The dispute involved the negotiability of a provision in the local parties' agreement concerning grievances over disciplinary actions, which the agency determined to be nonnegotiable during review of the agreement under section 15 of the Order.

Council action (November 8, 1978). The Council held that the published agency policy relied upon by the agency to bar negotiation on the disputed provision, as such policy was interpreted and applied by the agency, was inconsistent with the agency's obligation to bargain under section 11(a) of the Order and, thus, cannot stand as a bar to negotiation on the provision. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determination that the provision was nonnegotiable.

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

American Federation of Government
Employees, AFL-CIO, Local 1219

(Union)

and

FLRC No. 77A-126

Veterans Administration Hospital,
Sheridan, Wyoming

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Provision

The parties negotiated the disputed provision as part of their local collective bargaining agreement. The provision describes actions which are excluded from coverage under the local negotiated grievance procedure, as follows:

Except for disciplinary actions, any actions taken by officials who are above the level of the Hospital Director unless those actions are normally made by the Hospital Director. (Note: this does not preclude authority of a higher level than Hospital Director to initiate action but protects the right to appeal through grievance and arbitration procedures.)

Thus, the provision, as disputed herein, reflects the parties' agreement that disciplinary actions with respect to bargaining unit employees, taken by officials who are above the level of the Hospital Director, are within the scope and coverage of the local negotiated grievance procedure.

Agency Determination

During the section 15 review process,^{1/} the agency determined that the provision is nonnegotiable principally because it conflicts with published

^{1/} Section 15 of the Order provides:

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

agency policy (VA Manual MP-5, Part 1, Chapter 711, Section E, paragraph 3(a)) for which a "compelling need" exists under section 11(a) of the Order and Part 2413 of the Council's rules.^{2/}

Question Here Before the Council

The principal question is whether the disputed provision is barred from negotiation by a published agency policy under section 11(a) of the Order.

Opinion

Conclusion: The published agency policy relied upon by the agency to bar negotiation on the disputed provision, as such policy is interpreted and applied by the agency, is inconsistent with the agency's obligation to bargain under section 11(a) of the Order and thus cannot stand as a bar to negotiation on the subject provision. Therefore, the agency's determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{3/}

Reasons: The negotiated agreement involved in the instant case covers a unit of nonprofessional and nonsupervisory employees, including Canteen Service personnel, at the activity. Under the disputed provision of that agreement, as already indicated, the propriety of disciplinary actions taken by officials above the unit level with respect to unit employees would be subject to the grievance and arbitration procedures established by the local agreement.

(Continued)

has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. . . .

^{2/} The agency further determined, among other things, that the provision does not "conform to law." However, neither the determination of the agency, nor Council research, discloses any support whatsoever for this position. Accordingly, we reject this contention by the agency.

^{3/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties and based upon the record before the Council, the provision is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

The agency contends that such provision is outside the bargaining authority of the Hospital Director, because it would subject disciplinary actions taken above the station level to the agreement negotiated at the station level, and the provision thereby violates a published agency policy (VA Manual, MP-5, Part 1, Chapter 711, Section E, paragraph 3(a)), which states:

- a. Subjects appropriate for negotiation with labor organizations having exclusive recognition, must be within the administrative discretion and authority of the station head and permissible by . . . VA policy. . . .

In our opinion, however, this agency policy, as so interpreted and applied by the agency, conflicts with the agency's obligation to bargain under section 11(a) of the Order,^{4/} and consequently cannot serve to bar negotiation on the disputed provision.^{5/}

The circumstances in the present case are closely analogous to those considered by the Council in the Merchant Marine case.^{6/} In that case, the agency claimed that the union's proposals on faculty salary at the Merchant Marine Academy were nonnegotiable because they were outside the scope of bargaining based on various asserted laws, outside regulations, and substantive agency directives, and because the proposals were "outside the delegated bargaining authority of the Superintendent of the Academy" under published administrative orders of the agency. The Council held first that the proposals were within the scope of required bargaining at the Academy level. The Council then rejected the agency's contention that the published limitations on the delegated bargaining authority of the local official rendered the proposals nonnegotiable, stating (1 FLRC at 217):

4/ Section 11(a) of the Order provides:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . .

5/ In view of our decision herein, we do not reach the question of the "compelling need" for the published agency policy here involved.

6/ United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30].

There remains for consideration the agency's determination that the union's proposals are non-negotiable by virtue of Department of Commerce Administrative Orders 202-250 and 202-711. According to the agency, Commerce's A.O. 202-711 assigns to the Superintendent of the Academy, as the official who accorded recognition to the union, the responsibility for fulfilling the bargaining obligation of the Order in the Academy unit. However, authority to alter the faculty salary plan or schedule is reserved by Commerce's A.O. 202-250 to the Director of Personnel (or appropriate member of his staff). The agency reasons that the effect of these two regulations is to bar negotiations on the salary plan or schedule for Academy faculty since these matters are not within the Superintendent's delegated authority.

We do not agree. The obligation in section 11(a) of the Order reads:

An agency and a labor organization . . . through appropriate representatives, shall meet . . . and confer [Emphasis added.]

Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit. Since we have held that the union's proposals in this case are within the scope of negotiations, then to the extent Commerce's A.O. 202-711 bars such negotiations in the Academy unit, it is inconsistent with the Order and may not stand as a bar. Agency regulations, such as A.O. 202-711, which are issued to implement the Order must be consistent therewith, as required by section 23 of the Order. Further, since the authority to take action on the matters covered by the union's proposals is reserved by Commerce's A.O. 202-250 to the Director of Personnel, it is apparent that he becomes the "appropriate" official responsible for fulfilling the agency's section 11(a) obligation on those matters. [Emphasis in original, footnote omitted.]

Applying the decision in Merchant Marine to the instant case, disciplinary actions taken against unit employees obviously concern "personnel policies and practices and matters affecting working conditions" of the unit employees, and grievance procedures relating to such disciplinary actions clearly fall within the ambit of required bargaining under section 11(a) of the Order.^{7/}

^{7/} See, e.g., Veterans Administration Hospital, Danville, Illinois and American Federation of Government Employees, Local Union No. 1963 (Daugherty, Arbitrator), FLRC No. 78A-5 (Aug. 31, 1978), Report No. 155; American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), 3 FLRC 822 [FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94]; and AFGE Local 2028 (Professional Staff Nurses Unit "PSNU") and Veterans Administration Hospital, University Drive, Pittsburgh, Pennsylvania (Oakland) (Tive, Arbitrator), 3 FLRC 573 [FLRC No. 75A-21 (Sept. 12, 1975), Report No. 82].

While the agency, in its discretion, may delegate the authority to initiate and accomplish these disciplinary actions to officials above the unit level, such delegation does not alter in any manner the agency's duty to bargain with the exclusive representative of the unit employees on grievances concerning the disciplinary actions as they impact on individual unit employees. Therefore, as in the Merchant Marine case, we find initially that the disputed provision is within the scope of required bargaining by the agency.

Turning then to the agency's published policy which limits the authority of unit officials to negotiate on the disputed provision, the Order, as emphasized in Merchant Marine, requires the agency to provide representatives authorized to bargain and enter into agreement on all matters falling within the scope of negotiations in the bargaining unit. Although the agency, in its discretion, may limit the authority of unit officials to conduct such negotiations, it cannot, as claimed by the agency, thereby constrict the scope of bargaining mandated by section 11(a) of the Order. Rather, other appropriate officials must be designated by the agency to fulfill its section 11(a) obligations. Therefore, to the extent that the subject agency policy is intended by the agency to forestall negotiation on the disputed provision (which provision we have held falls within the required scope of bargaining under section 11(a) of the Order), the agency policy is inconsistent with the language and purposes of the Order, and, for the reasons detailed in the Merchant Marine case, may not stand as a bar to negotiation on the provision.^{8/}

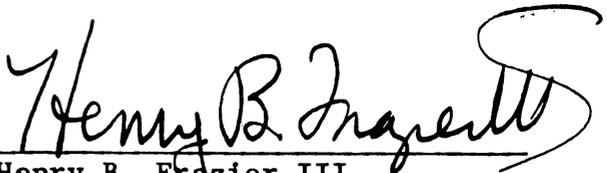
To repeat, therefore, we reject the agency's contention that the disputed provision is barred from negotiation by published agency policy (VA Manual MP-5, Part 1, Chapter 711, Section E, paragraph 3(a))^{9/} and find that the

^{8/} The Council's decision in American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, 3 FLRC 767 [FLRC No. 74A-67 (Nov. 28, 1975), Report No. 92], cited by the agency, does not compel a contrary conclusion. Here, unlike in the cited case, the local parties entered into an agreement concerning the disputed provision, which the agency determined nonnegotiable during the section 15 review process. Also here, unlike in the cited case, the agency relies on its regulation limiting the bargaining authority of unit officials, which regulation, based on the ruling of the Council in the Merchant Marine case, is inconsistent with the Order and cannot serve as a bar to negotiation on the disputed provision.

^{9/} While the agency argues that, in any event, the disputed provision was properly disapproved because the Hospital Director lacked actual or apparent authority to enter into the agreement, we find no merit in this argument. Apart from other considerations, such contention relates to an internal agency matter and is without controlling significance on the negotiability of the disputed provision, with which we are alone concerned in this proceeding.

disputed provision is negotiable under the Order. The agency's contrary determination is set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 8, 1978

Naval Air Station Oceana and Local 1835, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator). The arbitrator found that the GS-3 grievant was improperly required by the activity to perform a substantial amount of the duties of a GS-4 position; and, as part of his award, granted the grievant compensation for the period of time involved. The Council accepted the agency's petition for review insofar as it related to the exception alleging that the award was contrary to Comptroller General decisions and applicable Civil Service Commission regulations (Report No. 150).

Council action (November 8, 1978). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council held that the part of the award granting the grievant compensation for the period of time in question under the facts of this case violated applicable law. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law; and as so modified, sustained the award.

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

Naval Air Station Oceana

and

FLRC No. 78A-14

Local 1835, American Federation of
Government Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the grievant in this case was hired in 1974 by the Naval Air Station Oceana (the activity) as an Accounts Maintenance Clerk, GS-3. On February 29, 1976, she was promoted to Accounts Maintenance Clerk, GS-4. A grievance was filed on her behalf by American Federation of Government Employees Local 1835 (the union) alleging, among other things, that between August 28, 1975, and the date of her promotion, February 29, 1976, the grievant had been "misassigned" because she was required to perform GS-4 duties. As a remedy the grievant requested backpay for the difference between GS-3 and GS-4 compensation for the period in question. The matter was ultimately submitted to arbitration.

The Arbitrator's Award

The arbitrator found that the grievant, from August 28, 1975, to February 29, 1976, was required to and did perform a substantial amount of the duties of a GS-4. This action, according to the arbitrator, was improper and caused the employee to suffer a denial of compensation for such additional duties. The arbitrator made, in part, the following award:^{1/}

3. The grievance insofar as it seeks compensation for the GS-4 work performed in the period of August 28, 1975, to February 29, 1976, is granted.

4. Within 60 days from the date of this award, the Activity is directed to seek authorization from the General Accounting Office, or other appropriate agency to implement "3" in whole or in part.

Agency's Appeal to the Council

The agency filed a petition for review of parts 3 and 4 of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of

^{1/} Parts 1 and 2 of the arbitrator's award are not at issue before the Council.

procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award is contrary to Comptroller General decisions and applicable Civil Service Commission regulations.^{2/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award is contrary to Comptroller General decisions and applicable Civil Service Commission regulations. Because this case involves an issue within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and regulations. The Comptroller General's decision in the matter, B-192366, October 4, 1978, is set forth below:

This action is in response to a request by the Federal Labor Relations Council, dated July 7, 1978, for an advance decision as to the legality of implementing the backpay award of an arbitrator in the matter of Naval Air Station Oceana and Local 1835, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 78A-14. The arbitrator found that an employee, Ms. Regina Taylor, performed a substantial amount of higher level duties during a period of approximately 6 months, and he awarded her backpay as a remedy. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency (Navy) alleging that the award violates applicable laws and regulations.

FACTS AND ARBITRATOR'S AWARD

The facts in this case, as presented in the arbitrator's opinion and award dated December 20, 1977, are as follows. The grievant, Ms. Regina Taylor, was hired by the Naval Air Station Oceana as an Accounts Maintenance Clerk, grade GS-3, on July 2, 1974. Ms. Taylor filed a grievance on November 10, 1976, alleging, among other things, that she was compelled to perform the duties of a higher graded position, that of Budget Clerk, grade GS-4, during the period from

^{2/} The agency requested and the Council granted a stay of parts 3 and 4 of the award pending determination of the appeal, pursuant to section 2411.47(f) of the Council's rules of procedure.

August 28, 1975, through February 29, 1976. It appears that on the latter date the grievant was promoted to a different position, that of Accounts Maintenance Clerk, grade GS-4. The grievant sought retroactive compensation for the period she was performing the higher level duties.

The arbitrator found that while the grievant occupied a grade GS-3 position during the period in question she performed "a substantial amount of the duties described" in the grade GS-4 job description. He then turned to the grievant's allegation that such action by the agency constituted a "misassignment." Under local agency regulations, a "misassignment" is defined as follows:

"A misassignment occurs when an employee is required to perform duties not covered by the official description or definition of his position or rating for periods of time in excess of those authorized in this Instruction. Misassignments are contrary to law and Civil Service regulations and are prohibited." NAS Oceana Instruction 12340.1A, April 18, 1968.

The arbitrator then concluded as follows (Opinion, pp. 9-10):

"The grievant was required to perform duties not covered by her job description. Her case falls squarely within the Activity's definition of misassignment.* * *

"While compelling an employee to temporarily perform duties outside the scope of her position description, without additional compensation, to meet an emergency or the needs or work programs when necessary services cannot be obtained by other desirable or practical means, such was not the case in this instance. The Grievant performed the duties of the higher grade over a long period of time and there was no showing that it was for emergency or other reasons set forth in the NAS Oceana Instruction 12340.1A.

"After careful consideration of the evidence adduced at the hearing and the exhibits introduced therein, I find that the Grievant from August 28, 1975, to February 29, 1976, was required to and did actually perform a substantial amount of the duties of a GS-4. This action by the Activity was improper and caused the employee to suffer a denial of compensation for such additional duties.

"If this was a dispute in the private sector, an award for back pay could be properly ordered. However, in the Federal sector the implementation of any back pay award must comply with the provisions of the Back Pay Act of 1966 and the implementing regulations including the decisions of the Comptroller General.

"Simple equity, however, calls for compensation provided the Activity can obtain the necessary authorization from the Comptroller General or other appropriate agency to pay it."

DISCUSSION

On appeal to the Federal Labor Relations Council, the agency argues that while many of the elements of a detail are present, the arbitrator has not determined that there was a detail and has not found that there was an unjustified or unwarranted personnel action which, but for the action, would have resulted in higher compensation for the grievant. The agency contends, moreover, that the arbitrator's finding was one of a misassignment, the remedy for which is a classification appeal as provided in Chapter 51 of title 5, United States Code, and the implementing regulations contained in 5 C.F.R. §§ 511.601 et seq. In this connection the agency and the union agreed that the issue to be decided by the arbitrator was whether Article XV of the negotiated agreement was violated in the assignment of work to Ms. Taylor. That article covers position descriptions and classification of positions.

Our Office has held that the violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion, or reduction in pay, provided the provision was properly included in the agreement. See Annette Smith, et al., 56 Comp. Gen. 732 (1977), and decisions cited therein. The Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H (1978), are the appropriate authorities for compensating employees for such violations of a negotiated agreement assuming there is a finding that the denial or loss of pay or allowances is a result of and would not have occurred but for the unjustified or unwarranted personnel action. Annette Smith, supra.

In the present case the arbitrator linked the performance of higher level duties to the agency regulation concerning misassignments (quoted above) and, therefore, concluded that the grievant had been improperly denied higher compensation. However, as the agency has pointed out, neither the agency regulation nor the appropriate provision in the negotiated agreement concerning position descriptions (Article XV) provide for retroactive compensation for what is essentially a classification action. In this regard, the United States Supreme Court held, in United States v. Testan, et al., 424 U.S. 392 (1976) that neither the Classification Act (5 U.S.C. §§ 5105 et seq.) nor the Back Pay Act creates a substantive right to backpay for a period of wrongful position classification. The decisions of this Office, consistent with Testan, have held that classification actions upgrading a position may not be made retroactive and that an employee is not entitled to the salary of a higher level position until such time as he is promoted to that position. See Dee R. Geddes, B-191153, May 15, 1978; Russell Swain, B-191360, May 10, 1978, and decisions cited therein. Under the rule of Testan, notwithstanding the arbitrator's finding of a violation of the negotiated agreement dealing with classification and position descriptions (Article XV), that violation does not provide a basis for retroactive pay.

While the facts in the present case might lead one to the conclusion that the grievant had been detailed to the higher level position without the benefit of a temporary promotion, two elements essential to an award of backpay under those circumstances are missing. First, there is no evidence of acceptable proof to substantiate the detail such as official documents, written statements from supervisors or knowledgeable management officials, or a decision under established grievance procedures. See Federal Personnel Manual Bulletin No. 300-40, May 25, 1977. The arbitrator has not found that the grievant was detailed to the higher level position, but rather that she was misassigned. Secondly, there has been no finding that the mandatory provision in the negotiated agreement regarding details (Article XIX) has been violated. Instead, as noted above, the parties agreed prior to arbitration that the issue to be decided was whether there had been a violation of Article XV of the negotiated agreement dealing with position descriptions and classifications.

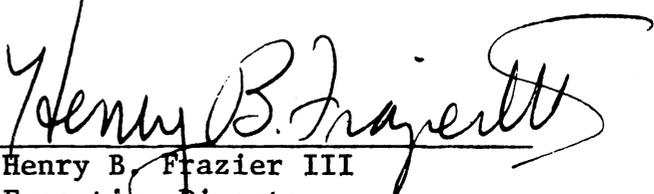
Accordingly, the arbitrator's award may not be implemented.

Based upon the foregoing decision of the Comptroller General it is clear that part 3 of the arbitrator's award, granting the grievant compensation for the period in question under the facts in this case, violates applicable laws and must be set aside.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking part 3 (along with part 4 which is implementive of part 3). As so modified, the award is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 8, 1978

FLRC No. 78A-49

American Federation of Government Employees, Council of Prison Locals and Department of Justice, Bureau of Prisons. The dispute involved the negotiability of a union proposal concerning access by prison inmates to various personnel records and data pertaining to unit employees.

Council action (November 8, 1978). The Council held that the union's proposal violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

American Federation of Government Employees,
Council of Prison Locals

(Union)

and

FLRC No. 78A-49

Department of Justice, Bureau of Prisons

(Agency)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Article 14 - Employees Performance and Ratings

Section h. Inmates shall not have access to any evaluation, performance rating, or other confidential data, personnel files, medical records or time and attendance forms pertaining to employees.

Agency Determination

The agency determined, inter alia, that the proposal is nonnegotiable because it violates section 12(b)(5) of the Order.

Question Here Before the Council

The question is whether the disputed proposal violates section 12(b)(5) of the Order.^{1/}

Opinion

Conclusion: The proposal conflicts with management's reserved right under section 12(b)(5) of the Order to determine the personnel by which its operations are to be conducted. Thus, the agency's determination that the

^{1/} In view of our decision herein, it is unnecessary to pass upon the merits of the remaining contentions of the agency concerning the negotiability of the proposal.

disputed proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The union's proposal in this case would proscribe access by inmates of agency correctional institutions to various personnel records pertaining to unit employees; specifically, to evaluations, performance ratings, or other confidential data, personnel files, medical records, or time and attendance forms. The agency contends that the proposal would restrict agency authority to assign a particular type of personnel (inmates), to particular agency operations (processing personnel-related forms and data) where such employment required access to the particular personnel records covered by the proposal.^{2/} Thus, the agency asserts that the proposal violates the right reserved to it by section 12(b)(5) of the Order to determine the personnel by which to conduct its operations, and, hence, that the proposal is nonnegotiable. We agree with the position of the agency.

It is well established that section 12(b) of the Order reserves specific authority to agency management under any agreement, and that proposals which interfere with the exercise of that authority are barred from negotiations.^{3/} As relevant here, section 12(b)(5) of the Order reserves to management the right "to determine the . . . personnel by which [agency] operations are to be conducted"

In the course of examining, in its Tidewater decision,^{4/} the scope of an agency's reserved authority under section 12(b)(5), the Council explained, as to the meaning of the term "personnel," as follows:

[A]s used in the Order, personnel means the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional

^{2/} The record reflects that such assignments have apparently been an agency practice, relating to the agency's statutory responsibility to rehabilitate inmates pursuant to, e.g., 18 U.S.C. § 4001(b)(2) (1976).

^{3/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

^{4/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations.^{5/} [Emphasis in original; footnote added.]

Here, the union's proposal would plainly interfere with the agency's authority to determine the personnel by which to conduct certain of its operations, since, for example, by barring any inmate access whatsoever to particular personnel records, it would necessarily limit the agency's discretion as to the use of inmates, in any manner, to conduct those agency operations requiring access to the records covered by the proposal.^{6/} Thus, the proposal interferes with the agency's authority to determine "who" will conduct agency operations, a matter reserved exclusively to the agency under section 12(b)(5) of the Order.^{7/}

^{5/} Id., 437.

^{6/} As to section 12(b) of the Order, the union asserts: "Since inmates are not employees as provided by the Order . . . we do not believe [section] 12(b) of the Order should bar negotiation on the proposal" We disagree.

As to the union's contention that inmates are not employees under the Order, the Council has interpreted and applied section 12(b)(5) as reserving to management the right to determine not merely by which groups of its own employees it will conduct its operations, but also whether to utilize a group composed of its own employees, or of nonemployees, such as private contract personnel. See, e.g., AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma, 5 FLRC 604 [FLRC No. 76A-96 (July 13, 1977), Report No. 131].

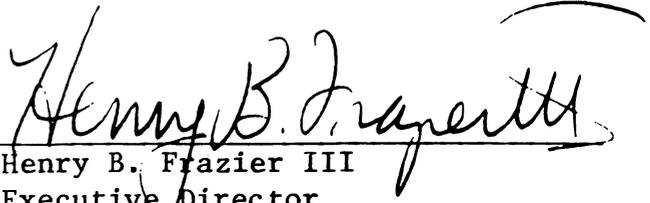
Accordingly, whether inmates in this case are agency "employees" is not of controlling significance regarding the applicability of section 12(b) to the instant proposal.

^{7/} In its appeal, the union adverts to the fact that language similar to that of the proposal has been contained in prior agreements with the agency. However, such circumstance is without controlling significance. See, e.g., Graphic Arts International Union, Local 234 and Energy Research and Development Administration, Technical Information Center, Oak Ridge, Tennessee, 5 FLRC 665 [FLRC No. 76A-65 (Aug. 2, 1977), Report No. 132] n. 21.

The union further asserts that the agency practice of allowing inmates of agency correctional institutions access to confidential data relating to unit employees violates the Privacy Act, 5 U.S.C. § 552a (1976). However, the Council does not reach this issue in determining whether section 12(b)(5) renders the union's proposal nonnegotiable, since a negotiability appeal under the Order does not provide a forum in which to test allegations that a particular agency practice violates the Privacy Act. Rather, such disputes may fall within the jurisdiction of Federal district courts, pursuant to section (g)(1) of the Privacy Act (5 U.S.C. § 552a(g)(1) (1976)).

Accordingly, we find that the union's proposal violates section 12(b)(5) of the Order and is thereby nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 8, 1978

Department of Health, Education, and Welfare, Social Security Administration, Bureau of Retirement and Survivor's Insurance, A/SLMR
No. 1022. The Assistant Secretary dismissed the complaint of the union (National Council of Social Security Payment Center Locals, AFGE, AFL-CIO), which alleged that the activity violated section 19(a)(1), (2) and (6) of the Order by its refusal to negotiate on the impact and implementation of a particular program. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (November 8, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. Peter B. Broida
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Department of Health, Education, and
Welfare, Social Security Administration,
Bureau of Retirement and Survivor's
Insurance, A/SLMR No. 1022, FLRC
No. 78A-70

Dear Mr. Broida:

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

In this case, as found by the Assistant Secretary, the National Council of Social Security Payment Center Locals, AFGE, AFL-CIO (the National Council) filed an unfair labor practice complaint against the Department of Health, Education, and Welfare, Social Security Administration, Bureau of Retirement and Survivor's Insurance (the activity). The complaint alleged that the activity violated section 19(a)(1), (2), and (6) of the Order by its refusal to negotiate over the impact and implementation of an individual performance assessment program prior to its institution. As further found by the Assistant Secretary, the activity has six Program Service Centers located throughout the nation, at each of which there is a local union (affiliated with the American Federation of Government Employees, AFL-CIO) which is a member of the National Council. At all times material herein, a negotiated agreement was in effect which defined the National Council as the exclusive representative of the activity's employees covered by the agreement. The instant dispute arose when the activity's Acting Director, in order to improve employee production and efficiency, drafted a paper on managing employee workloads which included an individual employee assessment system. The National Council, which was furnished a copy of the paper for comment, objected to the new program and stated that the matter of employee "workload management" was appropriate for bargaining at the Bureau level. The activity contended that the paper was only meant to constitute a broad framework within which each Program Service Center would work out its own management plan in consultation with the respective locals of the National Council. Thereafter, the

individual Payment Service Centers developed and implemented their respective programs, which led the National Council to file the instant complaint against the activity.

The Assistant Secretary, in agreement with the recommendation of the Administrative Law Judge (ALJ), dismissed the complaint, but for different reasons. Thus, contrary to the ALJ, the Assistant Secretary found that the National Council was a proper party to request negotiations in this matter, noting that the language of the parties' agreement coupled with the activity's course of conduct established, at a minimum, that the National Council was recognized as the agent of AFGE's National Office for purposes of representing the employees within the unit.^{*/} As to the gravamen of the complaint, the Assistant Secretary stated:

I find that the [activity's] contention that consultation between management and the [National] Council take place at the Program Service Center level reflected a good faith interpretation of the rights and obligations of the parties under their negotiated agreement, and did not, standing alone, constitute an improper refusal to bargain in good faith. Further, in view of the absence in the record of evidence that the appropriate locals of the [National] Council requested and were denied the right to bargain with their respective Program Service Centers, I find that the [National] Council has not established by a preponderance of the evidence that the [activity] failed to fulfill its obligation to bargain with regard to the contents and implementation of the individual Program Service Center plans. [Footnote omitted.]

The National Council then filed a motion with the Assistant Secretary requesting reconsideration of the latter part of the decision as stated above. The Assistant Secretary reaffirmed his earlier decision dismissing the complaint. In so affirming, he stated:

I did not mean to imply in my decision that there was no evidence in the record that appropriate locals of the [National] Council had requested and were denied bargaining with their respective Program Service Centers. Rather, as I indicated, the [National] Council had failed to establish "by a preponderance of the evidence that the [activity] failed to fulfill its obligation to bargain with regard to the contents and implementation of the individual Program Center plans" Thus, the record herein, viewed in its entirety, is unclear and ambiguous with respect to whether or not the requests by Payment Center locals for bargaining were requests for local bargaining or merely a reiteration of the [National] Council's

^{*/} The Assistant Secretary's finding in this regard was not appealed to the Council or raised by the parties herein.

demand by the locals for bargaining at the [National] Council-Bureau level. Nor is the record clear as to the extent to which local management responded to local union proposals. In this regard, it is noted that under Section 203.6(e) of the Assistant Secretary's Regulations, the Complainant bears the burden of proof regarding matters alleged in its complaint. [Emphasis in original.]

In your petition for review on behalf of the National Council, you allege that the Assistant Secretary's decision is "arbitrary and inconsistent [with] the purposes of Executive Order 11491," in that the Assistant Secretary found "an absence in the record of evidence that the appropriate locals of the [National] Council requested and were denied the right to bargain with their respective Program Service Centers." In this regard, you assert that this determinative factual finding was first developed by the Assistant Secretary rather than the ALJ, and that, contrary to such factual finding, there is ample testimonial evidence in the record that the locals requested and were denied the right to bargain with their respective Program Service Centers. You further assert that there is no substantial evidence to support the determinative conclusion of the Assistant Secretary in this case, and therefore his decision is arbitrary.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

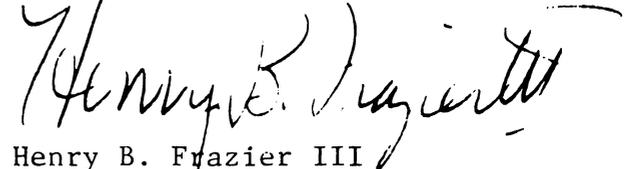
With regard to your allegation that the Assistant Secretary's decision is arbitrary and inconsistent with the purposes of the Order, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the preponderance of the evidence did not establish that the activity "failed to fulfill its obligation to bargain with regard to the contents and implementation of the individual Program Service Center plans" in the circumstances of the instant case. As to your related contention that, contrary to the Assistant Secretary's finding, the record evidence establishes that the local unions requested and were denied the right to bargain with their respective Program Service Centers, in the Council's opinion no basis for review is presented. In this regard, we note particularly that such contention constitutes essentially mere disagreement with the Assistant Secretary's finding that the National Council failed to meet its burden of proof regarding matters alleged in its complaint. Accordingly, no basis for Council review is thereby presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements

for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. Gold
SSA

Social Security Administration, Bureau of Hearings and Appeals, Washington, D.C., Assistant Secretary Case No. 22-08470(CA). The Assistant Secretary denied the request for review filed by the union (Local 3615, American Federation of Government Employees, AFL-CIO), seeking reversal of the Regional Administrator's dismissal of the union's complaint which alleged that the activity violated section 19(a)(1) and (6) of the Order by its conduct toward two employee-union officers. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (November 8, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration, Bureau
of Hearings and Appeals, Washington,
D.C., Assistant Secretary Case No.
22-08470(CA), FLRC No. 78A-72

Dear Mr. King:

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

In this case, American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed an unfair labor practice complaint against the Social Security Administration, Bureau of Hearings and Appeals (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by requiring two employees (who were also union officers) to take annual leave or leave without pay under the threat of being considered absent without leave for several hours while they were attending an arbitration hearing as witnesses, despite earlier activity approval of their attendance at the hearing. The complaint further alleged that the activity thereby failed to comply with past practice and demonstrated anti-union animus by openly threatening union officers with disciplinary action.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that no reasonable basis for the complaint had been established. In so finding, the Assistant Secretary stated:

[I]n my view, the gravamen of the dispute herein involves the interpretation and application of the parties' negotiated

agreement,^{1/} which is a matter more appropriately resolved through the negotiated grievance and arbitration procedures provided for in the agreement, rather than through the unfair labor practice procedures. See Department of Army, Watervliet Arsenal, Watervliet, New York, 6 A/SLMR 127, A/SLMR No. 624 (1976). [Footnote added.]

Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary was "arbitrary and capricious in failing to remand the instant unfair labor practice for a hearing." You further allege that the union "suffered a violation of its rights to participate in an arbitration hearing, and if such violations are permitted to stand, the [union] will be fearful of litigating matters in arbitration." In this latter regard, you assert that the activity's denial of official time following the hearing despite having granted it earlier under the parties' agreement was "patently improper."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue.

As to your allegation that the Assistant Secretary's dismissal of the instant complaint without a hearing was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. As the Council has previously stated in response to similar allegations, the Assistant Secretary's decision in this case that no reasonable basis for the complaint had been established was based on the application of his regulations, and your appeal presents no persuasive reason to show that the Assistant Secretary was without the authority to establish such regulations or that he wrongly applied the regulations to the facts and circumstances of this case. Moreover, your appeal does not demonstrate that substantial factual issues existed requiring a hearing. See, e.g., Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, Assistant Secretary Case No. 50-11018(CA), 3 FLRC 256 [FLRC No. 74A-90 (May 9, 1975), Report No. 69]; Securities and Exchange Commission, Assistant Secretary Case No. 22-5371(CA), 3 FLRC 225 [FLRC No. 74A-98 (May 6, 1975), Report No. 68]. With regard to your further

^{1/} According to the RA's decision, Article XXIV, Section 4 of the parties' negotiated agreement provides, in part, as follows:

The aggrieved employee and witnesses, who are employed by the Agency and who have direct knowledge of the circumstances and factors bearing on the case, as determined by the arbitrator, and the union representative (if an employee of the Agency) shall be in a pay status without charge to annual leave while participating in the arbitration proceeding.

allegation that the activity's denial of official time violated the union's right to participate in an arbitration hearing and was "patently improper," in the Council's view such contention constitutes essentially mere disagreement with the Assistant Secretary's finding that the matter in dispute herein involves the interpretation and application of the parties' agreement and is therefore more appropriately resolved under negotiated grievance and arbitration procedures than through the unfair labor practice procedures.^{2/} Moreover, your appeal neither alleges, nor does it otherwise appear, that the Assistant Secretary's decision raises a major policy issue.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege nor does it appear that a major policy issue is presented, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

I. L. Becker
SSA

^{2/} In this regard, see the Council's statements in Request for Interpretations and Policy Statements, 3 FLRC 874, 878-879 [FLRC No. 75P-1 (May 23, 1975), Report No. 90]; and the Council's decision in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 4 FLRC 586, 592 [FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118], to the effect that while nothing in the Order prohibits an agency and a labor organization from negotiating provisions for the use of official time by union representatives for contract administration and other representational activities, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a right guaranteed by the Order remediable under section 19 of the Order.

National Archives and Records Service, Assistant Secretary Case No. 22-07748(CA). The Assistant Secretary denied the request for review filed by the union (Local 2578, American Federation of Government Employees, AFL-CIO), seeking reversal of the Acting Regional Administrator's dismissal of those portions of the union's section 19(a)(1), (2) and (6) complaint which alleged that the activity had violated parking provisions in the parties' ground rules for negotiations. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue.

Council action (November 8, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. Carmen Delle Donne
President, Local 2578
American Federation of Government
Employees, AFL-CIO
Room 2E, National Archives Building
Washington, D.C. 20408

Re: National Archives and Records Service,
Assistant Secretary Case No. 22-07748(CA),
FLRC No. 78A-80

Dear Mr. Delle Donne:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto,^{1/} in the above-entitled case.

In this case, the American Federation of Government Employees, Local 2578, AFL-CIO (the union) filed an unfair labor practice complaint against the General Services Administration, National Archives and Records Service (the activity). The complaint alleged that the activity violated section 19(a)(1), (2), and (6) of the Order by bargaining in bad faith, unilaterally changing an established practice, threatening the union president in the conduct of union business, and discriminating against union officers in the administration of parking regulations. The Acting Regional Administrator (ARA) concluded that further proceedings were not warranted with respect to some of the allegations and that other proceedings were warranted with respect to the remaining allegation. More specifically, the ARA dismissed those portions of the complaint which alleged that the activity violated one of the parties' ground rules concerning contract negotiations which

^{1/} In its opposition to your petition for review of the Assistant Secretary's decision herein, the agency asserts that your petition, filed on July 11, 1978, was untimely filed pursuant to section 2411.13(b) of the Council's rules because it was not filed within 30 days from the Assistant Secretary's final decision of June 6, 1978. We are administratively advised, however, that this decision was mailed to the parties on June 6, 1978. Where a decision has been served on a party by mail, section 2411.13(b) must be read in conjunction with section 2411.45(c), which provides an additional 5 days in which to file an appeal with the Council. Accordingly, the appeal herein was timely filed and the agency's contrary assertion is rejected.

provided that the union could park two cars in the activity's garage on days of negotiations. In dismissing this aspect of the complaint, the ARA stated:

In response to your contention that you were entitled to parking on days of contract negotiations, the [activity] contends that the relevant provision of the groundrules must not be read in vacuo but rather in conjunction with the portion which establishes the hours of negotiations. [The activity] argues that the reason for the parking proviso was to facilitate matters for the Union representatives on days when negotiations went beyond normal work hours. Inasmuch as the parties had entered mediation and were meeting during working hours by the date of the alleged violation, the [activity] contends that those portions of the groundrules no longer applied. Thus, it appears that the dispute over the parking during negotiations is essentially a dispute over the interpretation of the groundrules. The Assistant Secretary has adopted a position that he will not police or interpret side agreements absent evidence that they constitute independent violations of the Order.^{1/} In view of this, I am of the opinion that the allegations relating to the [activity's] revocation of [the union's] parking privileges do not constitute a reasonable basis for the complaint.

^{1/} Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144 [(Mar. 28, 1972)].

The Assistant Secretary, in agreement with the ARA and based on his reasoning, found that insufficient evidence was presented to establish a reasonable basis for that portion of the complaint which alleged that the activity violated the parking provisions in the parties' ground rules for negotiations. Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the ARA's dismissal of the section 19(a)(1), (2), and (6) allegations with respect to this portion of the complaint.^{2/}

^{2/} However, the portions of the complaint alleging a violation of section 19(a)(1) and (2) of the Order with respect to anti-union discrimination and unjust treatment of the union's president related to parking were set for hearing. The Administrative Law Judge (ALJ) found that there was insufficient evidence to support these allegations, and therefore recommended dismissal of the entire complaint. The Assistant Secretary, noting the absence of exceptions, adopted the recommendations of the ALJ and dismissed the complaint. General Services Administration, National Archives and Records Service, A/SLMR No. 1055 (June 6, 1978). This determination has not been appealed to and therefore is not before the Council herein.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's "dismissal without hearing of the union's complaint regarding a patent breach of an agreement was arbitrary and capricious and raises a major policy issue." In this regard, you contend that "[i]t was arbitrary and capricious for the Assistant Secretary to rule that a unilateral change in the union's right to use official facilities is not an unfair labor practice if the union's rights in the matter stem from a negotiations groundrules agreement rather than a general contract covering all aspects of labor-management relations." You further allege that it was contrary to "past standards" and therefore "arbitrary and capricious for the Assistant Secretary to dismiss a 19(a)(6) complaint involving breach of [an] agreement without explicitly finding that the management conduct resulted from a reasonable or arguable interpretation of the agreement, and it is arbitrary and capricious for the Assistant Secretary to make a finding of reasonableness based on disputed factual contentions without holding a hearing to resolve the factual disputes."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your allegation that the Assistant Secretary's dismissal of the union's complaint without a hearing regarding a breach of the parties' ground rules agreement was arbitrary and capricious and raises a major policy issue, in the Council's view no basis for review is thereby presented. More particularly, as to your assertion that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Your contrary assertion constitutes, in essence, mere disagreement with the Assistant Secretary's finding that insufficient evidence was presented to establish a reasonable basis for that portion of the complaint which alleged that the activity violated the parking provisions in the parties' ground rules for negotiations, and therefore presents no basis for Council review. As to your further assertion that the Assistant Secretary's dismissal of the instant complaint without a hearing was contrary to his "past standards" and therefore arbitrary and capricious, your appeal fails to establish that there is a clear, unexplained inconsistency between this decision and the previously published decisions of the Assistant Secretary. Likewise, in the Council's opinion, no major policy issue is presented by the Assistant Secretary's dismissal of the union's complaint that the activity unilaterally changed the parties' agreement on ground rules for negotiations. In this regard, your appeal fails to contain any support for the contention that the Assistant Secretary's decision was inconsistent with applicable authority or the purposes and policies of the Order.^{3/}

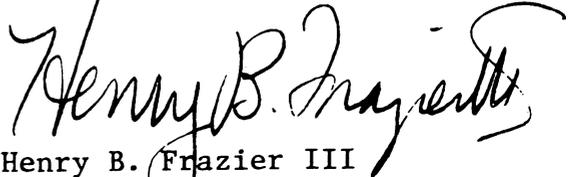
^{3/} In so concluding, we do not construe the Assistant Secretary's statement in the Keesler decision (supra p. 2) that it would not effectuate

(Continued)

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Mendenhall
GSA

(Continued)

the policies of the Order "to interpret or police . . . side agreements absent evidence that they constitute independent violations of the Order" as necessarily implying that violation of a ground rules agreement may never constitute an unfair labor practice. Rather, we interpret the Assistant Secretary's statement as indicating that, as with contract violations generally, a violation of ground rules for negotiations may constitute an unfair labor practice if an independent violation of the Order is established. See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 4 FLRC 586 [FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118].

Department of Defense, Department of the Army, U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois, Assistant Secretary Case No. 50-15485(GA). The Assistant Secretary, upon an Application for Decision on Arbitrability filed by the union (Local 15, National Federation of Federal Employees), found, in agreement with the Regional Administrator (RA), that a portion of the grievance involved (pertaining to the enumeration of duties in the grievant's position description and those she was performing) was arbitrable. The Assistant Secretary therefore denied the agency's request for review, seeking reversal of that part of the RA's Report and Findings on Arbitrability. The agency appealed to the Council, contending that the Assistant Secretary's decision raised major policy issues. The agency also requested a stay.

Council action (November 8, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. W. J. Schrader, Chief
Labor and Employee Relations Division
Office of the Deputy Chief of
Staff for Personnel
Department of the Army
Washington, D.C. 20310

Re: Department of Defense, Department of the Army, U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois, Assistant Secretary Case No. 50-15485(GA), FLRC No. 78A-81

Dear Mr. Schrader:

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

In this case, as found by the Assistant Secretary, Department of Defense, Department of the Army, U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois (the activity) and National Federation of Federal Employees Local 15 (the union) are parties to a collective bargaining agreement containing a negotiated grievance procedure. Pursuant to that procedure, the union filed a grievance alleging a violation of the parties' agreement resulting from the alleged incongruence between the grievant's duties and responsibilities provided in her position description and those duties and responsibilities which she actually performed on a daily basis. The grievance also alleged that performance of the additional functions on a regular basis by the grievant had resulted in a condition in which the employee's wage rate was inequitable. The activity consistently rejected the grievance on the ground that the matter was covered by a statutory appeal procedure and therefore was neither grievable nor arbitrable since section 13(a) of the Order prohibits use of a negotiated grievance procedure in matters for which a statutory appeal procedure exists.

The union then filed an Application for Decision on Arbitrability. The Regional Administrator (RA) found arbitrable "the gravamen of applicant's grievance [which] seems to be that an employee's supervisor continues to have that employee work at duties and responsibilities that are arguably additional and different from those set forth in the employee's position description." However, the RA found not arbitrable the applicant's

"further contention that the employee is employed in the capacity of a GS-301-5 or is improperly classified under the employee's current position description as a GS-301-4," since that "is a matter subject to a classification appeal which involves a statutory appeal procedure."

The agency filed a request for review with the Assistant Secretary seeking reversal, in part, of the RA's Report and Findings on Arbitrability. The Assistant Secretary then sought a determination from the Civil Service Commission (CSC) as to whether the grievant's allegations concerning the accuracy of an employee's position description are subject to resolution under a statutory appeal procedure. The CSC's response advised that although a grievance dealing with the evaluation of the duties performed by an employee is cognizable under a statutory appeal procedure, an allegation concerning the enumeration of those duties in a position description may be addressed under the parties' negotiated grievance/arbitration procedure. In keeping with this determination the Assistant Secretary stated:

I agree with the [RA's] findings. . . . Thus, . . . [a]s this contention [that the employee's position description does not adequately reflect her assigned duties and responsibilities, as required by the parties' negotiated agreement] deals solely with an alleged inconsistency between the enumeration of duties spelled out in the employee's position description and those she is performing, I find, in accordance with the CSC's advisory opinion, that this matter is not subject to resolution under a statutory appeal procedure. Notwithstanding [the activity's] assertion that the Commander HQ, US ARMCOM has the authority to make a final determination on questions concerning the "accuracy" of job descriptions pursuant to Article XXIV, Section 4 of the agreement,^{1/} I conclude that the meaning of the word "accuracy" as used in Section 4 is itself unclear, and that there is nothing in the agreement which precludes consideration of a question as to the proper enumeration of duties performed under the negotiated grievance/arbitration procedure. Thus, in agreement with the [RA], I find this portion of the grievance to be arbitrable. [Footnote added.]

Accordingly, the Assistant Secretary denied the agency's request for review seeking reversal in part of the RA's Report and Findings on Arbitrability.

^{1/} Article XXIV, Section 4 of the agreement provides:

Section 4. Job Description Accuracy. Questions of fact regarding the accuracy of an employee's officially assigned job description should be resolved between the employee and his immediate supervisor. Where necessary, a decision involving current and future duties and responsibilities of the position will be made by the Commander HQ, US ARMCOM; his decision will be considered final.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision raises a major policy issue as to whether the Assistant Secretary is "vested with the authority to alter, amend and/or modify the coverage and scope of a grievance procedure, negotiated in compliance with [s]ection 13(a) of Executive Order 11491, as amended." In this regard, you contend that the parties negotiated a grievance procedure of broad parameters, including matters not covered by the negotiated agreement; that the RA modified this expanded coverage by determining that, in the instant case, in order for a matter "to be grievable the agreement must refer to the matter grieved"; that as the Assistant Secretary's decision makes no reference to this statement by the RA, "it is assumed that he views his authority as extending to, and inclusive of, modification of the scope of the [parties'] negotiated grievance procedure"; and that the Assistant Secretary's decision is therefore contrary to the Council's holdings in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, 3 FLRC 120 [FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63] and Community Services Administration, A/SLMR No. 749, FLRC No. 76A-149 (Aug. 17, 1977), Report No. 133. You further allege that the Assistant Secretary's decision presents a major policy issue as to whether the Assistant Secretary is "vested with the authority to determine the grievability/arbitrability of an issue, other than that concerning the existence of a statutory appeal right, when the [p]arties to a negotiated [a]greement have exercised the option provided in [s]ection 13(d) of Executive Order 11491, as amended, to submit other issues of grievability/arbitrability to an arbitrator for decision." In this regard you contend that the Assistant Secretary's authority herein expired upon his decision that a statutory appeal procedure did not exist, and that the interpretation of the terms and conditions of the agreement to determine whether the issue was further excluded from arbitration by the specific language contained therein could only be accomplished by an arbitrator in view of the parties' mutual agreement to that effect.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

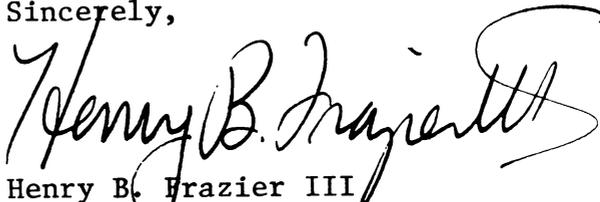
With respect to your alleged major policy issue regarding the alleged modification of the scope of a negotiated grievance procedure, in the Council's opinion no major policy issue is presented warranting review. Thus, your appeal fails to show in this regard that the Assistant Secretary either referred to or relied on the RA's statement with which you take issue in reaching his decision herein, and therefore your unsupported "assumption" to the contrary provides no basis for Council review. That is, your appeal fails to contain any support for the allegation that the Assistant Secretary's decision is inconsistent with the purposes and policies of the Order or applicable Council precedent. As to your alleged major policy issue concerning the Assistant Secretary's authority to determine the grievability/arbitrability of an issue which

the parties have agreed to submit to an arbitrator for decision, in the Council's view such assertion does not raise a major policy issue. In this regard, the Council notes particularly the Assistant Secretary's finding that "[a]s this contention [that the employee's position description does not adequately reflect her assigned duties and responsibilities as required by the parties' agreement] deals solely with an alleged inconsistency between the enumeration of duties spelled out in the employee's position description and those she is performing, . . . in accordance with the CSC's advisory opinion, . . . this matter is not subject to resolution under a statutory appeal procedure." Thus, no basis for Council review is presented in this regard.^{2/}

Since the Assistant Secretary's decision does not present any major policy issues and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR J. Helm
Labor NFFE

^{2/} In so concluding, the Council interprets the Assistant Secretary's further statement that "I find this portion of the grievance to be arbitrable" as relating only to the agency's contention that the Commander HQ, US ARMCOM has the authority to make a final determination on questions concerning the "accuracy" of job descriptions pursuant to Article XXIV, Section 4 of the parties' agreement. That is, the Council does not view the Assistant Secretary's statement set forth above as in any manner precluding the parties from submitting this question of contract interpretation pertaining to Article XXIV, Section 4 to an arbitrator. Thus, such question could be raised before the arbitrator in connection with the resolution of whether the instant grievance is arbitrable under the provisions of the parties' negotiated agreement. In other words, where the parties agree under section 13(d) of the Order to refer questions as to whether a matter is subject to arbitration under the provisions of their negotiated grievance procedure, it would be inconsistent with the provisions of the Order for the Assistant Secretary to resolve such questions in deciding whether a grievance is subject to a statutory appeal procedure, and, as indicated above, we do not interpret his decision as having done so in this case.

FLRC No. 78A-85

Department of Transportation, Transportation Systems Center, Cambridge, Massachusetts, A/SLMR No. 1031. The Assistant Secretary dismissed the section 19(a)(1) and (6) complaint of the union (Local R1-195, National Association of Government Employees) related to the implementation of a RIF by the activity. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (November 8, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. David Jenkins
Counsel
National Association of
Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Re: Department of Transportation, Transportation
Systems Center, Cambridge, Massachusetts,
A/SLMR No. 1031, FLRC No. 78A-85

Dear Mr. Jenkins:

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

In this case, the National Association of Government Employees, Local R1-195 (the union) filed an unfair labor practice complaint alleging, in substance, that the Department of Transportation, Transportation Systems Center (the activity) violated section 19(a)(1) and (6) of the Order by implementing a reduction-in-force (RIF) without giving the union timely notice and an opportunity to request negotiations concerning the procedures to be utilized and the impact on unit personnel adversely affected.

The Assistant Secretary, "noting particularly that no exceptions were filed,"^{*} adopted the findings, conclusions, and recommendations of the

^{*} In this connection, the Council, in Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108, stated, in pertinent part:

While the Council's rules do not explicitly preclude the filing of an appeal . . . under [such] circumstances, in our view, such practice is not consistent with the orderly processing of adjudicatory matters under the Order. That is, the needs of the Council in rendering an informed judgment in a contested matter would be best served by a party's filing exceptions with the Assistant Secretary, and by the Assistant Secretary's opportunity thereby to consider and pass upon such exceptions, before an appeal is submitted for consideration by the Council.

(Continued)

Administrative Law Judge (ALJ) who found that the activity gave the union timely notice of the impending RIF but that the union failed to take any action to request negotiations as to the manner in which the activity intended to implement its decision; and that when a final decision was announced two weeks later, the union again made no attempt to seek further negotiations on impact or implementation. Accordingly, the Assistant Secretary adopted the ALJ's conclusion that there was "insufficient basis for a 19(a)(1) and (6) finding" and ordered that the complaint be dismissed.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the evidence fails to support a finding that any consultations were held concerning implementation of the RIF plan, but instead shows that the union was given less than one day to initiate and conclude negotiations on the impact of the RIF. You further allege that a related major policy issue is presented as to "[w]hether a notice of a reduction in force given to a local union president the day before termination notices are to be delivered to affected employees affords the [u]nion an opportunity to meet and confer about the method and impact of carrying out a RIF or meeting on how the final lay-off plan could best be carried out, as was required by [s]ection 11(b) of the Executive Order."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. In this regard, your contention that the union was not afforded reasonable opportunity to meet and confer concerning the impact and implementation of the RIF constitutes nothing more than a disagreement with the Assistant Secretary's determination, based on the entire record, that the activity provided timely notice of the impending RIF but the union failed to request negotiations on the impact or implementation of that decision. Similarly, no major policy issue is raised by your related question as to whether the union was afforded timely

(Continued)

We reaffirm our previously expressed view, as set forth above, that exceptions should be filed with the Assistant Secretary by a party contesting the findings, conclusions, or recommendations of the ALJ, as here, so that he may consider them before an appeal is filed with the Council. See U.S. Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 720, FLRC No. 76A-123 (Jan. 18, 1977), Report No. 121; Department of the Air Force, Headquarters Tactical Air Command, Langley Air Force Base, Virginia, A/SLMR No. 742, FLRC No. 77A-3 (Mar. 22, 1977), Report No. 123.

notice and an opportunity to meet and confer on the impact and implementation of the RIF herein, noting particularly the Assistant Secretary's finding that the activity immediately informed the union when approval of the RIF appeared imminent but the union failed to request negotiations with the activity concerning implementation thereof, and that when the RIF was announced 14 days later, the union again made no attempt to negotiate regarding impact or implementation. Thus, your contention that the union was given insufficient notice to satisfy the requirements of the Order again constitutes, essentially, disagreement with the Assistant Secretary's contrary determination based upon the entire record, and therefore presents no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. S. Smith
Transportation

General Services Administration, National Personnel Records Center, St. Louis, Missouri, Assistant Secretary Case No. 62-5872(CA). The Assistant Secretary denied the request for review filed by the union (Local 900, American Federation of Government Employees, AFL-CIO), seeking reversal of the Regional Administrator's dismissal of the union's complaint, which alleged that the activity violated section 19(a)(1) and (6) of the Order by unilaterally imposing a limitation on the amount of on-duty time that two union officers could spend on representational activities. The union appealed to the Council, contending, in effect, that the Assistant Secretary's decision appeared arbitrary and capricious and presented a major policy issue.

Council action (November 8, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: General Services Administration,
National Personnel Records Center,
St. Louis, Missouri, Assistant
Secretary Case No. 62-5872(CA),
FLRC No. 78A-94

Dear Mr. King:

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

In this case, American Federation of Government Employees, Local 900, AFL-CIO (the union) filed an unfair labor practice complaint alleging that General Services Administration, National Personnel Records Center, St. Louis, Missouri (the activity) violated section 19(a)(1) and (6) of the Order by unilaterally imposing a 25 percent limitation upon the amount of on-duty time that two union officers could spend on representational duties.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that the evidence was insufficient to establish a reasonable basis for the complaint and consequently that further proceedings were unwarranted. In this regard he stated that "[t]he dispute herein essentially involves an interpretation of Article VII, Section 7 of the negotiated agreement between the [activity] and [the union],"^{1/} and concluded:

In accordance with the rationale contained in Department of the Army, Watervliet Arsenal, A/SLMR No. 624, 6 A/SLMR 127 (1976)

^{1/} As set forth in the Assistant Secretary's decision, Article VII, Section 7.g provides, in relevant part:

Determination as to whether or not the use of official time for performing representational functions is within reasonable limits, shall be made by the Center Manager or his designee after discussion and consultation with the Union President or his designee. If the Union is dissatisfied with the decision, it may exercise its right of complaint under the negotiated grievance procedure.

where, as in the instant case, an alleged violation of a negotiated agreement concerns differing and arguable interpretations of the agreement, it is not deemed to be an unfair labor practice, but rather, a matter to be resolved under the parties' contractual grievance/arbitration machinery.

Accordingly, and having administratively satisfied himself that the investigation in the instant case was consistent with established procedures, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review and supplement thereto filed on behalf of the union, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue in that it does not address the issue raised in the complaint. In this regard, your petition asserts that the "issue in this case is the agency's refusal to negotiate the amount of 'reasonable time' to be used by [two union officers] when performing their representational duties for those employees in the bargaining unit" rather than "an interpretation of Article VII" of the parties' agreement as found by the Assistant Secretary. Accordingly, you request that the Council remand the case to the Assistant Secretary for a hearing on the issue of the activity's refusal to negotiate.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, it does not appear that the decision of the Assistant Secretary was arbitrary and capricious or presents a major policy issue.

Specifically, no basis for Council review is presented with respect to your allegation that the Assistant Secretary did not address the issue raised in the complaint in that he failed to decide whether the activity violated the Order in refusing to negotiate the amount of official time to be used by union officers for representational activities. In the Council's view, such contention constitutes essentially mere disagreement with the Assistant Secretary's finding that the dispute herein essentially involves an interpretation of the parties' negotiated agreement and that where, as here, an alleged violation of a negotiated agreement concerns differing and arguable interpretations of the agreement, the matter is to be resolved under the parties' contractual grievance and arbitration machinery rather than as an unfair labor practice.^{2/}

^{2/} In this regard, see the Council's statements in Request for Interpretations and Policy Statements, 3 FLRC 874, 878-879 [FLRC No. 75P-1 (May 23, 1975), Report No. 90]; and the Council's decision in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 4 FLRC 586, 592 [FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118], to the effect that while nothing in the Order prohibits an agency and a labor organization from negotiating provisions for the use of official time by union representatives for contract administration and other representational activities, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a right guaranteed by the Order and remediable under section 19 of the Order.

Accordingly, as the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. B. Griffin
GSA

American Federation of Government Employees, Local 331, AFL-CIO and Veterans Administration Hospital, Perry Point, Maryland. The agency head's determination was dated August 17, 1978, and, so far as the union's appeal indicated, was served on the union by mail on that same date. Therefore, under sections 2411.24(a) and 2411.45(a) and (c) of the Council's rules, the union's appeal was due in the office of the Council no later than the close of business on September 21, 1978. However, the union's appeal was not filed with the Council until October 24, 1978, and no extension of time for filing was requested by the union or granted by the Council.

Council action (November 8, 1978). Since the union's petition for review was untimely filed, and apart from other considerations, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 8, 1978

Ms. Mary Lynn Walker
Acting Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, Local 331, AFL-CIO and
Veterans Administration Hospital,
Perry Point, Maryland, FLRC No. 78A-146

Dear Ms. Walker:

This refers to the union's petition for review of the agency head's negotiability determination in the above-entitled case, dated and filed with the Council on October 24, 1978. For the reasons indicated below, it has been determined that the subject petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The agency head's determination is dated August 17, 1978, and, so far as the union's appeal indicates, was served on the union by mail on that same date. Therefore, under sections 2411.24(a) and 2411.45(a) and (c) of the Council's rules, the union's appeal was due in the office of the Council no later than the close of business on September 21, 1978. However, as stated above, the union's appeal was not filed with the Council until October 24, 1978, or more than a month late, and no extension of time for filing was requested by the union or granted by the Council.

While the union, by letter of September 18, 1978, requested the agency head to grant "an exception in accordance with section 2411.22(b) of the Council's rules of procedure",^{*/} neither the union's request nor the

^{*/} Section 2411.22(b) of the Council's rules of procedure provides:

The Council will review a labor organization's appeal challenging an agency head's determination that an internal agency regulation bars negotiation only if the labor organization has first requested an exception to the regulation from the agency head and that request has been denied or has not been acted upon within the time limits prescribed by § 2411.24.

agency's response thereto of October 6, 1978, operated to extend the Council's prescribed time limits for filing an appeal in the circumstances of this case.

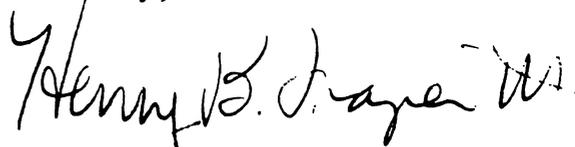
More particularly, it does not appear from the agency head's determination or otherwise from the record before the Council, that the agency raised any of its internal policies or regulations as a bar to negotiation on the union's proposal involved in the dispute. (Rather, it appears that the agency head determined that the union's proposal, to the extent it was in dispute, was outside the agency's obligation to bargain under section 11(a) of the Order.) Further, in its October 6, 1978, response, the agency declined to consider the union's exception request on the ground that no agency policy was at issue. Thus, it appears clear that section 2411.22(b) of the Council's rules, which pertains to situations where an agency raises an internal policy or regulation as a bar to negotiations, and the related section 2411.24(b) of the rules, which may operate to extend the time limits for filing an appeal with the Council in such situations, are not applicable in the circumstances of this case.

Moreover, even if the agency head had raised an internal regulation as a bar to negotiation on the union's proposal in the August 17, 1978, determination, then under sections 2411.24(b) and 2411.45(a) and (c) of the Council's rules, the union's appeal would have been due in the office of the Council no later than the close of business on October 23, 1978. Thus, even assuming the applicability of sections 2411.22(b) and 2411.24(b) of the Council's rules, the union's appeal, filed with the Council on October 24, 1978, would still have been untimely.

Accordingly, since the union's petition for review was untimely filed, and apart from other considerations, such petition is hereby denied.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: M. Rudd
VA

Headquarters, Fort Sam Houston, Texas and Local 2154, American Federation of Government Employees (AFGE), AFL-CIO (Britton, Arbitrator).

The arbitrator's award was dated May 12, 1978, and appeared to have been served on the union by mail on May 22, 1978. Therefore, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, the union's appeal was due in the office of the Council on June 26, 1978. However, the union's appeal was not filed until June 29, 1978, and no extension of time for such filing was requested by the union or granted by the Council.

Council action (November 13, 1978). Since the union's petition for review was untimely filed, and apart from other considerations, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 13, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Headquarters, Fort Sam Houston, Texas
and Local 2154, American Federation of
Government Employees (AFGE), AFL-CIO
(Britton, Arbitrator), FLRC No. 78A-73

Dear Mr. King:

This refers to your petition for review and request for a stay of the arbitrator's award in the above-entitled case, filed with the Council on June 29, 1978; to the agency's opposition filed on July 28, 1978; and to your supplemental submission filed on August 9, 1978, in response to the agency's opposition.

For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject arbitration award is dated May 12, 1978, and appears to have been served on you by mail on May 22, 1978. Therefore, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council on June 26, 1978. However, as stated above, your appeal was not filed with the Council until June 29, 1978, and no extension of time for filing was requested by you or granted by the Council.

In your response to the agency's opposition, you recognize that your petition for review was untimely filed, but you request that the prescribed time limits for such filing be waived because of the importance of the issue involved in the case, namely: "When the Union raises a question concerning the arbitrability of an issue, must the Agency follow the procedures under the Executive Order 11491 unless modified by their collective bargaining agreement?" In support of your contention, you assert that the issue is of major policy proportions, warranting Council consideration.

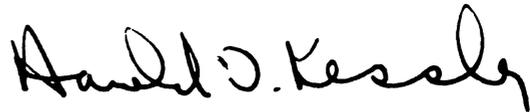
Section 2411.45(f) of the Council's rules provides that any expired time limit in Part 2411 of the rules may be waived in extraordinary circumstances.

The Council has consistently held in like cases that the asserted significance of an issue involved in a case does not constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules such as to warrant the granting of a waiver of the applicable time limits. See, e.g., State of New Jersey Department of Defense and National Army-Air Technicians Association, Local 371 (Howard, Arbitrator), 4 FLRC 320 [FLRC No. 76A-72 (May 27, 1976), Report No. 105], request for reconsideration denied: Aug. 3, 1976. No persuasive reason has been shown why this well-established precedent should not be applied in the present case. Therefore, your request for a waiver is hereby denied.

Accordingly, as your petition for review was untimely filed, and apart from other considerations, such petition is denied. Your request for a stay is likewise denied.

For the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: W. J. Schrader
Army

Department of the Interior, Bureau of Reclamation, Grand Coulee Project Office, Grand Coulee, Washington, Assistant Secretary Case No. 71-4234(GA)
Before deciding whether to accept or deny the petition filed by the union (Columbia Basin Trades Council), seeking review of the Assistant Secretary's dismissal of the union's Application for Decision on Grievability as untimely, the Council, on June 28, 1978, requested the Assistant Secretary to review and clarify his decision. On September 20, 1978, the Assistant Secretary issued a supplemental decision, in effect reversing his initial decision by waiving the applicable time limits in his regulations for the filing of the subject application and finding the matter in dispute to be grievable.

Council action (November 14, 1978). Since the union's petition for review of the Assistant Secretary's initial decision had been rendered moot by his supplemental decision, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 14, 1978

Mr. Louis P. Poulton
Associate General Counsel
International Association of Machinists
and Aerospace Workers
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

Mr. John F. McKune
Director of Personnel
Office of the Secretary
Department of the Interior
Washington, D.C. 20240

Re: Department of the Interior, Bureau of
Reclamation, Grand Coulee Project Office,
Grand Coulee, Washington, Assistant
Secretary Case No. 71-4234(GA), FLRC
No. 78A-16

Gentlemen:

Reference is made to the petition for review filed with the Council by the union, and the opposition filed by the agency, in the above-entitled case.

In the instant matter, the union, the Columbia Basin Trades Council, initially filed suit in the United States District Court for the District of Columbia against the Secretary of the Interior seeking to require the agency to arbitrate a grievance pursuant to the parties' collective bargaining agreement. The court dismissed the suit,*/ upon motion by the Government, for the union's failure to exhaust administrative remedies--specifically, the union's failure to refer the matter to the Assistant Secretary for a grievability or arbitrability decision as provided in section 6(a)(5) of the Order and to appeal any decision of the Assistant Secretary to the Council under section 4(c)(1) of the Order.

Following the court's dismissal of the suit, the union filed an Application for Decision on Grievability with the Assistant Secretary, who found the

*/ Columbia Basin Trades Council v. Kleppe, C.A. No. 76-1377 (D.D.C. Feb. 25, 1977).

Application to be procedurally defective since it was untimely filed. Consequently, the Application was dismissed. The union then filed a petition for review of the Assistant Secretary's decision with the Council contending, among other things, that the Application was timely filed when taking into consideration that the union's request was made after the court issued its decision dismissing the suit for failure to exhaust administrative remedies, in particular, the failure to refer the matter to the Assistant Secretary. Before determining whether to accept or deny the petition for review, the Council, on June 28, 1978, requested the Assistant Secretary to review and clarify his decision, stating:

Of significance, it appears from an examination of the record in the court proceedings that the Government, in raising the defense of failure to exhaust administrative remedies, failed to inform the court that a timely appeal could not have been filed with the Assistant Secretary prior to the filing of the suit. That is, the Government did not inform the court that the time limits established in the Assistant Secretary's regulations for seeking an administrative remedy pursuant to section 6(a)(5) of the Order had expired even before the union filed the suit and, consequently, no such administrative remedy was available to the union.

.

In view of the very special and unique circumstances in this case, namely the Government's failure to inform the court that the time limits for filing an appeal pursuant to your regulations had expired prior to the initiation of judicial proceedings, the Council has decided, prior to determining whether to accept or deny the instant petition for review, to request review and clarification of your decision. You are requested to make this review and clarification in light of the entire record before the court, including consideration of whether the time limits in your regulations should be waived in light of the entire record before the court, most particularly, in light of the Government's failure to inform the court fully as to the nature and impact of your procedural requirements.

The Council also stated in its request (copies of which were served upon the parties) that following the Assistant Secretary's "review and the issuance of such clarification, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from the date of service of such supplemental submissions to file respective responses thereto."

On September 20, 1978, the Assistant Secretary issued his supplemental decision herein, in which he stated that "[i]n view of the total circumstances in this case as described by the Council, and pursuant to Section 206.9(b) of the Assistant Secretary's Regulations, I am waiving the time limits established in Section 205.2(a) of the Regulations, and will address the merits of this case." The Assistant Secretary went on to

find that "the matter in dispute herein is grievable, as the subject matter of the grievance appears clearly to fall within . . . the parties' negotiated agreement. . . . Consequently, I direct the parties to proceed under the terms of their negotiated grievance procedure, and refer the dispute to their Joint Board of Adjustment."

Neither party has filed a supplemental submission with the Council following the issuance of the Assistant Secretary's decision as clarified. Since the Assistant Secretary has in effect reversed his initial decision in this case by waiving the time limits established in his regulations and finding the matter in dispute grievable, it is clear that the union's petition for review of the Assistant Secretary's initial dismissal of the case has been rendered moot. Accordingly, the Council denies the union's petition for review.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034. The Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge (ALJ) that the activity violated section 19(a)(1) and (6) of the Order in the circumstances of this case, that is, by unilaterally changing an established practice of permitting the union to utilize activity equipment and personnel to type grievances and other union communications. The Assistant Secretary thereupon issued a remedial order expressly limited to only those past practices which would not be inconsistent with section 20 of the Order. The agency appealed to the Council, contending that the Assistant Secretary's decision raised major policy issues. The agency also requested a stay.

Council action (December 1, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 1, 1978

Mr. David N. Reda
Staff Assistant to the
Regional Counsel
Internal Revenue Service
Southwest Region
Federal Office Building
1100 Commerce Street, Room 12D27
Dallas, Texas 75242

Re: U.S. Department of the Treasury,
Internal Revenue Service, New Orleans
District, New Orleans, Louisiana,
A/SLMR No. 1034, FLRC No. 78A-71

Dear Mr. Reda:

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

In this case, the National Treasury Employees Union (the union) filed an unfair labor practice complaint against the U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by unilaterally denying the union, contrary to past practice, the use of Government-owned typewriters and the assistance of activity clerical personnel in the preparation of grievances and other union papers "regardless of whether or not the employee utilizes the facilities while on annual leave or leave without pay or before the start of the workday or after the end of the workday or while on meal break or free time."

The Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge (ALJ) that the activity violated section 19(a)(1) and (6) of the Order in the circumstances of this case. Thus, it was found that the record established that the utilization by the union of typewriters and/or secretaries to type grievances and other union communications was permitted and in fact sanctioned by agency managers. Without any prior negotiations or consultation with the union, the agency unilaterally terminated the practice. It was concluded that, having granted the union the privilege of using activity equipment and personnel, the activity violated section 19(a)(1) and (6) of the Order by unilaterally changing this established practice. In so concluding, the Assistant Secretary expressly limited his remedial order to only those past practices

which would not be inconsistent with section 20 of the Order.^{1/} Thus his order directed the activity to cease and desist from "[u]nilaterally altering or changing the established past practice of allowing . . . the exclusive representative . . . the use of Activity typewriters, and the nonduty-time assistance of certain Activity personnel, for the purposes of typing grievances or other union communications incident to its representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities"

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision raises major policy issues as to (1) "[w]hether an agency supervisor without actual authority who allows the use of government property or equipment by union officials can create a past practice binding upon the agency," and (2) "[w]hether a past practice transforms non-mandatory subjects of bargaining into mandatory subjects which can only be altered through negotiations."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present any major policy issues, and you neither allege, nor does it appear, that his decision was arbitrary and capricious.

With respect to your allegation that the Assistant Secretary's decision raises a major policy issue concerning the extent to which a supervisor without actual authority can create a past practice binding upon agency management, in the Council's view no major policy issue is presented warranting review. Thus, your assertion in this regard constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual determination that such practice "was permitted and in fact sanctioned by agency managers."^{2/} Nor is a major policy issue presented,

^{1/} Section 20 provides, in pertinent part:

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned.

^{2/} Similarly, no basis for Council review is presented by your related assertion that provisions of law (E.O. 11222) and agency regulation (31 C.F.R. § 0.735.50) prohibiting the use of Federal property "for other than officially approved activities" rendered the practice in question unlawful, again noting the Assistant Secretary's finding that such practice had been permitted and in fact sanctioned by agency managers. In this connection, the Council notes that section 23 of the Order provides, in pertinent part:

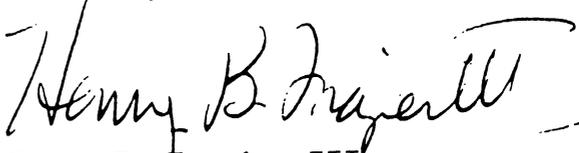
[E]ach agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes . . . policies with respect to the use of agency facilities by labor organizations

as alleged, concerning whether a past practice can transform a nonmandatory subject of bargaining into a mandatory subject. Thus, your appeal in this regard merely constitutes a disagreement with the Assistant Secretary's conclusion that the unilateral termination of a past practice violated section 19(a)(1) and (6) of the Order.

Since the Assistant Secretary's decision presents no major policy issues, and you neither allege, nor does it appear, that his decision was arbitrary and capricious, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision is also denied.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name and title.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. V. Robertson
NTEU

Bureau of Hearings and Appeals, Social Security Administration, Washington, D.C., Assistant Secretary Case No. 22-08587(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis had not been established for the section 19(a)(1), (2), (4) and (6) complaint filed by the union (Local 3615, American Federation of Government Employees, AFL-CIO) related to a memo from the activity to the union's Chief Steward. The Assistant Secretary thereupon denied the union's request for review seeking reversal of the RA's dismissal of the union's complaint. The union appealed to the Council, contending, in substance, that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 1, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 1, 1978

Mr. Albert B. Carrozza
Local 3615, American Federation of
Government Employees, AFL-CIO
Bureau of Hearings and Appeals
Social Security Administration
P.O. Box 147
Arlington, Virginia 22210

Re: Bureau of Hearings and Appeals, Social
Security Administration, Washington,
D.C., Assistant Secretary Case No.
22-08587(CA), FLRC No. 78A-102

Dear Mr. Carrozza:

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

In this case, as found by the Assistant Secretary, Local 3615, American Federation of Government Employees, AFL-CIO (the union) filed an unfair labor practice complaint against the Bureau of Hearings and Appeals, Social Security Administration, Washington, D.C. (the activity). The complaint alleged that the activity violated section 19(a)(1), (2), (4) and (6) of the Order by writing a "caustic and hostile memo to the [union's] Chief Steward" after the activity refused to grant him official time to discuss a grievance; that the memo contained several defaming remarks about the steward and was written clearly to intimidate and discourage him from participating in union activities; that the activity intentionally belittled the steward because he had previously testified at several unfair labor practice hearings and made adverse comments about certain management officials; and that the activity continually refused to meet with the steward on matters concerning unfair labor practices and grievances.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis for the complaint had not been established and that, consequently, further proceedings in the matter were unwarranted. Thus, in his view, there was insufficient evidence to support the allegation that the activity's memorandum violated section 19(a)(1), (2) and (4) of the Order. Further, as to the allegation that the activity's purported refusal to grant the steward official time to discuss a grievance violated section 19(a)(1) and (6) of the Order, the Assistant Secretary stated:

[I]t has been held previously that where, as here, the gravamen of the complaint involves the interpretation and application of the parties' negotiated agreement, absent evidence of a flagrant and deliberate breach of that agreement, the proper forum for resolution of the issue is the parties' negotiated grievance procedure. . . .

Under these circumstances, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the union, you allege as "grounds for review" that (1) "[t]he Assistant Secretary acted arbitrarily and capriciously in failing to remand this unfair labor practice as it involved a flagrant disregard for the rights of a union representative"; (2) "[t]he [union] was not permitted to participate in an arbitration matter because of the denial of official time"; and (3) the "evidence in this and other proceedings . . . show that the Activity had developed a flagrant and persistent pattern of denying official time to the union and its representatives."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious and you neither allege nor does it appear that the decision presents any major policy issues.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Thus, your contentions in this regard amount to essentially nothing more than mere disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint had been established, and therefore present no basis for Council review. With regard to your further allegations concerning the activity's denial of official time for the union to participate in arbitration matters, in the Council's view such contentions constitute essentially mere disagreement with the Assistant Secretary's finding that where, as here, the gravamen of the complaint involves the interpretation and application of the parties' agreement, the proper forum for resolving the issue is the parties' negotiated grievance procedure absent evidence of a flagrant and deliberate breach of that agreement.*/ Moreover, your appeal neither alleges, nor does it otherwise appear, that the Assistant Secretary's decision raises a major policy issue.

*/ In this regard, see the Council's comments in Request for Interpretations and Policy Statements, 3 FLRC 874, 878-879 [FLRC No. 75P-1 (May 23, 1975), Report No. 90]; and the Council's decision in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 4 FLRC 586, 592 [FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118], to the effect that while nothing in the Order prohibits an agency and a labor organization from negotiating provisions for the use of official time by union representatives for contract administration and other representational activities, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a right guaranteed by the Order and remediable under section 19 of the Order.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege nor does it appear that the decision presents any major policy issues, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

I. L. Becker
SSA

Department of the Air Force, 35th Combat Support Group, George Air Force Base, California, Assistant Secretary Case No. 72-7397(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis had not been established for the section 19(a)(1) and (6) complaint of the union (National Federation of Federal Employees), inasmuch as the evidence was insufficient to support the union's allegation that the activity had unilaterally changed a past practice with regard to the procedures followed by the Incentive Awards Committee. The Assistant Secretary therefore denied the union's request for review seeking reversal of the RA's dismissal of the union's complaint. The union appealed to the Council, asserting, in substance, that the Assistant Secretary's conclusion regarding the activity's alleged unilateral change in the past practice of its Incentive Awards Committee was, in effect, contrary to the evidence.

Council action (December 1, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the union neither alleged, nor did it appear, that the decision of the Assistant Secretary was either arbitrary and capricious or presented a major policy issue, and the union's assertions otherwise presented no basis for Council review. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 1, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of the Air Force, 35th Combat
Support Group, George Air Force Base,
California, Assistant Secretary Case No.
72-7397(CA), FLRC No. 78A-106

Dear Mr. Englehart:

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

According to the Assistant Secretary's decision, the National Federation of Federal Employees (the union) filed an unfair labor practice complaint alleging that the Department of the Air Force, 35th Combat Support Group, George Air Force Base, California (the activity) violated section 19(a)(1) and (6) of the Order when it unilaterally changed an existing practice by failing to require that each member of the activity's Incentive Awards Committee review the file of each employee nominated for an award prior to forwarding the Committee's recommendations to the awards approval authority. Upon investigation of the complaint, the Regional Administrator (RA) determined that at the Committee meeting in question the union had two representatives in attendance pursuant to a negotiated agreement provision, that at this meeting neither the union representatives nor any other member of the Committee objected to the procedure which was followed at any time, and that the union representatives voted to recommend approval of all the award candidates as a group. Finding that the union representatives thus "gave tacit approval to the procedure used in identifying the persons to be recommended for outstanding awards," the RA concluded that the activity had not unilaterally changed an established practice and, accordingly, dismissed the union's complaint. The Assistant Secretary, in agreement with the RA, found that no reasonable basis for the complaint had been established inasmuch as the evidence submitted was insufficient, in the Assistant Secretary's view, to support the union's allegation that the activity had changed a past practice with regard to the Committee's recommendation procedures. Accordingly, and noting in addition that "no member of the Committee was prevented from reviewing any file requested before a vote was

taken," the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition to the Council on behalf of the union, you "ask that the Assistant Secretary's decision in this case be reversed." In support of your petition you assert that the Assistant Secretary's conclusion regarding the activity's alleged unilateral change in the past practice of its Incentive Awards Committee is, in effect, contrary to the evidence and that his finding that no Committee member was prevented from reviewing any file before a vote was taken "misses the point."

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules. That is, you do not allege, and it does not appear, that the decision of the Assistant Secretary is either arbitrary and capricious or presents a major policy issue. Rather, your allegations as set forth above constitute, in essence, nothing more than disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint was established in the circumstances of this case, and therefore present no basis for Council review.

Since you neither allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious or raises a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. D. Franck
Air Force

Office of the Secretary, Headquarters, Department of Health, Education, and Welfare and Local 41, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator). The arbitrator, as part of his award, directed the agency to grant the grievant released time for three training courses to be selected by her. The Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exceptions which alleged that the disputed part of the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 150)

Council action (December 6, 1978). Based upon an interpretation rendered by the Civil Service Commission in response to the Council's request, the Council concluded that the portion of the arbitrator's award which directed that the grievant be granted released time for three courses to be selected by the grievant violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Office of the Secretary,
Headquarters, Department of
Health, Education, and Welfare

and

FLRC No. 78A-20

Local 41, American Federation
of Government Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the dispute in this matter arose when the Office of the Secretary, Headquarters, Department of Health, Education, and Welfare (the agency) refused to permit the grievant to take further training courses on agency time because it determined that as a result of courses and training taken under the agency's Upward Mobility Program, the grievant had met Civil Service Commission qualification standards for her targeted position of Operating Accountant GS-510-7. Thereafter the union filed a grievance on behalf of the grievant alleging that the agency had violated agency "regulations and [the] negotiated agreement concerning career development and training and leave authorization." The grievance ultimately went to arbitration, where the grievant alleged that the agency's determination that she was qualified for her targeted position was erroneous as evidenced by the fact that her application for the position had been rejected by other agencies on the basis that she was not qualified.

The Arbitrator's Award

The arbitrator, insofar as is pertinent herein, made the following award:^{1/}

4. Insofar as the grievance relates to the denial of the benefits of the Up[ward] Mobility Program:
 - a. The Agency should seek a written opinion from the Civil Service Commission as to whether the Grievant is qualified for the 5.10-5.25 Accounting positions.
 - b. Pending such opinion, the Grievant should be restored to the Up[ward] Mobility Program and be granted released time for three courses selected by her for the upcoming semester.

^{1/} Parts 1-3 of the award are not at issue before the Council.

Agency's Appeal to the Council

The agency filed a petition for review of part 4b of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review of the arbitrator's award insofar as it related to the agency's exceptions which alleged that part 4b of the award violates applicable law and appropriate regulation.^{2/} The parties filed briefs on the merits.^{3/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that part 4b of the award violates applicable law and appropriate regulation. Since the Civil Service Commission is authorized to issue regulations pertaining to the matters involved in this appeal, the Council requested from the Commission an interpretation of the relevant Commission regulations as they relate to part 4b of the arbitrator's award in this case.

The Commission replied in relevant part as follows:

In this case, the agency made a determination that as a result of job training and courses taken under the agency's Upward Mobility Program, the grievant had met the qualification requirements of her targeted position of Accountant, GS-510-7. Consequently, the agency refused the grievant's request to take further courses on official Government time. The grievant contested the agency's determination that she met qualification standards, citing as proof the findings of two agencies that she was not qualified for specific positions.

^{2/} The agency requested and the Council granted, pursuant to Section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

^{3/} The union filed its brief beyond the applicable time limits provided for in the Council's rules of procedure, and requested a waiver of the expired time limits in accordance with section 2411.45(f) of the rules. Without passing upon the question of whether the ground adverted to by the union in support of its waiver request constituted extraordinary circumstances within the meaning of section 2411.45(f) of the rules in the circumstances of this case, the Council considered the union's brief in reaching its decision herein.

In the part of his award that relates to the denial of the benefits of the Upward Mobility Program the arbitrator concluded that:

- a. The Agency should seek a written opinion from the Civil Service Commission as to whether the grievant is qualified for the 5.10-5.25 (sic) accounting positions, and that
- b. Pending such opinion, the grievant should be restored to the Upward Mobility Program and be granted released time for three courses selected by her for the upcoming semester.

In response to the agency's request for an opinion, the Civil Service Commission determined on February 16, 1978, that as of July 28, 1977, the grievant fully met the qualification standards for the position of Accountant, GS-510-7. You asked us whether that portion of the arbitrator's award which directs the activity to restore the grievant to the Upward Mobility Program conflicts with applicable law and regulations, as alleged by the agency in filing exceptions to the award.

Training of Government employees is authorized by statute. Chapter 41 of title 5, United States Code, which embodies the Government Employees Training Act of 1958 (72 Stat. 327), is the basic authorization for employee training throughout most of the Government. Section 717(b) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (86 Stat. 103; Public Law 92-261), requires the establishment of training and education programs (such as the one in which the grievant participated) designed to provide opportunity for employees to advance so as to perform to their highest potential. This provision of law does not change existing, or provide any new, training authority for organizations covered by chapter 41. The Civil Service Commission is authorized by chapter 41 to issue regulations governing various aspects of the law.

Training must be related to the performance of an employee's current or projected official duties in order to be lawfully paid for by an agency and/or undertaken on official time. Chapter 41 also requires (5 USC 4101(4), 4103, 4107(c), 4118) that a determination be made by competent authority that training courses are related to current or future duties within the employing agency. (Training for possible vacancies in other agencies is not authorized by chapter 41.)

In the instant case, the employee had received agency authorized training under the Upward Mobility Program, targeted toward a GS-510-7 position. Her continuing in the Upward Mobility Program was conditional on her not meeting the CSC Handbook X-118 qualification standards of her targeted position. The arbitrator determined that sufficient question existed as to the grievant's

qualifications that he directed the agency to seek clarification from the Commission. Pending resolution of that question, the arbitrator--competent authority--ordered the grievant restored to the Upward Mobility Program. There is nothing in the law or Commission regulations to prohibit such action by the arbitrator.

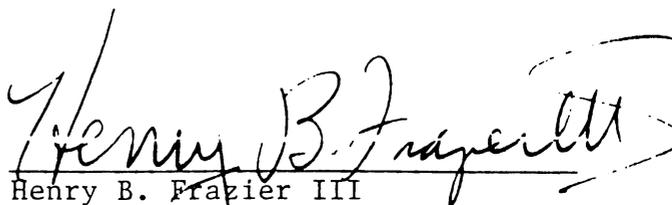
The arbitrator simultaneously ordered that (pending resolution of the question of qualifications) the grievant be allowed released time for three courses to be selected by her. As stated above, authorization of training on Government time or at Government expense must include a determination that the training courses are related to current or future duties within the employing agency. Unless the arbitrator (or the agency) made such a determination, the portion of the award granting released time is in violation of applicable law and regulation.

Based upon the foregoing interpretation of the Civil Service Commission, that there is nothing in law or regulation to prohibit the arbitrator from ordering that the grievant be restored to the Upward Mobility Program pending resolution by the Civil Service Commission of the question pertaining to her qualifications, the agency's exceptions in this regard must be denied. However as to that part of 4b which directs that the grievant be allowed released time for three courses selected by her, the Commission's interpretation indicates that authorization of training on government time or at government expense must include a determination by competent authority that the training courses are related to current or future duties within the employing agency. In this case no determination was made by either the arbitrator or the agency (indeed, the agency specifically challenged the relevance of the courses selected by the grievant to her targeted position) that the training courses are related to current or future duties within the agency. Therefore, we conclude that the portion of part 4b of the arbitrator's award which directs that the grievant be granted released time for three courses selected by her violates applicable law and regulation. Hence, the agency's exception in this regard must be sustained.

Conclusion

For the foregoing reasons, we conclude that the portion of part 4b of the arbitrator's award which directs that the grievant be granted released time for three courses to be selected by her violates applicable law and regulation. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion of part 4b of the award. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 6,, 1978

Department of the Army, United States Army Health Services Command, Kenner Army Hospital, DGSC Health Clinic, Richmond, Virginia, A/SLMR No. 1058. The Assistant Secretary dismissed the representation petition filed by the union (Local 2047, American Federation of Government Employees, AFL-CIO), having found that the proposed unit of three unrepresented employees at the activity was not appropriate for the purpose of exclusive recognition. The union appealed to the Council, contending, in substance, that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (December 6, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 6, 1978

Mr. Seaton B. Neal, Jr.
President, Local 2047
American Federation of Government
Employees, AFL-CIO
P.O. Box 3742
Richmond, Virginia 23234

Re: Department of the Army, United States
Army Health Services Command, Kenner
Army Hospital, DGSC Health Clinic,
Richmond, Virginia, A/SLMR No. 1058,
FLRC No. 78A-84

Dear Mr. Neal:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 2047 (the union) filed a petition (RO) seeking an election in a unit of three (3) nonprofessional employees assigned to the U.S. Army Health Clinic, Defense General Supply Center (DGSC Clinic), located in Richmond, Virginia. In the proceedings before the Assistant Secretary, the activity contended that the unit sought was not appropriate and would result in needless fragmentation. It further asserted that, because the DGSC Clinic is serviced by the Fort Lee reservation (Virginia) and is a satellite installation of the Kenner Army Hospital where actual bargaining authority resides, the employees in the petitioned for unit should be included in the established unit of all nonprofessional employees at Fort Lee, exclusively represented by AFGE Local 1178. The Assistant Secretary found that since 1970 AFGE Local 1178 has represented certain employees physically or administratively assigned to Fort Lee, including the Medical Department Activity at Fort Lee (MEDDAC), one department of which is the Kenner Army Hospital. He further found that Kenner provides medical care for all personnel located on the Fort Lee reservation and at certain other locations by operating nine clinics, one of which is the DGSC Clinic located 23 miles from Fort Lee; and that the three employees in the proposed unit at the DGSC Clinic are directed by Kenner, receive personnel services from the same Personnel Department as all other Kenner employees, and are treated as Kenner employees in all respects except that they are included in a different competitive area for reduction-in-force purposes.

Based upon the foregoing circumstances, the Assistant Secretary dismissed the union's RO petition, finding that the proposed unit was not appropriate for the purpose of exclusive recognition. In this regard, he stated:

[I]t is noted that while the petitioned for unit may contain all the unrepresented nonprofessional employees administratively assigned to Kenner, the record does not establish that the claimed employees would constitute a residual unit of all the unrepresented employees of the components of the exclusively recognized unit currently represented by AFGE Local 1178, . . . or that it is a residual unit of MEDDAC, Fort Lee, which is one of the components of the exclusively recognized unit that includes Kenner. As the employees in the claimed unit share similar job classifications, skills and duties with the employees in the exclusively recognized unit at Fort Lee, and are subject to the same personnel policies, personnel practices and labor relations policies as the employees in AFGE Local 1178's unit, established by the Fort Lee Civilian Personnel Office, I find that the petitioned for unit would not promote effective dealings and efficiency of agency operations but, rather, would lead to artificial fragmentation, and that the establishment of such a unit would be inconsistent with the objective as expressed by the Federal Labor Relations Council of promoting more comprehensive bargaining unit structures in the Federal Sector. [Footnote omitted.]

In your petition for review on behalf of the union, you allege as to the Assistant Secretary's decision that all elements of the case were not considered, that the decision was arbitrary and capricious and that the union is raising as a major policy issue:

Can management (agency) obtain an already existing unit, especially a unit placed in its present position due to deliberate actions merely by filing a position statement after the Union had filed a petition and management had made no effort, prior to that time, to include the unit in question in its bargaining unit?

In this latter regard, you appear to assert that since agency management had at one time deliberately agreed to exclude all activities outside the confines of the Fort Lee reservation from the unit exclusively represented by AFGE Local 1178 and thereafter had never sought to include the DGSC Clinic employees therein, it should not now be permitted to oppose the instant petition and prevent such employees from being separately represented by the union.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules of procedure. That is, the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues.

Thus, as to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary

acted without reasonable justification in reaching his decision. Your contentions in this regard, including the contention regarding the elements considered, constitute essentially mere disagreement with the Assistant Secretary's conclusion, based upon the entire record in the subject case, that the petitioned for unit of three employees is not appropriate for the purpose of exclusive recognition under section 10(b) of the Order, and therefore provide no basis for Council review. Nor, in the Council's opinion, is a major policy issue presented warranting review. In this regard, your appeal fails to contain any evidence that the Assistant Secretary's decision was in any manner inconsistent with applicable Council precedent or the purposes and policies of the Order.*/

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

C. E. Thomas
Army

*/ See, e.g., Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 687, 5 FLRC 631 [FLRC No. 76A-97 (July 20, 1977), Report No. 131], wherein the Council stated:

. . . it is important to remember that the Order reflects a dual policy: not only to reduce existing fragmentation through unit consolidations but also to prevent further fragmentation through new appropriate unit determinations, thereby promoting a more comprehensive bargaining unit structure. The Council acknowledges that this dual policy may have the effect in some situations of forestalling the representation of some employees; however, these employees need not be denied the opportunity for representation altogether. Rather, as is customary in cases such as here involved, representation can be achieved by expanding organizational efforts to include those employees who would constitute an appropriate unit. [Footnote omitted.]

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, A/SLMR No. 1070. The Assistant Secretary found that the activity violated section 19(a)(1) and (6) of the Order by failing to afford the union an opportunity to be represented at a particular meeting with a group of employees at the regional office; and ordered that a remedial notice be posted in all of the activity's facilities. The agency appealed to the Council, contending that the Assistant Secretary's decision with respect to the posting remedy was arbitrary and capricious and presented a major policy issue. The agency also requested a stay.

Council action (December 6, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 6, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Department of the Treasury, Bureau
of Alcohol, Tobacco and Firearms,
Midwest Region, Chicago, Illinois,
A/SLMR No. 1070, FLRC No. 78A-90

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, National Treasury Employees Union and NTEU Chapter 94 (the union) filed an unfair labor practice complaint alleging that the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois (the activity) had violated section 19(a)(1) and (6) of the Order by holding meetings with a group of employees at which contemplated changes in personnel policies and practices and other matters affecting working conditions were discussed, thereby bypassing the union. The Administrative Law Judge (ALJ) found that at one meeting at the Midwest Regional Office in Chicago the matter of the impact of the proposed changes on working conditions or personnel practices and policies did arise, and the activity's failure to give the union an opportunity to be represented violated the union's right under section 10(e) of the Order in violation of section 19(a)(6) and, derivatively, of the employees' right under section 19(a)(1). With respect to the posting of a remedial notice to employees, the ALJ recommended that the posting be ordered at the Midwest Regional Office of the Bureau in Chicago. The Assistant Secretary adopted the ALJ's findings, conclusions, and recommendations, but stated the following with respect to posting:

Under the circumstances herein, I have ordered that the remedial notices to employees be posted at all of the [activity's] facilities in the Midwest Region. The violation to be remedied in this matter involves an improper failure by the [activity] to notify the Chapter President of the [union], NTEU Chapter 94, of a formal discussion and afford the latter an opportunity to be represented at such discussion. In view of the nature of the violation and the Administrative Law Judge's undisputed finding that NTEU Chapter 94

acts for the NTEU in the Midwest Region of the Bureau of Alcohol, Tobacco and Firearms, I find that a posting coextensive with NTEU Chapter 94's jurisdiction in the Midwest Region is warranted.

In your petition for review on behalf of the agency, you do not take exception to the Assistant Secretary's finding that the agency committed an unfair labor practice, but rather you assert that the posting remedy ordered by the Assistant Secretary is arbitrary and capricious and raises a major policy issue. Specifically, you allege that the Assistant Secretary's decision with respect to posting was arbitrary and capricious because it contradicted, without reason, prior determinations rendered by the Assistant Secretary under similar circumstances and because it lacked a rational connection to the facts. You further allege that the decision raises a major policy issue as to "[w]hether the scope of the remedial posting in an unfair labor practice should be defined by the internal organization of the complainant or the situs of the wrong."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his formulation of a remedial order in the circumstances of this case. In this regard, your appeal fails to establish that there is any clear, unexplained inconsistency between this decision and previously published decisions of the Assistant Secretary. Moreover, your assertion constitutes, in essence, mere disagreement with the Assistant Secretary's determination that "[i]n view of the nature of the violation and the Administrative Law Judge's undisputed finding that NTEU Chapter 94 acts for the NTEU in the Midwest Region of the Bureau of Alcohol, Tobacco and Firearms, I find that a posting coextensive with NTEU Chapter 94's jurisdiction in the Midwest Region is warranted." As to the alleged major policy issue regarding the scope of a remedial posting in an unfair labor practice, in the Council's opinion no major policy issue is presented warranting review. In this regard, as the Council has consistently stated, section 6(b) of the Order confers considerable discretion on the Assistant Secretary, and his remedial directives therefore will not be reviewed by the Council unless it appears that the Assistant Secretary has exceeded the scope of his authority under section 6(b) or has acted arbitrarily and capriciously or in a manner inconsistent with the purposes and policies of the Order.*/ Your appeal herein fails to contain any support for the foregoing contentions but

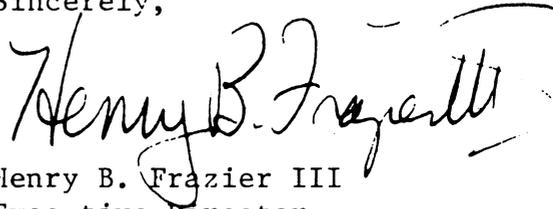
*/ See, e.g., Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784, FLRC No. 77A-22 (July 29, 1977), Report No. 132; U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122, and cases cited therein.

rather, as previously stated, constitutes mere disagreement with the Assistant Secretary's determination that, in view of the nature of the violation herein, a posting coextensive with NTEU Chapter 94's jurisdiction was warranted.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. Hersh
NTEU

Department of the Navy, Navy Accounting and Finance Center, Washington, D.C., Assistant Secretary Case No. 22-08545(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA) and based upon the RA's reasoning, found that further proceedings were unwarranted on the section 19(a)(1), (2), (4) and (6) complaint filed by the individual complainant (Cleveland B. Sparrow, Sr.), inasmuch as a reasonable basis for the complaint had not been established. The Assistant Secretary therefore denied Mr. Sparrow's request for review seeking reversal of the RA's dismissal of the complaint. Mr. Sparrow appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 6, 1978). The Council held that Mr. Sparrow's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Mr. Sparrow neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied Mr. Sparrow's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 6, 1978

Mr. Cleveland B. Sparrow, Sr.
845 52nd Street, NE.
Washington, D.C. 20019

Re: Department of the Navy, Navy Accounting
and Finance Center, Washington, D.C.,
Assistant Secretary Case No. 22-08545(CA),
FLRC No. 78A-99

Dear Mr. Sparrow:

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

This case arose when you filed an unfair labor practice complaint against the Department of the Navy, Navy Accounting and Finance Center (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(1), (2), (4), and (6) of the Order (1) by removing you from your position at the activity because you engaged in activity protected by the Order and by failing to promptly and impartially deal with five prior unfair labor practice charges that you filed; (2) by interfering with an organizing and membership drive conducted by a labor organization in which you were an officer; (3) by failing to respond to an unfair labor practice charge; and (4) by failing to provide guidelines for implementing the Order as required by section 23 of the Order.

The Regional Administrator (RA), following an investigation of such allegations, found, in pertinent part, as to (1) that the Assistant Secretary was precluded by section 19(d) of the Order from considering whether your removal was predicated on improper consideration of your having engaged in activity protected by the Order, because issues related to your removal could properly be raised under an appeals procedure. With respect to allegation (2), the RA found this portion of the complaint procedurally defective under section 203.2 of the Assistant Secretary's Regulations because both the precomplaint charge and the instant complaint were filed more than 6 and 9 months, respectively, after the occurrence of the alleged unfair labor practice. As to (3), the RA concluded that a reasonable basis for this portion of the complaint had not been established. Finally, he concluded as to (4) that failure to comply with the requirements of section 23 of the Order did not constitute an unfair labor practice cognizable under section 19 of the Order.

The Assistant Secretary, in agreement with the RA, and based on his reasoning, found that further proceedings were unwarranted inasmuch as a reasonable basis for the complaint had not been established. Accordingly, and noting that "[a]ny request for documents within the exclusive control of the Department of the Navy should be directed to the proper management official within that Department," he denied your request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review and supplement thereto which you filed with the Council, you allege that the Assistant Secretary's decision "was arbitrary, capricious and obviously inconsistent with the purposes of [the Order]." In this regard, you contend that the Assistant Secretary knew that the Navy violated the Freedom of Information Act [FOIA] but failed to correct the violations, and was "in flagrant violations of Statute 5. U.S.C., 556" in that the whole record has not been considered.^{1/} You further assert, in essence, that the Assistant Secretary's decision violates your constitutional right to due process and to a full and fair hearing. You also contend that the activity repeatedly harassed and intimidated you in reprisal for your having "filed a discrimination complaint," served as "vice-president of AFGE Local #1," and "initiated an exclusive recognition drive."^{2/}

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue.

1/ In your appeal, you also request that the Secretary of Defense and the Secretary of the Navy provide you with all documents containing information material to you in accordance with the FOIA and the Privacy Act. However, as the Assistant Secretary noted in his denial of your request for review of the RA's dismissal of your complaint, a request for documents within the exclusive control of the Department of Defense or Navy should be directed to the proper management official therein. Such procedures are provided for under the appropriate Acts.

2/ You also assert in your appeal that the failure of AFGE's National Office to provide you with effective union representation, although the local approved and requested it, constituted fraud. However, it does not appear from the documents filed with your appeal to the Council herein either that AFGE was a charged party or that such issue was presented as part of the unfair labor practice complaint in the proceedings before the Assistant Secretary. Accordingly, this issue provides no basis for Council review. In this regard, section 2411.51 of the Council's rules provides, in pertinent part:

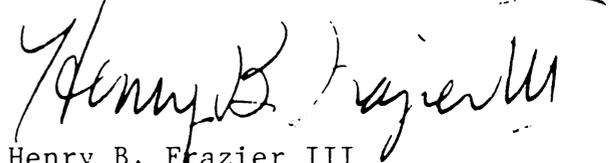
Consistent with the scope of review set forth in this part, the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in finding that no reasonable basis had been established for the complaint herein. More particularly, your appeal fails to contain any basis to support the assertion that the Assistant Secretary's decision was contrary to law or denied you due process and a fair hearing in the circumstances of this case. Rather, such contentions constitute essentially mere disagreement with the Assistant Secretary's findings, pursuant to his regulations, that further proceedings were unwarranted inasmuch as no reasonable basis for your complaint had been established. Similarly, your assertion that the activity harassed and intimidated you for exercising rights protected by the Order again constitutes no more than disagreement with the Assistant Secretary's finding that no reasonable basis for your complaint had been established. Finally, you neither assert, nor does it appear, that the Assistant Secretary's decision presents any major policy issues warranting Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that the decision raises a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

H. L. Zipperian
Navy

Social Security Administration, Bureau of Hearings and Appeals, Washington, D.C., Assistant Secretary Case No. 22-08856(CA). The Assistant Secretary denied the request for review filed by the union (American Federation of Government Employees, Local 3615, AFL-CIO) seeking reversal of the Regional Administrator's dismissal of the union's section 19(a)(1) and (6) complaint. The union appealed to the Council, contending, in substance, that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 6, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 6, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration, Bureau
of Hearings and Appeals, Washington, D.C.,
Assistant Secretary Case No. 22-08856(CA),
FLRC No. 73A-127

Dear Mr. King:

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

In this case the American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed a complaint against the Social Security Administration, Bureau of Hearings and Appeals, Washington, D.C. (the activity) alleging that the activity violated section 19(a)(1) and (6) of the Order by refusing to notify the union of a conference held by an agency grievance examiner to discuss the grievance of an employee. Additionally, it was claimed that the activity unilaterally changed a past practice of granting official time to union observers who attend formal meetings held pursuant to the activity grievance procedure.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that the evidence was insufficient to establish a reasonable basis for the instant complaint and that, consequently, further proceedings in the matter were unwarranted. In so concluding, the Assistant Secretary stated:

[C]ontrary to your contention that the [union] was not given notice of the grievance meeting in question, the evidence indicates that notice was indeed given the [union's] Chief Steward, who was designated by and represented the grievant herein throughout. Moreover, the evidence establishes that the procedure which gave rise to the meeting in question was an agency grievance procedure, not established pursuant to a negotiated agreement. Thus, even if the Respondent agency improperly failed to apply its own grievance procedure, such a failure, standing alone, would not automatically be violative of the Order. In this regard, it has been held previously that

the policing and enforcing of agency grievance procedures are essentially the responsibility of the agency involved and of the U.S. Civil Service Commission.

Accordingly, and "noting also the absence of any evidence of discriminatory motivation or disparity of treatment based on the grievant's union membership," the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that: (1) the Assistant Secretary acted arbitrarily and capriciously in refusing to remand this unfair labor practice for a hearing as it involved disputed material facts and concerned the activity's flagrant and persistent failure to grant official time to a union officer to attend an agency grievance as an observer; (2) the activity intentionally and wilfully refused to follow past practice in granting official time to elected union officials, and there was an adequate showing of anti-union animus in the case; and (3) there is a pattern of intentionally interfering with the rights of union officers, and this interference tends to discourage participation in union activities.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents any major policy issues.

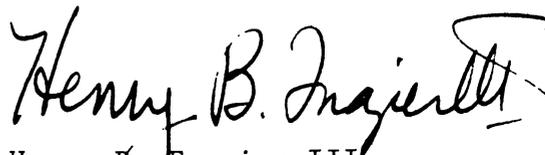
As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the instant case. In this regard, your contention that the Assistant Secretary should have "remand[ed] this unfair labor practice for a hearing as it involved disputed material facts" constitutes essentially mere disagreement with the Assistant Secretary's determination, pursuant to his regulations, that no reasonable basis for the union's complaint had been established. Similarly, your related contentions regarding the activity's anti-union animus and interference with the rights of union officers also constitute mere disagreement with the Assistant Secretary's finding that the evidence is insufficient to establish a reasonable basis for the complaint. In this regard, the Council notes that the Assistant Secretary, in denying the union's request for review seeking reversal of the RA's dismissal of the complaint, also found "the absence of any evidence of discriminatory motivation or disparity of treatment based on the grievant's union membership." Thus, in the Council's view, your contentions in this regard present no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents any major policy issues, your appeal fails to meet

the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Toner
SSA

Lake Central Region, Bureau of Outdoor Recreation, Department of the Interior, Federal Building, Ann Arbor, Michigan, A/SLMR No. 1032. The Assistant Secretary, upon a representation petition filed by the union (American Federation of Government Employees, AFL-CIO), concluded that the secretaries to two of the activity's Assistant Regional Directors and an administrative technician should be included in the unit found appropriate. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (December 13, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 13, 1978

Mr. Gerald J. Rachelson
Labor Relations Specialist
Personnel Management Division
Department of the Interior
Washington, D.C. 20240

Re: Lake Central Region, Bureau of Outdoor
Recreation, Department of the Interior,
Federal Building, Ann Arbor, Michigan,
A/SLMR No. 1032, FLRC No. 78A-89

Dear Mr. Rachelson:

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

In this case, the American Federation of Government Employees, AFL-CIO (the union) sought an election in a unit of all employees of the Lake Central Region, Bureau of Outdoor Recreation, Department of the Interior (the activity), which the parties stipulated and the Assistant Secretary found was appropriate for the purpose of exclusive recognition. However, as relevant herein, the activity and the union were in dispute as to whether the secretaries to the two Assistant Regional Directors and an administrative technician should be excluded from the unit, the activity contending that they should be excluded and the union contending that they should be included. The Assistant Secretary concluded that the secretaries to the two Assistant Regional Directors should be included in the unit. In this regard he stated:

Under the particular circumstances of this case, I find that the evidence regarding the current duties of the secretaries in question is insufficient to establish that they presently act in a confidential capacity to persons who formulate and effectuate management policies for the Activity in the field of labor relations. In my view, their designation as part of the management team on the day before the hearing and the amendment of their position description by the Activity [on the day of the hearing] amounts only to speculation as to the scope of their future duties. Moreover, the evidence is insufficient to establish that their inclusion in the unit would work a hardship on the Activity with respect to the typing and coordination of labor relations matters, given the parties' agreement as to the exclusion of the Regional Director's secretary from the unit as a confidential employee.

He further concluded, contrary to the activity's contentions, that the administrative technician should not be excluded from the unit either as a confidential employee or as an employee engaged in Federal personnel work in other than a purely clerical capacity. Thus, in this regard he stated:

[I] find that the evidence regarding the current duties of the employee in question is insufficient to establish that she serves in a confidential capacity to a person engaged in the formulation and effectuation of management policies in the field of labor relations. In this regard, . . . I view her recent designation as part of the "management team" [on the day before the hearing] and the amendment to her position description [on the day of the hearing] to be speculative rather than probative with respect to an appraisal of her current duties. Also, the record does not establish that the employee in question is engaged in Federal personnel work in other than a purely clerical capacity. Thus, the record reveals that in maintaining the local personnel and administrative files and in typing personnel actions, the performance of her duties is clerical in nature and requires little independent judgment on her part. [Footnote omitted.]

Accordingly, the Assistant Secretary included the disputed employees in the unit found appropriate and directed an election therein. (The union was thereafter certified as exclusive representative following a secret ballot election.)

In your petition for review on behalf of the activity, you allege that the Assistant Secretary acted arbitrarily and capriciously by ignoring, misstating, and failing to understand evidence in the record; by "failing to realize a conflict of position"; and by "prejudicially precluding the activity from presenting evidence as to a conflict of position." You further allege, in summary, that the Assistant Secretary's decision raises major policy issues as to (1) "what constitutes [management's] labor relations responsibilities as it pertains to a confidential employee when the union is organizing but not presently recognized," contending in essence that it is improperly restrictive to require the existence of an incumbent union and a negotiated agreement before an individual may qualify as a confidential employee; (2) "what constitutes . . . performing [F]ederal personnel work in other than a purely clerical capacity"; (3) "[d]oes the Assistant Secretary [have the authority to] determine how operations will be conducted or [to] make decisions within the framework of management operational decisions," contending in effect that the Assistant Secretary improperly determined that there should be only one confidential secretary for the entire region, thus requiring the activity to assign all confidential duties to the Regional Director's secretary; and (4) "whether management has the right to develop a management team and have such team assignments recognized by the Assistant Secretary in a unit determination case," contending that the Assistant Secretary refused to recognize management's lawful right to organize itself to deal with the Executive Order obligations.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious in his consideration and treatment of the evidence in this case, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the particular circumstances presented. Rather, your contentions to the contrary constitute nothing more than disagreement with the Assistant Secretary's factual determination, that the secretaries and the administrative technician should be included in the unit because the evidence was insufficient to show that they met the respective tests for exclusion as established in previously published decisions of the Assistant Secretary, and therefore present no basis for Council review. Moreover, as to your assertion that the Assistant Secretary prejudicially precluded the activity from presenting certain evidence, your appeal fails to set forth any relevant evidence which the Assistant Secretary did not consider in reaching his decision.

As to your first alleged major policy issue, as the Council has previously stated in denying review of similar contentions,^{*/} the Assistant Secretary relied upon his previously established test for determining confidentiality of employees as reflected in his case precedents--i.e., those who assist and act in confidential capacities to persons who formulate and effectuate management policies in the field of labor relations, and you do not contend that such definition of "confidential employee" is inconsistent either with the purposes of the Order or with other applicable authority. (See Labor-Management Relations in the Federal Service (1975), at 30.) Rather, your appeal herein essentially takes issue only with the manner in which the Assistant Secretary applied the definition to the facts of this case, and therefore does not raise a major policy issue warranting review.

With respect to your second alleged major policy issue as to what constitutes performing Federal personnel work in other than a purely clerical capacity, in the Council's view no basis for review is thereby presented. Thus, your contentions in this regard constitute essentially mere disagreement with the Assistant Secretary's conclusion, based upon the record evidence, that "in maintaining the local personnel and administrative files and in typing personnel actions, the performance of [the administrative technician's] duties is clerical in nature and requires little

*/ Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Boston Region, District and Branch Offices, A/SLMR No. 562, 4 FLRC 209 [FLRC No. 75A-108 (Mar. 22, 1976), Report No. 101]; U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, A/SLMR No. 428, 3 FLRC 270 [FLRC No. 74A-73 (May 21, 1975), Report No. 70].

independent judgment on her part." Nor are major policy issues presented, as alleged, concerning the Assistant Secretary's authority to determine how management's operations will be conducted or whether management has the right to develop its own team and have the Assistant Secretary recognize it as such in a unit determination case. Again, both of the foregoing allegations constitute no more than disagreement with the Assistant Secretary's factual determination that the activity designated the employees in question as part of the management team and amended their position descriptions just before the hearing herein, as well as disagreement with his conclusion, based upon the record evidence, that the employees should be included in the unit found appropriate.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. J. Mahannah
AFGE

Department of Transportation, Federal Aviation Administration, A/SLMR No. 1073. The Assistant Secretary found, in pertinent part, that section 19(d) of the Order precluded further processing of the section 19(a)(1) and (6) complaint filed by the union (National Association of Air Traffic Specialists), and ordered that the complaint be dismissed. The union appealed to the Council, contending that the Assistant Secretary's decision raised a major policy issue.

Council action (December 15, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and the union neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 15, 1978

Mr. Lawrence C. Cushing
President and Executive Director
National Association of Air Traffic
Specialists
Suite 415, Wheaton Plaza North
Wheaton, Maryland 20902

Re: Department of Transportation, Federal
Aviation Administration, A/SLMR No. 1073
FLRC No. 78A-86

Dear Mr. Cushing:

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

In this case, as found by the Assistant Secretary, the National Association of Air Traffic Specialists (the union) holds national exclusive recognition for a unit of Air Traffic Control Specialists employed in over 300 Flight Service Stations of the Department of Transportation, Federal Aviation Administration (the agency). The union filed an unfair labor practice complaint alleging that the agency violated section 19(a)(1) and (6) of the Order by failing to consult, confer or negotiate with certain union-designated facility representatives (FACREPS). In this regard, the union contended that, under the terms of the parties' negotiated agreement, it had the right to designate a facility representative at each Flight Service Station. The agency took the position, however, that it had no contractual obligation to consult with FACREPS who were not employed at the particular facility to which they had been designated. The Assistant Secretary found, in pertinent part, that section 19(d) of the Order precluded further processing of the instant complaint and ordered that it be dismissed. In so concluding, the Assistant Secretary stated:

The record reveals that several days prior to the filing of the pre-complaint charge in this matter the [union's] Central Region Director filed a contractual grievance with the [agency's] Central Region Director regarding the latter's refusal to consult with a unit employee who had been designated as the facility representative at Flight Service Stations at which he was not employed. The grievance was denied on both procedural grounds and on its merits. Thereafter, the [union] requested arbitration. The [agency] replied that as the grievance and the pre-complaint charge raised the same

issue, the [union] should indicate which procedure it wished to pursue. The [union] took the position that as the grievance presented a "regional issue" while the unfair labor practice charge raised a "national issue," it was not estopped from pursuing both actions. However, it decided to defer its arbitration request pending the disposition of the unfair labor practice charge.

In my view, as the issue raised in the grievance was the same as that raised in the unfair labor practice charge, i.e., the alleged failure to consult, confer or negotiate with certain of the [union's] facility representatives, and as the [union's] actions indicated that it actively pursued the grievance, even to the point of requesting arbitration, I find that [s]ection 19(d) of the Order precludes further processing of the complaint and shall order that it be dismissed on this basis. With respect to the [union's] contention that the grievance raised a "regional issue" while the charge dealt with a "national issue," it was noted that the issues raised in both forums are identical, and, as the parties are operating under a nationwide agreement, any resolution of the grievance would be applicable to the nationwide unit. [Footnotes omitted.]

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision presents a major policy issue in that it is inconsistent with the purposes and policies of the Order. In this regard, you contend, in summary, that the "issue in the instant case had neither been raised under any recognized grievance procedure agreed to by the parties nor treated on its merits." You further contend that the union originally may have had two avenues (a facility or national grievance on one hand and an unfair labor practice complaint on the other), but the union only availed itself of one. Therefore, you assert that the Assistant Secretary has dismissed the complaint in a manner inconsistent with the purposes of the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present a major policy issue and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

As to your allegations that the Assistant Secretary's decision presents a major policy issue, in the Council's view, no basis for review is presented. Thus, your assertions constitute mere disagreement with the Assistant Secretary's finding that the issues raised in the grievance were the same as those raised in the unfair labor practice charge, and that the union's actions indicated that it actively pursued the grievance; therefore your assertions present no major policy issue warranting Council review. Moreover, your appeal neither alleges nor does it appear that the Assistant Secretary acted without reasonable justification in reaching his decision.

Since the Assistant Secretary's decision does not present any major policy issues and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III". The signature is written in dark ink and is positioned above the typed name.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. B. Thoman
FAA

Army and Air Force Exchange Service, Sheppard Air Force Base, Texas, A/SLMR No. 1063. The Assistant Secretary, upon a representation petition filed by the union (Local 3718, American Federation of Government Employees, AFL-CIO), found that a unit of 13 employees assigned to two motion picture theaters at the activity was not appropriate for the purpose of exclusive recognition. The union appealed to the Council, contending, in effect, that the Assistant Secretary's decision was arbitrary and capricious or presented a major policy issue.

Council action (December 19, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Ms. Jimmie F. Griffith
National Representative
American Federation of Government
Employees, AFL-CIO
3141 Cliff oak Drive
Dallas, Texas 75233

Re: Army and Air Force Exchange Service,
Sheppard Air Force Base, Texas, A/SLMR
No. 1063, FLRC No. 78A-91

Dear Ms. Griffith:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, AFL-CIO, Local 3718 (the union), which represents a unit of certain employees of the Army and Air Force Exchange Service, Sheppard Air Force Base, Texas (the activity), filed a petition (RO) seeking an election in a unit of 13 employees assigned to the 2 motion picture theaters at the activity.

The Assistant Secretary found that the unit sought by the union was not appropriate for the purpose of exclusive recognition, as "the claimed employees do not share a community of interest which is separate and apart from other represented and certain other unrepresented employees of the [a]ctivity." In so finding, the Assistant Secretary stated:

[T]he evidence establishes that the claimed employees have certain common skills which are interchangeable and are intermingled in various degrees with employees throughout the [a]ctivity, who are both represented and unrepresented. Further, all personnel policies and practices are administered by the [a]ctivity's personnel section and the [activity] Manager is authorized to approve all personnel actions. Moreover, in my view, the proposed unit, which contains certain employees at two motion picture theaters on the base, could not reasonably be expected to promote effective dealings and efficiency of agency operations but, rather, would lead to the artificial fragmentation of the [a]ctivity's unrepresented employees.

Accordingly, the Assistant Secretary ordered that the union's RO petition be dismissed.

In your petition for review filed on behalf of the union, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue inasmuch as you "fail to understand the basis for the decision." In this regard you assert essentially that the Assistant Secretary should have included the theater employees in the established unit inasmuch as the evidence shows that "there is a community of interest," "there is no fragmentation," and "there are no unrepresented employees employed at [the activity] other than the [t]heater employees."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, it does not appear that the decision of the Assistant Secretary is arbitrary and capricious or presents any major policy issues. Thus, your contentions as set forth above all constitute, in essence, mere disagreement with the Assistant Secretary's factual determinations, based upon "the entire record in the subject case," that the theater employees interchange with employees throughout the activity who are both represented and unrepresented, and that the proposed unit "would lead to the artificial fragmentation of the activity's unrepresented employees."

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure, and therefore your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. W. DeMik
AAFES

Williams Air Force Base and American Federation of Government Employees (AFL-CIO), Local 1776 (Daughton, Arbitrator). The arbitrator found that the activity did not violate the collective bargaining agreement when it revised the position description of certain of its employees, resulting in the reclassification of the positions of those employees as WG-8 rather than WG-10. Therefore, the arbitrator denied the grievance. The union filed exceptions to the award with the Council alleging that (1) the award violated the intent of the Order; (2) the award violated the agreement; and (3) the award was inconsistent with the award of another arbitrator in an earlier case.

Council action (December 19, 1978). As to (1), the Council held that the union's petition did not contain sufficient facts and circumstances to support its allegation. As to (2) and (3), the Council held that the exceptions provided no basis for acceptance of the union's petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Stanley Lubin
McKendree and Lubin
Suite 1410, Financial Center
3343 N. Central Avenue
Phoenix, Arizona 85012

Re: Williams Air Force Base and American
Federation of Government Employees
(AFL-CIO), Local 1776 (Daughton, Arbitrator),
FLRC No. 78A-93

Dear Mr. Lubin:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator, the dispute in this matter arose in January 1977 when aircraft mechanics employed in the Transient Alert Branch at Williams Air Force Base were assigned duties relating to base aircraft. Prior to this time, the duties of these aircraft mechanics were limited to transient aircraft. A grievance was filed challenging management's authority to assign duties not included in the position description. The union withdrew the grievance after a position classification specialist was assigned to review the existing position description covering the employees in question.

As a result of the review, a meeting was held with the union in April 1977, at which time the president of the union Local became aware of a possible downgrading of the employees from their current WG-10 classification to WG-8. In June 1977 a revised position description was issued at the WG-8 level, and in July 1977 the employees were notified of their reclassification. The union then filed the grievance in this case and it was ultimately submitted to arbitration.

The issue, as stated by the arbitrator, was:

Did the Employer violate the collective bargaining agreement between the parties when it revised the position description of certain employees in the Transient Alert Branch, which revision, when approved by headquarters, Air Training Command, on June 29, 1977, resulted in the reclassification of such employees as WG-8 rather than their previous classification of WG-10? If so, what is the appropriate remedy for such employees?

The arbitrator went on to state:

The central issue before the arbitrator is whether the employer was required under the collective bargaining agreement to consult with the Union prior to the revision of the position description which resulted in a reclassification of the position from WG-10 to WG-8. The resolution of this issue depends upon the interpretation of article 16 section B of the collective bargaining agreement which reads:

Management actions which result in position classification changes affecting working conditions of employees will be subject to consultation with Local representatives prior to implementation.

The arbitrator denied the grievance. In doing so, he referred to the agreement provision at issue and concluded:

In the opinion of the arbitrator, the key words insofar as this particular fact situation is concerned are "affecting working conditions of employees." There is no question that management actions resulted in a position classification change. Whether that change affected working conditions of employees is another matter, and, although the Union contends that any change in position description necessarily includes a change in working conditions, the testimony in this case indicates that no change in working conditions occurred. Essentially, the result of the position description change was a reduction in duties of the affected employees without any change in the conditions under which the work was performed. Under these circumstances the arbitrator cannot accept the argument that any position description changes necessarily affects working conditions.

Although a fuller exchange between the employer and the Union during the process of the change in the position classification might have enhanced labor relations at Williams Air Force Base, the arbitrator cannot conclude under the facts presented on this grievance that the employer failed to fulfill a duty owed [sic] the Union under the collective bargaining agreement.

The union seeks Council review of the award on the basis of the three exceptions discussed below. The agency did not file an opposition.

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

In its first exception, the union refers to the arbitrator's interpretation of the words "working conditions" in Article 16, Section B, and asserts that his award violates the intent of the Order, particularly section 19(a)(2) and (6)*.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. However, the Council is of the opinion that the petition in this case does not contain sufficient facts and circumstances to support the allegation that the award violates the Order. The union's first exception is similar to an exception made in Indiana Army Ammunition Plant, Charleston, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator), 3 FLRC 777, 782 [FLRC No. 75A-84 (Nov. 28, 1975), Report No. 92]. In that case the Council, in finding that such an exception does not provide a basis for acceptance of a petition for review, stated:

In its first exception, the union contends that the arbitrator's award violates section 19(a)(1) and (6) of the Order. . . . The union's first exception, on its face, appears to allege that the award violates the Order. Nevertheless, when the substance of this exception and its supporting contentions is considered, the union is, in effect, alleging that the activity's conduct violated section 19(a)(1) and (6) of the Order and that the arbitrator reached an incorrect result in his interpretation of the collective bargaining agreement since he failed to find such action to be in violation of the agreement. However, the Council has previously held that a contention that an arbitrator has failed to decide, during the course of a grievance arbitration hearing, whether an unfair labor practice has been committed under section 19 of the Order does not state a ground upon which the Council will accept a petition for review of an arbitration award. Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85

*/ Section 19(a) of the Order provides in pertinent part:

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

.
(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

.
(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

(Aug. 14, 1975), Report No. 81 and Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76.

Similarly, the union's first exception in the instant case provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

The union's second exception is that the arbitrator's award violates the agreement. The Council has consistently held that this exception does not provide a basis for acceptance of a petition for review, because the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. E.g., Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), 3 FLRC 547 [FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82]; Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), 3 FLRC 569 [FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82]. Thus, the union's second exception also provides no basis for acceptance of the union's petition for review.

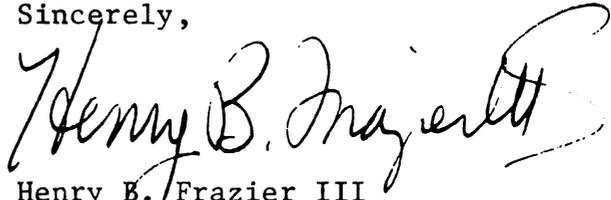
The union's third exception is that the arbitrator's award is inconsistent with the award of another arbitrator in an earlier case. Thus, the union contends that the award must be vacated because the arbitrator, contrary to another arbitrator in an earlier case, found that a classification action resulting in demotion without changes in duties does not constitute a change in working conditions.

This exception does not state a ground upon which the Council has previously granted review of an arbitration award. Moreover, the union fails to cite, and our own research has failed to disclose, any private sector precedent which would indicate that this is a ground upon which challenges to arbitration awards are sustained by courts in the private sector. Thus, the union's third exception establishes no basis for acceptance of its petition under section 2411.32 of the Council's rules. Moreover, the exception is, in essence, premised on the union's agreement with an arbitrator's reasoning leading to an award in an earlier case and disagreement with the arbitrator's reasoning leading to the award in the instant case. The Council has previously held that "it is the award rather than the conclusion or specific reasoning employed by the arbitrator that is subject to challenge." Federal Aviation Administration, St. Louis Air Traffic Control Tower and Professional Air Traffic Controllers Organization (Moore, Arbitrator), 5 FLRC 940,942 [FLRC No. 77A-95 (Nov. 30, 1977), Report No. 139]. Thus, this exception provides no basis for acceptance of the union's petition for review.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III". The signature is written in black ink and is positioned above the typed name and title.

Henry B. Frazier III
Executive Director

cc: J. W. Clark
USAF

Department of Commerce, Patent and Trademark Office and POPA (Daly, Arbitrator). The arbitrator concluded that the activity did not violate the parties' agreement by issuing a memorandum containing instructions concerning quality step increases and special achievement awards; and therefore dismissed the grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon two exceptions, contending (1) that the award did not draw its essence from the parties' agreement and (2) that the award violated the Federal Personnel Manual and the Performance Rating Act of 1950.

Council action (December 19, 1978). The Council held that the union's exceptions were not supported by the facts and circumstances described in the petition. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements of section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Alan P. Douglas, President
Patent Office Professional Association
6506 Elnido Street
McLean, Virginia 22101

Re: Department of Commerce, Patent and Trademark
Office and POPA (Daly, Arbitrator), FLRC
No. 78A-95

Dear Mr. Douglas:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator, the Patent and Trademark Office (the activity) and the Patent Office Professional Association (the union) entered into their present labor agreement on December 13, 1972, which included the following provision:

Article VII, Section 2:

The parties agree that a full evaluation of the performance of a member of the Unit may include, but not in any way be solely limited to, quantitative criteria. The quantitative criteria for any employee must be equitable, reasonably attainable and take into consideration work-related problems such as the technology and search problems encountered, as well as recognitions and qualifications of the employee involved. The employee shall be consulted before the quantitative criteria are established or changed.

On July 9, 1976, the parties agreed to amend their agreement by adding, in part, the following provisions to Article VII, Section 2:

Insofar as purely quantitative criteria are concerned, an individual's goal shall have the following meaning and effect:

1. An achievement of 110% of a goal over a period of twelve consecutive months shall be deemed prima facie evidence of sufficiently outstanding performance on the factor of production to warrant the grant of a quality step increase, except where the individual has

been promoted during the twelve month period, in which case the twelve month period runs from the date of promotion.

2. An achievement of 110% of a goal over a period of six consecutive months shall be deemed prima facie evidence of sufficiently exceptional performance on the factor of production to warrant the grant of a special achievement award, except where the individual has been promoted during the six month period, in which case the six month period runs from the date of the promotion.

On July 14, 1976, the Deputy Assistant Commissioner for Patents issued a memorandum containing instructions for implementation of the amendment to the agreement. The memorandum stated, with respect to the amendment provisions at issue, that "'prima facie evidence' on the factor of production to warrant the grant of 'a quality step increase' is 110% achievement for twelve months." The memorandum then stated that the awarding of any additional quality step increases (QSI's) after the first one in any grade would continue to be governed by a 1972 memorandum which had established standards of 117.5% achievement for the second QSI, 122.5% achievement for the third QSI, and progressively higher achievements for QSI's thereafter.

The union filed a grievance, contending that the memorandum of instructions violated the negotiated agreement by applying ascending standards to QSI's and special achievement awards (SAA's), rather than using the single standard of 110% set forth in the amendment.

The arbitrator stated that the issue in the case, though differently worded by the two parties, primarily concerned whether or not the activity's requirements for the granting of QSI or SAA awards subsequent to the first award are in accordance with the provisions of Article VII, Section 2, of the labor agreement, the amendment thereto, and other pertinent documents and regulations.

The arbitrator concluded:

[S]ince the language of the Labor Agreement Amendment lacks specificity re the implementation of its provisions and since the . . . testimony [at the arbitration hearing] offer[ed] no evidence that a change in the existing policy of implementation was considered, discussed or negotiated, it must necessarily be concluded that the [activity] has not violated Article VII, Section 2 of the Labor Agreement, the Amendment thereto, or other pertinent documents. Accordingly, the Arbitrator must rule in favor of the [activity] and dismiss the [union's] grievance.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to

the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the union contends that the award does not draw its essence from the collective bargaining agreement. In support of this exception, the union asserts that the arbitrator's award "totally fails to give any effect to the agreed-upon, signed contract language."

The Council will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that the award does not draw its essence from the negotiated agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), 3 FLRC 475 [FLRC No. 74A-38 (July 30, 1975), Report No. 79]. However, the Council is of the opinion that the union's exception is not supported by the facts and circumstances described in the petition. Thus, the union has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon the arbitrator's interpretation and application of the parties' agreement, "is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling," or that the award "could not in any rational way be derived from the agreement," or that it "evidences a manifest disregard of the agreement," or "on its face represents an implausible interpretation thereof." Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), 5 FLRC 230 [FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123]. Rather, the union, by arguing that the arbitrator's award ignores the express language of the parties' agreement, appears to be disagreeing with the arbitrator's interpretation and application of the agreement provision at issue and his reasoning in connection therewith. The Council has consistently held that the interpretation of contract provisions and, hence, resolution of the grievance, is a matter to be left to the arbitrator's judgment. E.g., Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), 4 FLRC 93 [FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96]. Furthermore, it is the arbitrator's award rather than his conclusion or specific reasoning that is subject to challenge. Frances N. Kenny and National Weather Service (Lubow, Arbitrator), 3 FLRC 713 [FLRC No. 75A-30 (Nov. 14, 1975), Report No. 89]. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the award violates the requirements of the Federal Personnel Manual (FPM) and the Performance Rating Act of 1950. In support of this exception, the union quotes FPM chapter 451, subchapter 3, section 3-3(b)(9) as providing:

. . . normally, when an Outstanding rating is approved, a quality step increase will be granted in all cases

The union contends that the effect of the above-cited FPM provision is to establish that an outstanding performance rating is, as a form of

recognition, superior to a quality step increase, and that since ascending standards of performance may not be applied to an outstanding rating, then "it follows that those same ascending standards of performance may not be applied to . . . the quality step increase."

The Council will grant a petition for review of an arbitrator's award on the ground that the award violates appropriate regulation, including the Federal Personnel Manual. However, in this case, the Council is of the opinion that the union has failed to provide sufficient facts and circumstances to support its exception. In this regard, the Council notes that the FPM provision cited by the union in support of its exception has been superseded and that section 3-3(b)(9), as revised April 1, 1977, now reads, in relevant part:

[T]he granting of a quality increase and the assigning of an outstanding rating are two separate actions, and an employee may meet the criteria for a quality increase, but not for an outstanding rating. A quality increase is not automatically granted when an outstanding rating is assigned; however, because an employee who receives an outstanding rating has met a higher criterion in total performance than is required for a quality increase, it is important for the employee's supervisor to consider the appropriateness of granting a quality increase when an outstanding rating is given. [Emphasis added.]

Thus, the revised language of section 3-3(b)(9) on its face does not provide support for the union's second exception. Moreover, nothing in the cited FPM provision deals with the application of ascending standards of performance to quality step increases as contended by the union in its petition. Therefore, the union has failed to provide facts and circumstances to warrant Council review on the ground that the arbitrator's award violates the FPM. As to the union's related assertion that the award violates the Performance Rating Act of 1950, the union makes only a bare assertion in this regard and presents no facts and circumstances in support thereof. Therefore, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: G. Wahlert
PTO

General Services Administration, National Archives and Records Service,
A/SLMR No. 1075. The Assistant Secretary, upon a CU petition filed by
the activity seeking to exclude the employees of the National Archives
Trust Fund Board (the Board) from a unit of all activity employees repre-
sented by Local 2578, American Federation of Government Employees, AFL-CIO,
found, in pertinent part, that the Board was "an agency" within the meaning
of section 2(a) of the Order; that the employees of the Board were
"employees" within the meaning of section 2(b) of the Order; and that the
unit involved should be clarified to reflect that the employees of the
Board had been and remained within such unit. The agency appealed to the
Council, contending that the Assistant Secretary's decision was arbitrary
and capricious and presented major policy issues. The agency also requested
a stay of the Assistant Secretary's decision.

Council action (December 19, 1978). The Council held that the agency's
petition for review did not meet the requirements of section 2411.12 of
the Council's rules of procedure; that is, the decision of the Assistant
Secretary did not appear arbitrary and capricious or present any major
policy issues. Accordingly, the Council denied the agency's petition for
review. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Ms. Janice K. Mendenhall
Director of Administration
General Services Administration
Washington, D.C. 20405

Re: General Services Administration,
National Archives and Records Service,
A/SLMR No. 1075, FLRC No. 78A-98

Dear Ms. Mendenhall:

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

According to the Assistant Secretary's decision, the General Services Administration, National Archives and Records Service (the activity) filed a unit-clarification (CU) petition seeking to exclude employees of the National Archives Trust Fund Board (the Board) from a unit of all activity employees represented by the American Federation of Government Employees, Local 2578, AFL-CIO (the union). In its petition the activity asserted that the Assistant Secretary had no jurisdiction over the Board because it was not an "agency" within the meaning of section 2(a) of the Order^{1/} and because employees of the Board were

1/ Section 2(a) provides:

"Agency" means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office[.]

5 U.S.C. § 104 provides:

For the purpose of this title, "independent establishment" means--

(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and

(2) the General Accounting Office.

not covered by the definition of "employee" set forth in section 2(b) of the Order.^{2/} However, the activity and the union stipulated that if the Assistant Secretary did assert jurisdiction over the Board and its employees those employees should be included in the unit found appropriate in this case, since they shared a community of interest with the activity's employees and their inclusion would promote effective dealings and the efficiency of agency operations.

After considering at length the history, organization and function of the Board, as well as the working conditions of Board employees, the Assistant Secretary concluded as follows:

Under all the foregoing circumstances, I conclude that the National Archives Trust Fund Board is an independent establishment within the meaning of Section 104 of title 5 of the United States Code. Accordingly, I find it to be an "agency" within the meaning of section 2(a) of the Order whose mission and business activities are functionally related to the [activity]. In this regard, it is noted particularly that the statutory Chairman of the Board is the Archivist of the United States, an official appointed by the Administrator of the GSA, and, further, that the Secretary of the Board, who is its chief administrative officer, is the Executive Director of the [activity]. Moreover, in my judgment, a finding that the Board is an "agency" within the meaning of Section 2(a) of the Order for the purpose of collective bargaining in no way conflicts with the Congressional concern that the Board accept and administer gifts, or bequests of money, securities or other personal property for the benefit of the [activity], or interferes with the Board's ability to collect and administer funds from the National Archives establishment or various Presidential libraries as part of the National Archives Trust Fund.

I find also that Board employees are "employees" within the meaning of Section 2(b) of the Order as they are employees of an "agency" as defined in the Order. In this regard, it is noted that the determination of whether employees, such as those involved herein, are subject to the jurisdiction of the Order, is dependent on whether they are employees of an "agency", rather than on their method of appointment, pay, or coverage under Civil Service laws and regulations.^{7/}

^{7/} See Action, 2 A/SLMR 495, A/SLMR No. 207 (1972), and National Science Foundation, 3 A/SLMR 564, A/SLMR No. 316 (1973).

^{2/} Section 2(b) provides:

"Employee" means an employee of an agency and an employee of a non-appropriated fund instrumentality of the United States but does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order[.]

I find further that the unit herein should be clarified to reflect that the employees of the Board have been and remain within the exclusively recognized unit.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary because, in summary, there is no legal rationale or case precedent for the decision and the Assistant Secretary has substituted his judgment for that of Congress--whose intent it was to establish the Board as an entity outside the control of the executive branch. You additionally allege that the decision presents the following major policy issues:

1. Does the Assistant Secretary possess the authority under Executive Order 11491, as amended, to subject to his jurisdiction the Management officials of a Federal entity that was not established by Congress in the Executive branch of the Federal Government--as indicated by the control over such entity that the Congress evidently sought to preserve for itself, and withhold from officials of both [the activity] and its parent agency, GSA[?]
2. [Is there] any justification for the Assistant Secretary to extend the coverage of the Executive Order to the employees of such an entity, when the very authority under which the President issued such Order derived expressly from the Civil Service laws in Title 5 of the U.S. Code (see Preamble of the Order), and the employees in question are appointed without regard to all Civil Service laws (44 U.S.C. Section 2301)[?]
3. [Is it] compatible with the usual powers of a trustee for these Board members to be directed by the Assistant Secretary that henceforth the personnel policies and practices and matters affecting working conditions of Board employees--for whom the Board is the exclusive employer--must be fixed by the process of collective bargaining, regardless of any stipulations appertaining thereto that may be incorporated in the trust instruments to which the trustees are obligated to adhere?

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in reaching his decision that the existing exclusively recognized unit herein should be clarified to reflect the inclusion of Board employees. Rather, your contentions that he acted without a reasonable basis and contrary to the intent of Congress constitute, in essence, mere disagreement with the Assistant Secretary's findings that the Board and its employees are properly subject

to the provisions of the Order and that employees of the Board "have been and remain within the exclusively recognized unit."

Further, it does not appear that any major policy issue is presented by the Assistant Secretary's decision. Thus, with particular regard to your first alleged major policy issue concerning Congressional control of the Board, the Council notes that the Congress recently enacted and the President signed into law a provision setting the membership of the Board as follows:^{3/}

[T]he first sentence of section 2301 of title 44, United States Code, is amended to read as follows: "The National Archives Trust Fund Board shall consist of the Archivist of the United States, as Chairman, and the Secretary of the Treasury and the Chairman of the National Endowment for the Humanities."

While retaining the Archivist of the United States (the head of the activity) as Chairman, this amendment serves to modify the remaining membership of the Board by replacing the Chairmen of the House Committee on Government Operations and the former Senate Committee on Post Office and Civil Service with officials appointed by the President. In this respect, the Council notes that the accompanying report of the House Committee on Government Operations states that "[t]he purpose of this bill is to modify the membership of the National Archives Trust Fund Board, replacing congressional members with Executive branch officials," and that "[t]he committee concludes that the appropriateness of congressional participation on such a board is highly questionable under the constitutional doctrine of separation of powers."^{4/} The accompanying report of the Senate Committee on Governmental Affairs states that "[t]hese replacements are designed to remove any possible conflict of interest which might arise by having congressional representatives serve on executive branch boards and/or committees."^{5/}

As to your second alleged major policy issue relating to your contention, in effect, that Board employees are excluded from coverage under the Order

^{3/} Act of Sept. 22, 1973, Pub. L. No. 95-379, 92 Stat. 724. While this act was approved after the submissions of the agency and the union in this case had been filed with the Council, neither party subsequently brought the act to the attention of the Council.

^{4/} H.R. Rep. No. 1408, 95th Cong., 2nd Sess. (1978).

^{5/} S. Rep. No. 1161, 95th Cong., 2nd Sess. (1978), reprinted in [1978] U.S. Code Cong. & Ad. News 3216. The Senate report additionally notes that "[t]he legislation was introduced at the request of the Administrator of General Services Administration [sic] and has the support of the administration." Id. at 2, [1978] U.S. Code Cong. & Ad. News at 3217.

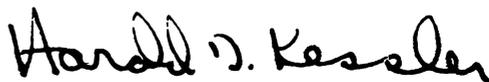
because they are appointed without regard to civil service laws, the Council is of the opinion that your appeal presents no basis for review. In this regard, your appeal provides no basis to support a conclusion that the Assistant Secretary's determination that the Board employees are not excluded is inconsistent with the purposes and policies of the Order. That is, your appeal does not show how the Assistant Secretary's determination that the coverage of Board employees under the Order "is dependent on whether they are employees of an 'agency', rather than on their method of appointment, pay, or coverage under Civil Service laws and regulations" is inconsistent with either section 2(b) or any other provision of the Order.

Finally, no basis for Council review is presented by your third alleged major policy issue regarding alleged conflicts between the Assistant Secretary's decision and the Board's fiduciary obligations as a trustee. In this regard the Council notes that the Assistant Secretary expressly considered this issue and determined that the designation of the Board as an "agency" for the purpose of collective bargaining under the Order in no way conflicts with the powers and obligations of the Board as established by Congress. Further, your appeal neither demonstrates that such conflict would occur in the future nor, despite the Assistant Secretary's finding that Board employees have previously been included in the appropriate unit in this case, does it demonstrate or even assert that any such conflict has occurred in the past. Your contention as to the effect of the Assistant Secretary's decision in this regard thus constitutes merely speculative disagreement with the conclusion reached by the Assistant Secretary and thus does not present a major policy issue warranting Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied. Likewise, your request for a stay of the Assistant Secretary's decision is denied.

By the Council:

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

W. J. Stone
AFGE

Division of Military and Naval Affairs, State of New York, New York State National Guard, Assistant Secretary Case No. 30-7896(GA). The Assistant Secretary, upon an Application for Decision on Grievability filed by the union (Association of Civilian Technicians, Inc., New York State Council), concluded, contrary to the Acting Regional Administrator (ARA), that as to one of four employee grievants, the grievance at issue (concerning the filling of a vacancy) was grievable under the parties' agreement. Accordingly, the Assistant Secretary granted the union's request for review seeking reversal of the ARA's Report and Findings on Grievability as to that employee. The activity appealed to the Council contending that the Assistant Secretary's decision was arbitrary and capricious. However, the activity thereafter informed the Council that, although it maintained that the employee's grievance "should not be viable," he would be provided with the specific remedy he sought.

Council action (December 19, 1978). The Council held that by providing the employee with the specific remedy he sought, the activity had in effect rendered moot the dispute involved in the appeal. Accordingly, the Council denied the activity's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Colonel Clarence C. Wallace
Technician Personnel Officer
State of New York
Division of Military and
Naval Affairs
Public Security Building, State Campus
Albany, New York 12226

Re: Division of Military and Naval Affairs, State
of New York, New York State National Guard,
Assistant Secretary Case No. 30-7896(GA),
FLRC No. 78A-109

Dear Colonel Wallace:

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

In this case, according to the Acting Regional Administrator's (ARA's) Report and Findings on Grievability, four employees in a unit of technicians exclusively represented by the Association of Civilian Technicians, Inc., New York State Council (the union) filed grievances concerning the filling of an announced vacancy. When the Division of Military and Naval Affairs, State of New York, New York State National Guard (the activity) rejected the grievances as nongrievable, the employees filed an Application for Decision on Grievability to determine whether their grievances were on a matter subject to the parties' negotiated grievance procedure. The ARA concluded that three of the grievances were covered under the negotiated grievance procedure but that the fourth was nongrievable. The Assistant Secretary thereafter granted the union's request for review seeking reversal of the ARA's Report and Findings on Grievability as to the fourth employee, concluding, contrary to the ARA, that the grievance, as to that employee, "involves a matter that is grievable under the terms of the parties' negotiated grievance procedure" in the particular circumstances of the case.

In your petition for review on behalf of the activity, you contend that the Assistant Secretary's reversal of the ARA's Report and Findings on Grievability on the grievance of the fourth employee was arbitrary and capricious. Thereafter, you informed the Council as follows:

The remedy sought by [the fourth employee] is being made available by the all encompassing resolution rendered to other grievants in

the instant case. Upon execution, this resolution will provide [the fourth employee] with the specific remedy he sought and should conclude the matter.

Although your letter further states that the activity "still maintains that [the fourth employee's] grievance should not be viable," the Council is of the opinion that, by providing that employee with "the specific remedy he sought," the activity has in effect rendered moot the dispute involved in your appeal from the Assistant Secretary's decision. Cf. National Federation of Federal Employees, Local 1641 and Veterans Administration Hospital, Spokane, Washington, 5 FLRC 878 [FLRC No. 77A-74 (Aug. 31, 1977), Report No. 137].

Accordingly, for the foregoing reason, and without passing upon the decision of the Assistant Secretary, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. F. Burt
ACT

D. Brenaman
NGB

Department of the Navy, Naval Ordnance Station, Louisville, Kentucky,
Assistant Secretary Case No. 41-5681(CA). The Assistant Secretary denied the request for review filed by the union (Local Lodge 830, International Association of Machinists and Aerospace Workers), seeking reversal of the Regional Administrator's dismissal of the union's section 19(a)(1) and (6) complaint which alleged that the activity had refused to implement an arbitration award. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue.

Council action (December 19, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. James W. Seidl
Business Representative
District Lodge 21
International Association of Machinists
and Aerospace Workers, AFL-CIO
Iroquois Office Building, Room 138
5330 South Third Street
Louisville, Kentucky 40214

Re: Department of the Navy, Naval Ordnance
Station, Louisville, Kentucky, Assistant
Secretary Case No. 41-5681(CA), FLRC
No. 78A-112

Dear Mr. Seidl:

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

In this case, the International Association of Machinists and Aerospace Workers, Local Lodge 830 (the union) filed an unfair labor practice complaint against the Department of the Navy, Naval Ordnance Station, Louisville, Kentucky (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order. At issue was an alleged refusal to implement an arbitration award wherein the arbitrator had upheld the union's grievance that the activity had violated the parties' negotiated agreement by establishing a WG-5 register for a particular position while seven previously qualified and evaluated employees remained on an existing WG-6 register.

The Regional Administrator (RA), following an investigation of such allegation, found that a reasonable basis for the complaint had not been established. Thus, he found that the union's request for a meeting with the activity to implement the arbitrator's award was held a few days later; that the parties were in disagreement as to the interpretation of the award; that the activity proposed a joint submission to the arbitrator for clarification and made the same request to the union by letter the following day; that the union filed an unfair labor practice charge against the activity and then rejected the activity's request for joint submission to the arbitrator as "untimely" in light of the pending unfair labor practice charge; that the activity thereafter submitted a unilateral request for clarification to the arbitrator, who advised the activity that absent both parties' consent, no clarification of the award could be rendered; and that the union then filed the instant complaint. On the basis of the foregoing, the RA concluded:

[The activity's] conduct with respect to the award does not constitute a refusal to implement that award. In this regard I note that following the issuance of the award . . . [the activity] promptly acceded to [the union's] request for a meeting to implement the award. There is no evidence that [the union] requested or [the activity] refused to meet on any prior date to implement the award. Moreover, neither the award nor the collective bargaining agreement specifies a time limit for implementation of an Arbitration Award. Investigation discloses that during the meeting [to discuss the award and its implementation] the parties were unable to agree on a plan to implement the award because of differing interpretations over the intent of the award.

During the meeting and in a subsequent letter [the activity] sought [the union's] cooperation in efforts to clarify the award. [The union's] refusal to join [the activity] in the request to the Arbitrator for clarification of the award resulted in the Arbitrator's refusal to clarify. Under the circumstances, I conclude that a reasonable basis for complaint has not been established. I am, therefore, dismissing the complaint in its entirety.

The Assistant Secretary, in agreement with the RA, and based on his reasoning, found that a reasonable basis for the complaint had not been established, and that further proceedings were unwarranted. Accordingly, he denied the union's request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is "both arbitrary and capricious and represents major policy." With regard to the arbitrary and capricious allegation, you assert that "the [RA's] decision to dismiss [the complaint] was based on erroneous conclusions of fact," in that the union "raised serious questions concerning the facts established by the Area Administrator during the independent investigation by the Compliance Officer," and "these questions of fact were never resolved by the [RA] nor the Assistant Secretary's Office." You further allege that the Assistant Secretary's determination herein that neither the arbitrator's award nor the collective bargaining agreement specified a time limit for implementing the award raises a major policy issue in that such determination is "inconsistent and not in line with the common law established by the Council." In this regard you assert that the Council, in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, 3 FLRC 188 [FLRC No. 74A-46 (Mar. 20, 1975), Report No. 67], and Department of Transportation, Federal Aviation Administration, A/SLMR No. 517, 3 FLRC 613 [FLRC No. 75A-66 (Sept. 23, 1975), Report No. 84], "held it to be an unfair labor practice . . . [if] the party failed to file an appeal to the Council or to request a stay pending an appeal."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12

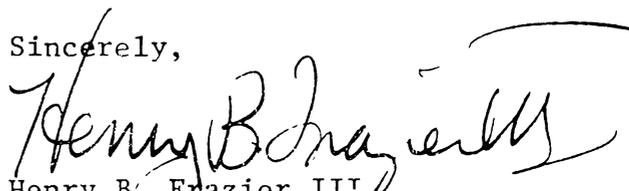
of the Council's rules; that is, the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your assertion that the Assistant Secretary's dismissal of the complaint was based on erroneous conclusions of fact which were never resolved by the RA or the Assistant Secretary is, in essence, nothing more than disagreement with the Assistant Secretary's determination, pursuant to his regulations, that no reasonable basis for the complaint had been established, and therefore provides no basis for Council review. Similarly, as to your further allegation that the Assistant Secretary's decision herein was inconsistent with the Council's prior decisions in Aberdeen and Federal Aviation Administration (supra p. 2), in the Council's opinion no major policy issue is presented warranting review. Your contentions in this regard are, in essence, a disagreement with the Assistant Secretary's finding that there was not a refusal to implement an award but, rather, differing interpretations over the intent of the award.*

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR M. Arkin
Labor Navy

*/ In this connection, the Council notes that an attempt to obtain clarification of an arbitrator's award through joint submission by the parties is consistent with the Council's disposition of cases where the arbitrator's award in question was ambiguous. In such cases, the Council has directed the parties to jointly submit such award to the arbitrator for clarification. See, e.g., Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), 4 FLRC 143 [74A-64 (Mar. 3, 1976), Report No. 100]; American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), 2 FLRC 82 [FLRC No. 73A-4 (Feb. 12, 1974), Report No. 49]; Internal Revenue Service, Chicago District Office and National Treasury Employees Union Chapter 10 (Mueller, Arbitrator), 5 FLRC 485 [FLRC No. 76A-150 (June 7, 1977), Report No. 128].

Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-73 (Foster, Arbitrator). The arbitrator concluded that the activity did not violate the parties' agreement in the promotion action at issue, and denied the grievance. The union filed exceptions to the arbitrator's award with the Council, alleging that the award violated agency regulations and the Federal Personnel Manual.

Council action (December 19, 1978). The Council held that the union's petition did not provide the necessary facts and circumstances to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Richard G. Remmes
Attorney
National Association of
Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Re: Federal Aviation Administration,
Eastern Region and National
Association of Government Employees,
Local R2-73 (Foster, Arbitrator),
FLRC No. 78A-118

Dear Mr. Remmes:

The Council has carefully considered the union's petition for review of the arbitrator's award filed in the above-entitled case.

According to the arbitrator's award, the dispute in this matter concerned the procedures the Federal Aviation Administration, Eastern Region (the activity), followed in announcing and filling a certain vacancy under its merit promotion plan. On November 21, 1977, the activity posted an announcement for a position of Electronic Technician, GS-856-13. A few days later, the promotion announcement was amended to describe the vacancy as "Electronic Technician or Electronic Engineer." The original and amended announcements both had opening dates of November 21, 1977, and closing dates of December 12, 1977. The following statements were included:

No application will be accepted after the closing date.

Candidates who fail to submit the required forms will not be considered.

On December 23, 1977, a list of six eligible candidates (including the three grievants in this case) was forwarded to the selecting official. In early January 1978, Mr. Otis Turney, an Electronic Engineer, requested that he be considered for the position, stating that he had not applied before the closing date of the announcement because he had been away from his desk in the regional office on detail and also had been on vacation.

The personnel official handling the matter ascertained that no selection had yet been made for the position, that Mr. Turney met the qualifications for the position, and that, in his estimation, it appeared that Mr. Turney came within the procedures for dealing with employees who are absent when promotion announcements are issued. He therefore accepted Mr. Turney's application and added Mr. Turney's name to an amended promotion certificate which he forwarded to the selecting official. None of the six candidates on the original certificate of eligibles was removed from the list.

The selecting official testified at the arbitration hearing that he considered all the names on the list and consulted all the candidates' records, and determined that Mr. Turney was the best qualified for the job. Mr. Turney was selected and the other candidates were advised of their nonselection.

Three of the nonselected candidates filed grievances, charging the activity with violation of merit promotion plan procedures in the selection of Mr. Turney. The matter was ultimately submitted to arbitration.

The arbitrator stated that the parties agreed to the following statement of the issue:

Whether the Employer violated Article XII, Sections 1 and 5 of the Agreement^{1/} regarding promotion number FPP-AEA-78-60 (AF-10)?
If so, what should the remedy be? [Footnote added.]

The arbitrator denied the grievance, concluding that the activity did not violate the above-cited agreement provision in the promotion action

1/ According to the arbitrator, the agreement provides, in part:

ARTICLE XII - PROMOTIONS

Section 1

The Employer and the Union agree that promotions will be made in full conformance with the FAA Merit Promotion Plan.

Section 5

The Employer agrees that selection for promotion to a position within the unit shall be among the best qualified persons available, without discrimination or personal bias.

at issue. The arbitrator stated that the evidence failed to establish that Mr. Turney's selection was based on personal bias or discrimination. He found that Mr. Turney's name was added to the promotion list after the close of the announcement and before a selection was made in proper application of the Absent Employee criteria. He also found that the evidence did not support the allegations of preselection or allegations that all other employees were not properly considered for the position.

The union requests that the Council accept its petition for review of the arbitrator's award based upon the exceptions discussed below. The activity did not file an opposition to the petition.

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

In its first exception to the award, the union contends that the award "violates regulations of the Federal Aviation Administration Eastern Region Merit Promotion Plan." In support of this exception the union states that "the Arbitrator failed to make a finding of fact that the selected employee was temporarily absent on detail, on leave, or attending training courses so that the selected employee's name could be added to the merit promotion certificate" and "[t]he violation of the FAA regulation was a violation of the negotiated agreement."

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates appropriate regulations. In this case, however, the Council is of the opinion that the union's petition does not contain a sufficient description of facts and circumstances to support its exception. In this regard the Council notes that the parties submitted to the arbitrator the question of whether the activity had violated Article XII, section 1, of the agreement which incorporates by reference "the FAA Merit Promotion Plan" and that the arbitrator had before him, considered, and in effect applied the relevant provisions of that plan in arriving at his award. The Council has previously held that under such circumstances the interpretation and application of an agency regulation by the arbitrator may not be challenged in an appeal of the award to the Council. Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), 3 FLRC 451 [FLRC No. 74A-88 (July 24, 1975), Report No. 78]. Further, in asserting "that the Arbitrator failed to

make a finding of fact that the selected employee was temporarily absent on detail, on leave, or attending training courses," thereby constituting a violation of FAA regulations, the union is in effect merely disagreeing with the arbitrator's reasoning and conclusion in arriving at the award. The Council has consistently held that it is the award rather than the specific reasoning and conclusions employed by the arbitrator that is subject to challenge. Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), 4 FLRC 444, 447 [FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111]; The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), 5 FLRC 764, 769 [FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135]. Accordingly, the union's first exception does not provide a basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception, the union contends that the arbitrator's award violates provisions of the Federal Personnel Manual (FPM). In support of this exception, the union asserts that the arbitrator misinterpreted the word "detail" as defined in FPM chapter 300, subchapter 8-1.^{2/}

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Federal Personnel Manual. Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky and Professional Air Traffic Controllers Organization (Witney, Arbitrator), 5 FLRC 455 [FLRC No. 76A-6 (June 7, 1977), Report No. 128]. In this case, however, the union's petition does not establish a nexus between the FPM provision defining a "detail" and the arbitrator's award denying the grievance, holding that, based upon the evidence before him, the activity did not violate Article XII of the parties' agreement in the promotion action at issue. In effect, the union appears to be merely disagreeing with the arbitrator's reasoning in arriving at his award. As previously indicated, this does not provide a basis for Council acceptance of a petition for review. Portsmouth Naval Shipyard, supra. Therefore, the union's petition fails to present the necessary facts and circumstances in support of this exception that the award violates the FPM and no basis is thus established for acceptance of the union's petition under section 2411.32 of the Council's rules.

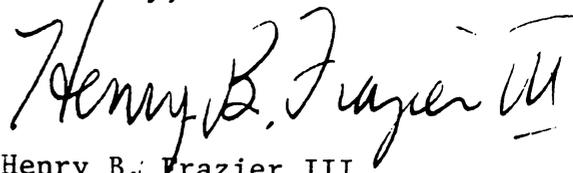
^{2/} FPM chapter 300, subchapter 8-1 provides:

A detail is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail. Technically, a position is not filled by a detail, as the employee continues to be the incumbent of the position from which detailed. [Emphasis in original.]

Accordingly, the union's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A. Rudyk
FAA

U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), St. Louis, Missouri, Assistant Secretary Case No. 62-5837(CA). The Assistant Secretary denied the request for review filed by the union (Local 405, National Federation of Federal Employees), seeking reversal of the Regional Administrator's dismissal of the union's section 19(a)(1) and (6) complaint related to a proposed disciplinary action against an employee. The union appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 19, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision raised a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Richard J. Kaiser
President, Local 405
National Federation of
Federal Employees
Building 107, Room 237
4300 Good Fellow Boulevard
St. Louis, Missouri 63120

Re: U.S. Army Troop Support and Aviation
Materiel Readiness Command (TSARCOM),
St. Louis, Missouri, Assistant Secretary
Case No. 62-5837(CA), FLRC No. 78A-125

Dear Mr. Kaiser:

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

In this case, as found by the Assistant Secretary, National Federation of Federal Employees, Local 405 (the union) filed an unfair labor practice complaint against the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), St. Louis, Missouri (the activity) alleging that the activity violated section 19(a)(1) and (6) of the Order. The complaint appears to have concerned an alleged failure to notify an employee of proposed disciplinary action against her within 15 calendar days of the incident which prompted the disciplinary action, thereby allegedly breaching the parties' negotiated agreement.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis for the complaint had not been established inasmuch as the instant dispute concerned essentially a dispute over contract interpretation as distinguished from a clear unilateral breach of a negotiated agreement, and, consequently, the remedy for such matters would be within the grievance-arbitration machinery of the parties' negotiated agreement. Accordingly, he denied the union's request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary and the RA failed to adequately familiarize themselves with the parties' collective bargaining agreement. You further contend that both the RA and the Assistant Secretary were furnished copies of

the parties' agreement and that, in accordance with that agreement as well as section 19(d) of the Order, the union "had the option of seeking redress under the procedure of the unfair labor practice."

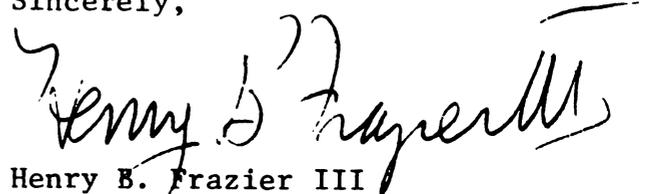
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that the decision raises a major policy issue.

Thus, with regard to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your assertions constitute, in essence, nothing more than mere disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint had been established as the instant dispute concerns essentially a dispute over contract interpretation as distinguished from a clear unilateral breach of a negotiated agreement. Moreover, your appeal neither alleges nor contains support for a finding that there is a clear, unexplained inconsistency between the Assistant Secretary's decision herein and his previously published decisions, or that such decision is inconsistent with the purposes and policies of the Order.*/

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that the decision raises a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. J. Schrader
Army

*/ See, e.g., Department of the Treasury, Internal Revenue Service, Chicago District, Illinois, Assistant Secretary Case No. 50-13155(CA), 5 FLRC 895 [FLRC No. 77A-79 (Oct. 20, 1977), Report No. 138].

Department of the Navy, Naval Air Rework Facility, Naval Air Station, North Island, San Diego, California, Assistant Secretary Case No. 72-7390(CA). The Assistant Secretary denied the request for review filed by the union (National Association of Government Inspectors and Quality Assurance Personnel), seeking reversal of the Regional Administrator's dismissal of the union's section 19(a) complaint against the activity. The union appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action (December 19, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or raise any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Leslie I. Mayer
National President and President
of Unit 8
National Association of Government
Inspectors and Quality Assurance Personnel
2662 Harcourt Drive
San Diego, California 92123

Re: Department of the Navy, Naval Air
Rework Facility, Naval Air Station,
North Island, San Diego, California,
Assistant Secretary Case No. 72-7390(CA),
FLRC No. 78A-126

Dear Mr. Mayer:

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

As found by the Assistant Secretary, the National Association of Government Inspectors and Quality Assurance Personnel (the union) filed an unfair labor practice complaint containing five separate allegations that the Naval Air Rework Facility, Naval Air Station, North Island, San Diego, California (the activity) violated section 19(a) of the Order and various provisions of the parties' negotiated agreement. More specifically, the complaint alleged that the activity violated the Order and the parties' negotiated agreement when: (1) a union officer received a letter of caution for allegedly leaving his work site, without permission, to attend to union business; (2) a union officer was not allowed to serve simultaneously as acting supervisor and secretary of the union; (3) a union officer was transferred from one work site to another without prior consultation with the union; (4) an employee received a letter of caution without prior notice to the union; and (5) two employees were required to sign waivers of their rights to overtime pay for traveling during non-work time.

The Assistant Secretary found that no reasonable basis had been established for any of the allegations contained in the complaint, and that, consequently, further proceedings were unwarranted. In so concluding, the Assistant Secretary stated as to allegation (1) that issuance of a letter of caution to the union officer, "standing alone, does not establish a reasonable basis for this portion of the complaint." With regard to allegation (2), the Assistant Secretary, finding that no basis for this allegation had been established, adopted the Regional Administrator's

conclusion that "the [activity's] actions in restricting [the union vice president's] union activity, while serving as an acting supervisor, were not unreasonable in light of the potential conflict of interest created by having a supervisor perform union duties." The Assistant Secretary found allegation (3) to be unsupported by the evidence, noting that the transferred union officer, "as a trainee Inspector, was part of an established program which involved required rotation among assignments and, hence, among the different buildings of the facility." The Assistant Secretary further noted the activity's uncontroverted statement that the union was consulted prior to the initial transfer of the union officer which began the rotation. As to allegation (4), the Assistant Secretary found no basis in the Order for concluding that the union must be notified when the activity disciplines an employee.* Finally, with regard to allegation (5), the Assistant Secretary found that no evidence was submitted to show that the activity's conduct was motivated by an intent to discredit the union or to discourage union membership or activity, and that the union's related allegations were similarly unsupported. Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the Regional Administrator's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision was arbitrary and capricious because, in essence, the unrefuted testimony and documents produced by the union, "together with the reasonable inferences therefrom, all support the allegations of unfair labor practices in violation of the Order." You further allege that the Assistant Secretary's decision raises major policy issues, as follows:

The [four] incidents, although separate, show a course of unilateral agency action to bypass the [union] and to unjustly penalize and harass its officers so as to interfere with, coerce, restrain, and discriminate against its members to discourage membership therein, in violation of Executive Order 11491, as amended.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

With respect to your contentions that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. In this regard, your assertion that the statements and documents furnished by the union "all support the allegations of unfair labor practices" constitutes, in essence, nothing more than disagreement with the Assistant Secretary's contrary determination and, therefore, provides no basis for Council review. As to your

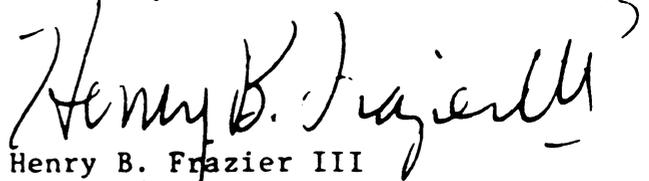
*/ The Assistant Secretary's finding on this allegation is expressly not relied upon by the union in its appeal to the Council herein.

allegation that the Assistant Secretary's decision presents major policy issues, your petition for review fails to allege or show that the decision herein is inconsistent with the purposes and policies of the Order. Rather, your assertion that the four incidents "show a course of unilateral agency action to bypass the [union] and unjustly penalize and harass its officers so as to interfere with, coerce, restrain, and discriminate against its members to discourage membership therein," essentially reflects your disagreement with the Assistant Secretary's conclusion " . . . that no reasonable basis has been established for any of the allegations contained in the complaint, and that, consequently, further proceedings in these matters are unwarranted." Accordingly, in the Council's opinion, no major policy issue warranting Council review is thereby presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. Schultz
Navy

The Council of AFGE Locals in the Board and the United States Railroad Retirement Board (Sembower, Arbitrator). The arbitrator denied the union's grievance concerning the cancellation of a vacancy announcement by the activity. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on four exceptions alleging (1) that the award was based on non-facts; (2) and (3), that the arbitrator failed to consider certain pertinent evidence; and (4) that the arbitrator misinterpreted and misapplied the precedents cited in his opinion.

Council action (December 19, 1978). The Council held that the union's petition did not describe facts and circumstances necessary to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 19, 1978

Mr. Robert C. Nelson, President
American Federation of Government
Employees, AFL-CIO, Local 375
844 Rush Street
Chicago, Illinois 60611

Re: The Council of AFGE Locals in the
Board and United States Railroad
Retirement Board (Sembower,
Arbitrator), FLRC No. 78A-129

Dear Mr. Nelson:

The Council has carefully considered the union's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when the agency cancelled a job posting for a vacancy in a particular position. Initially, the agency had decided to fill the position vacancy by promotion pursuant to the merit promotion plan. Subsequently, however, and before the selection panel which was convened pursuant to the merit promotion plan had completed its responsibilities, the agency reconsidered this decision and cancelled the vacancy posting. Thereafter, the agency filled the position noncompetitively by reassignment. A grievance was filed which claimed that the cancellation of the vacancy posting before the selection board completed its work violated merit promotion policy. The grievance was ultimately submitted to arbitration.

Although the arbitrator specifically recognized a number of deficiencies in the performance of the selection panel, he formulated the "only real question before [him]" to be:

[W]hether or not a posted vacancy may be withdrawn and another promotion method used before a panel has completed its work

Referring to a prior decision of the Council,^{*/} the arbitrator concluded:

[T]he rule appears to be that an agency in the exercise of its managerial functions may cancel a posting, and indeed the

*/ The arbitrator specifically noted the Council's decision in National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

reference to "Cancellation of Posting" in Section VIII of the Merit Promotion Program clearly so implies.

However, at the same time, the arbitrator recognized "that if an agency has a 'clear and unquestioned continuing intention to fill the position,' the Merit Promotion Program must be allowed to run its course." Thus, the arbitrator found it necessary to further consider whether the filling of the position by reassignment "more than a month after the posting was cancelled was an entirely independent act not connected with the original posting at all." In this regard he found the testimony uncontroverted that the reassignment of the employee to the position in dispute was not considered by the agency "until after the posting was cancelled." Accordingly, the arbitrator held that "the cancellation of the posting must be sustained." Thus, in his award the arbitrator denied the union's grievance.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of its exceptions discussed below.

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

In its first exception to the award, the union contends that the arbitrator's award is based on "non-facts." In support of this exception, the union argues that the award turns almost solely on management not having a clear and unquestioned intention to fill the position. However, this conclusion is asserted to be totally unsupported by the facts. The union also maintains that the arbitrator's "logic" was faulty in that he wrongly focused his attention on the employee ultimately reassigned to the position. This attention is asserted to be "faulty because the crucial point is not who would be reassigned but whether or not reassignment was contemplated before the vacancy announcement was cancelled." Contending that the "evidence clearly shows that . . . reassignment . . . was contemplated before the vacancy announcement was cancelled" and that "it was the intent to switch selection methods . . . which is the offense in this case," the union maintains that therefore the cancellation violated the merit promotion policy and cannot be sustained.

The Council has previously stated that it will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception presents a ground that "the central fact underlying an arbitrator's award is

concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached." Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), 3 FLRC 533, 536 [FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81]. However, the Council is of the opinion that the petition does not describe the facts and circumstances necessary to support this exception. That is, the petition for review does not present facts and circumstances to demonstrate that the central fact underlying the award is concededly erroneous and in effect a gross mistake of fact. Instead, by arguing that the arbitrator's conclusion is "totally unsupported by the facts," that his "logic is faulty," and that "the evidence clearly shows" something contrary to what the arbitrator found, the union's assertions pertain in substance to nothing more than disagreement with the arbitrator's findings as to the facts and with the specific reasoning and conclusions employed by the arbitrator in reaching his award. The Council has consistently held that it is the award rather than the specific reasoning and conclusions employed by the arbitrator that is subject to challenge and the arbitrator's findings as to the facts are not to be questioned upon appeal. The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), 5 FLRC 764 [FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135] and cases cited therein. Accordingly, the union's first exception provides no basis for acceptance of its petition for review under section 2411.32 of the Council's rules of procedure.

In its second and third exceptions the union contends that the arbitrator failed to consider pertinent evidence "regarding violations of the promotion procedures by the management panel members and the selection officer," and he failed to consider pertinent evidence since he did not resolve the conflict in testimony as to the reason for the cancellation of the vacancy posting. In support of these exceptions, the union cites the brief which it submitted to the arbitrator and testimony from the arbitration hearing pertaining to such violations. The union thus maintains that the "arbitrator failed totally to come to grips with this matter."

The Council has previously stated that it will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that during the course of the arbitration hearing, the arbitrator refused to hear evidence pertinent and material to the controversy before him or her and, hence, denied a party a fair hearing. E.g., American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), 4 FLRC 106 [FLRC No. 75A-105 (Jan. 30, 1976), Report No. 96]. However, the Council is of the opinion that the petition does not describe facts and circumstances necessary to support these exceptions. That is, the petition for review does not present facts and

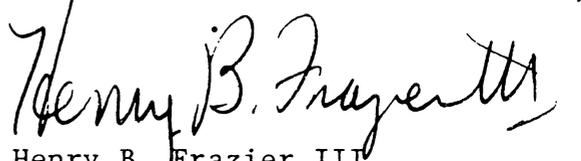
circumstances to demonstrate that the arbitrator refused to hear certain testimony, or that he refused to accept certain evidence. Instead, the union's exceptions about the arbitrator's "consideration" of evidence goes to evidence which was actually accepted and testimony actually heard. The substance of the union's second and third exceptions appears to again constitute disagreement with the arbitrator's findings as to the facts and his reasoning and conclusions employed in reaching his award. Such assertions do not present facts and circumstances to support an exception that the arbitrator refused to hear pertinent and material evidence and, hence, denied a party a fair hearing. Accordingly, the second and third exceptions provide no basis for acceptance of the union's petition under the Council's rules.

In its final exception the union contends "that the arbitrator misinterpreted and misapplied the precedents cited in the case." In support the union argues that National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61], does not apply to this case since the OEO case concerned a decision to fill or not to fill a position rather than a decision to switch selection methods. In the Council's opinion the union's contentions do not present facts and circumstances to support a contention that the award is contrary to the Order as interpreted and applied by the Council, but instead constitute nothing more than mere disagreement with the arbitrator's reasoning in reaching his award. Thus, this exception and such contentions do not assert any ground for review under section 2411.32 of the Council's rules. Accordingly, this exception provides no basis for acceptance of the union's petition.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: W. Adams
USRRB

National Treasury Employees Union, Chapter 101 and U.S. Customs Service, Office of Regulations and Rulings. The dispute involved the negotiability of a union proposal which would provide for the staying of employee suspensions pending review of the suspension decision under an "expedited" arbitration procedure.

Council action (December 20, 1978). The Council held that the union's proposal violated section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

National Treasury Employees Union,
Chapter 101

(Union)

and

FLRC No. 78A-88

U. S. Customs Service,
Office of Regulations and Rulings

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Article 34, Section 5

- A. (1). If the Employer's final decision is that an employee will be suspended for a period of four (4) days or more but not more than thirty (30) days, the Union will have three (3) days from the employee's receipt of the final decision to give notice that it elects to appeal the final decision to arbitration. For all other actions covered by this Article the Union will have fifteen (15) days from the employee's receipt of the final decision to give notice that it elects to appeal the final decision to arbitration.
- (2) The arbitration of any suspension action covered by this Article shall be held within thirty (30) days of the Employer's receipt of the Union's notice of appeal.
- (3) The arbitrator shall issue his/her decision within three (3) working days after completion of the hearing.
- (4) In the event that an arbitration is unable to be held within the time limits of Subsection A.(2) above, the affected employee shall serve the suspension. It is understood by the parties that the arbitrator may award back pay, if appropriate, in such a case.
- (5) The following three persons shall serve as arbitrators for cases arbitrated under this subsection:

They shall serve on a rotating basis, and, if the arbitrator who would be selected under the rotation system for a particular case, is unable to hold the arbitration within the time limits of Subsection A.(2) above, the next arbitrator on the list will be contacted, in turn, until the list is exhausted.

(6) Any arbitration held pursuant to Subsection A. of this Article shall be conducted in accordance with the requirements of Subsection G below, except that a verbatim transcript of the proceedings shall not be required unless requested by the arbitrator.

Agency Determination

The agency determined that the proposal violates section 12(b)(2) of the Order and is therefore nonnegotiable.

Question Here Before the Council

The question is whether the proposal is nonnegotiable under section 12(b)(2) of the Order.^{1/}

Opinion

Conclusion: The proposal would negate management's right to discipline employees under section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The agency principally contends that the union proposal in this case, which provides for the staying of employee suspensions pending review of the suspension decision under an "expedited" arbitration procedure, would result in staying employee suspensions indefinitely since the proposed procedure does not establish any readily definable limitation beyond which the arbitration process may not extend. Thus, the agency argues, the proposed procedure would have the effect of negating management's rights under section 12(b)(2) of the Order to take timely disciplinary action in suspension cases involving unit employees, thereby rendering the proposal nonnegotiable. The union argues to the contrary that the proposed procedure would not permit delays of indefinite duration in implementing employee

1/ Section 12(b)(2) of the Order provides in part:

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

.

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

.

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees

suspension actions, and would not result in the negation of management's section 12(b)(2) rights.^{2/} We disagree with the union's position.

Article 34, Section 5 as proposed by the union sets forth specific requirements designed to expedite cases appealed to arbitration under its provisions. The proposal does not, however, establish definite limits beyond which the arbitration process may not extend. More specifically, Article 34, Section 5, Subsection A.(2), providing that an arbitration hearing shall be held within 30 days of the agency's receipt of the union's notice of appeal, as interpreted by the agency in the record before us without contravention by the union, requires only that the hearing will be scheduled and convened within 30 days but does not require that the hearing actually be completed within a definite period after it is convened. In this regard, the union specifically indicates that Subsection A.(2) of the proposal requires the scheduling of the arbitration hearing within a definite period from the date of invocation of the hearing, but it does not argue that Subsection A.(2) requires the arbitration hearing be completed within any definite time limits whatsoever. Thus, the record before the Council in this case supports an interpretation of the proposal which would permit delays of indefinite duration in implementing employee suspension actions in cases that actually proceed to arbitration.

As so construed, the proposal under consideration here bears no material difference from the proposal in National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury requiring that, when the agency decides to suspend an employee for 30 days or less and if the union invokes an arbitration procedure to determine whether the suspension is imposed for just cause, the suspension will be stayed pending the outcome of the arbitration procedure.^{3/} In that case the Council, relying on its decisions in VA Research Hospital^{4/} and

^{2/} The specific requirements of Article 34, Section 5 relied upon by the union in support of its argument are: Subsection A.(2) (requiring that an arbitration hearing shall be held within 30 days of the agency's receipt of the union's notice of appeal); Subsection A.(3) (mandating the issuance of an arbitrator's decision within 3 working days after completion of the arbitration hearing); and, Subsection A.(4) (providing that, if an arbitration hearing is unable to be held within the time limits established by Subsection A.(2) of the proposal, the affected employee will serve the suspension).

^{3/} National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, FLRC No. 77A-58 (Jan. 27, 1978), Report No. 142.

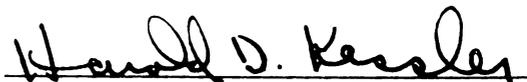
^{4/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

Blaine,^{5/} found the disputed proposal violative of section 12(b)(2) of the Order and, hence, nonnegotiable, stating at 4 of the Council's decision:

The Council's decisions in both VA Research Hospital and Blaine make clear that management's authority under section 12(b)(2) includes the right to act in the matters reserved under that section without unreasonable delay. . . . [T]he union's proposed arbitration procedure under consideration in this case would result in potential delays of indefinite duration since the procedure does not precisely define and limit the time to process cases through arbitration before management can act to implement its decision to take disciplinary action. Delay of indefinite duration is, under the circumstances of this case, unreasonable and interferes with management's right to take prompt, timely action in a matter specifically reserved to it under the Order, namely the right to take prompt, timely disciplinary action. Stated otherwise, the union's proposed procedure here would so unreasonably delay and impede the exercise of the reserved right to suspend employees as to negate that right and, hence, violates section 12(b)(2) of the Order.

Since, as indicated above, the union proposal under consideration here establishes an arbitration procedure with potential delays of indefinite duration, the Council decision in the National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms case is dispositive of the dispute in the present case. Accordingly, for the reasons more fully set out in that case, we find that the union's proposed procedure under consideration here would so unreasonably delay and impede the exercise of the reserved right to suspend employees as to negate that right and, hence, violates section 12(b)(2) of the Order and is nonnegotiable.^{6/}

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: December 20, 1978

5/ Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington, 3 FLRC 75 [FLRC No. 74A-33 (Jan. 8, 1975), Report No. 61].

6/ This decision should not be construed as ruling that a proposal providing for a maximum delay of 30 days duration, which proposal is not before us in the present case, would be consistent with section 12(b)(2) of the Order.

Social Security Administration, Bureau of Hearings and Appeals, Washington, D.C., Assistant Secretary Case No. 22-08671(CA). The Assistant Secretary denied the request for review filed by the union, (Local 3615, American Federation of Government Employees, AFL-CIO), seeking reversal of the Regional Administrator's dismissal of the union's complaint, which alleged that the activity violated section 19(a)(1), (2) and (6) of the Order by denying official time to union officials who were to act as technical advisors at an EEO hearing. The union appealed to the Council, contending, in essence, that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 20, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1978

Mr. William J. Stone
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration, Bureau
of Hearings and Appeals, Washington, D.C.,
Assistant Secretary Case No. 22-08671(CA),
FLRC No. 78A-97

Dear Mr. Stone:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed an unfair labor practice complaint against the Social Security Administration, Bureau of Hearings and Appeals, Washington, D.C. (the activity). The complaint alleged, in essence, that the activity violated section 19(a)(1), (2) and (6) of the Order by denying official time to union officials who were to act as technical advisors at an equal employment opportunity (EEO) hearing. Such denial of official time was alleged to constitute a change in the past practice of the activity.

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis for the complaint had not been established, and that, consequently, further proceedings in the matter were not warranted. In so concluding, he found that "the evidence submitted was insufficient to establish that a past practice had been established of granting official time to union representatives to serve in a capacity other than as the designated representative of complainants at [EEO] complaint hearings," and further that "the parties' negotiated agreement is silent in this regard." Accordingly, he denied the union's request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the union, you allege as grounds for review that (1) "[t]he Assistant Secretary acted arbitrarily and capriciously in failing to remand this unfair labor practice as it involved the union's representational rights at [EEO] hearings . . . conducted

by the Civil Service Commission"; (2) "the [union] suffered a violation of its rights as the [a]ctivity refused to follow past practices [in denying] the union officers official time to participate as union observers at the EEO hearing"; and (3) "[t]his [unfair labor practice] involved unique [F]ederal labor relations issues as [its resolution] will define the rights of the union at EEO hearings and whether . . . the [a]ctivity must grant official time to the designated union observers."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious and you neither allege nor does it appear that his decision presents a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Thus, your contentions in this regard essentially amount to mere disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint had been established, and therefore present no basis for Council review. With regard to your further allegation that the activity refused to follow past practice in denying union officers official time to participate as observers at an EEO hearing, in the Council's view such contention constitutes nothing more than disagreement with the Assistant Secretary's finding that "the evidence submitted was insufficient to establish . . . a past practice . . . of granting official time to union representatives to serve in a capacity other than as the designated representative of complainants at [EEO] complaint hearings." Moreover, no basis for Council review is presented by your related assertion that the instant case will define the rights of a union at EEO hearings and whether an activity must grant official time for designated union observers, again noting the Assistant Secretary's finding that there was insufficient evidence to establish a past practice of permitting union representatives to attend EEO hearings as observers (as opposed to designated representatives of EEO complainants) on official time, and noting further his finding that "the parties' negotiated agreement is silent in this regard." Moreover, your appeal neither alleges, nor does it otherwise appear, that the Assistant Secretary's decision raises a major policy issue.^{*/}

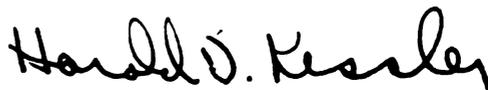
Since the Assistant-Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the

^{*/} See Department of the Navy and U.S. Civil Service Commission, A/SLMR No. 529, 3 FLRC 763 [FLRC No. 75A-88 (Nov. 26, 1975), Report No. 93].

standards for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Harold D. Kessler". The signature is written in a cursive style with a large, prominent initial "H".

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

I. L. Becker
SSA

Department of Justice, U.S. Marshals Service, Washington, D.C. and International Council of USMS Locals, AFGE, 78 FSIP 43. The dispute involved the negotiability of a union proposal relating to premium pay for overtime work.

Council action (December 20, 1978). Based upon an interpretation of applicable law and Civil Service Commission directives rendered by the Civil Service Commission in response to the Council's request, the Council found that the union's proposal conflicted with such applicable law and regulations. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

Department of Justice,
U.S. Marshals Service

(Activity)

and

78 FSIP 43
FLRC No. 78A-105

International Council of
USMS Locals, AFGE

(Union)

DECISION ON NEGOTIABILITY ISSUE REFERRED
BY FEDERAL SERVICE IMPASSES PANEL^{1/}

Union Proposal

Article XXII - Overtime and Standby

Section 3. All hours of work performed in excess of eight hours in any one day and all hours of work performed in excess of forty hours in one administrative workweek by an employee shall be overtime.

a. Employees will be compensated under the provisions of 5 U.S.C. 5545(c) where the hours of work in excess of eight hours per day or 40 hours per week cannot be controlled administratively. This may include courtroom duty, prisoner pickups and return and special assignment where overtime for these assignments cannot be anticipated. To qualify for AUO overtime work would not be predictable in terms of when it would occur and how long it would last and is administratively uncontrollable.

b. Employees will be compensated under the provisions of 5 U.S.C. and 5542 for overtime work that can be controlled administratively. This includes serving of papers, prisoner coordination trips and all other overtime including those duties described in Section a. where the overtime work is predictable in terms of when it would occur and how long it would last and is administratively controllable. All overtime

^{1/} Pursuant to section 2471.7 of the rules and regulations of the Federal Service Impasses Panel (Panel) (5 C.F.R. 2471.7) and section 2411.27 of the rules and regulations of the Council (5 C.F.R. 2411.27), the Panel referred to the Council the instant negotiability dispute which arose in connection with an impasse in negotiations between the parties.

under paragraph b. shall be defined regularly scheduled overtime regardless of its duration in accordance with Title 5 U.S.C. and 5542.

Premium compensation for AUO defined in Section a. and for regularly scheduled overtime defined in Section b. relate to independent mutually exclusive methods for compensating two distinct forms of overtime work. Employees are not precluded from receiving regular (hourly) overtime pay in addition to AUO premium pay. However, employees cannot claim both for the same hours worked.

Agency Determination

The agency determined that the union's proposed Article XXII, Section 3 is nonnegotiable because it violates 5 U.S.C. ^{2/} § 5545 and implementing regulations of the Civil Service Commission.

Question Here Before the Council

The question is whether the union's proposed Article XXII, Section 3 violates 5 U.S.C. § 5545 and implementing regulations of the Civil Service Commission.

Opinion

Conclusion: The union's proposed Article XXII, Section 3 violates 5 U.S.C. § 5545 and implementing regulations of the Civil Service Commission. Accordingly, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including those which implement title 5, United States Code, pertaining to premium pay, that agency was requested, in accordance with established practice, to interpret Commission directives as they pertain to this proposal.

The Commission responded, in pertinent part, as follows:

This is in response to your August 30, 1978, letter requesting an interpretation of Civil Service Commission regulations as they apply to the negotiability issue in the above-referenced case.

^{2/} The agency cites, in particular, 5 C.F.R. 550.151 - .164.

As Section 3 of Article XXII of the negotiated agreement, the union has proposed the following:

All hours of work performed in excess of eight hours in any one day and all hours of work performed in excess of forty hours in one administrative workweek by an employee shall be overtime. All overtime shall be paid at the appropriate rate of pay.

a. Employees will be compensated under the provisions of 5 USC 5545(c) where the hours of work in excess of eight hours per day or 40 hours per week cannot be controlled administratively. This may include courtroom duty, prisoner pickups and return and special assignment where overtime for these assignments cannot be anticipated. To qualify for AUO, overtime work would not be predictable in terms of when it would occur and how long it would last and is administratively uncontrollable.

b. Employees will be compensated under the provisions of 5 USC and 5542 for overtime work that can be controlled administratively. This includes serving of papers, prisoner coordination trips and all other overtime including those duties described in Section a. where the overtime work is predictable in terms of when it would occur and how long it would last and is administratively controllable. All overtime under paragraph b. shall be defined regularly scheduled overtime regardless of its duration in accordance with Title 5 U.S.C. and 5542.

Premium compensation for AUO defined in Section a. and for regularly scheduled overtime defined in Section b. relate to independent mutually exclusive methods for compensating two distinct forms of overtime work. Employees are not precluded from receiving regular (hourly) overtime pay in addition to AUO premium pay. However, employees cannot claim both for the same hours worked.

You asked whether the above-quoted section of the proposed agreement conflicts with Civil Service Commission regulations, in particular, those implementing section 5545 of title 5 United States Code, which pertains to premium pay.

Premium pay for overtime work is provided by section 5542 of title 5, United States Code, as follows:

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates;

The rates of overtime provided are one and one-half times the regular hourly rate except for employees whose basic rate of pay exceeds the minimum for GS-10, in which case the overtime rate is one and one-half times the minimum rate of basic pay for GS-10. The civil service regulations implementing this section of law are found in 5 CFR 550.111 - 550.131.

Compensation for administratively uncontrollable overtime (AUO) work is provided for in section 5545(c)(2) of title 5, United States Code:

(c) The head of an agency, with the approval of the Civil Service Commission, may provide that --
. . . (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position.

The implementing civil service regulations appear in 5 CFR 550.151-550.164 and provide, specifically in section 550.163(b) that:

An employee receiving premium pay on an annual basis under 550.151 [for AUO] may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work and work at night, on Sundays, and on holidays.

Two fundamental defects render the proposal inconsistent with existing law governing entitlement to premium pay. First, contrary to the explicit language set forth in law and regulations, the union proposal fails to specify that in order to qualify for AUO premium pay, an employee must occupy a position which has been determined to require substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, within the meaning of 5 USC 5545(c)(2) and 5 CFR 550.153-550.161.

Second, contrary to explicit statutory and regulatory prohibition, the union proposal would require paying employees for uncontrollable overtime work under the annual premium pay provision of 5 USC 5545(c)(2) in addition to overtime pay for controllable overtime work under 5 USC 5542. The statute and related CSC regulations provide that employees shall be paid annual premium pay (AUO) for "irregular, unscheduled overtime" duty, and only as an exception may they be paid for additional "regularly scheduled overtime" work under 5 USC 5542.

The phrases used in the proposal, "cannot be controlled administratively" and "can be controlled administratively" are not synonymous with the statutory phrases "irregular, unscheduled overtime" duty and "regularly scheduled overtime" work used for determining entitlement to premium pay under title 5.

Two types of "irregular, unscheduled overtime" duty are compensable as administratively uncontrollable overtime (AUO) under 5 USC 5545(c)(2): one is that generally at the recognition of the employee, the other is at the direction of the agency. In contrast, the union proposal would effectively redefine all overtime which "can be controlled administratively" to mean "regularly scheduled overtime." Such a redefinition could include some "irregular, unscheduled overtime" worked by an employee at his own recognition and, no doubt, a considerable amount of work which is directed by the agency but not assigned on a regularly scheduled basis.

It is our opinion that the proposal is barred from negotiation on the basis that the provisions of 5 USC 5545 (c)(2) and CSC regulations would be violated if "irregular, unscheduled overtime" duty would be considered "controllable" by the negotiated agreement, and therefore require compensation as "regularly scheduled overtime" work under 5 USC 5542.

Based on the foregoing interpretation of its own directives and related statutes by the Civil Service Commission, we find that the union's proposal concerning premium pay conflicts with applicable law and regulation of appropriate authority outside the agency. Accordingly, the agency determination that the proposal is nonnegotiable because it contravenes

Civil Service Commission directives implementing title 5, United States Code, was proper and is sustained.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: December 20, 1978

American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator). The arbitrator found that the agency violated the negotiated agreement by failing to timely promote the grievant because of an administrative mistake, and, as a remedy, ordered that the grievant's promotion be made retroactive to an earlier date, with backpay. The Council initially denied the agency's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 FLRC 474), but subsequently granted the agency's request for reconsideration of that decision, in light of the Comptroller General's decision in Matter of: Janice Levy--Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977. Thereafter, the Council accepted the agency's petition for review insofar as it related to the exception alleging that the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 149)

Council action (December 22, 1978). Based upon a decision of the Comptroller General rendered in response to the Council's request, the Council found that the arbitrator's award of retroactive promotion and backpay violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

American Federation of Government
Employees, Local 2327

and

FLRC No. 76A-144

Social Security Administration,
Philadelphia District

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award and the record before the Council, this dispute involves a career ladder promotion from GS-7 to GS-9. The grievant met the requirements for a career ladder promotion as of November 23, 1975. In September 1975 he was recommended for the promotion by his Branch Manager and the required request for promotion action was prepared and forwarded to the Social Security Administration (SSA) Regional Staff for further processing to the Department of Health, Education, and Welfare (HEW) Regional Personnel Office where final authority to approve promotion requests rests. However, he was not promoted at this time because neither the SSA Regional Staff nor the HEW Regional Personnel Office had a record of receiving the promotion request. After an investigation into the matter, the grievant's promotion was again recommended and he was promoted effective February 1, 1976. The activity's request that the grievant's promotion be made retroactive to November 23 due to administrative error was rejected on the basis that there was no authority for a retroactive promotion without a record of receipt by the appointing authority of the promotion request. The grievant filed a grievance because of the delay in his promotion and it was ultimately submitted to arbitration.

The arbitrator stated the "question-at-issue" as follows:

Did the Employer violate the collective bargaining agreement . . . by failure to timely promote [the grievant] on the date he would have been promoted except for administrative failure to timely process the promotion action?

The arbitrator concluded that all the facts in the case indicated an administrative mistake at the Regional Personnel Office and that such a mistake constituted a violation of the merit promotion provision of the

negotiated agreement^{1/} in that "merit promotion principles were not applied in a consistent manner and the Grievant was not treated with equity because someone misplaced the proper and timely request for personnel action." Accordingly, the arbitrator answered the "question-at-issue" affirmatively and sustained the grievance. As a remedy the arbitrator ordered that the grievant's promotion be made retroactive to November 23, 1975, with backpay.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. The Council initially denied the agency's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. 5 FLRC 474 [FLRC No. 76A-144 (June 7, 1977), Report No. 128]. However, subsequent to the Council's decision denying the petition for review, the Comptroller General issued his decision in Matter of: Janice Levy--Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977. Because the Comptroller General's decision was of precedential significance with regard to the agency's petition for review, the Council granted the agency's request for reconsideration of the Council's decision of June 7, 1977, denying review and, upon reconsideration, in light of the Comptroller General's decision in Janice Levy, accepted the agency's petition for review insofar as it related to the agency's exception which alleges that the award violates applicable law and appropriate regulation. The Council also granted the agency's request for a stay of the award. The union filed a brief on the merits.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleges that the award violates applicable law and appropriate regulation. Because this case involves an issue within the jurisdiction of the Comptroller General's Office and because the Council was uncertain in

^{1/} The provision that the arbitrator found violated was Article 6, Merit Promotion, Section 1 which provides:

The Employer and the Union mutually agree that the purpose and intent of the provisions contained herein is to implement the Region's Merit Promotion Plan, which will help to insure that merit promotion principles are applied in a consistent manner, with equity to all employees.

view of Janice Levy as to the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from the Comptroller General a decision as to whether the arbitrator's award in this case violates applicable law or appropriate regulation. The Comptroller General's decision in the matter, B-192455, November 1, 1978, is set forth below.

By letter dated July 18, 1978, the Federal Labor Relations Council (FLRC) requested a decision as to the legality of the arbitration award rendered September 16, 1976, in American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144. The award of retroactive promotion and backpay was granted by the arbitrator as a remedy for the failure of the Social Security Administration (SSA) to timely process Mr. John Cahill's promotion request.

The FLRC had initially, on June 7, 1977, denied the agency's petition for review of the award because it failed to meet the Council's requirements for review set forth in 5 C.F.R. § 2411.32. Subsequent to the Council's denial of review, we issued a decision in Matter of Janice Levy, B-190408, December 21, 1977, which invalidated an arbitrator's award issued under similar circumstances. Based on that decision, the SSA asked the FLRC to reconsider its denial of review in the present case.

The Council granted the agency's request for reconsideration and accepted its petition for review of the arbitrator's award. In its letter of July 18, 1978, the Council stated:

"* * * The Council determined that the agency's request for reconsideration should be granted and its petition for review of the arbitrator's award accepted because of the apparent precedential significance of your decision in Janice Levy to the facts of this case and because of the apparent departure in Janice Levy from the general principle established in previous decisions of your Office that a provision in a negotiated agreement, if otherwise proper, becomes a nondiscretionary agency policy for purposes of applying the provisions of the Back Pay Act of 1966.

"Because, as indicated, this case involves an issue within the jurisdiction of your Office and since the Council is uncertain, in light of the decision in Janice Levy, as to the applicability of prior Comptroller General decisions to the facts of this case, we request your decision as to whether the arbitrator's award in this case violates applicable law or appropriate regulation. * * *"

The facts in Mr. Cahill's case are not in dispute. The arbitrator found that the grievant met the requirements for a career-ladder promotion from GS-7 to GS-9 as of November 23, 1975. He was recommended for promotion by his Branch Manager and the required request for promotion action was prepared in September 1975 in the SSA District Office in Philadelphia. The request was forwarded to the SSA Regional Staff for processing and forwarding to the Regional Personnel Office of the Department of Health, Education, and Welfare (HEW) where final authority to approve promotion requests rests. However, neither the SSA Regional Staff nor the HEW Regional Personnel Office have any record of receiving Mr. Cahill's promotion request. After an investigation into the processing delay and an administrative determination that there was no authority to effect Mr. Cahill's promotion on a retroactive basis, he was prospectively promoted to GS-9 effective February 1, 1976.

Mr. Cahill grieved his failure to be timely promoted and the matter was submitted to arbitration. By award dated September 16, 1976, the arbitrator awarded Mr. Cahill a retroactive promotion to GS-9 with backpay, effective November 23, 1975, having specifically found:

"* * * All the facts in this case lead to an administrative mistake at the Receiving Department of the Regional Personnel Office (RPO). The Grievant met the contractual and regulatory requirements for a merit promotion. The properly completed and timely-filed request for personnel action 'fell through a bureaucratic crack' that is, was probably clerically misplaced. When the mistake was noted the Grievant was promoted--but no one was able to pinpoint the administrative cause(s) ('bureaucratic crack') and no retroactivity was awarded.

"The facts before us, the testimony and exhibits introduced indicate a violation of Article 6 (Merit Promotion), Section 1. The merit promotion principles were not applied in a consistent manner and the Grievant was not treated with equity because someone misplaced the proper and timely request for personnel action. * * *"

Section 1 of article 6 of the labor-management agreement found to be violated by the arbitrator is as follows:

"Section 1. The Employer and the Union mutually agree that the purpose and intent of the provisions contained herein is to implement the Region's Merit Promotion Plan, which will help insure that merit promotion principles are applied in a consistent manner, with equity to all employees."

As noted above, the arbitrator in the instant case found that an administrative error had resulted in the grievant's not being promoted effective November 23, 1975; that the merit promotion principles were not applied in a consistent manner and the grievant

was not treated with equity; and, therefore, that article 6, section 1 of the collective-bargaining agreement had been violated. In Mr. Cahill's case, as in the Janice Levy case, the misplacing of the grievant's promotion request occurred before the authorized official had exercised his authority to approve or disapprove the promotion. With respect to delays or omissions in processing a promotion request that will support a retroactive promotion and an award of backpay under 5 U.S.C. § 5596, we explained in Janice Levy, supra, page 8:

"With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotion have been fully carried out. The rule is as stated in B-180046, quoted above. See also 54 Comp. Gen. 538 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus. In that category of case, administrative intent can be ascertained with certainty and retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate."

We believe that the reasoning of the Levy decision is equally applicable to the case now before us. Since the arbitrator's award here is predicated upon clerical or administrative error prior to action by the authorized official, it is contrary to applicable authorities, except to the extent that the authorized official's exercise of discretion to approve or disapprove the grievant's promotion request is limited by statute, regulation, or collective-bargaining agreement. As we recognized in Janice Levy, while employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement or by promulgation of a regulation may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. See, for example, 54 Comp. Gen. 403 (1974); 54 id. 538 (1974); 54 id. 888 (1975); 55 id. 42 (1975); and B-180010,

August 30, 1976. In those cases, however, in contrast to the present case, the negotiated agreements contained specific provisions requiring promotions to be made under specified conditions.

Since the arbitrator found that the misplacing of Mr. Cahill's promotion request resulted in a violation of article 6, section 1 of the negotiated agreement, the question remaining for decision is whether that provision constituted a nondiscretionary provision so as to support an award of a retroactive promotion with backpay based on the violation. The FLRC originally refused to review the Cahill award based on its understanding that, under 54 Comp. Gen. 312 (1974) and later decisions of the Comptroller General, a violation of a collective-bargaining agreement coupled with a determination that but for that violation the grievant would have been promoted at an earlier date provides a proper basis for retroactive promotion and award of backpay. We note that this was essentially the basis for the Council's refusal to review the award in the Janice Levy case. Notwithstanding our decision in the Levy case, it appears from the above-quoted language of the Council's July 18, 1978, letter to this Office that there is still some question as to the effect under the Back Pay Act, 5 U.S.C. § 5596 of an arbitrator's determination that an agency has violated a provision of a negotiated agreement. Specifically, we refer to the Council's statement that the Levy decision is an "apparent departure * * * from the general principle established in previous decisions of your Office that a provision in a negotiated agreement, if otherwise proper, becomes a nondiscretionary agency policy for purposes of applying the provisions of the Back Pay Act of 1966."

We have held that an agency may bargain away its discretion and thereby make a provision of a collective-bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable laws and regulations. The violation of such a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, thus entitling the aggrieved employees to retroactive compensation for such violation of a negotiated agreement. 54 Comp. Gen. 1071, 1073 (1975); 55 id. 171, 173 (1975); 55 id. 405, 407 (1975); 55 id. 427, 429 (1975).

Thus, we are fully committed to upholding awards of backpay for violations of mandatory provisions in negotiated agreements. However, as we stressed in the Levy case, not every violation of a collective-bargaining agreement will support a retroactive promotion and award of backpay. The violation must be of a provision in a collective-bargaining agreement amounting to a nondiscretionary agency policy. Our prior decisions in this area have not held that any provision, by the mere fact of its inclusion in a collective-bargaining agreement, becomes a nondiscretionary policy for purposes of awarding backpay.

In John H. Brown, 56 Comp. Gen. 57 (1976) we specifically addressed the suggestion that any provision in a collective-bargaining agreement becomes a nondiscretionary agency policy. The arbitrator in that case had directed that a special achievement award be given the grievant as a remedy for the agency's violation of a clause in the agreement providing the awards shall be used exclusively for rewarding employees for the performance of assigned duties and that the awards program shall not be used to discriminate or effect favoritism. In holding that the agreement did not change the granting of awards into a mandatory agency policy, we stated at 56 id. 59:

"In recent decisions this Office has attempted to give meaningful effect to the labor-management program established under Executive Order 11491 and to arbitration awards rendered thereunder if such awards are consistent with laws, regulations and our decisions. 54 Comp. Gen. 312, 320 (1974). We have held that provisions in collective bargaining agreements under the Executive order may become nondiscretionary agency policies and, if the agency has agreed to binding arbitration, that the arbitrator's decision is entitled to the same weight as the agency head's decision would be given. Id. at 316. But we further stated therein that our decision 'should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy,' and we added that '[w]hen there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought.' Id. at 319, 320."

Any doubt as to the nature of contractual violations that will support awards of backpay is resolved by the Civil Service Commission's amended backpay regulations found in title 5, Code of Federal Regulations, Part 550, Subpart H (1978). At 5 C.F.R. § 550.802(d), the term "nondiscretionary provision" is defined to mean:

"* * * any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria."

Although that regulation was not adopted by the Commission until March 25, 1977, well after the Cahill award was rendered, it primarily restates the standards of specificity applied in our decisions rendered under the Back Pay Act. Under that definition, action which should or should not be taken, as well as the conditions and criteria under which that action should or should not be taken must be prescribed in the collective-bargaining agreement or in agency regulations or policies. Thus, while an arbitrator may appropriately find that an agency's actions were "inequitable" and hence contravened general language of a negotiated agreement calling for equitable treatment of all employees, that violation does not itself provide a basis for award of backpay, even when the arbitrator finds that the inequitable actions resulted in a loss of pay.

In the instant case, although the arbitrator found that clerical error in failing to process the grievant's promotion request in timely fashion resulted in a violation of article 6, section 1 of the negotiated agreement, he did not find, nor do we believe he properly could find, that article 6, section 1, specifically required promotions to be made within any prescribed time frame or in accordance with any stated conditions or criteria. Nothing in that provision limits or qualifies the discretion of the HEW Regional Personnel Office to approve or disapprove promotions or requires the agency to make promotions within any specified time period. Hence, this case is clearly distinguishable from those cases, such as 55 Comp. Gen. 42, supra, where the agency and the union had agreed upon a specified time frame for promotions under stated conditions.

Accordingly, since article 6, section 1, does not constitute a nondiscretionary agency policy, the award of a retroactive promotion and backpay to Mr. Cahill was improper.

Under the circumstances of this case, we believe that collection of overpayments of backpay made to Mr. Cahill in satisfaction of the arbitration award would be against equity and good conscience and not in the best interests of the United States. In particular, we refer to the facts that the issue of Mr. Cahill's entitlement was appealed through proper administrative channels and was deemed finally settled as of July 7, 1977, that payment was made to Mr. Cahill and received by him in good faith satisfaction of the award, and that the Council's determination denying the SSA's petition for review of the award apparently was based in part on its uncertainty as to the import of our prior decisions under the Back Pay Act. Accordingly, Mr. Cahill's indebtedness to the United States as a result of overpayments received pursuant to the arbitration award is waived pursuant to the provisions of 5 U.S.C. § 5584 and 4 C.F.R. Part 91.

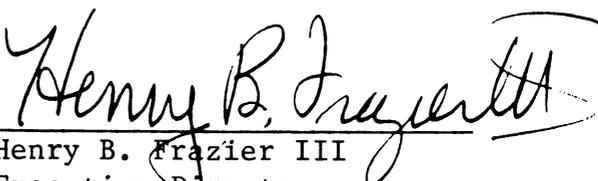
Based on the foregoing decision of the Comptroller General, we find that the arbitrator's award of retroactive promotion and backpay violates applicable law and appropriate regulation.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion of the award which directs that the grievant be given

a retroactive promotion with backpay. As so modified, the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 22, 1978

New York Regional Office, Bureau of District Office Operations, Social Security Administration, Department of Health, Education, and Welfare and Local No. 3369, New York-New Jersey Council of Social Security Administration District Office Locals, American Federation of Government Employees, AFL-CIO (Robins, Arbitrator). The arbitrator found that the agency violated the negotiated agreement by failing to promote the grievant on a particular date because of an error in processing the recommendation for the promotion, and, as a remedy, ordered that the grievant's promotion be made retroactive to that date, with backpay. The Council initially denied the agency's petition for review of the arbitrator's award because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 FLRC 678). Subsequently, the agency requested the Comptroller General's decision as to the agency's authority to implement the award, and on the basis of that decision, Matter of: Janice Levy-- Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977, requested the Council to reconsider its decision denying review of the award. The Council granted the request for reconsideration, and thereafter accepted the agency's petition for review insofar as it related to the exception alleging that the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 149)

Council action (December 22, 1978). Based on the decision of the Comptroller General in Janice Levy, and recognizing the Comptroller General's reaffirmation of that decision in Matter of: John Cahill-- Arbitration Award of Retroactive Promotion and Backpay, B-192455, November 1, 1978, the Council found that the arbitrator's award of retroactive promotion and backpay violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

New York Regional Office, Bureau of District
Office Operations, Social Security Administration,
Department of Health, Education, and Welfare

and

FLRC No. 77A-13

Local No. 3369, New York-New Jersey Council
of Social Security Administration District Office
Locals, American Federation of Government
Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based on the arbitrator's award and the record before the Council, it appears that the dispute in this case arose when the grieving employee, along with other eligible employees under the same training agreement, was recommended for a career ladder, noncompetitive promotion to be effective March 28, 1976. All recommendations were forwarded, in accordance with agency procedure, to the Regional Personnel Officer of the Department of Health, Education, and Welfare (HEW) for approval and authorization. All recommendations were mailed together on the same date and all of the grievant's eligible coworkers were promoted on March 28, 1976. However, the grievant was not promoted on that date because the recommendation for the grievant's promotion apparently never reached the Regional Personnel Officer. When the error was discovered, the activity resubmitted the recommendation and requested that the promotion be made retroactively effective as of March 28. The request for retroactivity was denied by HEW because the Regional Personnel Officer had no record of receipt of the recommendation and, according to HEW, Civil Service Commission regulations precluded making retroactive promotions in such circumstances. The grievant was promoted on May 9, 1976. Thereafter, the grievant filed a grievance because of the delay in her promotion and it was ultimately submitted to arbitration.

The parties stipulated the issue to be resolved by the arbitrator:

Did the Employer violate Article XXV, Section 12 of the agreement^{1/} by not giving the grievant a career ladder promotion as of March 28, 1976 and, if so, what shall be the appropriate remedy? [Footnote added.]

1/ Article XXV (Equal Employment Opportunity), Section 12 provides:

The Employer and the Union agree to the principle of equal pay for substantially equal work as well as providing distinctions in pay that are consistent with distinctions in work and work performance.

The arbitrator observed that it was stipulated that but for the error, the grievant would have been promoted on March 28, 1976. In resolving the grievance, the arbitrator made several findings: the agency's application of a "no-retroactivity" rule in this case would result in a "lasting inequity"; the agency's actions constituted a violation of Article XXV, Section 12 of the negotiated agreement; and decisions of the Comptroller General did not indicate a contrary result inasmuch as the "clear intent of the Agency to promote has been established." Accordingly, the arbitrator answered the stipulated issue in the affirmative and ordered the grievant's promotion to be made effective as of March 28, 1976, with backpay to that date.

The agency petitioned the Council for review of the arbitrator's award and requested that the Council accept its petition on the basis of its exception, among others, which asserted that the award violated applicable law and appropriate regulation. In support of this exception, the agency contended that the award violated "the general rule prohibiting retroactive promotion"; that the type of "administrative error" permitting an exception to the general rule had not occurred; and that the "nondiscretionary agency requirement" which would permit retroactive promotion and backpay was not present in this case.

The Council was of the opinion that the agency's petition did not present the facts and circumstances necessary to support its exception. In reaching this conclusion, the Council observed that it had previously indicated that, consistent with Civil Service Commission instructions and Comptroller General decisions, it has been established that an agency may be required to promote a particular individual and accord that individual backpay when a finding has been made by an arbitrator that such individual would definitely, and in accordance with law, regulation, and the negotiated agreement, have been promoted at a particular point in time but for an agency violation of its negotiated agreement. The Council further observed that the arbitrator specifically found in this case that the agency error constituted a violation of the negotiated agreement. Since it was stipulated that but for the error, the grievant would have been promoted on March 28, 1976, the Council was therefore of the opinion that this exception to the award provided no basis for acceptance of the agency's petition under the Council's rules.

The Council was also of the opinion that the agency's other exceptions to the award likewise provided no basis for acceptance of the agency's petition. Accordingly, on August 2, 1977, the Council denied the agency's petition for review. The Council also denied its request for a stay of the award.

On October 12, 1977, HEW requested of the Comptroller General his decision as to its authority to implement this award. Thereafter, in answer to this request the Comptroller General issued his decision in Matter of: Janice Levy--Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977.^{2/} Subsequently, on the

^{2/} The Comptroller General's decision is attached as an appendix.

basis of the Comptroller General's decision in Janice Levy, the agency requested the Council to reconsider and reopen its decision denying the petition for review of the arbitrator's award and denying the request for a stay of the award. Finding that the Comptroller General's decision in Janice Levy was of precedential significance with regard to the agency's petition for review of the award, the Council granted the request for reconsideration of its decision of August 2, 1977. Upon reconsideration of the agency's petition for review in light of Janice Levy the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleges that the award violates applicable law and appropriate regulation. Also upon reconsideration, the Council determined that an issuance of a stay of the award was warranted and the agency's request for a stay was therefore granted.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council upon reconsideration accepted the agency's petition for review insofar as it related to its exception which alleges that the award violates applicable law and appropriate regulation. As also previously noted, HEW requested and received of the Comptroller General his decision as to its authority to implement this arbitration award of retroactive promotion and backpay. In that decision the Comptroller General observed that there is an exception to the rule prohibiting retroactive promotion when the failure to promote constitutes a violation of a nondiscretionary regulation or policy. Although recognizing that provisions of negotiated agreements may constitute nondiscretionary agency policies, the Comptroller General was unable to find that the arbitrator in this case specifically construed the pertinent negotiated agreement provision as mandating promotion of career ladder employees at any specific time. Moreover, the Comptroller General did not believe that the arbitrator could have found that the language of this negotiated agreement provision constituted a nondiscretionary agency policy mandating promotion of career ladder employees within any specific timeframe. The Comptroller General declared that when a particular provision does nothing more than incorporate controlling laws and regulations into the negotiated agreement, an arbitrator is not free to disregard administrative and judicial construction of such provision. Concluding that the negotiated agreement language in this case was in substance merely a restatement of a provision

of the Classification Act of 1949^{3/} and that administrative and judicial decisions of the Act precluded any interpretation of that language as vesting in employees, particularly career ladder employees, any right to promotion, the Comptroller General held that HEW could not comply with the arbitrator's award of retroactive promotion and backpay:

On the basis of this decision of the Comptroller General and recognizing that the Comptroller General has recently reaffirmed the holding and principles enunciated in Janice Levy,^{4/} we find that the arbitrator's award of retroactive promotion and backpay violates applicable law and appropriate regulation.

Conclusion

On the basis of the Comptroller General's decision in Janice Levy, his subsequent reaffirmation of the principles enunciated therein in John Cahill, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion of the award which directs that the grievant be given a retroactive promotion with backpay. As so modified, the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Attachment:
Appendix

Issued: December 22, 1978

3/ The pertinent provision of the Act is codified at 5 U.S.C. § 5101 (1976).

4/ Matter of: John Cahill--Arbitration Award of Retroactive Promotion and Backpay, B-192455, November 1, 1978.

APPENDIX

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190408

DATE: December 21, 1977

MATTER OF: Janice Levy - Arbitration Award of
Retroactive Promotion and Backpay

- DIGEST:**
1. Where promotion of employee in career ladder position was delayed because original promotion request submitted by supervisor was lost in mails, agency may not comply with arbitration award of retroactive promotion and backpay. Original promotion request was lost prior to approval of promotion by authorized official and hence the delay in processing does not constitute such administrative error as will support retroactive promotion. Further, employee had no vested right to promotion effective the same date as other employees in same career ladder program.
 2. Award of retroactive promotion and backpay may not be sustained based on arbitrator's finding that employee would have been promoted March 28 but for loss of promotion request and that such loss constituted violation of collective bargaining agreement provision incorporating principle of equal pay for equal work. Retroactive promotion is appropriate where delay or failure to promote violates nondiscretionary agency regulation, policy or collective bargaining agreement provision, or a right granted by statute. Arbitrator did not and, in fact, could not, find that principle of equal pay for equal work mandates career ladder promotion at a specific date.

The Department of Health, Education, and Welfare (HEW) has requested a decision concerning its authority to implement an arbitration award of retroactive promotion and backpay to Ms. Janice Levy. The award was granted by the arbitrator as a remedy for

B-190408

HEW's failure to process Ms. Levy's promotion simultaneously with the promotions of other similarly situated career ladder employees. The Department believes that our decisions do not permit it to comply with the award.

The facts are not in dispute and may be summarized as follows. Janice Levy is a Claims Representative in the Social Security Administration (SSA). She was hired at grade GS-5 and, upon 1 year's satisfactory service, was promoted to GS-7, effective March 16, 1975. She became eligible for a career ladder promotion to GS-9 after 1 year of service in the lower grade. Promotion requests were initiated by the District Manager for a group of eligible employees in the Brooklyn Office of the SSA, including Ms. Levy. Those requests were forwarded in a common envelope to the New York Regional Personnel Officer of HEW, together with the supervisor's recommendation that the promotions be made effective March 28, 1976. All of the grievant's eligible coworkers were promoted on March 28, 1976. However, for reasons that remain unexplained, the promotion request made on Ms. Levy's behalf apparently never reached the Regional Personnel Officer who was authorized to approve promotion actions. As a result, Ms. Levy was not promoted along with the other employees on March 28, 1976. When the error was discovered, the District Manager, on May 7, resubmitted the promotion request, recommending that her promotion be made retroactive to March 28, 1976. The Regional Personnel Officer approved Ms. Levy's promotion effective May 9, 1976, but declined to make it retroactive on the ground that he had no authority to do so.

Ms. Levy filed a grievance as a result of the refusal to promote her on a retroactive basis. The matter was ultimately submitted to arbitration under the agency's labor-management agreement. On December 21, 1976, Eva Robins, the arbitrator, awarded Ms. Levy a promotion retroactive to March 28, 1976, together with backpay from that date through May 8, 1976. The award was predicated on the arbitrator's finding that the employer violated the following provision at Article XXV, Section 12 of the the General Agreement Between the Bureau of District Office Operations, SSA, New York Region, and the New York-New Jersey Council of District Office Locals of the American Federation of Government Employees, AFL-CIO:

"The Employer and the Union agree to the principle of equal pay for substantially equal work as well as providing distinctions in pay that are consistent with distinctions in work and work performance."

In awarding a retroactive promotion with backpay, the arbitrator considered the Comptroller General's holding in B-180046, April 11, 1974, that where an original promotion request was lost in the mails the employee could not be promoted retroactively inasmuch as the loss occurred prior to approval by the particular official having delegated authority to approve promotions. That decision summarizes pertinent rulings with respect to retroactivity of promotions as follows:

"* * * In cases involving approval of retroactive promotions on the ground of administrative or clerical error it is necessary that the official having delegated authority to approve the promotion has done so. If subsequent to such approval formal action to effect the promotion is not taken on a timely basis as intended by the approving officer consideration may be given to authorizing a retroactive effective date. However, when, as in this case, the delay or 'error' occurred prior to approval by such responsible official the intent of the agency to promote has not been established and there is no basis for holding that a properly approved promotion was delayed due to an administrative or clerical error.* * *"

The arbitrator distinguished the situation addressed in B-180046, supra, based first on the fact that Ms. Levy's promotion was part of a career ladder program, and based secondly on the fact that loss of the initial promotion request had been established by clear and compelling evidence:

"It was acknowledged at the hearing that there is no question whatever about Ms. Levy's performance and eligibility for promotion as a career ladder promotion. It was stipulated that, but for the error, Ms. Levy would have had the

promotional increase as of March 28, 1976. It appears to the Arbitrator to be cold comfort to the grievant that retroactivity was requested by the operating management but declined only because Regional Personnel Management had no record of receipt of the original form prepared and approved by that same operating management. Where, as here, it is clear that this was not an optional promotion but was a part of a career ladder program in which her colleagues as well as Ms. Levy were to be promoted as of a date certain, the improper retroactivity which the civil service and comptroller general rules appears to be aimed at preventing would not seem to have the same characteristics. In the opinion of this Arbitrator, a lasting inequity results from the application of the no-retroactivity provision in exactly the same manner for career ladder promotions as for other promotions which might require the added protections. There does not appear to be any doubt that the interpretation given by the Employer constitutes a continuing violation of Article XXV, Section 12 of the agreement."

The arbitrator stated that she believed this grievance to be distinguishable from the Comptroller General's decision in B-180046, supra, not only because of the difference in the kind of promotion involved, but for other reasons as well. The arbitrator's opinion continued as follows:

"* * * There is here clear and compelling evidence of clerical or administrative error. Ms. Levy had inquired in advance about her promotion, was told it was in process. The Assistant District Manager testified to its preparation and its transmittal as required. The performance appraisal supporting statements are glowing, and contain no negative comment. As a career ladder promotion, there can be no doubt that Ms. Levy would have received the promotion as of March 28, 1976 but for the administrative error. It was stipulated at the hearing that error

occurred. There is no basis upon which one can decide which of two conjectures is valid; but either the original Form 52 was lost before it reached the Regional Personnel Office, or it was lost after it reached that office and before it was acted on there.

"Finally, it should be noted that the Arbitrator reads the Comptroller General's decision submitted as Employer Exhibit 4 [B-180046, April 11, 1974] as indicating that some retroactive correction is permissible. Thus, in discussing the general 'rule', the decision states that where a personnel action was not effected as originally intended, the error may be corrected retroactively to comply with the original intent, without violating the rule prohibiting retro-prohibiting retroactive promotions. Subsequent language appears to raise other questions as to the time when the error occurs, but does so on the basis of the establishment of the intent of the agency. It appears to the Arbitrator that, for the reasons stated above, the clear intent of the Agency to promote has been established. Whether the correction of error must be made by one department or another of the agency, since the error is found to result in contract violation it appears to the Arbitrator, and she so finds, that it must be corrected by the Agency."

The Social Security Administration filed a petition for review and stay of the arbitration award with the Federal Labor Relations Council (FLRC). In denying the petition for review and for stay of the award, the Council specifically rejected the agency's contention that the award violates the general rule prohibiting retroactive promotion, stating:

"The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation. In this case, however, the Council is of the opinion that the agency's petition does not present facts and circumstances necessary to support its exception that the arbitrator's

award violates applicable law and appropriate regulation. In this regard, the Council has previously noted that, consistent with Civil Service Commission instructions and Comptroller General decisions, it has been established that an agency may be required to promote a particular individual, consistent with the Federal Personnel Manual, and accord that individual backpay, when a finding has been made by an arbitrator, or other competent authority, that such individual would definitely (and in accordance with law, regulation and/or the negotiated agreement) have been promoted at a particular point in time but for, among other things, an agency violation of its negotiated agreement.

* * * As noted previously the arbitrator specifically found that the error by the agency constituted a violation of Article XXV, section 12 of the negotiated agreement. Moreover, as noted by the arbitrator, it was stipulated that, but for the error, the grievant would have been promoted on March 28. The agency's argument that the provision found to be violated, because of its lack of specificity, does not constitute a nondiscretionary agency requirement appears to constitute nothing more than disagreement with the arbitrator's interpretation of Article XXV, section 12 of the parties' collective bargaining agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitration award. * * *

The above discussion is amplified by the following footnote suggesting that decisions of this Office have permitted retroactive promotions under similar circumstances where promotion requests had not been approved by the properly delegated agency official:

"In support of its exception the agency cites decisions of the Comptroller General prohibiting retroactive promotions when the official having authority to approve the promotion has not done so. The agency alleges that in the facts and circumstances of the instant case the official with

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the appropriate delegated authority was the Regional Personnel Officer and that official had not approved the promotion. However, the Council notes that in at least two decisions the Comptroller General has permitted retroactive promotions in cases involving violations of collective bargaining agreement provisions even though the appropriate agency official has not approved the promotions. 55 Comp. Gen. 42 (1975); B-180010, August 30, 1976. Thus in B-180010, August 30, 1976, involving a question of whether an employee whose promotion was delayed could be given a retroactive promotion, and in which the agency involved made arguments before the Comptroller General similar to those made by the agency in the instant case, the Comptroller General concluded that '[s]ince the arbitrator has determined that but for the agency's undue delay the grievant would have been promoted earlier, we would have no objection to processing a retroactive promotion * * * and paying the appropriate backpay. "

Regarding the FLRC, we stated in 54 Comp. Gen. 312, 317 (1974):

"* * * When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involve matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award. "

That decision concedes the FLRC's authority to rule on questions of the legality of implementation of an award in the first instance while at the same time reaffirming the Comptroller General's statutory responsibility as the final administrative authority to rule on questions of the propriety of expenditures of appropriated funds.

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Upon an agency's request for decision or referral of the matter by the FLRC, where we have found that an arbitration award violates applicable law or regulations we have held that the award may not be implemented. See 54 Comp. Gen. 921 (1975); 55 id. 183, 564, 1062 (1975); and 56 id. 57, 131 (1976). Although in the instant case, the FLRC has opined that the award does not violate applicable laws and regulations, HEW questions the correctness of that determination. Therefore, this Office will give further consideration to the question of whether the award contravenes the rule against retroactive promotions.

As a general rule a personnel action may not be made retroactive so as to increase the right of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. See 55 Comp. Gen. 42 (1975), 54 id. 888 (1975), and decisions cited therein.

With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotion have been fully carried out. The rule is as stated in B-180046, quoted above. See also 54 Comp. Gen. 539 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus. In that category

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of case, administrative intent can be ascertained with certainty and retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate.

The arbitrator is of the opinion that the persuasiveness of the showing of error is one factor that militates toward an exception to this rule. We note that in B-183969, supra, HEW itself requested authorization to retroactively effect 300 promotions, mostly career ladder promotions, based on a breakdown in procedures which resulted in a failure to process promotion requests. In most cases of retroactive promotion requests, as in B-183969, the showing of error is clear and certainly can be no more convincing than where the department or agency itself concedes the error and initiates action to effect correction. Thus, we do not concur in the arbitrator's reliance on this factor.

The other factor which the arbitrator finds distinguishes Ms. Levy's case and permits retroactive promotion is the fact that hers was a career ladder position. The arbitrator states that hers was not an "optional promotion but part of a career ladder program in which her colleagues as well as Ms. Levy were to be promoted as of a date certain." The arbitrator specifically finds that this difference in the kind of promotion "has meaning" and, from a careful reading of the arbitrator's opinion, it appears that this perceived distinction is the touchstone for the award.

We note that the opinion does not specifically refer to any regulation, instruction or policy of either HEW or the SSA making career ladder promotions obligatory and, in fact, the parties' agreement appears to confirm the nonexistence of any such requirement by its reservation for further negotiations of the matter of career ladder promotions. Article XXXVI, Section 14, of the agreement provides:

"In the event the Employer obtains authority to negotiate the effective date of career ladder promotions, the parties agree to negotiate a supplement to the General Agreement."

In the absence of any such administrative regulation, instruction, or policy, career ladder promotions are not mandatory. Subchapter 4-2b(2) of chapter 335 of the Federal Personnel Manual specifically provides that an agency may make successive career ladder promotions:

"(2) Career ladder position. An agency may make successive career promotions of an employee until he reaches the full performance level in a career ladder if he is one of a group in which all employees are given grade-building experience and are promoted as they demonstrate ability to perform at the next higher level, and if there is enough work at the full performance level for all employees in the group. * * *"

In B-168715, January 22, 1970, we held that employees in such positions have no vested right to be promoted at any specific time and that the dates of such promotions were within the discretionary authority of the official having promotion approval authority. The fact that career ladder employees have no vested right to promotion in the absence of a mandatory administrative regulation, instruction or policy or provision in a collective bargaining agreement was recently reaffirmed in Matter of Adrienne Ahearn, B-186649, January 3, 1977. Compare Matter of Joseph Pompeo, B-186916, April 25, 1977, where retroactive promotions were upheld based on the existence of an agency policy mandating promotion where there had been certification that a career ladder employee was performing at an acceptable level of competence.

Thus, we disagree with the arbitrator's conclusion that under pertinent regulations and decisions initiation of a promotion request without approval by the authorized official establishes agency intent to promote within the context of the administrative error rule discussed above and that those authorities do not apply to career ladder promotions where error is established by clear and convincing evidence.

The FLRC, in denying the SSA's request for review suggests that there is an alternative basis upon which the arbitration award can be upheld. As indicated by the above-quoted language from its decision, the FLRC is of the opinion that decisions of this Office, specifically 55 Comp. Gen. 42 (1975), and B-180010, August 3, 1976, permit retroactive promotion where there has been a determination of error on the agency's part amounting to a violation of a negotiated agreement and where, but for that error, the employee would have been promoted on a specific date. Noting that the arbitrator specifically found that but for loss of the promotion request Ms. Levy

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would have been promoted on March 28 and that such loss constituted a violation of Article XXV, Section 12, of the agreement, the FLRC finds a basis for sustaining the award.

As indicated above, one exception to the rule prohibiting retroactive promotion is where the failure to promote constitutes violation of a nondiscretionary regulation or policy. We have recognized that an agency, by agreeing to a provision of a collective bargaining agreement may, as well as by its own promulgation of regulations and instructions, limit its discretion to such a degree that it becomes mandatory under certain conditions to promote classes of employees. In both 55 Comp. Gen. 42, supra, and B-180010, supra, the collective bargaining agreements contained provisions mandating promotion of career ladder employees. In 55 Comp. Gen. 42, supra, the agreement included the following specific provision:

"All employees in career ladder positions will be promoted on the first pay period after a period of one year or whatever lesser period may be applicable provided the employer has certified that the employee is capable of satisfactorily performing at the next higher level."

The arbitrator in that case found that the Internal Revenue Service had violated that provision in delaying promotions of seven employees for up to 2 months. In upholding the arbitration award, we stated:

"* * *our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collective-bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and Comptroller General decisions, decides that an agency has violated an agreement, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay

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award for the period during which the employee would have received the pay but for the violation, so long as as the relevant provision is properly includable in the agreement. * * *''.

There, retroactive promotions were properly awarded based upon the arbitrator's finding that the delays in the promotions violated a nondiscretionary agency policy. See also 54 Comp. Gen. 888 (1975). In B-180010, supra, the award of retroactive promotion was partially upheld based on the arbitrator's finding that the agency had violated the nondiscretionary policy to which it had subscribed in the collective bargaining agreement mandating, rather than permitting, promotion of certain career ladder employees when they had met the qualifications of the position, demonstrated ability to perform at the higher level and provided there was enough work at the full performance level for all employees in the career ladder group. Thus, not every violation of a collective bargaining agreement will support the award of a retroactive promotion, but only violation of a nondiscretionary agency policy. See 55 Comp. Gen. 427 (1975), and 54 Comp. Gen. 403 (1974).

The FLRC suggests that the arbitrator's finding that SSA violated Article XXV, Section 12, of the agreement amounts to a finding of violation of such a mandatory agency requirement. Having reviewed the arbitrator's opinion we are unable to find that she specifically construed Article XXV, Section 12, as mandating promotion of career ladder employees at any specific time. Rather, she appears to have concluded that the inequity that would result from failure to retroactively promote the employee violates the general concept of equal pay for equal work as incorporated in the agreement. Moreover, we do not believe that the arbitrator could specifically find that the language of that section constitutes a nondiscretionary agency policy mandating promotion of career ladder employees within any specific timeframe.

In interpreting the language of a collective bargaining agreement, the arbitrator is bound by applicable laws and regulations. Where a particular provision does nothing more than incorporate controlling laws and regulations into the agreement, the arbitrator is not free to disregard administrative and judicial construction of such provision and the obligation of this Office to determine whether the agreement, as construed by the arbitrator, violates

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applicable laws and regulations extends to a consideration of the arbitrator's interpretation of such specific provision.

The language of Article XXV, Section 12, in substance, is merely a restatement of the following provision of the Classification Act as codified at 5 U. S. C. § 5101 (1970):

"§ 5101. Purpose

"It is the purpose of this chapter to provide a plan for classification of positions whereby--

"(1) in determining the rate of basic pay which an employee will receive--

"(A) the principle of equal pay for substantially equal work will be followed; and

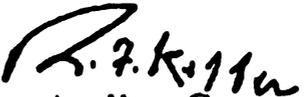
"(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service* * *."

That language sets forth a basic precept of the position classification system established in 1949. Odian v. United States, 203 Ct. Cl. 321 (1973). Even with respect to classification actions, the argument has been judicially rejected that the principle of equal pay for equal work mandates the upgrading of positions at any specific date, Brech v. United States Immigration and Naturalization Service, 362 F. Supp. 914 (1973), much less that it permits payment of backpay as a remedy for failures to timely reclassify, Haneke v. Secretary of Health, Education and Welfare, 535 F. 2d 1291 (1976). The fact that substantially similar language is incorporated into a collective bargaining agreement does not, in our opinion, give the arbitrator authority to now find that language of a law that has been in existence since 1949 mandates career ladder promotions, given the

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above court decisions and the fact that decisions of this Office postdating 1949 have repeatedly held that employees, and in particular career ladder employees, have no vested right to promotion.

Accordingly, we hold that HEW may not comply with the arbitrator's award of retroactive promotion and backpay to Ms. Levy.


Deputy Comptroller General
of the United States

American Federation of Government Employees, National Council of Social Security Payment Center Locals and Social Security Administration, Bureau of Retirement and Survivors Insurance. The dispute involved two proposals of the agency for inclusion in the parties' master agreement, which proposals related to the framework of the parties' relationship during the term of that agreement.

Council action (December 22, 1978). The Council held that the agency's proposals were within the bargaining obligation established by section 11(a) of the Order, and did not appear otherwise nonnegotiable. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination that the proposals were negotiable.

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

American Federation of Government Employees,
National Council of Social Security
Payment Center Locals
(Union)

and

FLRC No. 78A-62

Social Security Administration, Bureau
of Retirement and Survivors Insurance
(Agency)

DECISION ON NEGOTIABILITY ISSUES

Agency Proposals I and III^{1/}

Section c. The Program Service Center and respective Local will continue to follow the traditional consultation process relating to personnel policies, practices, and working conditions. Local issues will not be escalated to the Bureau/Council level for meeting and conferring.

Section d. The Bureau and the Council agree that labor-management meetings in the Program Service Center to discuss local personnel policies and practices and other general working conditions should be held on a monthly basis unless deferred by mutual consent of the Program Service Center and the Local.

Agency Determination

The agency determined that the proposals are negotiable under the Order.

Question Here Before the Council

The question is whether the agency's proposals are negotiable under the Order.^{2/}

^{1/} The proposals are considered together for convenience since essentially the same issues and contentions are involved.

^{2/} In its statement of position, the agency contended that the union's petition for review was untimely filed. However, in view of our decision herein we find it unnecessary to reach or pass upon this contention.

Opinion

Conclusion: The proposals are within the bargaining obligation established by section 11(a) of the Order, and do not appear otherwise nonnegotiable. Accordingly, the agency's determination that the proposals are negotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.^{3/}

Reasons: The agency's proposals at issue here arose in connection with the parties' negotiation of a master agreement covering an exclusive bargaining unit represented by a national council, and consisting of six affiliated local unions, none of which is separately certified as a collective bargaining representative. According to the language of the agency's proposals and the related explanations of the parties in their submissions to the Council, the proposals essentially concern the relationship existing between the parties at the local level, i.e., between each Program Service Center and the local union at that center. More particularly, as appears from the record before the Council, the proposals describe the nature of the relationship at the local level relating to changes in established personnel policies, practices, and working conditions during the life of the master agreement. Under the proposals, as relevant here, that relationship at the local level would include "consultations" and "discussions" as to such midcontract changes, but would not include "negotiations." Conversely, it appears from the record before us that the proposals do not pertain to the nature of the relationship or the nature of the rights and obligations of the parties at the level of recognition concerning such midcontract changes; that is, the proposals in no way attempt to define or describe the relationship between the Bureau and the National Council of Social Security Payment Center Locals concerning changes in established personnel policies, practices, and working conditions during the life of the master agreement.

In the AFGE Council of Prison Locals case,^{4/} the disputed union proposal concerned the negotiation of local supplements to the parties' master agreement. In resolving the dispute, the Council noted that parties to negotiations are free to determine both the form and the substance of their agreement, and thus, a proposal affecting the form or structure of the parties' master agreement would fall within the obligation to bargain established by section 11(a) of the Order, so long as such proposal did

^{3/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposals. We decide only that, in the circumstances presented, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{4/} AFGE Council of Prison Locals and Department of Justice, Bureau of Prisons and Federal Prison Industries, 5 FLRC 516 [FLRC No. 76A-38 (June 22, 1977), Report No. 129].

not conflict with explicit limitations on negotiations contained in that section of the Order. Consequently, the Council found, inter alia, "that there is an obligation under section 11(a), if requested, to negotiate at the level of recognition on proposals for the master agreement concerning whether or not supplemental local negotiation will be required under the controlling agreement" [Emphasis in original.]^{5/}

Analogous reasoning applies in this case to the agency's proposals offered in bargaining at the level of recognition, proposed for inclusion in the parties' master agreement, and relating to the framework of the parties' relationship during the term of that master agreement. That is, the parties are free to determine both the form and the substance of their agreements at the level of recognition. Thus, proposals describing the nature of the parties' relationship below the level of recognition concerning midcontract changes in established personnel policies, practices, and matters affecting working conditions fall within the obligation to bargain established by section 11(a) of the Order. Hence, we find that the section 11(a) obligation to bargain comprehends an obligation to negotiate, at the level of recognition, on the proposals at issue here, which relate to the nature of the relationship to be established below the level of recognition, i.e., at the local level, as to such midcontract changes.

The union contends that the agency's proposals are nonnegotiable, based on the mistaken assertion that the agency has an obligation to bargain below the level of recognition, i.e., at the local level within the National Council's unit of exclusive recognition. However, as the Council stated in the AFGE Council of Prison Locals case: "We must emphasize that under section 11(a) of the Order the obligation to negotiate agreements applies only at the level of recognition."^{6/} This is as true of agreements resulting from midcontract changes as of agreements constituting the basic contract between an agency and a labor organization; that is, under section 11(a) of the Order the obligation to negotiate with respect to midcontract changes applies only at the level of recognition.^{7/} Whether that obligation is to be extended to levels below the level of recognition is to be determined by the parties to the bargaining relationship

^{5/} Id., 520.

^{6/} Id.

^{7/} Regarding the obligation to negotiate with respect to midcontract changes, see Labor-Management Relations in the Federal Service (1975), 41-42.

at the level of recognition. Therefore, and apart from other considerations, we reject the union's argument that the agency's proposals are nonnegotiable.

Accordingly, we find the agency's proposals negotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 22, 1978

Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union (Morris, Arbitrator). The arbitrator found that under the relevant provision of the parties' agreement the grievant was entitled to 16 hours of administrative leave for the 2-day period she was unable to return to work from annual leave due to severe snow conditions at a vacation site. The arbitrator therefore sustained the grievance concerning the activity's denial of the grievant's request for administrative leave for the period of time in question, and directed that she be granted the leave claimed. The Council accepted the agency's petition for review insofar as it related to the exception alleging that the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay of the award. (Report No. 155)

Council action (December 22, 1978). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council held that the arbitrator's award violated applicable law and regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award.

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

Internal Revenue Service,
Brookhaven Service Center

and

FLRC No. 78A-68

National Treasury Employees
Union

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the grievant, a GS-7 Tax Examiner assigned to the Internal Revenue Service, Brookhaven Service Center (the activity), was scheduled to return to work from annual leave on March 23, 1977. She did not report to work until March 25, 1977, due to inclement weather in Decatur, Otsego County, New York, where she had been vacationing, although she made reasonable, continuing efforts to do so, and notified her supervisor of her difficulties. Thereafter, she requested 16 hours administrative leave for March 23 and 24, pursuant to the parties' negotiated agreement.^{1/} The agency denied her request for administrative leave, giving rise to a grievance which ultimately went to arbitration.

1/ According to the arbitrator, the parties' negotiated agreement provides, in relevant part:

Article 18 Administrative Leave, Section 2.

- A. The employer agrees that whenever it becomes necessary to close an office because of inclement weather or any other emergency situation and to grant administrative leave to those who are excused because of the emergency, reasonable efforts will be made to inform all employees by private or public media.
- B. If emergency conditions described above exist and prevent an employee from getting to work, and the Center is not closed, the employee may be granted administrative leave for absence from work for a part or all of his/her workday if he/she provides the Employer with reasonably acceptable documentation that he/she made a reasonable, continuing effort to reach work but that the emergency conditions prevented him/her from doing so. The Employer at his option, may waive the above requirement for documentation for absences of one (1) hour or less.

The Arbitrator's Award

The arbitrator framed the issue as whether the activity violated the parties' agreement by denying the grievant the 16 hours administrative leave she had requested. He sustained the grievance, finding that the grievant was entitled to administrative leave because the provision of the agreement concerning emergency weather conditions which prevent an employee from reporting to work were not specifically limited to weather conditions within the commuting area of the work site.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulation. ^{2/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award violates applicable law and appropriate regulation. Because this case involves an issue within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and regulations. The Comptroller General's decision in the matter, B-193389, November 29, 1978, is set forth below:

This action responds to the Federal Labor Relations Council's request of October 30, 1978, for an advance decision on implementing the award of administrative leave granted by the arbitrator in Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union (James A. Morris, Arbitrator), FLRC No. 78A-68.

This case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations. Our jurisdiction is based upon the authority of the Comptroller General under 31 U.S.C. §§ 74

^{2/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

and 82d to make decisions involving the expenditure of appropriated funds and is exercised under the rules published in 43 Fed. Reg. 32,395, July 27, 1978, (4 C.F.R. Chapter I, part 21).

The issue is whether 2 days of paid administrative leave may lawfully be granted because severe snow conditions at the employee's place of vacation prevented the employee's scheduled return to work at her permanent duty station located over 200 miles away. For the purpose of deciding this issue, we assume administrative leave to mean an excused absence with pay without the agency charging the employee's accumulated annual leave.

Mrs. Peggy Ann Mistler, the grievant in the arbitration case, is an employee of the Internal Revenue Service (IRS) at its Brookhaven Service Center, Holtsville, New York, on Long Island. She was authorized annual leave for her vacation and was due to report back at the Brookhaven Service Center on March 23, 1977. However, severe snow conditions had developed where she was vacationing at Decatur, Otsego County, New York, located over 200 miles from the Brookhaven Service Center. Mrs. Mistler made reasonable continuing efforts to return to Long Island on March 22, 23, and 24, 1977, but was unable to do so until March 25, 1977, because of the snow at Decatur. This emergency condition did not exist in the vicinity of the Brookhaven Service Center. She notified her supervisor on March 22 and 23 of her inability to report for work as scheduled on March 23 and 24, and she later provided documentation of her efforts to return.

Several days later, Mrs. Mistler requested 16 hours of administrative leave for her absence on March 23 and 24 due to inclement weather conditions, pursuant to Article 18, section 2(B), of the collective bargaining agreement between the Brookhaven Service Center and the National Treasury Employees Union, Chapter No. 99. The request was denied by Brookhaven, leading to the filing of a grievance and an arbitration hearing.

The arbitrator's opinion awarding the administrative leave was based on bargaining history, past practice, and the intent of the parties concerning section 2(B) of Article 18. The full text of Article 18, Section 2 of the agreement reads as follows:

"Article 18 Administrative Leave, Section 2.

"A. The employer agrees that whenever it becomes necessary to close an office because of inclement weather or any other emergency situation and to grant administrative leave to those who are excused because of the emergency, reasonable efforts will be made to inform all employees by private or public media.

"B. If emergency conditions described above exist and prevent an employee from getting to work, and the Center is not closed, the employee may be granted administrative leave for absence from work for a part or all of his/her workday if he/she provides the Employer with reasonably acceptable documentation that he/she made a reasonable, continuing effort to reach work but that the emergency conditions prevented him/her from doing so. The Employer at his option, may waive the above requirement for documentation for absences of one (1) hour or less."

The arbitrator stated that there was an honest difference of opinion between management and the union over the intended meaning of section 2(B). He noted that there was no specification that the emergency weather conditions must be those prevailing in the commuting area. He concluded that, since the parties did not restrict the emergency conditions provision to the commuting area of the Brookhaven Service Center, it applied to a situation where the emergency snow conditions occurred at the place of vacation outside the commuting area. Therefore, he found that the grievant was entitled to administrative leave under section 2(B), Article 18.

The IRS in its petition for review before the Federal Labor Relations Council argues that the arbitrator's interpretation of section 2(B) could not legally have been within the contemplation of the parties. The IRS characterizes a vacation emergency preventing an employee's return to duty as purely personal to the employee if the emergency occurs at a place of vacation distant from the commuting area. It believes that a Federal agency may not lawfully grant administrative leave for a purely personal emergency of this kind.

The union in its response agrees with the arbitrator's reasoning. It points out that an arbitrator's award should not be interfered with solely because a reviewing authority interprets a collective bargaining agreement differently than the arbitrator.

Our review of an arbitrator's award is conducted to determine whether the award is consistent with laws, regulations, and applicable decisions, as they apply to the expenditure of appropriated funds. We accept an arbitrator's reasonable interpretation of a negotiated agreement even though we might have interpreted it differently in the first instance. Roy F. Ross and Everett A. Squire, B-191266, June 12, 1978. However, we cannot accept an interpretation which results in an award that contravenes applicable laws and regulations.

Our decision in 56 Comp. Gen. 865, 868 (1977), followed our consistent holdings that absence should be charged to annual leave if excess traveltime is:

"* * * attributable to the employee's delay or deviation from the direct route of travel for personal reasons or where the excess traveltime is otherwise a matter of personal convenience to the employee * * *." (Emphasis added.)

The guidelines in Federal Personnel Manual Supplement 990-2, Book 610, Appendix A, para. A-2, similarly exclude personal reasons for granting administrative leave during emergency situations. There, an emergency is defined as "one which may prevent employees in significant numbers from reporting for work * * *." Further, para. A-2 says the emergency "must be general rather than personal in scope and impact."

The only statutory provision we are aware of which specifically recognizes the general authority of an executive agency to grant administrative leave is 5 U.S.C. § 6326, enacted by Public Law 90-588, October 17, 1968, 82 Stat. 1151. It authorizes up to 3 days' absence with pay and without charge to leave for funerals of immediate relatives who die as a result of serving in the Armed Forces in a combat zone. Subsection (c) of this provision provides:

"This section shall not be considered as affecting the authority of an Executive agency, except to the extent and under the conditions covered under this section, to grant administrative leave excusing an employee from work when it is in the public interest." (Emphasis added.)

In our view this provision merely sanctions previously issued decisions, regulations, and instructions regarding such leave. Its significance to the present case, moreover, is that it recognizes that the administrative leave authorized is to further the "public interest," as distinct from the purely personal interest of the employee.

The present case involves the typical situation where a Federal agency has no control over selecting the place of vacation, which can be as far distant, remote, and susceptible to emergency situations as the employee elects. By picking a vacation spot away from his permanent duty station, the employee establishes the degree of risk that his return to duty will be delayed. It has always been the responsibility of the employee to return to duty after a vacation. In this sense, an emergency at the vacation site and any resulting delay are essentially personal to the employee. As discussed above under our decision in 56 Comp. Gen. 865 (1977), administrative leave is not permitted for such personal reasons. This kind of emergency concerns the employee's private interest, rather than the public interest recognized as appropriate for administrative leave under 5 U.S.C. § 6326(c).

The arbitrator's award violates applicable law and regulations governing the authority of the IRS to grant administrative leave. Consequently the award of administrative leave to Mrs. Mistler may not be implemented.

Based upon the foregoing decision of the Comptroller General, it is clear that the arbitrator's award, granting the grievant administrative leave for the 2 days she was unable to return to work because of inclement weather conditions where she was vacationing, violates applicable law and regulations and must be set aside.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 22, 1978

Internal Revenue Service, Atlanta Service Center and National Treasury Employees Union, Chapter 70 (Forsythe, Arbitrator). The arbitrator found that a warning letter of inefficiency given the grievant was grievable under the negotiated agreement, and that, in the facts of the case, the letter should not be permanently contained in the grievant's personnel file. As an award, the arbitrator directed that the letter be removed from the grievant's personnel file. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on two exceptions, contending (1) that the arbitrator exceeded his authority, and (2) that the award did not draw its essence from the agreement. The agency also requested a stay of the arbitrator's award.

Council action (December 22, 1978). The Council held that the agency's petition for review failed to describe facts and circumstances to support its exceptions. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 22, 1978

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Internal Revenue Service, Atlanta
Service Center and National Treasury
Employees Union, Chapter 70 (Forsythe,
Arbitrator), FLRC No. 78A-78

Dear Mr. Simms:

The Council has carefully considered the agency's petition for review and request for stay of the arbitrator's award, and the union's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award and the record before the Council, the dispute in this matter arose when the grievant, a WAE (When Actually Employed) data transcriber at the IRS Atlanta Service Center (the activity), was given a warning letter of inefficiency which gave her sixty days to improve her work performance. The grievance resulting in the instant arbitration arose as a result of the grievant's allegation that the warning letter was not issued pursuant to the proper procedures.

The issues before the arbitrator as stipulated by the parties were as follows:

- (1) Whether the warning letter of inefficiency given the grievant is grievable under the Agreement pursuant to Article 8, Section 1(a)[.]^{1/} [Footnote added.]

^{1/} Article 8 (EVALUATIONS OF PERFORMANCE), Section 1, of the parties' negotiated agreement provides as follows:

- A. All evaluations of performance provided for under the terms of this Agreement will be made in a fair and objective manner. Evaluations will be made only by the employee's immediate supervisor who is immediately responsible for the employee's work and who assigns, reviews, and evaluates the employee's work; provided however that if the immediate supervisor is to be considered for a vacant position for which the employee is also being considered, the evaluation will be made by the next higher level manager.

- (2) If the warning letter of inefficiency is grievable as an evaluation of performance pursuant to Article 8, Section 1(a) whether it was warranted under the circumstances of this case.

With respect to the first issue of whether the warning letter of inefficiency was grievable under the agreement, the union took the position before the arbitrator that a letter of inefficiency is an evaluation of performance pursuant to Article 8, Section 1(a) of the agreement and, therefore, an employee has a right to grieve such a letter as an evaluation when such evaluation is completed. The agency's position essentially was that the warning letter was a "narrative recordation" resulting from counseling rather than an evaluation of performance, and, as such, was not subject to the negotiated grievance procedure in accordance with Article 8, Section 1(c) of the negotiated agreement.

The arbitrator, in addressing the first issue and finding the matter to be grievable, stated in part as follows:

. . . there are differences between a narrative recordation and a warning letter of inefficiency

The sixty day letter then is one which in industrial relations is regarded as a part of "progressive discipline" and an opportunity to give an employee an opportunity to correct his or her behavior or to question the contents thereof. This Arbitrator is mindful that he is dealing only with the Agreement between this Agency and the NTEU but makes the above observation as a part of intent which must be realized for any successful involvement in Employer-Employee relations, and this then is a grievable matter.

(Continued)

- B. A copy of each evaluation as provided in A above will be furnished to the employee, and will be discussed with the employee at least two work days prior to its filing. An employee's initials on an evaluation, where initialing is provided for, indicates only that the evaluation has been received, and does not necessarily indicate an employee's agreement with the evaluation.
- C. The Employer will counsel employees in relation to their overall performance on an as-needed basis. When a narrative recordation results from such counseling, the affected employee will be given a copy of the recordation and will have the right to make written comments concerning any disagreement with the recordation. These written comments will be attached to and become a part of the recordation. The Employer shall have the right to use such recordation when evaluations provided for in A above are being completed and the content thereof (i.e., the recordation) may not be grieved except in relation to a grievance related to the completed evaluations in A above.

The arbitrator went on to find that, in the facts of this case, the letter should not be permanently contained in the grievant's personnel file and awarded as follows:

The Union's request in the case of [the grievant] is granted, to the extent that the letter of inefficiency should be removed from her personnel file.

The agency's petition seeks Council review of the award on the basis of the two exceptions discussed below. The union filed an opposition.

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

In its first exception, the agency contends that the arbitrator exceeded his authority. In support of this exception, the agency asserts that the arbitrator's reference to discipline in the discussion accompanying his award indicates that the arbitrator failed to address the issue submitted by the parties which involved performance evaluation and that, in fact, the arbitrator based his award on discipline, an issue not submitted to him. The agency concludes that, by so basing his decision, the arbitrator exceeded his authority by determining an issue not submitted to arbitration, and by failing to decide the issue submitted; and, further, by violating the restriction on his authority as set forth in the submission agreement and the parties' negotiated agreement; and finally, by adding to and modifying the agreement by including an evaluation of performance as a form of disciplinary action.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, the Council will grant a petition for review where it appears that the exception presents grounds that an arbitrator exceeded his authority by determining an issue not included in the question(s) submitted to arbitration, Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), 3 FLRC 83 [FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62]; or by going beyond the scope of the submission agreement, Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), 4 FLRC 198 [FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101]; or by violating a specific limitation or restriction on his authority which is contained in the negotiated agreement, Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), 5 FLRC 230 [FLRC No. 76A-116 (Mar. 31,

1977), Report No. 123]; or by adding to, or modifying any of the terms of the agreement, Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator), 3 FLRC 415 [FLRC No. 75A-7 (June 26, 1975), Report No. 76].

In the instant case, however, the Council is of the opinion that the agency's petition does not describe facts and circumstances to support its exception that the arbitrator exceeded his authority in any manner. In this regard, the Council notes that the arbitrator, in his opinion accompanying his award, addressed both issues submitted to him with citation to and based upon the disputed agreement provision, and made his award accordingly. The agency presents no facts and circumstances to support its assertion that the arbitrator exceeded his authority in any of the ways alleged by his reference to discipline in his opinion accompanying his award. Accordingly, the agency's first exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

The agency's second exception alleges that the arbitrator's award does not draw its essence from the agreement. The agency contends in this regard that the arbitrator went outside the parties' agreement when he found that the warning letter was a part of progressive discipline in industrial relations and thus grievable. According to the agency, the arbitrator failed to confine himself to the agreement when making his award since nowhere in the labor agreement is such a letter defined or mentioned as a form of discipline.

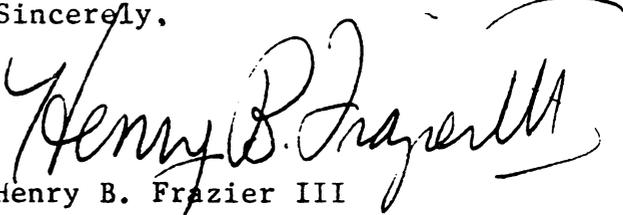
The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement, NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), 3 FLRC 475 [FLRC No. 74A-38 (July 30, 1975), Report No. 79]. However, the Council is of the opinion that the agency's second exception is not supported by the facts and circumstances described in the petition. In this regard, the agency has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon his interpretation and application of the parties' agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or that the award could not in any rational way be derived from the agreement; or that it evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof, NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma, supra. Furthermore, to the extent that the agency's exception is based upon the arbitrator's discussion, the Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), 4 FLRC 444 [FLRC No. 76A-36 (Aug. 31, 1976),

Report No. 111]. Therefore this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: S. Flig
NTEU

Marshall Space Flight Center, Marshall Space Flight Center, Alabama,
A/SLMR No. 1060. The Assistant Secretary, upon an Application for Decision on Grievability or Arbitrability filed by the union (Local 27, Marshall Engineers and Scientists Association, IFPTE), found, by decision of June 8, 1978, that the matter in dispute was grievable and arbitrable. Subsequently, in response to a request from the union for assistance regarding compliance, the Assistant Secretary, by decision of August 25, 1978, concluded that full compliance with his earlier decision could be achieved only by submitting all unresolved arbitrable issues raised by the subject grievance to an arbitrator in a single proceeding. The agency (NASA) filed an appeal with the Council on September 26, 1978, seeking review of the Assistant Secretary's decisions of June 8 and August 25, 1978. The agency also requested a stay.

Council action (December 22, 1978). The Council held that to the extent the agency's petition sought review of the Assistant Secretary's decision of June 8, 1978, the petition was untimely filed; and to the extent that it sought review of his decision of August 25, 1978, regarding compliance, it did not meet the requirements of section 2411.12 of the Council's rules of procedure. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 22, 1978

Mr. S. Neil Hosenball
General Counsel
National Aeronautics and
Space Administration
400 Maryland Avenue, SW.
Washington, D.C. 20546

Re: Marshall Space Flight Center, Marshall
Space Flight Center, Alabama, A/SLMR
No. 1060, FLRC No. 78A-132

Dear Mr. Hosenball:

The Council has carefully considered the agency's petition for review and request for a stay in the above-entitled case, which you filed with the Council on September 26, 1978.

In this case, as found by the Assistant Secretary, the activity (Marshall Space Flight Center) and the union (Marshall Engineers and Scientists Association, Local 27, International Federation of Professional and Technical Engineers) are parties to a collective bargaining agreement containing a negotiated grievance procedure. Pursuant to that procedure, the union filed a grievance alleging violations of various provisions of the parties' agreement in the filling of two supervisory positions by the activity. The activity rejected the union's grievance on the ground that the positions in question were outside the bargaining unit. The union then filed an Application for Decision on Grievability or Arbitrability with the Assistant Secretary.

The Assistant Secretary, by decision of June 3, 1978, adopting the findings, conclusions and recommendations of the Administrative Law Judge, found "that the issue raised by the grievance herein concerning whether certain provisions of the negotiated agreement are applicable to supervisory positions involves a question of interpretation and application of the negotiated agreement and, therefore, is grievable and arbitrable." The Assistant Secretary then found that the union's grievance was "subject to the grievance and arbitration procedures under the terms of the parties' negotiated agreement," and ordered the activity to comply with that finding.

It appears that thereafter a disagreement arose between the parties as to what constituted full compliance with the Assistant Secretary's decision. By letter of June 15, 1978, the activity advised the union that it was at

that time prepared to submit to arbitration only the issue of "whether certain provisions of the negotiated agreement are applicable to supervisory positions"; and that in the event that the arbitrator resolved that threshold issue in favor of the union, the union's grievance would be remanded to the parties for separate processing on its merits under the terms of their agreement. The union's position was that the threshold issue had already been decided by the Assistant Secretary in favor of the union and that full compliance with the Assistant Secretary's decision required submission of the grievance to arbitration for resolution on its merits.

Subsequently, the union sought the assistance of the Assistant Secretary with respect to the compliance matter. The Assistant Secretary responded by letter of August 25, 1978, reiterating the findings set forth in his June 8, 1978, decision, and stating:

In my opinion, where, as here, a threshold issue has been found to be arbitrable as well as the merits of a particular grievance, it will effectuate the purposes and policies of the Executive Order to submit all unresolved arbitrable issues (both threshold issues and the merits of the grievance) to an arbitrator in a single proceeding. This will promote the expeditious resolution of the grievance involved by permitting the arbitrator to resolve the merits of the grievance if he concludes with respect to the threshold issue that the negotiated agreement covers such grievance. In my view, the promotion of the expeditious resolution of an entire grievance in one proceeding is consistent with the policy of the Order to encourage the speedy resolution of labor-management relations disputes and to avoid the proliferation of issues in multiple proceedings.

The Assistant Secretary concluded by finding that "full compliance in this matter can be achieved only by submitting all unresolved arbitrable issues raised by the instant grievance to an arbitrator in a single proceeding." [Emphasis in original.]

In your appeal to the Council on behalf of the agency, you seek "review of the Finding and Order rendered . . . June 8, 1978, and August 25, 1978, by the Assistant Secretary." You then contend that such decision was "arbitrary and capricious in holding that the merits of the subject grievance are arbitrable," and that the decision "presents a major policy issue in that the Assistant Secretary has expanded his responsibilities in grievability/arbitrability determinations under [the Order]"

As to your appeal from the June 8, 1978, decision of the Assistant Secretary, you assert that the Assistant Secretary modified his decision of June 8, 1978, by his action of August 25, 1978, and, in effect, therefore, that your appeal is timely with respect to the earlier decision. We cannot agree with your assertion. In his action of August 25, 1978, the Assistant Secretary merely reiterated the findings set forth in his decision of June 8, 1978, and provided information, along with rationale,

as to the manner in which full compliance with that decision should be achieved. Thus, the Assistant Secretary's post-decision action of August 25, 1978, did not materially change his decision of June 8, 1978, but, rather, constituted a separate and distinct action confined to the issue of compliance.

Therefore, to the extent that your petition seeks review of the Assistant Secretary's decision of June 8, 1978, such petition was untimely filed under the Council's rules of procedure and cannot be accepted for review. The Assistant Secretary's decision of June 8, 1978, was served upon the parties by mail on that same date. Consequently, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, any appeal from that decision was due in the office of the Council on July 13, 1978. However, as stated above, the agency's appeal was not filed with the Council until September 26, 1978, or more than 2 months late, and no extension of time for such filing was requested by the agency or granted by the Council.

Accordingly, to the extent that the agency's petition seeks Council review of the Assistant Secretary's decision of June 8, 1978, the petition is hereby denied as untimely filed.

To the extent that your petition seeks review of the Assistant Secretary's separate decision of August 25, 1978, regarding compliance, the petition does not meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary regarding compliance does not appear arbitrary and capricious or present a major policy issue.

Section 6(b) of the Order confers considerable discretion on the Assistant Secretary, who "may require an agency or a labor organization . . . to take such affirmative action as he considers appropriate to effectuate the policies of [the] Order." The Council has previously held that the authority of the Assistant Secretary to issue orders includes the authority to interpret those orders. See, Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, 3 FLRC 529 [FLRC No. 75A-59 (Aug. 14, 1975), Report No. 80]. In the Council's opinion, it does not appear that the Assistant Secretary acted without reasonable justification in the circumstances of this case when, in response to the union's request, he ruled that full compliance with his June 8, 1978, decision meant that the issues he had found arbitrable should be submitted together to arbitration for resolution in a single proceeding. Moreover, as to the alleged major policy issue, it does not appear that the Assistant Secretary thereby exceeded the scope of his authority under section 6(b) of the Order or that his compliance ruling otherwise presents a major policy issue warranting Council review.

Since the Assistant Secretary's decision of August 25, 1978, regarding compliance does not appear arbitrary and capricious and does not present any major policy issue, to the extent that the agency's petition seeks Council review of that decision, the petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules

of procedure, and is hereby denied. The agency's request for a stay is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. E. Lyons
MESA/IFPTE

Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, A/SLMR No. 697, as supplemented by A/SLMR Nos. 929 and 1108. This appeal arose from a decision by the Assistant Secretary, subsequently reaffirmed following the Council's request for further consideration and clarification, finding that a unit of approximately 45 employees of the activity sought by the union (American Federation of Government Employees, AFL-CIO, Local 3671) was appropriate for the purpose of exclusive recognition. The Council accepted the agency's petition for review, concluding that the Assistant Secretary's decision, as supplemented, presented a major policy issue as to whether the decision was consistent with and promoted the purposes and policies of the Order, especially those reflected in section 10(b). (Report No. 159)

Council action (December 28, 1978). For reasons fully detailed in its decision, the Council concluded that the Assistant Secretary's decision, as supplemented, was inconsistent with and failed to promote the purposes and policies of the Order, particularly those reflected in section 10(b), and further, that the unit sought was not appropriate for purposes of exclusive recognition under the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, the Council set aside the Assistant Secretary's decision, as supplemented, and remanded the case for action consistent with its decision.

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

Department of State
Passport Office
Chicago Passport Agency
Chicago, Illinois

and

A/SLMR No. 697, as supplemented
by A/SLMR Nos. 929 and 1108, FLRC
No. 76A-147

American Federation of Government
Employees, AFL-CIO, Local 3671

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION AS SUPPLEMENTED

Background of Case

This case is before the Council on the agency's petition for review of the Assistant Secretary's decision in A/SLMR No. 697, as supplemented in A/SLMR Nos. 929 and 1108 pursuant to the Council's request for further consideration and clarification of his initial decision. In his decision, as supplemented, the Assistant Secretary found appropriate a unit of all (approximately 45) nonprofessional permanent, temporary and seasonal employees at the Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois (the activity).

More particularly, the Assistant Secretary, in his initial decision, found that the unit sought by the union (American Federation of Government Employees, AFL-CIO, Local 3671) is appropriate for the purpose of exclusive recognition under the three criteria set forth in section 10(b) of the Order, and directed an election in such unit. The election resulted in the union's certification as exclusive representative of the unit. The agency, on behalf of the activity, petitioned the Council for review of the Assistant Secretary's decision and requested a stay. The Council, before determining whether to accept or deny the agency's petition for review, decided to request clarification by the Assistant Secretary of the decision in A/SLMR No. 697, in light of the Council's consolidated DCASR decision which had been issued subsequent to A/SLMR No. 697.^{1/}

1/ Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services.

(Continued)

The Assistant Secretary, finding that "the record did not provide an adequate basis upon which to make affirmative determinations regarding effective dealings and efficiency of agency operations as required by the Council," remanded the case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence relating to these criteria (A/SLMR No. 929). In his second supplemental decision (A/SLMR No. 1108), the Assistant Secretary, upon the entire record in this case, reaffirmed the previous finding that the unit sought is appropriate for the purpose of exclusive recognition under the Order.

The pertinent factual background herein, based upon the findings of the Assistant Secretary, is as follows: The overall mission of the Department of State Passport Office (Passport Office) is to administer laws relating to nationality and to conduct all passport activities. The specific mission of its field agencies is to provide passport services to persons within their assigned geographical areas. The Passport Office is part of the Bureau of Security and Counselor Affairs in the Department of State. It has a national office in Washington, D.C. and ten field agencies located throughout the United States, one of which is the activity involved herein. Each field agency is under the direction of an Agent-In-Charge (AIC) who reports directly to the Director of the Passport Office.

The Passport Office field agencies and the national office are linked together by a teletype network and contact each other as needed. While there is no evidence of regular temporary interchange of personnel among the various field agencies, during the past nine years lateral transfers into the activity involved herein occurred frequently.

The claimed unit within the activity consists of approximately 45 employees.^{2/} The skills required and the duties performed by these employees are essentially the same as those at the other field agencies. Common personnel policies and practices apply to all the field agencies. These personnel policies are established for all employees of the agency by the Bureau of Personnel for the Department of State located at agency headquarters in Washington, D.C. The agency's Bureau of Personnel also has final administrative authority over labor relations matters and personnel actions involving Passport Office employees. Thus, final approval for personnel

(Continued)

Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4 [4 FLRC 668 (Dec. 30, 1976), Report No. 119].

^{2/} According to the record, as of January 1978, the total strength of the field agencies and the national headquarters was 868 on-board permanent and temporary employees.

actions is vested solely within the Bureau of Personnel in Washington, D.C., while at the activity level the AIC implements personnel policies and makes recommendations on personnel actions which are forwarded to the agency's Bureau of Personnel for approval. On personnel matters such as promotions, overtime, travel, awards, hiring at the GS-7 level and below, formal discipline, layoffs, training, and position descriptions, the activity's AIC forwards his recommendations to the Bureau of Personnel for approval and these recommendations are generally adopted.

With regard to labor relations, such policy is established for the entire Passport Office by the agency's Deputy Under-Secretary of State for Management. Labor relations personnel, located in the Bureau of Personnel in Washington, D.C., are authorized to handle all labor relations matters for the agency's Passport Office. No labor relations personnel are assigned to, or located at, the activity.

Finally, while local personnel problems (such as work breaks, lunch periods, starting and quitting times and procedures for rotating the Duty Officer assignment) can be resolved at the activity level, a nationwide unit, as indicated by the Assistant Secretary, "would result in a uniform policy nationally, and the potential for inconsistencies among the [a]ctivity level offices would be less in a unit structure which followed the centralized operational and organizational structure of the [a]gency."^{3/}

As already stated, the Assistant Secretary, in his decision as supplemented, found that the unit limited to the 45 employees of the Chicago field agency met the three criteria of section 10(b) of the Order and therefore was appropriate for the purpose of exclusive recognition under the Order.

Upon consideration of the agency's petition for review and the supplement thereto, the Council determined that a major policy issue is presented by the decision of the Assistant Secretary as supplemented, namely: Whether the Assistant Secretary's decision in this case is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). The Council also granted the agency's request for a stay. Neither of the parties filed a separate brief on the merits. Instead, the agency relied upon earlier submissions to the Council in support of its appeal, and the union incorporated by reference an earlier submission to the Assistant Secretary as its brief before the Council. The Council has carefully considered these documents as well as the entire record in the case in reaching its decision herein.

Opinion

As previously indicated, the Assistant Secretary, upon further consideration and clarification of his initial decision (A/SLMR No. 697) in light of the consolidated DCASR decision pursuant to the Council's request, found that a unit of all (approximately 45) nonprofessional permanent, temporary, and seasonal employees at the activity was appropriate for exclusive recognition

^{3/} The record is unclear as to the impact of the claimed unit on agency operations in terms of cost, productivity and use of resources, as compared to the impact of a more comprehensive unit.

(A/SLMR No. 1108). The major policy issue raised herein is whether the instant decision as supplemented is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b).

In its consolidated DCASR decision, the Council set forth and explicated certain principles which flow from section 10(b) of the Order and, in so doing, further emphasized the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, as follows (supra n. 1, 4 FLRC 668 at 677):

Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

Moreover, in its letter requesting clarification of the Assistant Secretary's initial decision herein, the Council quoted and discussed at length its consolidated DCASR decision, thereby directing his attention to the detailed principles set forth therein.

The Council, reaffirming the principles enunciated in the consolidated DCASR decision for the reasons fully explicated by the Council in that decision, which are equally applicable herein, finds, upon careful consideration of the entire record in the instant case, that the Assistant Secretary's decision as supplemented in the instant case is inconsistent with and fails to promote the purposes and policies of the Order, especially those reflected in section 10(b). Therefore, the Council finds that the unit sought by the union is not appropriate for the purposes of exclusive recognition under the Order.

In more detail, the Council is of the opinion that, while the Assistant Secretary made an affirmative determination that the proposed unit satisfied each of the three appropriate unit criteria contained in section 10(b), he did not, "most importantly," make his determination "in recognition of and in a manner fully consistent with the purposes of the Order," specifically the objective "of preventing further fragmentation of bargaining units . . . , thereby promoting a more comprehensive bargaining unit structure."

Thus, the Assistant Secretary based his finding that the 45 employees in the unit sought "share a clear and identifiable community of interest separate and distinct from all other employees of the [a]gency" on a number of specific factors, i.e., that "the employees in the unit sought share a common mission, common supervision, common working conditions, uniform personnel and labor relations policies, essentially similar job classifications and, generally, do not experience significant interchange or transfer among other organizational components of the [a]gency". However, the decision of the Assistant Secretary fails adequately to recognize and properly to weigh the factors which clearly demonstrate the community of interest shared by all employees in the Passport Office. Thus, for example, as to the above considerations expressly relied upon in the Assistant Secretary's decision, the specific mission of all the field agencies within the Passport Office is to provide the same passport services to persons within their assigned areas; the skills required and the duties performed by the 45 employees in the unit sought at the activity were essentially the same as those at the other field agencies; personnel policies and practices are centrally established and administered at agency headquarters in Washington, D.C. and apply uniformly to all employees of the agency, not just to the 45 employees in the unit sought; labor relations policy also is centrally established for the entire Passport Office at headquarters in Washington, D.C., where all labor relations personnel for the agency are located and are authorized to handle all labor relations matters for the Passport Office; while local personnel problems can be resolved at the activity level, final approval for personnel actions is vested solely within the agency's Bureau of Personnel in Washington, D.C.; lateral transfers into the activity have occurred regularly over the past nine years; and a nationwide unit of all Passport Office employees, rather than the unit sought, would reduce potential inconsistencies among the activity level offices by following "the centralized operational and organizational structure of the [a]gency." Under all of these circumstances, we conclude that the finding of a clear and identifiable community of interest among the 45 activity employees, separate and distinct from all other agency employees, is inconsistent with the purposes and policies of the Order, specifically the policy in section 10(b) of "preventing further fragmentation of bargaining units . . . , thereby promoting a more comprehensive bargaining unit structure."

Similarly, the Assistant Secretary found that the proposed unit "would promote effective dealings within the [a]gency" notwithstanding an expressed recognition that a number of factors considered in this regard (such as "the locus and scope of personnel authority, limitations on the negotiation

of matters of critical concern to employees at the level of the petitioned for unit, the availability of negotiation expertise, experience of this [a]gency in other bargaining units, and the level at which labor relations policy is set in the [a]gency") would derogate from a conclusion as to the appropriateness of a unit at the activity level. Thus, as previously stated, the Assistant Secretary found, concerning the locus and scope of personnel authority within the agency, that the Bureau of Personnel located at agency headquarters in Washington, D.C., establishes and administers common personnel policies and practices for all employees of the agency and also retains final approval authority for personnel actions, thereby placing limitations on the negotiation of matters at the local level; that negotiating expertise is concentrated at the agency headquarters level (where labor relations policy is established for the entire Passport Office) and completely lacking at the activity level, where there are no labor relations personnel and there has been no history of collective bargaining within the Passport Office. In light of these factual determinations, and for the reasons previously stated, we conclude that the finding that the proposed unit "would promote effective dealings within the agency" is inconsistent with the purposes and policies of the Order, especially the policy reflected in section 10(b) of "preventing further fragmentation of bargaining units . . . , thereby promoting a more comprehensive bargaining unit structure."

Finally, "[w]ith respect to efficiency of agency operations . . . if the petitioned for unit [were] found appropriate," the Assistant Secretary specifically relied upon such factors as: (1) travel costs for the agency's negotiating team "could be" less than for a nationwide unit; (2) no unusual labor relations training costs would be incurred; (3) no additional labor relations personnel would be required; and (4) no allegation was made by the agency that two exclusively recognized bargaining units located elsewhere in the Department of State "have failed to promote the efficiency of its operations." However, in reaching his final conclusion with respect to the efficiency of agency operations, the Assistant Secretary failed to accord proper weight to his own additional factual determinations that (a) the employees in the unit sought enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all employees of the Passport Office, and (b) "[a] nationwide unit . . . which followed the centralized operational and organizational structure of the [a]gency" would "result in a uniform policy nationally and [reduce] the potential for inconsistencies among the activity level offices" As the Council stated in its consolidated DCASR decision (supra n. 1, 4 FLRC 668 at 681):

As to "efficiency of agency operations" among those factors which should be considered would be the benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency
[T]he relationship between the proposed bargaining unit and the operational and organizational structure of the agency should be given substantial weight in ascertaining whether the unit will promote efficiency of agency operations. [Emphasis added.]

Moreover, the Assistant Secretary's reliance upon the absence of an allegation by the agency that existing bargaining units elsewhere in the agency "have failed to promote the efficiency of its operations" is also inconsistent with the principles enunciated in the Council's consolidated DCASR decision. Thus, as the Council stated therein (4 FLRC 668 at 690):

[T]he Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of agency operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit.

Finally, with regard to the other factors relied upon by the Assistant Secretary in connection with "efficiency of agency operations," all relating essentially to the impact of the claimed unit on agency operations in terms of costs, as compared to the impact of a more comprehensive unit, the Council also stated in its consolidated DCASR decision (4 FLRC 668 at 686) that "more than cost factors are involved in a determination of the promotion of efficiency of agency operations" Thus, for example, as previously indicated (supra at 6), the Assistant Secretary should have given substantial weight to the organizational and operational structure of the agency in this regard, but failed to do so. Accordingly, in light of these considerations, and for the reasons previously stated, we conclude that the finding that the proposed unit would promote the efficiency of the agency's operations is inconsistent with the purposes and policies of the Order, specifically the policy reflected in section 10(b) of "preventing further fragmentation of bargaining units . . . , thereby promoting a more comprehensive bargaining unit structure."

In conclusion, under all of the circumstances in this case, it is the Council's opinion that the instant decision of the Assistant Secretary as supplemented is inconsistent with and fails to promote the purposes and policies of the Order, particularly those reflected in section 10(b), and further, that the unit sought is not^{4/} appropriate for purposes of exclusive recognition under the Order.—

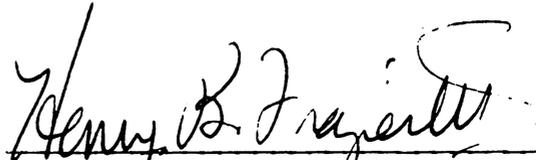
Conclusion

For the reasons set forth above, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's

4/ See also Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 687, 5 FLRC 631 [FLRC No. 76A-97 (July 20, 1977), Report No. 131].

decision as supplemented and remand the case for action consistent with our decision herein.

By the Council.



Henry B. Frazier III
Executive Director

Issued: December 28, 1978

American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator). The arbitrator found that the agency was not justified in delaying the grievant's career-ladder promotion, and, as a remedy, ordered that the grievant's promotion be made retroactive to an earlier date with backpay. The Council initially denied the agency's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 FLRC 792), but subsequently granted the agency's request for reconsideration of that decision, in light of the Comptroller General's decision in Matter of: Janice Levy--Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977. Thereafter, the Council accepted the agency's petition for review insofar as it related to the exception alleging that the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 149)

Council action (December 28, 1978). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council found that the arbitrator's award of retroactive promotion and backpay violated applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

American Federation of Government Employees,
Local 1760

and

FLRC No. 77A-31

Northeastern Program Service Center

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award and the record before the Council, the grievant was hired by the Social Security Administration in September 1974 under a temporary appointment as a GS-5 Claims Representative Trainee. After 3 weeks of training, he was assigned to a branch office of the agency. Because of the temporary nature of his appointment, he did not receive the normal 12 weeks of training. In May 1975 he was transferred to the activity where he was given a term appointment as a GS-5 Benefit Authorizer Trainee. He received, along with others hired in May 1975 for the same position, 7 weeks of training in a particular area of operations. They did not receive the full range of 16 weeks of formal training because of a backlog of cases the activity wanted to reduce. In September 1975 the grievant received a within-grade increase because he had performed at an acceptable level of competence at the GS-5 level for 1 year.

The dispute in this matter arose when in response to an inquiry from the grievant, the activity notified him in December 1975 that he was ineligible for promotion to GS-7 until he completed the full range of formal training. He then filed a grievance contending that the activity had violated the parties' negotiated agreement by refusing to promote him. On June 6, 1976, the grievant and the rest of this class of trainees were promoted to GS-7 without having received any additional documented training. Despite this promotion, the grievant contended that he was entitled to the promotion as of October 12, 1975, on the basis of a personnel policy which assertedly gives employees their career ladder promotions on the commencement of the pay period following a within-grade increase if the employees are qualified. The matter was ultimately submitted to arbitration.

The arbitrator found that the grievant's failure to complete the full range of training was the responsibility of the activity. The arbitrator also observed that the grievant and the other trainees had been promoted in June 1976 without further training and that it was uncontroverted that the grievant was doing the same work in September

and October of 1975 as he was in June 1976 when he was promoted. On this basis the arbitrator determined that the grievant was qualified for promotion to GS-7 in October 1975. He also determined that the activity was not justified in delaying the grievant's promotion until the other trainees were eligible for promotion. In the arbitrator's opinion "to permit this would, in effect, be denying Grievant the contractual 'equal opportunity' in the promotion program (Art. 14b)."^{1/} The arbitrator therefore sustained the grievance and ordered that the grievant be retroactively promoted effective October 12, 1975, with backpay.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. The Council initially denied the agency's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. 5 FLRC 792 [FLRC No. 77A-31 (Aug. 26, 1977), Report No. 136]. However, subsequent to the Council's decision denying the petition for review, the Comptroller General issued his decision in Matter of: Janice Levy--Arbitration Award of Retroactive Promotion and Backpay, B-190408, December 21, 1977. Because the Comptroller General's decision was of precedential significance with regard to the agency's petition for review, the Council granted the agency's request for reconsideration of the Council's decision of August 26, 1977, in which, as noted, the Council had denied the agency's petition for review. Upon reconsideration in light of the Comptroller General's decision in Janice Levy, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleges that the award violates applicable law and appropriate regulation. Also upon reconsideration, the Council determined that an issuance of a stay of the award was warranted and the agency's request for a stay was therefore granted.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

^{1/} According to the arbitrator, Article 14, Section b of the parties' negotiated agreement provides:

The parties agree to cooperate actively and positively in their efforts to carry out a plan of affirmative action to accomplish equal opportunity for all employees and to seek and achieve the highest potential and productivity in employment situations. The Bureau agrees to provide encouragement, assistance, and appropriate training opportunities so that all employees may utilize their abilities to the fullest extent.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleges that the award violates applicable law and appropriate regulation.

Because this case involves an issue within the jurisdiction of the Comptroller General's Office and because the Council was uncertain in view of Janice Levy as to the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from the Comptroller General a decision as to whether the arbitrator's award in this case violates applicable law or appropriate regulation. The Comptroller General's decision in the matter, B-192556, December 4, 1978, is set forth below.

This action is in response to a request from the Federal Labor Relations Council, dated July 26, 1978, for an advance decision concerning the legality of implementing the backpay award of an arbitrator in the matter of American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator), FLRC No. 77A-31. The arbitrator found that the agency, the Social Security Administration (SSA), was not justified in delaying the career-ladder promotion of an employee, Mr. William Wilder, and the arbitrator awarded him a retroactive promotion with backpay.

The FLRC had initially, on August 26, 1977, denied the agency's petition for review of the award because it failed to meet the FLRC's requirements for review set forth in 5 C.F.R. § 2411.32. Subsequent to the FLRC's denial of review, we issued a decision in Janice Levy, B-190408, December 21, 1977, in which we invalidated an arbitrator's award of a retroactive promotion made under similar circumstances. Based on that decision, the SSA asked the FLRC to reconsider its denial of review in the present case. The FLRC granted the agency's request for reconsideration and accepted its petition for review of the arbitrator's award. The FLRC requests our decision as to whether, in light of the decision in Janice Levy, supra, the arbitrator's award in this case violates applicable law or appropriate regulation.

The facts in this case are that the grievant, Mr. Wilder, was hired by SSA in September 1974, under a temporary appointment as a Claims Representative Trainee, grade GS-5. Because Mr. Wilder was a temporary employee, he received only 3 weeks of training instead of the normal 12 weeks of training, and he was then assigned to a SSA branch office. On May 27, 1975, the grievant was transferred to SSA's Northeastern Program Service Center where he was given a term appointment as a Benefit Authorizer Trainee, grade GS-5. Mr. Wilder, along with 13 other Trainees who were hired in May 1975, then received 7 weeks of specialized training in lieu of the 16-week formalized training program since the agency wanted to reduce the backlog of cases in a certain area.

In September 1975, Mr. Wilder received a within-grade increase in grade GS-5 but his subsequent request for a promotion to grade GS-7 was denied by the agency in December 1975 on the ground that he had not completed the full range of formal training necessary for a career-ladder promotion. The grievant and the other trainees were later promoted to grade GS-7 in June 1976, but Mr. Wilder filed a grievance contending that he was entitled under the negotiated agreement to a career-ladder promotion on October 12, 1975, the pay period following a within-grade increase.

The arbitrator found that the grievant and the other trainees had been promoted in June 1976, without receiving further training, and that the grievant was performing the same work in September and October 1975, as he was when he was promoted in June 1976. Based upon the evidence before him, the arbitrator concluded that the grievant was eligible and qualified for promotion to grade GS-7 in October 1975. Furthermore, the arbitrator held that the agency was not justified in delaying the grievant's promotion until the other trainees were eligible for promotion since the agency's failure to provide "the full range of training" violated Article 16 of the negotiated agreement which provides, in pertinent part, as follows:

"Section b. The Bureau shall continue to provide equal opportunity in its promotion program for all qualified employees and will make promotions without discrimination for any nonmerit reason.* * *."

Therefore, the arbitrator awarded the grievant a promotion retroactive to October 12, 1975, with backpay.

Our Office has held that as a general rule personnel actions may not be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. 55 Comp. Gen. 42 (1975); and 54 id. 888 (1975). We have also recognized that these exceptions to the general rule prohibiting retroactively effective personnel actions may constitute unjustified or unwarranted personnel actions under the Back Pay Act, 5 U.S.C. § 5596, and may be remedied through an award of backpay.

In considering the legality of implementing arbitration awards relating to Federal employees who are covered under negotiated labor-management agreements, we have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations. 55 Comp. Gen. 42, supra. Therefore, where an arbitrator finds that an employee

has been denied or has lost pay or allowances which is the result of and would not have occurred but for the violation of the negotiated agreement, the Back Pay Act and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H (1978), are the appropriate authorities for compensating the employee.

In the present case, the question presented is whether this provision of the negotiated agreement constitutes a nondiscretionary agency policy so as to support an award of a retroactive promotion with backpay. The arbitrator held that the agency, by delaying the grievant's promotion until the other Trainee employees were eligible for promotion, violated "the contractual 'equal opportunity' in the promotion program". However, there appears to be no agency regulation nor provision in the negotiated agreement which mandates that employees receive career-ladder promotions within a certain time frame. In fact, the agency regulations clearly leave promotions to the next highest level within the discretion of the agency as evidenced by the following excerpts from the SSA regulations on career ladder promotions:

"Timing and Intent

"Advancement to the journeyman level is the intent and expectation in the career ladder system. However, promotions within career ladders are neither automatic nor mandatory. There is no guarantee that an employee in a career ladder will be promoted, nor a commitment that a promotion will be made at any set time. Promotions will be effected as the employee's performance demonstrates readiness to assume more difficult duties at the next higher level and as other legal requirements (e.g., time-in-grade) are met.

* * *

"Basis for Promotion

"Time-in-grade requirements establish the minimum time within which career promotions may be made. They do not, however, constitute a basis for promotion. Promotions within career ladders are to be made only when (1) the employee has performed successfully at this current grade level and (2) his performance indicates that he is ready for assignments at a higher level and ultimately can be expected to perform at the journeyman level.

"Minimum Time

"Employees in career ladders will be considered for promotion when they meet time-in-grade requirements; they will be promoted only as they meet established promotion criteria."

The provision in the negotiated agreement which the arbitrator relied upon requires "equal opportunity" in the promotion program, but that provision does not require the agency to make promotions within any specified time frame under any stated conditions. Therefore, we are unable to conclude that there has been a violation of a nondiscretionary agency policy or regulation which constitutes an unjustified or unwarranted personnel action under the Back Pay Act and thus entitles the grievant to a retroactive promotion with backpay.

This case is clearly distinguishable from prior cases which have been considered by our Office where the agency and the union had agreed upon a specific time frame for promotions under stated conditions. See, for example 55 Comp. Gen. 427 (1975); 55 id. 42, supra; 55 id. 888, supra; and 54 id. 403 (1974). On the other hand, this case is quite similar to our recent decisions in Janice Levy, supra, and John Cahill, B-192455, November 1, 1978, where we held that negotiated agreement provisions requiring consistent and equitable application of merit promotion principles or equal pay for substantially equal work do not constitute nondiscretionary agency policies which require an agency to make promotions at any specified time or under specified criteria.

Accordingly, since we conclude that there has been no violation of a nondiscretionary agency policy or regulation, we hold that the award of a retroactive promotion and backpay was improper and may not be implemented.

We have been informally advised that payment of backpay has been made to Mr. Wilder in satisfaction of the arbitration award. Under the circumstances of this case, we believe that the overpayments of backpay would be subject to waiver under the provisions of 5 U.S.C. § 5584 (1976) and 4 C.F.R. Part 91 (1978).

Based on the foregoing decision of the Comptroller General, we find that the arbitrator's award of retroactive promotion and backpay violates applicable law and appropriate regulation.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion of the award which directs that the grievant be promoted

retroactively and be made whole for any losses.^{2/} As so modified, the award is sustained and the stay is vacated.

By the Council.



Henry B. Frazier III
Executive Director

Issued: December 28, 1978

^{2/} As noted in the Comptroller General's decision, backpay overpayments made to the grievant in this case would appear to be subject to waiver.

American Federation of Government Employees, Local 3632 and Corpus Christi Army Depot. The dispute involved union proposals relating to (1) union recognition; (2) staggered work shifts; (3) work to be performed on involuntary split shifts; (4) direction of employees in certain circumstances; (5) scheduling of travel and compensatory time; (6) internal security practices; (7) and (8) training; (9) and (10) details to supervisory positions; (11) assignment of work; (12) union participation in manpower survey; (13) demonstrations of new products and methods by private contractors; (14) experimentation by employees; (15) assignment of duties to demoted employees; (16) delay of demotion actions; (17) recognition of and awards for professional employees; (18) provision of facilities, equipment and support personnel for professional employees; (19) investigation of staffing requirements; (20), (21) and (22) union participation on selection panels, in the development of qualification criteria, and in determining criteria for highly qualified candidates, respectively; (23) delay of position dissolutions or downgradings; and (24) incentive awards.

Council action (December 28, 1978). As fully detailed in its decision, the Council, pursuant to section 2411.28 of its rules, set aside the agency's determinations of nonnegotiability as to a portion of (2), insofar as it contemplated merely changing the starting and ending time of an existing work shift, and (15) and (19); and sustained the determinations of nonnegotiability as to (2), except as noted above, and as to the remaining 21 proposals.

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

American Federation of Government
Employees, Local 3632

(Union)

and

FLRC No. 77A-140

Corpus Christi Army Depot

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

Article 7, Section 5.

Both parties will be governed by the [applicable] regulation of the Civil Service Commission, Department of Defense and the Assistant Secretary of Labor for Labor-Management Relations when dealing with labor organizations requesting a determination of the Union's recognition. [Underscoring added to show portions in dispute.]

Agency Determination^{1/}

The agency determined that insofar as the proposal addresses the methods and means by which the exclusive representative of bargaining unit employees

^{1/} This appeal was timely filed under section 2411.24(c)(1) of the Council's rules after the agency head declined to render a negotiability determination. In its statement of position to the Council, the agency requested that the union's appeal be dismissed on the grounds that the local parties had not extended sufficient effort in seeking acceptable alternatives to proposals presenting negotiability problems. This request was denied based on the Council's decision in 77P-3 (Mar. 15, 1973), Report No. 146, in which the Council ruled that the Order imposes an affirmative obligation upon an agency head to render a determination on the negotiability of bargaining proposals when requested by a labor organization provided that the negotiability issue arose in connection with negotiations. The agency was granted additional time to address the negotiability of each of the proposals contained in the union's appeal upon which local agreement had not been reached. Additionally, the union was granted time to file a response to the agency's submission. The agency responded to the Council's request and its position with regard to each of the union's proposals is included herein. The union did not file any response.

will be chosen and certified, a matter within the exclusive authority of the Assistant Secretary under section 6(a)(1) of the Order, rather than personnel policies, practices and matters affecting working conditions of unit employees, it concerns a matter outside the bargaining obligation established by section 11(a) of the Order and is, therefore, nonnegotiable.

Question Here Before the Council

The question is whether the proposal conflicts with section 6(a)(1) and (2) of the Order.^{2/}

Opinion

Conclusion: The proposal conflicts with section 6(a)(1) and (2) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.^{3/}

Reasons: Section 6(a) of Executive Order 11491^{4/} assigns to the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) the authority to resolve representation questions. The "legislative history" of this section establishes that this authority was to be exclusively exercised by the A/SLMR subject only to a limited appeal to the Federal Labor Relations Council.^{5/} According to the union, the intent of the proposal is to "provide a basis for contractual enforcement of the cited regulatory provisions under the negotiated procedure." Thus the union's proposal, as intended to be applied, would establish a contractual basis for the resolution of certain representation questions. In this regard, the proposal conflicts with the exclusive authority of the A/SLMR to resolve such representation questions under section 6(a)(1) and (2) of the Order and thus, is nonnegotiable.

2/ Section 6(a) of the Order provides in pertinent part as follows:

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.(a)

The Assistant Secretary shall--

- (1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;
- (2) supervise elections to determine whether a labor organization is the choice of a majority of employees in an appropriate unit as the exclusive representative, and certify the results;

3/ In view of our decision that the proposal violates section 6(a)(1) and (2) of the Order, it is unnecessary to further consider the remaining contention of the agency as to the negotiability of the proposal.

4/ Note 2 supra.

5/ Labor-Management Relations in the Federal Service (1975) at 68-69.

Union Proposal II

Article 9, Section 1.a.

Working hours on eight hour shifts will be established by management. When feasible, staggered shifts will be used to assure that professional expertise is available for at least a portion of all the working shifts in the shops supported.

Agency Determination

The agency determined that the proposal concerns a matter integrally related to the staffing patterns of the activity since the implementation of staggered shifts would impact on the numbers, types and grades or employees assigned to a shift or tour of duty and, hence, is excepted from the obligation to bargain under section 11(b).

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal is not excepted from the obligation to bargain by section 11(b) of the Order but is within the obligation to bargain under section 11(a) of the Order. Accordingly, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{6/}

Reasons: The agency asserts that the union's proposal is excepted from the obligation to bargain by section 11(b) of the Order since "the implementation of staggered shifts obviously impacts on [staffing patterns] (indeed the requirement for 'professional expertise' may even mandate that a specific type of employee be assigned to a staggered shift)." We disagree.

In our opinion, the agency has misinterpreted the union's proposal. In this regard, there is nothing in the language of the proposal or in the expressed intent of the union as to the meaning of that language which indicates that the proposal would require anything more than adjustment of the starting and ending times of various existing shifts so that two or more shifts overlap. In other words, we do not perceive this proposal as requiring the creation of shifts where none currently exists or the movement of positions or personnel among shifts in order to maintain

^{6/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposal. We decide only that, in the circumstances presented, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

"professional expertise." Rather, the proposal concerns merely the starting and ending times of the shifts of professional employees and we so interpret the proposal for purposes of this decision. Of course any requirements to create shifts or to move personnel among shifts would, perforce be determinative of agency staffing patterns and therefore be excluded from the obligation to bargain by section 11(b) of the Order.

Hence, since, in our view, the union's proposal does not concern the agency's staffing patterns it is not excepted from the obligation to bargain by section 11(b) of the Order.^{7/}

Union Proposal III

Article 9, Section 1.b.

A professional employee's eight working hours may be split and divided over a 24-hour period by management, provided such splitting and dividing is agreed to by the employee affected; no special compensation will be given to the employee for such agreements. However, a professional employee will not be forced against his will by management to accept such a split and divided work day without special compensation; work performed on an involuntary split or divided work shift will be negotiated by management, the Union, and affected employee. [Underscoring added to show portion in dispute.]

Agency Determination

The agency determined that the portion of the proposal in dispute concerns job content or tasks to be assigned to employees and, thus, is excepted from the obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the disputed portion of the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The disputed portion of the proposal concerns the job content of unit employees and therefore is excepted from the obligation to negotiate by section 11(b) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

7/ See, e.g., American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture,

Reasons: According to the agency's uncontradicted assertion, the disputed portion of the proposal ". . . refers to negotiations over the 'job content' or tasks to be assigned to employees working an involuntary split or divided work shift, requiring that the specific tasks be arrived at by discussions between the Activity, the Union and the employee." In this regard, the Council consistently has indicated^{8/} that, since proposals concerning "job content" of unit employees fall within the meaning of the phrases agency "organization" and "numbers, types and grades of positions or employees assigned to an organizational unit, work project or tour of duty" in section 11(b) of the Order, such proposals are excepted from the agency's bargaining obligation under section 11(a). Accordingly, consistent with established precedent we find the disputed portion of the proposal is excepted from the obligation to bargain by section 11(b) of the Order and is, therefore, nonnegotiable.

Union Proposal IV

Article 9, Section 2.c.

Management reserves the right to decide whether or not full workforce requirement is met by the qualified available employees. However, in the event of a dispute as to whether full workforce requirements are met, the employee and the area Steward may ask for consultation with the supervisor before a final decision is made. In the event the supervisor determines full workforce requirements are not met, he will direct individual employees to work as required. [Underscoring added to show portion in dispute.]

Agency Determination

The agency determined that the portion of the proposal in dispute is non-negotiable because it violates the rights reserved to management by section 12(b) of the Order.

Question Here Before the Council

The question is whether the disputed portion of the proposal violates section 12(b) of the Order.

(Continued)

3 FLRC 324, [FLRC No. 73A-36, supplemental decision (June 10, 1975), Report No. 73, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147--74-A (E.D. Va. Oct. 16, 1975)].

8/ E.g., AFGE Local 1738 and VA Hospital, Salisbury, North Carolina
4 FLRC 376 [FLRC No. 75A-103 (July 8, 1976), Report No. 107].

Opinion

Conclusion: The disputed portion of the proposal would limit supervisory discretion to direct employees of the agency under section 12(b)(1) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 12(b)(1) of the Order provides that management retains the right to "direct employees of the agency."

The mandatory nature of the reservation of 12(b) rights was underscored in the VA Research Hospital case^{9/} where, in interpreting and applying section 12(b)(2), the Council stated:

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

Although the decision in the VA Research Hospital case dealt only with the interpretation and application of section 12(b)(2), the reasoning of that decision as reflected in the quoted language above is equally applicable to section 12(b)(1).

Turning to the disputed language of the proposal here involved, such language expressly would require a supervisor to take a particular action if the supervisor has determined that full workforce requirements are not met. That is, once the supervisor determines that full workforce requirements are not met, he has no discretion to act other than "to direct individual employees to work as required." Thus, the supervisor would, for example, be barred from taking alternative action to the one specified; from deciding not to take any action; or from changing a decision, once made, whether or not to take such action.^{10/} Accordingly, since the disputed

9/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

10/ In National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61], the Council indicated, in interpreting and applying section 12(b)(2), that:

. . . implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action.

While such decision concerned only section 12(b)(2), its reasoning is also applicable to section 12(b)(1).

portion of the proposal would interfere with management's reserved authority to direct employees under section 12(b)(1) of the Order, it is nonnegotiable.

Union Proposal V

Article 12, Section 1.a and b.

All travel shall be as prescribed by DOD Joint Travel Regulations. The Employer agrees to the following:

- a. Travel shall be scheduled during normal work days.
- b. If travel is required on non-workdays, compensatory time shall be granted to the employee.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates 5 U.S.C. § 5542(b).

Question Here Before the Council

The question is whether the proposal violates 5 U.S.C. § 5542(b).

Opinion

Conclusion: The proposal violates 5 U.S.C. § 5542(b). Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The union's proposal, as here relevant, requires that compensatory time off be granted to employees required to travel on non-workdays. With regard to the question of whether time spent in a travel status is considered hours of work for the purpose of calculating an employee's overtime entitlement 5 U.S.C. § 5542 provides, in pertinent part:

§ 5542. Overtime rates; computation

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(b) For the purposes of this subchapter

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(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless---

(B) the travel (i) involves the performance of work while traveling (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

The same requirements apply in calculating an employee's compensatory time off entitlement under section 5 U.S.C. § 5543.11/ The union's proposal however, contains no reference to any of the four requirements set out in the statute which must be met before time spent in a travel status is considered hours of work. Further, the union makes no allusion to such requirements in its petition for review. Thus, since the union's proposal would mandate the granting of compensatory time off to employees required to travel on non-work days without regard to the applicable statutory requirements noted above, the proposal clearly is inconsistent with 5 U.S.C. § 5542 and hence, nonnegotiable.

Union Proposal VI

Article 13, Section 10.

The Employer will provide reasonable security for the protection of professional employee books, tools, equipment and supplies without regard to private or Government ownership.

Agency Determination

The agency determined that the proposal concerns the agency's internal security practices, the technology of performing its work, and its staffing patterns and, thus, is excepted from the obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order because it concerns matters with respect to the agency's internal security practices.

Opinion

Conclusion: The proposal concerns matters with respect to the internal security practices of the agency and thus, is excepted from the agency's

11/ See 5 C.F.R. §§ 550.112 -- 550.114.

obligation to negotiate under section 11(b) of the Order. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.^{12/}

Reasons: Section 11(b) of the Order provides in relevant part that "the obligation to meet and confer does not include matters with respect to . . . internal security practices."

The Council interpreted and applied the phrase "internal security practices" in its decision in the Army Air Force Exchange Service case.^{13/} In that decision the Council stated, in pertinent part:

. . . as used in the Order . . . the term "security" practices includes, inter alia, those policies, procedures and actions that are established and undertaken to defend, protect, make safe or secure (i.e., to render relatively less subject to danger, risk or apprehension) the property of an organization.

Clearly, the specific nature of the "internal security" practices which would best accomplish these objectives for a particular organization generally will depend upon the functions of that organization and its derivative goals, activities and processes; the character and vulnerability of what is being protected; and whether security is sought against a risk or danger from within or from outside the organization. Hence, such practices might include any of a wide range of measures intended to render secure the physical property of an organization. As a consequence of the variety of risks which might be involved, the specific methods employed, i.e., the security practices themselves, will of necessity differ according to the particular circumstances. Thus, depending upon the circumstances, they may involve one or a combination of practices, for example, guard forces, barriers, alarms and special lighting. Further, they may involve procedures to be followed by employees, which procedures are designed to eliminate or minimize particular risks to the property of an organization from such employees. [Footnote omitted.]

While the union's proposal here involved does not specifically mandate the internal security methods to be employed by the agency, it is clear, however, that the proposal would require the agency to take one or a combination of possible measures designed to provide "reasonable" security.

^{12/} In view of our decision that the proposal is excepted from the obligation to bargain by section 11(b) because it concerns matters with respect to the agency's internal security practices, it is unnecessary to further consider the remaining contentions of the agency as to the negotiability of the proposal.

^{13/} American Federation of Government Employees, AFL-CIO, Local 1592 and Army-Air Force Exchange Service, Hill Air Force Base, Utah, FLRC No. 77A-123 (Aug. 14, 1978), Report No. 153.

Thus, by its express terms, the union's proposal would have a direct impact on the internal security practices of the agency and since such matters are excluded from the obligation to bargain by section 11(b) of the Order, the proposal is nonnegotiable.

Union Proposal VII

Article 15, Section 3.

The Employer shall review with the Union on a quarterly basis the names of Union members who have applied and/or have been selected for training, the general conduct of training for Union members, number of employees selected, and other relevant data of joint interest and concern. Those members who are denied requested training shall receive written notification of such denial and the reason for denial of requests over the signature of the person or persons denying the requested training.

Agency Determination

The agency determined that the proposal is nonnegotiable to the extent it is intended to be limited to union members since it would amount to a request for a "members only" agreement in violation of sections 10(e) and 19(b)(1) and (2) of the Order.

Question Here Before the Council

The question is whether the proposal violates section 10(e) of the Order.

Opinion

Conclusion: Insofar as the application of the proposal is limited on the basis of union membership it violates section 10(e) of the Order.^{14/} Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 10(e) of the Order provides, in pertinent part:

(e) when a labor organization has been accorded exclusive recognition, it is the exclusive representative of all employees in the unit and . . . is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership.

^{14/} In view of our decision that the proposal violates section 10(e) of the Order, it is unnecessary to further consider the remaining contention of the agency that the proposal violates sections 19(b)(1) and (2) of the Order.

While the union argues that the proposal is merely intended to assist the union in policing the nondiscrimination guarantees of the Order and the contract with regard to participation in a labor organization, the express language of the proposal requires the agency to review the names of union members who have applied for training and the general conduct of training for union members. Further, the proposal requires that written justification for denials of training requests be furnished to members. Thus, since the express language of the proposal contravenes the mandate of section 10(e) of the Order that an exclusive representative represent the interests of all employees in the unit without regard to union membership the proposal is nonnegotiable.

Union Proposal VIII

Article 15, Section 4.

The Employer shall encourage and support to the extent possible under applicable regulations, budgetary limitations, and mission accomplishment factors, Union member's application for training relevant to development and/or advancement. The Employer will provide the Union with a report of training expenditures for the most recent fiscal year and a budget for the forthcoming year. To the extent possible, the Employer will maintain the future training expenditure level at no less than that of the previous fiscal year. On an annual basis the Union will be allowed to bargain for the number of working hours and the amount of Federal money to be allocated to the Union for training.

Agency Determination

The agency determined that since the first sentence of the proposal concerns only union members, it violates section 10(e) of the Order and is nonnegotiable. The agency further determined that since the third and last sentences of the proposal concern the agency's budget they are excluded from the obligation to bargain by section 11(b) of the Order and are thus, also nonnegotiable.

Questions Here Before the Council

- I. Whether the first sentence of the proposal violates section 10(e) of the Order.
- II. Whether the third and last sentences of the proposal are excepted from agency's obligation to bargain by section 11(b) of the Order or are outside the mandatory scope of bargaining under section 11(a) of the Order.

Opinion

A. Conclusion as to Question I: The first sentence of the proposal violates section 10(e) of the Order since its application is limited on the basis of union membership.^{15/} Accordingly, the agency's determination that the first sentence of the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 10(e) of the Order, as previously set out with regard to Proposal VII, mandates that the exclusive representative of employees in a bargaining unit represent the interests of all employees and not just union members. The first sentence of the union's proposal however, would require the agency to encourage and support training only for employees who are union members. Thus, for the reasons more fully set forth with regard to Proposal VII the first sentence of the proposal clearly conflicts with the mandate of section 10(e) and, hence, is nonnegotiable.

B. Conclusion as to Question II: The third and last sentences of the proposal concern matters with respect to the agency's budget, and thus are excepted from the agency's obligation to bargain by section 11(b) of the Order.^{16/} Accordingly, the agency's determination to that effect was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 11(b) provides in relevant part that "the obligation to meet and confer does not include matters with respect to . . . [the agency's] budget." The meaning of "budget" is not defined in the Order. Thus, consistent with the general rules of statutory construction,^{17/} words in the Order are given their common meaning in the absence of a "legislative intent" to the contrary.^{18/}

No intent is evident in the Order, or in the various reports and recommendations which accompanied the Order and its subsequent amendments, that the word "budget" is to be accorded any meaning other than the common meaning ascribed to it. The common meaning of word as indicated by the dictionary

^{15/} In view of our decision that the first sentence of the proposal violates section 10(e) of the Order, it is unnecessary to further consider the remaining contention of the agency as to the negotiability of the first sentence of the proposal.

^{16/} In view of our decision that the third and last sentences of the proposal are excepted from the obligation to bargain by section 11(b) of the Order, it is unnecessary to further consider the remaining contention of the agency as to the negotiability of those sentences.

^{17/} 73 Am. Jur. Statutes § 206 (1974).

^{18/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 436 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

definition is as follows:^{19/} "Budget" denotes a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during that period and proposals for financing them. Hence, as used in the Order with respect to an agency and its subordinate organizations, the term "budget" includes, inter alia, the determination of what items will be included in the estimate of planned or expected expenditures for a particular period of time and further, the determination of the monetary amount of each of the items so included.

Turning to the present case, the third and last sentences of the union's proposal, by their express language, concern the monetary amount of a particular item in the budget, i.e., the agency's training expenditure for a future fiscal year and the amount of money to be allocated to the union for training. Accordingly, since these two sentences directly concern the budget of the agency, here the training budget, we find that these two sentences are excepted from the obligation to bargain by section 11(b) of the Order.

Union Proposals IX, X^{20/}

Proposal IX, Article 16, Section 1.j.

The Employer agrees to rotate acting supervisor details and temporary assignments among the highest level professional non-supervisory personnel in the office or shop organization. As near as practicable, each highest level professional non-supervisory employee in the office or shop organization will be the acting supervisor for the same number of workdays per year.

Proposal X, Article 16, Section 1.k.

At no time will a lower level professional employee be the acting supervisor over a senior (or higher) grade professional. At no time will a non-professional non-supervisory employee be the acting supervisory over a professional employee.

Agency Determination

The agency determined, inter alia, that Proposal IX concerns the filling of supervisory positions and is, therefore, outside the obligation to bargain under section 11(a) of the Order and that Proposal X is nonnegotiable because it infringes on management's reserved right to assign employees under section 12(b)(2) of the Order.

19/ Webster's Third New International Dictionary (1966).

20/ These two proposals involve similar considerations and are treated together, herein, for convenience of decision.

Question Here Before the Council

The question is whether the proposals are outside the scope of mandatory bargaining under section 11(a) of the Order.

Opinion

Conclusion: The proposals concern the filling of supervisory positions outside the bargaining unit and, thus, are outside the bargaining obligation established by section 11(a) of the Order.^{21/} Accordingly, the agency's determinations that the proposals are nonnegotiable were proper and, pursuant to section 2411.28 of the Council's rules, are sustained.

Reasons: The union's proposals concern the procedures to be used by the agency in temporarily assigning or detailing unit employees to supervisory positions outside the bargaining unit. In this regard, the Council has determined that proposals concerning the filling of supervisory positions outside the bargaining unit are outside the obligation to bargain under section 11(a) of the Order.^{22/} While the proposals here involved concern only the temporary filling of such supervisory positions, the intended duration of the personnel action contemplated is without controlling significance. The essential fact is that such supervisory positions are outside the bargaining unit. Thus, the union's proposals which are concerned solely with procedures for filling nonbargaining unit positions, clearly do not relate to personnel policies and practices affecting the bargaining unit which are encompassed within the bargaining obligation under section 11(a). Accordingly, consistent with established precedent, the union's proposals here involved are outside the obligation to bargain under section 11(a) and are nonnegotiable.

Union Proposal XI

Article 16, Section j.

The Employer agrees to the maximum extent consistent with work requirements to assign employees work appropriate to their classification.

^{21/} In view of our decision that the proposals are outside the mandatory obligation to bargain under section 11(a) of the Order, it is unnecessary to further consider the remaining contentions of the agency as to the negotiability of each proposal.

^{22/} Texas ANG Council of Locals, AFGE and State of Texas National Guard, 4 FLRC 153 [FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100]. See also International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 78A-28 (Feb. 28, 1978), Report No. 145 at 3 of decision.

Agency Determination

The agency determined, in part, that the union's proposal is nonnegotiable because it concerns job content and thus is excepted from the obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal concerns the job content of unit employees and therefore is excepted from the obligation to bargain by section 11(b) of the Order.^{23/} Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The union's proposal here in dispute would require the agency to assign to unit employees work appropriate to their classification. In this regard, the proposal here involved bears no material difference from the union's proposal conditioning the assignment of duties to employees on the "'scope of the classification assigned' to the respective unit employees as defined in 'appropriate classification standards,'" which was before the Council and held to be excepted from the obligation to negotiate by section 11(b) in the Wright-Patterson decision.^{24/} Therefore, for the reasons more fully explicated in the Wright-Patterson decision, the proposal here in dispute must also be held to be excepted from the obligation to bargain by section 11(b) of the Order.

Union Proposal XII

Article 16, Section 3.

Manpower Survey. The Union shall participate and have an input on all manpower surveys at CCAD if professional employees or positions are affected, or under study. Before such a study begins the Union shall meet with the manpower study team to determine the extent of participation desired by the Union.

^{23/} In view of our decision herein, it is unnecessary to further consider the remaining contention of the agency as to the negotiability of the proposal.

^{24/} Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, 2 FLRC 280 [FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60].

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it concerns matters outside the obligation to bargain under section 11(a) of the Order.

Question Here Before the Council

The question is whether the union's proposal is outside the agency's obligation to bargain under section 11(a) of the Order.

Opinion

Conclusion: The proposal does not directly relate to personnel policies and practices and matters affecting working conditions and, therefore, is outside the agency's obligation to bargain under section 11(a) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 11(a) of the Order^{25/} establishes, within specified limits not here in dispute, an obligation to bargain concerning personnel policies and practices and matters affecting working conditions of bargaining unit employees. The manpower surveys to which the disputed proposal relates are characterized in the record as being initiated and conducted by the Army Materiel Development and Readiness Command, the activity's parent command in the organizational hierarchy. Further, such manpower surveys are conducted by the parent command's own personnel and for the purpose of enabling the parent command to measure the effectiveness of manpower utilization by various activities within the command, or in the command as a whole.

The proposal in dispute, by its express terms and as explained by the union in the record before the Council, is concerned with securing representation for the union on such manpower survey teams.

In our opinion, the proposal in dispute is outside the agency's obligation to bargain because it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Clearly, union representation on such manpower

^{25/} Section 11(a) of the Order provides, in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order.

survey teams does not, of itself, involve such personnel policies or practices or matters affecting working conditions of bargaining unit employees.^{26/} Furthermore, while the recommendations of a manpower survey may ultimately affect bargaining unit employees, neither the method employed by the survey team in conducting the survey, including team membership, nor the preparation of the survey results and recommendations themselves involve such personnel policies and practices, or matters affecting working conditions. Accordingly, since the union's proposal falls outside the scope of required bargaining under section 11(a) of the Order, we must hold that the proposal is not one on which the agency is obligated to negotiate.^{27/}

Union Proposal XIII

Article 21, Section 5.

Professional employees working in the engineering and scientific fields will be permitted to have contractors come to CCAD to demonstrate new industrial methods, products, equipment, etc., at no cost to the government, without approval of the Purchasing and Contracting Division or any other element of CCAD. However, the Purchasing and Contracting Division will be notified of such visits.

Agency Determination

The agency determined, in essence, that the proposal does not concern a matter within the obligation to bargain under the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal concerns the technology of performing work and, therefore, is excepted from the obligation to bargain by section 11(b) of

^{26/} Cf. National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRC 609 [FLRC No. 76A-111 (July 13, 1977), Report No. 131] and cases cited therein.

^{27/} The impact on personnel policies and practices concerning bargaining unit members and on bargaining unit working conditions of a decision of the activity commander, based on a survey recommendation or requirement, would, of course, be a proper matter for negotiation under section 11(a) of the Order.

the Order.^{28/} Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 11(b) provides in relevant part that "the obligation to meet and confer does not include matters with respect to . . . the technology of performing [the agency's] work." In this regard, the Council has indicated that proposals concerning the particular equipment to be utilized by an agency are excepted from the obligation to bargain by section 11(b) because they relate to the technology of performing work.^{29/} However, the right to determine the technology of performing work is not limited to the current methods or equipment to be utilized but logically extends to the choice of what new method or equipment will be utilized in the future. Implicit and coextensive with the actual choice of technology to be adopted for future use are the decisions as to when and how potential choices will be selected for evaluation and, further, how such evaluations will be conducted.

The union's proposal here involved, by its express terms, would require management to bargain over whether unit employees will make such determination as to when and how new industrial methods and equipment will be evaluated for possible future application by the agency. Thus, since this proposal requires bargaining over whether unit employees will be directly involved in the assessment of the technology of agency operations, it is excepted from the agency's obligation to bargain by section 11(b) and, hence, in the circumstances of this case is nonnegotiable.

Union Proposal XIV

Article 21, Section 8.

The policy of management will be to encourage experimentation by professional employees provided the following criteria exist:

- a. There is no significant cost to the Government or the cost is properly funded.
- b. The experimentation has the potential of producing a cost savings for CCAD.

^{28/} In view of our decision herein, it is unnecessary to further consider the remaining contention of the agency as to the negotiability of the proposal.

^{29/} E.g., National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, 4 FLRC 125 [FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98].

Agency Determination

The agency determined that the proposal concerns the job content of unit employees, a matter which is excepted from the obligation to bargain by section 11(b) of the Order.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal concerns a matter with respect to the job content of unit employees and, therefore, is excluded from the obligation to bargain by section 11(b) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Union proposals proscribing^{30/} or conditioning^{31/} the assignment of duties to unit employees are excepted from the agency's obligation to bargain by section 11(b).

The agency asserts without contradiction that unit employees currently perform experiments as part of their regular assigned duties. The union's proposal, however, would condition the agency's discretion with respect to assigning duties involving the performance of experiments upon the cost and funding factors set forth in the proposal. Accordingly, consistent with established Council precedent and apart from other considerations, we find the union's proposal concerns a matter with respect to job content and, hence, is excepted from the agency's obligation to bargain by section 11(b) of the Order.

Union Proposal XV

Unnumbered Article.

When an employee has been demoted, he will be assigned to perform the duties of the lower position except when serving on a formal detail assignment.

^{30/} See Council opinion concerning proposal III, p. 4 supra and Council opinion concerning proposal XI, p. 15 supra.

^{31/} E.g., NAGE, Local R12-58 and McClellan Air Force Base, 4 FLRC 523 [FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114].

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it violates the agency's rights to assign employees under section 12(b)(2) and to determine the methods, means and personnel by which agency operations are conducted under section 12(b)(5); and is excepted from the obligation to bargain by section 11(b) because it concerns job content.

Questions Here Before the Council

The questions are whether the proposal violates sections 12(b)(2) and 12(b)(5) or is excepted from the obligation to bargain by section 11(b).

Opinion

Conclusion: The union's proposal does not violate the agency's 12(b) rights and is not excepted from the obligation to bargain under section 11(b). Accordingly, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{32/}

Reasons: The agency asserts that the union's proposal infringes on the rights reserved to management by sections 12(b)(2) and (5) of the Order and further, that the proposal is excepted from the obligation to bargain by section 11(b) of the Order. We disagree.

In our opinion, the agency has failed to support its contentions. In this regard, the union's proposal merely provides that when an employee is demoted to a position, the employee so demoted will perform the duties which comprise or are assigned to that position unless the employee has been detailed to a different position. There is nothing in the language of the proposal or in the expressed intent of the union as to the meaning of that language which precludes the agency from exercising its 12(b)(2) right "to . . . assign . . . employees in positions within the agency . . ." ^{33/} or from exercising its section 12(b)(5) right "to determine the methods, means, and personnel by which [agency] operations are to be conducted" Nor does the proposal in any way restrict the agency in determining what duties will comprise a given position or in changing the duties already

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^{32/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposal. We decide only that, in the circumstances presented, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{33/} Included in the 12(b)(2) right to assign are the rights to "temporarily assign" and to "detail." Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157, 161 n. 5. [FLRC No. 73A-16 (July 31, 1974), Report No. 55].

assigned to a particular position. Instead, the proposal merely requires that an employee perform whatever duties management has assigned to the position the employee occupies unless the employee is detailed to another position. Thus, in our view, the proposal is not rendered nonnegotiable by section 12(b) or 11(b) of the Order.^{34/}

Union Proposal XVI

Article 22, Section 6.

Employees not performing the full scope of their positions and who thereby lose skill in the performance of certain aspects of their profession shall be given a reasonable amount of time and/or training to bring their skills and performance up to an acceptable level prior to the initiation of actions to demote such employee.

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it would so delay and impede management's reserved right under section 12(b)(2) of the Order to demote employees as to negate that right.

Question Here Before the Council

The question is whether the union's proposal violates section 12(b)(2) of the Order.

Opinion

Conclusion: The proposal would negate management's right to demote employees under section 12(b)(2) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 12(b)(2) of the Order reserves to management the right, among other things, "to suspend, demote, [and] discharge . . . employees." In interpreting and applying this section of the Order, the Council, in its

^{34/} We note that this proposal would not afford employees a means of challenging job classifications which classification appeals are subject exclusively to statutory appeals procedures under 5 U.S.C. § 5112 and 5 U.S.C. § 5346. Cf. Community Services Administration, Dallas, Texas, Assistant Secretary Case No. 63-5997 (GA) (July 6, 1978) at 2 of attachment.

VA Research Hospital decision,^{35/} stated that section 12(b)(2) of the Order does not preclude the negotiation of procedures which management will observe in reaching the decision or taking the action involved, as long as those procedures do not have the effect of negating management's reserved authority. Subsequently, in the Blaine decision,^{36/} the Council found a union proposal for a promotion procedure nonnegotiable because the procedure, by failing to establish any "precise and readily definable limitation" before the personnel actions were taken by the agency, would create the potential for significant delays in filling vacancies.^{37/} The Council determined that these delays would be so unreasonable as to negate management's reserved authority under section 12(b)(2) of the Order, thereby violating that section of the Order. More recently, in its Bureau of Alcohol, Tobacco and Firearms decision,^{38/} the Council, in applying the general principle established in VA Research Hospital, found nonnegotiable a union proposal requiring the staying of employee suspensions pending the outcome of an expedited arbitration procedure to determine if the proposed suspensions were for just cause. The Council found that the proposal did not "precisely define and limit the time to process cases through arbitration before management [could] act to implement its decision to take disciplinary actions."^{39/} Therefore, the Council concluded, the proposal would create the potential for delays of indefinite duration before a disciplinary decision could be implemented and would have the effect of negating management's reserved right.

Turning to the proposal here involved, such proposal, by its express terms, would require the agency to "suspend" initiation of action to demote employees until such employees were given a "reasonable" time and or training to bring their skill and performance up to acceptable levels. However, nowhere in the proposal itself or in the expressed intent of the union as

35/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

36/ Local 63, American Federation of Government Employees, AFL-CIO and Blaine Air Force Station, Blaine, Washington, 3 FLRC 75 [FLRC No. 74A-33 (Jan. 8, 1975), Report No. 61]. In that case, the union proposal would have prevented management from filling any vacancy on a permanent basis, when a formal grievance is filed under the agency grievance procedure, until the grievance is finally resolved or until an employee has exercised any of his statutory or mandatory placement rights, whichever occurs first.

37/ Id. at 79.

38/ National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, FLRC No. 77A-58 (Jan. 27, 1978), Report No. 142.

39/ Id. at 4 of decision.

to the meaning of the proposal, is the term "reasonable" defined so as to place a definite limit on the time employees will be granted to bring their skill and performance up to acceptable levels. Under the proposal, therefore, the "reasonable" time for an employee to improve his or her skill and performance would depend on the particular level of skill then possessed by the particular employee involved and, thus, result in potential delays of indefinite and uncertain duration in the exercise by management of its right to demote such employees. In our opinion, such delays of indefinite and uncertain duration in the circumstances of this case interfere with management's right to take prompt, timely action in a matter specifically reserved to it under the Order, namely, the right to take prompt, timely demotion actions.^{40/} Stated otherwise, the union's proposal here would so delay and impede the exercise of the reserved right to demote employees as to negate that right and, hence, violates section 12(b)(2) of the Order.

Union Proposal XVII

Article 24, Section 2.

The Employer has a responsibility to treat its professional employees as professional individuals. The Employer will ensure that Professional Employees receive appropriate recognition in the organizational structure and that his economic rewards must be compatible with other groups in our society.

Agency Determination

The agency determined that the union's proposal is nonnegotiable because (1) it concerns pay and fringe benefits for employees which are matters which arise in statute and not in the Order; (2) it concerns an employee's status in the organization which is not a personnel policy, practice or matter affecting working conditions; and (3) it contains terms which are contrary to 5 U.S.C. § 4503.

Question Here Before the Council

The question is whether the proposal is contrary to law, namely, 5 U.S.C. § 4503 which concerns the granting of incentive awards.

^{40/} We make no determination as to the precise length of time which might be provided to employees for the purposes set forth in the proposal without being violative of section 12(b).

Opinion

Conclusion: The proposal violates law, namely 5 U.S.C. § 4503. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.^{41/}

Reasons: 5 U.S.C. § 4503, which concerns the criteria pursuant to which inventive awards may be granted, provides:

The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who--
(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or
(2) performs a special act or service in the public interest in connection with or related to his official employment.

It is clear that this section of law requires that incentive awards be granted solely on the basis of merit.^{42/} The union's proposal here involved, however, based on the language of the proposal, would require the granting of incentive awards to bargaining unit employees on the basis of compatibility with other groups in the society. Thus, the proposal would introduce criteria into the granting of incentive awards that are wholly extraneous to the merit of the employee's contribution or performance. Accordingly, since the proposal is clearly incompatible with the law governing the granting of incentive awards, it is nonnegotiable.

Union Proposal XVIII

Article 24, Section 9.

The Employer agrees to create a professional-type condition for the creation and maintenance of a professional spirit. This includes such matters as office facilities, professional tools and equipment, working space, helpers (in the form of technicians, equipment specialists, aides, etc.), clerical help, reference materials, availability of mechanical office equipment and pleasant surroundings.

^{41/} In view of our decision that the proposal violates 5 U.S.C. § 4503, it is unnecessary to further consider the remaining contentions of the agency as to the negotiability of the proposal.

^{42/} NFFE Local 1555 and Tobacco Division, AMS, USDA, 3 FLRC 242 [FLRC No. 74A-31 (May 9, 1975), Report No. 69].

Agency Determination

The agency determined that the union's proposal is excepted from the obligation to bargain by section 11(b) of the Order because the proposal concerns the agency's staffing patterns and the technology of performing the agency's work.

Question Here Before the Council

The question is whether the proposal is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal is excepted from the obligation to bargain by section 11(b) of the Order. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.23 of the Council's rules, is sustained.

Reasons: Section 11(b) provides, in relevant part, that "the obligation to meet and confer does not include matters with respect to . . . the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty [i.e., the staffing patterns of the agency] [and] the technology of performing [the agency's] work."

With regard to the exclusion of matters concerning the agency's staffing patterns from the bargaining obligation, the union's proposal would, by its express terms, require the agency to provide bargaining unit employees with the assistance of "particular types of positions or employees," e.g., technicians, equipment specialists, aides, etc. Thus, since the proposal would require the agency to negotiate over its staffing patterns it is to that extent excepted from the obligation to bargain by section 11(b).

The union's proposal is also excepted from the obligation to bargain because it would require the agency to negotiate with respect to the technology of performing the agency's work. In this regard, the Council has indicated that proposals concerning the particular equipment to be utilized by the agency in carrying out its mission and proposals concerning the particular design and use of agency workspace are excepted from the obligation to bargain because they concern the technology of performing the agency's work.^{43/} While the union proposal here involved does not require the agency to utilize a specific piece of equipment or particular workplace design, it would subject agency decisions on these matters to union challenge and constraints under the contract. Thus, since the proposal involves matters

43/ E.g., National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago, District, 4 FLRC 125 [FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98].

with respect to the technology of performing the agency's work it is excepted from the obligation to bargain by section 11(b) of the Order.

Union Proposal XIX

Article 24, Section 13.

If the supervisor begins to perform professional employee's duties by using the professional's helpers as aides, the employer agrees to investigate the need of additional professional employee positions. The data and conclusions from such an investigation shall be furnished the Union for comment and prospective [sic].

Agency Determination

The agency determined that because the proposal would, in effect, prevent the agency from assigning bargaining unit work to supervisors it violates section 12(b)(5) of the Order. The agency also determined that insofar as the proposal concerns the possibility of increasing the numbers of employees it concerns the agency's staffing patterns and is excepted from the obligation to bargain by section 11(b) of the Order.

Questions Here Before the Council

The questions are whether the proposal violates section 12(b)(5) of the Order or is excepted from the obligation to bargain by section 11(b).

Opinion

Conclusion: Contrary to the agency determination, the union's proposal does not violate the agency's 12(b)(5) right to determine the methods, means or personnel by which agency operations are conducted. Further, the proposal does not concern the agency's staffing patterns under section 11(b) but is within the obligation to bargain under section 11(a) of the Order. Accordingly, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{44/}

Reasons: The agency asserts that by making the performance of bargaining unit duties by supervisors an act which automatically initiates an investigation of the activity's staffing requirements, the intent of the proposal

^{44/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the proposal. We decide only that, in the circumstances presented, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

is to preclude the activity from assigning such bargaining unit duties to supervisors in violation of section 12(b)(5) of the Order. The agency also asserts that because the study contemplated by the proposal would look toward the possibility of increasing the numbers of professional employees within the activity, the proposal concerns the agency's staffing patterns and is therefore, excepted from the agency's obligation to bargain by section 11(b) of the Order.

In our opinion, the agency's arguments are without merit. There is nothing in the language of the proposal or in the expressed intent of the union as to the meaning of the proposal which would preclude the agency from exercising its 12(b)(5) right to determine the personnel by which agency operations are conducted, i.e., in the circumstances of this case, to assign supervisors to perform bargaining unit work. In this regard, even though the performance of bargaining unit work by supervisors would trigger an investigation of the need for additional professional personnel, it does not prescribe any particular agency action as the result of such investigation. Hence, the proposal would not violate management's right to continue to have supervisors perform bargaining unit work or to assign bargaining unit work to supervisors in the future. Thus, the proposal does not violate section 12(b)(5) of the Order.

With regard to the agency's claim that the proposal concerns the staffing patterns of the activity and is, thus, excepted from the obligation to bargain by section 11(b) of the Order, there is nothing in the language of the proposal or in the union's expressed intent as to the meaning of the proposal which would require the agency to do anything more than investigate the need for additional personnel. Thus, even if such investigation documented a "need" for additional personnel, the agency would be under no obligation to actually obtain any additional personnel. Therefore, since the proposal is not determinative of the agency's staffing patterns, it is not excepted from the obligation to bargain by section 11(b) of the Order.

Union Proposals XX, XXI, XXII^{45/}

Proposal XX, Article 25, Section 1.

Promotional Selection Panels. The Employer agrees to grant Union participation on all job promotion selection panels for all positions classified as professional by the Civil Service Commission. The Employer also agrees to permit the Union to participate in selection panels for positions on which a professional employee has applied for.

45/ These three proposals involve similar considerations and are treated together, herein, for convenience of decision.

The Union agrees to provide a panel member from its membership to participate in such promotional panels or if it so desires to decline to participate.

Proposal XXI, Article 25, Section 2.

Position Qualification Crediting Plan. The Union will be allowed to participate as a full partner in the process of determining the Qualification Crediting Plan for the qualification criteria of any position to be filled for which professional employees are qualified.

Proposal XXII, Article 25, Section 3.

Criteria for Highly Qualified Candidates. The Union will be allowed to participate as a full partner in the process of determining the criteria for Highly Qualified Candidates for any position to be filled for which professional employees are qualified.

Agency Determination

The agency determined that these three proposals are outside the scope of bargaining established by section 11(a) of the Order because they would apply to positions outside the bargaining unit.

Question Here Before the Council

The question is whether the proposals are outside the obligation to bargain established by section 11(a) of the Order.

Opinion

Conclusion: The proposals are outside the required scope of bargaining under section 11(a) of the Order. Accordingly, the agency determinations of nonnegotiability were proper and, pursuant to section 2411.28 of the Council's rules, are sustained.

Reasons: Section 11(a) of the Order establishes an obligation to bargain on personnel policies affecting bargaining unit employees.^{46/} The three

^{46/} Section 11(a) of the Order provides, in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order.

union proposals here involved, however, would by their express terms result in procedures applicable to bargaining unit positions being applied to positions outside the bargaining unit. For example, Proposal XX would permit the union to participate in selection panels for "positions on which a professional employee has applied for." Proposal XXI would permit the union to participate in determining qualification criteria for "any position to be filled for which professional employees are qualified." And, Proposal XXII would permit the union to participate in determining the criteria for highly qualified candidates for "any position to be filled for which professional employees are qualified."

Accordingly, since these proposed procedures are not limited to bargaining unit positions they do not directly relate to personnel policies and practices and matters affecting bargaining unit working conditions which are encompassed within the bargaining obligation of section 11(a) of the Order. Thus, they are nonnegotiable.^{47/}

Union Proposal XXIII

Article 25, Section 4.

The Employer agrees to notify the Union on any action which will create, dissolve or downgrade any professional position. The Union will be given a reasonable time to prepare comments to proposed actions. [Underscored portion in dispute.]

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it would so delay and impede management's reserved right under section 12(b)(2) to take prompt, timely personnel actions as to negate that right.

Question Here Before the Council

The question is whether the union's proposal violates section 12(b)(2) of the Order.

Opinion

Conclusion: The proposal would negate management's right to take actions under section 12(b)(2). Accordingly, the agency determination

47/ See International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at 7 of Council decision.

of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: As we previously indicated in this decision,^{48/} agency management has the right to effect the personnel actions listed in section 12(b)(2) in a prompt, timely manner. Thus, we determined that union proposal XVI, herein, which would result in delays of indefinite and uncertain duration, violated section 12(b)(2) of the Order. The proposal here involved would require management to delay any action "to create, dissolve or downgrade any professional position" until the union is granted a "reasonable" time to prepare comments on the proposed action. As with proposal XVI, neither the proposal itself, nor the union's submission in support of the proposal, defines the term "reasonable." Thus, this proposal also would result in delays of indefinite and uncertain duration in the exercise by management of its rights to create, dissolve or downgrade any position. In our opinion, such delays of indefinite and uncertain duration, in the circumstances of this case, interfere with management's right to take prompt timely actions in matters reserved to it under section 12(b)(2) of the Order. Stated otherwise, the union's proposal here would so delay and impede the exercise of the reserved rights under section 12(b)(2) as to negate those rights and, hence, violates section 12(b)(2) of the Order.

Union Proposal XXIV

Article 26, Section 4.

Also, the employer agrees, when issuing awards of recognition to other employees for participation in a project, conceiving an idea, etc., to verify if an engineer or other professional employee participated in and was assigned significant responsibility in the project. If such is verified, the employer agrees to give that engineer or other professional employee just recognition. [Underscoring added to show portion in dispute.]

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it is contrary to law, namely, 5 U.S.C. § 4503, which section concerns the granting of incentive awards.

Question Here Before the Council

The question is whether the proposal violates law.

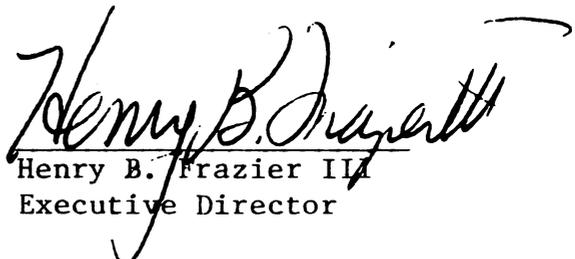
^{48/} See Council opinion concerning proposal XVI, p. 21 supra.

Opinion

Conclusion: The proposal violates 5 U.S.C. § 4503. Accordingly, the agency determination of nonnegotiability was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: 5 U.S.C. § 4503 as previously set forth in this decision,^{49/} establishes that incentive awards are to be granted solely on the basis of the merit of the employee's contribution or performance.^{50/} The union's proposal here involved, however, by its express language, would result in an employee being granted an award on the basis of assigning that employee "significant responsibility in the project" rather than on the merit of the employee's performance. Thus, since the union's proposal would introduce a criterion into the granting of incentive awards that is wholly extraneous to the merit of the employee's contribution or performance, the union's proposal is clearly incompatible with 5 U.S.C. § 4503 and is nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

^{49/} See Council's opinion concerning proposal XVII, p. 24 supra.

^{50/} NFFE Local 1552 and Tobacco Division, AMS, USDA, 3 FLRC 242 [FLRC No. 74A-31 (May 9, 1975), Report No. 69].

Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908.
This appeal arose from a decision and order of the Assistant Secretary, upon a complaint filed by the union (Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO). The Assistant Secretary found, in pertinent part, that the activity violated section 19(a)(1) and (6) of the Order by denying union representation to four probationary employees, who had requested such representation, at meetings with management where disciplinary action was discussed and imposed. The Council accepted the agency's petition for review, concluding that the Assistant Secretary's decision raised a major policy issue as to whether the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of the case was consistent with the purposes and policies of the Order. The Council also granted the agency's request for a stay. (Report No. 149)

Council action (December 28, 1978). For the reasons fully detailed in its decision, the Council concluded that the Assistant Secretary's finding of a violation of section 19(a)(1) and (6) of the Order, based upon his interpretation of the requirements of section 10(e), was inconsistent with the purposes and policies of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and order and remanded the case for action consistent with its decision.

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

Department of Defense,
U.S. Navy,
Norfolk Naval Shipyard

and

A/SLMR No. 908
FLRC No. 77A-141

Tidewater Virginia Federal
Employees Metal Trades
Council, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary, involving an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (the union) against the Department of Defense, U.S. Navy, Norfolk Naval Shipyard, Norfolk, Virginia (the activity). The Assistant Secretary found, in pertinent part, that the activity violated section 19(a)(6) and--based on the same conduct--section 19(a)(1) of the Order^{1/} by denying union representation to four probationary employees, who had requested such representation, at meetings with management where disciplinary action was imposed.

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: Four probationary employees, members of the bargaining unit exclusively represented by the union, were discovered sleeping on the job by a supervisor at the activity. The activity thereafter scheduled individual meetings with each of the probationers for

1/ Section 19(a) of the Order provides in pertinent part:

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

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

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

the purpose of terminating their employment, and gave the union advance notice of the meetings. The activity further advised the union that, because the men were probationary employees, they were not entitled to union representation as they had requested, but that a union steward could attend the meeting as an observer.^{2/} A management representative met

2/ In this connection, the activity took the position that the governing regulation which contained the procedure for terminating temporary and probationary employees, NAVSHIPDNOR/SURSHIPFIVE Instruction 12300.1, did not entitle the probationary employees to such representation. As found by the Assistant Secretary, Instruction 12300.1 made no mention of any "pre-action investigation" for probationary employees such as described in Article 31 (Disciplinary and Adverse Actions), Section 2 of the parties' negotiated agreement, which provides in pertinent part:

When it is determined by the supervisor having authority that formal disciplinary or adverse action may be necessary, an investigator will normally be appointed within 5 workdays to conduct a pre-action investigation of the incident or knowledge of the incident by the supervisor. . . . The investigator assigned will conduct whatever inquiry is necessary to determine and document the facts. In all cases . . . a discussion will be held with the employee as part of the pre-action investigation. It is agreed that during any discussion held with the employee as part of the pre-action investigation the employee shall be advised of his right to be represented by the cognizant [union] steward. If the employee declines representation, the cognizant [union] steward or appropriate chief steward in his absence shall be given the opportunity to be present to represent the Council

In this regard, as reflected in the documents accompanying the agency's appeal in this case, Appendix 2 of the parties' negotiated agreement further provided, in part, as follows:

APPENDIX 2: EXCLUSIONS FROM GRIEVANCE AND ARBITRATION

1. Matters for which statutory appeals procedures exist or which are subject to final administrative review or regulations of the Civil Service Commission (CSC) such as:

.

o. Separation for failure to satisfactorily complete a trial or probationary period appealable under part 315 of CSC regulations.

with each employee individually and in each case informed the employee that he was not entitled to representation but that the union was entitled to have an observer present. During the course of the meetings, the union steward tried to speak on several occasions, but the management representative stopped him each time and told him that he was only an observer and could make a statement on behalf of the union at the end of the meeting. Each of the four meetings lasted approximately 5 minutes and resulted in the termination of the employee involved for failure to meet the standards for satisfactory performance. The union subsequently filed an unfair labor practice complaint alleging, in pertinent part, that the activity had violated section 19(a)(1) and (6) of the Order.

The Assistant Secretary found that the meetings, convened by management for the explicit purpose of notifying the probationary employees of their termination, were "formal discussions" within the meaning of section 10(e) of the Order.^{3/} In this regard, he noted that "the meetings which were held herein were called specifically for the purpose of terminating the probationary employees and not for investigatory purposes," and that they involved the termination of probationary employees "who, except in a limited number of instances not relevant here, have no statutory appeal rights and, therefore, no right of representation upon appeal from an agency action." The Assistant Secretary further stated:

Such meetings not only substantially affected personnel policies and practices as they related to the specific employees' job security, but they also substantially affect personnel policies and practices as they pertain to other employees in the bargaining unit. Thus, the union representative whose representation the probationary employees were seeking would, in effect, be safeguarding not only interests of the particular employees involved, but also the interests of others in the bargaining unit by exercising vigilance to make certain that the agency does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other probationary employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like meeting where such discipline is imposed.

3/ Section 10(e) provides as follows:

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

Further, in my view, such right of union representation will effectuate the purposes and policies of the Order by allowing the individual employee who may be too fearful or inarticulate to relate accurately what occurred, or too ignorant of the law of the shop to raise extenuating factors, the benefit of a knowledgeable union representative. In view of the probationary status of the employees in this case and their lack of appeal rights, this, indeed, may be their only opportunity for knowledgeable union representation.

Based upon the foregoing, the Assistant Secretary concluded that the activity's refusal to allow the union, as exclusive representative of the unit employees involved, the right to participate fully in such discussions violated section 19(a)(6). Further, noting "the vested derivative right of representation at formal meetings under section 10(e) when the employee deems such representation imperative for the protection of his own employment interests," the Assistant Secretary found that the activity's denial of the employees' request for union representation was violative of section 19(a)(1) of the Order.

The agency appealed the Assistant Secretary's decision to the Council. The Council accepted the agency's petition for review, concluding that the Assistant Secretary's decision raises a major policy issue, namely: "Whether the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of this case are consistent with the purposes and policies of the Order." The Council also granted the agency's request for a stay, having concluded that the request met the criteria set forth in section 2411.47(e)(2) of its rules. The union filed a brief on the merits with the Council as provided in section 2411.16 of the Council's rules. The International Association of Machinists and Aerospace Workers, AFL-CIO, filed an amicus curiae brief, as provided in section 2411.49 of the Council's rules.

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary herein raised a major policy issue as to whether his interpretation and application of section 10(e) of the Order in the circumstances of this case were consistent with the purposes and policies of the Order. More particularly, the issue presented concerns the propriety of the Assistant Secretary's interpretation and application of the last sentence of section 10(e) in finding "that the meetings . . . , called for the explicit purpose of terminating probationary employees, were formal discussions within the meaning of [s]ection 10(e) of the Order" which "substantially affected personnel policies and practices as they related to the specific employees' job security . . . [as well as] other employees in the bargaining unit," and that the activity's refusal to permit full

participation at those meetings by the exclusive representative was in violation of section 19(a)(1) and (6) of the Order.

The last sentence of section 10(e) provides:

The [exclusive representative] shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

With regard to this sentence, the Council has previously stated in its Lyndon B. Johnson Space Center (NASA) decision:^{4/}

The language of the pertinent portion of section 10(e) . . . makes clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. Rather, such a right exists only when the discussions are determined to be formal discussions and concern grievances, personnel policies and practices, or other matters affecting the general working conditions of unit employees. [Footnotes omitted.]

Thus, the discussion or meeting for which representation is sought must be "formal" in nature and the topic of the meeting must be one or more of the matters enumerated in the last sentence of section 10(e), i.e., "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Both elements must exist for the right of representation under section 10(e) to accrue either to the exclusive representative or, derivatively, to the employee involved.^{5/}

As to the first element, the question of whether a meeting is "formal" or informal is essentially a factual determination which, in our view, is a matter best resolved on a case-by-case basis by the Assistant Secretary as finder of fact, taking into consideration and weighing a variety of factors such as: who called the meeting and for what purpose; whether written notice was given; where the meeting was held; who attended; whether a

^{4/} National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, 3 FLRC 617 [FLRC No. 74A-95 (Sept. 26, 1975), Report No. 84], at 621.

^{5/} Statement on Major Policy Issue, 4 FLRC 709 [FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116], at 711.

record or notes of the meeting were kept; and what was actually discussed.^{6/} In the instant case, the Assistant Secretary found the meetings to be formal because, inter alia, they "were called specifically for the purpose of terminating the probationary employees and not for investigatory purposes." As previously noted, the finder of fact may appropriately rely upon the purpose(s) for which a meeting was called in deciding whether it constitutes a "formal discussion." The Council, therefore, in accordance with its consistent policy, will not pass upon the Assistant Secretary's adequately supported factual determination in this regard.^{7/}

We next turn to the second element required to be met by the last sentence of section 10(e), i.e., whether the formal discussion concerns "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Clearly, the subject of the instant

^{6/} The Assistant Secretary has identified and applied these and other factors in a number of previous decisions. See, e.g., U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 (Jan. 17, 1973); U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (June 25, 1973); Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438 (Sept. 30, 1974); Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804 (Feb. 18, 1977); and Department of the Treasury, U.S. Customs Service, Region VII, Los Angeles, California, A/SLMR No. 926 (Nov. 23, 1977). With regard to what was actually discussed at such meeting(s), the Assistant Secretary has found discussions to be "formal" when they have ramifications for all unit employees (A/SLMR No. 242) or when they are integrally related to the formal grievance process (A/SLMR No. 926), but has found discussions to be informal when they are mere "counselling" sessions involving individual employees' conduct (see, e.g., Internal Revenue Service, Mid-Atlantic Service Center, A/SLMR No. 421 (Aug. 26, 1974)) or concern conversations between individual employees and their supervisors in the course of day-to-day operations (see, Great Lakes case, A/SLMR No. 804).

^{7/} However, to the extent that the Assistant Secretary also may have relied upon the probationary status of the employees in question and their lack of statutory appeal or representation rights following management's termination of their employment in finding that the meetings were formal, such reliance is inconsistent with the CSC's interpretation and application of the relevant provisions in the Federal Personnel Manual regarding the status and rights of probationary employees and therefore must be set aside as inconsistent with the purposes and policies of the Order. See FPM Chapter 315, Subchapter 8-1 ("Purpose of Probationary Period") which states that ". . . the probationary period described in this subchapter [is] a final and highly significant step in the examining process" during which a probationary employee "may be separated from the service without undue formality if circumstances warrant," and subchapter 8-4 pertaining to the separation of probationers for unsatisfactory performance or conduct.

discussions did not concern a grievance. Thus, the Assistant Secretary did not find, and it has not been alleged, either that a grievance was filed by or on behalf of the four probationary employees concerning the termination of their employment at any time prior to the meetings at issue herein, or that the subject of such meetings was grievances.^{8/} Nor do we find that the discussions herein concerned "personnel policies" as that term is used in section 10(e) of the Order.^{9/}

Thus, the issue here is ultimately narrowed to whether the subject meetings concerned "other matters affecting general working conditions of employees in the unit." [Emphasis added.] As previously indicated, the meetings were called for the specific purpose of notifying the four probationers that agency management had decided to terminate their employment. In this regard, the instant appeal bears a similarity to the Council's Louisville decision,^{10/} wherein the termination of an employee exclusively represented by a labor organization also was involved. In Louisville, after a unit employee was notified of his proposed removal, the employee's exclusive representative sought an extension of the time limit specified for reply to the notice on the ground that the employee had been hospitalized, but the request was denied. The Council, interpreting the first sentence of section 10(e), concluded that an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice. In its decision (3 FLRC 686 at 691), the Council ruled that adverse action proceedings, "which are fundamentally personal to the individual and only remotely related to the rights of the other unit employees, are not automatically within the scope of the exclusive representative's 10(e) rights, which are protected by the Order." Similarly, in the instant case, while the employees involved are probationary employees possessing limited statutory appeal rights (rather than the

^{8/} Moreover, as previously noted, Appendix 2 of the parties' negotiated agreement (n. 2, supra) explicitly barred separation of probationers from the grievance and arbitration process, and the cognizant internal regulation did not provide for grievances over such action.

^{9/} In this regard we note the undisputed factual determination (Recommended Decision and Order of the Administrative Law Judge at 15), tacitly adopted by the Assistant Secretary, that the employees' supervisor "was not a personnel officer nor was he shown to have had authority to establish personnel policies or practices." Rather, it was found that the supervisor "was the Head of . . . only one of numerous components of the . . . [a]ctivity, . . . did not establish a policy or practice even for [that component but] simply reached a conclusion and acted in each case [and] . . . [i]n any future case . . . [he] or any one else would not be bound to reach the same result because of what was done in this case."

^{10/} United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, 3 FLRC 686 [FLRC No. 74A-54 (Oct. 23, 1975), Report No. 87].

career employee in Louisville), the subject of the meetings in both cases was nevertheless "fundamentally personal to the individual(s) and only remotely related to the rights of the other unit employees." As such, in the Council's opinion, the meetings may not properly be found to concern "other matters affecting general working conditions of employees in the unit" within the meaning of section 10(e) of the Order.

Accordingly, as the "formal discussions" herein did not concern "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit" under the last sentence of section 10(e), the exclusive representative had no right guaranteed by the Order to be represented at the meetings in question, and the individual probationary employees therefore had no derivative right to union representation in the circumstances of this case. Consequently, the Assistant Secretary's conclusion that the activity violated section 19(a)(1) and (6) of the Order herein by denying union representation to four probationary employees, based upon his interpretation of the requirements of section 10(e), is inconsistent with the purposes and policies of the Order and must be set aside.

This is not to say, however, that unions and probationary employees are without recourse in these and similar circumstances. Thus, while the Council has concluded that the Assistant Secretary's 19(a)(1) and (6) finding in the instant case must be set aside, the Council also recognized in Louisville (3 FLRC 686 at 691) that ". . . the parties to an exclusive relationship could negotiate rights to be accorded the exclusive representative related to individual employee adverse actions so long as they were otherwise consistent with applicable laws and regulations." Further, the Council ruled in Vandenberg Air Force Base^{11/} that "[t]he relief for alleged violations of negotiated rights . . . would be available through the negotiated grievance procedure which section 13 of the Order requires the parties to include in their agreement." [Footnote omitted.] Thus, to the extent consistent with law and regulation, the parties could agree to negotiate a procedure permitting union representation of probationary employees prior to their termination.^{12/} In the instant case, the union has not contended that it had any right, arising from the agreement, to represent probationary employees during termination proceedings. Furthermore, as previously noted, the parties' negotiated agreement expressly barred grievances and arbitration over the termination of probationary employees.

^{11/} Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 4 FLRC 586 [FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118], at 595.

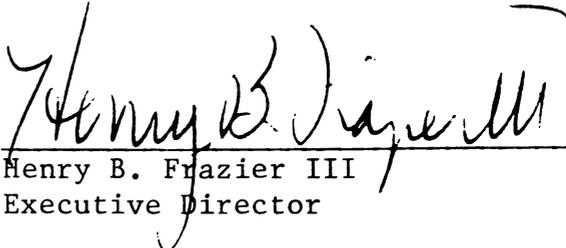
^{12/} See also Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3492, 4 FLRC 620 [FLRC No. 76A-57 (Dec. 7, 1976), Report No. 118], wherein the Council denied review of the Assistant Secretary's finding that a grievance concerning the termination of a probationary employee for alleged misuse of annual and sick leave was on a matter subject to the parties' negotiated grievance procedure in the circumstances of that case.

In summary, for the reasons set forth above, the Council concludes that the Assistant Secretary's interpretation and application of section 10(e) of the Order in the circumstances of this case were not consistent with the purposes and policies of the Order.

Conclusion

Therefore, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the decision and order of the Assistant Secretary and remand this matter for appropriate action consistent with this decision.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

American Federation of Government Employees, Local 1802 and Department of Health, Education, and Welfare, Social Security Administration, Denver District. The dispute involved the negotiability of provisions of the parties' agreement which were disapproved by the agency during review of the agreement under section 15 of the Order. The disputed provisions related to promotions of employees in career ladder positions and training programs.

Council action (December 28, 1978). The Council held that the disputed provisions were not violative of section 12(b) of the Order, but were excepted from the obligation to bargain by section 11(b) of the Order. However, since the local parties had agreed to the provisions, the agency could not, after the agreement, change its position during the section 15 review process. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determination that the provisions were nonnegotiable.

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

American Federation of Government
Employees, Local 1802

(Union)

and

FLRC No. 77A-148

Department of Health, Education, and
Welfare, Social Security Administration,
Denver District

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Provisions^{1/}

(Article 18, Section 4. "Performance Evaluations")

- a. All employees in career ladder positions will be promoted when the employer has certified that the employee is capable of satisfactorily performing all aspects of current level and demonstrated ability to perform at the next higher level, provided time-in-grade requirements have been met.
- b. Trainees' promotions, upon satisfactory performance and completion of time-in-grade requirements, are to take effect at the beginning of the first full pay period thereafter. Supervisor error or workload in the Personnel Office will not absolve the employer from contractual obligation.

Agency Determination

During the section 15 review process,^{2/} the agency determined that Article 18, Section 4.a and b of the negotiated agreement conflicts

1/ Throughout the record before the Council, the parties have construed the provisions as a whole, applicable in like manner to employees in career ladder positions and to employees in training positions. Therefore, for the purposes of this decision, the Council will also consider that the provisions apply alike to employees in the two types of positions.

2/ Section 15 of the Order provides:

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to

with rights reserved to management by section 12(b) of the Order,^{3/} and, hence, is nonnegotiable.^{4/}

(Continued)

the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

3/ Section 12(b) of the Order provides, in part:

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

.

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

.

(4) to maintain the efficiency of the Government operations entrusted to them;

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

4/ While the agency adverted to its regulations issued pursuant to section 12(b) of the Order, it appears that the agency essentially relied on rights reserved to it under section 12(b) of the Order. In this regard, the agency stated in its determination that:

[The regulations] are protected by E.O. 11491, Section 12(b)(4) and (5), and thus are deemed non-negotiable under Section 11(a) of the Order. Since these issuances are thus not subject to the Section 11(a) obligation to meet and confer, there is no requirement to make a compelling need determination.

Question Here Before the Council

The question is whether the disputed provisions violate the Order.

Opinion

Conclusion: The provisions are not violative of section 12(b) of the Order. Rather, they are excepted from the obligation to bargain under section 11(b) of the Order.^{5/} However, since the local parties agreed to the provisions, as permitted by the Order, the agency cannot, after that agreement, change its position during the section 15 review process. Accordingly, the agency's determination that the provisions are non-negotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{6/}

Reasons: The agency principally claims that the disputed provisions violate section 12(b) of the Order, in essence, because they deal with a matter which is outside the delegated administrative discretion of the Denver District Manager and, derivatively, because the provisions are outside that official's authority to conduct negotiations. More specifically, the agency takes the position that the provisions violate section 12(b)(4) and (5) of the Order by permitting the Denver District Manager to effect promotions of unit employees in career ladder and trainee positions, in conflict with the agency's published directives, one of which delegates the administrative authority to effect such promotions in the bargaining unit to the Personnel Officer of HEW Region VIII^{7/} and another of which limits the authority of a local official to conduct negotiations to those matters subject to his administrative discretion.^{8/}

^{5/} Section 11(b) of the Order provides, in relevant part:

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

^{6/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions. We decide only that, as agreed upon by the parties and based upon the record before the Council, the provisions are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{7/} HEW Personnel Instruction 250-5-50C.

^{8/} HEW Personnel Instruction 711-1-110A.

That is, the agency contends that the provisions violate section 12(b) of the Order because that section reserves to management the right to determine the official to whom such administrative authority will be assigned. We find the agency's position that section 12(b) renders the provisions nonnegotiable to be without merit.

The Council has previously held that such assignment of a function falls not within the ambit of section 12(b), but rather is excepted from the obligation to bargain by section 11(b) of the Order. For example, in Kirk Army Hospital^{9/} the question before the Council was whether a union proposal analagous to the provisions in dispute in the present case was nonnegotiable under the Order. That proposal provided as follows:

The screening of [promotion] candidates to determine basic eligibility shall be a function of the Civilian Personnel Division and the rating panel.

The Council found that the quoted proposal was concerned with the agency's "organization" within the meaning of section 11(b) of the Order, since it purported to assign the responsibility for performing an agency function. Consequently, the Council held the proposal was excepted from the agency's obligation to bargain under section 11(b), explaining its decision, as follows:

Section 11(b) of the Order excepts from the agency's obligation to bargain matters with respect to ". . . its organization" As the Council explained in the Griffiss Air Force Base case, the administrative and functional structure of an agency, i.e., the systematic grouping of the agency's work, comprises the agency's "organization" as that term is used in section 11(b). [Footnote omitted.]

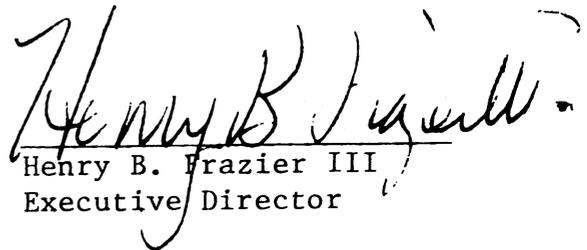
Turning to the provisions disputed in the present case, in our view these provisions similarly purport to assign a particular agency function, (the effecting of certain promotions within the bargaining unit), to the Denver District Manager. Hence, as these contract provisions are materially indistinguishable from the proposal before the Council in FLRC No. 72A-18, for the reasons stated in that decision we find the instant provisions concern a matter with respect to the administrative and functional structure of the agency, and, thus, the agency's "organization" within the meaning of section 11(b) of the Order. Accordingly, we find they are, therefore, excepted from the agency's obligation to bargain under that section of the Order. However, while under section 11(b), the agency may but is not required to bargain on "organization," here the agency's local bargaining representative exercised such option by negotiating and entering into an agreement on the disputed provisions. Accordingly, consistent with established Council precedent, the agency was without

9/ IAM-AW Lodge 2424 and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., 1 FLRC 525, 533 [FLRC No. 72A-18 (Sept. 17, 1973), Report No. 44].

authority during the section 15 review process to determine these provisions nonnegotiable on the basis of section 11(b) of the Order.^{10/}

For the foregoing reasons, we find in the circumstances of the present case the provisions are negotiable under the Order.^{11/} The agency determination to the contrary is set aside.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

10/ E.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 396 [FLRC No. 74A-48 (June 26, 1975) Report No. 75].

11/ We note that the provisions would not prevent the agency from establishing such internal procedures as may be appropriate to assure that all legal and regulatory requirements necessary to the proper effectuation of a promotion are met prior to the Denver District Manager's taking the action set forth in the provisions of the negotiated agreement.

Antilles Consolidated School System and Antilles Consolidated Education Association (Kanzer, Arbitrator). The arbitrator determined that under the relevant provision of the parties' agreement, the teacher-grievant, at the time of his termination in connection with a reduction-in-force, possessed the basic qualifications to teach a particular subject, which was being taught by a more recently hired teacher. The arbitrator therefore sustained the grievance and directed, among other things, that the grievant be reinstated retroactively to a particular date with backpay, contingent upon the grievant's completion of certain required course work. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated the Back Pay Act of 1966. The Council also granted the agency's request for a stay. (Report No. 151)

Council action (December 28, 1978). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council held that the portion of the arbitrator's award which directed the payment of backpay in connection with a retroactive reinstatement was violative of the Back Pay Act. Accordingly, pursuant to section 2411.37(b) its rules of procedure, the Council modified the award by striking the portion thereof found violative of the Back Pay Act. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Antilles Consolidated School System

and

FLRC No. 78A-21

Antilles Consolidated Education Association

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award and the entire record, the grievant was employed for about 6 years by the Antilles Consolidated School System (the activity) as a general industrial arts teacher and was teaching such subjects at the activity's middle school prior to his termination. The North Central Association of Colleges and Secondary Schools (North Central) is the accrediting agency for the activity establishing program standards for the operation of schools, as well as minimum educational and experience requirements for teachers. North Central requires a teacher of industrial arts to have taken a minimum of one course in each subject taught. The arbitrator found that the only formal course in the auto mechanics area completed by the grievant did not satisfy the requirement. However, the arbitrator noted that if the activity were cited by North Central for a deficiency in teacher coursework, North Central would normally allow one year within which the teacher could remedy the situation by completion of the needed course.

Prior to the start of the 1976-77 school year, North Central advised the activity to offer a course in auto mechanics at the high school. A qualified teacher was hired, and he began teaching the course in January 1977. In February and March of 1977, the grievant was advised of a probable reduction-in-force at the middle school which could terminate his job. On May 10, 1977, grievant was given a formal reduction-in-force letter. The grievant then applied for the teaching position which included teaching the course in auto mechanics in the high school, and he offered to take the needed coursework in auto mechanics in the spring or summer of 1977. However, the activity refused to reconsider its decision that the grievant was not qualified to compete with the other teacher in the teaching of auto mechanics. Neither did it offer to permit the grievant a trial period to demonstrate on the job whether he knew the work, pending completion of the deficit in coursework, which could have been completed in less than the one year citation period permitted by North Central.

The union filed a grievance resulting in the instant arbitration, contending^{2/} that the termination action violated Article 3(1)^{1/} and/or Article 21^{2/} of the parties' collective bargaining agreement.

The Arbitrator's Award

The statement of issue by the arbitrator was as follows:

Was [grievant] qualified to perform the duties of [the other teacher] as a teacher of auto mechanics in the Antilles Senior High School at the time of the termination of [grievant] on July 10, 1977?

It was stipulated by the activity before the arbitrator that if the arbitrator resolved the issue in the affirmative, pursuant to Article 21 of the agreement, the grievant would automatically have sufficient retention points to bump or replace the other teacher in his job.

The arbitrator stated that the sole issue before him was whether the grievant possessed those "basic qualifications" called for under Article 21, Section e(3) of the negotiated agreement. Therefore, while he found that the one course taken by the grievant in the auto mechanics area did not meet the North Central requirement for certification, he also determined that the grievant had the "overall 'basic qualifications' to teach such course in all other respects, pursuant to Art. 21, Sec. e(3)." He thus concluded that the activity failed to support its burden of proving that the grievant was not basically qualified to perform the other teacher's job at the time of the grievant's termination. Accordingly, the arbitrator granted the grievance and awarded the grievant the teaching position at issue "retroactive to July 10, 1977," with backpay, contingent upon the grievant's completion of the required coursework.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure,

^{1/} As set forth in the arbitrator's award, Article 3(1) of the negotiated agreement contains the section 12(a) language of Executive Order 11491.

^{2/} According to the arbitrator's award, Article 21 (Reduction in Force) provides, in pertinent part, as follows:

Section e: Retention Procedures

- (3) In the event of a reduction in force, retention of teachers within the affected competitive area will be based on teacher qualifications, performance, and experience in accordance with the following ranking system. Teachers with the basic qualifications and highest number of accumulated points will preempt those with a lesser number of points. . . . [Emphasis by arbitrator.]

the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates the Back Pay Act of 1966.^{3/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award violates the Back Pay Act. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from him a decision as to whether the arbitrator's award violates the Back Pay Act. The Comptroller General's decision in the matter, B-192568, December 8, 1978, is set forth below.

The Federal Labor Relations Council has requested a decision on the legality of backpay ordered by an arbitrator in the matter of Antilles Consolidated School System and Antilles Consolidated Education Association (Kanzer, Arbitrator), FLRC No. 78A-21. This case is before the Federal Labor Relations Council as the result of a petition for review filed by the Department of the Navy alleging that the award violates applicable laws and regulations. The Council accepted the petition insofar as it related to the agency's exception which alleged that the award violates the Back Pay Act of 1966. The sole issue presented for consideration by us is whether or not the arbitrator's award of backpay to the aggrieved employee violates the Back Pay Act, 5 U.S.C. 5596 (1976).

The arbitrator made a conditional award of backpay to Mr. Clifton F. Rush, a teacher whose employment at the Antilles Middle School, Antilles Consolidated School System, Fort Buchanan, Puerto Rico, was terminated on the basis of a reduction-in-force. Mr. Rush's employment was terminated effective July 10, 1977. From May 1971, through that date, he had been employed as a teacher of industrial arts in the school system. The Navy operated the school system under the authority of 20 U.S. Code 241(a), as a "Section 6 school" for the Commissioner of Education, Department of Health, Education, and Welfare.

The issue as formulated by the arbitrator for his consideration is as follows: "Was Mr. Clifton Rush qualified to perform the duties of Mr. Carl Pachucki as a teacher of auto mechanics in the Antilles Senior High School at the time of the termination of Rush on July 10, 1977?"

^{3/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending determination of the appeal.

The facts in the matter as stated in the arbitrator's decision are summarized as follows. Mr. Rush received both B.S. and M.S. degrees and possesses a teacher certificate issued by the Kansas Department of Education which list the following subjects: general shop, drafting, metals, and wood. Rush completed one formal college course in the auto mechanics area; however, to earn certification in Kansas he would have to complete two more advanced courses in auto mechanics. He never taught a class in auto mechanics, but repaired engines in the Navy from 1962-1967, and worked four months as an auto mechanic while at college. The accrediting agency for Antilles Consolidated School System (hereafter "Antilles") requires a teacher of industrial arts to have a minimum of one course in each subject taught. Although the arbitrator found that the course passed by Rush did not satisfy that requirement, he noted that if Antilles were cited by the accrediting agency for a deficiency in such coursework, the accrediting agency normally would allow Antilles one year under citation within which time the teacher could complete the needed course.

The accrediting agency advised Antilles prior to the start of 1976-1977 school year to offer a course in auto mechanics at the high school with the start of the latter year. Accordingly, Antilles hired a teacher who was found by the arbitrator to be fully qualified to teach a course in auto mechanics.

It was not until about May 1977, that the new teacher of auto mechanics provided shop work for the auto mechanics class. The arbitrator found that, although the college course completed by Rush was not comprehensive enough to meet the standards of the accrediting agency, his course did cover most of the areas covered by the text book used by the new class for the auto mechanics course.

In February 1977, Rush was advised that the industrial arts classes at the middle school were to be phased out for economic reasons which could result in Rush losing his job. The arbitrator found that Rush did not receive a written roster of competitive rating within 30 days of March 31, 1977, as required by the negotiated labor agreement. On May 10, 1977, Rush received a formal reduction-in-force letter. Rush then applied for the teaching position in auto mechanics at Antilles High School, offering to complete the needed coursework that he lacked for certification. However, Antilles refused to reconsider. Neither did it offer to permit Rush a brief trial or training period to demonstrate on the job whether he knew the work, pending completion of the deficit in coursework, which the arbitrator found could have been completed in much less time than the one year citation period permitted by the accrediting agency.

On the basis of the facts developed at the hearing, the arbitrator found that the single 2-credit course taken by Rush did not meet the accrediting agency's requirement for certification to teach

auto mechanics at Antilles High School. But he also found that Rush had the "basic qualifications" to teach the course in all other respects pursuant to Article 21 of the agreement. He based this on Rush's employment experience as a mechanic, his knowledge of the subjects covered and his six years of general teaching experience in industrial arts.

However, because he found that the sole course in small gas engines completed by Rush did not suffice, the arbitrator conditioned the remedies awarded to Rush in granting his grievance directly upon a prompt completion of the next course needed.

The arbitrator's award reads as follows:

"I, THEREFORE, CONCLUDE that Rush possessed the basic qualifications to perform the job as auto mechanics teacher in Antilles H.S. which was held by Pachucki, and his grievance is hereby granted, vesting him in Pachucki's position as of July 10, 1977, however within the framework of the remedies fashioned by the arbitrator below:

"1. Rush is awarded Pachucki's position retroactive to July 10, 1977, without any break in seniority or employee rights or benefits.

"2. Rush is hereby directed to immediately enroll in and pass the next auto mechanics course needed to secure his certification. This must be done and an appropriate transcript and certificate filed with the Antilles School System no later than the end of the 1977-78 school year (On or about July 10, 1978). If Rush fails to perform the latter contingency by the end of the 1977-78 school, then his contract shall be terminated by Antilles and he shall be dismissed from service at the Antilles H.S.

"3. While Rush takes and completes his course, Antilles shall honor Pachucki's contract, and allow him to complete his duties on his current job until the end of the 1977-78 school year. Although this Arbitrator has no jurisdiction regarding the destiny of Pachucki, as far as his re-employment is concerned, it is hoped all parties will join hands to find him a new position in the Ft. Buchanan area as worthy as the one he now has. As an innocent victim of the reduction in force, he deserves the help of both labor and management.

"4. If Rush completes his course by the end of the 1977-78 year, he is to be reimbursed by Antilles by payment of the difference between his gross annual salary and the sums received in the form of severance pay of \$1,950.40 and weekly checks of \$100 in unemployment compensation benefits.

"5. In sum, Rush is not to perform any services or receive any back pay (see, no. 4 supra) unless and until he complies fully with my directive of completion of the course set out in paragraph 2, above."

Personnel employed at so called "Section 6 schools," such as the Antilles Consolidated School System, created under authority of Section 6 of Public Law 81-874, 64 Stat. 1100, September 30, 1950, as amended 20 U.S.C. § 241, are employees of the United States, and as such fall within the purview of the Back Pay Act, 5 U.S.C. 5596 (1976). See 52 Comp. Gen. 291 (1972); B-187881, October 3, 1977; B-183804, November 14, 1975. However, Section 6 specifically exempts such employees from the Civil Service Act and rules (5 U.S.C. § 3301 et seq.); accordingly, they have no statutory appeal from a reduction-in-force action, but the parties in their negotiated agreement have established reduction-in-force policies and procedures (Article 21).

Our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collective bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and decisions decides that an agency has violated an agreement, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay award for the period during which the employee would have received the pay but for the violation, so long as the relevant provision is properly includable in the agreement. See 54 Comp. Gen. 312 (1974), and 54 Comp. Gen. 435 (1974).

The Back Pay Act, codified in 5 U.S.C. 5596, is the statutory authority under which an agency may retroactively adjust an employee's compensation, and it provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; * * *."

However, before retroactive payment may be made under the provisions of 5 U.S.C. § 5596, there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760, 763 (1975).

In light of the foregoing, in order to make a valid award of backpay, it is necessary for the arbitrator not only to find that the negotiated agreement has been violated by the agency, but also to find that such improper action directly caused the grievant to suffer a loss or reduction in pay, allowances, or differentials. 55 Comp. Gen. 629, 633 (1976).

Here, the arbitrator found that the Antilles Consolidated School System violated the agreement because the school system failed to meet its burden of showing by convincing proof that the grievant was not basically qualified to perform Pachucki's job. However, the arbitrator also found that Rush did not meet the certification requirement to teach auto mechanics at the high school and, therefore, would have to take another course before he could teach auto mechanics. Accordingly, the arbitrator directed Rush to enroll in and pass the next available course and specified that Rush was not entitled to perform any services or receive any backpay unless and until he complied with the directive to complete the next auto mechanics course needed to secure his certification. Only if he completed the course would Rush be entitled to receive retroactive pay.

We do not believe that the arbitrator's conditional award of backpay meets the requirement of the Back Pay Act that the unjustified action must have directly caused the employee to suffer a loss or reduction in pay. The direct cause of the loss of pay was that the grievant did not have the required course credits to teach auto mechanics at the Antilles High School. Since the arbitrator found that the grievant lacked the formal qualifications to fill the position in question at the time of his termination, he did not and could not find that but for the wrongful action the loss of pay would not have occurred.

Accordingly, there is no authority under the Back Pay Act for the conditional backpay awarded by the arbitrator, and that part of the award may not be implemented.

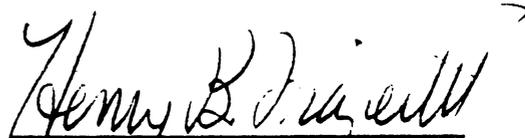
Based upon the foregoing decision of the Comptroller General, it is clear that the arbitrator's award in this case, to the extent that it directs the payment of backpay in connection with a retroactive reinstatement, is violative of the Back Pay Act and cannot be sustained.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion which directs the payment of backpay in connection with a retroactive reinstatement.

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

By the Council.


Henry B. Frazier VII
Executive Director

Issued: December 28, 1978

U.S. Customs Service, Region VII, Office of the Regional Commissioner and National Treasury Employees Union and NTEU Chapter 123 (Gentile, Arbitrator). The arbitrator found that the activity violated the parties' agreement by denying regular overtime pay under the Federal Employees Pay Act to Customs Patrol Officers (CPOs) on temporary assignment to U.S. Coast Guard cutters for a portion of the time spent on such assignments. As a remedy, the arbitrator awarded the affected CPOs appropriate compensation. The Council accepted the agency's petition for review which took exception to the award on the grounds that the award violated applicable law and appropriate regulation. The Council also granted the agency's request for a stay. (Report No. 151)

Council action (December 28, 1978). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council held that the award did not violate applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the award and vacated the stay.

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

U.S. Customs Service, Region VII,
Office of the Regional Commissioner

and

FLRC No. 78A-30

National Treasury Employees Union
and NTEU Chapter 123

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the activity assigned a number of Customs Patrol Officers to perform certain duties aboard U.S. Coast Guard cutters for periods of time up to 3 days. The Customs Patrol Officers were assigned to 8-hour work shifts while serving on their tours of duty and, in addition, they performed work assignments on overtime. The activity treated this overtime as administratively uncontrollable overtime and compensated the Customs Patrol Officers, who were eligible to receive compensation for overtime under the law governing administratively uncontrollable overtime,^{1/} accordingly.

A grievance was filed challenging the validity of the activity's determination that the Customs Patrol Officers would be compensated for their cutter duty overtime under the administratively uncontrollable overtime provisions. The grievants claimed that they were entitled to overtime compensation at the rate of one and one-half times

1/ The applicable law, 5 U.S.C. § 5545(c)(2) (1976) provides, in pertinent part:

(c) The head of an agency, with the approval of the Civil Service Commission, may provide that--

.

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

their basic hourly rate of pay. The grievance was not resolved and the matter went to arbitration.

According to the arbitrator, the parties stipulated to the following issue:

Did Management violate Article 23, Section 1^{2/} of the Negotiated Agreement by denying regular overtime pay under the Federal Employees Pay Act^{3/} to Customs patrol officers on temporary assignment to U.S. Coast Guard Cutters? [Footnotes added.]

In finding that the activity violated Article 23, Section 1 of the negotiated agreement, the arbitrator noted, among other things, that the work assignment "was reasonably subject to advance scheduling, at least in part, because it was known that it would recur on successive days." In the arbitrator's view, at least some of the work in question was "regularly scheduled overtime" and compensable therefore under 5 U.S.C. § 5542. As his award, the arbitrator provided:

Management violated Article 23, Section 1 of the Negotiated Agreement by denying regular overtime pay under the Federal Employees Pay Act to Customs Patrol Officers on temporary assignment to U.S. Coast Guard Cutters for four hours out of each twenty-four hour period of time spent in such an activity.

The affected CPOs should be appropriately compensated in keeping with the above AWARD.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the arbitrator's award on the grounds that the award violates applicable law and appropriate regulation.^{4/} Only the agency filed a brief.

^{2/} According to the arbitrator, Article 23, Section 1 provides: "Employees when assigned overtime will be compensated in accordance with applicable laws and regulations."

^{3/} The applicable law, 5 U.S.C. § 5542(a) (1976), provides in pertinent part:

[H]ours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at [one and one-half times the hourly rate of appropriate pay]

^{4/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council granted the agency's request for a stay of the award pending determination of the appeal.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review which took exception to the arbitrator's award on the grounds that the award violates applicable law and appropriate regulation. Because this case involves an issue within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulation. The Comptroller General's decision in the matter, B-192727, December 19, 1978, is set forth below:

This is in response to a request from the Federal Labor Relations Council (FLRC) for our opinion concerning an arbitrator's award of overtime pay rendered in a grievance-arbitration hearing between the U.S. Customs Service, Region VII, and the National Treasury Employees Union, Chapter 123 (Gentile, Arbitrator), FLRC No. 78A-30.

The dispute which was the subject of that arbitration concerned the proper rate of overtime pay for Customs Patrol Officers (CPOs) in San Diego, California, who, during May and June 1976, were assigned to accompany the crews of U.S. Coast Guard cutters on board and search missions. The officers' supervisor assigned them to 8-hour shifts per day, but the un rebutted testimony was that the officers actually worked 18-20 hours per day while on board. The assigned duties of the CPOs were to assist in all boardings, and they were also directed by the Commander of the cutter to act as observers and as helmsmen. The CPOs received administratively uncontrollable overtime pay (AUO) on an annual basis as provided for by 5 U.S.C. § 5545(c)(2) (1976). The CPOs alleged that for the duty on board the cutters they were entitled to regular overtime pay (time-and-one-half) pursuant to the Federal Employees Pay Act, 5 U.S.C. § 5542 (1976). A grievance was filed, in which union representatives claimed that by denying CPOs time-and-one-half, management violated Article 23, Section 1 of the Negotiated Agreement which provides in full that "[e]mployees when assigned overtime will be compensated in accordance with applicable laws and regulations."

Section 5542 of title 5, United States Code (1976), requires that a General Schedule employee's hours of work in excess of the standard 8-hour day or 40-hour workweek, which have been officially ordered or approved, must be compensated at an hourly rate equal to

one and one-half times the employee's basic hourly compensation, or of the minimum rate of GS-10 if his basic rate exceeds that rate. However, according to 5 U.S.C. § 5545(c)(2), when a General Schedule employee's hours of duty exceed the basic workweek and cannot be controlled administratively, an agency may provide for the payment of premium pay not to exceed 25 percent of his basic annual rate of compensation. Where, as in this case, such a determination is made, the premium pay for such administratively uncontrollable overtime is in lieu of all other premium compensation except that payable for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

The arbitrator found: (1) that the agency was notified ahead of time to schedule this type of duty assignment; (2) that these assignments to cutters were regularly scheduled in advance for duty lasting 2 to 3 days; (3) that the agency knew the nature of the duties and tasks to be performed, that many of these activities would involve a substantial amount of overtime, and that this overtime would recur on subsequent days; and (4) that the agency knew or should have known that the boarding activities would take place outside the assigned 8-hour shift and that the CPOs would be required to take part in these boardings.

As to whether the questioned overtime was authorized, the arbitrator, relying on the rationale of Fox v. United States, 416 F. Supp. 593 (E.D. Va. 1976), stated that overtime performed with the knowledge and inducement of supervisors is deemed to be officially ordered or approved, and he concluded that the supervisors here "had full knowledge at the time of the advance assignment that an 8-hour shift would not cover the intended activities."

The arbitrator found that the CPOs were entitled to be paid time and a half for 4 hours stating:

"The scheduling of personnel must be accomplished to maximize efficiency and meet the known needs of the particular operation. To knowingly schedule a shift assignment, which is the exclusive responsibility of the Agency's supervision, that clearly will not approach the meeting of the time demands of the assignment and then to claim all time outside this established schedule as AUO time is most inappropriate and not in keeping with the applicable laws and regulations. The application of laws and regulations presumes the use of scheduling in keeping with the known needs of an activity and not be (sic) utilized to circumvent other pay requirements and the proper compensation of employees. The assignment in question was reasonably subject to advance scheduling, at least in part, because it was known that it would recur on successive days. Based on the above, it appeared that in this rather particular situation an additional four hours per day would meet the Comptroller General's definition of regularly scheduled overtime; thus, a violation of Article 23, Section 1, must be found."

Accordingly, the arbitrator awarded the CPOs regular overtime pay for 4 hours each day of their assignments to the Coast Guard cutters.

The Customs Service contends that the arbitrator's award violates 5 U.S.C. § 5545(c)(2) and the implementing Civil Service Commission regulations because the 4 hours does not fall within the Comptroller General's definition of regularly scheduled overtime, as overtime duly authorized in advance and scheduled to recur on successive days or after specified intervals. See 48 Comp. Gen. 334.

In deciding cases arising under the Federal Labor Relations Program we have stated, on several occasions that we will overturn an arbitrator's award only if the agency head's own decision to take the same action would be disallowed by this Office, provided that the award is not contrary to applicable laws and regulations. See National Labor Relations Board, 54 Comp. Gen. 312, 316 (1974). In Ross and Squire, B-191266, June 12, 1978, (57 Comp. Gen. 536, 541), we said that, in ruling on arbitration awards, "we generally will not rule upon any exceptions to the arbitrator's award relating to the facts, and thus * * * we shall limit our consideration to the legality of implementing the award based on the facts as found by the arbitrator * * *."

In the present case the arbitrator specifically found, based on the testimony before him, that the Customs Service had scheduled the vessel assignments in advance with knowledge that the required duties on board would involve a substantial amount of overtime and that the supervisors making the schedules "had full knowledge at the time of advance assignment that an eight hour shift would not cover the intended activities." He then concluded, that to knowingly schedule a shift that clearly will not meet the time demands of the assignment was not in keeping with applicable laws and regulations. To remedy this violation he ordered that the grievants be compensated for an extra 4 hours per day of regularly scheduled overtime.

Applying the standards stated above for judging arbitrator's awards, we must uphold the legality of the award based on the facts as found by the arbitrator, provided that it is not contrary to applicable laws or regulations. Under the governing statute, 5 U.S.C. § 5545(c)(2), the grievants may be paid for the 4 hours of regular overtime in addition to their AUO premium pay only if the 4 hours constitutes "regularly scheduled overtime" duty.

We conclude that the overtime in question does meet the test of "regularly scheduled." Our decisions establish that a 12-hour shift authorized in advance and scheduled to recur on successive days or after specified intervals is regularly scheduled overtime. 48 Comp. Gen. 334 (1968). Here it was known that the additional time would be required during each day of vessel duty and the agency could have

scheduled it in advance. These facts place the present case in line with Aviles v. United States, 151 Ct. Cl. 1, 8 (1960). There the Court of Claims addressed a similar situation where the employees had no choice but to work overtime on a regular basis. The Court found that the agency could have formally scheduled tours of duty which included the overtime which it knew would be required and that the mere fact of omitting overtime from the scheduled tours of duty did not make it occasional or irregular. Although Aviles involved night differential payments rather than overtime pay, we think the principle stated therein applies equally to the case at bar.

We also find support for the arbitrator's award in our "Sky Marshal" cases. In B-151168, May 25, 1976, Secret Service agents were temporarily assigned to security duty aboard commercial airplanes to deter airline hijacking. While the Treasury Department did not prepare definite schedules for overtime, that fact was found not to be conclusive since the agents received advance schedules of flights which frequently required overtime duty. Accordingly, based on the facts of that case we followed the decision of the U.S. District Court (Southern District of Ohio, Civil No. 4082, February 23, 1973), in Rothgeb v. Staats, and held that the "inflight" overtime claimed by the agents was regularly scheduled and compensable at time and one-half rates under 5 U.S.C. § 5542. See also, B-178261, July 7, 1977.

As shown by the foregoing cases, the matter of "uncontrollable" versus "regularly scheduled" overtime is always a difficult determination. In several other court cases the result has depended on the particular facts before the court. See Anderson v. United States, 201 Ct. Cl. 660 (1973) and Fox v. United States, 416 F. Supp. 593 (E.D. Va. 1976). Compare Burich v. United States, 366 F.2d 984 (Ct. Cl. 1966).

In the instant case, the arbitrator was careful to limit the holding to the particular facts before him and to tailor his award to those facts. While we recognize that there is a basis for the view that the extra work performed by the Customs Patrol Officers was uncontrollable and not regularly scheduled, we believe that the arbitrator's conclusion to the contrary is supported by the cases cited above.

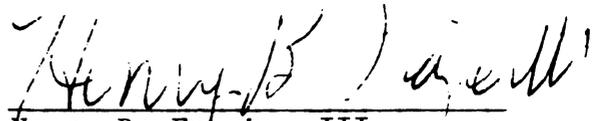
We, therefore, conclude that the arbitrator's award of 4 hours per day regular overtime pay to the Customs Patrol Officers in this case is not contrary to the applicable laws and regulations and may be implemented.

Based upon the foregoing decision of the Comptroller General, the Council concludes that the arbitrator's award in this case does not violate applicable law and appropriate regulation.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

Veterans Administration Hospital, Houston, Texas and American Federation of Government Employees, Local 1633 (Marlatt, Arbitrator). The arbitrator found that grievances filed by two nonselected employee applicants for a vacancy were nonarbitrable for lack of any enforceable remedy. The arbitrator therefore dismissed the grievances. The union appealed to the Council, requesting that the Council accept its petition for review based on exceptions alleging (1) that the arbitrator exceeded his authority, and (2) that the award violated an appropriate regulation.

Council action (December 28, 1973). The Council held that the union's petition for review failed to describe facts and circumstances to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Veterans Administration Hospital, Houston,
Texas and American Federation of Government
Employees, Local No. 1633 (Marlatt, Arbitrator),
FLRC No. 78A-46

Dear Mr. King:

The Council has carefully considered the union's petition for review (as supplemented)^{1/} of the arbitrator's award, and the agency's opposition thereto, in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when the Houston Veterans Administration Hospital (the activity) posted a vacancy announcement for the position of Maintenance Foreman. A number of employees applied for the job and were considered by a promotion panel which, after reviewing the applicants' personnel files, certified the four top-ranking applicants as "qualified" to the selecting official. Interviews were then conducted of the top four candidates, one of whom was selected to fill the vacancy. Two of the nonselected employees filed grievances. The matter ultimately went to arbitration.

The arbitrator did not specifically set forth the issue before him, but in connection with the grievance he referred to Article XXVI, Section 1 of the parties' negotiated agreement^{2/} cited to him by the union.

^{1/} The union's request to supplement its petition for review, opposed by the agency, has been granted pursuant to section 2411.52 of the Council's rules of procedure.

^{2/} According to the arbitrator, Article XXVI, Section 1 of the labor agreement provides, in part:

The principles of the Merit Promotion Program will be followed at this Hospital. . . . Management at all levels is responsible for helping employees to improve performance and thereby improve their

In the discussion accompanying his award the arbitrator stated:

The real problem for the Arbitrator in this case is not whether the merit promotion system was manipulated, nor even whether or not [the selecting official] and the other supervisors acted in good faith. The real problem, to which neither party addressed itself at all, is simply this: assuming that the merit promotion system permits pre-selection of management's favorites, what can an Arbitrator possibly do about it?

The arbitrator also stated that "[the successful candidate] was duly and legally appointed to his position under existing laws and procedures, and has acquired a vested right to his job until lawfully removed, whether or not he is qualified for it." He concluded by saying:

I do not wish to leave the impression with the Union that Article XXVI of the Agreement dealing with merit promotions is a dead letter. Merit promotions constitute a negotiable subject under Executive Order 11491, and the Union may be able to correct what it regards as abuses in the program by negotiating with the Hospital for the future participation by the Union in the promotion process. However, the arbitrator has no power to modify or expand the Labor Agreement as it is now written, even if such changes would be mutually beneficial to both parties.

The arbitrator's award was "that the grievances in this dispute are non-arbitrable for lack of any enforceable remedy; and they are therefore dismissed without prejudice to further action in any other appropriate forum."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the two exceptions discussed below.

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

(Continued)

promotion opportunities. The objective of the promotion plan will be to fill positions in the unit from among the best qualified employees without regard to race, color, religion, sex, or national origin or age.

In its first exception, the union alleges that the arbitrator exceeded the scope of his authority. In support of this exception, the union refers to the arbitrator's "award" that "the grievances in this dispute are non-arbitrable for lack of any enforceable remedy" The union states in its petition for review:

[I]t is our position that the Arbitrator exceeded the scope of his authority in declaring the issue to be non-arbitrable. The Arbitrator was presented with an issue and remedies by the parties dealing only with the merits of the case. No question of arbitrability was raised by either party. Therefore, the question of arbitrability was not before the Arbitrator. For the Arbitrator to rule outside the range of remedies presented, was to exceed the scope of his authority.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, the Council will grant a petition for review where it appears that the exception presents grounds that an arbitrator exceeded his authority by, for example, determining an issue not included in the question submitted to arbitration. Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sinclitico, Arbitrator), FLRC No. 77A-52 (Jan. 27, 1978), Report No. 142.

In this case, however, the Council is of the opinion that the union's petition fails to describe facts and circumstances to support its exception. In this regard, the Council is of the opinion that, contrary to the assertions of the union, the arbitrator did, in fact, reach the merits of the dispute before him. The Council notes that the arbitrator stated that the successful candidate "was duly and legally appointed to his position under existing laws and procedures" and that, with respect to the negotiated agreement provision before him, "the Union may be able to correct what it regards as abuses in the program by negotiating with the Hospital [T]he Arbitrator has no power to modify or expand the Labor Agreement as it is now written" Thus, the arbitrator specifically addressed the successful candidate's appointment, finding that he was "legally appointed . . . under existing laws and procedures," and the agreement provision involved, finding, in effect, no violation of it since "changes" to it would have to come through "negotiating with the Hospital." Therefore, the Council is of the opinion that the union has failed to present facts and circumstances to show that the arbitrator used the term "non-arbitrable" as a term of art relating to the arbitrability of the grievance and thus exceeded his authority by answering a question not submitted to him and

thereby failing to reach the merits of the grievance.^{3/} Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception, the union asserts that the award violates an appropriate regulation. In support of this exception, the union refers to a statement by the arbitrator in the opinion accompanying his award that there was evidence that the successful candidate had been "pre-selected" for the promotion. The union asserts that the award violates Federal Personnel Manual (FPM) chapter 335, section 6-4a(1)^{4/} since, in light of this "finding," the arbitrator failed to award appropriate affirmative remedies.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates an appropriate regulation. However, in this case, the Council is of the opinion that the union's petition fails to describe facts and circumstances to support its exception. In this regard, the union's assertions are directed only to the arbitrator's statement regarding "pre-selection" and are premised on the assumption that the arbitrator found that an action requiring "corrective action" within the meaning of FPM chapter 335 had occurred. However, as previously indicated,

^{3/} It would appear that, despite finding the successful candidate legally appointed, the arbitrator was concerned with the scope of an arbitrator's authority to fashion appropriate remedies in the Federal sector. This is further supported by a letter from the arbitrator dated approximately 6 months after the issuance of his award and submitted to the Council in the union's supplement to its petition for review. In his letter the arbitrator states that he had "come across" two Council decisions regarding remedies in the Federal sector pertaining to promotion actions, and that "[n]either of these decisions were called to my attention at the time the case was submitted." However, failure of the parties to submit to an arbitrator, during an arbitration hearing, remedies available to the arbitrator if there were a finding in favor of the aggrieved party, or an arbitrator's unawareness of available remedies, does not constitute a basis for Council acceptance of a petition for review of an arbitrator's award. Further, it does not provide a basis for the Council to direct, as requested by the union in its supplement, the resubmission of the award to the arbitrator. See, as to the Council directing the resubmission of an arbitration award, Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), 4 FLRC 143 [FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100].

^{4/} The union cites the following part of FPM chapter 335, section 6-4a(1):

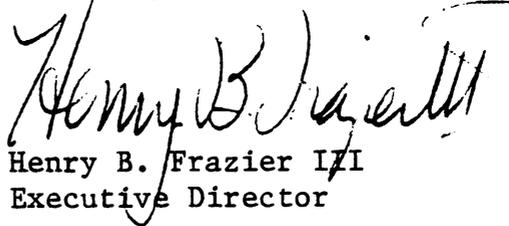
Failure to adhere strictly to laws, Commission regulations and instructions, agency policies and guidelines, and agency promotion plans is to be rectified promptly by the Commission or the agency involved.

the arbitrator did not make such a determination, finding instead that the successful candidate was "duly and legally appointed to his position" and, in effect, that there had been no violation of the collective bargaining agreement. Therefore, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

A handwritten signature in cursive script, appearing to read "Henry B. Frazier III".

Henry B. Frazier III
Executive Director

cc: J. Adams
VA

Service Employees' International Union, Local 556, AFL-CIO and Submarine Force, U.S. Pacific Fleet and Naval Submarine Base, Pearl Harbor, Hawaii. The dispute involved the negotiability of union proposals concerning (1) temporary assignments and temporary promotions to higher level positions and (2) the assignment of qualified employees, when available, to higher level positions.

Council action (December 28, 1978). As to (1), the Council held that the proposal was outside the agency's obligation to bargain under section 11(a) of the Order to the extent that it would apply to the filling of supervisory positions outside the bargaining unit. As to (2), the Council held that the proposal violated section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency's determination as to the nonnegotiability of (1), to the extent that the Council found the proposal nonnegotiable, and sustained the agency's determination as to the nonnegotiability of (2).

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

Service Employees' International Union,
Local 556, AFL-CIO

(Union)

and

FLRC No. 78A-65

Submarine Force, U.S. Pacific Fleet
and Naval Submarine Base, Pearl Harbor,
Hawaii

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Union Proposal I

TEMPORARY ASSIGNMENTS

1. When an employee is detailed to a higher level position in excess of 20 work days within a calendar year, the employee will be temporarily promoted to the higher level position commencing with the 21st day if he/she is eligible and otherwise qualified for a temporary promotion.

Agency Determination

The agency determined that the proposal is nonnegotiable under section 11(a) to the extent that, as intended by the union, it would apply to the filling of supervisory positions outside the bargaining unit.

Question Here Before the Council

The question is whether the proposal, to the extent that it would apply to the filling of supervisory positions, is outside the agency's obligation to bargain under section 11(a) of the Order.

Opinion

Conclusion: The proposal is outside the agency's obligation to bargain under section 11(a) of the Order to the extent that it would apply to the

filling of supervisory positions outside the bargaining unit. Accordingly, the agency's determination that the proposal is, to that extent, nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The union proposal provides that bargaining unit employees detailed to higher grade level positions will be temporarily promoted to those positions under specified circumstances, namely, when an employee is detailed to a "higher level position" in excess of 20 workdays and the employee is eligible and otherwise qualified for that position. The union indicates in its appeal that the proposal is intended to cover details to supervisory positions outside the bargaining unit. The union contends, in this regard, that an employee who is detailed or temporarily promoted to such a position remains the incumbent of the position from which he or she is detailed or temporarily promoted and a member of the bargaining unit.^{1/} Thus, the union argues, the proposal does not relate to a matter which is outside the agency's obligation to bargain under section 11(a) of the Order. The agency, on the other hand, takes the contrary position that the intended application of the proposal to supervisory positions outside the unit renders the proposal, in that respect, outside the agency's obligation to bargain under section 11(a). In the circumstances of this case, we agree with the agency.

The Council has consistently held that proposals concerning the filling of supervisory positions outside the bargaining unit are outside the bargaining obligation established by section 11(a) of the Order.^{2/} Moreover, this principle applies both to temporary and to permanent promotions. For example, the Council held, in the Marine Corps Air Station case, that a proposal relating to temporary promotions of unit employees to supervisory positions, as is involved in the present case, (as well as to permanent promotions), was outside the agency's bargaining obligation under section 11(a).^{3/} In the same case, the Council likewise held nonnegotiable under section 11(a) a proposal relating to the filling of vacant positions at, among others, an agency instrumentality located on the same base but not

1/ The union cites, inter alia, Federal Personnel Manual, chap. 300, subchap. 3-1; chap. 335, subchap. 4-4.

2/ Texas ANG Council of Locals, AFGE and State of Texas National Guard, 4 FLRC 153 [FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100]; AFGE (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, 5 FLRC 808 [FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136]; International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145.

3/ International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at 2-3 of Council decision.

included in the bargaining unit.^{4/} Thus, under Council precedent, it is clear that the decisive factor in determining whether a proposal relating to the filling of vacant positions is outside the obligation to bargain under section 11(a) is whether the positions covered by the proposal are outside the bargaining unit (and not, as the union contends, the temporary nature or duration of the personnel action involved in the proposal).^{5/} Accordingly, we find that the union proposal, to the extent that it would apply to details and temporary promotions to supervisory positions outside the bargaining unit, is outside the agency's obligation to bargain under section 11(a) and, hence, to that extent, is nonnegotiable.^{6/}

Union Proposal II

TEMPORARY ASSIGNMENTS

-
3. When available, qualified employees only will be assigned to higher level positions.

Agency Determination

The agency determined that section 3 of the proposal is nonnegotiable under section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether the proposal is excluded from bargaining under section 12(b)(2) of the Order.

Opinion

Conclusion: The proposal violates section 12(b)(2) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby sustained.

^{4/} Id. at 6-7 of Council decision.

^{5/} Cf. United States Forest Service, Salmon National Forest, Salmon, Idaho, A/SLMR No. 556, 4 FLRC 89 [FLRC No. 75A-107 (Jan. 22, 1976), Report No. 96] (seasonal supervisors).

^{6/} Of course, there is no dispute in this case as to whether the proposal as it applies to positions in the bargaining unit is negotiable under the Order. Cf. National Federation of Federal Employees, Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia, FLRC No. 77A-94 (Nov. 8, 1978), Report No. 159 at 8-11 of Council decision.

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

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

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

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

Section 12(b) of the Order enumerates the rights reserved to management under any collective bargaining agreement. Specifically, in the VA Research Hospital case the Council stated:--

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

Further, the Council ruled in its Long Beach Naval Shipyard decision^{8/} that:

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

Therefore, under section 12(b)(2) of the Order, the right to assign employees includes the right to temporarily assign or to detail employees. Moreover, as to the use of details by agency management, within the Federal sector, generally, such temporary assignments are intended for meeting the temporary needs of the agency when, for example, necessary services cannot be

7/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

8/ Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC, and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 158, 161, at n. 5 [FLRC No. 73A-16 (July 31, 1974), Report No. 55].

obtained through other practicable means due to emergencies occasioned by abnormal workload and similar exigencies; and for other interim situations, for example, to accomplish certain training purposes, or pending official assignment or description and classification of a new position.^{9/} Thus, in the Federal sector, management is permitted to detail an employee to a higher graded position for less than 60 days without determining that the employee meets the minimum qualifications standards for such higher graded position as established by the Civil Service Commission.^{10/}

Section 3 of the union's proposal would require that, when the agency decides to fill a vacant "higher level position" by temporarily assigning or detailing an employee to that position, it must assign only an employee it has determined is qualified to fill that position, if such an employee is available. That is, the agency would be precluded from detailing an employee who may not be qualified to fill the vacant position until it has determined if there are unit employees who are qualified to fill that position and if any of those employees are available. In our opinion, section 3, by thus requiring the agency to determine the qualifications and availability of its employees as a precondition of its decision to detail an employee, particularly in circumstances where such a decision must be expeditiously made, would impose constraints upon agency management's exercise of its authority under section 12(b)(2) to temporarily assign or detail employees so as, in effect, to negate that authority.^{11/} Moreover, in other respects, section 3 at issue herein is analogous to those proposals which establish a "preference" for a certain class of employees and which the Council has held nonnegotiable under section 12(b)(2) on the ground that they deprive agency management of the required discretion inherent in the exercise of its reserved rights under the Order.^{12/}

9/ See Federal Personnel Manual, chap. 300, subchap. 8-3.

10/ See Federal Personnel Manual, chap. 300, subchap. 8-4(e). Cf. International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at 3-6 of Council decision.

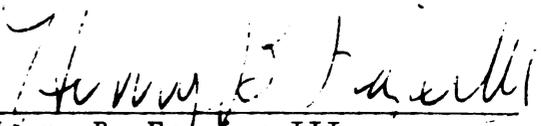
11/ See Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC, and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 158, 162 [FLRC No. 73A-16 (July 31, 1974), Report No. 55].

12/ See, e.g., International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at 9-10 of Council decision; Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, FLRC No. 76A-142 (Feb. 28, 1978), Report No. 143 at 19-20 of Council decision; American Federation of Government Employees, Local 1778 and McGuire Air Force Base, New Jersey, FLRC Nos. 77A-18 and 77A-21 (Jan. 27, 1978), Report No. 142 at 18-20; AFGE (National Border Patrol Council and National INS Council) and Immigration and Naturalization

(Continued)

Accordingly, based on the foregoing reasons, we find section 3 of the union's proposal to be violative of section 12(b)(2) of the Order, and, consequently, nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

(Continued)

Service, U.S. Department of Justice, 5 FLRC 808, 823-824 [FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136]; and National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, 5 FLRC 497 [FLRC No. 76A-79 (June 21, 1977), Report No. 128].

U.S. Marine Corps Logistics Support Base, Atlantic, Albany, Georgia and American Federation of Government Employees, Local 2317, AFL-CIO (Griffin, Arbitrator). The arbitrator determined that the activity violated the parties' agreement by reorganizing one of its shops without prior negotiation with the union, and he directed that the reorganization be rescinded and that the parties undertake negotiations. The Council accepted the agency's petition for review of the award insofar as it related to the agency's exceptions which alleged that the award violated sections 11(b) and 12(b)(5) of the Order. The Council also granted the agency's request for a stay. (Report No. 160)

Council action (December 28, 1978). The Council held that the portion of the award directing that the reorganization be rescinded violated section 12(b)(5) of the Order, but that the portion of the award directing that the parties undertake negotiations violated neither section 11(b) nor 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of section 12(b)(5) of the Order. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

U.S. Marine Corps Logistics Support
Base, Atlantic, Albany, Georgia

and

FLRC No. 78A-74

American Federation of Government
Employees, Local 2317, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based on the findings of the arbitrator and the record before the Council, it appears that this dispute arose when the activity reorganized one of its shops. Previously, the work in this shop had been divided among three units--an electrical unit, a vehicle unit, and an ordnance unit--organized under one foreman. The activity reorganized the shop by establishing two supervisory positions. The activity placed the ordnance and vehicle units under one of the new supervisors and the electrical unit under the other supervisor. A military person was made supervisor of the ordnance and vehicle units. A grievance was filed by a number of civilian employees in the ordnance and vehicle units maintaining that their promotional opportunities had been inhibited by making a military person their supervisor and that the activity was obligated to discuss these changes with the union prior to putting them into effect. The grievance was ultimately submitted to arbitration.

The Arbitrator's Award

The arbitrator stated the issue before him as whether the activity violated Article IV of the parties' negotiated agreement^{1/} and the Order when it did not consult with the union prior to the shop reorganization. Noting that both the parties' agreement and the Order "call for consultation, negotiation, or discussion when Management undertakes to make certain changes," the arbitrator questioned whether the changes in this case were among those that are required "to be negotiated and discussed with the Union." Finding that the activity "failed to prove that [the reorganization involved in this case] is excluded from negotiation" and that it failed "to show that

^{1/} Article IV of the parties' negotiated agreement sets forth the matters subject to consultation and negotiation. The text of Article IV is attached as an appendix.

prior negotiation ever took place," the arbitrator sustained the grievance. His award was that "Management did violate the terms of the Agreement as well as the Executive Order. The reorganization . . . should now be rescinded, and the parties should undertake negotiations."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleges that the award violates section 11(b) of the Order and the agency's exception^{2/} which alleges that the award violates section 12(b)(5) of the Order.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that the award violates sections 11(b) and 12(b)(5) of the Order.

Turning first to the agency's exception that the award violates section 12(b)(5),^{3/} the agency asserts that the award contravenes the right

^{2/} The agency noted with respect to both of these exceptions to the award that it does not seek to have the award set aside in its entirety. The agency concedes that the arbitrator was correct in concluding that the union was not given such specific and timely notice of the reorganization so as to provide the union with an opportunity to request negotiation about the impact and implementation of the reorganization. In accepting the agency's petition for review, the Council also granted, pursuant to section 2411.47(f) of its rules, the agency's request for a stay.

^{3/} Section 12(b)(5) provides:

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

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

reserved to management by section 12(b)(5) to determine the methods, means, and personnel for accomplishing its work by ordering rescission of the shop reorganization, an assertedly improper status quo ante remedy, and by ordering negotiation over whether the supervisory position established for the ordnance and vehicle units should be filled by civilian or military personnel. As already mentioned, prompted by an increase in workload, the activity reorganized one of its shops by establishing two supervisory positions. The activity chose to establish the supervisory position for the ordnance and vehicle units as a military billet. In resolving the resulting grievance, the arbitrator found a violation of the agreement because the activity failed to consult with the union prior to effecting this reorganization. As a remedy the arbitrator ordered the reorganization rescinded and ordered the parties to undertake negotiations. In the Council's opinion, to the extent that the award directs that the reorganization be rescinded, such award interferes with rights reserved exclusively to agency management by section 12(b)(5) and therefore violates that section of the Order.

The Council has frequently stated that agency management has the reserved right to determine the type of personnel that will conduct agency operations, in short, "who" will conduct its operations. Specifically, the Council has held that section 12(b)(5) reserves to agency management the exclusive right to determine the particular group of persons, such as military personnel rather than civilian personnel, to be engaged in the performance of agency operations.^{4/} Thus, in terms of this case it is clear that the activity's reorganization of the shop, particularly the determination to make the ordnance and vehicle unit supervisory position a military billet, related to the exercise by agency management of its substantive right under section 12(b)(5) to determine the type of personnel who will conduct specific agency operations. Moreover, it is likewise clear that this right may neither be relinquished nor diluted by a negotiated agreement or by an award of an arbitrator.^{5/} In this case the arbitrator's award directs that the reorganization be rescinded. Since such a status quo ante remedy in this case so interferes with the exercise by agency management of rights reserved exclusively to it by section 12(b) of the Order as to effectively deny the exercise of the right itself, the award's ordered rescission of the reorganization violates section 12(b)(5) of the Order and may not be sustained.^{6/}

4/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 437 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

5/ Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sabella, Arbitrator), FLRC No. 77A-101 (Oct. 4, 1978), Report No. 156.

6/ In view of this decision, further consideration of whether this part of the award violates section 11(b) of the Order is unnecessary.

At the same time, however, the Council is of the opinion that the agency has misinterpreted that portion of the award ordering that "the parties should undertake negotiations." As previously noted, the agency asserts that the award has ordered negotiation over whether the supervisory position established for the ordnance and vehicle units should be filled by civilian or military personnel. Based on the arbitrator's award as a whole, the Council understands this part of the award as simply directing the activity to negotiate over the impact and implementation of the shop reorganization. Nowhere does the arbitrator direct such substantive negotiations as asserted by the agency. Furthermore, the agency presents no reason why such a directive must be inferred. In our opinion, therefore, the only clear requirement of the award is that the agency now undertake negotiation over the impact and implementation of the reorganization, a matter the agency concedes that it was obligated, but failed, to do. Thus, there is no basis for finding that portion of the award ordering that "the parties should undertake negotiations" contrary to section 12(b)(5) of the Order.

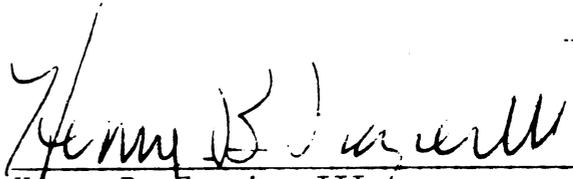
The agency also takes exception to the negotiations directed by the award as violative of section 11(b) of the Order. However, this objection proceeds from the identical interpretation of this portion of the award as premised the agency's assertions respecting section 12(b)(5). As stated above, the Council is of the opinion that the award only requires that the agency undertake that which it concededly failed to do originally, i.e., negotiate over the impact and implementation of the reorganization. Thus, there is likewise no basis for finding this part of the award contrary to section 11(b) of the Order.

Accordingly, the Council holds that this portion of the award ordering that "the parties should undertake negotiations" does not conflict with either section 12(b)(5) or section 11(b) of the Order and must therefore be sustained.

Conclusion

For the foregoing reasons and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that part of the award which directs that the reorganization should be rescinded. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Attachments:
Appendix

Issued: December 28, 1978

APPENDIX

Article IV, Matters Subject to Consultation and Negotiation, provides:

Section 1. It is agreed and understood that matters appropriate for consultation and negotiation between the Employer and the Union are personnel policies and practices and matters affecting working conditions which are within the discretion of the Employer including, but not limited to, such matters as safety, training, labor-management relations, employee services, methods of adjusting grievances, appeals, leave, promotion plans, demotion practices, pay practices, reduction-in-force practices, and hours of work.

Section 2. The Employer agrees to issue no regulation or directive which effects changes to existing personnel policies and practices or working conditions without prior consultation with the Union, and an opportunity to negotiate, unless the parties have mutually agreed to limit this obligation in any way. For purposes of this Agreement, consultation is defined as dialogue, either oral or written on specific issues. The Employer further agrees to provide the Union with a copy of any proposed regulation or directive which effects such changes for comments and recommendations. The Employer agrees to give objective and specific consideration to the Union's views and suggestions thereon. If the Union desires to meet and consult or negotiate with the Employer on the proposed change a meeting for this purpose will be held, providing a request for such meeting is submitted by the Union within five (5) working days after receipt of the copy of the proposed regulation. In consultation, a serious attempt will be made by the Employer to accommodate the viewpoints of the Union. If the Union's viewpoints are not accepted at consultation, the Union will be advised fully of the reasons for not being able to accommodate the viewpoints prior to implementation of the regulation or directive.

Section 3. The Employer and the Union are agreed on the necessity of meeting at reasonable times and consulting in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. Consultation with the Union or its representatives will normally be conducted during the regular work day, with reasonable time being granted the employee representatives, without charge to leave, in connection with officially requested or approved consultations or meetings with the Employer. It is understood that the payment of overtime will not be obligated for this purpose.

Section 4. It is agreed and understood that the Employer will give the Union adequate notice and will consult with the Union (as described in Section 2 above) before making changes of existing benefits, practices and understandings which have been mutually acceptable to the Employer and the Union but which are not covered by this Agreement.

These existing benefits, practices and understandings must have been of long duration, generally over a period of years in which the Employer and the Union have recognized a continued and consistent response to a similar set of recurring circumstances wherein the response is consistently the same to the degree that the parties found no need in the past to formalize these into this Agreement. These benefits, practices and understandings cannot be inconsistent with this Agreement nor can they violate any existing law or regulation.

International Association of Siderographers, AFL-CIO, Washington Association and Department of the Treasury, Bureau of Engraving and Printing. The dispute involved a union proposal related to pay for particular craft employees.

Council action (December 28, 1978). The Council held that the proposal violated the Prevailing Rate Equalization Adjustment Act of 1972. Accordingly, pursuant to section 2411.28 of its rules of procedure, the Council sustained the agency's determination that the proposal was nonnegotiable.

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

International Association
of Siderographers, AFL-CIO,
Washington Association
(Union)

and

FLRC No. 73A-79

Department of the Treasury,
Bureau of Engraving and Printing
(Agency)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

WAGES

OF

SIDEROGRAPHERS - CYLINDER ENGRAVERS^{1/}

Wages - Siderographers - Cylinder Engravers at the Bureau of Engraving and Printing shall have their wages adjusted from time to time as is consistent with rates prevailing at the American Bank Note Company, plus a differential of 25% for the additional skills, complexity and responsibility.

^{1/} Siderographers are members of a discrete craft engaged in the integrated work process of the intaglio method of printing used by the Bureau of Engraving and Printing in the production of bank notes, postage stamps and other similar products issued by the U.S. Government. Specifically, siderographers are in that series of jobs that "includes all classes of positions the duties of which are to supervise and/or perform work involved in reproducing engravings on steel plates and rolls from original dies making it possible to produce a single design from individual engravings (lettering, ornamental scrolls, portraits, vignettes) and geometric lathe work according to models and layouts and reproducing multiple subject plates from single subject dies." CSC, Handbook of Blue Collar Occupational Families and Series, section 5621, reprinted 1967.

In any event, the wages paid to the Cylinder Siderographers shall be no less than those paid to the Engravers at the Bureau who possess comparable skills. [Footnote supplied.]

Agency Determination

The agency determined that the proposal violates the Prevailing Rate Equalization Adjustment Act of 1972 (hereinafter the Prevailing Rate Act)^{2/} and consequently is not negotiable under section 11(a) of the Order.

Question Here Before the Council

Whether the proposal violates the Prevailing Rate Act and is thereby rendered nonnegotiable under section 11(a) of the Order.^{3/}

Opinion

Conclusion: The proposal violates the Prevailing Rate Act. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: The agency contends that the union's proposal violates the Prevailing Rate Act because the proposal would establish a standard for the pay of siderographers different from the standard mandated in the Act. We find merit in the agency's contention.

Section 5349(a) of title 5, which mandates the standard for setting the pay of siderographers (and certain other employees at the Bureau of Engraving and Printing), provides in relevant part:^{4/}

^{2/} Prevailing Rate Equalization Adjustment Act of 1972, 5 U.S.C. § 5349 (1976).

^{3/} Section 11(a) of the Order provides in relevant part:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws

^{4/} The Prevailing Rate Equalization Adjustment Act of 1972 was passed by the Congress with the purpose of "establish[ing] by law an equitable

§ 5349. Prevailing rate employees; legislative, judicial, Bureau of Engraving and Printing, and government of the District of Columbia.

(a) The pay of employees, described under section 5102(c)(7) of this title, in . . . the Bureau of Engraving and Printing . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates . . . as the pay-fixing authority of each such agency may determine.

The union's proposal, on the other hand, provides that the rate of pay for siderographers at the Bureau of Engraving and Printing will be adjusted from time to time as is consistent with the prevailing rate of pay of their counterpart siderographers at the American Bank Note Company plus a differential of 25%.^{5/} The proposal further provides that in any event, the wages paid to the siderographers at the Bureau shall be no less than those wages paid to the engravers at the Bureau. In other words, this proposal would establish, in the first instance, a standard for fixing the rate of pay for siderographers, i.e., the prevailing rate at the American Bank Note Company plus a differential of 25 percent. Secondly, the proposal would require that the wages of the siderographers meet a minimum standard, i.e., their wages may not be less than those of the engravers (a wholly discrete craft) at the Bureau.

(Continued)

system for fixing and adjusting from time to time, the rates of pay for prevailing rate employees of the Government of the United States, and of prevailing rate employees paid from nonappropriated funds of the Armed Forces." H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 5 (1971). To that end, the Congress established, by that Act, a process to be administered by the U.S. Civil Service Commission to determine the rate of pay for such prevailing rate employees. See 5 U.S.C. § 5341 et seq. (1976). Employees of the Bureau of Engraving and Printing are excluded from the provisions of the Prevailing section 5349. 5 U.S.C. § 5342(a)(1)(I) (1976); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 9 (1971).

^{5/} Wage rates for siderographers and other intaglio craft employees at the Bureau of Engraving and Printing are established through job-to-job comparisons with the American Bank Note Company in New York, which has the only comparable positions available in the United States. The policy establishing this practice was set forth by the Department of the Treasury in Treasury Personnel Manual, Chap. 532, para. 2-2d (May 12, 1969), and was subsequently endorsed by the Congress in exempting these employees from the general provisions of the Prevailing Rate Equalization Adjustment Act of 1972. See H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 9-10, 19 (1971).

It is clear that the standards proposed for negotiation by the union do not require, as does the Prevailing Rate Act, that the pay of siderographers shall be "as nearly as is consistent with the public interest in accordance with prevailing rates" The union's proposal would establish different standards for fixing the rate of pay for siderographers (the prevailing rate plus 25 percent or in any event, not less than that paid to engravers at the Bureau) and would supplant the standard prescribed by the statute.

In this regard, contrary to the union's contention, the disputed proposal is distinguishable from the three proposals concerning compensation which the Council found negotiable in the Office of Dependents Schools case.^{6/} In that case, the union's proposals concerning compensation for teachers sought only to implement provisions of the Overseas Teachers Pay and Personnel Practices Act.^{7/} That is, the proposals contained mechanisms designed merely to effectuate the standards for the rate of compensation prescribed by the Act; those proposals did not, by their language or by the union's intent as to their effect as reflected in the record before the Council, require replacement of the statutory standard for the rate of compensation with another conflicting standard, as the proposal in this case would do.^{8/} Consequently, here, unlike the Office of Dependents Schools case, we must find that the union's proposal violates the statute and, consequently, is nonnegotiable.

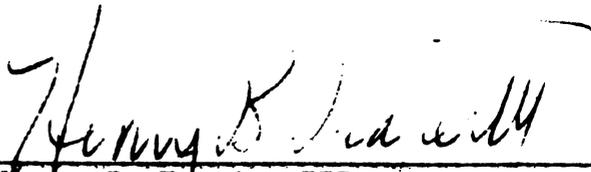
^{6/} Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, FLRC No. 76A-142 (Feb. 23, 1978), Report No. 143 at 1-4 of Council decision.

^{7/} Department of Defense Overseas Teachers Pay and Personnel Practices Act of 1959, as amended, 20 U.S.C. § 901, et seq. (1976).

^{8/} As indicated earlier (note 5, supra), when Congress set the standard for pay rates for employees at the Bureau of Engraving and Printing in section 5349 of the Prevailing Rate Act, it approved the pay practices of the agency with regard to these employees as meeting such standard. See H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 10, 19 (1971). At the same time, the Congress also indicated that the pay-fixing authority in the agency could change such practices if a "valid basis" existed for such changes. H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 19 (1971). Although not a controlling consideration herein, we note that the union, though it contends, in part, that its proposal is consistent with Congress's intention as expressed in the legislative history of the Prevailing Rate Act, has made no showing that a "valid basis" exists, in fact, for changes in the agency's pay practices, nor has it made any showing at all that such changed practices would result in rates of pay which would meet the standard set out in 5 U.S.C. § 5349.

Accordingly, for the reasons stated above, we sustain the agency's determination that this proposal is nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

International Brotherhood of Electrical Workers, Local 1245, AFL-CIO and Department of the Interior, Bureau of Reclamation, Mid-Pacific Region.

The union appealed to the Council from the agency's disapproval of a number of provisions in the local parties' agreement during review of the agreement under section 15 of the Order. However, subsequent to the union's appeal the agency withdrew its objections to the subject provisions.

Council action (December 28, 1978). The Council held that the agency's action subsequent to the union's appeal in effect rescinded its initial disapproval of the disputed provisions and thereby rendered moot the dispute involved in the appeal. Accordingly, the Council dismissed the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Alan Nicholas Kopke
Neyhart, Anderson and Nussbaum
Attorneys at Law
100 Bush Street, Suite 2600
San Francisco, California 94104

Re: International Brotherhood of
Electrical Workers, Local 1245,
AFL-CIO and Department of the
Interior, Bureau of Reclamation,
Mid-Pacific Region, FLRC No. 78A-82

Dear Mr. Kopke:

The Council has carefully considered your petition for review of a negotiability dispute filed with the Council on behalf of IBEW Local 1245 on July 17, 1978; your supplemental submission filed on September 29, 1978; the agency's letter to you of October 27, 1978; and your telegram to the Council filed on November 13, 1978, in the above-entitled case.

The record in this case indicates that the agency initially disapproved the disputed provisions involved in your appeal during its review of the local parties' agreement under section 15 of the Order. However, in its letter to you of October 27, 1978, the agency withdrew its objections to the subject provisions.

In the Council's opinion, the agency's action of October 27, 1978, in effect rescinded its initial disapproval of the disputed provisions and thereby rendered moot the dispute involved in your appeal. See, e.g., National Federation of Federal Employees, Local 1641 and Veterans Administration Hospital, Spokane, Washington, 5 FLRC 878 [FLRC No. 77A-74 (Aug. 31, 1977), Report No. 137].

Accordingly, your petition for review is hereby dismissed.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: H. Jascourt
Interior

American Federation of Government Employees, Local 12 and Department of Labor, Labor-Management Services Administration. The dispute, involving the negotiability of proposals relating to a transfer of office space and containing certain "new matters" allegedly unrelated to the particular space reconstruction being undertaken by the agency, raised questions as to whether the agency was obligated to bargain with the union in the circumstances of the case and, if so, whether the agency had met that obligation.

Council action* (December 28, 1978). The Council held that the union's petition for review of negotiability issues was prematurely filed and failed to meet the conditions for review prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure; that is, the union's appeal presented unfair labor practice questions which should first be resolved under the procedures of the Vice Chairman of the Civil Service Commission. Accordingly, the Council denied the union's petition for review.

*/ The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Jeffrey D. Salzman
3rd Vice President
Local 12, American Federation
of Government Employees, AFL-CIO
P.O. Box 865
Washington, D.C. 20044

Re: American Federation of Government
Employees, Local 12 and Department
of Labor, Labor-Management Services
Administration, FLRC No. 78A-83

Dear Mr. Salzman:

The Council has carefully considered your petition for review, and the agency's statement of position, in the above-entitled case. For the reasons indicated below, the Council has determined that your appeal must be denied.

The basic facts, as set forth in the record, are as follows: During the term of an agreement between the Department of Labor (DOL) and the American Federation of Government Employees, Local 12 (the union), DOL notified the union of a proposed transfer of office space involving the Labor-Management Services Administration (LMSA) and requested consultation regarding the impact of this decision on the employees affected. Subsequently, LMSA supplied the union with renovation and layout drawings, as well as a tentative renovation and office move sequence, and the union submitted proposals which LMSA indicated were nonnegotiable. During this period, at the request of the union, construction of the proposed offices, which had already begun, was halted to permit consultation between the parties. However, the construction was subsequently resumed and, according to the union's uncontradicted assertion, was scheduled for completion some eight months later. Further, the agency states, and the union does not disagree, that the union made no other requests for construction to be halted, but discussed with LMSA the changes to be made in each office before construction began on that office.

Soon after construction resumed, the union submitted revised proposals to LMSA and LMSA stated that those proposals also were nonnegotiable. In the following month, LMSA formally notified the union in writing of its "final decision" in the matter, i.e., that the union's proposals are nonnegotiable under the Order. The union subsequently appealed this "final decision" of LMSA to the Council. DOL timely filed a statement of position, in effect, adopting the "final decision" of LMSA as the agency determination, and the union requested, and was granted, an opportunity to file a supplement to its appeal.

In your appeal to the Council, you contend that the proposals are negotiable, and request that the Council give "expeditious consideration" to your petition, "since negotiations, now stalled, could re-convene prior to completion of this space transfer." In addition, you request the Council "to restore the status quo ante so that appropriate negotiations may proceed," or, in the alternative, to "establish the negotiability of these proposals in any space transfer that the Department shall undertake." In this connection, you state that "[t]he proposals were brought up during the present move so as to be less disruptive to employees and the functions of the Department," and, further, contend that if the proposals are "negotiable on their merits, [they] would be subject to collective bargaining at any time." Further in this regard, you note that section 11(a) of the Order requires an agency and a labor organization to meet at "reasonable times" to confer in good faith with respect to employee working conditions, and contend that there is "no more reasonable time to deal with matters that might require construction [than] when the agency has already made its decision to reconstruct its space." DOL, on the other hand, contends that the proposals are nonnegotiable under the Order and, further, that the union is using mid-contract negotiations regarding the impact on unit employees of the proposed changes in agency workspace as an "opportunity to negotiate changes in working conditions which [are] not related to the space reallocation matter at issue." In this regard, the agency states that since it "had not agreed to mid-term negotiations with the union over this subject matter, it was inappropriate for [the union] to bring such matters up at this time."

The Council is of the opinion that the negotiability issues attempted to be raised by the union in its appeal are premature. As previously indicated, the parties' submissions to the Council in this case raise questions as to whether DOL was obligated to bargain with the union in the circumstances of this case and, if so, whether DOL has met that obligation. That is, the contentions of the parties raise questions as to whether DOL is obligated to bargain with respect to certain "new matters" in the union's proposals which allegedly are unrelated to the particular space reconstruction being undertaken by DOL in the instant case.

The Council considered similar contentions regarding the scope of an agency's obligation under section 11(a) of the Order to negotiate in circumstances involving mid-contract, unilateral changes in employee working conditions in the Immigration and Naturalization Service case.^{1/} In that case, the Council determined that the essence of such contentions "principally relates to whether . . . [the agency] has met its obligation to bargain over the union's proposals, in contrast to a question of whether the union's proposals are themselves negotiable," concluding that, insofar as the appeal raised negotiability issues, it was premature, and, further that the proper forum in which to raise such issues was not through a negotiability appeal but an unfair labor practice proceeding before the Assistant Secretary.^{2/} Similarly, in the instant case, we find that the contentions

1/ National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice, 4 FLRC 500 [FLRC No. 76A-47 (Sept. 29, 1976), Report No. 114].

2/ Id. at 504.

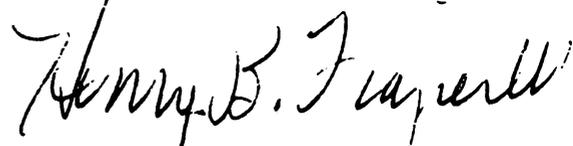
of the parties as to the extent of the agency's obligation to bargain raise unfair labor practice issues, and related factual questions, which are appropriately resolved, in the particular circumstances of this case, through the unfair labor practice procedures of the Vice Chairman of the Civil Service Commission.^{3/}

Therefore, for the reasons more fully stated in Immigration and Naturalization Service, we find that the instant appeal, attempting to raise issues as to the negotiability of the disputed proposals under the Order, is prematurely filed and the conditions for Council review of such issues, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules (5 C.F.R. 2411.22) have not been met.

Accordingly, because your petition for review fails to meet the conditions for review prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure (5 C.F.R. 2411.22), your appeal is hereby denied.

By the Council.^{4/}

Sincerely,



Henry B. Frazier III
Executive Director

cc: S.K. Cronan
DOL

3/ As to the assumption by the Vice Chairman of the Civil Service Commission of the responsibilities of the Assistant Secretary of Labor for Labor-Management Relations under section 6(a)(4) of the Order in cases which involve the Department of Labor, section 6(e) of the Order provides as follows:

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.

(e) If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

See, e.g., Labor-Management Services Administration, Department of Labor, 5 FLRC 747 [Decision and Order of Vice Chairman of U.S. Civil Service Commission No. 34), FLRC No. 77A-43 (Aug. 23, 1977), Report No. 135].

4/ The Secretary of Labor did not participate in this decision.

Marine Corps Air Station, Cherry Point, North Carolina and International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 2296 (Carson, Arbitrator). On a grievance arising from the union's long-standing dissatisfaction with various management personnel assignments to the position of outside boiler plant operator, the arbitrator, as part of his award, ruled that such assignments could be made from within the boiler plant operator trade, "but not from individuals in other trades." The Council accepted the agency's petition for review which excepted to that part (part 3) of the arbitrator's award on the ground that it violated section 12(b)(5) of the Order. The Council also granted the agency's request for a stay. (Report No. 160)

Council action (December 28, 1978). The Council held that the portion of part 3 of the award limiting management's use of "individuals in other trades" to conduct outside boiler plant operations violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified part 3 of the arbitrator's award consistent with its holding. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Marine Corps Air Station,
Cherry Point, North Carolina

and

FLRC No. 78A-87

International Association of
Machinists and Aerospace Workers,
AFL-CIO, Local Lodge No. 2296

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that the Marine Corps Air Station, Cherry Point, North Carolina (activity) had a number of "outside" boilers which were generally maintained by WG-9 boiler plant operators. On June 13, 1977, an outside boiler plant operator was unable to report to work and his place was taken by a WG-7 operator who was a regularly assigned member of the relief crew. This action resulted in a grievance being filed alleging violations of several provisions of the parties' negotiated agreement.^{1/} The grievance was not resolved and it was ultimately submitted to the arbitrator. It appears that the specific grievance which was processed to arbitration served to express the union's long-standing dissatisfaction with various management personnel assignments to the outside boiler plant position and thus the arbitration concerned, apparently without objection, matters beyond the confines of the grievance.

1/ The provision of the parties' negotiated agreement which is pertinent to the agency's appeal to the Council is Article XVIII, Section 6, entitled, "CHANGES IN JOB DESCRIPTIONS AND REQUIREMENTS." It provides in relevant part:

Section 6. The Employer agrees to assign work within the proper rating jurisdiction of respective employees within the unit, as defined by established Navy rating guides. Exceptions to the above policy will be made under the following circumstances:

(a) Lack of workload for employees in their respective rating and employees who do not want to take annual leave.

(b) To meet a short term work situation of the Employer where it is impossible to assign such work to employees in the proper rating.

(c) To occasionally perform miscellaneous duties incidental to the job requirement not covered in the job description.

In particular, the union noted that on occasion, management assigned an electrician to fill in for an absent outside boiler plant operator on the work shift beginning at 8:00 a.m.

Thus, as the parties did not restrict the scope of the arbitration, the following issues, according to the arbitrator, emerged during the arbitration hearing:

1. Was the assignment of a relief crew member to the 0800 - 1600 watch, with less than 72 hours notice, made in order to avoid the payment of overtime?
2. Did the assignment of a relief crew member to the 0800 - 1600 watch constitute a change of schedule or work week without 72 hours notice?
3. Must an assignment to replace an outside boiler operator be made from within the same trade group and from the same rating level?

In responding to these issues, the arbitrator issued a three-part award (only the third part of which is at issue herein) which provided:

1. Assignments of relief operators to cover for absent outside boiler plant operator WG-9 on the day watch have not been made to avoid overtime.
2. The assignment of an individual normally scheduled to work from 0730 to 1615 to work a shift from 0800 to 1600 does not constitute a significant change of schedule within the meaning of the contract.
3. Assignments to cover for the outside boiler operator WG-9 may be made from within the boiler plant operator trade, but not from individuals in other trades.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which excepted to the arbitrator's award on the ground that part 3 of the award violates section 12(b)(5) of the Order.^{2/}

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award

^{2/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council also stayed part 3 of the arbitrator's award.

violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review which excepted to the arbitrator's award on the ground that part 3 of the award violates section 12(b)(5) of the Order.^{3/} Part 3 of the award, as set forth above, provides that "[a]ssignments to cover for the outside boiler operator WG-9 may be made from within the boiler plant operator trade, but not from individuals in other trades." In the agency's view, the portion of the award stating "but not from individuals in other trades" restricts the activity's 12(b)(5) right to determine which personnel will conduct its operations, thus, in this instance, limiting the activity "to the use of one occupation among the total personnel engaged in the operation in question."

In the Council's opinion, the disposition of the issue in this case is controlled by the Council's decision in Tidewater.^{4/} In Tidewater, the Council pointed out that, under section 12(b)(5), the term "personnel" means:

3/ Section 12(b)(5) of the Order provides:

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

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

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

4/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 437 [FLRC No. 71A-56 (June 29, 1973), Report No. 41]; see also, Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sabella, Arbitrator), FLRC No. 77A-101 (Oct. 4, 1978), Report No. 156; and U.S. Immigration and Naturalization Service, Burlington, Vermont and American Federation of Government Employees, Local No. 2538, AFL-CIO (Purcell, Arbitrator), 5 FLRC 625 [FLRC No. 76A-131 (July 13, 1977), Report No. 131].

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

The Council has consistently held that rights reserved to management under section 12(b) of the Order may not be infringed by an arbitrator's award under a negotiated agreement.^{5/} It is manifest in the circumstances of the instant case that the provision of the parties' negotiated agreement (quoted in note 1, supra) on which the arbitrator relied in fashioning his award is a work preservation clause. The Council has consistently held that such work preservation provisions violate section 12(b)(5) of the Order.^{6/} Thus, the arbitrator's award herein enforcing this contract provision by limiting management in the exercise of its right to determine which personnel will conduct agency operations, i.e., in the circumstances of this case limiting management's right to use personnel in "other trades" to conduct "outside" boiler plant operations, likewise violates section 12(b)(5) of the Order. Were the activity to be so limited, it would be deprived of its 12(b)(5) right to determine the "personnel" to conduct its operations. Thus, the disputed portion of the award violates section 12(b)(5) of the Order.

Conclusion

For the foregoing reasons, we find that the portion of part 3 of the award which states "but not from individuals in other trades" violates section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby modify part 3 of the award to provide in its entirety, as follows: "Assignments to cover for the outside boiler operator WG-9 may be made from within, but

5/ E.g., National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

6/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41]; see also Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 444 [FLRC No. 72A-33 (June 29, 1973), Report No. 41]; and NAGE, Local R12-58 and McClellan Air Force Base, 4 FLRC 523 [FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114].

not limited to, the boiler plant operator trade." As so modified,
part 3 of the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 28, 1978

Department of the Army, St. Louis District, Corps of Engineers and International Union of Operating Engineers, Local 149B (Local 2) (Bernstein, Arbitrator). The arbitrator determined that the selection for a particular position was made in violation of the parties' agreement, and, as a remedy, directed the activity to vacate the position by a date certain and rerun the promotion action. The Council accepted the agency's petition for review insofar as it related to the exception alleging that the portion of the award directing that the position be vacated prior to rerunning the promotion action violated appropriate regulation, namely, the Federal Personnel Manual. The Council also granted the agency's request for a stay.

Council action (December 28, 1978). The Council held that the portion of the award directing the agency to vacate the position prior to rerunning the promotion action was, in the circumstances of the case, violative of the Federal Personnel Manual. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of the Federal Personnel Manual, and, as so modified, sustained the award and vacated the stay.

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

Department of the Army,
St. Louis District,
Corps of Engineers

and

FLRC No. 78A-101

International Union of Operating Engineers,
Local 149B (Local 2)

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Insofar as is pertinent herein, the facts in this case as set forth in the arbitrator's award are as follows: This matter concerned the filling of an announced vacancy for the position of Head Lock Operator at Locks 27, St. Louis District, Army Corps of Engineers. Four applicants had been rated as "best qualified" for the position, including the grievant and the employee eventually selected. After the selection was made and announced, the grievant filed a grievance contending that he had not been interviewed by the Lockmaster prior to the selection as required under the terms of the activity's merit promotion plan.^{1/} The activity then attempted to settle the grievance by directing the Lockmaster to conduct an interview with the grievant. After the interview, the grievant was notified that "[his] interview had revealed no new information and that the selection of [the selected employee] would stand." The grievant continued to pursue his grievance and the matter was ultimately submitted to arbitration.

The arbitrator determined that the activity had violated the collective bargaining agreement with respect to the selection involved in this case. He found that the Lockmaster had not interviewed the grievant or other "best qualified" candidates prior to making a selection. The activity's argument that the post-selection interview had cured the violation was rejected on the ground that it was an "inadequate substitute for the interview [the grievant] should have been afforded."

^{1/} According to the arbitrator's award, the applicable provision of the Merit Promotion and Internal Placement Plan reads as follows:

The immediate supervisor of the position to be filled normally will make the selection decision. Interviewing of all "best qualified" candidates for selection purposes, including outside candidates within commuting distance, will be mandatory with supervisor. . . .
[Emphasis in award.]

In considering a remedy for the grievant, the arbitrator refused to award the position to the grievant. The arbitrator stated:

The difficulty with that remedy is that there is no showing that the Grievant would have been given that position in the first instance if the proper procedures had been followed. The job was awarded to [the selected employee] because (1) all candidates were considered equally capable with regard to necessary skills, and (2) [the selected employee] had specific knowledge of Locks No. 27.

The Grievant did not allege that he could or would have disproved either of these points if he had been given an interview before the selection was made. Perhaps he could have, but it is equally possible that he could not have. There is no way of knowing which way the process would have led if it had been followed.

The arbitrator then made the following award:

Therefore, the Arbitrator concludes that the only suitable remedy he can discover is to direct the Employer to declare the position of Head Lock Operator at Locks No. 27 currently occupied by [the selected employee] to be vacated as of September 1, 1978 and to require that the original applicants for that position be given priority consideration for the position. [The selected employee] will be eligible for priority consideration, but no weight may be given to the fact that he has held the position since 1974, nor may he derive any preference therefrom.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that, insofar as it would require the activity to vacate the position in advance of the rerunning of the promotion action, the award violates appropriate regulation, namely the Federal Personnel Manual.^{2/} Neither party filed a brief.^{3/}

^{2/} The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

^{3/} After acceptance of the petition for review, the union notified the Council that it no longer represents the bargaining unit. In view of our disposition of this appeal, this fact is without controlling significance.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review which took exception to the award on the ground that the award, insofar as it directs the activity to remove the selected employee from the position prior to rerunning the promotion action, violates applicable Civil Service Commission regulations.

The Council has previously sought and received from the Civil Service Commission interpretations of applicable Commission regulations pertaining to arbitration awards which, as here, direct an agency to remove an employee from a position prior to rerunning a promotion action. The Civil Service Commission has advised the Council, among other things, that:

Under Commission policy an erroneously promoted employee may be retained in the position only "if the promotion action can be corrected to conform essentially to all Commission and agency requirements as of the date the action was taken" (FPM Chapter 335, 6-4(b)). The employee should not be removed from the position in advance of the corrective action (in this case the re-running of the promotion), however, unless it has been determined by an arbitrator or other competent authority that he could not properly have been considered for the position in the first place and hence, should not be allowed to compete in the second round. In the absence of such a determination, no action should be taken with regard to the employee pending the outcome of the reconstructed promotion.^{4/}

In the instant case, however, there has been no finding by the arbitrator that the employee originally selected could not properly have been considered in the first place, and thus should not be allowed to compete in the second round. In fact, the arbitrator apparently reached just the opposite conclusion. Thus, the arbitrator specifically found that "all" of the original candidates were equally capable and that the selected employee had specific knowledge of Locks No. 27. Further, the arbitrator's award specifically states that the selected employee is to be given priority consideration along with the nonselected candidates in the rerunning of the promotion.

Accordingly, we conclude that the portion of the arbitrator's award which directs the agency to vacate the position prior to rerunning the

^{4/} Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees (Ables, Arbitrator),
4 FLRC 289 at 294-5 [FLRC No. 75A-33 (Apr. 27, 1976), Report No. 104].

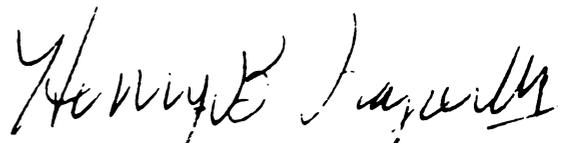
promotion action is, under the circumstances of this case, violative of the Federal Personnel Manual and cannot be sustained.

Conclusion

For the foregoing reasons and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking that portion which directs the activity to vacate the position in advance of rerunning the promotion action.

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

By the Council.



Henry B. Frazier III
Executive Director

Issued: December 28, 1978

Veterans Administration, Veterans Administration Data Processing Center and American Federation of Government Employees, Local 1969 (Bognanno, Arbitrator). The arbitrator held that the agency violated the parties' negotiated agreement when it implemented a new staffing pattern involving rotating tours of duty, determining that during the term of the agreement the activity could not unilaterally effect any changes which violated the agreed method of staffing any tour of duty program, new or old. The agency filed exceptions to the award with the Council alleging that the award violated section 12(b)(4) and (5) of the Order.

Council action (December 28, 1978). The Council held that the agency's petition did not describe facts and circumstances necessary to support its exceptions. Accordingly, the Council denied the agency's petition because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. James C. Klein
Attorney
Office of the General Counsel
Veterans Administration
Washington, D.C. 20420

Re: Veterans Administration, Veterans Administration
Data Processing Center and American Federation
of Government Employees, Local 1969 (Bognanno,
Arbitrator), FLRC No. 78A-108

Dear Mr. Klein:

The Council has carefully considered the agency's petition for review of the arbitrator's award in the above-entitled case.

According to the arbitrator's award, this dispute arose as the result of the unilateral inauguration by the activity of a new staffing concept known as Four Tour Rotating Shift Schedule. This new staffing pattern involved the fixed assignment of five employees to a crew which would rotate through each of four tours of duty every 28 days. The previous staffing pattern involved, generally, individual employee choice by seniority of a specific tour of duty which choice was binding for a minimum of twelve weeks. A grievance was filed and ultimately submitted to arbitration that disputed the propriety of the new staffing concept.

The parties stipulated the issue to be resolved by the arbitrator:

Does the Employer's implementation of rotating tours of duty . . .^{1/}
violate Article IX, Section . . . G of the negotiated agreement?
[Footnote added.]

^{1/} According to the arbitrator's award, Article IX pertains to hours of work and Section G provides:

Tours of duty other than the normal tour defined in Section A will be assigned to employees of the appropriate section or unit in the following manner:

First: By qualified employees who have volunteered in writing and are selected for the specific tour of duty. If there is an excess of volunteers for a particular tour, seniority (based on Service Computation Data) will govern. Volunteer status will be binding for a minimum of twelve (12) weeks.

As first observed by the arbitrator, the record was unequivocal that in past practice and prior to the institution of the new staffing pattern, scheduling for all "irregular" tours of duty (i.e., any tour other than 8:00 a.m. to 4:30 p.m., Monday through Friday) was arranged as prescribed by Article IX, Section G. However, the result of the new Four Tour Rotating Shift Schedule, the arbitrator concluded, was to have each employee work rotating shifts over the period of a month with no employee working a given or permanent shift secured by virtue of seniority through a bidding procedure. The activity had argued to the arbitrator that the negotiated agreement did not include any commitment that seniority would prevail in staffing all shift assignments or that the method of assignment would always remain constant regardless of changes in staffing patterns needed to meet operational requirements.

To the contrary, however, the arbitrator found that the terms of Article IX, Section G were in full force and effect when the activity unilaterally introduced the new Schedule. He also found that those terms dealt explicitly with the manner the activity agreed to follow in implementing the assignment of individuals to tours of duty--"a legitimate, negotiable clause under the Order." He noted that the activity in its discretion may determine the number of tours of duty, the duration of shifts, and the positions or grades represented on each tour. He concluded, however, that the way or manner in which employees are assigned to a tour of duty is negotiable, was negotiated, and appears as Article IX, Section G of the negotiated agreement. Thus, the arbitrator determined that during the term of the agreement, the activity could not unilaterally effect any changes which violated that agreed method of staffing any tour of duty program, new or old. Accordingly, in his award the arbitrator held:

Article IX, Section G of the Agreement is being violated by the Employer's actions of September 25, 1977, when it implemented the Four Tour Rotating Shift program.

The agency requests that the Council accept its petition for review of the arbitrator's award based upon the exceptions discussed below.

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

(Continued)

Second: If insufficient volunteers are received, by equitable distribution to all employees within the appropriate section or unit on a rotating basis.

In its first exception to the award, the agency contends that the award violates section 12(b)(5) of the Order.^{2/} In support of this exception, the agency notes that pursuant to section 12(b)(5) there is expressly reserved to management the right to determine the personnel by which the agency's operations are to be conducted. Thus, the agency asserts that the award, which bars management from establishing and implementing the team concept, and requires it to revert to the earlier staffing pattern, is a clear infringement on the exercise of management's 12(b)(5) right.

Although the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order, the Council is of the opinion that the agency's petition in this case does not contain a description of facts and circumstances to support its exception that the award violates section 12(b)(5) of the Order. In resolving the stipulated issue submitted by the parties of whether the activity's implementation of rotating tours of duty violated the negotiated agreement, the arbitrator found a violation of the agreement on the basis of his determination that "the way or manner individuals are assigned to a tour is negotiable, was negotiated and appears as Article IX, Section G of the Agreement." In the Council's opinion the agency has failed to present facts and circumstances to demonstrate in what manner the arbitrator's award that "Article IX, Section G of the agreement is being violated" by the activity's implementation of the rotating shift program infringes upon any right reserved to management by section 12(b)(5) of the Order.

In this regard the Council has previously held that negotiated agreement provisions which establish specific procedures and criteria to be applied by management in selecting individual personnel for assignment to particular shifts and tours of duty do not infringe on an agency's right to establish either the "methods," "means," or "personnel" by which its operations are to be conducted within the recognized meaning of those terms as used in section 12(b)(5) of the Order. Moreover, the Council has further consistently held that the Order neither bars the negotiation of, nor excepts from the agency's obligation to negotiate, matters related solely to procedures, including criteria such as seniority, for the selection of individual personnel to be assigned to particular shifts

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

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

* * * * *

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

or tours of duty.^{3/} As the Council has further held, when such procedures are negotiated, and when they otherwise conform to law, regulation and the Order, they may be enforced through the arbitral process.^{4/} The agency presents no facts and circumstances in its petition to demonstrate that the arbitrator's award in this case, finding that the agency had violated a negotiated agreement provision which the agency itself characterizes as dealing with the "arrangement of assigning employees on a seniority basis to tours of duty which they have requested," violates any rights reserved to management under section 12(b)(5) of the Order.

Further, the agency presents no facts and circumstances to support its assertions that the award bars "management from implementing the team concept, and requires it to revert to the earlier pattern." On its face the award only states that "Article IX, Section G of the Agreement is being violated . . . when [the activity] implemented the Four Tour Rotating Shift program," in effect apparently directing the activity to comply with the procedures for selecting individual personnel for assignment to particular tours of duty, "new or old," to which it had agreed in the collective bargaining process. While the award finds the institution of rotating shifts to be in violation of the agreement, nowhere does it appear that the award prohibits the institution of the team concept encompassing positions representing a skills mix as determined by management. Thus, it does not appear that the arbitrator ordered a restoration of the status quo ante, nor does the agency present facts and circumstances which demonstrate why such an order must be inferred for it to comply with the agreement provision found to have been violated. Accordingly, the agency's first exception provides no basis for acceptance of its petition under the Council's rules of procedure.

In its second exception to the award, the agency contends that the award violates section 12(b)(4) of the Order.^{5/} In support of this exception,

3/ E.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, 5 FLRC 279, 284-85 [FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124]; National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, 5 FLRC 249, 257-58 [FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123].

4/ See International Brotherhood of Electrical Workers, AFL-CIO, Local 640 and Parker-Davis Project Office, Bureau of Reclamation, United States Department of the Interior (Irwin, Arbitrator), 5 FLRC 562 [FLRC No. 76A-44 (July 12, 1977), Report No. 130].

5/ Section 12(b)(4) of the Order provides:

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

* * * * *

(4) to maintain the efficiency of the Government operations entrusted to them[.]

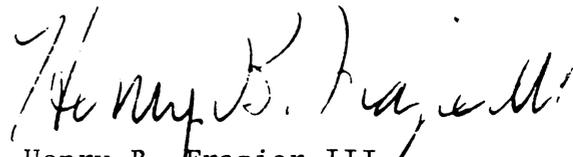
the agency notes that section 12(b)(4) grants it the right to maintain the efficiency of government operations and asserts that its determination to institute the new staffing pattern was based solely on considerations of efficiency. Thus, the agency asserts that the award must be set aside as violative of section 12(b)(4) of the Order.

Although the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order, the Council is of the opinion that the agency's petition does not contain a description of facts and circumstances necessary to support its exception that the award violates section 12(b)(4). In this regard, the agency's petition fails to present facts and circumstances to demonstrate that the arbitrator's award requires the agency to take any action from which "increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits." See American Federation of Government Employees, Local 3488 and Federal Deposit Insurance Corporation, New York Region, FLRC No. 77A-76 (Mar. 13, 1978), Report No. 147 at 5-6 of the Council's decision; Local Union 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219, 225 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30]. Moreover, to the extent that the agency's contentions are premised upon a belief that the award would prevent it from implementing the team concept, as previously indicated nothing in the arbitrator's award orders a restoration of the status quo ante. Accordingly, the agency's second exception provides no basis for acceptance of its petition under the Council's rules of procedure.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: F.X. Helgesen
AFGE

Internal Revenue Service and Brookhaven Service Center, A/SLMR No. 1092.

The Assistant Secretary dismissed the complaint filed by the union (National Treasury Employees Union and NTEU Chapter 99), which alleged that the activity violated section 19(a)(1) of the Order by denying four employees union representation in agency grievance proceedings. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (December 28, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. John F. Bufe
Associate General Counsel
National Treasury Employees Union
Suite 1101
1730 K Street, NW.
Washington, D.C. 20006

Re: Internal Revenue Service and
Brookhaven Service Center, A/SLMR
No. 1092, FLRC No. 78A-111

Dear Mr. Bufe:

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

This case arose when the National Treasury Employees Union and NTEU Chapter 99 (the union) filed an unfair labor practice complaint alleging that the Internal Revenue Service and its Brookhaven Service Center (the agency) had violated section 19(a)(1) of the Order by denying four employees their designated choice of personal representatives in agency grievance proceedings solely because those chosen representatives were affiliated with the union. As found by the Assistant Secretary, four employees in a bargaining unit exclusively represented by the union applied for promotion to supervisory positions. Pursuant to agency regulations, each applicant's supervisor prepared a performance evaluation and a report of managerial potential to be used in evaluating the candidates' relative merits for the supervisory positions. After receiving copies of their evaluations and reports, the four applicants filed grievances under the agency grievance procedure contesting their promotion evaluations. Each applicant designated a union official as her representative in the agency proceeding. However, the Director of the Brookhaven Service Center informed the grievants that their requests for union representation would be denied, stating, "Since you have applied for a supervisory position, Union representation on this agency grievance would present a potential conflict of interest." He further advised the applicants that they could have any representative of their choice "as long as that individual is not a steward or official of NTEU." The union appealed this action to agency headquarters, which,

based upon Civil Service Commission regulations (5 C.F.R. 771.105(c)(2)),^{1/} affirmed the decision to deny the employees their designated union representatives.

The Assistant Secretary found, in the particular circumstances of this case, that the agency's denial of union representation to the four employees involved under the agency grievance procedure herein did not violate section 19(a)(1) of the Order. In so concluding, the Assistant Secretary stated:

. . . I find that, absent evidence of anti-union motivation, the enforcement of the rules governing [the agency's] grievance procedure, which procedure is the creation of the [agency] pursuant to the requirements of the Civil Service Commission, is the responsibility of the [agency] and the Civil Service Commission.^{3/} And where, as here, the Commission has specifically regulated agency grievance procedures by providing that an agency head may deny employees a particular representative on the grounds of conflict of interest or conflict of position, in my view, the unfair labor practice procedures of the Order cannot, in effect, be utilized to police the agency's application of the Commission's regulations.

3/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR 668, A/SLMR No. 334 (1973).

Accordingly, the Assistant Secretary ordered that the subject complaint be dismissed in its entirety.

1/ 5 C.F.R. Part 771 (Agency Grievance System) § 771.105 provides, in pertinent part:

§ 771.105 Presentation of a grievance

(c) The agency shall have the right:

.

(2) To disallow any selection the employee makes with regard to a representative on the grounds of conflict of interest or conflict of position.

(d) The employee shall have the right to challenge the decision to disallow his/her choice of representation to the head of the agency or a person the head of the agency has designated and obtain a decision before proceeding with a grievance, in accordance with procedures described in the agency grievance system. . . . The decision [of the agency head or his/her designee] will be final.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that his finding that the agency's action in denying designated union representation in an agency grievance proceeding did not violate section 19(a)(1) of the Order is "totally unsupportable." You further allege that the Assistant Secretary's decision presents two major policy issues, as follows:

1. Whether the [Assistant Secretary] and the Council possess the authority to invoke the unfair labor practice procedures of the Executive Order to safeguard Executive Order rights when an agency incorrectly applies Civil Service Commission regulations and thereby infringes upon rights guaranteed by the Order?
2. Was the [agency] refusal to permit four (4) bargaining unit employees Union representation in agency grievances contesting their promotion evaluations for supervisory positions a violation of Section 19(a)(1) of the Order?

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

Thus, with respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the agency's denial of union representation to the four employees involved under the agency grievance procedure herein did not violate section 19(a)(1) of the Order in the particular circumstances of this case.

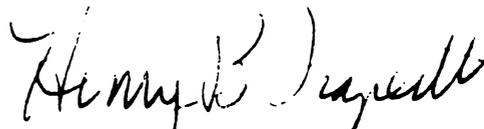
Moreover, in the Council's view, the Assistant Secretary's decision presents no major policy issue warranting Council review. Thus, with regard to the first alleged major policy issue, your appeal fails to contain any support for the assertion that "the agency incorrectly applie[d] Civil Service Commission regulations and thereby infringe[d] upon rights guaranteed by the Order." Rather, such assertion, and the related second alleged major policy issue as to whether the agency's conduct herein violated section 19(a)(1) of the Order, both constitute, essentially, mere disagreement with the Assistant Secretary's conclusion that the agency's denial of union representation to the four employees involved in the agency grievance procedure did not violate section 19(a)(1) in the particular circumstances of this case. Further, your appeal does not provide any basis for concluding that the Assistant Secretary's decision was in any manner inconsistent with the purposes and policies of the Order or applicable Council precedent. In this regard, the Council has previously denied review of a decision of the Assistant Secretary in which he held that no reasonable basis for the union's complaint (alleging that the activity had violated section 19(a)(1) and (2) of the Order by failing to grant an employee and his union representative either official time or an extension of time to

appeal the activity's denial of the employee's grievance under the agency grievance procedure) had been established.^{2/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. F. Hermann
IRS

2/ Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2575, 3 FLRC 526 [FLRC No. 75A-51 (Aug. 14, 1975), Report No. 80]. See also, Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, 2 FLRC 119 [FLRC No. 74A-3 (Apr. 29, 1974), Report No. 52].

Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and Local 916, American Federation of Government Employees, AFL-CIO (Gray, Arbitrator). The arbitrator determined that the activity had not violated the parties' agreement by charging the grievant with being absent without leave for 1 hour in the circumstances involved. The union appealed to the Council, seeking review of the arbitrator's award based upon the following exceptions: (1) the award violated the Order; (2) and (3) the arbitrator refused to hear certain evidence and thereby denied the grievant a fair hearing; (4) the award was based on a nonfact; and (5) the award was arbitrary and capricious.

Council action (December 28, 1978). As to (1), (2), (3) and (4), the Council held that the union's exceptions were not supported by the facts and circumstances described in the petition. As to (5), the Council held that the exception provided no basis for acceptance of the union's petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Oklahoma City Air Logistics Center, Tinker
Air Force Base, Oklahoma and Local 916,
American Federation of Government Employees,
AFL-CIO (Gray, Arbitrator), FLRC No. 78A-113

Dear Mr. King:

The Council has carefully considered your petition for review (as supplemented) of the arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, the grievance in this case arose when the grievant left his post of duty to make a visit to the activity's Freedom of Information (FOI) Office. The grievant signed a sign-out board before leaving his work area, but did not obtain the express permission of his supervisor to leave. The activity charged the grievant with one hour AWOL (Absent Without Leave). The union alleged that, based on past practice, employees could properly leave their work stations by signing out. The union argued that since the grievant had signed out, the AWOL charge was unjustified. The activity alleged that the grievant was required to obtain his supervisor's permission prior to leaving his work area, and since he had not done this, the grievant was AWOL. The dispute ultimately went to arbitration.

The arbitrator set forth the issues before him as follows:

ISSUE ACCORDING TO EMPLOYER

Was management's action in charging [the grievant] one hour AWOL for his absence of February 8, 1978 arbitrary, capricious or discriminatory?

ISSUES ACCORDING TO UNION

- A. Whether the grievant was properly charged one hour AWOL for his absence of 8 February 1978 from his work assignment . . . while visiting the Freedom of Information Office on Tinker Air Force Base after properly completing the sign out board within his section to announce and describe his absence.
- B. Whether the one hour AWOL charge was arbitrary, capricious, discriminatory, or without proper procedure.
- C. Whether the grievant was required to obtain prior permission from his supervisor¹ before visiting the Freedom of Information Office under the circumstances of this grievance.

The arbitrator held, in pertinent part, that "[t]he grievant was required to obtain prior permission from his supervisor to visit the Freedom of Information Office." He said that the one hour AWOL charge was proper, and not arbitrary, capricious or discriminatory; and that the activity had not violated the collective bargaining agreement. Therefore the arbitrator, in effect, denied the grievance.

The union's petition seeks Council review of the award on the basis of the exceptions discussed below.

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

In its first exception, the union contends that the arbitration award violates the Order. In support of this exception, the union asserts that testimony offered during the hearing urged that the action taken by the activity to charge the grievant with one hour leave without pay was an act of discrimination against the grievant because he was a union official. Thus the union states that the activity's action "violated grievant's protected rights under section 1 of the Executive Order,"^{*/} and "[t]his award sustained a discriminatory AWOL charge."

*/ Section 1 of the Order states, in pertinent part:

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.

The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that an exception presents grounds that the award violates the Order. However, the Council is of the opinion that the union's petition does not contain a description of facts and circumstances to support this exception. In this regard, the union's contentions are directed to the activity's action assertedly being in violation of section 1 of the Order, rather than the arbitrator's award. Council precedent is clear that an assertion that the activity violated the Order does not state a ground upon which the Council will grant a petition for review of an arbitrator's award. The National Labor Relations Board Union (NLRBU) and The National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), 5 FLRC 764' [FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135]. Moreover, noting that the arbitrator specifically addressed and discussed the question of discrimination in regard to the AWOL charge and concluded in his award that "[t]here was no discrimination," the union, in essence, is disagreeing with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), 4 FLRC 444 [FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111]. Therefore, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that "the arbitrator exceeded his authority and showed bias in his Award by admitting evidence offered by the Employer on the same subject and issue [an earlier 15-minute AWOL charge against the grievant] on which evidence offered by the grievant was denied." The union argues in this regard that the arbitrator selectively admitted evidence which proved that the grievant had been warned about his absences and excluded evidence offered by the grievant concerning the 15-minute AWOL charge, which tended to show discrimination against the grievant, the "vagueness of policy" as to the need for express permission in order to go to the FOI office, and the employees' belief that signing the sign-out board was the only action required before properly leaving the work area. Additionally, the union contends that the arbitrator was biased and partial as demonstrated by "hostile comments" made by the arbitrator to the union's representative throughout the hearing, and the "arbitrator's blatant participation in the employer's case"

By contending that the arbitrator "exceeded his authority and portrayed bias" because he excluded certain evidence, the union, in substance, is arguing that the award should be set aside because the arbitrator refused to hear certain evidence, and thereby denied the grievant a fair hearing. However, the union's third exception similarly contends that the award should be set aside because the arbitrator refused to hear pertinent and material evidence and thereby denied the grievant a fair hearing. The

union argues that this excluded evidence was crucial in proving its case, and the exclusion of evidence by the arbitrator denied the grievant a fair hearing. Therefore the union's second and third exceptions will be treated jointly.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that an arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair hearing. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2961, AFL-CIO (Yarowsky, Arbitrator), 3 FLRC 533 [FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81]. However, in the Council's view, the union's petition does not describe the necessary facts and circumstances to support such an exception. In this regard, the facts presented by the union in support of its second and third exceptions demonstrate nothing more than the arbitrator's exercise of control over the conduct of the hearing. The Council has held that it is the arbitrator's responsibility to control the conduct of the hearing. The fact that the arbitrator controlled the conduct of the hearing by insuring that the testimony as was offered by witnesses was relevant to the resolution of the issues before him, does not support a contention that the arbitrator denied that party a fair hearing. U.S. Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO (National Border Patrol Council) (Shister, Arbitrator), 5 FLRC 802 [FLRC No. 77A-51 (Aug. 26, 1977), Report No. 136].

As for the union's contentions that the arbitrator's comments and actions throughout the hearing demonstrate bias, the portions of the transcript cited by the union in support of its contentions again reveal nothing more than an attempt by the arbitrator to control the conduct of the hearing. Such assertions do not support a contention of bias. Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), 1 FLRC 557 [FLRC No. 73A-20 (Sept. 17, 1973), Report No. 44]. Thus, the union's second and third exceptions provide no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

The union's fourth exception asserts that the arbitrator's award is based on a nonfact. In support of this exception the union contends that "[t]he award is based on a non-fact of the employee being away from his post of duty without official leave." The union reasons that since the grievant followed the established procedure of signing out, the grievant was not AWOL. Also, the union argues that the arbitrator's conclusion that this was not a discipline case was a gross mistake of fact but for which a different result would have been reached.

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. . . ." Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2961, AFL-CIO (Yarowsky, Arbitrator), 3 FLRC 533, 536 [FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81]. However, the Council is of the opinion that the union's exception is not supported by the facts and circumstances described in the petition. That is, the union has not presented the necessary facts and circumstances to demonstrate that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. Rather, the union's contentions on their face constitute nothing more than mere disagreement with the arbitrator's findings and conclusions. The Council has consistently applied the principle that an arbitrator's findings of fact are not to be questioned by the Council. Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), 4 FLRC 101 [FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96]. Further, as previously stated, the Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. Thus, the union's fourth exception provides no basis for acceptance of its petition for review under section 2411.32 of the Council's rules.

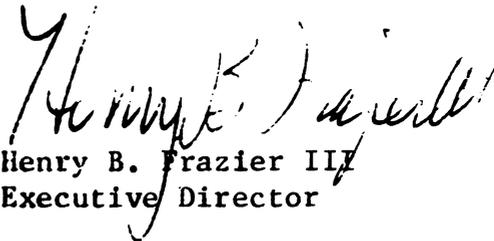
Finally, the union asserts that the arbitrator was arbitrary and capricious. The union argues that the evidence supports the allegation that the grievant did not violate any written or oral policy in leaving his work station, and thus no basis exists for the arbitrator's decision. The union contends that by basing the finding of a policy violation on the testimony of the grievant's supervisor, the arbitrator acted in an arbitrary and capricious manner.

In the Council's opinion, the union's contention that the arbitrator's award is arbitrary and capricious is, in substance, nothing more than mere disagreement with both the weight given by the arbitrator to certain evidence and with the arbitrator's reasoning and conclusion in arriving at his award. The Council has previously held that arbitral determinations as to the credibility of witnesses and the weight to be given their testimony are not matters subject to Council review. Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), 3 FLRC 569 [FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82]. And, as previously stated, it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. Accordingly, the union's fifth exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: R. McLean
Air Force

U.S. ARRCOM and National Federation of Federal Employees, Local 1437 (Malkin, Arbitrator). The arbitrator denied the union's grievance challenging a system for screening and referring eligible engineer and scientist career program registrants locally for GS-13 and GS-14 position vacancies. The union appealed to the Council, seeking review of the arbitrator's award based upon an exception contending that the arbitrator misinterpreted agency regulations and that the screening and referral system violated an agency regulation.

Council action (December 28, 1978). The Council held that the union's exception provided no basis for acceptance of its petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of
Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: U.S. ARRCOM and National Federation
of Federal Employees, Local 1437 (Malkin,
Arbitrator), FLRC No. 78A-114

Dear Mr. Englehart:

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

According to the arbitrator's award, the grievance challenged as improper the U.S. Army Development and Readiness Command (DARCOM) Interim Decentralized Engineer and Scientist (IDEAS) Career Screening and Referral System. IDEAS was an interim procedure issued in order to "decentralize the screening and referral system by giving authority to . . . DARCOM commanders to screen and refer eligible engineer and scientist career program registrants locally for position vacancies at the GS-13 and GS-14 levels." The grievance alleged that the IDEAS procedures were contrary to Army regulations, and resulted in an adverse effect on the grievant's career promotional opportunities. The matter was ultimately submitted to arbitration.

The parties' stipulated issue as stated by the arbitrator was as follows:

Are the IDEAS procedures contrary to Civilian Personnel Regulation (CPR) 950-1, Army Regulation (AR) 310-2 (paragraphs 2-5.c and 4-1.b) and AR 310-1 (paragraph 1-2.b) and were the procedures improperly issued and without authentication? If the answer is affirmative to either question, has it adversely affected the*/ Grievant and, if so, what is the appropriate remedial action?—
[Footnote added.]

*/ According to the arbitrator's award, "CPR 950-1, Career Management, establishes the basic policies and requirements for the intake and career management of personnel resources and the filling of positions in designated occupations throughout the Department of the Army," and AR 310-2

The arbitrator denied the grievance, holding that the IDEAS procedures were not contrary to the cited regulations, and that the procedures were not issued improperly and without authentication. With respect to the referral process itself, the arbitrator found that IDEAS was not inconsistent with the "policy, procedures and requirements" of CPR 950-1 as IDEAS was "merely a method intended to speed-up and improve screening and referral procedures." The arbitrator determined that IDEAS "did not change the basic policy of CPR 950-1." As for its issuance, the arbitrator found that the IDEAS system simply "articulated the delegation of authority provided for in CPR 950-1," and that "CPR 950-18.5-4b indicates that these delegations may be made to a subordinate level."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below.

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

In its exception to the award, the union contends that "the arbitrator misinterpreted the agency regulations which formed the basis for the grievance," and further alleges that the IDEAS system violated an agency regulation.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground that the award violates appropriate regulations. However, in this case the union's exception provides no basis for Council acceptance of its petition. It is noted that the arbitrator, in the course of rendering his award in this matter, had before him and considered the agency regulation relied upon by the union in support of its exception. Under these circumstances the application of that agency regulation by the arbitrator may not be challenged in an appeal of the award to the Council. Local 2449, American Federation of Government Employees (AFL-CIO) and Headquarters, Defense Supply Agency and DSA Field Activities Located at Cameron Station, Virginia (Coburn, Arbitrator), 4 FLRC 516 [FLRC No. 76A-22 (Oct. 6, 1976), Report No. 114].

Moreover, the union's petition, read literally, takes exception to the arbitrator's interpretation of agency regulations "which formed the basis for the grievance," rather than taking exception to the award itself. The union's contention that the arbitrator "misinterpreted"

(Continued)

(paragraphs 2-5.c and 4-1.b) and AR 310-1 (paragraph 1-2.b) "contain the rules and regulations governing the issuance of official publications and forms."

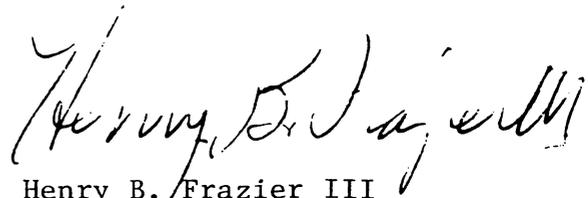
agency regulations appears to constitute nothing more than disagreement with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge and does not state a ground for review under section 2411.32 of the Council's rules. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), 4 FLRC 444 [FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111]; Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), 4 FLRC 101 [FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96].

As previously indicated, the union's exception additionally alleges that the agency's IDEAS system itself violates an agency regulation. In this regard it should be noted that the union's exception does not allege that the arbitrator's award (wherein the arbitrator answered the question submitted and found that IDEAS did not violate CPR 950-1, AR 310-2 and AR 310-1) violates appropriate regulation. The Council has previously held that a contention that an agency action, rather than an arbitrator's award, violates appropriate regulation does not state a ground upon which the Council will grant review of an arbitrator's award. E.g., Puget Sound Naval Shipyard and Bremerton Metal Trades Council, AFL-CIO (Smith, Arbitrator), 5 FLRC 480 [FLRC No. 76A-146 (June 7, 1977), Report No. 128]; The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator), 5 FLRC 764 [FLRC No. 77A-23 (Aug. 25, 1977), Report No. 135]. Therefore, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: Charles E. Thomas
Army

Local 12, AFGE and U.S. Department of Labor (Decision of the Vice Chairman of the U.S. Civil Service Commission), V/C CSC Case No. 79. The Vice Chairman denied the union's request for review, seeking reversal of the General Counsel's Report and Findings on Grievability, wherein the General Counsel had concluded that the union's grievances were not on a matter subject to the parties' negotiated grievance procedure. The union appealed to the Council, contending that the Vice Chairman's decision was arbitrary and capricious.

Council action* (December 28, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Vice Chairman did not appear arbitrary and capricious and the union neither alleged, nor did it appear, that the decision presented any major policy issue. Accordingly, the Council denied the union's petition for review.

*/ The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Local 12, AFGE and U.S. Department of
Labor (Decision of the Vice Chairman of
the U.S. Civil Service Commission), V/C
CSC Case No. 79, FLRC No. 78A-116

Dear Mr. King:

The Council has carefully considered your petition for review of the decision of the Vice Chairman of the United States Civil Service Commission in the above-entitled case.

In this case, as found by the Vice Chairman, Local 12, American Federation of Government Employees, AFL-CIO (the union) filed two grievances against the U.S. Department of Labor (the agency) alleging that the agency violated a Memorandum of Understanding between the parties (the "September 3 Memorandum")^{1/} and section II D of the parties' negotiated agreement^{2/} by considering only one bargaining unit employee for a position along with outside candidates, even though there were four unit employees qualified

^{1/} As described in documents accompanying the appeal filed by the union in this case, the Memorandum of Understanding precludes the agency from filling any vacancy in the bargaining unit by promotion, reassignment, transfer or downgrading of any Federal employee currently employed outside the unit or appointment from a Civil Service register except: (1) when the position involved is at the entry level; (2) the position involved has a "special skills requirement" not available within the unit; or (3) there are fewer than three qualified candidates within the bargaining unit. Further, an appointment or selection from outside the unit is permitted only after the agency has notified the union in writing and intensified its search within the unit.

^{2/} Section II D states:

The provisions of any supplemental agreement or understanding entered into at any level shall become a valid part of this Agreement upon the effective date specified in the agreement when such agreement or understanding is signed by the President of Local 12 and the Secretary of Labor or their duly designated representatives.

for the position who should have been considered first; and by the re-assignment of an employee. After the agency rejected both grievances as nongrievable, the union filed an Application for Decision on Grievability with the General Counsel of the U.S. Civil Service Commission (CSC) pursuant to section 6(e) of the Order.^{3/} On December 14, 1977, the General Counsel issued his Report and Findings on Grievability in which he concluded, citing a letter dated September 19, 1977, from the Chairman of the CSC to the Secretary of Labor to the effect that the September 3 Memorandum violated applicable CSC regulations and therefore was void and unenforceable, that the grievances in question were not on a matter subject to the parties' negotiated grievance procedure. On July 28, 1978, the Vice Chairman denied the union's request for review seeking reversal of the General Counsel's Report and Findings on Grievability. In so concluding, he stated:

A careful study of the [September 19, 1977] letter [from the CSC Chairman to the Secretary of Labor] leads me to the inescapable conclusion that it is substantive, conclusory, and binding. In plain language it points out specifically how the September 3rd Memorandum is in open conflict with Civil Service Rule 7.1^{4/} in that it takes away the required discretion of an appointing officer. This being a key feature, if indeed not the main thrust of the September 3rd Memorandum, it follows that no amount of negotiation on implementing procedures could cure the plainly stated illegalities. . . . I also reject your contentions that the "mandatory language" in the master agreement would be curative if only the [agency], the [CSC], and your organization would sit down and make the Memorandum "legal" by interpretive accommodation. In my view, nothing short of substantial language change in the Memorandum itself could accomplish this. [Footnote added.]

^{3/} Section 6(e) of the Order provides that:

If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

^{4/} Civil Service Rule 7.1 states that:

In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by noncompetitive selection of a present or future Federal employee, in accordance with the Civil Service Regulations.

In your petition for review on behalf of the union, you allege that the Vice Chairman's decision is arbitrary and capricious in that: (1) it is clearly inconsistent with a prior CSC letter which stated that the September 3 Memorandum could not be said to be illegal; (2) it distorted the union's contentions in this case; and (3) the CSC violated its own previously expressed position that action on its part herein would be premature prior to the formal proceedings before the Vice Chairman under the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Vice Chairman does not appear arbitrary and capricious, and you do not allege, nor does it appear, that the decision raises any major policy issue.

As to your allegations that the Vice Chairman's decision is arbitrary and capricious, it does not appear that the Vice Chairman acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your contentions in this regard essentially amount to mere disagreement with his conclusions that "the September 3rd Memorandum is in open conflict with Civil Service Rule 7.1 in that it takes away the required discretion of an appointing officer" and therefore that the "matter herein is not subject to the negotiated grievance and arbitration procedures in the parties' negotiated agreement."^{5/}

Since the Vice Chairman's decision does not appear arbitrary and capricious and you do not allege, nor does it appear, that a major policy issue is presented, your appeal fails to meet the requirements for review as set

5/ Cf. Department of Treasury, Bureau of Engraving and Printing, Washington, D.C., Assistant Secretary Case No. 22-7554(AP), FLRC No. 77A-132 (Sept. 5, 1978), Report No. 155, in which the Council held that the Assistant Secretary, in a grievability or arbitrability dispute, must consider allegations that a substantive provision of the agreement relied upon by the grievant is inconsistent with section 12(b) of the Order and therefore "void and unenforceable," and, where he finds that the agreement provision does conflict with the Order, he must decide that the grievance is nongrievable or nonarbitrable.

forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council. 6/

Sincerely,



Henry B. Frazier III
Executive Director

cc: Vice Chairman
CSC

F. R. Marshall
Labor

6/ The Secretary of Labor did not participate in this decision. Your request that the Chairman of the Civil Service Commission also should not participate in the consideration of this case is denied, no basis to support such request having been established in your appeal.

Equal Employment Opportunity Commission, A/SLMR No. 1096. The Assistant Secretary found that the agency had violated section 19(a)(1) and (6) of the Order by refusing to negotiate with the union (American Federation of Government Employees, AFL-CIO) regarding a number of draft directives. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues. The agency also requested a stay.

Council action (December 28, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. LeRoy B. Curtis, Chief
Labor-Management Relations Branch
Equal Employment Opportunity
Commission
2401 E Street, NW., Room 3214
Washington, D.C. 20506

Re: Equal Employment Opportunity
Commission, A/SLMR No. 1096,
FLRC No. 78A-117

Dear Mr. Curtis:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, as supplemented, and the union's opposition thereto,^{1/} in the above-entitled case.

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, AFL-CIO (AFGE) was the exclusive representative of employees in a nationwide bargaining unit at the Equal Employment Opportunity Commission (the agency) when a collective bargaining agreement was negotiated by the AFGE and the agency. Two years later, AFGE notified the agency that a National Council of EEOC Locals (the union) had been established and that AFGE was delegating its authority regarding the parties' "exclusive recognition agreement" to the union effective as of that date. Shortly thereafter, the agency sent the union four draft directives pertaining to the agency's Upward Mobility Program, Disciplinary Actions, Selection Procedures and Appointment Authority, and EEOC Policies and Procedures. At a subsequent meeting, the union requested negotiations regarding the four proposed draft directives. A representative of the agency stated that the agency was not obligated to negotiate since, pursuant to a provision of the parties' agreement, the agency was only required to "consult" with the union. The union responded that another provision of the agreement required the parties to meet and confer on any changes in personnel policies and practices and matters affecting working conditions. The discussion became heated and, when it became apparent that neither party would alter its position, the parties turned to other subjects. The union then wrote to the agency stating that it had not

^{1/} In response to the agency's supplement to its petition for review, the union filed a "motion to dismiss" the agency's appeal. In view of the Council's disposition of this case, the Council finds it unnecessary to address this motion.

clearly and unmistakably waived the right to negotiate concerning the draft directives and that the agency's failure to do so would constitute an unfair labor practice. In response, the agency stated, "There was no intent on the part of the parties that [a]gency regulations would become the subject of negotiation at any time during the subject of the [a]greement."

The union thereafter filed an unfair labor practice complaint alleging violations of section 19(a)(1) and (6) of the Order. The Administrative Law Judge (ALJ) found that the agency violated section 19(a)(1) and (6) by refusing to meet, confer and negotiate with the union regarding the proposed draft directives. The Assistant Secretary, in adopting the ALJ's findings, conclusions and recommendations, stated:

After reviewing the agreement, the [ALJ] found that it did not constitute a waiver by the [union] of its right to negotiate. Consequently, he concluded that the [agency's] attempt at the . . . meeting to limit the discussion concerning the draft directives to "consultation," rather than negotiation, constituted a refusal to bargain in violation of [s]ection 19(a)(1) and (6) of the Order.

The [ALJ] found, and I agree, that the [agency] violated [s]ection 19(a)(1) and (6) of the Order by refusing to negotiate . . . based on its incorrect interpretation of the parties' negotiated agreement. My review of the record, including exhibits placed in the rejected exhibits file and certain testimony which was admitted into evidence regarding the subsequent meetings,^{2/} shows that the [agency] at no time abandoned its position that the parties' negotiated agreement constituted a waiver by the [union] of its bargaining rights set forth in the Order. In my opinion, by basing its defense to the instant complaint on its interpretation of the agreement the [agency] acted at its peril, and the finding herein, that the parties' negotiated agreement did not constitute a clear and unmistakable waiver, in effect, nullifies the [agency's] defense. [Footnote added.]

^{2/} To refute the contention that it had refused to bargain, the agency attempted to introduce evidence at the hearing that it had engaged in continuing discussions with the union regarding the draft directives, but the ALJ sustained objections to the receipt of the evidence. The Assistant Secretary stated that such evidence should have been admitted into the record as it could have been used to demonstrate that an alleged refusal to bargain had been cured by the agency's subsequent conduct. The Assistant Secretary, therefore, found that the ALJ should have received the proffered evidence. However, for the reasons stated, he found that the agency was not prejudiced by the ALJ's ruling.

Additionally, the Assistant Secretary found in regard to the agency's contention that the alleged refusal to bargain had been cured by subsequent conduct, "under the particular circumstances of this case, . . . a mere willingness by the [agency] to engage in further 'consultations' did not cure its improper refusal to meet and confer in good faith within the meaning of [s]ection 11(a) of the Order." Accordingly, the Assistant Secretary ordered the agency to cease and desist from such violative conduct and, among other things, to meet and confer with the union in good faith.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary found no prejudicial error in the ALJ's refusal to admit into evidence relevant testimony concerning events that occurred after the alleged refusal to bargain. In addition, you take issue with statements in his decision that the agency's incorrect interpretation of the agreement constituted a violation of section 19(a)(1) and (6) of the Order and with his evaluation of certain allegedly conflicting and inconsistent testimony. Further, you allege that the Assistant Secretary's remedial order directing the agency to meet and confer with the AFGE, EEOC Council of Locals is arbitrary and capricious and presents a major policy issue. You also allege that the Assistant Secretary's decision raises major policy issues concerning: (1) the authority of the Assistant Secretary to resolve negotiability issues that arise in the context of certain unfair labor practice proceedings; (2) the extent of the Assistant Secretary's authority to decide questions on the interpretation or application of an agreement under the guise of an unfair labor practice complaint; (3) the authority of the Assistant Secretary to determine when the unfair labor practice occurred in the absence of specific allegations to this effect; and (4) the Federal Labor Relations Council's own interpretation of the terms "consult" and "meet and confer."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or raise any major policy issues.

With respect to your allegations that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Thus, no basis for review is presented by your assertion relating to the ALJ's refusal to admit certain testimony into evidence, noting particularly that the Assistant Secretary's review of the record "includ[ed] exhibits placed in the rejected exhibits file and certain testimony which was admitted into evidence regarding the subsequent meetings[.]" Your further assertions in effect challenging certain statements in the Assistant Secretary's decision that the agency's incorrect interpretation of the agreement violated section 19(a)(1) and (6) of the Order constitute, in essence, nothing more than disagreement with the Assistant Secretary's conclusions based upon the record evidence in the instant case and thus present no basis for review. Nor is any basis

for review presented by your contention regarding the Assistant Secretary's evaluation of certain testimony, inasmuch as such contention constitutes mere disagreement with the weight accorded the evidence by the Assistant Secretary. See, e.g., Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1040, FLRC No. 78A-61 (Oct. 27, 1978), Report No. 157.

As to your allegation that the Assistant Secretary's remedial order directing the agency to meet and confer with the AFGE, EEOC Council of Locals is arbitrary and capricious and presents a major policy issue, such contention appears to constitute mere disagreement with the Assistant Secretary's adoption of the ALJ's finding that "the [EEOC] Council [of Locals] was the exclusive bargaining representative of employees covered in the parties' . . . agreement." See also Department of Health, Education, and Welfare, Social Security Administration, Bureau of Retirement and Survivor's Insurance, A/SLMR No. 1022, FLRC No. 78A-70 (Nov. 8, 1978), Report No. 159. Accordingly, in the Council's opinion, no basis for review is thereby presented.

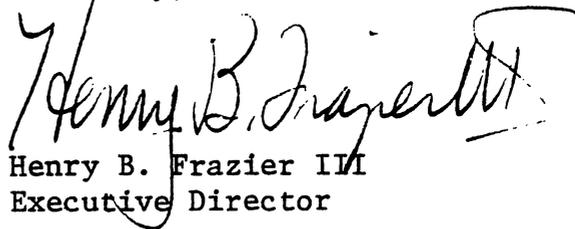
With respect to your alleged major policy issue concerning the Assistant Secretary's authority to resolve negotiability issues, such contention presents no basis for review, noting that no negotiability issue was presented to the Assistant Secretary for his determination in the circumstances of this case, nor was it necessary for him to make such a determination in order to resolve the merits of the instant unfair labor practice complaint. See Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, 4 FLRC 645 [FLRC No. 76A-87 (Dec. 20, 1976), Report No. 119]. As to your alleged major policy issue concerning the Assistant Secretary's authority to decide questions on the interpretation or application of an agreement, in the Council's view your contention in this regard does not present a major policy issue warranting review. Thus, your contention in this regard constitutes mere disagreement with the Assistant Secretary's finding that the agreement did not constitute a waiver of the union's right to negotiate. The agency's mere disagreement with the Assistant Secretary's conclusion in this regard provides no basis for review. Further, with respect to your alleged major policy issue in effect contending that the union's complaint was defective by failing to specify when the unfair labor practice occurred, such contention constitutes essentially disagreement with the Assistant Secretary's application of his regulations, promulgated pursuant to his authority under section 6(d) of the Order, to the facts and circumstances of this case. Moreover, your appeal fails to show that the agency was prejudiced in any manner by the Assistant Secretary's interpretation and application of his regulations, and therefore presents no basis for review. Finally, with respect to your last alleged major policy issue regarding the Council's own interpretation of the terms "consult" and "meet and confer," your appeal fails to provide any basis to support a contention that the Assistant Secretary's decision was inconsistent with the purposes and policies of the Order. In this regard the Council's 1975 Report and Recommendations upon which you appear to

rely^{3/} simply attempted to dispel certain confusion which had arisen concerning the meaning of the terms "meet and confer" and "consult" by clarifying that "meet and confer" was (and always had been) synonymous with "negotiate," whereas "consult" has always referred to an agency's obligations with respect to a labor organization holding national consultation rights under section 9(b) of the Order. Furthermore, to the extent that your appeal in this connection may be construed as a contention that the Assistant Secretary failed to consider "the true meaning and intent of the parties" in using these words in their negotiated agreement, such contention again constitutes, in essence, disagreement with the Assistant Secretary's finding that the agreement did not constitute a waiver of the union's right to negotiate.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. D. King
AFGE

3/ Labor-Management Relations in the Federal Service (1975), at 41-42.

National Union of Compliance Officers (Independent) and Labor-Management Services Administration, U.S. Department of Labor (Gamsler, Arbitrator). The arbitrator determined that certain activity employees required to travel on Sunday to attend a training conference were entitled to overtime pay or compensatory time off. The Council denied the agency's petition for review of the arbitrator's award because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure (5 FLRC 778). Subsequently, the agency requested a decision from the Comptroller General as to the propriety of the award of payment of overtime (or compensatory time). In his decision in response to that request, Matter of: Department of Labor--Arbitration Award of Overtime Pay for Traveltime, B-190494, May 8, 1978, the Comptroller General held that the award conflicted with statute and implementing provisions of the Federal Personnel Manual and could not be implemented. The union then filed the instant petition with the Council, in substance seeking enforcement of the arbitrator's award.

Council action* (December 28, 1978). The Council held that there was no basis for granting the union's petition in this case. Accordingly, the Council denied the union's petition.

*/ The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Bruce M. Stark
Attorney
Suite 301
10203 Santa Monica Boulevard
Los Angeles, California 90067

Re: National Union of Compliance Officers
(Independent) and Labor-Management
Services Administration, U.S. Department
of Labor (Gamser, Arbitrator),
FLRC No. 78A-121

Dear Mr. Stark:

The Council has carefully considered your "Petition for Review and Order Enforcing Arbitrator's Award," and the agency's opposition to it, in the above-entitled case.

This matter is before the Council as the result of an arbitration award rendered in a dispute between the union (National Union of Compliance Officers (Independent)), and the activity (Labor-Management Services Administration of the Department of Labor). Under the terms of their collective bargaining agreement, the activity and the union submitted to arbitration a question as to whether certain activity employees required to travel on Sunday to attend a training conference were entitled to overtime pay or compensatory time off. The arbitrator sustained the grievance, stating that the employees were entitled to overtime pay or compensatory time off.

Thereafter, the agency petitioned the Council for review of the award on the basis of its exception which asserted that the award of overtime pay or compensatory time off violated applicable law and appropriate regulation. The Council, by decision letter of August 25, 1977, denied the agency's petition for review, finding that the agency's exception did not present the necessary facts and circumstances to support a ground upon which the Council grants review under section 2411.32 of its rules of procedure.^{1/}

1/ National Union of Compliance Officers (Independent) and Labor-Management Services Administration, U.S. Department of Labor (Gamser, Arbitrator), 5 FLRC 778 [FLRC No. 77A-39 (Aug. 25, 1977), Report No. 136].

Subsequently, the agency requested a decision from the Comptroller General as to the propriety of the payment of overtime (or compensatory time) awarded by the arbitrator. In answer to this request, the Comptroller General issued his decision in Matter of: Department of Labor--Arbitration Award of Overtime Pay for Traveltime, B-190494, May 8, 1978. In his decision the Comptroller General held that in the circumstances of the case the arbitration award conflicted with the overtime statute, 5 U.S.C. § 5542 (1976), and the implementing provisions of the Federal Personnel Manual and therefore could not be implemented.

The union has now filed the petition involved in the instant case, in substance seeking enforcement of the award despite the decision of the Comptroller General in Matter of: Department of Labor, supra. In the Council's opinion, there is no basis for granting the union's petition in this case.

As the Council has previously held, questions concerning the enforcement of arbitration awards must be submitted to the Assistant Secretary (or if, as here, the case involves the Department of Labor, to the Vice Chairman of the Civil Service Commission), for disposition under the unfair labor practice procedures of the Order; such questions are not properly resolved by an appeal to the Council from the arbitration award.^{2/} Moreover, it should be noted that, even if the request for enforcement here involved were submitted for resolution under the unfair labor practice procedures, an order for enforcement would not properly issue. For the Comptroller General, in the present case, determined pursuant to his statutory authority under 31 U.S.C. § 74 that the arbitrator's award conflicts with applicable law and appropriate regulations and may not be implemented. And, as the Council stated in the Aberdeen Proving Ground case:^{3/}

[W]here the Assistant Secretary finds that an agency has committed an unfair labor practice under Executive Order 11491, as amended, by its failure to abide by an arbitration award . . . , the Assistant Secretary may not, as part of his remedial order, direct the agency to comply with an award which the Comptroller General has determined, under 31 U.S.C. § 74, to call for an improper payment and, hence, to be contrary to law.

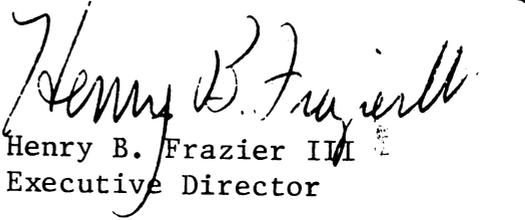
^{2/} See, e.g., Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, A/SLMR No. 413, 3 FLRC 188,193 [FLRC No. 74A-46 (Mar. 20, 1975), Report No. 6].

^{3/} Id. at 195.

Accordingly, the union's "Petition for Review and Order Enforcing Arbitrator's Award" is denied.

By the Council.^{4/}

Sincerely,


Henry B. Frazier III
Executive Director

cc: D. Schulman
Labor

^{4/} The Secretary of Labor did not participate in this decision.

Social Security Administration, Bureau of Hearings and Appeals, Arlington, Virginia, Assistant Secretary Case No. 22-07902(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA) and based upon the RA's reasoning, found that a reasonable basis had not been established for the section 19(a)(1) complaint of the union (Local 3615, American Federation of Government Employees, AFL-CIO) concerning a supervisor's denial of an employee's requests for union representation at a number of meetings, and that further proceedings on the complaint were unwarranted. The Assistant Secretary therefore denied the union's request for review seeking reversal of the RA's dismissal of the complaint. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (December 28, 1978). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Social Security Administration,
Bureau of Hearings and Appeals,
Arlington, Virginia, Assistant
Secretary Case No. 22-07902(CA),
FLRC No. 78A-124

Dear Mr. King:

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

In this case, the American Federation of Government Employees, Local 3615, AFL-CIO (the union) filed an unfair labor practice complaint against the Social Security Administration, Bureau of Hearings and Appeals (the activity). The complaint alleged that the activity violated section 19(a)(1) of the Order by refusing to permit a union representative to participate in an alleged formal discussion between a bargaining unit employee and her immediate supervisor. The Regional Administrator (RA) initially found that a reasonable basis for the complaint had not been established and accordingly dismissed it.

The Assistant Secretary, upon the union's request for review of the RA's dismissal of the complaint, remanded the case to the RA for "further investigation into the facts surrounding the requests [of the employee herein] for representation at meetings with management." The RA's further investigation revealed the following, as to which he found there was no question of fact: The employee involved herein filed a grievance under the agency grievance procedure contesting her supervisor's decision not to promote her based on an assessment of the employee's work. Thereafter, the supervisor initiated a practice of meeting with the employee on a bi-weekly basis to discuss her work assignments. After a number of such meetings, the employee requested representation by her union steward, but such request was denied by her supervisor. The

employee subsequently filed an EEO complaint which alleged that her supervisor was harassing her through these bi-weekly meetings. Thereafter, the supervisor summoned the employee to a number of such meetings but consistently denied her request for union representation. Finally, the employee was formally reprimanded for insubordination, as proposed by her supervisor, in that she refused to discuss her work assignments at such meetings without the presence of a union representative. The supervisor never discussed or attempted to adjust either the grievance or the EEO complaint at any of these meetings. After considering these additional findings, the RA concluded:

In my view, the meetings . . . were not rendered formal discussions merely because their avowed purpose was to discuss [the employee's] work assignments and leave usage--matters which were also the focus of the pending grievance and EEO complaint. In this regard, the evidence is unequivocal that these meetings were neither conducted in connection with nor an integral part of the processing of either the grievance or EEO complaint. On the contrary, [the supervisor] never attempted to discuss or make an adjustment in either action at any of the meetings in question Accordingly, I am of the opinion that the meetings [at] which [the employee] was denied representation were not formal discussions under Section 10(e) of the Order and that she was not, therefore, entitled to representation.

In view of my finding that [the employee] was not entitled to representation at the meetings in question under Section 10(e), I find that no reasonable basis has been established for [the] allegation that Section 19(a)(1) of the Order was violated by [the supervisor's] denial of her requests for representation. Therefore, I am hereby dismissing the instant complaint in its entirety. [Footnote omitted.]

The Assistant Secretary, in agreement with the RA, and based on his reasoning, found that a reasonable basis for the complaint had not been established and that, consequently, further proceedings were unwarranted. Accordingly, he denied the union's request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary acted arbitrarily and capriciously by "refusing to remand this unfair labor practice for a hearing as it involved disputed material facts and concerned a flagrant and persistent pattern of denying grievants rights to be represented by the union at formal conferences." You further allege that "there is a reasonable basis [for the complaint] as the Assistant Secretary remanded the case on one occasion for a further investigation, but refused to note that the Activity intentionally bypassed the union representative, and conducted several conferences without the union present." Finally, you allege that the Assistant

Secretary's decision herein presents a major policy issue as to "whether . . . a [F]ederal employee has the right to be represented at a formal conference wherein agency grievances . . . equal opportunity . . . and other matters [were discussed] which resulted in a formal reprimand . . . against the . . . employee."

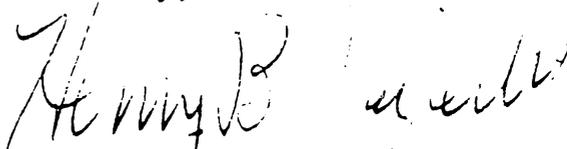
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your allegation that the Assistant Secretary acted arbitrarily and capriciously, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the particular circumstances of this case. Thus, your contentions in this regard constitute essentially mere disagreement with the Assistant Secretary's finding that there was no disputed factual issue requiring a hearing and his further determination, pursuant to his regulations, that no reasonable basis for the complaint had been established. Such contentions therefore present no basis for Council review. Nor is a major policy issue presented, as alleged, regarding the right of a Federal employee to be represented at a formal conference concerning the discussion of grievances and equal opportunity matters that result in a formal reprimand. In this connection, we note particularly that such allegation again constitutes essentially mere disagreement with the Assistant Secretary's findings, in agreement with the RA, that there was never an attempt to discuss or adjust either the employee's grievance or her EEO complaint at any of the meetings in question, and that such meetings therefore were not formal discussions under section 10(e) of the Order. Accordingly, no basis for Council review is thereby presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR I. L. Becker
 Labor SSA

Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-1031(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that further proceedings were unwarranted on the section 19(a)(1) complaint filed by an individual employee related to a discussion between the employee and his foreman. The Assistant Secretary therefore denied the request for review seeking reversal of the RA's dismissal of the complaint. The individual's representative appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue.

Council action (December 28, 1978). The Council held that the instant petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Jack L. Copess
Business Manager
International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers,
Local 204
555 Paiea Street, Room 206
Honolulu, Hawaii 96819

Re: Pearl Harbor Naval Shipyard,
Assistant Secretary Case
No. 73-1031(CA), FLRC No. 78A-131

Dear Mr. Copess:

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

In this case, an unfair labor practice complaint was filed against the Pearl Harbor Naval Shipyard (the activity) by one of the activity's employees. The complaint alleged that the activity violated section 19(a)(1) of the Order by attempting to intimidate, coerce, restrain and otherwise interfere with the employee in the exercise of his rights as guaranteed by section 1 of the Order. Specifically, the complaint alleged that "during the course of a discussion about [a] request to examine a work-related instruction" the employee was threatened by his foreman with disciplinary action and told, "We don't need guys like you in the yard." The complaint further alleged that the employee had asked to examine the memo in question not only for himself but also in his capacity as a steward for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 204 (the union).

The Regional Administrator (RA), following an investigation, found that there was no reasonable basis for the complaint and therefore dismissed it. In this regard he advised the complaining employee:

The investigation reveals that in making a request for a copy of the memo with respect to the inspection and certification of the welds, you were acting on your own behalf as a worker and not as a union steward. . . . Therefore, an overview of the entire conversation reveals that the statements made to you were not violative of [s]ection 19(a)(1) of the Order.

The Assistant Secretary, in agreement with the RA, found that the evidence was insufficient to establish a reasonable basis for the complaint and, consequently, that further proceedings were unwarranted. Accordingly, and "noting that the investigation conducted in this case was consistent with the existing procedures," he denied the request for review seeking reversal of the RA's dismissal of the instant complaint.

In your petition for review on behalf of the employee, you allege that the Assistant Secretary's decision is "arbitrary and capricious and disregarding of the evidence." You further allege that the Assistant Secretary's decision presents the following major policy issue:

Can a steward or other representative of an exclusively recognized labor organization unilaterally assume, or be said by another party to have assumed, a private role as an employee when dealing with activity management officials or supervisors in a matter involving personnel policies and practices and general working conditions subject to the terms of a collective bargaining agreement and which have an effect on persons other than the steward or representative?

In this regard your appeal asserts that, although the employee involved herein stated, during the investigation of his complaint, "that at the time he made the request he did so as an individual worker and not as a steward," such statement was made "under duress."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

Thus, as to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. Rather, your contention that the Assistant Secretary disregarded the evidence constitutes, in effect, nothing more than disagreement with the Assistant Secretary's finding, pursuant to his regulations, that the evidence was insufficient to establish a reasonable basis for the complaint, and therefore provides no basis for Council review. Similarly, your alleged major policy issue concerning whether an employee may be assumed to be acting only for himself rather than as a union steward on behalf of other unit employees in a matter involving personnel policies and practices, presents no major policy issue warranting review. Rather your contention in this regard is, in essence, merely disagreement with the finding relied upon by the Assistant Secretary that the employee was "acting on [his] own behalf as a worker and not as a union steward." Moreover, your related argument that the employee acted "under duress" in acknowledging during the investigation that he was acting "as an individual worker and not as a steward" similarly provides no basis for review, noting

particularly the Assistant Secretary's finding that "the investigation conducted in this case was consistent with the existing procedures," and noting further the absence of any basis in your appeal to support the contention that the employee's statements during the investigation were made under duress.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



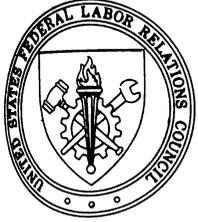
Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

B. Lederer
Navy

Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, A/SLMR No. 1106. The Assistant Secretary, upon a complaint filed by the union (National Treasury Employees Union (NTEU) and NTEU Chapter 91), found that the activity violated section 19(a)(1) and (6) of the Order in the circumstances of this case by failing to fulfill its bargaining obligation with regard to a change in the basis for selecting work samples of certain employees for performance evaluations. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues. The agency also requested a stay.

Council action (December 28, 1978). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. David Markman
Office of the Chief Counsel
General Legal Services Division
Branch No. 1 - Room 4562
Internal Revenue Service
1111 Constitution Avenue, NW.
Washington, D.C. 20224

Re: Department of the Treasury, Internal
Revenue Service, Southwest Region,
Dallas, Texas, A/SLMR No. 1106,
FLRC No. 78A-135

Dear Mr. Markman:

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

In this case, as found by the Assistant Secretary, National Treasury Employees Union and NTEU Chapter 91 (the union) filed an unfair labor practice complaint against the Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas (the activity). The complaint alleged, in substance, that the activity violated section 19(a) (1) and (6) of the Order by failing to negotiate on the impact and implementation of a change in the method used to select work samples of certain bargaining unit employees for performance review.^{1/}

The Assistant Secretary concluded that the activity violated section 19(a) (1) and (6) of the Order in the circumstances of this case. In so concluding, he stated:

[T]he new basis for selecting cases for performance evaluation effected a change in employee terms and conditions of employment. Thus, prior to April 1, 1976, the Appeals Officers working for the

^{1/} According to the Assistant Secretary, the activity's new "trigger point" system of selecting work samples required the Branch Chief to review, at a minimum, performance of all cases which exceeded "trigger points" based on national and regional average lengths of time for completion of various classes of cases, thereby removing the Branch Chief's discretion in selecting cases for review.

[activity] could generally expect that a cross-section of their work product would form the basis for their performance evaluation. Subsequent [thereto], a skewed sample of their work, either limited to or weighted toward those cases which exceeded the "trigger points," would form the basis for their evaluation. In my view, this change to an unbalanced sample of work selected for review in contrast with the prior system involving Branch Chiefs' discretionary selections, constituted a change in the base from which performance evaluations were to be made and, therefore, was a change in employee terms and conditions of employment giving rise to the obligation of the [activity] to meet and confer, upon request, with the exclusive representative concerning the impact and implementation of such change. The Administrative Law Judge found, and I agree, that the [union's] demand to negotiate was sufficient to clearly apprise the [activity] that it desired to negotiate on any element of the change which was negotiable. Therefore, I conclude that the [activity's] subsequent failure to fulfill its bargaining obligation in this regard constituted a violation of [s]ection 19(a)(1) and (6) of the Order. [Footnotes omitted.]

Accordingly, the Assistant Secretary ordered the activity to cease and desist from such violative conduct and, among other things, "[u]pon request, [to] reevaluate, using the present sampling system,^{2/} any employee whose current annual evaluation is based, in whole or in part, on individual cases selected for review . . . based on the ["trigger points"] sampling system" [Footnote added.]

In your petition for review on behalf of the agency, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that the decision is contrary to the evidence of record. You further allege that the decision raises two major policy issues: (1) "May the Assistant Secretary order agency management to negotiate the implementation and impact of instructions to supervisors which govern the type of case a supervisor must review?"; and (2) "Is the purpose and policy of the Order effectuated by ordering a return to the status quo ante when an agency fails to negotiate the implementation and impact of a management decision excluded from the coverage of [s]ection 11(a) of the Order?"

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not appear arbitrary and capricious or present any major policy issues.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the instant

^{2/} As found by the Assistant Secretary, the activity reverted to its original sampling system less than 8 months after the "trigger point" system was implemented.

case. Rather, your contention that the Assistant Secretary's decision is contrary to the record evidence constitutes, in essence, nothing more than disagreement with the Assistant Secretary's factual determination that the activity's "new basis for selecting cases for performance evaluation effected a change in employee terms and conditions of employment" and therefore presents no basis for Council review.

With respect to your first alleged major policy issue regarding the Assistant Secretary's authority to require negotiations as to the implementation and impact of instructions to supervisors, in the Council's opinion no major policy issue is presented warranting review. Thus, in our view, your assertion that the Assistant Secretary lacks such authority also appears to constitute mere disagreement with the Assistant Secretary's determination, based upon the record, that the change to the new system of work sampling "constituted a change in the base from which performance evaluations were to be made and, therefore, was a change in employee terms and conditions of employment giving rise to the obligation of the [activity] to meet and confer, upon request, with the exclusive representative concerning the impact and implementation of such change."

As to your second alleged major policy issue regarding that part of the Assistant Secretary's remedial order which you characterized as directing "a return to the status quo ante," in the Council's opinion no major policy issue warranting review is presented. In this regard, as the Council has consistently stated, section 6(b) of the Order confers considerable discretion on the Assistant Secretary, and his remedial directives therefore will not be reviewed by the Council unless it appears that the Assistant Secretary has exceeded the scope of his authority under section 6(b) or has acted either arbitrarily and capriciously or in a manner inconsistent with the purposes and policies of the Order.^{3/} That is, mere dissatisfaction with the Assistant Secretary's remedy in a particular case, without more, constitutes no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR H. Robinson
Labor NTEU

3/ See, e.g., Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784, 5 FLRC 658 [FLRC No. 77A-22 (July 29, 1977), Report No. 132]; U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 5 FLRC 177 [FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122], and cases cited therein.

Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924. This appeal arose from a decision of the Assistant Secretary holding, in essence, that the agency violated section 19(a)(1) and (6) of the Order by failing to provide the American Federation of Government Employees, AFL-CIO (the union), which had previously been granted national consultation rights by the agency under section 9(b) of the Order, with notice of and an opportunity to comment on a proposed change in its contracting out policy, as well as by depriving the union of the right to consult concerning the procedures implementing the policy and the impact thereof. The Council accepted the agency's petition for review, having concluded that the Assistant Secretary's decision raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case. (Report No. 147)

Council action (December 29, 1978). The Council, pursuant to section 2411.18(b) of its rules of procedure, set aside the decision of the Assistant Secretary to the extent that he found that the agency violated section 19(a)(1) and (6) of the Order by failing to notify the union of the proposed change in its contracting out policy and failing to afford the union an opportunity to comment on the proposed change; sustained the decision to the extent that the Assistant Secretary found that the agency violated section 19(a)(1) and (6) by failing to meet its section 9(b) obligation to consult with the union concerning the impact and implementation of the decision to change the contracting out policy; and remanded the case for appropriate action.

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

Secretary of the Navy
Department of the Navy
Pentagon

and

A/SLMR No. 924
FLRC No. 77A-146

American Federation of Government
Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary holding, in essence, that the Secretary of the Navy (the agency) violated section 19(a)(1) and (6) of the Order by: (a) failing and refusing to notify the American Federation of Government Employees, AFL-CIO (the union), pursuant to its national consultation rights under the Order, of proposed substantive changes in personnel policies that affect employees it represents and provide it an opportunity to comment on such changes; (b) failing to provide an opportunity for the union to consult in person and to present its views in writing on personnel policy matters; and (c) refusing to consult with the union on personnel policy matters.

According to the Assistant Secretary's decision, the case arose when the agency issued a new instruction reflecting what the Assistant Secretary found to be a "new policy, which essentially was one of accelerating contracting out of certain named services" The union, which was granted national consultation rights by the agency in 1971, learned of this new policy through a newspaper article. The union requested and received copies of the agency's instruction. It then sought to consult with the agency, but its request was denied and the instant unfair labor practice complaint ultimately followed.

The Assistant Secretary found, in pertinent part, that section 9(b) of the Order establishes three distinct rights for a labor organization which has been accorded national consultation rights.^{1/} The first

^{1/} Section 9(b) of the Order provides as follows:

When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify

(Continued)

requires that the labor organization be notified by an agency of proposed substantive changes in personnel policies affecting unit employees, and that the agency provide an opportunity for the organization to comment thereon. The second is the labor organization's right to suggest changes in the agency's personnel policies and to have its views carefully considered. The third is the labor organization's right to consult in person, upon request, with agency management on personnel matters and to present its views thereon in writing. With respect to the fourth and last sentence of section 9(b), namely that an agency is not required to consult with a labor organization on any matter which the agency would not be required to meet and confer if the labor organization were entitled to exclusive recognition, the Assistant Secretary concluded that: "This limitation . . . does not . . . affect the right of an organization possessing national consultation rights to comment, as distinguished from consult, upon substantive changes in personnel policies proposed either by the agency or by the organization." In this regard, the Assistant Secretary stated, "the right to notice and an opportunity to comment is not, in my view, limited to those matters concerning which an agency is required to meet and confer."

Having concluded that the new policy on contracting out was a "substantive change in personnel policy," the Assistant Secretary further concluded that its issuance without notification and an opportunity to comment violated section 19(a)(1) and (6). Moreover, the Assistant Secretary noted that although the actual decision of an agency to contract out has been held to be a reserved right of management, and therefore is not negotiable with a labor organization holding exclusive recognition, such labor organization may negotiate over the implementation and impact of such a decision to contract out. Thus, the Assistant Secretary concluded that, where a union holds national consultation rights, it may consult over the impact and implementation of new policies on contracting out where such policies constitute a substantive change. Therefore, he found that the failure of the agency herein to give the union notice of the new policy violated section 19(a)(1) and (6) because it deprived the union

(Continued)

representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

of its right to consult on the matter (procedures implementing its policy and the impact thereof) in person and to present its views thereon in writing.

The agency appealed the Assistant Secretary's decision to the Council. The Council accepted the agency's petition for review, having concluded that the Assistant Secretary's decision raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case. The Council also determined that the agency's request for a stay met the criteria for granting stays set forth in section 2411.47(e)(2) of the Council's rules and granted the request. Only the union filed a brief on the merits, as provided for in section 2411.16 of the Council's rules.

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary herein raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case. Specifically, the question before the Council is the propriety of the Assistant Secretary's finding that the last sentence of section 9(b) of the Order ("An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition") does not apply as a limitation of the union's right to comment upon proposed substantive changes in personnel policies, as provided in the first sentence of section 9(b). That is, the question is whether the Assistant Secretary properly ruled that "the right to notice and an opportunity to comment [as provided in the first sentence of section 9(b)] is not . . . limited to those matters concerning which an agency is required to meet and confer."

In the Council's view, the Assistant Secretary's determination in the above regard is inconsistent with the purposes of the Order and must be set aside.

As the Assistant Secretary correctly concluded, the first three sentences of section 9(b) of the Order set forth certain affirmative rights which accrue to a labor organization holding national consultation rights. In summary, the rights are: to be notified of proposed substantive changes in personnel policies and be provided an opportunity to comment on the proposed changes; to suggest changes in the agency's personnel policies and have its views carefully considered; and to consult on personnel policy matters, and at all times present its views thereon in writing. However, contrary to the Assistant Secretary's further conclusion, the limitation in the last sentence of section 9(b), namely that an agency is not required to consult on any matter on which it would not be required to negotiate^{2/}

^{2/} Labor-Management Relations in the Federal Service (1975), at 42 states:

The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

if the organization were entitled to exclusive recognition, does not apply to the union's right to comment under the first sentence of section 9(b) is incorrect.

As discussed above, the Assistant Secretary's determination with respect to the limitation on the right to consult in the last sentence of section 9(b) makes a distinction between the right to comment in the first sentence of the section and the right to consult otherwise granted throughout the section. In our view, no such distinction is intended. That is, all rights provided for in section 9(b) are integral aspects of the right to consult. This conclusion is mandated by the appellation "national consultation rights" which applies to all of section 9 of the Order. It is further dictated by the specific language of section 19(a)(6) of the Order which provides, in relevant part, that it shall be an unfair labor practice for agency management to refuse to consult as required by the Order.^{3/}

Since all three of the rights provided for in section 9(b) are aspects of the right to consult, it is obvious that the limitation on such right in the last sentence of section 9(b) applies uniformly to each of these aspects of the right.

Moreover, to hold as did the Assistant Secretary, that the union had a right to be notified of, and to comment on, the agency's proposed change in its policy on contracting out prior to the agency's final decision thereon is contrary to section 9(b) and 12(b)(5) of the Order. Thus, as we have said herein, under the last sentence of section 9(b) of the Order, the union's rights to notification and comment under the first sentence are limited to matters which fall within the scope of negotiation and hence are limited by, among other things, section 12(b)(5) of the Order. As the Council held in Tidewater,^{4/} the agency's decision with respect to contracting out is not subject to negotiation by the exclusive representative under section 12(b)(5) of the Order. Likewise, the agency's decision

^{3/} As the Council expressly stated in the Report which led to the adoption of E.O. 11838:

In the Federal labor-management relations program, "consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under section 9 of the Order. (Id., at 42).

^{4/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

to change its policy regarding contracting out is not subject to consultation with, including notification to and comment by, a union holding national consultation rights.^{5/} In the present case, the Assistant Secretary would interpret section 9(b) of the Order as granting a union holding national consultation rights a right enforceable under section 19(a)(6) to be involved in that decision: that is, an enforceable right to be notified of and to comment on the decision to change the policy on contracting out. Yet an exclusive representative is not accorded such right under the duty to "negotiate" which is alone enforceable by such exclusive representative under section 19(a)(6). Consequently, the Assistant Secretary's ruling which, in effect, provides greater rights for labor organizations holding national consultation rights than to exclusive representatives is clearly inconsistent with the purposes of the Order. Therefore, to the extent that the Assistant Secretary predicated his finding that the agency violated section 19(a)(1) and (6) of the Order by failing to notify the union of the proposed change in its contracting out policy and to afford the union an opportunity to comment on the proposed change, such finding must be set aside.

However, as already mentioned, the Assistant Secretary also found that the agency violated section 19(a)(1) and (6) by depriving the union of the right to consult about procedures implementing its policy on contracting out and the impact thereof. The Council previously held in the Tidewater case that matters related to the impact and implementation of contracting out are negotiable.^{6/} Since such matters are negotiable within the context of an exclusive bargaining relationship, they are not excepted from the obligation to consult by the last sentence of section 9(b) of the Order. Consequently, to the extent that the Assistant Secretary predicated his 19(a)(1) and (6) finding on the agency's failure to meet its section 9(b) obligation by consulting with the union on the matter of the impact and implementation of the agency's determination to change its contracting out policy, the Assistant Secretary's decision is clearly consistent with the purposes of the Order and must be sustained.

Conclusion

For the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we sustain in part and set aside in part

^{5/} Of course, as discussed hereinafter, the union has a right to be notified of such a decision, once made, and to consult (including comment) as to the impact and implementation of such change.

^{6/} See note 4, supra, 1 FLRC 431 at 442.

the Assistant Secretary's decision and order and remand the case for appropriate action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 29, 1978

American Federation of Government Employees, Local 2928 and General Services Administration, National Personnel Records Center. The dispute involved the negotiability of provisions in the parties' agreement which were disapproved by the agency during review of the agreement under section 15 of the Order. The disputed provisions related to (1) release to the union of information pertaining to employees; (2) the presence of the union at the adjustment of employee-presented grievances; (3) equal opportunity and discrimination complaints; (4) union nomination of EEO counselors; (5) scheduling of Field Accident and Fire Prevention Council meetings; (6) abatement of health and safety hazards; (7) relief from duty of employees under certain temperature and humidity conditions; (8) court leave; (9) delivery of warning letters; and (10) inspection by employees of their OPFs.

Council action (December 29, 1978). For the reasons fully detailed in its decision, the Council held that the provisions in dispute were negotiable, and accordingly, pursuant to section 2411.28 of its rules of procedure, set aside the agency's determination as to the nonnegotiability of the provisions.

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

American Federation of Government
Employees, Local 2928

(Union)

and

FLRC No. 78A-7

General Services Administration,
National Personnel Records Center

(Agency)

DECISION ON NEGOTIABILITY ISSUES^{1/}

Provisions I - II^{2/}

Provision I:

Article 5.6

1/ In this case, the agency contends that "the union's appeal should be dismissed for failure to comply with the Council's requirements concerning the content and service of petitions in section 2411.25 of the Council's rules." In this regard, the agency argues that (1) the union's petition does not contain a full and detailed statement of the reasons why it believes the agency determination of nonnegotiability should be set aside, and (2) certain documents were not included in the union's service upon the agency of a copy of its petition to the Council. We find the agency's contention without merit. Specifically, the agency has not shown that it was in any way prejudiced by the alleged insufficiency of the union's petition for review or by the alleged inadequacy of the union's service of a copy of its petition to the Council. Moreover, the record in this case constitutes an adequate basis for a Council decision on the merits of the negotiability issues presented, and the record indicates that those documents alleged by the agency to be "missing" from the union's service upon it were in fact either generated by the agency itself or received by the agency from the union in the course of their negotiations. Moreover, the agency submitted copies of these materials, which copies were identical to those included by the union in its petition to the Council. Accordingly, we deny the agency's request that the union's petition for review be dismissed. See Local 2578, American Federation of Government Employees, AFL-CIO and National Archives and Record Service, General Services Administration, FLRC No. 78A-44 (Oct. 27, 1978), Report No. 157.

2/ These provisions, which were disapproved by the agency (as well as all the provisions at issue in this case) during the review of a negotiated agreement pursuant to section 15 of the Order, are considered together for convenience of decision since essentially the same issues and contentions are involved.

Information pertaining to any employee will be released to or discussed with the Union representative in accordance with Civil Service Commission regulations and upon request by the Union.

Provision II:

Article 35.4

Information pertaining to any employee will be released to or discussed with the Union representative in accordance with Civil Service Commission regulations and upon request by the Union.

Agency Determination

The agency head determined that the provisions are nonnegotiable because they violate the Privacy Act of 1974^{3/} and unspecified agency regulations.

Question Here Before the Council

The question is whether the provisions are barred from negotiation by reason of agency regulations or the Privacy Act.

Opinion

Conclusion: The agency failed to establish the applicability of its regulations as a bar to negotiation. Likewise, the agency failed to demonstrate that the disputed provisions violate other agencies' regulations or the Privacy Act. Thus, the agency determination that the provisions are nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{4/}

^{3/} The Privacy Act of 1974, 5 U.S.C. § 552a (1976).

^{4/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions. We decide only, as agreed upon by the parties at the local level and based upon the record before the Council, the provisions were properly subject to negotiation by the parties.

Reasons: The agency contends that the provisions would require agency management to disclose all employee-related information in its possession to the union representative without regard to the requirements of either the Privacy Act or agency regulations. Specifically, the agency claims that such information includes (1) records maintained by the agency as required by the Civil Service Commission, (2) records generated by the agency itself of its own volition, and (3) records generated and maintained pursuant to the direction of other Government agencies, e.g., the Department of Labor. As to the first category of information, i.e., CSC records, the agency argues that the provisions seek to circumvent the agency's regulations which are applicable as well as CSC regulations to the disclosure of information from such records. As to the second category, the agency argues that such records are subject to regulations of the agency and not those of the CSC, and, thus, the provisions at issue violate these agency regulations by attempting to subject the records only to CSC regulations. As to the third category of records, the agency also argues that CSC regulations are not applicable and that the provisions are thereby nonnegotiable since they do not take into account applicable regulations of either the agency itself or such other Government agencies requiring the compilation and maintenance of such records. Finally, the agency contends that the provisions violate the Privacy Act of 1974 generally since, in the agency's view, they require disclosure of all of this information to the union representative "without the prior written consent of the subjects of such information." In our opinion, the agency's contentions are based on an overly broad and clearly erroneous interpretation of the disputed provisions and therefore are without merit.

The meaning and intent of the provisions, as reflected by their language and so far as the record before the Council indicates, are essentially to require the agency "to release to or discuss with the union representative information, pertaining to an employee" within the bargaining unit, that is contained in CSC records, i.e., records maintained by the agency pursuant to CSC requirements,^{5/} "in accordance with the regulations of the Civil Service Commission."^{6/} The provisions do not involve information from any other records developed or maintained by the agency, either of its own volition or as required by any other Government agency. Further, since the source of the information involved in the provisions

5/ See CSC Personnel Records and Files, 5 C.F.R. § 293.102 (1978).

6/ See CSC Personnel Records and Files, 5 C.F.R. Part 293 (1978), CSC Availability of Official Information, 5 C.F.R. Part 294 (1978), CSC Protection of Privacy in Personnel Records, 5 C.F.R. Part 297 (1978).

is records for which the Civil Service Commission is responsible,^{7/} those regulations applicable to protect the privacy of the individual personnel as required by the Privacy Act of 1974 are those of the CSC.^{8/}

7/ See CSC Personnel Records and Files, 5 C.F.R. § 293.102 (1978).
5 C.F.R. § 293.102(b)-(c) provides:

(b) Specifically, the Commission is responsible for managing major Government-wide systems of personnel records as required by statute or Executive Order. For each system of personnel records the Commission:

(1) Prescribes the contents, format, or methods of keeping the records; and

(2) Requires agencies or Commission offices to maintain and retrieve the records by individual name or identifying number.

(c) In accordance with paragraphs (b)(1) and (2) of this section, the Commission is responsible for the following specific Government-wide systems of personnel records:

(1) Appeals, Grievances, and Complaints Records;

(2) Confidential Employment and Financial Interest Statements;

(3) General Personnel Records;

(4) Personnel Investigations Records; and

(5) Recruiting, Examining, and Placement Records.

8/ See CSC Protection of Privacy in Personnel Records, 5 C.F.R. §§ 297.101, 297.103, 297.116(a) (1978).

Indeed, in the statement of its position, the agency points out that, "[T]o the extent that information referred to in [the provisions at issue] is found in 'CSC/GOVT-3, General Personnel Records,' the 'routine use' statement applicable to disclosure of information from such records to recognized labor organizations is that of the CSC. See 41 Fed. Reg. 54522 (1976), for text of CSC 'routine use' statement. See also 'Guidance for Agencies in Disclosing Information, Covered Under the Freedom of Information Act and the Privacy Act, to Labor Organizations Recognized Under Executive Orders 11636 and 11491, as Amended,' FPM Ltr. 711-126 (Dec. 30, 1976).

We further note GSA Regulations Implementing the Privacy Act of 1974, 41 C.F.R. § 105-64.102(b) (1978), which provides:

(b) Current records of other agencies. If GSA receives a request for access to records which are the primary responsibility of another agency, but which are maintained by or in the temporary

(Continued)

Thus, since the agency has plainly misconstrued the meaning of the disputed provisions, we hold, consistent with established Council precedent, that the agency has failed to demonstrate the applicability of its regulations as a bar to negotiation on the subject provisions under section 11(a) of the Order.^{9/} Further, the agency has failed to show that the disputed provisions, as properly interpreted, violate the regulations of other Government agencies.

With regard to the agency's claim that the provisions violate the Privacy Act and are therefore nonnegotiable, the agency's contention is based upon the misconception of the provisions discussed above. The plain language of the provisions themselves requires compliance with regulations of the Civil Service Commission in disclosing employee-related information to the representative of the labor union. Such regulations were issued by the CSC pursuant to the Privacy Act in order to effectuate the purpose of the Act^{10/} with regard to those records for which the CSC is responsible. Thus, it appears that effectuation of the provisions would be entirely consistent with the requirements of the Privacy Act, and, therefore, the agency's claim that the provisions automatically violate the Act is unfounded.

Therefore, since the agency's claim that the provisions violate the Privacy Act is based on a misinterpretation of the provisions, we find that the agency has failed to show that the disputed provisions, as properly interpreted, violate the Privacy Act. Accordingly, the agency head's determination of nonnegotiability cannot be sustained.

(Continued)

possession of GSA on behalf of that agency, GSA will refer the request to the agency concerned for appropriate action. GSA will advise the requester that the request has been forwarded to the responsible agency. Records in the custody of GSA which are the primary responsibility of the U.S. Civil Service Commission are governed by the rules of the Commission promulgated pursuant to the Privacy Act. [Emphasis supplied.]

9/ See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, 5 FLRC 279, 280-82 [FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 2-3 of Council decision]. In view of our determination that the agency has not established the applicability of its regulations to the disputed provision we do not reach the question as to the "compelling need" for these regulations.

10/ See CSC Personnel Records and Files, 5 C.F.R. § 203.101(a) and CSC Protection of Privacy in Personnel Records, 5 C.F.R. § 297.101 (1978) and FPM Ltr. 711-126, supra note 9.

Provisions III - v^{11/}

Provision III

Article 6.3

The union has the exclusive right to represent employees in presenting grievances at all levels of the negotiated grievance procedure contained in this agreement, except when an employee or employees in the Unit desire to present grievances to the Employer and have them adjusted without representation by the Union, as long as the adjustment is not inconsistent with the terms of the Agreement and the Union has been given opportunity to be present at the adjustment.

Provision IV

Article 39.4

Any employee or group of employees desiring representation when presenting a grievance under the procedures outlined in this article must be represented by the Union, either a steward at the location where the employee is stationed, chief steward, vice president, president or a representative approved by the Union. However, any employee or group of employees in the unit may utilize this grievance procedure to present grievances to the Employer for resolution without intervention by the Union. In such instances, the Employer will provide the Union an opportunity to be present at the adjustment and the adjustment shall not be inconsistent with the terms of this Agreement.

Provision V

Article 39.8a

Step 1 - The grievance shall be presented in writing by the concerned employee or steward to the appropriate supervisor below the level of the Branch Chief, in an attempt to resolve the matter. Grievances must be presented within fifteen (15) work days from the date the grievant became aware of the matter being grieved. The steward may be present when the grievance

11/ These provisions are considered together for convenience of decision since essentially the same issues and contentions are involved.

is presented if the employee so desires. The supervisor receiving the grievance will give his decision in writing within five (5) working days after receipt of the grievance. If an employee or group of employees presents a grievance for adjustment without representation, the Union will be permitted to have a representative present at the adjustment on official time. If the matter being grieved is the action of an official identified in step 2 or higher, this step of the grievance procedure may be omitted.

Agency Determination

The agency determined that the provisions are nonnegotiable because they violate the Privacy Act of 1974.^{12/}

Question Here Before the Council

The question is whether the provisions violate the Privacy Act of 1974.

Opinion

Conclusion: The provisions do not conflict with the Privacy Act of 1974. Thus, the agency determination that the provisions are nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{13/}

Reasons: The three provisions here at issue essentially provide, consistent with section 13(a) of the Order,^{14/} that individuals or

^{12/} The agency also contended that the provisions violate unspecified agency regulations implementing the Privacy Act. In view of our decision herein and the fact that the agency failed to specifically identify or offer any support for its argument, we find it unnecessary to consider this contention.

^{13/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions. We decide only, as agreed upon by the parties at the local level and based upon the record before the Council, the provisions were properly subject to negotiation by the parties.

^{14/} Section 13. Grievance and arbitration procedures.

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

groups of employees may present grievances within the scope of the negotiated grievance procedure to the agency and have them adjusted without intervention by the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given the opportunity to be present at the adjustment. The agency argues that under the provisions there is a possibility that the union representative will gain access to information that is protected by the Privacy Act and, therefore, the provisions violate the Privacy Act and, consequently, are nonnegotiable under the Order. We find no merit in the agency's contention.

There is no indication in the language of the provisions or in the record before the Council that the provisions would prevent the parties from complying with the Privacy Act (or regulations implementing the Act) while fulfilling the requirements of the provisions.^{15/} Moreover, section 13(a) of the Order, which the provisions closely parallel, must be interpreted and applied in a manner which is consistent with statute, e.g., the Privacy Act. Thus, we cannot sustain the agency's determination of nonnegotiability as to these three provisions.

(Continued)

The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

^{15/} In this regard, section 12(a) of the Order requires:

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

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

Provisions VI - VII^{16/}

Provision VI

Article 14.1

The parties agree to cooperate in providing equal opportunity in employment and promotions for all qualified persons without regard to sex, race, color, religion, age between 40 and 65, or national origin, and to promote the full realization of equal employment opportunity through a positive and continuing effort, in accordance with the objectives and principles of equal employment opportunities, as set forth in applicable laws and regulations. The views of the Union will be solicited in the development of the Affirmative Action Plan which includes employees in the unit.

Provision VII

Article 14.6

Complaints of discrimination on the part of the Employer involving race, color, religion, sex, age between 40 and 65, or national origin will be processed in accordance with applicable GSA and U.S. Civil Service Commission regulations.

Agency Determination

The agency determined that the provisions violate the FPM and are therefore nonnegotiable. The agency further determined specifically that the first sentence of Provision VI violates section 12(b) of the Order and therefore is nonnegotiable.

Questions Here Before the Council

Question 1: The question is whether, under the facts and circumstances of this case, the appeal with respect to the portions of the provisions relating to discrimination on the basis of age meets the conditions for

16/ These provisions are considered together for convenience of decision since essentially the same issues and contentions are involved.

Council review prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure.^{17/}

Question 2: The question is whether the first sentence of Article 14.1 violates section 12(b) of the Order and is therefore nonnegotiable.

Opinion

Conclusion as to Question 1: The petition for review of the portions of the provisions relating to discrimination on the basis of age was prematurely filed. Accordingly, without passing upon the merits of the issue of negotiability, the appeal as it pertains to those portions of the provisions is denied.

Reasons: The agency determined specifically that the provisions violate the FPM^{18/} since they do not provide for the age grouping (up to age 70) established to protect against discrimination due to age. In its petition for review, the union explained that "[t]he intent of the provisions is to comply with age executive orders and law" and further stated, "We have no objection to extending coverage of the labor contract to include those up to age 70. . . ."

Thus, it appears from the record that the local parties, and particularly the union, intended the disputed language to comply with the requirements of law (as reflected in regulations of the CSC), and that the agency would not contest the negotiability of the provisions (as to the aspect of discrimination due to age) if the agreement were so revised. Under these circumstances and consistent with established Council precedent,^{19/} we believe that revision of the literal language of these provisions, by the local parties, is indicated to reflect more precisely their intent. Unless and until the agency then disapproves the provisions as revised, the conditions for Council review, as prescribed by section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure, have not been met.

^{17/} In view of our decision herein, we find it unnecessary to consider the agency's contention as to the negotiability of these portions of the provisions.

^{18/} FPM Ltr. 713-39 (July 29, 1977) and FPM Supp. 990-1, Book III, § 713.512.

^{19/} Cf. Local Lodge 2331, IAM&AW and 2750th Air Base Wing, Wright-Patterson Air Force Base, 3 FLRC 587, 589, n. 2 [FLRC No. 75A-40 (Sept. 18, 1975), Report No. 82]. The Council held that further clarification of the union's proposal was indicated so as to reflect more specifically its stated objective (which objective the agency indicated was negotiable), and that unless and until the agency head then determined that such clarified proposal was not negotiable, the conditions for Council review had not been met.

Conclusion as to Question 2: The first sentence of Article 14.1 does not conflict with section 12(b) of the Order. Thus, the agency determination that this sentence is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{20/}

Reasons: The agency's contention that the first sentence of Article 14.1 violates section 12(b) of the Order rests on its interpretation that the language of that sentence establishes the union as "co-employer" with the agency. However, such interpretation is not borne out by the language of the provision itself or its purpose as evidenced in the record before the Council. The plain language is that the parties merely agree to join in cooperative efforts toward the realization of equal employment opportunity in accordance with objectives and principles set forth in applicable laws and regulations. Further, there is absolutely nothing in the record before the Council that indicates any intent on the part of the parties (particularly the union) to establish the union as a "co-employer" with the agency.

Accordingly, based on the foregoing, the Council concludes, contrary to the agency determination, that section 12(b) of the Order does not bar negotiation of the first sentence of Article 14.1.^{21/}

Provision VIII

Article 14.2

When a new part-time Equal Employment Opportunity Counselor is to be selected from among employees of the unit, the Union will be asked to nominate employees of the unit to serve as EEO Counselors. The Director, NPRC will consider the nominations along with nominations obtained from other sources, and will appoint EEO Counselors. The regular term of appointment for EEO Counselors will be two years.

^{20/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the first sentence of Article 14.1. We decide only that, as agreed by the parties at the local level and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{21/} Cf. American Federation of Government Employees, Local 1749 and Laughlin Air Force Base, Texas, FLRC No. 77A-36 (June 29, 1978), Report No. 151, at 2 of Council decision. The Council held an agency proposal outside the union's obligation to bargain under section 11(a) of the Order, but indicated that "cooperative efforts between the union and management to promote productivity, motivation and cost effective operations, and to reduce tension and conflict are, of themselves, totally consistent with the broad purposes of the Order and may be negotiated by the parties."

Agency Determination

The agency head determined that the provision violates the FPM and therefore is not negotiable.^{22/}

Question Here Before the Council

The question is whether the provision conflicts with the FPM and thus is rendered nonnegotiable.

Opinion

Conclusion: The provision does not conflict with the FPM. Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{23/}

Reasons: The agency contends that the provision at issue here requires that EEO counselors be selected from the bargaining unit, and thus the provision conflicts with FPM Letter 713-29 (Sept. 12, 1974).^{24/} The

^{22/} The agency also determined that the provision violated an agency regulation relating to the authority of the Director of the National Personnel Records Center to appoint EEO counselors. The union requested an exception to the regulation which was granted.

^{23/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based upon the record before the Council, the provision was properly subject to negotiation by the parties.

^{24/} The agency specifically cites FPM Ltr. 713-29, part II, B5(a)(1) and (2) (Sept. 12, 1974), which provides:

- (1) The selection of counselors is a responsibility of management. Nominations for prospective counselors may come from unions, employees, union-management committees or EEO committees as well as other sources.
- (2) Union membership or inclusion in an exclusive bargaining unit are not valid reasons for non-selection. Since counselors serve all employees (i.e. regardless of bargaining unit status) every effort should be made to have as broad a representation as possible, without limiting selections to the unit of recognition. Furthermore, since a counselor serves as a bridge

agency's explanation of the meaning and effect of the provision, however, is not borne out by the plain language of the provision itself. The provision in no way requires that EEO counselors be selected from the bargaining unit. Rather, the provision only requires that after a decision has been made to select a "new part-time Equal Employment Opportunity Counselor from among employees in the unit," then the "union will be asked to nominate Employees of the unit to serve as EEO Counselors." The provision further provides that such nominations by the union will be considered by the Director of the National Personnel Records Center, together with nominations from other sources and the Director will then appoint the EEO counselors from among all of the nominees. Nowhere in the language of the provision or in the record before the Council is there any indication that the selecting authority (the Director) may be required by the union to make the initial determination that such EEO counselors will be selected from members of the bargaining unit. Nor is there any indication that, when such a decision is made, the selecting authority would be required to choose the union's nominee. Thus, the agency's contention that the provision conflicts with FPM Letter 713-29 is based upon a misinterpretation of the provision itself. Accordingly, we find the agency's contention to be without merit and set aside the agency's determination of nonnegotiability since there is no apparent conflict between the plain language of the provision itself and FPM Letter 713-29 (see note 24, supra).

Provision IX

Article 16.3

The Council shall meet at the call of the chairman and not less than once each quarter.

Agency Determination

The agency head determined that the provision is nonnegotiable on the ground that it conflicts with agency regulations^{25/} for which a "compelling need" exists under section 11(a) of the Order.

(Continued)

between the complainant and management in resolution of problems, rather than as a chosen or designated representative of the employee, and since a counselor may need access to otherwise restricted information in order to function effectively, care should be taken to avoid conflicts of interest such as prescribed by Section 1(b) of Executive Order 11491, as amended.

^{25/} The agency cites PBS P5900.2, ch. 2-4c, which provided at the time of the section 15 review and all of the time during negotiations:

Question Here Before the Council

The question is whether the provision is rendered nonnegotiable by agency regulations.

Opinion

Conclusion: The agency failed to establish the applicability of its regulations as a bar to negotiation of the provision. Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{26/}

Reasons: The agency contends that the provision conflicts with agency regulations regarding the frequency of meetings of the Field Accident and Fire Prevention Council.^{27/} Specifically, the agency claims that the provision violates agency regulations requiring meetings of such councils to be held monthly,^{28/} by requiring that council meetings be held quarterly. In our view, the agency's contention is without merit. The provision at issue, by its plain language, does not limit the number of such council meetings to one time per quarter; rather it merely requires that there be at least one meeting per quarter. Obviously, compliance

(Continued)

Each Field Protection Council shall meet at the call of the Chairman and not less than once each month.

The regulation was revised, effective December 5, 1977, to read:

The Council shall meet monthly and at such other times as the chairperson may deem necessary.

^{26/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{27/} According to the record before the Council, the term "Council" in the provision refers to the Field Accident and Fire Prevention Council, a committee at the activity concerned with safety and health matters at the activity. See generally, Safety and Health Provisions for Federal Employees, 29 C.F.R. § 1960.17 (1977) and PBS P5900.2 CHGE 18, ch. 2-4c(1) for the purpose and functions of such committees.

^{28/} See note 25, supra.

with the agency's regulation, as interpreted by the agency, would more than satisfy the requirement of the provision. Further, since the requirement in the provision is cast in terms of the minimum number of meetings of the Council and no reference as to the maximum number of such meetings, there is nothing in the provision that would interfere in any way with compliance with the regulatory requirement for monthly meetings. Thus, the agency has clearly misinterpreted the provision and we therefore hold, consistent with controlling Council precedent, that the agency has failed to establish the applicability of its regulations as a bar to negotiation of the provision under section 11(a) of the Order.^{29/}

Provision X

Article 16.5

The period for initiation of corrective action to abate a reported health and safety hazard which can be corrected by Assistant Director for Civilian Records will normally be three (3) work days. Should additional time be required, the Employer will notify the Union.

Agency Determination

The agency determined the provision to be nonnegotiable on the grounds that it conflicts with its own regulations^{30/} and regulations of the Department of Labor.^{31/}

^{29/} See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, R.I., 5 FLRC 279, 280-82 [FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 3 of Council decision]. As the provision is not shown to violate agency regulations, we do not pass upon the compelling need for such regulations.

^{30/} The agency cites PBS P5900.2, para. 4-16, Accident and Fire Prevention-General, which provides in relevant part:

. . . [U]pon identification of an unsafe or unhealthful condition, corrective action shall be initiated.

^{31/} The agency cites Safety and Health Provisions for Federal Employees, 29 C.F.R. § 1960.32 (1977), which provides in relevant part:

. . . The official in charge of the establishment, or a person empowered to act for him in his absence, should undertake

(Continued)

Question Here Before the Council

The question is whether the provision is rendered nonnegotiable by the agency's regulations and/or regulations of the Department of Labor.

Opinion

Conclusion: The agency has failed to establish the applicability of its regulations as a bar to negotiation. Likewise, the agency has failed to demonstrate that the disputed provision violates regulations of the Department of Labor. Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{32/}

Reasons: In his determination, noted above, the agency head states in substance that the instant provision was disapproved because it "does not mandate the immediate abatement of an imminent danger, once discovered." The agency's characterization of the provision, as indicated initially in the agency head determination and further in its statement of position, appears to be based on its interpretation that the provision would preclude the agency from initiating any corrective measures to abate a safety or health hazard immediately upon its determination that such hazard exists. However, we do not find such a characterization borne out by the language of the provision. The plain language of the provision merely establishes an upper limit of time (3 days) during which the agency may initiate "corrective action to abate a reported health and safety hazard" and the requirement that the employer notify the union should any additional time be needed. Nowhere in the language of the provision itself or in the record before the Council is there any indication of any limitation or intent to limit the agency in taking immediate action to abate a safety and/or health hazard upon its identification.

Accordingly, in view of the erroneous characterization by the agency of the provision, and under the circumstances of this case, the agency has

(Continued)

immediate abatement and the withdrawal of employees not necessary for abatement of the dangerous conditions.

^{32/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

failed to demonstrate that the disputed provision, as properly interpreted, violates either the agency's regulations or regulations of the Department of Labor.^{33/}

Provision XI

Article 16.8

Should temperature and humidity in any regular work area reach any of the combinations set forth below, employees will be relieved from duty in the affected area(s):

- Temperature 93 degrees Fahrenheit - 62% or higher humidity
- Temperature 94 degrees Fahrenheit - 59% or higher humidity
- Temperature 95 degrees Fahrenheit - 55% or higher humidity
- Temperature 96 degrees Fahrenheit - 52% or higher humidity

Agency Determination

The agency head determined the provision to be nonnegotiable on the ground that it violates the FPM and agency regulations which establish the conditions for hot-weather dismissal.

Questions Here Before the Council

Question 1:

The question is whether the provision violates the FPM^{34/} and therefore is nonnegotiable.

33/ See Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20, 3 FLRC 636, 643-45 [FLRC No. 75A-13 (Oct. 3, 1975), Report No. 85].

34/ FPM Supp. 990-2, Book 610, Appendix B.

Question 2:

The question is whether a "compelling need" exists, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules for the GSA regulation ^{35/} asserted as a bar to negotiation of this provision.

Opinion

Conclusion as to Question 1: The provision does not violate the FPM. Accordingly, the agency's determination that the provision is nonnegotiable on this ground was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including the FPM, that agency was requested, in accordance with Council practice, to interpret Commission directives as they pertain to this provision. The Commission responded, in pertinent part, as follows:

The Civil Service Commission has no authority to regulate in the area of excused absence. Federal Personnel Manual Supplement 990-2, Book 610, Appendix B contains the only Federal policy on the subject of hot weather dismissals. While this policy was designed to promote uniformity in the exercise of agency discretion in these matters, it applies only to the Washington, D.C. metropolitan area and agency compliance is not required. Hence, although the union proposal would establish a more lenient policy than that in Appendix B, and therefore is in conflict with it, the policy as expressed in the appendix would not serve as a bar to negotiation of the proposal.

Agency heads have general authority to decide questions of excused absence. . . .

Based on the foregoing interpretation of the Civil Service Commission of its own directives, we find that the disputed provision does not conflict with the FPM.

Conclusion as to Question 2: No "compelling need" exists, under section 11(a) of the Order and Part 2413 of the Council's rules, for the GSA regulation relied on to bar negotiation of the disputed provision.

^{35/} GSA Time and Leave Administration Handbook, OADP 6010.4, ch. 9-7.

Accordingly, the agency's determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{36/}

Reasons: Although the agency determined the instant provision nonnegotiable on the ground that it violates an agency regulation and refused to grant an exception, properly requested by the union to the regulation so asserted, the agency advances no argument whatsoever in support of its position that a "compelling need" exists for such regulation.^{37/} Thus, under these circumstances, where the agency does not assert any argument in support of its position and the "compelling need" for the regulation is not otherwise apparent, we must find that no "compelling need" exists for the regulation to bar negotiation of the provision at issue.^{38/} Accordingly, the agency head's disapproval of the provision cannot be sustained.

36/ This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only, as agreed upon by the parties at the local level and based upon the record before the Council, the provision was properly subject to negotiation by the parties.

37/ Section 11(a) of the Order provides:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision. . . . [Emphasis supplied.]

See Labor-Management Relations in the Federal Service (1975), at 37-40 and Rules and Regulations of the Federal Labor Relations Council, 5 C.F.R. Part 2413 (1978).

38/ See National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith); and National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard, FLRC No. 76A-75 (and other cases consolidated therewith) 5 FLRC 336, 338 [(May 18, 1977), Report No. 125] (statement denying requests of reconsideration and stay of enforcement).

Provision XII

Article 24.3

Court Leave: Court leave is an authorized absence from duty, without charge to leave or loss of pay, for jury duty, or for attending judicial proceedings in a nonofficial capacity as a witness on behalf of a state or local government. All employees, except intermittent employees, are entitled to court leave for jury duty and witness service. The Employer will administer court leave in accordance with the Civil Service Commission and General Services Administration regulations.

Agency Determination

The agency head determined that the provision conflicts with the FPM^{39/} and is therefore nonnegotiable.

Question Here Before the Council

The question is whether the provision conflicts with the FPM and is therefore nonnegotiable.

Opinion

Conclusion: The provision does not conflict with the FPM. Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{40/}

Reasons: In our opinion, it is clear that the agency's contention that the provision is nonnegotiable because it conflicts with the FPM is without merit. The agency's objection to the provision appears to be that the language in the first two sentences of the provision does not "track"

^{39/} The agency head refers to FPM Ltr. 630-25 (Aug. 20, 1976).

^{40/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

language found in FPM Letter 630-25 (Aug. 20, 1976),^{41/} and thereby, in some unexplained manner, limits the circumstances under which a member of the bargaining unit would receive court leave. However, there is nothing in the provision itself or in the record before the Council that indicates that the parties to the agreement had any intent to so limit the receipt of court leave. Indeed, the plain language of the provision itself requires that "the Employer administer court leave in accordance with the Civil Service Commission['s] . . . regulations."^{42/} Thus, in view of the agency's erroneous characterization of the provision, the agency has failed to demonstrate that the disputed provision, as properly interpreted, violates regulations of the Civil Service Commission.

Provision XIII

Article 33.4b(7)

After a discussion as described in a., above, the supervisor shall issue a letter of warning of unsatisfactory performance unless the supervisor believes, as a result of the discussion, that the employee's performance will improve to a level of adequacy. Normally, the letter of warning should be signed within sixty (60) workdays after the discussion and it must:

Be delivered to the employee and/or employee representative and delivery certified by signature of the employee or of a witness to delivery on a duplicate copy of the letter.

Agency Determination

The agency head determined that the provision violates the Privacy Act and the FPM^{43/} and therefore is nonnegotiable.

^{41/} The agency specifically refers to that portion of FPM Ltr. 630-2 (Aug. 20, 1976), which provides:

By Public Law 94-310, June 15, 1976, the provisions of section 6322 of title 5, United States Code, are amended, effective October 1, 1976, to grant court leave to employees who appear as witnesses in a nonofficial capacity on behalf of a private party in connection with any judicial proceeding to which the United States, the District of Columbia, or a State or local government is a party.

^{42/} See generally, FPM Supplement 990-2, Book 630, S10-4, FPM Chapter 630, subch. 10 and FPM Ltr. 630-25 (Aug. 20, 1976).

^{43/} The agency refers specifically to FPM Ltr. 711-126 (Dec. 30, 1976), "Guidance for Agencies in Disclosing Information, Covered Under the Freedom of Information Act and the Privacy Act, to Labor Organizations Recognized Under Executive Orders 11636 and 11491, as Amended."

Question Here Before the Council

Whether the provision violates the Privacy Act of 1974 or the FPM and is thereby rendered nonnegotiable.

Opinion

Conclusion: The agency misinterpreted the disputed provision and failed to demonstrate that the disputed provision violates the FPM. Likewise, the agency failed to demonstrate that the subject provision violates the Privacy Act. Thus, the agency determination that the provision is non-negotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{44/}

Reasons: The agency contends that the provision requires the unauthorized delivery of sensitive information about an individual employee to the labor organization in violation of both the Privacy Act and the FPM. In our view, the agency's contention is based upon an erroneous interpretation of the provision and is therefore without merit.

The provision requires delivery of a "letter of warning" to the employee and/or his or her employee representative, and it is clear from the plain language and context of this provision that the phrase "employee representative" means representative designated by the employee. Thus, such delivery to a representative designated by the employee would not be "unauthorized so as to violate the Privacy Act or the FPM requirements implementing the Act." Accordingly, since the agency's claim that the provision violates the Privacy Act and the FPM is based on a misinterpretation of the provision, we find that the agency has failed to demonstrate that the provision, as properly interpreted, violates the Privacy Act and the FPM.

Provision XIV

Article 34

Each employee has the right to inspect his/her official personnel folder. The release of information from and access to the official personnel folder of employees shall be in accordance

^{44/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

with U.S. Civil Service Commission regulations and applicable statutory provisions.

Agency Determination

The agency head determined that the provision is nonnegotiable on the ground that it violates the Privacy Act.^{45/}

Question Here Before the Council

The question is whether the provision is barred from negotiation by reason of agency regulations or the Privacy Act.

Opinion

Conclusion: The agency failed to establish the applicability of its regulations as a bar to negotiation. Likewise, the agency failed to demonstrate that the provision violates the Privacy Act. Thus, the agency determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is hereby set aside.^{46/}

Reasons: The agency claims that the instant provision violates the Privacy Act and agency regulations, in essence, repeating the arguments it made with respects to Provisions I - II (see text 1-5, supra). The provision itself specifies that each employee may have access to any information from his/her official personnel folder in accordance with applicable statutory provisions and Civil Service Commission regulations. Official personnel folders of all Federal employees in positions subject to the Civil Service rules and regulations are under the jurisdiction and control of, and part of the records of the Civil Service Commission.^{47/}

^{45/} The agency subsequently asserted, in its statement of position, that the provision is barred from negotiation by agency regulations.

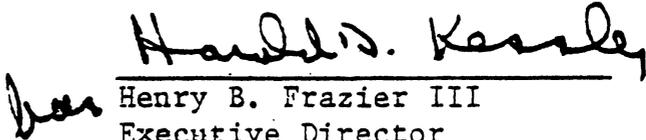
^{46/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provision. We decide only that, as agreed upon by the parties at the local level and based upon the record before the Council, the provision is properly subject to negotiation by the parties.

^{47/} CSC Personnel Records and Files, 5 C.F.R. § 293.203 (1978).

Thus, the discussion and analysis with regard to Provisions I - II, supra, concerning general personnel records maintained by the agency pursuant to CSC requirement, are applicable to this disputed provision.

Accordingly, based on the discussion and analysis with regard to Provisions I - II, supra, we find that the agency has failed to demonstrate the applicability of its regulations^{48/} as a bar to negotiation of the instant provision under section 11(a) of the Order and further that the agency has failed to support its contention that the provision as properly interpreted violates the Privacy Act.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 29, 1978

48/ See GSA Regulations Implementing the Privacy Act of 1974, 41 C.F.R. § 105-64.102(b) (1978), which provides in relevant part:

(b) Current records of other agencies.

. . . Records in the custody of GSA which are the primary responsibility of the U.S. Civil Service Commission are governed by the rules of the Commission promulgated pursuant to the Privacy Act.

General Services Administration, Region 3 and American Federation of Government Employees, Local 2151, AFL-CIO (Ables, Arbitrator). The arbitrator found, among other things, that the activity had changed a personnel policy and practice of including WG-10 operating engineers in the distribution of overtime without the discussion and/or negotiation required by the parties' agreement when, after determining that an unsafe condition existed at a particular boiler plant, a foreman limited overtime on shifts without appropriate supervisory personnel to WG-11 operating engineers. In his award, the arbitrator directed that absent a finding by the agency, to be made within a specified period of time pursuant to an investigation by a joint safety committee, that unsafe conditions exist at the plant in question, the agency shall include the WG-10 employees in the distribution of overtime. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated section 11(b) of the Order. The Council also granted the agency's request for a stay. (Report No. 152)

Council action (December 29, 1978). The Council found that the arbitrator's award did not violate section 11(b) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the award and vacated the stay which it had previously granted.

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

General Services Administration,
Region 3

and

FLRC No. 78A-43

American Federation of Government
Employees, Local 2151, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based upon the findings of the arbitrator and the record before the Council, it appears that a new foreman of boiler plant operations at the activity determined that boiler plant conditions there were unsafe and he took certain actions to correct the deficiencies he had noted. Among the actions taken by the foreman was one restricting overtime on the second and third shifts each day when a supervisor or another WG-11 was not on duty to a WG-11 operating engineer.^{1/} Management's reason for this change was that the WG-10 is not fully qualified to work on such shifts in place of an absent WG-11 without either a full-time supervisor or another WG-11 on duty. This difference between the WG-10 and WG-11 positions was reflected in the position description of the WG-10 operating engineer which did not give to WG-10's the same authority to serve in a supervisory capacity as was provided in the WG-11 position description.

Thereafter, a grievance was initiated which asserted, among other things, that overtime was not being "equalized" as required by Article V, Section 1 of the parties' negotiated agreement.^{2/} The grievance was denied by management and ultimately submitted to arbitration. The arbitrator concluded that "[a]s management has continued its policy not to use WG-10 employees on an overtime basis, the union has a justifiable basis to complain about

^{1/} The agency states, and it is uncontroverted by the union, that WG-10 operating engineers still share in overtime work. The difference from the previous practice appears to be that WG-10's are no longer assigned to overtime in place of absent WG-11's on a shift without a supervisor or another WG-11 being present on the same shift.

^{2/} Article V, Section 1 provides in pertinent part:

Overtime assignments will be distributed and rotated equitably among qualified employees in accordance with their particular skills.

violation of the provision of the contract concerning 'Changes in Working Conditions.'"^{3/} In reaching his decision the arbitrator found that "[m]anagement clearly changed a personnel policy and practice without negotiations with the union" in violation of that provision of the agreement.

Thus, as his award, the arbitrator directed:

The agency will have violated the agreement with respect to changing overtime practices without required discussions and/or negotiations with the union if, within two weeks from the date of this arbitration decision, the agency does not make a finding pursuant to an investigation by the joint agency/union safety committee that there are unsafe boiler conditions at the McLean plant. In the absence of such findings the agency shall include WG-10 operators in the distribution of overtime as being qualified within the meaning of Article V of the contract.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception that the award violates section 11(b) of the Order.^{4/} Briefs were filed by the parties.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

^{3/} In pertinent part, that provision states:

It is agreed that any changes affecting working conditions, personnel policies and practices that are not specifically covered in this Agreement shall not be changed without prior discussions and/or negotiations with the Union.

^{4/} Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council also granted the agency's request for a stay of the award pending determination of the appeal.

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exception that the award violates section 11(b) of the Order.^{5/} In its brief on the merits, the agency refers to that part of the arbitrator's award which provides that "[i]n the absence of [a determination that boiler conditions are unsafe^{6/}] the agency shall include WG-10 operators in the distribution of overtime as being qualified within the meaning of Article V of the contract," and contends, in essence, that the award violates section 11(b) of the Order because it interferes with management's prerogative to determine numbers, types and grades of employees assigned to a work project or tour of duty. To the agency, implementation of the award would mean that WG-10 and WG-11 operating engineers would have to be treated as "functional equivalent[s]," and that each would have to be assigned the "same responsibilities." Additionally, the agency asserts that when an absence of a WG-11 necessitates overtime, the overtime would go "to the next employee on the overtime roster regardless of grade level." According to the agency, the award "would prevent the Activity from assigning WG-11 overtime work to WG-11's" when a WG-10 was next on the overtime roster.

The Council is of the opinion that the agency has misinterpreted the arbitrator's award in this case. The Council does not read the award as in any manner requiring management to assign the same responsibilities to both WG-10's and WG-11's or to require that WG-11 overtime, i.e., supervisory responsibilities in the absence of a supervisor, be assigned to a WG-10. Contrary to the agency's interpretation of the award, we believe the award is only intended to allow WG-10 operating engineers to participate in the distribution of overtime within the meaning of Article V, Section 1 of the parties' agreement which in part specifies that "[o]vertime assignments will be distributed and rotated equitably among qualified employees in accordance with their particular skills." Rather than finding as a "blanket" requirement that all WG-10's are qualified for all WG-11 overtime, the arbitrator found, in essence, that management could not "automatically exclude" the WG-10's from receiving consideration for, and participating in, the distribution of overtime in accordance with the contract provision, i.e., among qualified

^{5/} Section 11(b) of the Order provides, in part:

In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

^{6/} In its petition for review, the agency stated that the required investigation was conducted and that boiler conditions "were found to be operable and safe."

employees based on their particular skills. Thus, in the Council's opinion, the award cannot be read to mean that WG-10 and WG-11 operating engineers are to be treated as "functional equivalent[s]," and that they must be assigned to overtime interchangeably without regard to management's retained prerogatives under section 11(b) of the Order (particularly, in the context of this case, the establishment of "staffing patterns" for overtime), or without regard to the requirements of the contract that overtime be rotated equitably and distributed among "qualified employees in accordance with their particular skills." (Emphasis added.) Thus, under the award, management's right to establish the "staffing patterns" on such overtime shifts is in no way affected.

The Council thus emphasizes that the arbitrator's award in this case in no way prohibits management from establishing staffing patterns consisting only of WG-11 positions, or only of WG-10 positions, or of a mixture of the two, on such shifts. Once such staffing patterns are established, management is then obligated to select personnel for such overtime assignments in accordance with Article V, Section 1 of the negotiated agreement.

Conclusion

For the foregoing reasons, we find that the arbitrator's award does not violate section 11(b) of the Order. Pursuant to section 2411.37(b) of the Council's rules of procedure, we therefore sustain the award and vacate the stay.

By the Council.

For 
Henry B. Frazier III
Executive Director

Issued: December 29, 1978

Department of the Navy, Office of Civilian Personnel, A/SLMR No. 1012.

This appeal arose from a decision of the Assistant Secretary holding that the agency violated section 19(a)(1) and (6) of the Order by failing to provide the National Federation of Federal Employees (the union), which previously had been granted national consultation rights under section 9(b) of the Order, with notice of and an opportunity to comment on a proposed substantive change in personnel policy (i.e., an agencywide proposal for the consolidation of certain support facilities), as well as by failing to provide the union with prior notice of the decision to consolidate and an opportunity to consult on the impact and implementation thereof. The Council accepted the agency's petition for review, having concluded that the Assistant Secretary's decision raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case. (Report No. 152)

Council action (December 29, 1978). For the reasons fully explicated in its decision in FLRC No. 77A-146, reported above, the Council, pursuant to section 2411.18 of its rules of procedure, sustained the Assistant Secretary's decision to the extent he found that the agency violated section 19(a)(1) and (6) by failing to notify the union of its decision to consolidate certain support services and to provide the union with an opportunity to consult about the impact and implementation thereof; set aside the decision to the extent he found that the agency violated section 19(a)(1) and (6) by failing to notify the union of the proposed consolidation and to provide an opportunity to comment thereon; and remanded the case for appropriate action consistent with its decision.

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

Department of the Navy
Office of Civilian Personnel

and

A/SLMR No. 1012
FLRC No. 78A-47

National Federation of
Federal Employees

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary holding that the Department of the Navy, Office of Civilian Personnel (the agency) violated section 19(a)(1) and (6) of the Order by failing to provide the National Federation of Federal Employees (the union), which had previously^{1/} been granted national consultation rights under section 9(b) of the Order, with notice of and an opportunity to comment on a proposed substantive change in personnel policy (i.e., an agencywide proposal for the consolidation of certain support facilities), as well as by failing to notify the union of the proposed change and to afford it an opportunity to consult about the impact and implementation thereof.

1/ Section 9(b) of the Order provides as follows:

When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

According to the Assistant Secretary's decision, based upon undisputed facts as stipulated by the parties, the case arose when the Secretary of the Navy issued a news release proposing a number of management actions directed toward the reduction of overhead and support costs, among which actions was a study of the possible termination of air operations and the consolidation of remaining support facilities at the Naval Air Engineering Center, Lakehurst, New Jersey. Following this news release, the Chief of the Naval Air Systems Command (NASC) issued a memorandum directing the consolidation of the Lakehurst Naval Air Engineering Center with the other two Lakehurst commands, resulting in the displacement of approximately 59 civilian employees. This NASC memorandum, as found by the Assistant Secretary, "was the [union's] first notice of an agency-wide proposal for consolidation of its support facilities as outlined in the Secretary of the Navy's news release" The union thereupon filed an unfair labor practice complaint alleging that the agency violated section 19(a)(1) and (6) of the Order "when its agent, the [NASC], directed the realignment of its field activities at Lakehurst, New Jersey, without prior national consultation with the [union]."

The Assistant Secretary found, contrary to the agency's contention, that the proposal by the Secretary of the Navy to consolidate support activities agencywide was a "substantive change in personnel policy" within the meaning of section 9(b) of the Order and section 2412.1 of the Council's regulations.^{2/} Accordingly, and citing his previous decision in Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, the Council's decision in which (FLRC No. 77A-146) issued this date, the Assistant Secretary held that the agency had violated section 19(a)(1) and (6) of the Order by failing to notify the union of the proposed consolidation, thereby depriving the union of its right under section 9(b) to comment on that proposed change. The Assistant Secretary further held (again citing his decision in Secretary of the Navy, supra) that, although the agency was not obligated to consult with the union about the actual decision to consolidate support services,^{3/} it was nevertheless obligated to consult about the impact and implementation of such decision, and that its failure to provide the union with prior notice of the decision and to afford it an opportunity to so consult also violated section 19(a)(1) and (6) of the

^{2/} Section 2412.1 of the Council's rules (5 C.F.R. 2412.1) provides in pertinent part:

Substantive change in personnel policy means a change in the established rights of employees or labor organizations or the conditions relating to such rights.

^{3/} The Assistant Secretary's finding that the agency was not obligated to consult with the union about the actual decision to consolidate support services is unchallenged and therefore not at issue before the Council.

Order. Accordingly, he issued a remedial order directing the agency to cease and desist from such violations and to post the customary notice to employees.

The agency appealed the Assistant Secretary's decision to the Council. The Council accepted the agency's petition for review, having concluded that the Assistant Secretary's decision raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case. The Council also determined that the agency's request for a stay met the criteria for granting stays set forth in section 2411.47 (e)(2) of the Council's rules and granted the request. Only the union filed a submission on the merits of the case.

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary raised a major policy issue as to the meaning and application of section 9(b) of the Order in the circumstances of this case.

As further noted above, on this date the Council has issued its decision in Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, FLRC No. 77A-146, which presented, in similar circumstances, the identical major policy issue involved in the instant case. In Secretary of the Navy, the Council concluded that the Assistant Secretary had in certain respects misinterpreted and misapplied section 9(b) of the Order in finding that the agency violated section 19(a)(1) and (6) by failing to provide the union with notice of and an opportunity to comment on a proposed change in the agency's contracting out policy, but that his decision was consistent with the Order to the extent that he found the agency in violation of section 19(a)(1) and (6) of the Order for refusing to consult with the union about the impact and implementation of that policy. For the reasons fully explicated by the Council in FLRC No. 77A-146, which are dispositive in the instant case, we similarly sustain the Assistant Secretary's decision herein as consistent with the Order to the extent he found that the agency violated section 19(a)(1) and (6) by failing to notify the union of its decision to consolidate certain support services and to provide the union with an opportunity to consult about the impact and implementation thereof, but set aside his decision to the extent that he found that the agency violated section 19(a)(1) and (6) by failing to notify the union of the proposed consolidation and to provide it the opportunity to comment on such proposed change.

Conclusion

Accordingly, for the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we sustain in part and set aside in

part the Assistant Secretary's decision and order and remand this matter for appropriate action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 29, 1978

National Association of Government Employees, Local R5-66 and Department of the Navy, Navy Exchange, Millington, Tennessee. The dispute involved the negotiability of provisions of the parties' agreement which were disapproved by the agency during review of the agreement under section 15 of the Order. The agency's disapproval of the disputed provisions was served on the union by mail at least 47 days after the agreement was executed.

Council action (December 29, 1978). The Council held that since, under section 15 of the Order, the parties' agreement went into effect prior to the agency's disapproval of certain of its provisions, such subsequent disapproval by the agency raised no dispute concerning the terms of such agreement which was cognizable under section 11(c)(4) of the Order. Accordingly, as the union's petition for review failed to meet the conditions for review set forth in section 11(c)(4) of the Order, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Stanley Q. Lyman
Executive Vice President
National Association of Government Employees
2139 Wisconsin Avenue, NW.
Washington, D.C. 20007

Re: National Association of Government
Employees, Local R5-66 and Department
of the Navy, Navy Exchange,
Millington, Tennessee, FLRC No. 78A-92

Dear Mr. Lyman:

The Council has carefully considered your petition for review of a negotiability dispute, as supplemented, and the agency's statement of position, as also supplemented, in the above-entitled case.

The essential facts in this case, as indicated in the above-mentioned submissions to the Council, are that on April 20, 1978, the local parties' negotiated agreement was submitted to the agency for review and approval in accordance with section 15 of the Order; and that by letter of June 6, 1978, the agency notified the union, in effect, that it had disapproved a number of provisions of that agreement. Thus, it appears that the agreement was executed by the local parties on or before April 20, 1978, and the agency's disapproval was served on the union by mail on June 6, 1978, or at least 47 days after the agreement was executed.

Section 15 of the Order provides in pertinent part:

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. . . .

Thus, under section 15 of the Order, an agreement which has not been approved or disapproved by the agency involved within 45 days after its execution becomes effective and binding on the parties on the 46th day, without the approval of the agency, subject only to the requirements of law, the Order, and regulations of appropriate authorities outside the agency.

In this case, as previously indicated, the parties' negotiated agreement was executed and submitted for agency review and approval on or before April 20, 1978. However, the agency's disapproval was not served on the union until June 6, 1978, or at least 47 days after the agreement was executed and submitted for approval. Therefore, under section 15 of the Order, the parties' agreement went into effect no later than June 5, 1978, and is binding on the parties, subject only to the requirements of law, the Order and regulations of appropriate authorities outside the agency.

Consequently, since the entire agreement, as negotiated and executed by the parties, became effective no later than June 5, 1978, the agency's subsequent disapproval raises no dispute concerning the terms of such agreement which is cognizable under section 11(c)(4) of the Order.

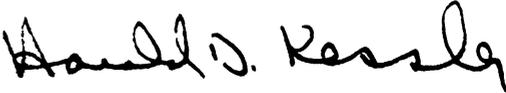
Our conclusion that the propriety of the agency's disapproval of a number of the agreement provisions is not cognizable in the present proceeding does not, of course, mean that any provisions in the agreement which are contrary to law, the Order, or regulation of appropriate authority outside the agency are thereby enforceable. Rather, a question as to the validity of such provisions may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provisions are there found to be violative of law, the Order, or regulation of appropriate authority outside the agency, they would not be enforceable. As stated in this regard in the Report which led to the amendment of E.O. 114' (Labor-Management Relations in the Federal Service (1975) at 45):

Where an agency fails to act within 45 days from the date of execution of an agreement, with the agreement then going into effect automatically and a particular provision of the agreement is subsequently found to be violative of law, the Order, or regulation of appropriate authority outside the agency, the provision would be deemed void and unenforceable

Accordingly, since your petition fails to meet the conditions for review set forth in section 11(c)(4) of the Order, pursuant to section 2411.22 of the Council's rules, your petition for review is hereby denied.

By the Council.

Sincerely,


for Henry B. Frazier III
Executive Director

National Treasury Employees Union, Chapter 49 and Internal Revenue Service, Indianapolis District. The dispute involved the negotiability of provisions of the parties' agreement disapproved by the agency during review of the agreement under section 15 of the Order. The disputed provisions related to (1) retention of position descriptions; (2) assignment of workloads; and (3) procedures for reassigning cases.

Council action (December 29, 1978). As to (1) and (3), the Council held that the provisions did not violate section 12(b) of the Order. As to (2), the Council held that the provision violated the agency's section 12(b)(1) right to direct employees. Accordingly, pursuant to section 2411.28 of its rules, the Council set aside the agency's determination as to the non-negotiability of (1) and (3), and sustained the agency's determination as to the nonnegotiability of (2).

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

National Treasury Employees Union,
Chapter 49

(Union)

and

FLRC No. 78A-100

Internal Revenue Service,
Indianapolis District

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Background of Case

In September 1977 the Internal Revenue Service combined the positions of Revenue Representative and Office Collection Representative. NTEU Chapter 49 negotiated a local agreement with the Indianapolis District concerning the impact of this change. The agency head took the position during the section 15 review process that three provisions of the agreement violate section 12(b) of the Order.

Provision I

ARTICLE 3 - AGREEMENT

Section A

Those employees in the Indianapolis District who entered into the Revenue Representative position and were assigned IRS SPD No. 454N dated June 24, 1973, will retain that position description, together with an appropriate addendum to be drafted and attached thereto (the whole of which will be given a new district number as is required) until such time as they are promoted or transfer to a different position than that presently held or until such time as it no longer accurately reflects the duties being performed.

Agency Determination

The agency head determined that the provision is nonnegotiable on the ground that it violates section 12(b) of the Order because it would restrict management's right to change the subject job description to reflect any duties which it wishes to assign to an employee.

Question Here Before the Council

The question is whether the provision violates section 12(b) of the Order.^{1/}

Opinion

Conclusion: The provision is not violative of section 12(b) of the Order. Thus, the agency's determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{2/}

1/ Section 12(b) of the Order provides:

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

-
- (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
 - (1) to direct employees of the agency;
 - (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
 - (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
 - (4) to maintain the efficiency of the Government operations entrusted to them;
 - (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
 - (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency

2/ This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions involved herein. We decide only that, based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

Reasons: The agency contends in essence that the disputed provision would prevent management from changing the duties assigned to the Revenue Representative position and from modifying the position description to reflect such changes. We disagree that the provision would have the effect which the agency claims. Rather, in our view, the provision restricts neither the assignment of duties to employees or positions nor the modification of the position description to reflect such assignments. Instead, it deals with the accuracy of the position description. The provision merely requires that bargaining unit employees in the Revenue Representative position will retain their current position description (plus an addendum) until such time as the employee either no longer occupies the position or until the duties being performed by the employee are no longer accurately reflected in the position description. Thus, management's right to change the duties of the position at any time and to alter the position description to reflect those changes is in no way affected. Such a requirement as that reflected in the provision at issue does not violate any rights reserved to management under section 12(b) of the Order^{3/} and the agency determination to the contrary is set aside.^{4/}

Provision II

Section F

Management agrees that they will use IRM 5200 which relates to Revenue Representatives' field procedures as a guideline as long as it is in effect and that Revenue Representatives on field duty will be assigned only manageable inventory work loads. Management further agrees to give proper consideration and make proper allowances when incompleting case assignments are the result of an interruption of a tour of duty in the field or an oppressive case inventory or for other reasons beyond the direct control of the affected employees. [Only the underscored portion is in dispute.]

3/ See, e.g., Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy, 2 FLRC 55 [FLRC No. 73A-21 (Jan. 31, 1974), Report No. 48].

4/ We note that even if the provision were construed as prescribing job content of the employees involved, section 12(b) would be inapplicable under the Council's decision in International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 27, 1973), Report No. 36]. In that case we held that "job content" is excepted from the obligation to bargain by section 11(b) of the Order. See Griffiss at 329-332. In this connection we note further that section 11(b) cannot be relied upon in the section 15 review process to render nonnegotiable provisions of an agreement reached, as in the present case, between a labor organization and representatives of management at the local level. See, e.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, 3 FLRC 396 [FLRC No. 74A-48 (June 26, 1975), Report No. 75].

Agency Determination

The agency head determined that the provision interferes with management's retained right under section 12(b) of the Order to assign the types and amounts of work to be done by the employee.

Question Here Before the Council

The question is whether the underscored portion of the provision violates section 12(b) of the Order.

Opinion

Conclusion: The provision violates management's right to direct employees under section 12(b)(1) of the Order. Thus, the agency head's determination that the disputed provision is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is sustained.

Reasons: Section 12(b)(1) of the Order provides that management retains the right to "direct employees of the agency."

The mandatory nature of the reservation of 12(b) rights was underscored in the VA Research Hospital case^{5/} where, in interpreting and applying section 12(b)(2), the Council stated:

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

Although the decision in the VA Research Hospital case dealt only with interpretation and application of section 12(b)(2), the reasoning of that decision as reflected in the quoted language above is equally applicable to section 12(b)(1).

The disputed provision in the present case clearly is concerned with the types and amounts of work which management will direct employees to perform. It expressly requires, in that regard, that employees only will be directed to perform workloads which are "manageable." It thereby, in effect, prohibits management from directing an employee to perform a type and amount of work which would render the employee's workload "unmanageable" as a consequence. Thus, the provision (without any regard for potentially

5/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

significant external variable factors such as personnel ceilings, office workload, or time limits involving statutes of limitation in the Internal Revenue Code) would permit management to direct an employee to perform a type and quantity of work which management has determined is necessary to accomplish the agency's mission only if the work involved would be "manageable" by the particular employee. In our opinion, such a substantive limitation upon management's right to direct employees by assigning to them such work as needs to be performed to accomplish the agency's mission is violative of section 12(b)(1) of the Order.^{6/} Hence, the provision is nonnegotiable.^{7/}

Provision III

Section G

When a Revenue Representative's field duty tour is interrupted for any significant period of time, their unresolved or incompleted cases may be 1) assigned to a Revenue Officer for further action; 2) assigned to another Revenue Representative in the field; or 3) returned to the office for further processing or reassignment.

6/ The impact of the quantity of work assigned on the performance evaluation of individual employees is, of course, negotiable. See, Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 3 FLRC 635 [FLRC No. 75A-13 (Oct. 3, 1975), Report No. 85], wherein the Council said, at 641:

Thus, the Council finds that the provisions of the proposal in question neither purport by their language to limit, nor are intended to limit, the amount or type of work which management might assign to individual examiners or examining groups. Likewise, neither the language nor intent of the provisions prescribe how such work will be distributed by management among those individuals or groups which management determines are available to perform it. Further, the provisions do not by their language or intent relate in any way to management's determination of the methods or means by which its directions and the operations of the agency will be carried out. Rather, the provisions are concerned with production expectations insofar as they may ultimately relate to the performance evaluation of individual examiners, i.e., the individual's prospects for being favorably evaluated in relation to his assigned production goal.

7/ The union asserts in its appeal that the provision in question reflects existing agency policy and the controlling labor agreement. The Council consistently has held, however, that it is without controlling significance even if, as claimed by the union, the proposal mirrors a published agency policy by means of which the agency has exercised a right reserved to it under section 12(b) of the Order, or may have been contained in prior agreements between the parties. See, e.g., National Treasury Employees Union and Internal Revenue Service, 5 FLRC 848 [FLRC No. 77A-12 (Aug. 31, 1977), Report No. 137], at n. 4.

Agency Determination

The agency head determined that the provision violates section 12(b) because it seeks to define where and to whom management may assign work.

Question Here Before the Council

The question is whether the provision violates section 12(b) of the Order.

Opinion

Conclusion: The provision is not violative of section 12(b). Thus, the agency's determination that the provision is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{8/}

Reasons: The agency's contention that this disputed provision violates section 12(b) of the Order rests upon its interpretation that the provision requires the agency to relieve a Revenue Representative of his assigned cases when his field duty tour is interrupted for any significant period of time. Such interpretation, however, is not borne out by the plain language of the provision, in our opinion. As ordinarily understood, the language of the provision is not mandatory. Rather, it presents alternatives that management "may," but is not required, to follow. This plain meaning of the provision is further supported by the union's explanation in the record before us (not contradicted by the local parties) as to the intent of the local parties regarding the meaning of the provision. In this connection, the union states that the provision "merely suggests a number of alternatives that management may follow . . ." which alternatives "are merely suggestions and do not exhaust the options management has at its disposal" Further, in this connection, the union states that the third option "allows management unlimited authority to assign cases to whomever it chooses."

Thus, both the ordinary meaning of the language of the provision, on its face, as well as the intent of such language indicate that the provision would not restrict management's authority to take any action which it deems proper with respect to those cases assigned to a Revenue Representative which are pending when such employee's field tour of duty is interrupted for any significant period of time and we so interpret the provision for the purpose of this decision. Hence, under the provision the agency retains complete freedom to reassign a case, return such case to the office for further processing, including holding the case in abeyance pending the return to field duty of the employee to whom the case was assigned so that

^{8/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions involved herein. We decide only that, based on the record before the Council, the provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

such employee can complete the case, or take whatever other action with respect to such case management deems to be in the best interests of the agency.

Accordingly, based on the foregoing, the Council concludes, contrary to the agency determination, that section 12(b) of the Order does not bar negotiation of the disputed provision.

By the Council.

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

Issued: December 29, 1978

FLRC No. 78A-76

National Treasury Employees Union, Chapter 6 and Internal Revenue Service,
New Orleans District Office;

FLRC No. 78A-96

National Federation of Federal Employees, Local 1514 and Department of
the Interior, Bureau of Indian Affairs, Phoenix Indian High School, Phoenix
Arizona;

FLRC No. 78A-119

American Federation of Government Employees, AFL-CIO, Local 2116 and U.S.
Merchant Marine Academy, Kings Point, New York;

FLRC No. 78A-133

National Treasury Employees Union and NTEU Chapter 098 and Internal Revenue
Service and IRS, Memphis Service Center;

FLRC No. 78A-144

National Treasury Employees Union Chapters 137 and 146 and U.S. Customs
Service, Region IV;

FLRC No. 78A-159

National Federation of Federal Employees, Local 15 and U.S. Army Armaments
Materiel Readiness Command, Rock Island, Illinois;

FLRC No. 78A-163

American Federation of Government Employees, AFL-CIO, Local 3407 and Defense
Mapping Agency Hydrographic Center;

FLRC No. 78A-164

National Treasury Employees Union, Chapters 103 and 111 and U.S. Customs
Service, Region VII;

FLRC No. 78A-168

National Treasury Employees Union and NTEU Buffalo District Joint Council and Internal Revenue Service, Buffalo District;

FLRC No. 78A-169

National Treasury Employees Union and NTEU Chapter 49 and Internal Revenue Service, Manhattan District;

FLRC No. 78A-170

National Treasury Employees Union and NTEU Chapter 54 and Internal Revenue Service, Providence District;

FLRC No. 78A-171

National Treasury Employees Union and NTEU Chapter 61 and Internal Revenue Service, Albany District;

FLRC No. 78A-178

American Federation of Government Employees, AFL-CIO, National Council of Social Security Payment Locals and Department of Health, Education, and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance;

FLRC No. 78A-179

American Federation of Government Employees, AFL-CIO, International Council of USMS Locals and Department of Justice, U.S. Marshals Service;

FLRC No. 78A-180

American Federation of Government Employees, AFL-CIO, Local 1581 and Department of Health, Education, and Welfare, Social Security Administration, Downtown District Office, Portland, Oregon;

FLRC No. 78A-182

National Treasury Employees Union and Internal Revenue Service; and

National Treasury Employees Union and Internal Revenue Service.

Each of the above disputes involved the negotiability of union proposals under the provisions of E.O. 11491, as amended.

Council actions (December 28 and 29, 1978). The Council held in each of the cases that, particularly in view of the imminent effective date of the Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191), the applicability of which the parties did not address in their pleadings, no useful purpose would be served by further processing of the case. Accordingly, the Council dismissed the unions' petitions for review as in effect moot, without passing upon the merits of the appeals and without prejudice to the submission of the disputes to the Federal Labor Relations Authority in conformity with the provisions of the new statute and the regulations of the Authority issued thereunder.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Henry H. Robinson
Associate General Counsel
National Treasury Employees Union
300 East Huntland Drive, Suite 104
Austin, Texas 78752

Re: National Treasury Employees Union,
Chapter 6 and Internal Revenue Service,
New Orleans District Office,
FLRC No. 78A-76

Dear Mr. Robinson:

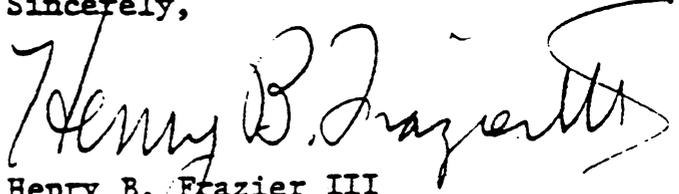
Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: D. N. Reda
IRS

M. A. Simms
Treasury



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: National Federation of Federal Employees,
Local 1514 and Department of the Interior,
Bureau of Indian Affairs, Phoenix Indian
High School, Phoenix, Arizona,
FLRC No. 78A-96

Dear Mr. Englehart:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: J. F. McKune
Interior



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, Local 2116 and
U.S. Merchant Marine Academy, Kings
Point, New York, FLRC No. 78A-119

Dear Mr. King:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

for Henry B. Frazier III
Executive Director

cc: J. M. Golden
Commerce



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Ms. Joyce F. Glucksman
Assistant Counsel
National Treasury Employees Union
3445 Peachtree Road, NE., Suite 930
Atlanta, Georgia 30326

Re: National Treasury Employees Union and
NTEU Chapter 098 and Internal Revenue
Service and IRS, Memphis Service Center,
FLRC No. 78A-133

Dear Ms. Glucksman:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: M. S. Sussman
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Lawrence K.G. Poole
Assistant Counsel
National Treasury Employees Union
3445 Peachtree Road, N.E., Suite 930
Atlanta, Georgia 30326

Re: National Treasury Employees Union
Chapters 137 and 146 and U.S. Customs
Service, Region IV, FLRC No. 78A-144

Dear Mr. Poole:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: M. A. Simms
Treasury



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Robert J. Englehart
Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: National Federation of Federal
Employees, Local 15 and U.S. Army
Armaments Materiel Readiness Command,
Rock Island, Illinois, FLRC No. 78A-159

Dear Mr. Englehart:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: W. C. Valdes
Army



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

Ms. Mary Lynn Walker
Acting Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

December 28, 1978

Re: American Federation of Government
Employees, AFL-CIO, Local 3407 and
Defense Mapping Agency Hydrographic
Center, FLRC No. 78A-163

Dear Ms. Walker:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: C. Clewlow
DOD



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Mike Gaide
National Field Representative
National Treasury Employees Union
209 Post Street, Suite 11112
San Francisco, California 94108

Re: National Treasury Employees Union,
Chapters 103 and 111 and U.S. Customs
Service, Region VII, FLRC No. 78A-164

Dear Mr. Gaide:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: G. Spinks
Customs



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Kenneth A. Davis
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
NTEU Buffalo District Joint Council and
Internal Revenue Service, Buffalo District,
FLRC No. 78A-168

Dear Mr. Davis:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

A handwritten signature in cursive script, reading "Henry B. Frazier III".
Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Kenneth A. Davis
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
NTEU Chapter 49 and Internal Revenue
Service, Manhattan District,
FLRC No. 78A-169

Dear Mr. Davis:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

for Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Kenneth A. Davis
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
NTEU Chapter 54 and Internal Revenue
Service, Providence District,
FLRC No. 78A-170

Dear Mr. Davis:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III".

for Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Kenneth A. Davis
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
NTEU Chapter 61 and Internal Revenue
Service, Albany District,
FLRC No. 78A-171

Dear Mr. Davis:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, National Council of
Social Security Payment Locals and
Department of Health, Education, and
Welfare, Social Security Administration,
Bureau of Retirement and Survivors
Insurance, FLRC No. 78A-178

Dear Mr. King:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. Hacker



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, International Council
of USMS Locals and Department of Justice,
U.S. Marshals Service, FLRC No. 78A-179

Dear Mr. King:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A. Ross
Justice



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Ms. Mary Lynn Walker
Acting Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, Local 1581 and
Department of Health, Education, and
Welfare, Social Security Administration,
Downtown District Office, Portland,
Oregon, FLRC No. 78A-180

Dear Ms. Walker:

Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. Hacker



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Robert M. Tobias
General Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and
Internal Revenue Service, FLRC No. 78A-182

Dear Mr. Tobias:

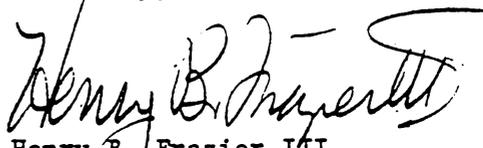
Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1978

Mr. Robert M. Tobias
General Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union
and Internal Revenue Service,
FLRC No. 78A-186

Dear Mr. Tobias:

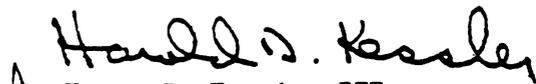
Reference is made to your petition for review of a negotiability determination by the agency, and the agency's statement of position with respect to your petition, in the above-entitled case.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposal(s) under the provisions of E.O. 11491, as amended. However, on January 11, 1979, the new Federal Labor-Management Relations Statute (Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1191) will become effective. The agency, in its determination, did not address the applicability of the new Statute to the disputed proposal(s). Likewise, neither the union, nor the agency, considered the applicability of the new law to the disputed proposal(s) in any of their pleadings submitted to the Council in the present case.

Under these circumstances, and particularly the imminent effective date of the new Statute, we believe that no useful purpose would be served by further processing of the instant case. We shall, therefore, dismiss your petition for review as in effect moot, without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Federal Labor Relations Authority in conformity with the provisions of the new Statute and with the regulations of the Authority issued thereunder.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: J. Kurtz
IRS

INTERPRETATIONS AND POLICY STATEMENTS

January 1, 1978 through December 31, 1978

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The American Federation of Government Employees requested a statement on certain alleged major policy issues which, according to its submission, arose out of a dispute between AFGE Local 12 and the Department of Labor over a negotiated "memorandum of understanding" dealing with the Department's promotion procedures.

Council action* (February 24, 1978). The Council decided that the questions presented by the AFGE request concerning the Department of Labor's inquiry to the U.S. Civil Service Commission as to whether the disputed memorandum conformed to Commission regulations, and concerning the participation of individual Council members in any proceedings which may grow out of the dispute between AFGE Local 12 and the Department of Labor, did not satisfy the considerations governing the issuance of statements on major policy issues set forth in section 2410.3 of the Council's rules. Accordingly, the Council denied the AFGE's request.

* The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 24, 1978

Mr. John W. Mulholland
Director, Labor Management
Services Department
American Federation of
Government Employees, AFL-CIO
1325 Massachusetts Ave., NW.
Washington, D.C. 20005

Re: FLRC No. 77P-4

Dear Mr. Mulholland:

This is in further reply to your request for a statement on certain alleged major policy issues:

1. What is the propriety of the Civil Service Commission getting involved in questions of negotiability on a unilateral basis?
2. What is the propriety of the Commission becoming involved in labor management disputes within the Labor Department prior to Section 6(e) actions by the parties?
3. Should the Secretary of Labor and/or the Commission be involved in the consideration by the Council of an issue generating from the present dispute relating to promotions between AFGE Local 12 and the Department of Labor?
4. In the event the preceding question is answered in a way indicating that the two Council members should be excused, or that they choose to do so, can other parties be appointed to participate?

According to your submission, this request arises out of a dispute between Local 12 of the American Federation of Government Employees (the union) and the Department of Labor (the agency) concerning a certain negotiated "memorandum of understanding" dealing with the agency's promotion procedures. You indicate that, following negotiation, the agency requested from the U.S. Civil Service Commission an opinion as to the validity of the memorandum. You further indicate that the Commission did not obtain the views of the union before finding the memorandum in violation of "the requirement that [promotion] selections be made according to merit," and assert that the agency, apparently relying upon the Commission's finding, has refused to implement the memorandum. Accordingly, you request the Council to issue a statement on the questions which you present.

The Council has considered carefully your request for a statement on major policy issues and has determined that it does not satisfy the considerations governing the issuance of statements on major policy issues set forth in section 2410.3 of the Council's rules.^{1/}

With respect to the first alleged major policy issue on which you seek a Council statement, concerning the Civil Service Commission's alleged "involvement" in questions of negotiability, the Council is of the opinion that this alleged issue has no general applicability to the overall program in assuring the effectuation of the purposes of the Order as provided in section 2410.3(a) of the Council's rules. Your submission to the Council contains nothing to show that the Commission, in responding to the agency's inquiry as to whether the disputed memorandum conformed to Commission regulations, was "involved in questions of negotiability on a unilateral basis." In fact, according to your submission, the Commission stated in its response that "[w]e have not considered the Memorandum in relation to the provisions

^{1/} Section 2410.3 of the Council's rules provides:

- (a) The Council shall, in its discretion, issue interpretations of the order and statements on major policy issues which it deems to have general applicability to the overall program in assuring the effectuation of the purposes of the order. . . .
- (b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:
 - (1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;
 - (2) Where other means are available, whether Council action would prevent the proliferation of cases involving the same or similar questions of interpretation or major policy issue;
 - (3) Whether the resolution of the question presented would have general applicability to the overall program;
 - (4) Whether the issue currently confronts parties in the context of a labor-management relationship;
 - (5) Whether the question is presented jointly by the parties involved; and
 - (6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and co-operative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

of E.O. 11491, as amended, because that responsibility is vested in the Federal Labor Relations Council." Furthermore, in responding to the request of the Labor Department, the Civil Service Commission clearly was exercising its authority under, among other things, section 25(a) of E.O. 11491, as amended. That provision requires the Civil Service Commission to "establish and maintain a program for the policy guidance of agencies on labor-management relations in the Federal service [and] to assist in assuring adherence to its provisions and merit system requirements"

Similarly, as regards your second alleged major policy issue, the Council finds that it, like the first issue, has no general applicability to the overall program in assuring the effectuation of the purposes of the Order as provided in section 2410.3(a) of the Council's rules and therefore does not meet the requirements under which the Council will issue interpretations and policy statements. Moreover, decisions issued by the Commission pursuant to section 6(e) of the Order may be appealed to the Council as provided in section 4(c)(1) of the Order and part 2411 of the Council's rules. Therefore questions which you may wish to raise concerning any proceedings held pursuant to section 6(e), can, in the Council's opinion, "more appropriately be resolved by other means available under . . . the order" and thus do not warrant the issuance of a major policy statement under section 2410.3(b)(1) of the Council's rules.^{2/}

As to the third and fourth policy issues which you propose, it has been the established practice of the members of the Council to withdraw from

^{2/} The Council has been advised that the union has filed with the Vice Chairman of the Commission, pursuant to section 6(e) of the Order and the regulations of the Assistant Secretary of Labor, an application for decision on grievability or arbitrability arising out of two grievances alleging "non-application" by the agency of the disputed memorandum. The Council has been further advised that this application was filed prior to the instant request. In this respect, the Council notes that section 2410.4(b) of its rules provides:

The Council will not consider a request [for an interpretation or policy statement] related to a pending petition, application, charge, or complaint which the Council is advised has been filed pursuant to the Assistant Secretary's regulations unless the party involved in the case filing the request with the Council has first secured the prior approval of the Assistant Secretary.

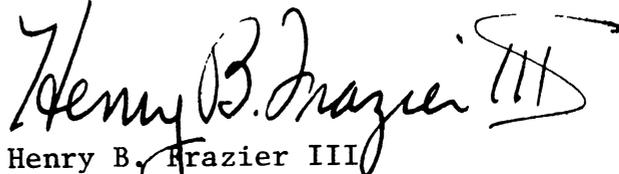
While our decision herein is made on other grounds, it should be pointed out that the necessary approval (which, in this case, would be obtained from the Vice Chairman) has not been secured, nor does the union request that the Council waive its requirement for such approval.

participation in cases to which they are parties. Thus, the Secretary of Labor does not participate in the decision of cases to which the Department of Labor is itself a party (See, e.g., Labor-Management Services Administration, Department of Labor (Decision and Order of Vice Chairman of U.S. Civil Service Commission No. 34), FLRC No. 77A-43 (Aug. 23, 1977), Report No. 135). Furthermore, any issue as to the participation of individual members of the Council in any proceedings which may grow out of this dispute and which may be brought before the Council under section 4(c) of the Order can be resolved as those proceedings arise. The Council therefore finds that your third and fourth proposed policy issues, which can be resolved by other means available under the Order, do not meet the requirements of section 2410.3(b)(1) of the Council's rules.

Accordingly, your request for a statement on major policy issues is denied.

By the Council.^{3/}

Sincerely,



Henry B. Frazier III
Executive Director

cc: Mr. P. H. Jensen
Labor

^{3/} The Secretary of Labor did not participate in this decision.

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules and regulations (5 CFR 2410.3), in response to a request by the American Federation of Government Employees, the Council determined to provide an interpretation of the Order with respect to the issues:

- (1) Does the Order impose an affirmative obligation upon an agency head to render a determination on the negotiability of bargaining proposals when requested by a labor organization?
- (2) Whether or not the union headquarters may assume that [an agency head's] refusal to make a [negotiability] determination is an adverse determination and request a review by the Council under the provisions of Part 2411.24 [of the Council's rules]. May such a request be made and will the Council grant such a review?

Council action (March 16, 1978). The Council determined, for reasons fully detailed in its interpretation, that:

- (1) The Order imposes an affirmative obligation upon an agency head to render a determination on the negotiability of bargaining proposals when requested by a labor organization provided that an issue as to the negotiability of such proposals has developed "in connection with negotiations" as required by section 11(c) of the Order.
- (2) Where the union shows that the issue as to the negotiability of the bargaining proposals has developed "in connection with negotiations" as provided in section 11(c) of the Order, and that the agency has not made a timely determination concerning the negotiability of the bargaining proposals as provided in section 2411.24(c) of the Council's rules, the union may seek Council review of the negotiability issue without a prior determination of the agency head.

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

FLRC No. 77P-3

INTERPRETATION OF THE ORDER

Pursuant to section 4(b) of Executive Order 11491, as amended, and section 2410.3 of the Council's rules and regulations (5 CFR 2410.3), the Council has considered a request from the American Federation of Government Employees for an Interpretation of the Order and the Council's rules. The Council determined that the request raises an issue which has general applicability to the Federal labor-management relations program in assuring the effectuation of the purposes of the Order and consequently warrants the issuance of an Interpretation of the Order.

In its request, AFGE referred to a situation involving collective-bargaining negotiations between the United States Coast Guard Academy and AFGE Local 3655. It appears from that request and from a submission by the Department of Transportation (DOT) that in December 1976, the Academy advised the Local that certain of its negotiation proposals were nonnegotiable. Subsequently, the Local consulted with the AFGE National Office and developed revised proposals which were submitted to the Academy in August and/or September 1977.^{1/}

According to AFGE's request, the Academy advised the Local that the revised proposals were nonnegotiable and on September 15 the AFGE National Office requested an agency head negotiability determination from DOT.

On September 26 the Academy wrote the Local denying that it had taken a position on the negotiability of the revised proposals and suggesting postponement of negotiations in view of the pendency of the request for an agency head determination. On September 27 the Local wrote the Academy expressing regret on the postponement and requesting a determination by the Academy that the revised proposals were either negotiable or nonnegotiable and to include a written notification of any proposal found nonnegotiable. Finally, on October 14, DOT wrote the AFGE National Office concluding that its request for an agency head negotiability determination was premature because the parties had not sought viable alternatives,^{2/} denying that the Academy had taken a position on the negotiability of the revised proposals,

^{1/} The exact date(s) that the revised proposals were presented to the Academy is not clear from the parties' submissions to the Council.

^{2/} DOT cited Council Information Announcement, September 10, 1973, portions of which are quoted infra.

and suggesting that negotiations between the Local and the Academy resume. In this context, AFGE has asked the following questions:

Does the Order impose an affirmative obligation upon an agency head to render a determination on the negotiability of bargaining proposals when requested by a labor organization?

[W]hether or not the union headquarters may assume that [an agency head's] refusal to make a [negotiability] determination is an adverse determination and request a review by the Council under the provisions of Part 2411.24 [of the Council's rules]. May such a request be made and will the Council grant such a review?

Executive Order 11491, as amended, contains procedures for resolving negotiability issues which might arise between parties to negotiations. Section 11(c) provides, in pertinent part:

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(4) A labor organization may appeal to the Council for a decision when—

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under paragraph (a) of this section.

The underlying philosophy of the section 11(c) procedures for resolving negotiability issues is discussed in the report which led to the issuance of E.O. 11491, where it is stated that:^{3/}

Where disputes develop in connection with negotiations at the local level as to whether a labor organization proposal is contrary to law or to agency regulations or regulations of other appropriate authorities and therefore not negotiable, the labor organization should have

^{3/} Labor-Management Relations in the Federal Service (1975), at 71.

the right to refer such disputes immediately to agency headquarters for an expeditious determination.

Issues as to whether a proposal advanced during negotiations, either at the local or national level, is not negotiable, because the agency head has determined that it would violate any law, regulation or rule established by appropriate authority outside the agency may be referred to the Federal Labor Relations Council for decision. Similarly, issues as to whether an agency's regulations are contrary to the new order, to interpretations of the order issued by the Council, or to applicable law or regulations of appropriate authorities, should be referred to the Council for decision.

Thus, under the procedures established by section 11(c) of the Order, it was clearly intended that if a dispute concerning the negotiability of a bargaining proposal should develop in connection with negotiations at the local level the labor organization should have the right to refer such disputes immediately to agency headquarters for an expeditious determination. Further, the labor organization could thereafter seek Council review of an agency head determination of nonnegotiability. Moreover, as referenced in AFGE's question, the Council's rules of procedure implementing the provisions of section 11(c) impose time limits on an agency head in these circumstances and permit a labor organization to request Council review of a negotiability issue without a prior determination by the agency head where he fails to meet the time limits.^{4/}

While procedures are available for requesting Council review of a negotiability issue without a prior determination by an agency head, it must be noted that such procedures are appropriate only where, among other things, a negotiability dispute has developed in connection with negotiations. That is, the conditions for Council review prescribed in section 11(c) of the Order are not met where the proposals which are the subject of an appeal are not the product of, and were not considered in, local negotiations as

^{4/} Section 2411.24(c) of the Council's Rules and Regulations provides:

(c) Review of a negotiability issue may be requested by a labor organization under this subpart without a prior determination by the agency head, if the agency head has not made a decision—

(1) Within 45 days after a party to the negotiations initiates referral of the issue for determination, in writing, through prescribed agency channels; or

(2) Within 15 days after receipt by the agency head of a written request for such determination following referral through prescribed agency channels, or following direct submission if no agency channels are prescribed.

required by the Order.^{5/} Such a requirement gives the parties to negotiations an opportunity to work out their differences to the maximum extent possible without intervention by the Council or the other third parties in the program. In this regard the Council has stated:^{6/}

[T]he Council has concluded that some negotiability disputes have been brought to the Council prematurely. In some instances, management representatives have failed to offer feasible, negotiable alternatives to union proposals when they believe the union's proposals to be non-negotiable. Instead, the management representatives have simply asserted that the union proposals are nonnegotiable giving the unions no alternative but to appeal or to drop the matter from negotiations. On the other hand, where management has offered alternatives, some union representatives have appealed the negotiability of their proposals without first considering and discussing the management proposals at the bargaining table. Both actions are a disservice to labor-management relations and demonstrate a failure on the part of the parties to attempt to work matters out bilaterally.

A fundamental purpose of the labor-management relations program is to give unions and agencies an opportunity to work out their differences to the maximum extent possible without intervention by the Council or the other third parties in the program. Therefore, parties are urged, where appropriate, (1) to take full advantage of the opportunity to work out mutually acceptable language designed to deal with problems peculiar to the installations involved and jointly seek exceptions to agency regulations, and (2) to seek feasible, acceptable alternatives to proposals which are allegedly nonnegotiable before appealing the matter to the Council.

In summary, the answers to AFGE's questions are as follows:

- (1) The Order imposes an affirmative obligation upon an agency head to render a determination on the negotiability of bargaining proposals when requested by a labor organization provided that an issue as to the negotiability of such proposals has developed "in connection with negotiations" as required by section 11(c) of the Order.
- (2) Where the union shows that the issue as to the negotiability of the bargaining proposals has developed "in connection with negotiations" as provided in section 11(c) of the Order, and that the agency has not made a timely determination concerning the negotiability of the bargaining proposals as provided in section 2411.24(c) of the

^{5/} AFGE Local 2151 and General Services Administration, Region 3, 3 FLRC 668, 672 [FLRC No. 75A-28 (Oct. 8, 1975), Report No. 86].

^{6/} Information Announcement, September 10, 1973, 1 FLRC 674.

Council's rules, the union may seek Council review of the negotiability issue without a prior determination of the agency head.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 16, 1978

Pursuant to section 4(b) of the Order and section 2410.3(a) of the Council's rules and regulations (5 C.F.R. 2410.3(a)), the Council determined to provide an interpretation of the Order with respect to the application of section 24(1) of the Order to agreement provisions allegedly inconsistent with specific provisions of the Order.

Council action (August 9, 1978). The Council determined, for reasons detailed in its interpretation, that section 24(1) of the Order maintains the validity of otherwise lawful provisions in an agreement entered into between an agency and the exclusive representative of its employees before January 17, 1962, if such agreement has been renewed or continued in substance after that time, and notwithstanding any inconsistency of such provisions with limitations or proscriptions imposed by the Order itself.

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

FLRC No. 78P-2

INTERPRETATION OF THE ORDER

The Council is informed that a number of questions have recently arisen concerning the meaning of section 24(1) of E.O. 11491 (the Order), in circumstances where the agreement entered into before the effective date of E.O. 10988 (Jan. 17, 1962) contains provisions allegedly violative of relevant provisions of the Order. To assure the effectuation of the purposes of the Order, including the prevention of an unwarranted proliferation of cases involving such questions, the Council has determined, pursuant to section 4(b) of the Order and section 2410.3(a) of the Council's rules of procedure (5 C.F.R. 2410.3(a)), to provide an interpretation of section 24(1) as applied to agreement provisions allegedly inconsistent with specific provisions of the Order.

Section 24(1) of the Order, similar to section 15 of E.O. 10988, provides as follows:

Sec. 24. Savings clauses. This Order does not preclude--

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962)

As indicated when the Order was adopted, section 24(1) is intended to "grandfather" those agreements lawfully entered into before January 17, 1962 (Labor-Management Relations in the Federal Service (1969) at 55). In other words, section 24(1) is intended to maintain the viability of provisions in an agreement entered into before January 17, 1962, which would otherwise be limited or proscribed by constraints imposed solely in the Order itself.

Thus, otherwise valid provisions in an agreement entered into before January 17, 1962, which agreement was renewed or continued in substance after that time, would not be rendered inoperative or invalid because they conflict with provisions of the Order. Where an otherwise valid provision in an agreement entered into before January 17, 1962, conflicts with the Order, the agreement provision remains viable and operative.

To repeat, therefore, section 24(1) of the Order maintains the validity of otherwise lawful provisions in an agreement entered into between an agency

and the exclusive representative of its employees before January 17, 1962, if such agreement has been renewed or continued in substance after that time, and notwithstanding any inconsistency of such provisions with limitations or proscriptions imposed by the Order itself.

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 9, 1978

The American Federation of Government Employees requested a statement on the following major policy issue:

To what extent, if any, can management make demands upon a union regarding its choice of representatives, internal structure, and/or other internal matters and whether or not it can refuse to bargain until the union meets these demands.

Council action (August 16, 1978). The Council determined that the request did not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules. In the Council's opinion, the question presented, in the circumstances more fully described in its letter, could more appropriately be resolved by other means available under the Order. Furthermore, nothing in the request indicated that Council action in lieu of other means available for resolution would prevent the proliferation of cases involving the same or similar questions. Accordingly, the Council denied the request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 16, 1978

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Ave., NW.
Washington, D.C. 20005

Re: FLRC No. 78P-1

Dear Mr. King:

This is in further reply to your request for a statement on a major policy issue.

Based upon your request and the views of the Defense Logistics Agency (DLA), it appears that a reorganization by Department of Defense (DoD) resulted in the creation of five Defense Property Disposal Regions (DPDR's), three of which are involved in the instant request. During the reorganization, DLA granted a request from several national unions that all existing dues withholding arrangements with the locals covering employees who were to be affected by the reorganization continue until the representation dispute that resulted from the reorganization was resolved. Resolution of the representation dispute by the Assistant Secretary resulted in the American Federation of Government Employees (AFGE), the International Association of Machinists and Aerospace Workers and the Metal Trades Department being jointly certified as the exclusive representative of the employees in each of three separate DPDR units.^{1/} Following resolution of the representation dispute, DLA took the position in negotiations with AFGE that the jointly certified labor organizations had not established local organizations or councils of locals in any of the three DPDR's to assume the responsibilities of the certified bargaining representative of the employees. Thereafter DLA informed the jointly certified labor organizations that since no effective action had been taken to establish local labor organizations, there was no legal justification for the continuation of the dues withholding arrangements and the disbursement of the dues to the unions which formerly represented the employees now included in the newly created units. After notice and discussions with AFGE, DLA terminated the dues withholding arrangements.

1/ Defense Property Disposal Service, Defense Property Disposal Regions, Memphis, Columbus, and Ogden, et al., A/SLMR No. 779 (Jan. 19, 1977).

In this context, you request the Council to issue a statement on the following question:

To what extent, if any, can management make demands upon a union regarding its choice of representatives, internal structure, and/or other internal matters and whether or not it can refuse to bargain until the union meets these demands?

DLA concurs with AFGE that a major policy issue is raised which clearly merits Council review--contending further that subsidiary questions flow from the major policy issue posed by AFGE, specifically:

a. What responsibilities, with respect to an agency-wide consolidated unit, approved and certified by the DOL [Department of Labor], does Section 18 of E.O. 11491 place upon a labor organization certified as that unit's exclusive bargaining representative?

b. What corresponding responsibilities does it impose upon the head of the agency who is specifically enjoined, by the provisions of Section 18, to "accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles"?

c. Does the Constitution of the AFGE (i.e., the National Federation) contain the same or comparable guarantees against violation of the "Standards of Conduct" (Part 204, Title 29, Code of Federal Regulations) which are commonly contained in the constitutions of AFGE local unions so as to provide acceptable prima facie evidence that, when the AFGE National Office is performing the functions of a certified exclusive bargaining agent in a given Federal bargaining unit, it has taken sufficient, effective safeguards to ensure that it will always perform those functions in a way that is "free from corrupt influences and influences opposed to basic democratic principles"? [Emphasis in original.]

The Council has considered carefully your request for a statement on a major policy issue and DLA's response and has determined that it does not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules, which provides in pertinent part:

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;

(2) Where other means are available, whether Council action would prevent the proliferation of cases involving the same or similar question of interpretation or major policy issue[.]

In the Council's opinion, the question presented, which in essence concerns whether, in the circumstances described, DLA has engaged in conduct which would constitute a refusal to comply with obligations owed the exclusive representative, can more appropriately be resolved by other means available under the Order. In this regard, it is noted that section 6(a)(4) of the Order authorizes the Assistant Secretary of Labor for Labor-Management Relations to decide unfair labor practice complaints filed pursuant to section 19.^{2/} In this connection, as indicated in your request, it is alleged that DLA's "refusal to conduct negotiations because of these nonnegotiable demands [concerning] union representation and structure--is clearly a per se violation of section 19(a)(1) and (6) of the Order." Also, your request states that "the avenue of the Assistant Secretary might seem available in processing this case strictly on an unfair labor practice basis." It is noted further that the final decision of the Assistant Secretary may be appealed to the Council as provided for in section 4(c)(1) of the Order and the Council's implementing regulations in part 2411. Furthermore, nothing in the request indicates that Council action under part 2410 in lieu of other means available for resolution would prevent the proliferation of cases involving the same or similar question in connection with other unit consolidations.

2/ Section 19 provides in pertinent part:

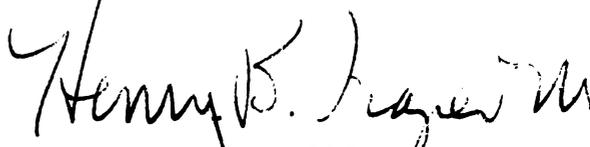
Unfair labor practices. (a) Agency management shall not--

-
- (5) refuse to accord appropriate recognition to a labor organization qualified for such recognition; or
 - (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

Accordingly, your request for a statement on a major policy issue is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: W. Hart
DLA

Brigadier General W. R. Coleman
USAF

R. Simboli
DPDS

J. Meese
IAM

S. Stein
MTC

The American Federation of Government Employees requested an interpretation of the Order and a statement on a major policy issue concerning the following question:

Whether the Order or Council policy permits agency management to exclude positions from an established collective bargaining unit without first utilizing the Assistant Secretary's clarification of unit processes?

Council action (December 22, 1978). The Council determined that the request did not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules. In the Council's opinion, in view of the fact that the Assistant Secretary has been granted authority under the Order to decide questions concerning exclusive recognition and that he has developed and applied clearly stated policies in this regard, which have been determined by the Council to be consistent with the purposes of the Order, the issuance of an interpretation of the Order or a statement on a major policy issue is not necessary to promote the purposes of the Order. Accordingly, the Council denied the request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 22, 1978

Mr. William J. Stone
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Ave., NW.
Washington, D.C. 20005

Re: FLRC No. 78P-3

Dear Mr. Stone:

This is in further reply to your request for an interpretation of the Order and a statement on a major policy issue.

You request the Council to issue an interpretation and a statement on the following question:

Whether the Order or Council policy permits agency management to exclude positions from an established collective bargaining unit without first utilizing the Assistant Secretary's clarification of unit processes?

The Council has considered carefully your request and has determined that it does not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules, which provides in pertinent part:

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;

(6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

The Assistant Secretary of Labor for Labor-Management Relations has been given authority under section 6(a)(1) of the Order to decide questions concerning exclusive recognition and related issues. Section 6(a)(1) provides in pertinent part:

Assistant Secretary of Labor for Labor-Management Relations.

(a) The Assistant Secretary shall--

(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration[.]

In accordance with that grant of authority, the Assistant Secretary has prescribed regulations governing the manner in which questions concerning exclusive recognition will be handled. He has established the petition for clarification of an existing unit (CU) procedure as a means of determining whether or not positions are properly included in or excluded from an existing unit.^{1/}

However, the CU procedure is not the sole means available for determining the propriety of including positions in or excluding them from existing units. As indicated in your request, the Assistant Secretary has determined also that an agency may unilaterally determine that an employee is excluded from an exclusive unit and terminate that employee's union dues withholding subject to a possible finding of an unfair labor practice should that action later prove to be erroneous.^{2/} The Council has considered this policy of the Assistant Secretary and the related issue of whether an agency is required to file a CU petition before removing an employee from an exclusive unit.^{3/} In U.S. Marine Corps Air Station, El Toro the Council stated:

Thus, while an agency must be permitted to protect itself against an unfair labor practice finding by filing an

1/ See Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3551(CA), 4 FLRC 238 [FLRC No. 75A-124 (Apr. 12, 1976), Report No. 102] and Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3253, 3 FLRC 710 [FLRC No. 75A-92 (Nov. 12, 1975), Report No. 89].

2/ See Environmental Protection Agency, Region III, A/SLMR No. 999; U.S. Naval Weapons Station, Seal Beach, California, Department of the Navy, A/SLMR No. 827; and U.S. Department of the Army, Edgewood Arsenal, Aberdeen Proving Ground Command, A/SLMR No. 286.

3/ U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560, 4 FLRC 218 [FLRC No. 75A-115 (Mar. 22, 1976), Report No. 101].

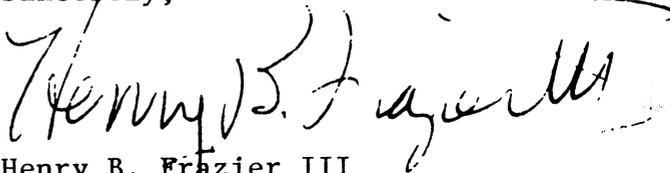
appropriate representation petition, it is not required to do so by virtue of the Council's decision in AVSCOM. Of course, as the ALJ stated in the instant case (at footnote 4), "an agency acts at its peril when it unilaterally determines supervisory status [or any other representation question], since an erroneous determination could well support a violation of . . . the Order." However, such is not the case herein, noting that the Assistant Secretary found that the position of Maintenance Scheduler was in fact supervisory. [Emphasis in original.]

In view of the fact that the Assistant Secretary has been granted authority under the Order to decide questions concerning exclusive recognition and that he has developed and applied clearly stated policies in this regard, which have been determined by the Council to be consistent with the purposes of the Order, the issuance of an interpretation of the Order or a statement on a major policy issue is not necessary to promote the purposes of the Order.

Accordingly, your request for an interpretation of the Order and a statement on a major policy issue is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. McCart
PED, AFL-CIO

L. Wallerstein
DOL

K. Moffett
FMCS

H. Solomon
FSIP

The Department of Energy requested the Council to clarify its interpretation of the Order in FLRC No. 78P-2 which concerned the application of section 24(1) of the Order to agreement provisions allegedly inconsistent with specific provisions of the Order, through a response to the following questions:

- (1) Upon entering into the renegotiation of an agreement which predates Executive Order 10988, when either but not both parties want to change, add, or delete language in the agreement, and when such a change, addition, or deletion would bring the agreement into conformity with Executive Order 11491, as amended, is the original agreement still protected by Section 24(1)?
- (2) The FLRC in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR 360, FLRC 74A-22, held that a successor employer is not "required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union." Does this mean that a successor agency can then, without negotiating, require that the new agreement conform to all sections of the Order?

Council action (December 28, 1978). The Council determined that insofar as the agency requested a "clarification" of FLRC No. 78P-2 with respect to questions outside the ambit of that interpretation, the request must be denied. Moreover, the Council determined that even if the agency's request was deemed a request for an interpretation of the Order under Part 2410 of the Council's rules, the agency's request did not satisfy the considerations governing such issuances set forth in section 2410.3(b) of the Council's rules. In the Council's opinion, the agency failed to show that other means were not available under the Order through which the questions presented could more appropriately be resolved, and nothing in the request indicated that Council action would prevent the proliferation of cases involving the same or similar questions. Accordingly, the Council denied the request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Mr. Lloyd W. Grable
Director of Personnel
Department of Energy
Washington, D.C. 20585

Re: FLRC No. 78P-4

Dear Mr. Grable:

This is in further reply to your request for a clarification of the Council's interpretation of the Order (FLRC No. 78P-2), in which you ask that the Council issue a statement in response to questions which you raise in your request.

On August 9, 1978, the Council issued an interpretation of the Order (FLRC No. 78P-2) which concerned the application of section 24(1) of the Order to agreement provisions allegedly inconsistent with specific provisions of the Order. In its interpretation, the Council considered questions which had arisen with respect to the meaning of section 24(1), in circumstances where the agreement entered into before the effective date of E.O. 10988 (January 17, 1962) contains provisions allegedly violative of relevant provisions of the Order. The Council, in response to those questions, which presumed that the "grandfathered" agreement is currently viable, stated that section 24(1) maintains the validity of otherwise lawful provisions in an agreement entered into between the parties before January 17, 1962, if such agreement has been renewed or continued in substance after that time, and notwithstanding any inconsistency of such provisions with limitations or proscriptions imposed by the Order itself.

In this context, you request the Council to clarify its interpretation of the Order in FLRC No. 78P-2 through a response to the following questions:

- (1) Upon entering into the renegotiation of an agreement which predates Executive Order 10983, when either but not both parties want to change, add, or delete language in the agreement, and when such a change, addition, or deletion would bring the agreement into conformity with Executive Order 11491, as amended, is the original agreement still protected by Section 24(1)?

- (2) The FLRC in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR 360, FLRC 74A-22, held that a successor employer is not "required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union." Does this mean that a successor agency can then, without negotiating, require that the new agreement conform to all sections of the Order?

The Council, in its interpretation of the Order in FLRC No. 78P-2, did not address the questions raised in your request for clarification, relating to circumstances where an agency seeks to change the "grandfathered" agreement either during the renegotiation of that agreement or in a successorship situation, and in your request you acknowledge that "[n]either section 24(1) nor 78P-2 speaks to the situation in which one but not both of the parties to the agreement wish to change, add, or delete provisions in a way which would cause the agreement to conform to all sections of the Order." Accordingly, insofar as you request a "clarification" of FLRC No. 78P-2 with respect to questions which fall outside the ambit of that interpretation, your request must be denied.

Moreover, even if your request be deemed simply a request for an interpretation of the Order under Part 2410 of the Council's rules, the Council has determined that your request does not satisfy the considerations governing such issuances set forth in section 2410.3(b) and must be denied. Section 2410.3(b) provides, in pertinent part, that:

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;

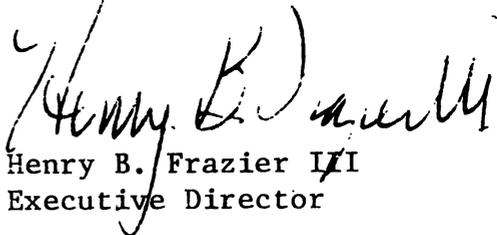
(2) Where other means are available, whether Council action would prevent the proliferation of cases involving the same or similar question of interpretation or major policy issue[.]

In the Council's opinion, you have failed to show that other means are not available under the Order through which the questions presented can more appropriately be resolved. Furthermore, unlike in FLRC No. 78P-2, nothing in your request indicates that Council action under Part 2410 would prevent the proliferation of cases involving the same or similar questions.

To repeat, therefore, your request for a clarification of the Council's interpretation of the Order (FLRC No. 78P-2) or, in the alternative, for an interpretation of the Order, is hereby denied.

By the Council.

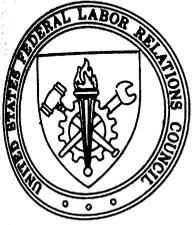
Sincerely,

A handwritten signature in cursive script, appearing to read "Henry B. Frazier III".

Henry B. Frazier III
Executive Director

The Pennsylvania National Guard requested a statement on a number of alleged major policy issues, which, in effect, sought review of the Decision and Order of the Federal Service Impasses Panel in Pennsylvania Association of Civilian Technicians, Inc., 77 FSIP 29 (June 30, 1978), Release No. 101.

Council action (December 28, 1978). The Council determined that the request did not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules. In the Council's opinion, the questions presented could more appropriately be resolved by other means under the Order. In addition, in the Council's view, the resolution of the questions presented would not have general applicability to the overall program. Moreover, the questions presented were not presented jointly by the parties. Finally, in the Council's view, in the circumstances presented, Council consideration of the alleged major policy issues would not promote constructive and cooperative labor-management relationships in the Federal service or otherwise promote the purposes of the Order. Accordingly, the Council denied the request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Major General Nicholas P. Kafkalas
The Adjutant General
Pennsylvania National Guard
Annville, Pennsylvania 17003

Re: FLRC No. 78P-5

Dear General Kafkalas:

This is in further reply to your request that the Council issue a statement on the following alleged major policy issues:

1. Has the Federal Service Impasses Panel exceeded its authority under Executive Order 11491, as amended, by promulgating and enforcing a national policy with regard to the wear of the military uniform by National Guard Technicians in violation of its charter to provide a case-by-case adjudication based upon the unique facts of each case?
2. Has the Federal Service Impasses Panel properly construed and applied the decision of the Council that the issue of the wear of the military uniform by National Guard Technicians is negotiable by deciding this issue in a manner that ignores the statutory and military authority of the Adjutant General of the Commonwealth of Pennsylvania and the Adjutants General of other states and territories?
3. Have the decisions of the Federal Service Impasses Panel in this and the other cases [in which the Panel has considered the uniform question] had the purpose and effect of improperly stripping the Adjutants General of the states and territories of their statutory authority (based upon the Constitution) for the employment and administration of National Guard Technicians by substituting the judgment and opinions of said Panel for the military judgment and decisions of the Adjutants General on the uniquely military question of when members should wear their military uniform?
4. Have the decisions of the Federal Service Impasses Panel in this and the other cases [referenced in paragraph 3 above] properly considered the role of National Guard Technicians in the administration and training of National Guardsmen?

The Council has considered carefully your request, together with the views of several other state Adjutants General submitted in support of your request

and the opposing views of the Association of Civilian Technicians, Inc. (ACT). For the reasons expressed below the Council has decided that your request must be denied.

As is evident from your alleged major policy issues and your submission you are in effect seeking review of the Decision and Order of the Federal Service Impasses Panel in Pennsylvania National Guard, Annville, Pennsylvania and Pennsylvania State Council, Association of Civilian Technicians, Inc., 77 FSIP 29 (June 30, 1978), Release No. 101.1/

The Council is administratively advised that after the issuance of the Panel's Decision and Order in the Pennsylvania National Guard case, unfair labor practice proceedings were initiated by ACT before the Assistant Secretary of Labor for Labor-Management Relations under section 6(a)(4) of the Order.

Section 2410.3(b) of the Council's rules sets forth the considerations governing the issuance of Interpretations of the Order and Statements on Major Policy Issues. These rules provide, in pertinent part:

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

1/ The Decision and Order of the Panel directed that the parties adopt in their agreement language which would provide that while performing their day-to-day duties during the regular workweek, bargaining unit civilian technicians are to have the option of wearing either (a) the military uniform or (b) an agreed upon standard civilian attire without display of military rank, such clothing to be purchased by the technicians. The Panel also directed, furthermore, that the circumstances and occasions for which the military uniform may be required, once they are agreed to by the parties, are to be incorporated in the agreement.

Prior to and subsequent to the issuance of the Panel's Decision and Order in the Pennsylvania National Guard case, the Panel (in some cases after the issuance of an Order to Show Cause and the consideration of the responses thereto) issued Decisions and Orders similarly requiring the parties to adopt language in their agreement which would (1) give employees, while performing their day-to-day technician duties, the option of wearing either the military uniform or agreed-upon standard civilian attire and (2) provide circumstances and occasions for which the wearing of the military uniform may be required. Federal Service Impasses Panel, Release No. 110. (Oct. 31, 1978).

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order;

(3) Whether the resolution of the question presented would have general applicability to the overall program;

(5) Whether the question is presented jointly by the parties involved; and

(6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

As regards section 2410.3(b)(1), in the Council's opinion the questions presented can more appropriately be resolved by other means; i.e., the unfair labor practice procedures under the Order. In this connection, as previously indicated, ACT has initiated unfair labor practice proceedings before the Assistant Secretary of Labor under section 6(a)(4). As regards section 2410.3(b)(3), the Council is of the view that the resolution of the question presented would not have general applicability to the overall program. Rather, the questions presented relate to disputes among various state National Guards and labor organizations representing civilian technicians over the adoption in negotiated agreements of provisions concerning the wearing of civilian attire, the negotiability of which has already been addressed by the Council.^{2/}

Moreover, as regards section 2410.3(b)(5), the questions presented are not presented jointly by the parties. Rather, ACT opposes the request for a major policy statement, contending principally that the Pennsylvania National Guard seeks only to delay implementation of the Panel's decision.

Finally, as to section 2410.3(b)(6), the Order established the Panel to provide a third-party procedure for resolution of negotiation impasses and

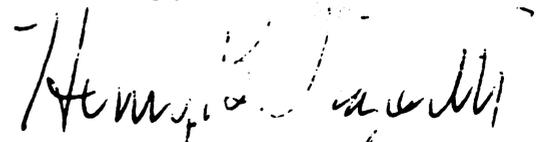
^{2/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, 5 FLRC 124 [FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120], reconsideration denied, 5 FLRC 336 [(May 18, 1977), Report No. 125].

empowers it to settle the impasse by appropriate action. In the Council's view, in the circumstances here presented, Council consideration of your alleged major policy issues would not promote constructive and cooperative labor-management relationships in the Federal service or otherwise promote the purposes of the Order.

Accordingly, for the reasons expressed above, your request for a statement on major policy issues is denied.

By the Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry B. Frazier III". The signature is written in a cursive style with a large initial "H".

Henry B. Frazier III
Executive Director

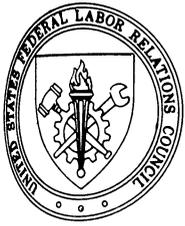
cc: [see attached list]

| | |
|------------------------|---------------------|
| cc: V. Paterno ACT | T. Bishop TXNG |
| L. Wallerstein DOL | C. Wallace TNNG |
| K. Moffett FMCS | R. McCrady SCNG |
| H. Solomon FSIP | L. Holland RING |
| K. Lyons NAGE | J. Coffey OKNG |
| D. Howell PSC, ACT | J. Clem OHNG |
| J. Womack MTNG | C. Murry NDNG |
| V. Vartanian MANG | R. Buechler MONG |
| F. Edsall NVNG | A. Ahner INNG |
| J. Blatsos NHNG | J. Brooks IDNG |
| J. Smith AZNG | G. Franch CONG |
| B. Jones GANG | H. Gray ALNG |
| V. Castellano NYNG | E. Binder NENG |
| E. Warfield MDNG | P. Day MENG |
| V. Siefertmann HING | H. Simonson WING |
| K. Bullard FLNG | |
| M. Watts UTNG | |

Several agencies jointly requested a statement on the following major policy issue:

Whether there is a need for the Council to ask the Assistant Secretary of Labor for Labor-Management Relations to develop expedited proceedings to resolve representational issues resulting from reorganizations?

Council action (December 28, 1978). The Council determined that action on the question presented, which in essence was a request that the Council require the Assistant Secretary to develop expedited procedures for processing representational issues resulting from agency reorganizations, was not necessary or appropriate because the Assistant Secretary would not be responsible for resolving such issues after January 1, 1979. Further, the Council determined that the request did not satisfy the considerations governing the issuance of interpretations and policy statements set forth in section 2410.3(b) of the Council's rules. In the Council's opinion, the issuance of the requested major policy statement was not appropriate because other means are available under the Order for resolution of the matters at issue, and nothing in the request demonstrated that means available under the Order were not sufficient to resolve issues that might arise as a result of agency reorganizations. Accordingly, the Council denied the request.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 28, 1978

Ms. Janice K. Mendenhall
Controller-Director of
Administration
General Services Administration
Washington, D.C. 20405

Mr. William C. Valdes
Staff Director, Office Civilian
Personnel Policy - OASD (MRA&L)
The Pentagon, Room 3D281
Washington, D.C. 20301

Mr. Thomas S. McFee
Assistant Secretary for Personnel
Administration
Department of Health, Education
and Welfare
200 Independence Ave., SW,
Washington, D.C. 20201

Mr. Lloyd W. Grable
Director of Personnel
Department of Energy
Washington, D.C. 20545

Mr. Harry H. Flickinger
Director of Personnel and
Training Staff
Department of Justice
Constitution Avenue and Tenth
Street, NW.
Washington, D.C. 20530

Mr. Morris A. Simms
Director of Personnel
Department of Treasury
Washington, D.C. 20220

Re: FLRC No. 78P-6

Dear Ms. Mendenhall and Gentlemen:

This is in further reply to your request for a statement on the following major policy issue:

Whether there is a need for the Council to ask the Assistant Secretary of Labor for Labor-Management Relations to develop expedited proceedings to resolve representational issues resulting from reorganizations.

In your submission you indicate "that because of the multitude and magnitude of problems created by reorganizations, their impact on the overall labor relations environment, and the inordinate amount of time required by the Assistant Secretary to resolve representational issues resulting from reorganizations, the establishment of additional procedures for resolving such issues is clearly warranted." You further state that "favorable Council action on this policy issue would prevent the proliferation of cases involving reorganization issues and would facilitate the expeditious handling of such issues."

The Council has considered carefully your request and has determined that action on the question presented, which, in essence, is a request that the

Council require the Assistant Secretary to develop expedited procedures for processing representational issues resulting from agency reorganizations, is not necessary or appropriate because, the Assistant Secretary of Labor will not be responsible for resolving representational issues after January 1, 1979.^{1/}

Further, the Council has determined that your request does not satisfy the considerations governing the issuance of statements on major policy issues set forth in section 2410.3(b) of the Council's rules, which provides in pertinent part:

(b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:

(1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order [.]

The issuance of the major policy statement which you seek is not appropriate because other means are available under the Order for resolution of the matters at issue.

In its Report accompanying E.O. 11838, the Council examined reorganization-related problems and concluded that such problems should be resolved on a case-by-case basis under the flexible and comprehensive policy requirement of the three criteria set forth in section 10(b) of the Order. Specifically, the Council concluded:

. . . equal weight must be given to each criterion in any representational case arising out of a reorganization just as it is in any other case involving a question as to the appropriateness of a unit. For example, to give controlling weight to a desire, however otherwise commendable, of maintaining the stability of an existing unit would not meet the policy requirements in section 10(b). On the other hand, existing recognitions, agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final

^{1/} We note in this regard that pursuant to the provisions of Reorganization Plan No. 2 of 1978, which will be effective January 1, 1979, and the Federal Service Labor-Management Relations Statute, the functions of the Assistant Secretary of determining appropriate bargaining units, supervising elections and certifying exclusive bargaining representatives will be assigned to the Federal Labor Relations Authority. This change will remove a level of appellate review thereby further expediting the resolution of representational issues.

decisions on issues raised by reorganizations. The Council believes that the adjudicatory processes established under the Order will result in a body of case law which will provide any additional policies, principles, or standards which may be required to resolve problems arising out of reorganizations.2/

The Council has consistently reaffirmed its belief that the adjudicatory processes provided for in the Order are not only sufficient to resolve reorganization-related problems, but also constitute the appropriate method of resolution.3/

Specifically addressing the difficulties inherent in fashioning adjudicative techniques to reorganization-related problems, the Council has stated:

. . . the administrative difficulties . . . may be readily resolved by established adjudicative techniques, such as consolidated proceedings, multi-party stipulations, expedited hearings and the like, and by prompt resort to procedures already provided for or available under the Order.4/

Nothing in your request demonstrates that means available under the Order are not sufficient to resolve issues that might arise as a result of agency reorganization.5/

2/ Labor-Management Relations in the Federal Service (1975), at 51.

3/ See e.g., Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787 [FLRC No. 74A-22 (Dec. 19, 1975), Report No. 88]; Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, 4 FLRC 484 [FLRC No. 74A-52 (Sept. 17, 1976) Report No. 112].

4/ Defense Supply Agency Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, supra, n. 3, 797-8.

5/ It should also be noted that section 2410.4(b) of the Council's rules provides:

The Council will not consider a request related to a pending petition, application, charge, or complaint which the Council is advised has been filed pursuant to the Assistant Secretary's regulations unless the party involved in the case filing the request with the Council has first secured the prior approval of the Assistant Secretary.

The request indicates that three representation petitions filed by the Department of Energy were pending before the Assistant Secretary at the

(continued)

Accordingly, your request for a statement on a major policy issue is denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: F. Burkhardt
DOL

H. Solomon
FSIP

W. Horvitz
FMCS

A. Ingrassia
OLMR

K. Blaylock
AFGE

J. Peirce
NFFE

V. Connery
NTEU

A. Whitney
NAGE

P. Burnsky
MTD

C. Pillard
IBEW

(continued)

time of the request. As it does not appear that prior approval for the request was secured from the Assistant Secretary, the request, as it relates to the Department of Energy, would be deficient pursuant to section 2410.4(b) of the Council's rules.

PART III.

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January 1, 1978 through December 31, 1978



SUBJECT MATTER INDEX*

January 1, 1978 through December 31, 1978

* COUNCIL PRACTICE AND PROCEDURE separately indexed beginning at 1421.

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PREFACE

This index provides access to the Federal Labor Relations Council's decisions by key words pertaining to the substantive subject matter involved, such as agency reorganizations, leave, discipline, and promotions. In addition, the index contains major sections which differentiate decisions by type. These major sections are: ARBITRATION AWARDS; GRIEVABILITY/ARBITRABILITY (SECTION 13(d)); NEGOTIABILITY APPEALS; REPRESENTATION PROCEEDINGS; and UNFAIR LABOR PRACTICE CASES.

Similarly, the index contains major sections for specific authorities: CIVIL SERVICE DIRECTIVES, which includes the Federal Personnel Manual as a subsection; COMPTROLLER GENERAL DECISIONS; EXECUTIVE ORDER 11491; and UNITED STATES CODE.

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