

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

AMERICAN FOREIGN  
SERVICE ASSOCIATION

Union

and

Case No. FS-NG-8

UNITED STATES  
DEPARTMENT OF STATE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Foreign Service Labor Relations Board (the Board) because of a negotiability appeal filed under section 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the Act), and concerns the negotiability of one proposal. We find that the proposal is nonnegotiable.

II. Proposal

Upon receiving a report or otherwise discovering a suspected case of abuse/neglect, the FAO [Family Advocacy Officer] opens a Family Advocacy Case File and contacts medical authorities. The investigation begins with informal, confidential inquiries to advise the family of the nature of the investigation and to obtain their cooperation. At the onset of the investigation, the Family Advocacy Officer shall inform any individual suspected of abuse/neglect of the right to have counsel present at any interview conducted with the individual during the investigation. Employees are advised that the FAO investigation is a nondisciplinary procedure whose sole purpose is to determine whether medical treatment, counseling or other family services are required, and that information or statements gathered in the course of the

investigation in connection with the family advocacy program will not be used for disciplinary purposes. The employee is advised that repatriation may be ordered if MED determines that required services are not available at post or if the investigation cannot be completed due to noncooperation of the individual involved. The employee is also advised that he/she has a right to request voluntary repatriation.

The investigation process begins with a two-week initial investigation period, during which the FAO determines whether there is cause for any further investigation. Inquiries are made to teachers and others who may have information as to the seriousness of the suspected case. Medical examinations and/or consultations are scheduled with the RMO [Regional Medical Officer] or other available medical professionals as appropriate. If, at the end of the initial investigation period, it is determined that there is cause for further investigation, favorable consideration will be given to any requests for voluntary repatriation.

[Only the underscored portion of the proposal is in dispute.]

### III. Background

The Union's proposal was made in response to the Agency's proposed regulation for a Family Advocacy Program (FAP). According to the Agency, the FAP is a counselling and treatment program whose purpose is to protect (1) "the physical and mental well-being of [United States] citizen employees, their spouses and family members stationed at posts abroad," and (2) "an employee's career and reputation." Agency Statement of Position at 3. The regulation "provides guidance and assigns responsibility for the handling and disposition of alleged or established cases of spouse or child abuse/neglect. [The FAP] forms an integral part of the Medical and Health program administered at posts abroad by the Office of Medical Services, Department of State." Id. at 3. No disciplinary or adverse action is authorized under the program. Id. at 20.

#### IV. Positions of the Parties

According to the Agency, if management determined that further investigation was necessary after the initial 2-week investigation, the proposal would require that an employee upon request, "for whatever reason proffered" and "in total disregard of the nature and seriousness of the case and the needs of the service," be returned to the United States. Agency Statement of Position at 6. In the Agency's view, by "mandating repatriation," the proposal infringes on management's rights to assign employees and to assign work under section 1005(a)(2) and (3) of the Act.<sup>1/</sup> Agency Statement of Position at 11. The Agency also states that the proposal does not constitute an arrangement under section 1005(b)(3) of the Act because "the proposal is not in response to the exercise of any management right," and there are "no foreseeable adverse consequences addressed by this proposal" since "no disciplinary or adverse action is authorized under the [FAP]." Id. at 20.

The Union states that under its proposal an employee subject to further investigation under the FAP would "be permitted, upon request, to return to the U.S. from an overseas post to seek legal counsel or other assistance before providing information under the FAP." Union Response to Agency Statement of Position at 1 and 5. The Union states that the employee would remain in a duty status during his return to the U.S., and that repatriation would be available to the employee under very limited circumstances--"when there is an extended investigation into alleged spouse and/or child abuse or neglect." Id. at 3.

More particularly, the Union states that "an employee [could not] request repatriation unless he is suspected of a criminal act (assault, battery, or child abuse) and is the focus of an extended investigation by the government." Id. at 13. Referring to various attachments in its reply brief pertaining to child and family abuse laws in the U.S., the Union asserts that the proposal provides necessary safeguards since the information obtained under the FAP could be subpoenaed by authorities outside the Agency seeking

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<sup>1/</sup> For the pertinent text of section 1005 of the Act, see the Appendix to this decision.

information related to criminal matters. The Union claims that the proposal is not inconsistent with section 1005(a) of the Act because the FAP is not an exercise of a management right under section 1005(a). Alternatively, it argues that, assuming management's rights are involved, its proposal constitutes either a negotiable procedure or an appropriate arrangement.

#### V. Analysis and Conclusions

For the reasons which follow, we find that the proposal is outside the duty to bargain because it directly interferes with management's rights to assign employees and to assign work under section 1005(a)(2) and (3) of the Act. The proposal also does not constitute a negotiable procedure under section 1005(b)(2) of the Act, nor does it qualify for consideration as an appropriate arrangement under section 1005(b)(3).

##### A. The proposal directly interferes with management's rights to assign employees and to assign work

The proposal would require management to repatriate a unit employee upon request if it found reason to extend the 2-week investigation. The record is unclear as to whether repatriation of a unit employee would entail the assignment of the employee to another position or the assignment of different duties to the employee. According to the Agency, repatriation involves "the movement of an employee and family at government expense from post of assignment to Washington, [D.C.] into [an alternate personnel] status," for instance, "into an overcomplement position, to another Bureau, to the Medical Bureau for treatment, or into a temporary duty position." Agency Statement of Position at 9. The Agency claims that these alternate personnel actions could require reassigning or detailing the employee to a new position, or in some instances would require some form of leave. The Union states that under its proposal, "reassignment or transfer of the employee is . . . the prerogative of the Department," and that "the employee is still obligated to complete work assigned to him." Union Response to Agency Statement of Position at 13.

Considering the parties' interpretation of what repatriation entails, it is our view that the effect of the proposal is to force management to choose a course of action which would directly interfere with the exercise of its



rights under the Act. Not only would management lose the services of the employee at the post of duty during the period of the repatriation, but it would also have to detail the repatriated employee to a new position, assign the employee other duties, or grant the employee a period of leave. The fact that management has a choice of action does not mean that management's rights are not affected. Any of the choices noted involve the exercise of management's rights; when management grants the employee's request, as required by the proposal, it must inevitably take an action which would involve the exercise of those rights. See National Treasury Employees Union and Internal Revenue Service, 17 FLRA 379, 380 (1985) (Proposal 1), affirmed as to Proposal 1 sub nom. NTEU v. FLRA, 810 F.2d 1224 (D.C. Cir. 1987).<sup>2/</sup>

For example, by forcing management to choose whether or not to reassign the employee to a new position, the proposal has the same effect as Proposal 3 in American Federation of Government Employees, Local 1395 and Social Security Administration, Great Lakes Program Center, Chicago, Illinois, 14 FLRA 408, 411-12 (1984). That proposal provided that employees who were performing unsatisfactorily had the option of reassignment to another position of the same grade. Relying on International Organization of Masters, Mates, and Pilots and Panama Canal Commission, 11 FLRA 115, 119-20 (1983), the Authority held that by subjecting management's decision concerning reassignment of an employee to the control of that employee, the proposal directly interfered with management's right to assign employees under section 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute). See also National Union of Hospital and Health Care Employees, AFL-CIO, District 1199 and Veterans Administration Medical Center, Dayton, Ohio, 28 FLRA 435, 477 (1987) (Proposal 21) (proposal establishing closed unit system, whereby unit members made work and shift assignments, found nonnegotiable because it directly interfered with management's right to assign work under section 7106(a)(2)(B)). Similarly, the proposal here would, in effect, subject management's decision as to the assignment of the employee and the assignment of work to the employee to

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<sup>2/</sup> Section 1007 of the Act requires decisions of the Board to be consistent with decisions of the Federal Labor Relations Authority (the Authority) except when the Board finds that special circumstances require otherwise. See footnote 2 in Appendix.

the control of that employee. The proposal, therefore, directly interferes with management's rights to assign employees and assign work under section 1005(a)(2) and (a)(3) of the Act.

Further, by allowing an employee to repatriate upon request, the proposal could also require management to decide whether or not to place the employee on leave and forego the employee's services in some other capacity. The proposal has the same effect as Proposal 4 in American Federation of Government Employees, AFL-CIO, Local 2263 and Department of the Air Force, Headquarters, 1606th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA 580 (1984). It would restrict management's ability to determine when assigned work would be performed and therefore directly interferes with management's right to assign work under 1005(a)(3) of the Act.

- B. The proposal does not involve a procedure within the meaning of section 1005(b)(2) of the Act

In determining whether a proposal constitutes a negotiable procedure under the Act, the Board looks to the Authority's interpretation and application of negotiable procedures under the Statute for guidance. See American Foreign Service Association and American Federation of Government Employees, AFL-CIO, Local 1812, FS-NG-1 and FS-NG-2, slip op. at 6 (1982). Under the Statute, the Authority applies a direct interference test to distinguish between nonnegotiable matters of substance and negotiable procedures. See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603, 613 (1980), affirmed sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). In American Federation of Government Employees, Local 1923 v. FLRA, 819 F.2d 306, 308 (D.C. Cir. 1987), the court provided further guidance on the application of the direct interference test and the determination of a procedure. The court stated:

To decide whether a proposal concerns a "procedure," the decisionmaker must ask whether "implementation would 'directly interfere with the agency's basic right[s]'" listed in § 7106(a). If implementation of the proposal would not interfere directly with managerial prerogatives, it is procedural and therefore negotiable. [Citations omitted.]

See also National Federation of Federal Employees, Local 1745 v. FLRA, 828 F.2d 834 (D.C. Cir. 1987).

Applying that test here, we find that the proposal does not concern a matter which is procedural under section 1005(b)(2) of the Act. As found in Section V. A., the proposal directly interferes with management's right to assign employees under section 1005(a)(2) by permitting the employee, in effect, to determine his or her assignment. The proposal also directly interferes with management's right to assign work under section 1005(a)(3) of the Act by requiring management, in effect, to grant an employee's request for repatriation. The proposal therefore does not constitute a negotiable procedure under section 1005(b)(2) of the Act because it directly interferes with management's exercise of (1) its discretion in the assignment of an employee to a position at a particular duty station--U.S. or foreign post--based on its consideration of the investigation's results and the needs of the Agency and the employee; and (2) its right to assign work to employees by restricting management's ability to determine when assigned work will be performed.

We further note that the Authority has found that proposals which preserve management's ability to exercise its reserved statutory rights are negotiable as procedures under section 7106(b)(2). For example, in American Federation of Government Employees, AFL-CIO Local 1760 and Department of Health and Human Services, Social Security Administration, 28 FLRA 160, 163 (1987), the Authority found that Provisions 1 and 6, which merely required the agency to consider certain employees for assignment to a position or selection to fill a vacancy, were negotiable since they did not violate management rights under the Statute. The Authority found that these provisions required the agency only to consider employees for selection to fill a vacant position or for reassignment and did not require either the assignment of an employee to a position or the selection of an employee to fill a position. If the disputed language in the proposal before us were revised to allow management to exercise its discretion concerning a request to repatriate, it would not be barred from negotiations by management's rights under the Act.

C. The proposal is not an arrangement within the meaning of section 1005(b)(3) of the Act

We turn now to whether the proposal constitutes a negotiable appropriate arrangement under section 1005(b)(3) of the Act. The Act recognizes that employees may in some



cases suffer an adverse effect as a result of the exercise of management rights. It explicitly provides for the negotiation of "appropriate arrangements for employees adversely affected by the exercise of any" management right under the Act. Section 1005(b)(3). The application by the Authority of the parallel "appropriate arrangements" provision of the Statute, section 7106(b)(3), is illustrative for determining how we should apply section 1005(b)(3) of the Act.

In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986), the Authority adopted the "excessive interference" test set forth in American Federation of Government Employees, Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983), for determining whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute. See also AFGE, Local 1923 v. FLRA, 819 F.2d 306, 308-09, where the court discusses the application of the appropriate arrangement test. In Kansas Army National Guard, the Authority held that, as a threshold matter, a union must demonstrate that its proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. Specifically, there must be some evidence in the record identifying the management right or rights claimed to produce the alleged adverse effects which flow from the exercise of those rights, how those effects are adverse, and how the proposal is intended to address or compensate for the actual or anticipated adverse effects.

Once the Authority finds that a proposal is an "arrangement" for employees within the meaning of section 7106(b)(3), it then determines whether the proposal is "appropriate" for bargaining by applying the excessive interference test. That test involves weighing the competing practical needs of employees and management in the light of various factors, so as to determine whether, on balance, the impact of the proposal on management's rights is excessive when compared to the benefits afforded employees.

Stating that "no direct management right is involved in the FAP investigation," the Agency claims that the proposal is not in response to the exercise of a management right. Agency Statement of Position at 20. The Union states that the proposal is intended to provide a safeguard for an employee being investigated under the FAP. Specifically, it claims that the proposal is designed to protect an employee from giving incriminating information during an FAO



investigation. According to the Union, this information could later be subpoenaed by outside governmental bodies in connection with a criminal matter which could potentially affect an employee's job.

We find, in agreement with the Agency, that the proposal is not an arrangement under section 1005(b)(3) because it does not address the direct adverse effects of the exercise of a management right. The consequences contemplated by the Union's proposal do not result from the exercise of a management right in connection with the FAP investigation. No discipline or adverse action is authorized under the FAP, whose purpose, according to the Agency, is protective and therapeutic. Rather, the adverse consequences which the proposal is designed to address--criminal matters--are possible actions by other governmental bodies, at most indirectly related to management's action. The FAP investigation is not itself concerned with whether an employee has committed a criminal act, but rather with whether an employee would benefit from counselling or medical treatment.

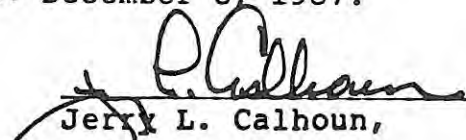
Nevertheless, in implementing the FAP, both parties seek to protect the physical and mental well-being of employees and their families, as well as their reputations and careers. In this context, appropriate procedural safeguards for employees subjected to an investigation under this program are clearly desirable. Collective bargaining provides an opportunity for the parties to create such safeguards while implementing the FAP.


Although we find, for the reasons discussed above, that the specific disputed proposal before us is not within the duty to bargain, the parties may make full use of the bargaining process to explore other ways in which employees could be assured effective access to union representation and or appropriate legal counsel (locally or stateside) in a manner consistent with law, particularly if they might be in jeopardy of criminal investigation or prosecution because of the FAP.

VI. Order

The Union's petition is dismissed.

Issued, Washington, D.C. December 8, 1987.

  
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Jerry L. Calhoun, Chairman

  
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Tia Schneider Denenberg, Member

  
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Marcia L. Greenbaum, Member

FOREIGN SERVICE LABOR RELATIONS BOARD

APPENDIX

1/ Section 1005 of the Act provides in pertinent part:

SEC. 1005. MANAGEMENT RIGHTS-- (a) Subject to subsection (b), nothing in this chapter shall affect the authority of any management official of the Department, in accordance with applicable law--

. . . . .

(2) to hire, assign, direct, lay off, and retain individuals in the Service or in the Department, to suspend, remove, or take other disciplinary action against such individuals, and to determine the number of members of the Service to be promoted and to remove the name of or delay the promotion of any member in accordance with regulations prescribed under section 605(b);

(3) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the operations of the Department shall be conducted[.]

. . . . .

(b) Nothing in this section shall preclude the Department and the exclusive representative from negotiating--

. . . . .

(3) appropriate arrangements for employees adversely affected by the exercise of any function under this section by such management officials.

2/ Section 1007 of the Act provides in pertinent part:

SEC. 1007. FUNCTIONS OF THE BOARD.

. . . . .

(b) Decisions of the Board under this chapter shall be consistent with decisions rendered by the Authority under chapter 71 of title 5, United States Code, other than in cases in which the Board finds that special circumstances require otherwise. Decisions of the Board under this chapter shall not be construed as precedent by the Authority, or any court or other authority, for any decision under chapter 71 of title 5, United States Code.



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UNITED STATES  
DEPARTMENT OF STATE

CERTIFICATE OF SERVICE

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

  
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