

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

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1812

Union

and

Case No. FS-NG-7

UNITED STATES INFORMATION
AGENCY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

This case comes before the Foreign Service Labor Relations Board (the Board), pursuant to section 1007(a)(3) of the Foreign Service Act of 1980 (the Act), and presents issues involving the negotiability of six proposals. Upon careful consideration of the entire record, including the parties' contentions,^{1/} the Board makes the following determinations.

Union Proposal 1

Conversion of an individual in accordance with sections 2104 and 2106 of the Foreign Service Act of 1980 be done in a manner that the employee be converted to a grade and pay rate that most closely corresponds to the class or grade and step at which the individual was serving immediately prior to conversion.

Union Proposal 5

Any employee converted under sections 2104 and 2106 of the Foreign Service Act of 1980 be converted to a grade

1/ Pursuant to a Motion to Intervene, the Board has granted the Department of State permission to submit written arguments as an amicus curiae and has considered these arguments and the Union's response thereto in rendering its decision.

at a step which will ensure the employee's eligibility for the same number of step increases (up to a maximum of ten) he would have had prior to conversion (unless or until promoted to a higher grade).

Union Proposal 6

Any employee who is converted under sections 2104 and 2106 of the Foreign Service Act of 1980, remain eligible regardless of grade and step to which they are converted for the same number of steps (up to a maximum of 14) the employee would have been eligible for had the employee not been converted (unless or until promoted to a higher grade).

Section 2104 of the Act required the mandatory conversion of Foreign Service Domestic Specialists (domestic employees) from the Foreign Service to the Civil Service, including their conversion to the General Schedule (GS) pay system.^{2/} These Union proposals, all of which are concerned with the grade and step of the General Schedule to which employees who are converted will be assigned, are so interrelated that they must be construed together. Taken together, they would require the Agency to convert USIA domestic employees to the grade and pay rates that

2/ Section 2104 of the Act in pertinent part provides as follows:

Sec. 2104. CONVERSION FROM THE FOREIGN SERVICE. - (a) In the case of any individual in the Foreign Service who, immediately before the effective date of this Act, is serving under an appointment described in section 2102(a) or 2103(a) and who is not converted under section 2102 or section 2103 because such individual does not meet the conditions specified in section 2102(b) or 2103(d), the Secretary shall, not later than 3 years after the effective date of this Act, provide that--

(1) the position such individual holds shall be subject to chapter 51 and subchapter III of chapter 53 of title 5, United States Code;

(b) In the case of individuals in the Foreign Service in the International Communication Agency who immediately before the date of enactment of this Act are covered by a collective bargaining agreement between the Agency and the exclusive representative of those individuals, the 3-year period referred to in subsection (a) shall begin on July 1, 1981.

most closely correspond to their Foreign Service class or grade and which would ensure a certain range of eligibility for step increases after conversion. The Agency has refused to negotiate over the Union proposals contending that they are inconsistent with regulations prescribed by the Secretary of State ("Secretary"), with which the Agency must comply pursuant to sections 2107 and 2108 of the Act,^{3/} and therefore nonnegotiable.

The Union tacitly concedes that the proposals are inconsistent with the Secretary's regulations. However, it argues that section 2107 is inapplicable to the USIA's employees since Congress intended to treat USIA employees differently than those employed by the other Foreign Service agencies. It further claims that the State Department waived its right to assert that its regulations bar negotiation between USIA and the Union since the State Department previously refused to negotiate with the Union on the basis that conversion matters should be negotiated with the individual agencies.

In agreement with the Agency, the Board finds herein that regulations prescribed by the Secretary of State govern the conversion of all domestic employees from the Foreign Service to the Civil Service and, thus, bar negotiation over Union Proposals 1, 5 and 6. Section 2107 of the Act mandates the Secretary to prescribe general regulations implementing the conversion provisions of the Act so as to "insure that the transition will be implemented in a uniform and consistent manner[.]"^{4/} While section 2107 permits the agency heads to determine

^{3/} Sections 2107 and 2108 of the Act read as follow:

Sec. 2107. REGULATIONS. - Under the direction of the President, the Secretary shall prescribe regulations for the implementation of this chapter.

Sec. 2108. AUTHORITY OF OTHER AGENCIES. - The head of agencies other than the Department of State which utilize the Foreign Service personnel system shall perform functions under this chapter in accordance with regulations presented by the Secretary of State under 2107. Such agency heads shall consult with the Secretary of State in the exercise of such functions.

^{4/} In this regard, the report of the Senate Committee on Foreign Relations states:

Section 2107 provides that the Secretary, under the direction of the President, shall prescribe regulations to implement this transition chapter. This section contemplates two sets of

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implementing details for his or her agency, section 2108 mandates that the agency heads shall implement the conversion in accordance with regulations prescribed by the Secretary of State under the authority of section 2107. Thus, pursuant to sections 2107 and 2108 of the Act, the conversion of all domestic employees from the Foreign Service to the Civil Service must be accomplished consistent with regulations prescribed by the Secretary of State. Inasmuch as the Union tacitly concedes that its proposals are inconsistent with regulations prescribed by the Secretary of State, these regulations bar negotiation over the Union's proposals.^{5/}

The Board rejects the Union's contention that section 2107 of the Act is not applicable to USIA. Contrary to the Union's claim, there is no evidence in the legislative history or the Act indicating that USIA should be exempted from provisions of the Act other than that which is specifically provided in section 2104(b) of the Act, authorizing USIA the right to delay the time in which to complete the conversion process.

Similarly, the Union's claim that the Department of State waived its right to prescribe regulations governing the conversion of domestic employees to the Civil Service cannot be sustained. The Act did not confer upon the Secretary of State a right to prescribe such regulations. Rather, the Act vested in the Secretary of State the responsibility of prescribing regulations governing the conversion of domestic employees.

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regulations. Each agency head (the "Secretary") will prescribe implementing regulations for his or her agency. The Secretary of State will also prescribe general regulations which will apply uniformly to all agencies (cf. section 2108).

Section 2108 provides that other agency heads shall implement chapter 1 of title II in accordance with regulations prescribed by the Secretary of State under section 2107 and in consultation with the Secretary. This will insure that the transition will be implemented in a uniform and consistent manner while leaving each agency head free to determine the implementing details for his or her agency under the authority of section 2107. S. Rep. No. 96-913, 96th Cong. 2d Sess. p. 97 (1980).

The language as contained in the House Committee of Foreign Affairs report, H.R. Rep. No. 96-992, Part I, 96th Cong., 2d. Sess. p.101 (1980), parallels the above quoted language from the Senate report.

^{5/} Inasmuch as the Union did not challenge the Agency's claim that the proposals are inconsistent with the Secretary of State regulations, the Board will, as the parties have, treat the proposals as being inconsistent therewith.

Pursuant to section 201(b) of the Act, functions which are vested in the Secretary of State can only be performed by the Secretary of State and not by heads of other agencies.^{6/} The legislative history of the Act supports such a finding. The House Committee on Post Office and Civil Service in its report, which parallels the language contained in the Senate Committee on Foreign Relations' report,^{7/} stated:

Section 201(a) provides that the Secretary of State shall direct and administer the Foreign Service and coordinate its functions. Section 201(b) provides that those functions which are expressly vested in the Secretary of State by the bill may be performed only by the Secretary of State and not by heads of other agencies utilizing Foreign Services personnel authorities. [Emphasis added.] H. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 43 (1980).

Thus, insofar as the responsibility for prescribing regulations for the conversion of domestic employees is vested in the Secretary of State pursuant to sections 2107 and 2108 of the Act, the Secretary of State cannot delegate this responsibility to USIA.

Accordingly, insofar as the proposals, as conceded by the Union, are inconsistent with the Secretary of State regulations, Union Proposals 1, 5 and 6 are outside the duty to bargain.

Union Proposal 2

Employees subject to conversion under sections 2104 and 2106 of the FS Act of 1980 who will be converted to a grade and step higher than a step 10 will receive 100% annual pay adjustments based on their basic rate of salary.

6/ Section 201(b) of the Act reads as follows:

Sec. 201. THE SECRETARY OF STATE. - (a) Under the direction of the President, the Secretary of State shall administer and direct the Service and shall coordinate its activities with the needs of the Department of State and other agencies.

(b) The Secretary of State alone among the heads of agencies utilizing the Foreign Service personnel system shall perform the functions expressly vested in the Secretary of State by this Act.

7/ S. Rep. No. 96-913, 96th Cong., 2d Sess. 21 (1980).

The proposal would require USIA to pay annual statutory pay comparability adjustments to employees, whom it proposes to convert to "balloon steps" in the GS grade system, based on the employee's basic rate of pay at the balloon step, rather than at the 10th step.^{8/}

The Agency claims the proposal is nonnegotiable because it violates 5 U.S.C. § 5305 which prohibits the computation of pay comparability based upon the balloon rates.^{9/} In this regard, the Agency contends that while the Act prescribed the pay and benefits of converted employees during their conversion, once converted to the GS pay system converted employees become subject to the pay setting rules of 5 CFR § 531 which only provides for an adjustment based on the maximum rate of the employee's grade. Consequently, according to the Agency, the Act does not require and title 5 does not permit an employee whose rate of pay is beyond step 10 of a GS grade, to which he or she has been converted, to obtain 100% of the annual GS pay comparability adjustment for that rate.

The Union tacitly concedes that Union Proposal 2 is inconsistent with 5 U.S.C. § 5305. However, it asserts that employees at balloon rates are entitled to 100% comparability adjustments after being converted to the GS system, since it was Congress' intent to preserve the pay and benefits of converted employees. Thus, the Union contends that inasmuch as 5 U.S.C. § 5305 is inapplicable to converted domestic employees, the proposal is not inconsistent with law. In support of this claim the Union cites the failure of section 2104(a)(1) to specifically subject converted employees to the provisions of title 5 governing pay comparability, while specifically subjecting them to subchapter III of Chapter 53 of title 5. The Union's contentions, however, must be rejected.

Section 2106(a)(1) of the Act provides for the preservation of status and benefits of all employees who are converted pursuant to provisions of the Act. Section 2106(a)(2) further provides that an employee converted to the Civil Service is entitled to have his or her position considered for all purposes as being at the grade which corresponds to the class in

^{8/} "Balloon steps," as defined by the parties, are rates of pay above the 10th, and highest, step of the GS pay system.

^{9/} Pursuant to 5 U.S.C. § 5305(q), rates of pay are adjusted under conversion rules prescribed by an agency designated by the President. The Office of Personnel Management (OPM) has prescribed such rules as set forth in 5 CFR § 531.205. 5 CFR § 531.205(a)(3) specifically provides that "the employee shall receive his or her existing rate of basic pay increased by the amount of increase made by the pay adjustment under 5 U.S.C. § 5305 in the maximum rate for the employee's grade." [Emphasis added.]

which the employee served immediately before conversion.^{10/} While it is clear that Congress intended to preserve the pay and benefits of converted domestic employees during the conversion process, the legislative history of the Act just as clearly indicates that Congress intended employees once converted to the Civil Service to be subject to the personnel rules and regulations governing all other Civil Service employees, particularly, the provisions of title 5 of the U.S. Code. The House Committee on Post Office and Civil Service stated in its report:

Foreign affairs agencies have, in the past, created numerous overlapping personnel categories. The committee believes that the Foreign Service personnel authorities should be utilized only for American personnel who are needed for worldwide assignments, including frequent rotation, and who have committed themselves to being truly worldwide available. All other personnel should be employed under the authorities provided in title 5, United States Code, for Government employees generally. This bill requires the simplification and rationalization of personnel categories and mandates the conversion of those employees who are not in the appropriate category.

Any conversion required is intended to take place without detriment to the employee affected. H.R. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 16 (1980).^{11/}
[Emphasis added.]

10/ Section 2106 of the Act provides as follows:

Sec. 2106. PRESERVATION OF STATUS AND BENEFITS. - (a)(1) Every individual who is converted under this chapter shall be converted to the class or grade and pay rate that most closely corresponds to the class or grade and step at which the individual was serving immediately before conversion. No conversion under this chapter shall cause any individual to incur a reduction in his or her class, grade, or basic rate of salary.

(2) An individual converted under section 2104 to a position in the competitive service shall be entitled to have that position, or any other position to which the individual is subsequently assigned (other than at the request of the individual), be considered for all purposes as at the grade which corresponds to the class in which the individual served immediately before conversion so long as the individual continues to hold that position.

11/ See also, Congresswoman Schroeder's comment on the need for separate and distinct personnel categories in Cong. Rec. H 8655, Sept. 8, 1980.

Therefore, although Congress did not intend converted employees to suffer a loss in salary due to their conversion, it is clear that Congress intended for these employees to be employed, without exception, under authorities provided in title 5 of the U.S. Code.

Moreover, contrary to the Union's claim, Congress' failure to specifically subject converted employees to the provisions of the Pay Comparability Act does not render these provisions inapplicable in regards to converted domestic employees. It was unnecessary for Congress to specifically subject converted employees to the provisions of the Pay Comparability Act since the Act itself brought within its coverage employees paid under the GS pay system.^{12/} As noted by the Union, section 2104(a)(1) of the Act subjects converted employees to the provisions of the law governing the GS pay system (subchapter III of Chapter 53, title 5, U.S. Code). Thus, inasmuch as the Union concedes that Union Proposal 2 is inconsistent with 5 U.S.C. § 5305 and the Board finds that 5 U.S.C. § 5305 is applicable to converted domestic employees, Union Proposal 2 is inconsistent with Federal law and outside the duty to bargain.

Union Proposal 3

Any claim arising out of preservation of status benefits under sections 2104 and 2106 of the Act or this negotiated circular shall be filed under chapter 11 of the Foreign Service Act of 1980.

12/ 5 U.S.C. § 5305 sets forth the procedures for implementing the policies espoused in 5 U.S.C. § 5301, which states in pertinent part as follows:

§ 5301. Policy

(b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of sections 5305, 5306, and 5308 of this title.

(c) For the purpose of this subchapter, "statutory pay system" means a pay system under--

(1) subchapter III of this chapter, relating to the General Schedule;

(2) Section 403 of the Foreign Service Act of 1980, relating to the Foreign Service of the United States; or

(3) chapter 73 of title 38, relating to the Department of Medicine and Surgery, Veterans' Administration. [Emphasis added.]

Union Proposal 4

Any claim or grievance not arising out of sections 2104 and 2106 of the Act or this negotiated circular may be filed under chapter 11 of the Foreign Service Act of 1980 if otherwise filed in accordance with the time limits and other provisions of 3 FAM 660.

The Union has indicated that the intent of Union Proposal 3 is to permit converted employees to grieve their conversion after it has occurred. While the intent of Union Proposal 4 is unclear, it would seem designed to preserve for converted employees the right to grieve essentially all matters which they could have grieved prior to conversion other than those covered under Union Proposal 3.

The Agency asserts that both proposals are nonnegotiable because they are inconsistent with sections 1101 and 1102 of the Act. In this regard, the Agency claims that converted employees are "former" members of the Foreign Service and, as former members, are limited to filing grievances pursuant to section 1102 of the Act "only with respect to allegations described in section 1101(a)(1)(G)."^{13/} According to the Agency, Union Proposals 3 and 4 would permit the filing of grievances other than those described under section 1101(a)(1)(G), which includes only "alleged denial of an allowance, premium pay, or other financial benefit"

The Union claims that Union Proposal 3 is consistent with sections 1101(a)(1)(A), (G) and 1101(a)(2) of the Act.^{14/} In regard to section

13/ Section 1102 of the Act provides:

Sec. 1102. GRIEVANCES CONCERNING FORMER MEMBERS. - Within the time limitations of section 1104, a former member of the Service or the surviving spouse (or, if none, another member of the family) of a deceased member or former member of the Service may file a grievance under this subchapter only with respect to allegations described in section 1101(a)(1)(G).

14/ Sections 1101(a)(1) and (2) of the Act read in pertinent part as follow:

Sec. 1101. DEFINITION OF GRIEVANCE. - (a)(1) Except as provided in subsection (b), for the purposes of this chapter, the term "grievance" means any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the

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1101(a)(1)(A), the Union claims that since this section permits grievances for the "separation" of a member which allegedly occurred contrary to law or regulations, grievances regarding the employee's conversion fall within the parameters of this section. The Union seems to claim further that since conversion impacts on financial benefits, Union Proposal 3 also is consistent with section 1101(a)(1)(G) which permits former members to grieve disputes involving financial benefits. The Union contends that both proposals are negotiable because the Act specifically provides for the expansion of the scope of the grievance procedure pursuant to section 1101(a)(2). In regard to Proposal 4, the Union asserts that access to the Foreign Service Grievance Board is a "benefit" which is preserved to converted employees under section 2106 of the Act.

The Board finds that converted employees are limited, pursuant to section 1101(a)(2), in the matters which they may grieve under the Act to those allegations described in section 1101(a)(1)(G). Hence, we find, in agreement with the Agency, that Union Proposals 3 and 4 are nonnegotiable. As converted employees who are now employed under the Civil Service system, domestic employees are no longer members of the Foreign Service but instead are now "former" members. The Act specifically limits the access these employees have to the grievance procedures provided under the Act to allegations of an "alleged denial of an allowance, premium pay, or other financial benefit[.]" Moreover, the legislative history of the Act indicates that Congress did not intend to treat domestic employees as separated employees within the meaning of section 1101(a)(1)(A). The

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Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including--

(A) separation of the member allegedly contrary to laws or regulations, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;

(G) alleged denial of an allowance, premium pay, or other financial benefit to which the member claims entitlement under applicable laws or regulations.

(2) The scope of grievances described in paragraph (1) may be modified by written agreement between the Department and the labor organization accorded recognition as the exclusive representative under Chapter 10 (hereinafter in this chapter referred to as the "exclusive representative").

House Committee on Foreign Affairs in its report, H.R. Rep. 96-992, Part 1, 96th Cong., 2d Sess. 93 (1980), stated:

Section 1102 carries forward section 692(1)(C) of the 1946 act. Former members of the Foreign Service, or their survivors, may file grievances within the period specified in section 1104, but only with respect to an alleged wrongful denial during the period of service of an allowance or other financial benefit. Consistent with current practice of the Foreign Service Grievance Board, matters which have only a consequential effect upon financial benefits are not covered by this section. It is the committee's expectation that any member faced with imminent separation will have adequate opportunity to file a grievance if he or she wishes to do so.
[Emphasis added.]

Thus, the Union's argument that converted employees are "separated" employees entitled to grieve their conversion pursuant to section 1101(a)(1)(A) of the Act cannot be sustained. A member of the Foreign Service who wishes to grieve his or her separation or conversion under the Act must do so prior to the actual conversion or separation. Once separated or converted, the employee is no longer a member of the Foreign Service and, thus, not entitled to the grievance procedure applicable to these employees.

Contrary to the Union's contention, section 1101(a)(2) of the Act, which allows the parties to expand the scope of the grievance procedure, does not encompass expanding the coverage of the procedure to converted employees who are no longer members of the Foreign Service. First, as previously noted, section 1101(a)(1) is inapplicable to converted employees since by definition grievances under the Act only include members of the Foreign Service. As "former" members, converted employees do not fall within the provisions of section 1101(a) of the Act, and, thus, are not entitled to expand the scope of grievances. In addition, the legislative history of the Act reveals that the term "scope of grievance" is used to refer to the "items" which a party may bring before the Foreign Service Grievance Board (Grievance Board) and does not encompass the parties who may bring the dispute.^{15/}

Finally, contrary to the Union's contention in regard to Union Proposal 4, the legislative history of the Act does not support a finding that Congress intended to preserve under section 2106 of the Act benefits

^{15/} See Congresswoman Schroeder's comments proffered in support of the Conference Report accompanying the House bill which referred to the scope of grievances as including "[t]he list of grievable items in section 1101(a)[.]" [Emphasis added.] Cong. Rec. H 10236, Oct. 1, 1980.

of converted employees other than financial benefits. Conversely, in light of Congress' intent to create separate and distinct personnel categories governed by separate personnel rules and regulations, it is clear that it did not intend to continue to grant converted employees access to the Grievance Board after these employees were converted to the Civil Service. Therefore, the Union's contention that access to the Grievance Board is a preserved benefit under the Act, is rejected.

Since the plain language of Union Proposals 3 and 4 would permit the filing of grievances beyond those permitted under the limitations prescribed in sections 1101(a)(1)(G) and 1101(a)(2) read together, Union Proposals 3 and 4 are inconsistent with those sections of the Act and, thus, outside the duty to bargain.

Based upon the foregoing, the Board finds that Union Proposals 1, 2, 3, 4, 5 and 6 are nonnegotiable and, thus, not within the duty to bargain.

Accordingly, pursuant to section 1424.10(b) of the Board's Rules and Regulations (22 CFR § 1424.10(b) (1985)), IT IS ORDERED that the petition for review of these proposals be, and it hereby is, dismissed.

Issued, Washington, D.C. January 31, 1986



Jerry L. Calhoun, Chairman



Arnold Ordman, Member

FOREIGN SERVICE LABOR RELATIONS BOARD

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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 upon issuance to the parties listed:

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