FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D. C.

AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)

and

UNITED STATES DEPARTMENT OF STATE
(Agency)

FS-NG-9

DECISION AND ORDER ON NEGOTIABILITY ISSUES

October 29, 1990

Before Chairman McKee and Members Denenberg and Greenbaum.

I. Statement of the Case

This case is before the Foreign Service Labor Relations Board (the Board) because of a negotiability petition filed under section 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the Act) by the Union (AFSA). The appeal concerns two proposals which the Agency declared nonnegotiable.

The first proposal concerns a special allowance to Foreign Service Officers (FSOs) for substantial amounts of extra work. It would require the Agency to maintain certain special allowance payments at the current rate. The second proposal concerns salary increases as incentives for study and proficiency in certain difficult foreign languages. It would require the Agency to maintain the incentive program which permits such salary increases.

As explained below, we find that the proposals concern conditions of employment and are negotiable under the Act.

II. Proposals

Proposal 1

As to the proposed reduction in payments for Category A and B, AFSA proposes maintaining those levels at 18 and 13 percent, respectively. AFSA proposes to retain the Category C payment, unless the Department can assure us that no employees would be eligible for this payment over the coming years.

Proposal 2

In response to your proposal of April 1 to terminate the program for language incentives, AFSA proposes that the incentive program be retained as it currently exists.

[Only the underscored portions of the proposals are in dispute.]

III. Background 1/

The dispute arose when the Agency notified the Union of its intent to change certain sections in its Foreign Affairs Manual (FAM). The Agency intended to change: (1) 3 FAM 238.7, entitled "Special Allowance For Substantial Amounts of Extra Work"; and (2) 3 FAM 873.4, entitled "Salary Increases for Study and Proficiency in the Incentive Languages."

Section 238 sets forth procedures for granting a special allowance to FSOs in recognition of: (1) requirements to perform additional work on a regular basis in substantial excess of normal requirements; and (2) the fact that these employees are not eligible to receive premium pay. The Agency informed the Union that it was changing the rate of allowances contained in section 238.7. The Agency stated that it was reducing Category A payments from 18 to 10 percent; reducing Category B payments from 13 to 8 percent; and terminating the Category C payment.

1/ Pertinent statutory and regulatory provisions involved in this case are set forth in the Appendix.

Section 873.4 provides for monetary incentives--within-class salary increases--to employees for proficiency in designated languages. The Agency advised the Union that it was terminating the monetary incentives provided to employees under this section.

The Union submitted Proposals 1 and 2 to the Agency, which declared them nonnegotiable. The Union then filed the instant petition for review.

IV. Positions of the Parties

The Agency contends that Proposal 1 concerns premium compensation for selected positions, a matter which is specifically provided for by section 412(a) of the Act. Therefore, the Agency claims that the proposal concerns a matter which is excluded from the definition of conditions of employment under section 1002(5)(C) of the Act. The Agency claims that Proposal 2 concerns an economic benefit which is specifically provided for by section 704(b)(3) of the Act. It contends, therefore, that this proposal also concerns a matter which is excluded from the definition of conditions of employment. The Agency argues that because the proposals do not concern conditions of employment, it has no duty to bargain over them under section 1013(e)(2) of the Act.

The Agency also asserts that proposals concerning wages and fringe benefits are outside the duty to bargain because there is no specific indication that Congress intended to make pay and monetary fringe benefits a subject of labor-management negotiations. The Agency asserts that because Proposals 1 and 2 involve wages and fringe benefits, they are outside the duty to bargain. The Agency contends that its position is supported by the courts' decisions in Department of the Navy, Military Sealift Command v. FLRA, 836 F.2d 1409 (3d Cir. 1988) (Military Sealift Command) and Department of the Treasury, Bureau of Engraving and Printing v. FLRA, 838 F.2d 1341 (D.C. Cir. 1988) (Bureau of Engraving and Printing).

The Union contends that Proposals 1 and 2 do not concern matters which are specifically provided for by statute. The Union states that sections 412(a) and 704(b)(3) of the Act grant the Secretary of State discretion to provide special allowances and monetary incentives for language proficiency, respectively. The Union also states that the court's decision in Military Sealift Command is inapposite. The Union claims that unlike the statute involved in that case, which required the Secretary of the

Navy to set employees' pay, neither the sections of the Act involved here nor the Act's legislative history requires the Secretary of State to establish special allowances or monetary incentives for language proficiency. It also asserts that the Act does not prescribe a scheme for implementing special allowances or monetary incentives for language proficiency.

The Union contends that the matters addressed by its proposals are not wages or fringe benefits, but rather are similar to incentive awards, which the Federal Labor Relations Authority (the Authority) found negotiable in National Treasury Employees Union and Internal Revenue Service, 27 FLRA 132 (1987) (NTEU and IRS). Further, the Union contends that even if the Board finds that the matters involved in the proposals are wages or fringe benefits, the proposals are negotiable under the Act and the Authority's decision in American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 FLRA 377 (1986) (Eglin Air Force Base).

V. Analysis and Conclusions

A. Decisions of the Federal Labor Relations Authority Interpreting Section 7103(a)(14)(C) of the Federal Service Labor-Management Relations Statute are Relevant to the Interpretation of Section 1002(5)(C) of the Act

Under the Act, the Agency is required to bargain with the Union over "conditions of employment." Sections 1002(3) and 1013(e)(2). The Act defines conditions of employment as "personnel policies, practices, and matters, whether established by regulation or otherwise, affecting working conditions." Section 1002(3) and (5). Matters which are "specifically provided for by Federal statute" are excluded from the definition of conditions of employment. Section 1002(5)(C).

For the following reasons, we find that decisions issued by the Authority on similar issues are relevant to our determination in this case. First, under section 1007 of the Act, decisions of the Board must be consistent with decisions of the Authority unless the Board finds that special circumstances require otherwise. We find that there are no special circumstances in this case within the meaning of section 1007 of the Act--and none are alleged by the parties--which require a departure from Authority decisions.

Second, the legislative history of the Act demonstrates Congress' intent that the Board's decisions on issues concerning "conditions of employment" be consistent with the decisions of the Authority. The House Post Office and Civil Service Committee stated the following about section 1002(5):

> Paragraph (5) defines the term "conditions of employment." Except for subparagraph (D), paragraph (5) restates without substantive change the definition set forth in section 7103[a](14) [of the Federal Service Labor-Management Relations Statute]. Wording differences contained in the original administration bill (H.R. 4674) were rejected to ensure that the term would be interpreted in the same manner for the Foreign Service and the rest of the Civil Service[.]

H.R. Rep. No. 992, 96th Cong., 2d. Sess., pt. 2, at 98 (1980).

Therefore, consistent with section 1007 of the Act and with Congressional intent, we must examine not only the provisions of the Act involved but also decisions of the Authority interpreting section 7103(a)(14) of the Federal Service Labor-Management Relations Statute (the Statute) in order to determine whether the matters proposed by the Union concern conditions of employment under the Act.

B. Authority Decisions Interpreting Section 7103(a)(14) of the Statute

Under the Statute, parties are obligated to bargain over proposals concerning conditions of employment, provided that the proposals do not violate law, Government-wide regulation, or an agency regulation for which there is a compelling need. Conditions of employment are defined as personnel policies, practices, and matters--whether established by rule, regulation, or otherwise--affecting working conditions. 5 U.S.C. § 7103(a)(14). As the U.S. Supreme Court recently held, matters pertaining to employee compensation are "conditions of employment" within the meaning of 5 U.S.C. § 7103(a)(14). Fort Stewart Schools v. FLRA, 110 S. Ct. 2043 (1990) (Fort Stewart Schools). However, matters which are specifically provided for by Federal statute are excluded from the definition of conditions of employment. 5 U.S.C. § 7103(a)(14)(C). Accordingly, a party is not obligated to bargain over a proposal concerning a matter pertaining to employee compensation which is specifically provided for by Federal statute.

Reference to a particular subject matter in a statute is not sufficient to exclude that subject matter from the definition of conditions of employment. In American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, 32 FLRA 1023, 1060-62 (1988), reversed as to other matters sub nom. Department of the Navy, Naval Weapons Station, Concord, California v. FLRA, No. 88-7408 (9th Cir. Feb. 7, 1989) (order), the Authority stated the following:

> We reject any interpretation of section 7103(a)(14)(C) which would hold that reference to a particular matter in a statute is sufficient to except that matter from the definition of conditions of employment. Rather, where a statute specifically provides for or establishes a particular aspect of a matter, that aspect of the matter is not included within the conditions of employment about which an agency is obligated to bargain.
>
> For example, the fact that Federal statutes establish criteria governing overtime work for Federal employees does not remove every aspect of that matter from the duty to bargain for those employees. However, the fact that those statutes specifically provide for the rate of overtime compensation does remove that matter from the duty to bargain.

Id. at 1060-61 (emphasis in original; citations omitted).

Consistent with this interpretation of section 7103(a)(14)(C), where a statute vests authority over a subject matter of a proposal with an agency and provides the agency with discretion to exercise that authority, the subject matter is not specifically provided for by statute. See NTEU and IRS, 27 FLRA 132. If an agency is provided with discretion to exercise authority over a matter which affects working conditions, a proposal that the agency's discretion be exercised in a manner which is not inconsistent with law, Government-wide regulation, or agency regulation for which there is a compelling need is negotiable. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA 6, 10 (1986), affirmed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, 836 F.2d 1381 (D.C. Cir. 1988).

The Authority uses the same analytical framework for determining whether a matter is specifically provided for by

Federal statute in cases involving wages and fringe benefits as it uses in other cases. For example, in Fort Stewart (Georgia) Association of Educators, 28 FLRA 547, the Authority held that salaries and fringe benefits of teachers employed by the Department of the Army under 20 U.S.C. § 241 were not specifically provided for by law and were within the discretion of the agency.

In Fort Stewart Schools, the Supreme Court upheld the Authority's determination that the agency had not shown that the proposals in dispute concerned a matter specifically provided for by law or that they were outside the agency's discretion to adopt. The Court stated that the statutory mandate of 20 U.S.C. § 241 is not "essentially nondiscretionary in nature." 110 S. Ct. at 2052. That is, 20 U.S.C § 241 does not require the agency to pay its teachers a salary identical to the salary of teachers in local school districts, nor does it dictate the particular employment practices which could be adopted by the Agency. Id. See also West Point Elementary School Teachers Association v. FLRA, 855 F.2d 936, 942-44 (2d Cir. 1988). Compare American Federation of Government Employees, AFL-CIO and Department of Defense, Department of the Army and Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas, 32 FLRA 591 (1988) (Department of Defense, Department of the Army and Air Force)(aspects of pay-fixing under the prevailing rate system, 5 U.S.C. §§ 5341-49, are specifically provided for by law and, therefore, are excluded from the definition of conditions of employment under section 7103(a)(14)(C) of the Statute).

The Board has adopted the Authority's position regarding the obligation to bargain over the exercise of discretion granted by a statute. In Interpretation and Guidance, FS-PS-1 (1982), the Board determined that proposals relating to the composition of selection boards established under sections 405 and 602 of the Act would be negotiable provided the proposals were otherwise consistent with law. The Board concluded that discretion to establish selection boards was vested in the agency head and that "under sections 405 and 602 of the Act, the discretion . . . is subject to negotiation." Id., slip op. at 6.

C. Application of the Authority's Interpretation of Section 7103(a)(14) of the Statute to Section 1002(5) of the Act

Both the House and Senate reports state the following about the meaning of "conditions of employment" under section 1002(5) of the Act:

> Section 1002(5) defines "conditions of employment" to be personnel policies, practices, and other matters affecting working conditions which are within the discretion of the Secretary. Excluded are matters related to prohibited political activities, designation or classification of positions, Government-wide or multiagency responsibilities of the Secretary affecting agencies not authorized to utilize the Foreign Service personnel system, and matters specifically provided for by law--for example, pay and benefits. . . .

H.R. Rep. No. 992, 96th Cong., 2d Sess., pt. 1, at 84 (1980); and S. Rep. No. 913, 96th Cong., 2d Sess. 81, reprinted in 1980 U.S. Code Cong. & Admin. News 4419, 4498.

We do not interpret the above statement, pertaining to pay and benefits, to mean that all matters pertaining to pay and benefits are outside the duty to bargain under section 1002(5)(C) of the Act. Consistent with relevant Authority decisions, we find that, like other matters, pay and fringe benefits are excluded from the definition of conditions of employment only when they are specifically provided for by law. If an agency has discretion under law to determine matters pertaining to pay and fringe benefits, a proposal pertaining to those matters is within an agency's duty to bargain if the proposal is otherwise consistent with law and regulations.

We now examine the proposals more specifically.

1. Proposal 1

Section 412 of the Act provides, in pertinent part, as follows:

> SEC. 412. SPECIAL DIFFERENTIALS.--(a) The Secretary may pay special differentials, in addition to compensation otherwise authorized, to Foreign Service officers who are required because of the nature of their assignments to perform additional work on a regular basis in substantial excess of normal requirements.
>
> (b) Before implementing any proposal to limit either the number of [FSOs] who may receive a special differential . . . or the amounts of such special differentials, the Secretary shall submit such proposal to the Committee on Foreign

> Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

Section 412(a) of the Act provides the Agency with discretion to pay special allowances to FSOs who "are required because of the nature of their assignments to perform additional work on a regular basis in substantial excess of normal requirements." Proposal 1 concerns only the rate of these payments. Section 412(a) of the Act does not place any limitation on the Agency's discretion to bargain over the rate of the allowance to be paid. Further, there is nothing in section 412(a) or in its legislative history which indicates that Congress intended to restrict the Agency's discretion to compensate employees by the payment of special differentials, provided that the employees are eligible for compensation under section 412(a).

Both the House and Senate Committees' reports state the following concerning section 412:

> The committee expects that, in implementing this section, the heads of agencies will provide this compensation to any member of the Service who meets the criteria, subject only to budgetary considerations and the requirements of section 412(b). The intent of the provision is to recognize the unique character of work requirements in the Foreign Service, which do not lend themselves to a 5-day, 40-hour week, thus there should be no arbitrary limits set on the number of individuals who can receive special differentials in a given year.

H.R. Rep. No. 992, 96th Cong., 2d Sess, pt. 1, at 44-45 (1980); and S. Rep. No. 913, 96th Cong., 2d Sess. 43-44, reprinted in 1980 U.S. Code Cong. & Admin. News at 4461. ee also H.R. Rep. No. 992, 96th Cong., 2d Sess., pt. 2, at 65 (1980). Although the legislative history indicates that the payment of special differentials is subject to budgetary considerations, the Agency has made no claim and presented no evidence to show that Proposal 1, if agreed to, would prevent it from complying with its budgetary requirements.

Proposal 1 is distinguishable from the proposals in Department of Defense, Department of the Army and Air Force, 32 FLRA 591; Military Sealift Command; and Bureau of Engraving and Printing. Those cases involved provisions of the Prevailing Rate Systems Act, in which Congress directed that pay be set in accordance with certain criteria. Section

412(a) contains no criteria applicable to the rate of payment of special differentials. Rather, section 412(a) provides that the Secretary of State "may pay special differentials" to certain employees. Because section 412(a) contains no criteria governing the rate of payment of special differentials, it is unlike the provisions in Department of Defense, Department of the Army and Air Force, Military Sealift Command, and Bureau of Engraving and Printing.

We disagree with the Agency's claim that section 412(b) of the Act indicates that Congress did not authorize negotiations on special allowances. Section 412(b) does not prohibit the Agency from bargaining on the matter. Rather, section 412(b) requires the Agency to submit any proposal which would limit the number of FSOs receiving such differentials or the amounts of such differentials to appropriate committees of Congress before implementation. Nothing in section 412(b) or its legislative history indicates that the requirement for Congressional review was intended to preclude bargaining over special allowances. Therefore, Proposal 1 would not prevent the Agency from complying with section 412(b). See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477; American Federation of State, County and Municipal Employees, AFL-CIO, Local 2910; Congressional Research Employees Association; and Law Library of Congress United Association of Employees and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Proposals XI-XVI), enforced sub nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983) (statutory provision providing that the Architect of the Capitol will have charge of all structural work at the Library of Congress held not to preclude negotiation on proposal requiring structural alteration to the building); Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 27 FLRA 492 (1987) (Proposal 37 and 38), affirmed as to other matters sub nom. Overseas Education Association v. FLRA, 858 F.2d 769 (D.C. Cir. 1988) (agency obligated to negotiate over discretion to recommend to State Department that incentive pay differentials be changed).

The Agency has not established that Proposal 1 concerns a matter which is specifically provided for by law. The Agency makes no other allegations that Proposal 1 is nonnegotiable. We find, therefore, that Proposal 1 concerns a condition of employment of bargaining unit employees and is within the Agency's duty to bargain.

2. Proposal 2

Section 704, TRAINING AUTHORITIES, provides, in pertinent part, as follows:

* * * * * * *

(b) In furtherance of the objectives of this Act, the Secretary may--

* * * * * * *

(3) provide special monetary or other incentives to encourage members of the Service to acquire or retain proficiency in foreign languages or special abilities needed in the Service.

Under the Agency's FAM regulations implementing section 704 of the Act, monetary incentives are provided for language skills. In particular, 3 FAM 873.4 provides within-class incentive salary increases for proficiency in certain designated languages.

Section 704(b)(3) of the Act provides the Secretary with discretion to establish special monetary incentives for proficiency in foreign languages. Nothing in section 704(b)(3) or its legislative history indicates that Congress intended to restrict the Agency's discretion to provide or not to provide employees monetary incentives for proficiency in certain languages. Therefore, the matter of whether monetary incentives will be paid to employees under this provision is not a matter which is specifically provided for by law.

The courts' decisions in Department of Defense, Department of the Army and Air Force, Military Sealift Command, and Bureau of Engraving and Printing do not compel a different conclusion. Unlike the provisions of the Prevailing Rate Systems Act involved in those cases, section 704(b)(3) places no limitation on the Agency's bargaining discretion. See Fort Stewart Schools and West Point Elementary School Teachers Association.

The Agency has not established that Proposal 2 concerns a matter which is specifically provided for by law. The Agency makes no other allegations that Proposal 2 is nonnegotiable. We find, therefore, that it concerns a condition of employment of bargaining unit employees and is within the Agency's duty to bargain.

Our conclusion that Proposal 2 is negotiable is consistent with Authority decisions in similar cases. Under the Statute, money awarded under an agency's incentive awards program is within an agency's discretion under 5 U.S.C. § 4503 and, therefore, is within the agency's duty to bargain. NTEU and IRS, 27 FLRA 132. The monetary incentives provided under section 704(b)(3) of the Act are like money awarded to employees as incentive awards under 5 U.S.C. § 4503. Both monetary incentives for special language studies and monetary incentive awards under 5 U.S.C § 4503 are designed to encourage or recognize employees who make a special contribution to the accomplishment of an agency's operations. See, for example, National Treasury Employees Union, Chapter 245 and Department of Commerce, Patent and Trademark Office, 30 FLRA 1219 (1988) (Proposal 1) (where the Authority found proposals establishing mandatory performance awards of various percentages of salary based on an employee's performance rating to be negotiable).

VI. Order

The Agency must, upon request or as otherwise agreed to by the parties, bargain over these proposals.2/

2/ In finding these proposals to be negotiable, we make no judgment as to their merits.

APPENDIX

1/ 3 FAM 238.7 and 3 FAM 873.4 provide as follows:

238.7 Rate of Special Allowance

a. The rate of special allowance to be paid for the three categories of requirements listed [in] section 238.6 is as follows:

Category A. 18 percent of the basic compensation earned during the pay period;

Category B. 13 percent of the basic compensation earned during the pay period; and

Category C. 10 percent of the basic compensation earned during the pay period.

b. The special allowance is not subject to the following limitations:
(1) Section 552, Standardized Regulations (Government Civilians, Foreign Areas). . . . .
(2) 5 U.S.C. 5547, which places the maximum limitation on compensation . . . .

873.4 Salary Increases for Study and Proficiency in Incentive Languages

* * * * * * *

b. A member of the Service who enters upon training in an already designated incentive language, shall receive one within-class salary increase effective the beginning of the first pay period following completion of 16 continuous weeks of full-time training in an intensive course upon certification by FSI.

c. A member of the Foreign Service who receives an FSI tested rating of S-3/R-3 or S-3/R-N in a language during a period when that language is on the incentive list . . . shall receive 3 within-class step increases unless the member received a step increase under section

873.4(b) . . . or unless the member received awithin-class increase in salary for competence in the same language under the provisions of section 873.3[.]

d. During any career with the Department of State [and certain other agencies], no more than three language proficiency salary increases will be awarded an employee for proficiency in a single language except as provided in section 873.3c.

Section 1002(5) of the Act provides as follows:

(5) "[C]onditions 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--

(A) relating to political activities prohibited abroad or prohibited under subchapter III of chapter 73 of title 5, United States Code;

(B) relating to the designation or classification of any position under section 501;

(C) to the extent such matters are specifically provided for by Federal statute; or

(D) relating 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[.]

Section 1013(e)(2) of the Act provides in pertinent part, as follows:

(e) The duty of the Department and the exclusive representative to negotiate in good faith shall include the obligation--

* * * * * * *

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]

FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)

and

UNITED STATES DEPARTMENT OF STATE
(Agency)

FS-NG-9

STATEMENT OF SERVICE

I hereby certify that copies of the Decision and Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:

Susan Z. Holik
General Counsel
American Foreign Service Association
2101 E Street, N.W.
Washington, D.C. 20003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert S. Sherman
Chief, Labor Management Negotiator
U.S. Department of State
2201 C Street, NW.
DGP/LM, Room 6217
Washington, D.C. 20520

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable James A. Baker
Secretary
U.S. Department of State
2201 C Street, NW.
Washington, D.C. 20210

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DATED: October 29, 1990
WASHINGTON, D.C.

Deborah D. Johnson
Legal Technician