UNITED STATES OF AMERICA
BEFORE THE
FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF STATE

Respondent

and

Case No. 3-CA-30477(F)

AMERICAN FOREIGN SERVICE ASSOCIATION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Exceptions to the Judge's Decision were filed by the General Counsel, limited cross-exceptions were filed by the Respondent, and an Opposition to the Respondent's limited cross-exceptions was filed by the General Counsel.

Pursuant to section 1423.29 of the Board's Rules and Regulations and section 1016 of the Foreign Service Act of 1980 (the Act), the Board has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record in this case, the Board hereby adopts the Judge's findings, conclusions, and Recommended Order. Thus, inasmuch as cable 103955 is excepted from the definition of "conditions of employment" because it concerns a matter relating to the Secretary of State's Government-wide or multiagency responsibility under section 1002(5)(D) of the Act, the Respondent was under no obligation to bargain with respect to the cable prior to its issuance. Moreover, in agreement with the Judge, the Board finds that the General Counsel failed to establish by a preponderance of the evidence that the cable effected a change in matters affecting the rights, benefits, or obligations of individuals employed in agencies not authorized to utilize the Foreign Service personnel system so as to give rise to an obligation on the part of the Respondent to consult with the Charging Party under section 1013(g) of the Act.

ORDER

IT IS ORDERED that the complaint in Case NO. 3-CA-30477(F) be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., February 14, 1985

Henry B. Frazier III, Acting Chairperson

Arnold Ordman, Member

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CERTIFICATE OF SERVICE

Copies of the Decision and Order of the Foreign Service Labor Relations Board in the subject proceeding have this day been mailed to the parties listed:

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UNITED STATES OF AMERICA
FOREIGN SERVICE LABOR RELATIONS BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

UNITED STATES DEPARTMENT OF STATE Respondent and AMERICAN FOREIGN SERVICE ASSOCIATION Charging Party	Case No.: 3-CA-30477(F)

Paul M. Coran, Esquire
For the Respondent

Peter A. Sutton, Esquire
For the General Counsel

Susan Z. Holik, Esquire
For the Charging Party

BEFORE: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of Chapter 10 of the Foreign Service Act of 1980, P.L. 96-465, 94 Stat. 2071, 2128, et seq., 22 U.S.C. § 4101, et seq. (hereinafter referred to as "the Act"), and the Rules and Regulations issued thereunder, 22 C.F.R. § 1423.1 et seq.

The complaint, filed on behalf of the American Foreign Service Association (Charging Party or Union), alleged that the Department of State (Respondent) committed unfair labor practices within the purview of Sections 4115(a)(1) and (5) of the Act by failing and refusing to negotiate in good faith with the Charging Party. It was further alleged that the Respondent, without first giving notice to the Union, issued

Cable Number 103955, dated April 15, 1983, to all diplomatic and consular posts for the purpose of directing ambassadors to impose ceilings on amounts of local currency converted into U.S. dollars at embassy facilities abroad. Counsel representing the General Counsel and counsel representing the Charging Party argue that Cable Number 103955 constituted implementation of a unilateral change in conditions of employment.

Counsel representing the Respondent contends that embassy currency conversion privileges do not relate to "conditions of employment" within the meaning of Section 4102(5) of the Act; that issuance of the cable did not modify existing policies or authorities governing currency conversion at posts abroad; and lastly, that Respondent met any controlling obligation to bargain.

All parties were represented by counsel during the hearing, and all parties were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Post-hearing briefs were filed by counsel representing the parties. Based upon the entire record herein, including my observations of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs filed, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Prior Practice Relating to Currency Conversion

In order to place the issuance of Cable Number 103955 into proper perspective it is necessary to describe prior practice and the pattern of regulation relating to the conversion of foreign currency at Respondent's facilities in foreign countries.

At Respondent's overseas posts, cashier functions are performed by United States Government cashiers (post cashiers). These employees represent the United States Treasury Department, but are under the jurisdiction of Respondent's representatives (Tr. 95). In some countries, post currency exchange facilities provide the only place to exchange local currency (Tr. 47, 108).

In most countries one rate governs the exchange of local currency into U.S. dollars. However, at some overseas posts parallel exchange rates, or local "street rates" of exchange exist. The latter are unofficial, or illegal exchange rates (Tr. 100). The Respondent encountered very sensitive foreign policy issues when through the sale of personal property, employees came into possession of large amounts of local currency based on parallel or unofficial exchange rates, and thereafter sought to utilize embassy currency exchange facilities to convert such local currency into U.S. dollars at favorable official exchange rates (G.C. Exh. No. 4). In a few countries great differences in these exchange rates led to grossly inflated values based upon the exchange of large sums

of local currency into U.S. dollars at more favorable official exchange rates utilized by post cashiers (G.C. Exh. No. 4).[1/]

There was no dispute that in countries having a wide divergence between the official and unofficial rates of exchange, great potential for profit existed in local markets through the sale of personal property. Motor vehicle sales in particular involved special problems. A witness representing the Charging Party testified that profits as high as $50,000 in U.S. dollars could be realized from such sales if individuals realizing these large profits were allowed to take advantage of embassy currency conversion facilities to exchange local currency into dollars (Tr. 51, 57). Other relevant testimony supplied on behalf of the Respondent revealed that major personal property items might be sold in Ghana for ten times their value at the street rate of exchange, and that profits in the amount of $200,000 might be generated if embassy currency exchange facilities were extended to convert such large amounts of local currency into dollars (Tr. 103).

The record disclosed that ambassadors or Chiefs of Missions have, within the framework of pertinent Department of State regulations relating to the subject, always exercised a great deal of discretion with respect to questions involving foreign currency exchange at embassy facilities. Since July 12, 1971, the purchase of foreign currency from U.S. Government personnel has been governed by general financial management regulations set forth in Section 365, Volume 4, of the Foreign Affairs Manual (4 FAM 365), (R. Exh. No. 4). These regulations provide that currency may be purchased from civilian employees of the U.S. Government who are U.S. citizens, and members of the Armed Forces of the U.S. when such personnel are departing from Respondent's overseas posts on transfer or home leave (4 FAM 365.2). Under the terms of 4 FAM 365.2-1, local currency equal to the sum of the employee's salary and allowances for two biweekly pay periods is established as the maximum amount which may be purchased upon transfer. Conversion of additional amounts is made dependent upon approval of an employee application submitted to the principal of the post involved, or to his designee. Under rules set forth in these regulations applicants are required to include in the application, information concerning the amount of local currency which employees seek to convert, the employee's anticipated departure date, a complete description of the source of the local currency, a declaration that it was not acquired in violation of local currency regulations, or exchange control laws of the country involved, and a request for official approval to exchange local currency. Additional limitations were placed upon employees going on home leave (4 FAM 365.2-2).

[1/] In some countries the official rate of exchange paid by post cashiers was higher than the official rate paid by local currency exchanges (Tr. 47).

Pursuant to Section 207 of the Act, Chiefs of Missions possess broad supervisory authority over U.S. Government civilian personnel assigned abroad. The Section provides:

> Sec. 207. Chief of Mission
>
> (a) Under the direction of the President, the chief of mission to a foreign country -
>
> (1) shall have full responsibility for the direction, coordination, and supervision of all Government employees in that country (except for employees under the command of a United States area military commander). . . . (R. Exh. No. 1, 1 FAM 011.2a).

By letter dated September 23, 1981 President Reagan provided each ambassador with authorization and support relating to the area of responsibility described in Section 207 of the Act. In pertinent part, this letter reflects the following:

> I expect the highest standards of professional and personal conduct from all United States Government personnel abroad. You have the authority and my full support to take any action required to ensure the maintenance of such standards. (R. Exh. No. 1, 1 FAM 011.2b).

Under standards of conduct set forth in 22 C.F.R. § 10.735-206(a)(2) (also set out in Appendix A, 3 FAM 620), all U.S. citizen employees serving abroad are prohibited from engaging in "transactions at exchange rates differing from local legally available rates, unless such transactions are duly authorized in advance" by the concerned foreign affairs agency (R. Exh. No. 3). These standards were in place both before and after issuance of Cable Number 103955.

Ms. Anthea de Rouville, an official representative of the Charging Party, testified that to her knowledge general rules set out in 4 FAM 365.2-1 have always been observed in some embassies, and further that the conversion of amounts of foreign currency in excess of two biweekly pay periods has always involved ambassador discretion (Tr. 61). It was further established that the Union never questioned this exercise of discretion because it had never been considered necessary to do so (Tr. 61-62). This testimony was corroborated by Mr. Clint Lauderdale, Respondent's Deputy Assistant Secretary for Personnel. He testified that embassy purchase of local currency had always been governed by the general rules set out in 4 FAM 365 (Tr. 91-94), and that ambassador discretion was a constituent part of these regulatory provisions (Tr. 94-95). The rules applied to all U.S. Government employees serving in foreign countries (Tr. 95).

In making decisions relating to currency conversion issues within their discretion, ambassadors considered many factors, including whether the U.S. Government would be in a position to make use of the foreign currency; whether the United States would be engaging in currency speculation, or would otherwise be considered a party in a currency speculation transaction; whether agreements with foreign nations would be violated; and whether the provisions of international treaties would be involved (Tr. 97-98). Counsel for the General Counsel acknowledged that 4 FAM 365 was in effect before the issuance of Cable Number 103955, and that these regulations were still in effect (Tr. 143).[2/] He also indicated that an ambassador faced with currency conversion problems as a result of parallel exchange rates would be expected to impose currency conversion limitations of some type (Tr. 146-147).

Prior Practice Relating to Importation and Sale of Personal Property

Regulations relating solely to currency conversion may not be considered apart from an understanding of prior restrictions placed on U.S. employees with respect to the importation and sale of personal automobiles and other personal property abroad. Until April 17, 1983, the provisions of Foreign Affairs Manual Circular (FAMC) 378, dated February 1, 1966, governed the sale of personal automobiles, and other personal property of U.S. employees abroad (Jt. Exh. No. 2). This Circular reflected a policy of full compliance with laws, regulations and conventions of host countries. It required that personal property importation into other countries by U.S. employees be for their bona fide personal use, or that of their dependents, and that importation not be solely with intent to sell or transfer. It prohibited sales at prices producing profits resulting primarily from import privileges derived primarily from the official status of U.S. Government employees. Under local regulations approved by ambassadors, sales were permitted so as to allow a profit, but in no event were employees allowed to retain profits. Employees had the option of selling personal property to recover acquisition costs. This figure included charges incurred for transportation, taxes, customs duties, and capital improvements. Profits in excess of this figure might be realized only if the excess obtained was donated by the employee to a charity approved by the ambassador.[3/] In the latter situation amounts realized in excess of an individual's tax basis were generally treated as capital gains; and in appropriate cases the

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2/ At a later point in the record, Counsel appeared to modify his position relative to the viability of 4 FAM 365 (Tr. 147-148).

3/ Specific provision was made for the retention of a portion of the profit over acquisition cost in cases where tax savings realized from charitable contributions did not offset taxes assessed on capital gains (Jt. Exh. No. 2, FAMC 378, § 8).

contribution to charity could be treated as a tax saving income tax deduction. The entire procedure was administratively handled by sales committees appointed by an ambassador or his designee. These sales committees approved or disapproved each transaction.4/

Ambassadors were charged with the responsibility for compliance with rules set out in FAMC 378, and could limit or prohibit importation of certain property; specify which categories of persons or dealers to whom sales could be made; limit the conversion of currency realized from the sale of personal property; and require the export of personal property (Jt. Exh. No. 2, FAMC 378 § 3(b)).

Respondent and Charging Party Agree to Changes in Regulations Governing Sale of Personal Property of U.S. Government Personnel Serving Abroad

By letter dated November 24, 1982, the Respondent proposed rescission of FAMC 378, and the amendment of other regulations so as to incorporate new liberalized rules relating to the importation and sale of personal property abroad by U.S. Government employees (G.C. Exh. No. 2). Negotiations between the Respondent and Union ensued. During negotiations no proposals were made concerning the modification of embassy foreign currency conversion rules (Tr. 48, 60). There was no discussion of the effect that the proposals would have on such existing regulations (Tr. 50). Agreement was reached on March 16, 1983, and the agreement was implemented on April 17, 1983, two days after issuance of Cable Number 103955.5/

Under the terms of the agreement a new section designated 2 FAM 225.3, and entitled "Importation and Sale of Personal Property" was added to 2 FAM 225; and 6 FAM 165.7 entitled "Limitations at Specific Posts," was modified to include new sections (b), (c), (d) and (e) (G.C. Exh. No. 3).

The newly revised 2 FAM 225.3 relates specifically to the "personal effects of all U.S. Government employees . . . , their spouses and dependents, regardless of agency, under the jurisdiction of the Chief of the Mission." Section (a) provides:

4/ Employees usually appeared before these committees with pertinent records to document the legality of applications to dispose of personal property in accordance with the provisions of FAMC 378 (Tr. 47-48). Cars and major appliances were normally sold upon departure from a post and the sale of these constituted the main source of committee business (Tr. 19).

5/ Foreign affairs agencies subject to the Act, and labor organizations representing bargaining unit employees in these agencies were signatories to the agreement (G.C. Exh. No. 3).

> (a) Personal property imported into host countries by U.S. citizen employees under diplomatic privileges and immunities must be for their bona fide personal use or that of their dependents. The Chief of Mission shall establish procedures to ensure that subsequent sales of such property are in compliance with bilateral agreements, international treaties and host government laws.

In instances involving reason to believe that bona fide personal use would not be, or had not been the intended purpose of the importation, the Chief of Mission is authorized to investigate to determine whether importation or intended importation is primarily for the purpose of sale at a profit. If primarily for the purpose of sale at a profit, the Chief of Mission is authorized to take one or more of the following actions:

> (1) As appropriate, deny request to import the property or deny the sale;
>
> (2) Require the employee to repay the U.S. Government the original cost of shipping the property to post;
>
> (3) Deny use of Embassy facilities for conversion or transfer of funds;
>
> (4) Withhold certification of employee's diplomatic or official privilege to sell, register, or transfer title to the property;
>
> (5) Require property to be re-exported at employee's expense.
>
> (6) Take such other action as may be appropriate, including recommending disciplinary action against the employee.

Subsection (b) of 2 FAM 225.3 specifically refers to, and incorporates by reference, "3 FAM 620, Employee Responsibilities and Conduct,"[6/] and newly added provisions of 6 FAM 165.7.

Additions to 6 FAM 165.7 specifically relate to restrictions concerning the disposition of automobiles. Subsection (b) condemns importation for the purpose of sale, and authorizes investigation in appropriate

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6/ As previously noted 22 C.F.R. § 10.735-206(a)(2), which is also codified in 3 FAM 620, specifically prohibits "transactions at exchange rates differing from local legally available rates, unless such transactions are duty authorized in advance. . . ."

cases to determine whether a profit was made or anticipated, and whether questionable circumstances exist. Subsection (c) authorizes Chiefs of Missions to require repayment of transportation costs, or to deny the right to replace a vehicle if the facts warrant such action. Subsection (d) refers to, and incorporates by reference, authority conferred on Chiefs of Missions in 2 FAM 225.3. Subsection (e) again refers to the latter provision, and to "3 FAM 620 for rules on personal conduct."

The parties agreed that the March 16th agreement constituted a liberalization of existing rules relating to the retention of profit from the sale of personal property. Counsel for the General Counsel could point to no element of the agreement which mandated the conversion of personal property sale proceeds into U.S. dollars (Tr. 124). Further, it was admitted that although the agreement did replace FAMC 378, it did not have the affect of nullifying or replacing existing rules and regulations relating to an ambassador's discretion to control embassy currency conversion (Tr. 120-121).

It was clear from the agreement, and the entire record, that the agreement did not address the issue of embassy currency exchange, nor the diverse money exchange problems encountered at diplomatic and consular posts.7/

Counsel representing the General Counsel acknowledged that the effect of the agreement was to permit employees to retain profits in excess of acquisition costs, that employees gained the possibility of financial benefit from the sum obtained in excess of acquisition costs, and that under the old practice employees would not have been permitted to realize such benefits unless they elected to donate the excess to charity and claim an income tax deduction (Tr. 123).

The position of counsel representing the General Counsel closely paralleled that of counsel representing the Respondent. The latter asserted that the agreement did not nullify 4 FAM 365, or other authorities which had provided a basis for ambassador discretion in the currency conversion area. Counsel representing the Respondent also accurately noted that under the agreement, employees could, in accordance with policy outlined therein, retain all foreign currency obtained from the sale of personal property abroad (Tr. 143); but that currency conversion remained a matter of ambassador discretion in accordance with regulations existing before and after the execution of the March 16th agreement.

7/ Counsel representing the General Counsel perceived no issue of contract interpretation, and stated, "Now that agreement provides very simply. . . . [t]hat employees would be allowed to retain the profits from the sale of personal property." (Tr. 118, 121).

The rescission of FAMC 378 guidelines had the effect of relegating employees to other existing rules and regulations relating to the disposition of foreign currency; that is, to embassy exchange facilities if permitted under local ambassadorial policy; or to other avenues of relief. In cases wherein embassy currency exchange privileges might not be available, employees might still derive value for their foreign currency. Employees might, depending on the circumstances and local rules and laws, have the right to convert such currency locally, take currency out of the country, buy securities, purchase real property, or buy removable items of property (Tr. 103-104). The March 16th agreement did not compel employees to forfeit foreign currency obtained through the sale of personal property (Tr. 88-89, 104).

Reluctantly, and in a somewhat ambivalent manner, Counsel representing the Charging Party argued that the March 16th agreement had the effect of abrogating ambassador discretion to deny currency exchange privileges in all cases involving the sale of personal property unless it could be shown through inquiry that there was reason to believe that policy expressed in the March 16th agreement had been contravened. However, neither the agreement nor the record reflects a basis for such a factual finding. As noted counsel representing the Charging Party acknowledged that the agreement was primarily designed to liberalize rules relating to the retention of profit. It was also conceded that only existing rules and regulations inconsistent with the agreement would have been rescinded by the agreement (Tr. 119-120); that the agreement incorporated 2 FAM 225.3, 6 FAM 165.7, and 3 FAM 620 by reference; that the latter related to rules of personal conduct, including 22 C.F.R. § 10.735-206(a)(2); and that such rules were binding on bargaining unit employees (Tr. 120-121). The record did not include a showing that the March 16, 1983 agreement was inconsistent with, or that it otherwise abrogated the general regulatory provisions relating to embassy purchase of foreign currency.

Implementation of March 16, 1983 Agreement

Prior to April 17, 1983, the effective date of the March 16th agreement, the Respondent issued Cable Number 87412, dated March 31, 1983, to all diplomatic and consular posts to explain the effect that the agreement would have (Jt. Exh. No. 1). This document, adopted as a Joint Exhibit by the parties, announced the rescission of FAMC 378; explained that previously required submission of proof of purchase and sale price of personal property would not be required; and advised that employees would be permitted to retain profits from the sale of personal property. It was noted that certain restrictions would remain; that is, property might be imported only for bona fide personal use, and sold only in accordance with the laws, regulations and conventions of the host country." It was further observed that "employees and dependents (would be) expected to conduct themselves with propriety befitting the employees' positions as representatives of the United States." The Cable referred to existing authority of Chiefs of Missions to "establish procedures to ensure that subsequent sales of such property (would be) in compliance with bilateral

agreements, international treaties and host government laws." It described Chiefs of Missions as having the authority to determine that certain "property was imported or intended to be imported under diplomatic privileges and immunities primarily for the purpose of sale at a profit," and that they could in such cases thereafter take appropriate action, including the denial of embassy currency exchange services. The Cable included the following additional guidance:

> (4) Since the new regulations do not require posts to monitor or approve employees' sale of personal property, sales committees will no longer be necessary, and they may be abolished. However, Posts should note that the new policy does not alter the Chief of Mission's authority and responsibility to establish policies, rules and procedures in the mission to assure that employees comply with host government rules on importation and sale or personal property, and rules of conduct for Government employees. The Chief of Mission may wish to use some form of employee committee on an ad hoc basis to review questionable sales.
>
> (5) All implementing procedures published on this subject shall be in conformance with the criteria in 2 FAM 225.3, 6 FAM 165.7 and 3 FAM 620, as revised.
>
> (6) Posts are expected to apply this new policy with good judgment and reason. Employees should recognize that, when disposing of personal property, they have an obligation to avoid situations which would indicate abuse or invite suspicion of abuse. In case of questions on this policy, posts should contact their Regional Bureau Executive Office for guidance.
>
> (7) Existing regulations governing currency conversion (4 FAM 365) remain unchanged.

Cable Number 87412 was referred to by counsel representing the General Counsel as a document "informing . . . of the contents of the parties' March 16, 1983 agreement. . . ." (General Counsel's Brief at page 4). It was identified in the record by counsel representing the General Counsel as a document which "implemented the agreement that the parties reached on the sale of personal property." (Tr. 43). These statements, together with the language of Joint Exhibit No. 1, make it clear that the March 16th agreement did not abrogate ambassadorial discretion. Furthermore, it reflects that the parties contemplated that the Respondent would heed the caveats outlined.

Following issuance of Cable Number 87412, the Respondent received expressions of concern and requests for guidance from at least two ambassadors representing countries with parallel exchange rates. They

indicated that precautions would have to be taken to avoid embarrassment in the conduct of foreign affairs (Tr. 99-100, 108).[8/] The inquiries reflect requests for guidance concerning embassy handling of foreign currency by post cashiers (Tr. 109).[9/]

Respondent's Issuance of Cable Number 103955 to Diplomatic and Consular Posts

Cable Number 103955, the gravamen of the Complaint herein, was transmitted on April 15, 1983 to all diplomatic and consular posts. It was issued without first notifying the Charging Party (Tr. 12-13, 22, Respondent's Answer, Paragraph 7).[10/] The Cable was prepared by the Respondent as a response to inquiries received from overseas posts with parallel currency exchange rates (Tr. 109).

The Cable referred to existing rules set out in 4 FAM 365 as being available to guide Chiefs of Missions. It also alluded to their discretion to take steps needed to regulate embassy currency exchange privileges to avoid currency conversions when such conversions would not be "in the interest of the Government." The Cable suggested specific actions, but did not mandate courses of action. Instead, the power of decision relating to the issue was left entirely to the head of each diplomatic and consular post. It dealt entirely with the use of embassy currency exchange privileges and did not repudiate or otherwise limit the March 16, 1983 agreement. Specific reference was made to the need to consider employee standards of conduct, particularly 22 C.F.R. § 10.735-206 (a)(2), dealing with the prohibition against dealing in transactions at exchange rates differing from local legally available rates.

The parties stipulated that there was an uneven response to Cable No. 103955, and that forty-three posts imposed no limitations whatsoever on currency exchange privileges associated with the sale of personal property

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8/ One expression of concern emanated from the American Embassy in Ghana.

9/ The record disclosed that Chiefs of Missions often sought advice and/or approval concerning the implementation of ambassadorial authority in the field (Tr. 115).

10/ Cable 103955 related to currency conversion transactions involving all U.S. Government employees representing Federal agencies at overseas diplomatic and consular posts. Depending on the post, approximately three to forty-four U.S. Government agencies would have been affected (Tr. 95-96).

(Tr. 41-43, 78). It was also stipulated that certain posts imposed conversion limitations based upon local conditions.[11/]

Charging Party Interposes Objection to Cable Number 103955

By letter dated April 21, 1983, the Charging Party informed the Respondent that Cable Number 103955 represented an attempt to modify the terms of the March 16th agreement; that it constituted a bypass of the Charging Party, and that it imposed "procedures which would effectively negate any benefits accruing from the agreement." (G.C. Exh. No. 7). The letter sought revocation of the Cable.

By letter dated April 22, 1983, the Respondent replied denying any attempt to modify the terms of the March 16th agreement; and noting that employees could, in accordance with the agreement, sell personal property and retain profit gained from the sales (G.C. Exh. No. 8). It explained further that "[t]here is simply a limit on the amount of currency that will be officially converted by post management in those countries where there is more than one exchange rate."

Counsel representing the General Counsel was ambivalent concerning the meaning to be attributed to Cable Number 103955. At one point he stated that there was nothing in the March 16th agreement which precluded issuance of Cable Number 103955, and at another point in the record he stated that issuance of the Cable was in conflict with the March 16th agreement (Tr. 11-12, 121). However, as previously noted the record is clear that the March 16th agreement did not relate to ambassador discretion to control embassy currency exchange privileges. Moreover, Cable Number 103955 did not mandate the imposition of conversion exchange ceilings, but merely alluded to existing ambassador discretion to impose limitations in parallel exchange situations within the purview of existing policy and regulations. More significantly, Cable Number 103955 did not require the forfeiture of foreign currency realized from the sale of personal property abroad.

11/ Managua Post imposed a $50,000 limit; Kingston Post, a limitation amounting to two-thirds of personal property sale proceeds; Warsaw Post, $25,000 per family; Bucharest Post, original purchase price of sale items; Kinshasa Post, $6,000 per employee, $1,500 for a spouse, and $500 for each dependent; Asuncion Post, indeterminate foreign currency conversion limitation (Tr. 42-43). The record also disclosed the imposition of currency exchange limitations relating to personal property sales in Ghana (Tr. 84A, G.C. Exh. No. 9(a)).

Discussion and Conclusions

A threshold issue posed in this case relates to the question of whether the issuance of Cable Number 103955, involved "conditions of employment" within the meaning of the Act.

In part, the phrase "conditions of employment" is defined in Section 4102(5) of the Act as follows:

> (5) "conditions of employment" means personnel policies, practices, and matters, whether established by regulation or otherwise, affecting working conditions, but does not include policies, practices and matters -
>
> . . . .
>
> (D) relating to Government-wide or multiagency responsibility of the Secretary [of State] affecting the rights, benefits, or obligations of individuals employed in agencies other than those which are authorized to utilize the Foreign Service personnel system. . . .

The record makes it clear that embassy cashiers are Treasury Department agents acting under ambassadorial jurisdiction. Currency conversion policy promulgated and imposed at the embassy level as a result of Cable Number 103955, would necessarily operate to limit and control to some extent, all U.S. Government employees under an ambassador's authority. Depending on the size of the overseas post, these employees could represent up to forty-four different U.S. Government agencies. Cable 103955 enunciated a State Department policy, and this policy was applicable to all U.S. Government employees, and not solely to employing agencies which the Act explicitly identifies as being authorized to utilize the Foreign Service personnel system under the provisions of 22 U.S.C. § 3922. This being the case, Cable Number 103955 did not involve "conditions of employment" within the meaning of the Act because it related to "Government-wide or multiagency responsibility of the Secretary affecting the rights, benefits, or obligations of individuals employed in agencies other than those which are authorized to utilize the Foreign Service personnel system. . . ." Under these circumstances the Respondent had no obligation to negotiate with the Charging Party prior to issuance of Cable 103955.

Although the obligation to negotiate did not exist by reason of language reflected in Section 4102(5)(D) of the Act, a question is posed concerning the obligation to "consult" within the meaning of Section 4113(g) of the Act. This Section provides:

> (g) The Department shall consult with the exclusive representative with respect to Government-

> wide or multiagency matters affecting the rights, benefits, or obligations of individuals employed in agencies not authorized to utilize the Foreign Service personnel system. The exclusive representative shall be informed of any change proposed by the Department with respect to such matters, and shall be permitted reasonable time to present its views and recommendations regarding such change. The Department shall consider the views and recommendations of the exclusive representative before taking final action on any such change, and shall provide the exclusive representative a written statement of the reasons for taking the final action.

The record does reflect that the subject of Cable Number 103955 involved "Government-wide or multiagency matters affecting the rights, benefits, or obligations of individuals employed in agencies not authorized to utilize the Foreign Service personnel system."[12/] If Section 4113(g) required no more, the circumstances outlined would give rise to an obligation to consult. However, in order to bring the language of Section 4113(g) into operation, there must first be showing that a "change . . . with respect to such matters" occurred. The burden of showing such a change rests with counsel for the General Counsel.[13/]

Counsel representing the General Counsel and Charging Party argue that Cable Number 103955 involved a change amounting to the imposition of new terms and conditions of employment. The record does not support this contention. Instead, the record disclosed that prior to the issuance of Cable Number 103955, Chiefs of Missions exercised discretion with respect to issues involving the exchange of local foreign currency by post cashiers. The prior existence of such discretion is reflected in 4 FAM 365. Basis for the prior existence of such discretion may also be traced to Section 207(a) of the Act, and more particularly to presidential authority enabling ambassadors to take action to uphold "the highest standards of professional and personal conduct from all United States Government personnel abroad." (R. Exh. No. 1, 1 FAM 011.2a). Similar authority for such discretion may be attributed to 22 C.F.R. § 10.735-206 (a)(2), which prohibits "transactions at exchange rates differing from locally available rates, unless such transactions are duly authorized in advance. . . ." All of these provisions were in place before and after issuance of Cable Number 103955, and all must be recognized as viable guides for ambassador discretion.

12/ Briefs filed by counsel representing the General Counsel and the Charging Party suggest the possible application of Section 4113(g).

13/ See Section 4116(g) of the Act.

The record did not show that the March 16, 1983 agreement operated to nullify, or otherwise modify this discretion. During negotiations leading to the agreement no proposals were made by either party concerning changes in embassy foreign currency exchange privileges, nor was the cited regulatory and statutory basis for ambassador discretion modified in any way. Moreover, the language of the agreement provided a basis for inquiry in situations involving personal property sales suggestive of reason to believe that bona fide personal use would not be, or had not been, the intended purpose of importation. The agreement provided sanctions in cases wherein profit was the primary reason for importation or intended importation; and the denial of use of embassy facilities for the conversion of local currency was an option which a Chief of Mission might impose in such cases. The agreement did not provide that U.S. Government employees would have an unlimited right to convert local currency in all other cases, nor did the inclusion of sanctions strip ambassadors of all other discretion. Such an interpretation would be tantamount to removal of all embassy currency conversion ceilings designed to protect the integrity of the United States and the Foreign Service in this significant area of concern. The record reflects illustrations indicative of grossly inflated values, and of profiteering, which might result at certain overseas posts in the absence of currency conversion controls. There is no reasonable basis for determining that such a result was contemplated by the parties to the March 16, 1983 agreement. It was acknowledged that the agreement did not mandate the conversion of personal property sale proceeds into U.S. dollars.

The record disclosed the existence of a wide difference between permitting profits to be realized in the form of local currency, and the regulation of exchange facilities to limit the exchange of local currency into U.S. dollars. The thrust of the agreement was to permit the former only. Under the terms of the agreement, the rescission of restrictions on profit did in fact enhance the possibility of realizing profits through the sale of personal property. This was true even in situations where conversion privileges were limited by ambassador discretion. However, the parties left intact the controls needed to help prevent employees from taking advantage of embassy facilities to realize questionable windfall profits through the sale of personal property abroad.

Cable Number 87412, introduced as Jt. Exh. No. 1 by the parties, removes any doubt concerning the limited application of the March 16, 1983 agreement. This document reflects the intent of the parties. It shows that the rescission of FAMC 378 operated to allow the retention of certain profits made from the sale of personal property; but that "employees and dependents (would be) expected to conduct themselves with propriety befitting the employees' positions as representatives of the United States." Cable Number 87412 referred to existing authority of Chiefs of Missions to "establish procedures to ensure that subsequent sales of such property (would be) in compliance with bilateral agreements, international treaties and host government laws." It also reflected that Chiefs of Missions had broad discretion to establish policies, rules, and procedures

to assure compliance with host government rules relating to importation and sale, and rules of conduct governing U.S. Government employees. Chiefs of Missions were expected to implement the March 16th agreement with "good judgment and reason," and employees were required "to avoid situations which would indicate abuse or invite suspicion of abuse."

In summary, the facts show that Cable Number 103955 did not represent the introduction of a new term and condition of employment, nor did it give rise to a change triggering an obligation to consult. It merely alluded to existing ambassadorial discretion to control embassy conversion of local currency into U.S. dollars; and suggested that ambassadors exercise their discretion as appropriate in countries with parallel exchange rates.[14/] The uneven response to Cable Number 103955 shows that ambassadors did in fact exercise discretion. It is well-settled that the reaffirmation of existing personnel policies and practices does not constitute a change in the terms and conditions of employment. Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33 (1982), 9 FLRA 229; Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA No. 40 (1981), 6 FLRA 240; Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA No. 98 (1980), 4 FLRA 736. Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 3 FLRA No. 106 (1980), 3 FLRA 655.

The March 16, 1983 agreement merely created an atmosphere wherein certain overseas posts exercised existing authority to act. This was consistent with what had occurred in the past, and was entirely in accord with the March 16th agreement. Cable Number 87412 (Jt. Exh. No. 1), indicates that the parties fully contemplated creation of a climate in which discretion would come into play to insure compliance with existing rules and regulations relating to the conversion of local currency by post cashiers.

14/ If adopted, the position of the General Counsel and Charging Party would result in a repudiation of this administrative discretion, since it follows that in the absence of agreement relating to currency conversion ceilings, their position would favor a policy of unrestricted conversion of local currency into U.S. dollars except in cases where it could be definitively shown that an employee had imported, or intended to import, personal property for the purpose of sale at a profit. This would make the Respondent a participant in a policy designed to circumvent key objectives of existing regulations.

Section 4101 of the Act provides that the Labor-Management provisions of Chapter 10 of the Act "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Apart from other considerations militating against adoption of theories underlying the complaint, a construction of the Act permitting the result outlined would contravene the meaning of Section 4101.

In order to derive benefit from a prosecutive theory relying upon issuance of Cable Number 103955 as a basis for the alleged change, counsel would have had to show that Cable Number 103955 did in fact represent a change. Under the circumstances presented herein it is not possible to conclude that the issuance of the Cable represented a change. Accordingly, Respondent did not, under the provisions of Section 4113(g) of the Act, have a duty to inform the Charging Party of the Cable prior to issuance, nor was Respondent obligated to consult within the meaning of that Section.15/

Based on the foregoing it is determined that counsel representing the General Counsel did not meet the burden of showing, by a preponderance of the evidence that the Respondent changed conditions of employment within the meaning of Sections 4115(a)(1) and (5) of the Act.16/

It is recommended that the Foreign Service Labor Relations Board issue the following Order pursuant to 22 C.F.R. § 1423.29.

ORDER

IT IS HEREBY ORDERED, that the compliant in Case No. 3-CA-30477(F), be, and it hereby is, dismissed.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: April 9, 1984
Washington, DC

15/ Counsel representing the General Counsel took the position that the Respondent had no obligation to bargain concerning decisions to impose ceilings on currency conversion at Respondent's overseas posts; but that the imposition of ceilings was a management right falling within the purview of Section 104 of the Act. He argued that the Respondent had an obligation to bargain on impact and implementation prior to issuance of Cable Number 103955. Counsel representing the Charging Party argued in favor of decision bargaining but offered no legal authority to support the position. References herein to the applicability of Section 4113(g) of the Act make it unnecessary to discuss the merits of these legal theories. Furthermore, it is noted that the record discloses that Cable Number 103955 did not impose currency conversion ceilings, but merely advised diplomatic and consular parts of their authority to take appropriate action under existing policy and regulations.

16/ In view of the conclusions outlined it is unnecessary to address other defenses interposed by the Respondent in opposition to the complaint.