

DECISIONS AND
INTERPRETATIONS
OF THE
FEDERAL
LABOR RELATIONS
COUNCIL

Volume 5

Property
of
FEDERAL LABOR
RELATIONS COUNCIL

7

Stuart R. Horn



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

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

Volume 5

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January 1, 1977 through December 31, 1977

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PART I.

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January 1, 1977 through December 31, 1977

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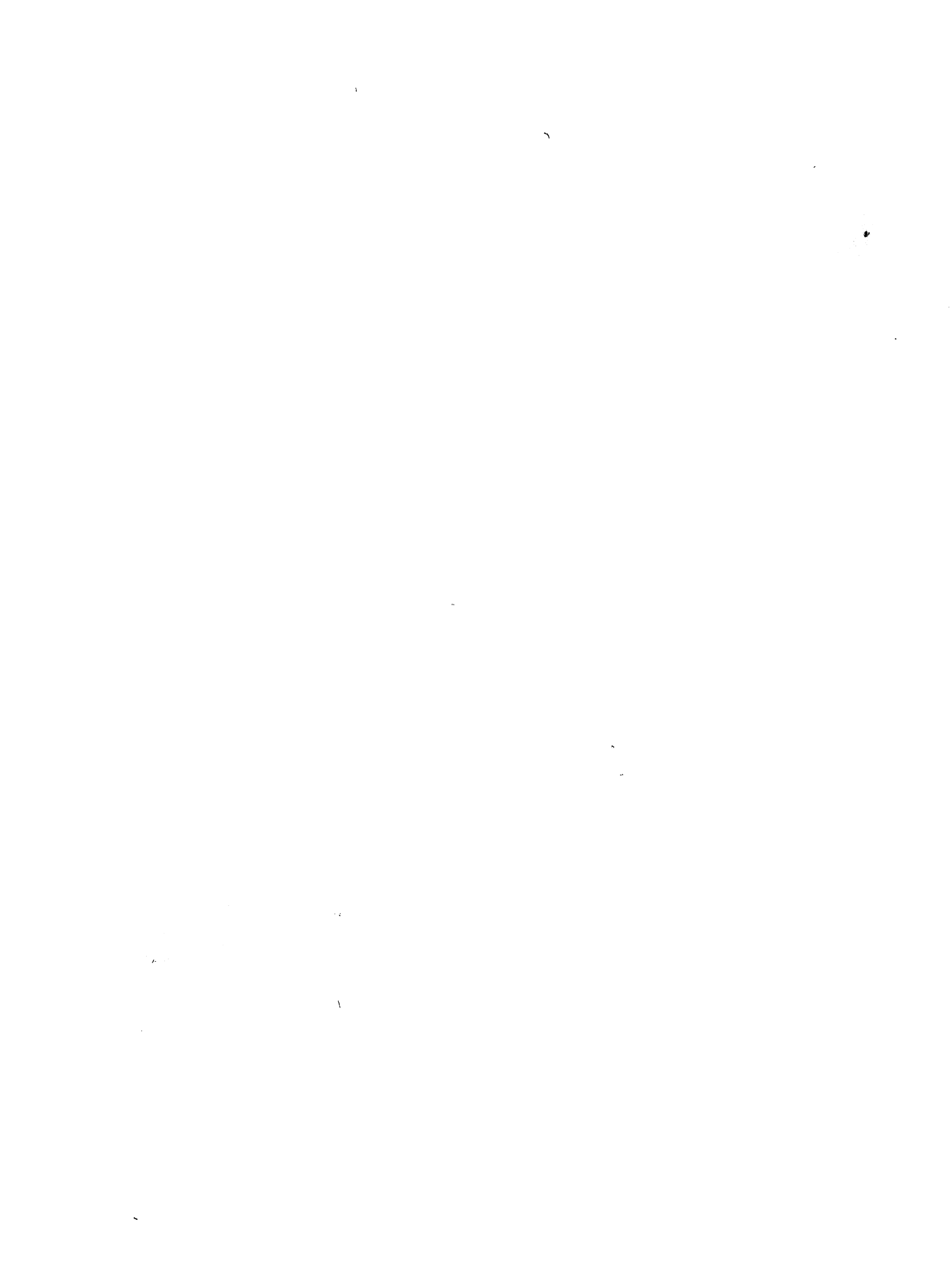
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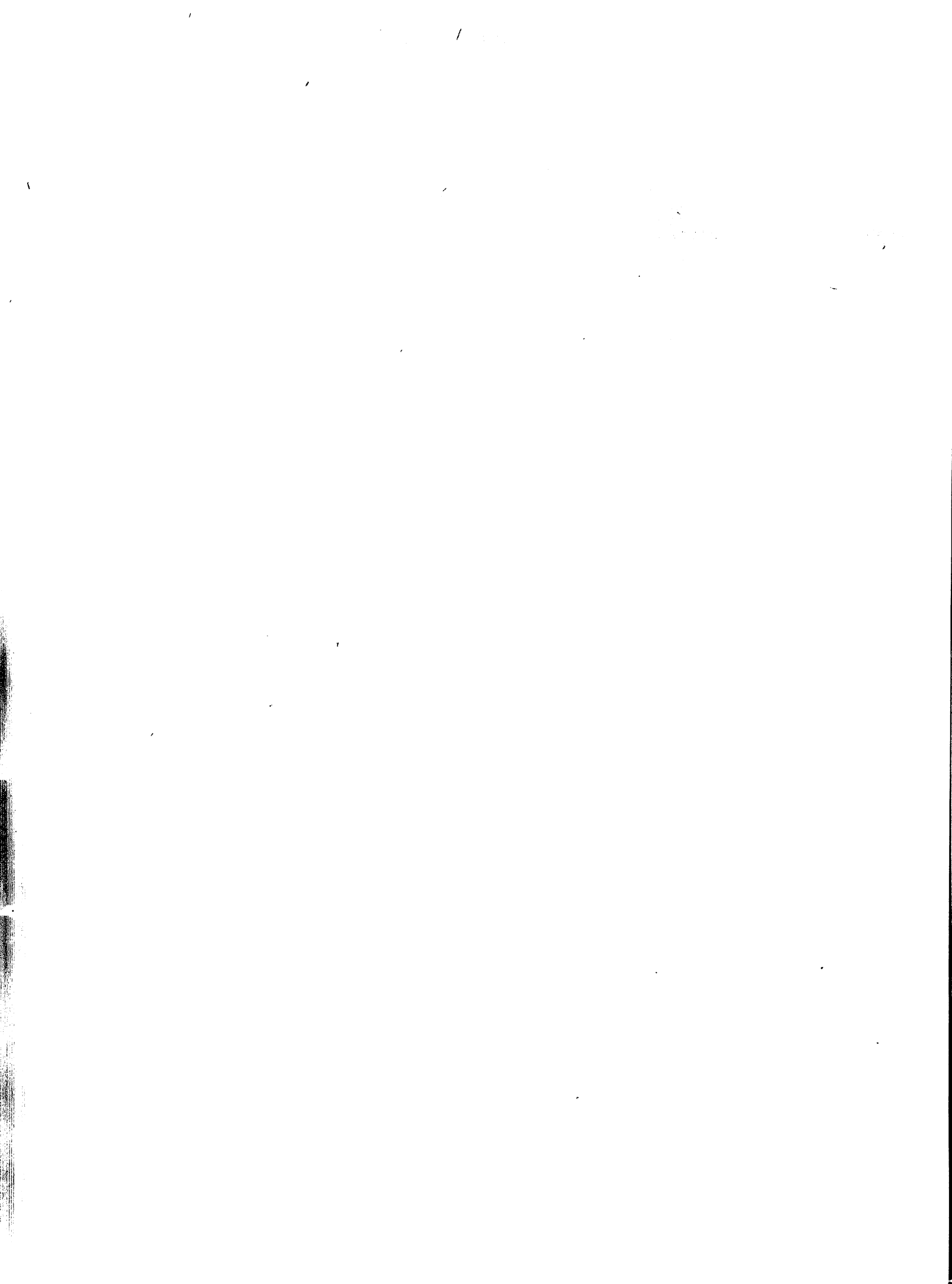
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INTERPRETATIONS AND POLICY STATEMENTS
BY DOCKET NUMBERS AND SUBJECTS

January 1, 1977 through December 31, 1977



INTERPRETATIONS AND POLICY STATEMENTS
BY
DOCKET NUMBERS AND SUBJECTS

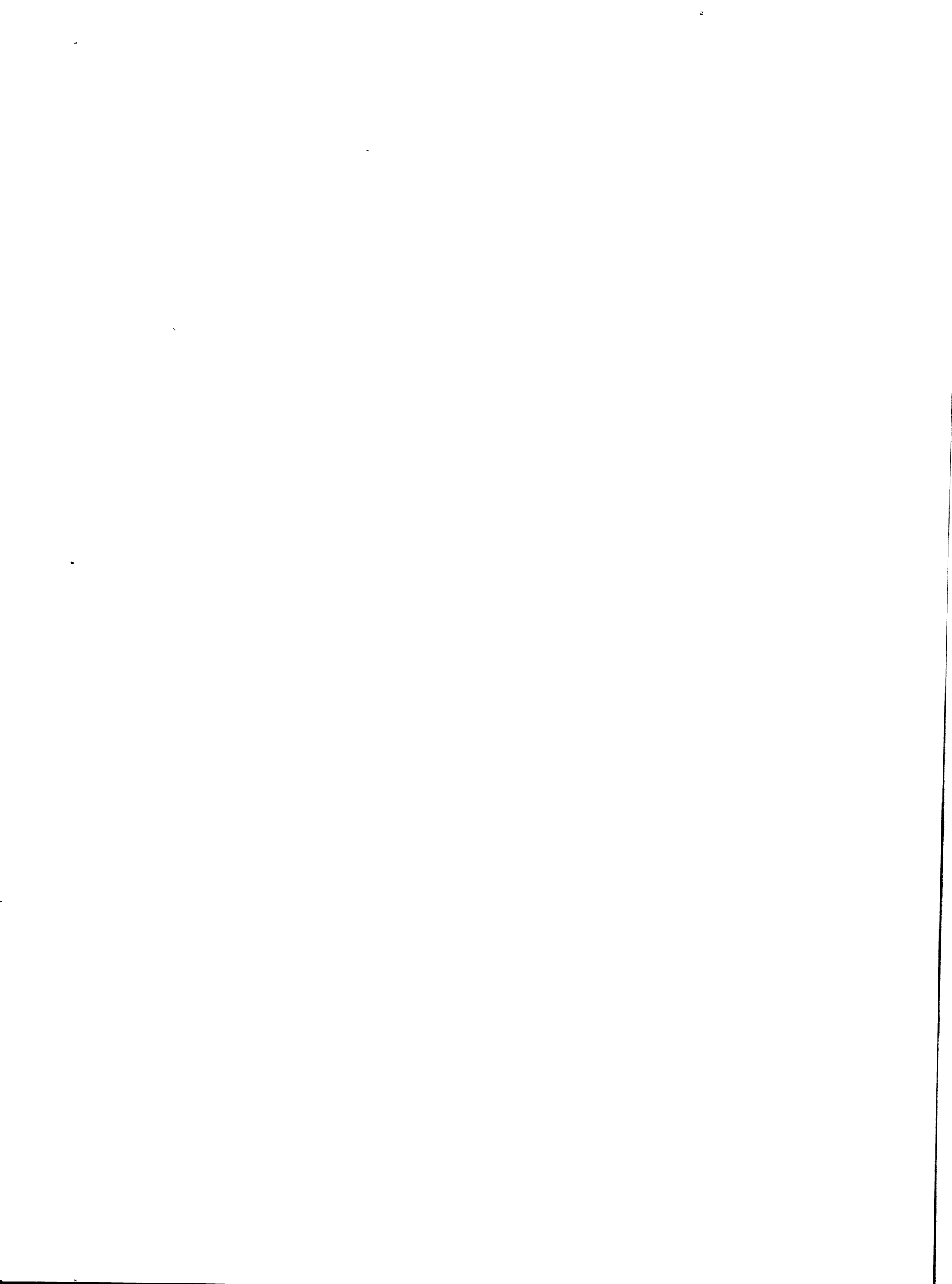
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PART II.

TEXTS OF DECISIONS AND INTERPRETATIONS

January 1, 1977 through December 31, 1977



APPEALS DECISIONS

January 1, 1977 through December 31, 1977



Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR Nos. 523 and 663. Upon the filing of a number of unfair labor practice complaints by National Federation of Federal Employees, Local 1745, the Assistant Secretary, in his decision as supplemented, found that the activity violated section 19(a)(1) of the Order by imposing discriminatory reporting requirements on a union steward; failing to take adequate measures to disassociate itself from the implication that it was lending support to a decertification effort; the reading of a particular letter from the union to the activity by a supervisor to unit employees under his supervision; and by the participation of a supervisor in a decertification effort. The agency appealed to the Council, contending that the Assistant Secretary's decision, as supplemented, was arbitrary and capricious and presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (January 11, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure, since the Assistant Secretary's decision did not appear arbitrary and capricious and did not present any major policy issues. Accordingly, the Council denied the review of the agency's appeal. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 11, 1977

Mr. Stephen L. Shochet, Attorney
Office of General Counsel
Veterans Administration
Washington, D.C. 20420

Re: Veterans Administration, Veterans
Administration Data Processing Center,
Austin, Texas, A/SLMR Nos. 523 and 663,
FLRC No. 75A-80

Dear Mr. Shochet:

The Council has carefully considered your petitions for review and requests for a stay of the Assistant Secretary's decisions, and the oppositions thereto filed by the union, in the above-entitled case.

This case arose upon the filing of a number of unfair labor practice complaints by the National Federation of Federal Employees, Local 1745 (NFFE) against the Veterans Administration Data Processing Center, Austin, Texas (the activity). In A/SLMR No. 523, the Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), found that the activity had committed violations of section 19(a)(1) and (6) of the Order. More particularly, the Assistant Secretary found, in pertinent part, that: (1) the requirement placed on a union steward by her supervisor that she report to him each time she left the work area constituted a violation of section 19(a)(1) of the Order; (2) by failing to take adequate measures to disassociate itself from the implication that it was lending support to a decertification effort by allowing the use of its mail service for the return of signed decertification leaflets, the activity violated section 19(a)(1) of the Order; (3) by a supervisor's reading to employees under his supervision a letter sent by the union to the activity, which action indicated to employees that their confidential dealings with their exclusive representative might not be kept confidential, the activity violated section 19(a)(1) of the Order; and (4) by a supervisor's circulating to employees under his supervision a memorandum he had received which stated the respective positions of the union and the activity regarding the status of negotiations and the current effect of the recently expired agreement between the parties, the activity improperly communicated directly with employees regarding a matter related to the collective bargaining relationship and, therefore, violated section 19(a)(1) and (6) of the Order. He further found that P. Lamar Gordon, whose name appeared with his knowledge and consent as a "representative" in a leaflet soliciting NFFE's decertification, was a supervisor within the meaning of section 2(c) of the Order, and that his participation in the decertification effort therefore violated section 19(a)(1) of the Order.

Following receipt of the petition for review on behalf of the activity, on August 8, 1975, the Council issued its decision in Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77 (Aug. 8, 1975), Report No. 79, setting aside and remanding the Assistant Secretary's decision in that case. In its decision therein, the Council concluded that in the circumstances presented, where the activity had ceased to engage in the allegedly improper conduct immediately after it occurred and thereafter sought to meet its obligations under the Order, a finding that an unfair labor practice had been committed was not warranted. In its opinion, the principles enunciated by the Council in its Vandenberg decision, and the rationale contained therein, were relevant to that part of the Assistant Secretary's decision in this case wherein it was found that a supervisor violated section 19(a)(1) of the Order by requiring a union steward to report to him each time she left the work area, and to that part of the Assistant Secretary's decision wherein it was found that the activity, subsequent to the use of its internal mail system by employees seeking to decertify the union, violated section 19(a)(1) of the Order by failing to take adequate measures to disassociate itself from the implication that it had given its support to the decertification effort.

Further, on October 24, 1975, the Council issued its decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80 (Oct. 24, 1975), Report No. 87, sustaining the Assistant Secretary's decision that certain communications by agency management with unit employees concerning the collective bargaining relationship were violative of the Order, while enunciating general principles for judging whether specific communications are permissible or improper under the Order. In the Council's opinion, the general principles enunciated in the Fallon decision were relevant to the instant case, in particular to that part of the Assistant Secretary's decision wherein it was found that a supervisor violated section 19(a)(1) of the Order by reading to employees under his supervision a letter sent by the union to the activity, and to the Assistant Secretary's decision wherein it was found that a supervisor, in violation of section 19(a)(1) and (6) of the Order, circulated to employees under his supervision a copy of a memorandum he had received which stated the respective positions of the union and the activity regarding the status of negotiations and the current effect of the recently expired agreement between the parties.^{1/}

Accordingly, further consideration and clarification of the Assistant Secretary's decision (A/SLMR No. 523) in the instant case was requested in light of the Council's decisions in the Vandenberg and Fallon cases. Pending the issuance of the Assistant Secretary's decision as clarified

^{1/} The Council did not request further consideration and clarification of that part of the Assistant Secretary's decision that the participation by a supervisory employee in the decertification movement constituted a violation of section 19(a)(1) of the Order.

and further submissions by the parties, the Council held in abeyance its decision on acceptance or denial of the present appeal.

The Assistant Secretary thereafter issued a Supplemental Decision (A/SLMR No. 663). As to the finding that a supervisor violated section 19(a)(1) by requiring a union steward to report to him each time she left the work area, he found that the matter involved was clearly distinguishable from the incident involved in the bargaining negotiations in Vandenberg, noting that in A/SLMR No. 523, the Assistant Secretary found that the activity's "overall conduct in the matters litigated before me were [sic] not isolated, deminimus [sic] or fully remedied and accordingly the violation found herein requires a remedial order." In this regard, the Assistant Secretary further noted that with respect to the finding that the activity's conduct was not isolated, the supervisor who placed the discriminatory reporting requirements on the union steward was involved in a number of other unfair labor practice complaints and findings of violation involved in this proceeding. Moreover, he concluded that a "clear" violation of a section 1(a) right, such as the activity's imposition of a discriminatory reporting requirement upon the union representative, was not de minimis in nature, and that a remedial order was necessary, regardless of any subsequent informal settlement between the parties, "to effectuate the purposes of the Order" and to "act as a deterrent to any future similar occurrences."

As to the finding of a violation by the activity for a failure to take adequate measures to disassociate itself from the implication that it had given support to the decertification effort, the Assistant Secretary concluded, upon further consideration, that the application of the principles in Vandenberg did not require a change in the previous conclusions reached in A/SLMR No. 523. In this regard, the Assistant Secretary noted that the unfair labor practice finding in the instant case was not that the activity violated the Order by its failure to prevent the use of its internal mail system for the return of signed decertification leaflets, but, rather, by its failure to promulgate a disavowal of the impression to other employees that it was lending support to the decertification effort through the use of its internal mail system for the return of signed decertification leaflets. The Assistant Secretary noted particularly that each decertification leaflet had an internal mail routing number alongside each employee's name appearing on it; that one of the employees whose name appeared on the leaflet as a sponsor was found to be a supervisor; that at least some of the original leaflets were returned through the internal mail system if only for one day; and that, while some of those whose names appeared on the leaflet were admonished, none of those who used the internal mail system to return a signed leaflet was so admonished.

With respect to the finding that a supervisor violated the Order by reading to employees a letter sent by the union to the activity, the Assistant Secretary reaffirmed that the conduct of the activity's supervisor in reading to unit employees a letter containing an EEO complaint filed by the union with the activity violated section 19(a)(1) of the

Order under the principles enunciated in Fallon. In this regard, he noted that the Council, in its decision in Fallon, held that each communication must be ". . . judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees." The Assistant Secretary noted that in A/SLMR No. 523, the Assistant Secretary had found that under the circumstances involved, the supervisor's reading of the union's letter to his employees, thereby revealing to all present the names of those who filed an EEO complaint through the union, inherently was a breach of confidentiality which ". . . tended to engender apprehension and indeed hostility to the Union as well as dissuade employees from seeking Union assistance or consulting with the Union with regard to employment related matters in fear that the matter would become public or fall into the Activity's hands without their consent."

With respect to the finding of a violation on the basis of a supervisor's circulation to unit employees of a copy of a memorandum which stated the position of the union and the activity regarding negotiations, the Assistant Secretary concluded that, consistent with the principles enunciated in Fallon, the communications involved were permissible under the Order, and that the findings of violation in this regard made in A/SLMR No. 523, therefore, must be reversed. He noted, in this regard, that prior to the Council's decision in Fallon, the Assistant Secretary had indicated that direct communications with employees by agency management regarding the collective bargaining relationship, absent evidence of waiver, were violative of section 19(a)(1) and (6) of the Order and, therefore, under this standard, the circulation of the memorandum to employees, by a supervisor, was viewed as being violative of the Order. The Assistant Secretary concluded, however, as there was no evidence presented that the circulation of the memorandum constituted an attempt by the activity to deal or negotiate directly with unit employees, to threaten or promise benefits to employees, or to undermine the union in any other regard, that such a finding is not consistent with the principles enunciated in Fallon. The Assistant Secretary noted, in this regard, that the memorandum involved, which was addressed to the activity's Division Chiefs, was characterized by the testimony of a union official as an accurate statement of the parties' positions with respect to the negotiated agreement. Accordingly, this complaint was dismissed.

In your petition for review on behalf of the activity, you allege that the supplemental decision of the Assistant Secretary presents a major policy issue as to the finding of a violation based on the reporting requirement. You allege as a major policy issue: "Did management properly remedy the violation involving the restrictions placed on the union steward by her supervisor?" You contend, in this regard, that the Assistant Secretary failed to properly apply the Council's decision in Vandenberg. You also allege in this regard that a major policy issue is presented as to "[w]hether the mere allegation of a violation by an individual should result in that individual being treated as guilty."

Similarly, as to the finding of a violation by the activity for a failure to disassociate itself from the implication that it had given support to the decertification effort, you allege, in essence, that the Assistant Secretary failed to properly apply Vandenberg and that such failure was arbitrary and capricious and raises a major policy issue. As to the finding of a violation based on the supervisor's reading of the EEO letter to unit employees, you renew your contention that under the Council's Fallon decision, such conduct does not violate the Order. Finally, you renew your contention that the Assistant Secretary acted arbitrarily and capriciously in finding that P. Lamar Gordon (whose participation in the decertification movement was found to constitute a violation of section 19(a)(1)) was a supervisor. [See footnote 1.]

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

As to your contention that the Assistant Secretary's requirement of further remedial action after management properly remedied the violation involving restrictions placed on the union steward by her supervisor is inconsistent with Vandenberg, such assertion constitutes, in effect, nothing more than disagreement with the Assistant Secretary's conclusion that the activity's conduct herein was such a "clear" violation of a section 1(a) right that it was not de minimis in nature, and that a remedial order was necessary (pursuant to his authority under section 6(b) of the Order) regardless of any informal settlement between the parties. Such a contention, in the circumstances of this case, therefore, does not present a major policy issue warranting Council review.^{2/} Similarly, your related assertion

^{2/} However, it should be noted, in this regard, that we do not interpret the Assistant Secretary's decision to mean that he must issue a notice of hearing and litigate, or that a remedial order is required, in every instance where an unfair labor practice may have been committed and subsequently the parties have reached an informal settlement of the matter(s) raised by the charge or the complaint. Indeed, in the report accompanying Executive Order 11491, emphasis was placed on the informal resolution by the parties of alleged unfair labor practices [Labor-Management Relations in the Federal Service (1975), Section D.3., p. 69]:

Alleged unfair labor practices . . . should be investigated by the agency and labor organization involved and informal attempts to resolve the complaints should be made by the parties. . . . If the Assistant Secretary finds that . . . a satisfactory offer of settlement has been made, he may dismiss the complaint. If he finds, based on the allegations and the report of investigation of the parties, that there is a reasonable basis for the complaint, and

(Continued)

concerning the treatment of a person alleged to have committed a violation as guilty constitutes, in effect, nothing more than disagreement with the Assistant Secretary's conclusion that the activity's conduct herein was not isolated, and therefore presents no basis for Council review.

With respect to your further contention that, consistent with Vandenberg, management may not be required to take affirmative action to remedy the unauthorized, wrongful acts of the nonsupervisory, nonmanagerial employees who used the internal mail system to promote NFFE's decertification, or to publicize such action, in the Council's view, no basis for review is presented herein, noting particularly the Assistant Secretary's finding that one of the employees whose name appeared on the decertification leaflet as a sponsor was a supervisor.^{3/}

Furthermore, no major policy issue is presented with regard to the reading of the letter, noting particularly the Assistant Secretary's finding that the supervisor's reading to employees a letter sent by NFFE to the activity regarding an EEO complaint filed by NFFE tended to "dissuade employees from seeking [u]nion assistance or consulting with the [u]nion" and thus "tended to improperly undermine the [exclusive bargaining representative] in violation of [s]ection 19(a)(1) of the Order."^{4/} Your assertion to the

(Continued)

that no satisfactory offer of settlement has been made, he may appoint a hearing officer to hold a hearing and report findings of fact and recommendations including, where appropriate, remedial action to be taken and notices to be posted. . . .

Pursuant to this recommendation, the Assistant Secretary has provided in his regulations for such settlements. Rules and Regulations of the Assistant Secretary, Section 203.7(a)(3). See also Section 203.7(b)(4).

In the instant case, as previously stated, we merely find that no major policy issue is presented by the Assistant Secretary's finding that, in the totality of the facts and circumstances of this case, a remedial order was required in order to effectuate the purposes of the Order notwithstanding an informal settlement between the parties.

3/ It should be noted, however, that we do not view the Assistant Secretary's decision herein as requiring, under all circumstances, agency management to disavow the unauthorized conduct of its employees when that conduct might be violative of the Order. Rather, we merely find that, in light of the Assistant Secretary's determination that one of the employees named in the decertification leaflet as a sponsor was a supervisor, no major policy issue is presented warranting Council review.

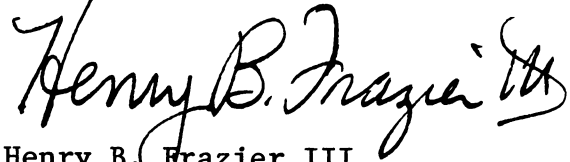
4/ In this regard, we construe the Assistant Secretary's decision as finding that the supervisor's reading of the EEO letter in the circumstances of this case constituted direct dealings with unit employees, rather than permissible communications, within the general principles enunciated by the Council in its Fallon decision.

contrary constitutes mere disagreement with his determination in this regard. Finally, it does not appear that the Assistant Secretary acted without reasonable justification in concluding that P. Lamar Gordon was a supervisor within the meaning of section 2(c) of the Order, noting the Assistant Secretary's finding that Gordon, in the course of his normal duties, "responsibly directs employees using independent judgment both as to the regular assignment of work . . . and granting leave time to section employees."

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Cooper
NFFE

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Boston, Massachusetts and National Treasury Employees Union, A/SLMR No. 695. The Assistant Secretary dismissed the complaint filed by the National Treasury Employees Union (NTEU), which alleged that the activity violated section 19(a)(1) and (3) of the Order by improperly interfering in NTEU's internal process of choosing its officers. NTEU appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (January 11, 1977). The Council held¹ that NTEU's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of NTEU's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 11, 1977

Mr. Hayward C. Reed
Assistant Counsel
National Treasury Employees Union
Suite 1101 - 1730 K Street, NW.
Washington, D.C. 20006

Re: Department of the Treasury, Bureau of
Alcohol, Tobacco and Firearms, Boston,
Massachusetts and National Treasury
Employees Union, A/SLMR No. 695, FLRC
No. 76A-105

Dear Mr. Reed:

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

In this case, the National Treasury Employees Union (NTEU) alleged that the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Boston, Massachusetts (the activity) violated section 19(a)(1) and (3) of the Order by improperly interfering in NTEU's internal process of choosing its officers. The employee involved, the vice-president of a chapter of NTEU, had been excluded by the head of the agency from the coverage of the Order under the provisions of section 3(b)(3).^{1/}

The Assistant Secretary, in agreement with the Administrative Law Judge, found that the activity's conduct was not violative of the Order, and ordered that NTEU's complaint be dismissed. The Assistant Secretary, noting that "the employee involved was excluded from coverage of the Order under the provisions of Section 3(b)(3)," stated:

1/ Section 3(b)(3) provides:

(b) This Order (except section 22) does not apply to—

.
(3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations.

In view of the basis for such exclusion, I find that the excluded employee is precluded from participation in the management of, or acting as the representative of, [NTEU] because, in my judgment, such participation "would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee" within the meaning of Section 1(b) of the Order.^{2/} [Footnote added.]

In your petition for review on behalf of NTEU, you allege that the Assistant Secretary's decision is arbitrary and capricious because his "interpretation that an agency does not violate [s]ections 19(a)(1) and (3) when it forbids an employee excluded from coverage of the Order by [s]ection 3(b)(3) from participating in a labor organization and representing its members under [s]ection 1(b) is erroneous." You also allege, in this regard, that his "erroneous interpretation of [s]ection 1(b) as effected by [s]ection 3(b)(3) of the Executive Order is a major policy issue which, if left uncorrected, will be prejudicial to the effectuation of the purpose of the Order." You further allege that the Assistant Secretary's decision is arbitrary and capricious in that "applying [s]ection 1(b) to the facts discloses no substantial evidence of a conflict of interest or incompatibility between [the excluded employee's] Union and official duties."

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision in the circumstances of this case. With respect to your contention that his decision presents a major policy issue as to his allegedly erroneous interpretation of section 1(b) as effected by section 3(b)(3), his decision in this regard does not present major policy issues warranting review. In this latter regard, we note particularly the Assistant Secretary's finding that as "the employee involved was excluded from coverage of the Order under the provisions of Section 3(b)(3)," the employee's "participation 'would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee' within the meaning of Section 1(b) of the Order." Similarly, with respect to your contention

2/ Section 1(b) provides:

(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

that the Assistant Secretary's decision is arbitrary and capricious because no substantial evidence of a conflict of interest between the excluded employee's union and official duties was shown, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision in the circumstances of this case. In this regard, we again note that the Assistant Secretary's finding that the employee's participation as a union official would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee in the instant case was based upon the employee's exclusion from coverage of the Order by the agency head under section 3(b)(3), rather than upon record evidence of a conflict of interest.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. A. Chevrier
Treasury

Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator). The arbitrator sustained the grievance and directed that the grievant be granted an environmental pay differential for functional flight checks. The agency filed an exception to the award with the Council, contending that the award violated appropriate regulations, specifically the Federal Personnel Manual (FPM).

Council action (January 12, 1977). The Council held that the agency's petition failed to present the necessary facts and circumstances in support of its exception that the award violated the FPM. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 12, 1977

Mr. Robert T. McLean, Chief
Labor & Employee Relations Division
Directorate of Civilian Personnel
Headquarters U.S. Air Force
Department of the Air Force
Washington, D.C. 20314

Re: Headquarters, Sacramento Air Logistics Center,
McClellan Air Force Base, California and American
Federation of Government Employees, Local 1857
(Staudohar, Arbitrator), FLRC No. 76A-71

Dear Mr. McLean:

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

According to the arbitrator's award, the grievant is an aircraft propeller mechanic required by his job description to fly periodically in functional check flights of military aircraft. On this account the grievant filed a grievance requesting an environmental pay differential while aboard these check flights and the matter was ultimately submitted to arbitration. In the opinion accompanying his award, the arbitrator observed that he was to determine whether the grievant was entitled to an environmental pay differential and framed the issue as "whether the Agency violated Article XXXII, Section 1^{1/} of the Agreement by failing to pay an environmental differential to the Grievant . . . for duties performed during functional check flights." [Footnote added.] The arbitrator stated that directly bearing upon the resolution of the issue

1/ According to the award, Article XXXII, Section 1 of the parties' collective bargaining agreement provides:

HAZARD AND ENVIRONMENTAL PAY

Section 1. In accordance with FPM Supplement 532-1, Subchapter S8-7c, an environmental differential will be paid to a wage employee who is exposed to a hazard, physical hardship, or working condition listed under the categories in Appendix J of this subchapter.

was whether such flights are included in work category 1.a. of part I of FPM Supplement 532-1, appendix J^{2/} and also whether the activity had "practically eliminated" hazards of an unusually severe nature pursuant to FPM Supplement 532-1, subchapter S8-7c and d.^{3/} The arbitrator noted

2/ FPM Supplement 532-1, appendix J, entitled "Schedule of Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature," provides in part I, category 1.a.:

1. Flying. Participating in flights under one or more types of the following conditions:

a. Test flights of a new or repaired plane or modified plane when the repair or modification may affect the flight characteristics of the plane.

3/ FPM Supplement 532-1, subchapter S8-7c and d provides:

c. Payment for environmental differential. An environmental differential is paid to a wage employee who is exposed to a hazard, physical hardship, or working condition of an unusually severe nature listed under the categories in appendix J of this subchapter. Exposure to a hazard, physical hardship, or working condition of an unusually severe nature listed in appendix J is not taken into consideration in the job-grading process, and additional pay for exposure to these conditions is provided only through the environmental differentials authorized by this section. An employee subjected at the same time to more than one hazard, physical hardship, or working condition of an unusually severe nature listed in appendix J shall be paid for that exposure which results in the highest differential but shall not be paid more than one differential for the same hours of work.

d. Authorization for pay for environmental differential.

(1) Pay is authorized for exposure to an unusually severe hazard which could result in significant injury, illness, or death, such as on a high structure when the hazard is not practically eliminated by protective facilities or on an open structure when adverse conditions such as darkness, lightning, steady rain, snow, sleet, ice, or high wind velocity exists.

(2) Pay is authorized for exposure to an unusually severe physical hardship under circumstances which cause significant physical discomfort or distress not practically eliminated by protective devices.

(3) Pay is authorized for exposure to an unusually severe working condition under circumstances involving exposure to fumes, dust, or

(Continued)

with respect to work category 1.a. that, since an environmental differential is not payable for all test flights and functional check flights are neither specifically included nor excluded, the key terminology in that category appeared to be "may affect the flight characteristics of the plane." To the arbitrator, use of the word "may" in that phrase meant "includes the possibility of such occurrence." In this regard he found the purposes of functional check flights to be apparently to reestablish the air worthiness of an aircraft after normal maintenance repairs by means of system tests to determine if the systems function properly "and the possibility exists that they will not." Thus, the arbitrator concluded that while the probability of an accident might be small, the consequences could be extremely hazardous. Accordingly, the arbitrator sustained the grievance and ordered the grievant granted an environmental pay differential for functional check flights.

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

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

In its exception to the award, the agency contends that the award violates appropriate regulation, specifically the Federal Personnel Manual (FPM). In support of this exception, the agency asserts that the award violates the FPM by directing payment of an environmental differential when the criteria set forth in FPM Supplement 532-1, subchapter S8-7, and appendix J thereto, regarding payment of such differential for flying, have not been met.

The Council will grant review of an arbitrator's award where it appears, based upon facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulation. However, in this case, the agency's petition does not contain a description of facts and circumstances to support its exception. In the Council's opinion, the agency has failed to show in what manner the arbitrator's determination that, in the situation before him, an environmental differential was payable for functional check

(Continued)

noise which cause significant distress or discomfort in the form of nausea, or skin, eye, ear, or nose irritation or conditions which cause abnormal soil of body and clothing, etc., and where the distress or discomfort is not practically eliminated.

flights is violative of FPM Supplement 532-1, subchapter S8-7, and appendix J thereto. In this regard it is noted that the FPM does not enumerate specific work situations for which an environmental differential is payable. Rather, the FPM only defines in appendix J categories of work situations, "each of an unusually severe nature," for which payment of an environmental differential may be authorized. FPM Supplement 532-1, subchapter S8-7e points out that the examples listed under the categories in appendix J "are illustrative only and are not intended to be exclusive of other exposures which may be encountered under the circumstances which describe the listed category." Further, subchapter S8-7g(2)^{4/} provides that each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether and which local work situations are covered by the defined work categories. Thus, specific work situations for which an environmental differential is payable are left to local determination. The Council further notes that FPM Supplement 532-1 provides for the collective bargaining process as one specific means of locally determining whether a particular disputed local work situation warrants payment of an environmental differential.^{5/}

In the instant case, the activity has referenced within its collective bargaining agreement the appendix J guidelines and submitted to the arbitrator the question of whether under these guidelines the grievant was entitled to environmental differential pay. The arbitrator determined that functional check-flights, a disputed local work situation, warranted payment of an environmental differential pursuant to the FPM work categories. Thus, since, as indicated, the Commission has delegated to local determination specific situations for which an environmental differential is payable,^{6/} the Council is of the opinion

4/ FPM Supplement 532-1, subchapter S8-7g(2) provides in pertinent part:

(2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.

5/ FPM Supplement 532-1, subchapter S8-7g(3) provides:

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above.

6/ In this regard the Council also notes that in a recent decision of the Comptroller General, B-180010.03, October 7, 1976, wherein it was

(Continued)

that the agency's petition fails to present the necessary facts and circumstances in support of its exception that this award violates the FPM. No basis is therefore provided for the acceptance of the agency's petition.

(Continued)

held in a case involving arbitral determinations of environmental differential pay that "[s]ince the Commission's regulations delegate authority to determine local coverage to each agency and expressly permit the collective bargaining process to determine additional coverage under appropriate categories in Appendix J . . . the arbitrators were authorized to decide that the local working conditions . . . were covered by the specified categories of Appendix J . . ." the Comptroller General quoted in part a letter from the Civil Service Commission as follows:

"Under the Federal Wage System, environmental differentials are paid to Federal wage employees who are exposed to a hazard, physical hardship, or working condition of an unusually severe nature as listed under the categories of situations contained in Appendix J of Federal Personnel Manual Supplement 532-1. While the Civil Service Commission considers proposals for broad categories of situations for which payment of a differential may be authorized, the system is designed so that it is incumbent upon individual installations or activities to evaluate their own situations against these broad guidelines. When the local situation is determined to be covered by one or more of the defined categories the authorized environmental differential is paid for the appropriate category. The FPM Supplement specifically permits, where otherwise appropriate, negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Civil Service Commission for prior approval.

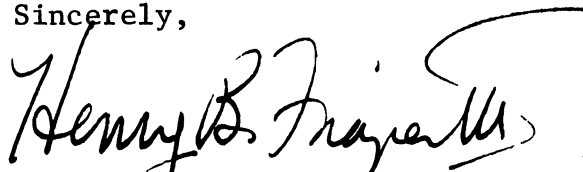
.

"If a question arises concerning interpretation of the Commission's regulations or instructions, we would provide pertinent clarification and needed guidance. We would, of course, expect the agency to utilize this guidance as well as the basic regulation or instruction in determining which, if any, differentials are appropriate to be paid in any given case. However, the Commission has consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases, rather, this authority has been delegated to the agencies. Whether or not an arbitrator had exceeded his authority in a specific case would be an appropriate matter for the Federal Labor Relations Council."

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: B. Blaustone
AFGE

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Eastern Region (Wolf, Arbitrator). The arbitrator directed that the agency reimburse the grievant for travel expenses as though his travel by privately owned vehicle had been under conditions advantageous to the Government, and that the grievant's time and leave credits be corrected accordingly. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law and appropriate regulations (Report No. 105).

Council action (January 18, 1977). Because this case concerned issues within the jurisdiction of the Comptroller General's office, the Council requested a decision from him as to whether the arbitrator's award violated applicable law and appropriate regulations. Based on the subsequent decision of the Comptroller General, the Council held that the arbitrator's award, insofar as it directed the agency to reimburse the grievant for his travel expenses and correct his time and leave credits as though his travel by privately owned vehicle had been under conditions advantageous to the Government, was, under the circumstances of this case, contrary to the Federal Travel Regulations and could not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Professional Air Traffic
Controllers Organization

and

FLRC No. 76A-10

Federal Aviation Administration,
Eastern Region

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he directed that the agency reimburse the grievant for travel expenses as though his travel by privately owned vehicle had been under conditions advantageous to the Government, and that the grievant's time and leave credits be corrected accordingly.

According to the arbitrator's award, the grievant, an employee of the New York Air Route Traffic Control Center of the Federal Aviation Administration (FAA), was tentatively selected for a position as air traffic control instructor at the FAA Academy, Oklahoma City, Oklahoma. On April 1, 1974, the grievant requested authorization to use his privately owned vehicle (POV) as being "advantageous to the Government" for the travel to Oklahoma City from New York City. Such request had to be submitted 15 days in advance of the scheduled departure, and required approval of the Air Traffic Division Chief. On or about April 11, 1974, the Operation Specialist of the Division, whose function it was to evaluate such requests, requested a recommendation from the grievant's facility. He did not say that if the facility recommended approval it would definitely be approved, but he did say that the request would probably be approved. On April 12, the facility chief recommended approval and forwarded that recommendation to the Division. On April 15, the grievant, without travel orders, left for the FAA Academy in his personal vehicle under the impression that his request would be approved. According to the parties' stipulations before the arbitrator, sometime between April 15 and April 19 the Operation Specialist advised the facility that the grievant's request was disapproved.^{1/} Subsequently, the grievant filed a grievance, and the matter proceeded to arbitration.

^{1/} A travel order was issued on April 19, 1974, allowing the grievant use of his personal vehicle under "personal preference" conditions. This permitted the grievant to use his own vehicle but he would be reimbursed as to cost and time as if he had traveled by common carrier. The grievant did not receive the travel order until May 23, 1974.

The Arbitrator's Award

The arbitrator stated the issue as follows: "Whether or not [grievant] was reimbursed for his travel consistent with the provisions of Article 18, Sections 1 and 2 of the 1973 PATCO-FAA agreement."^{2/} The arbitrator noted that "[u]nder [Department of Transportation] regulations it was incumbent upon the authorizing officials to determine the mode of travel within [a 15-day] time period. The failure to do so was an error on the part of the officials not upon [grievant]." Further, in addressing the agency's position that the grievant's right to a travel order authorizing use of a privately owned vehicle as advantageous to the Government is governed by regulations and that the grievant's request did not meet the established standards, the arbitrator stated that "the regulations do provide for discretion on the part of the officials and it could have been approved. The errors delayed the non-approval until too late and, under the circumstances, must be deemed an approval at the time [grievant] departed." The arbitrator issued the following award: "The grievance is granted. The FAA is directed to reimburse the grievant as though he had traveled POV under conditions 'Advantageous to Government', and that his time and leave credits be corrected accordingly."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulations.^{3/} The agency filed a brief, and the union relied upon its opposition filed to the petition for review.

^{2/} Article 18, Sections 1 and 2 of the parties' agreement provide as follows:

ARTICLE 18—TRAVEL AND PER DIEM

Section 1. The desires of the traveler will be considered to the extent that they are not inconsistent with the principle that travel by common carrier generally results in the least costly and most expeditious method of travel. This method will be used unless the circumstances involved make travel by Government owned vehicle, privately owned conveyance, or special conveyance preferred for reason of cost, efficiency or work requirements.

Section 2. An employee permitted to travel by privately owned vehicle will be paid the mileage rate authorized for such travel by agency directives.

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

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award violates applicable law and appropriate regulations. Because this case concerns issues within the jurisdiction of the Comptroller General's office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulations. The Comptroller General's decision in the matter, B-180010.09, December 9, 1976, is set forth in relevant part below:

FACTS

The record indicates that on March 12, 1974, the grievant, Mr. Joseph Pradarits, an employee of the New York Air Route Traffic Control Center of the Federal Aviation Administration (FAA), was tentatively selected for a position as an air traffic control instructor at the FAA Academy, Oklahoma City, Oklahoma, subject to his successful completion of basic instructor and manager training courses which were to commence on April 2, 1974. For some unexplained reason, the latter commencement date was postponed for several weeks.

On April 1, 1974, Mr. Pradarits requested authorization to use his privately owned vehicle (POV) as being "advantageous to the Government" for the travel to Oklahoma City from New York City. Mr. Pradarits' justification for the request was that if he went to Oklahoma City by common carrier, he would subsequently have to make a 6-day house-hunting trip and incur other costs incident to his permanent change of station move to Oklahoma City at a total estimated cost of \$1,450, whereas if he were allowed to use his POV he would be able to perform the temporary duty travel and perform his househunting and other chores at the same time thus incurring a lesser cost estimated at \$971.

On or about April 11, 1974, Mr. Harold Eisbrock, Operation Specialist of the Air Traffic Division, whose function it was to evaluate such requests, called Gerald Shipman, who was then Personnel Management Specialist in the New York center, requesting the facility's recommendation regarding the request. Mr. Eisbrock did not say that if the facility recommended approval it would definitely be approved, but he did say that the request would probably be approved. The facility's recommendation to allow the use of a POV as being advantageous to the Government was sent to Mr. Eisbrock on April 12.

Mr. Eisbrock reviewed the request and the recommendation and concluded that the criteria in the pertinent FAA regulations were not met since it was not cheaper for Mr. Pradarits to travel by POV, nor was it more efficient for him to have the vehicle in Oklahoma City nor would it enhance his work at the Academy. Mr. Eisbrock considered the advice of the FAA's Accounting Division that it was not customary to authorize POV use when the employee's tentative selection as air traffic control instructor at the FAA Academy was contingent upon his satisfactorily completing the basic instructor and manager training courses since unless he satisfactorily completed the courses, he would not be transferred and would not incur permanent change of station expenses. Mr. Eisbrock did not advise Mr. Shipman of his denial of Mr. Pradarits' request until about April 19, 1974.

On April 15, 1974, Mr. Pradarits left for the FAA Academy in his personal vehicle without travel orders under the impression that his request to use the POV as being advantageous to the Government would be approved. However, on April 19, 1974, a travel order was issued allowing Mr. Pradarits use of a POV under "Personal preference" conditions only. Mr. Pradarits did not receive the travel order until May 23, 1974.

ARBITRATOR'S AWARD

Mr. Pradarits filed a grievance against the FAA's decision to deny him the use of his personal vehicle as being advantageous to the Government. The grievance went to arbitration with the issue presented being whether or not Mr. Pradarits was reimbursed for his travel consistent with the provisions of Article 18, sections 1 and 2 of the 1973 PATCO-FAA agreement, which provide:

"Travel and Per Diem

"Section 1. The desires of the traveler will be considered to the extent that they are not inconsistent with the principle that travel by common carrier generally results in the least costly and most expeditious method of travel. This method will be used unless the circumstances involved make travel by Government owned vehicle, privately owned conveyance, or special conveyance preferred for reason of cost, efficiency or work requirements.

"Section 2. An employee permitted to travel by privately owned vehicle will be paid the mileage rate authorized for such travel by agency directives."

The arbitrator held for Mr. Pradarits as follows:

"The grievance is granted.

"The FAA is directed to reimburse the grievant as though he had traveled POV under conditions 'Advantageous to the Government,' and that his time and leave credits be corrected accordingly."

The basis for the arbitrator's award was his belief that Mr. Pradarits had complied with the Department of Transportation's regulation 1500.14 EA SUP 5, February 6, 1974, concerning criteria that must be considered for determining whether the use of POV is advantageous to the Government for en route travel to and from the Aeronautical Center. The latter regulation states in part:

"The requirement that authorizing officials make individual determinations of POV use as advantageous to the Government is not changed. As a minimum, criteria set forth in paragraph 451-S1, of Order 1500.14, Appendix 1, as revised herein must be used in making these determinations. (i.e., paragraph 451-S1 subparagraph b, must be considered in conjunction with paragraph 451-S1, subparagraph a.) It is incumbent upon authorizing officials to first determine the mode of travel which will best assure that the mission is accomplished.

"With the Departmental objective of encouraging the reduction in motor vehicle fuel consumption for official Government travel, and in view of the expanded FAA bus service available at the Aeronautical Center, the basic policy is that the use of POV cannot be considered as advantageous to the Government. Use of POV should not be justified solely on the basis of cost, but rather on the basis of need. Although travel by POV should be discouraged, this will not preclude the use of POV for personal convenience on a comparative cost basis provided the extra travel time (annual leave) does not conflict with workload before or after the training course.

"Requests for exception of the policy which necessitate POV travel as advantageous to the Government must be justified including the extenuating circumstances thereof. Exceptions require the approval of the Division Chief and should therefore be submitted in writing through the Facility Chief or Sector Manager sufficiently in advance (at least 15 days prior) of the scheduled departure for the training course. * * *"

The arbitrator held that under regulation 1500-14 EA, SUP 5, supra, it was incumbent upon the authorizing officials to determine the mode of travel within the 15-day time period stated therein. Since Mr. Pradarits had submitted his request for POV use 14 days prior to his departure and the FAA had been alerted to his travel in March, the arbitrator found that Mr. Pradarits had done all that was expected

of him under the FAA-PATCO agreement and the regulations. Moreover, the arbitrator held that although the agency official had not approved the use of POV as being advantageous to the Government as required by appropriate regulations, those regulations also provided that the authorizing official had discretion to approve use of POV and the use of POV could have been approved. The arbitrator concluded:

"* * * The errors delayed the non-approval until too late and, under the circumstances, must be deemed an approval at the time Pradarits departed.

"The Government must necessarily shoulder the responsibility for the negligence of those officials whose duty it was to act. It is unrealistic to expect an employee to assume the burden of official negligence even if his request might have been disapproved under regulations. The burden must be borne by the Government. A principal is responsible for acts of its agents within their ostensible authority."

OPINION

Paragraph 1-2.2c of the Federal Travel Regulations (FPMR 101-7) (May 1973) states in pertinent part:

"c. Presumption as to most advantageous method of transportation.

"(1) Common carrier. Since travel by comon [sic] carrier will generally result in the least costly and most expeditious performance of travel, this method shall be used unless the circumstances involved make travel by Government, privately owned, or special conveyance preferred for reasons of cost, efficiency, or work requirements. The advantages which may result from common carrier transportation must be fully considered by the agency before it is determined that some other method of transportation should be used.

"(2) Government-owned or Government-contract rental automobiles. When it is determined that an automobile is required for official travel, a Government-owned automobile shall be used. A Government-contract rental automobile shall be used when a Government-owned automobile is unobtainable or its use is impracticable. Privately owned or special conveyances shall be approved for use in lieu of Government-owned or Government-contract rental automobiles only when preferred for reasons of cost, efficiency, or work requirements. Cost advantages which will normally result from use of Government-owned automobiles must be fully considered since these vehicles are operated at a

relatively low cost. Costs involved in using a Government-owned or Government-contract rental automobile shall include any administrative costs and any costs associated with picking up and returning the automobile.

"(3) Privately owned conveyance. A determination that use of a privately owned conveyance would be advantageous to the Government shall normally be made when the use of a commercially rented conveyance would otherwise be authorized for the travel involved. A determination that use of a privately owned conveyance would be advantageous to the Government must be preceded by determinations that both common carrier and Government-owned vehicle transportation are not feasible in the circumstances or that transportation by those means would be more costly to the Government. Those determinations shall be based on both the direct transportation cost and the economies which result from the more expeditious and effective performance of Government business through the use of one or another method of transportation. Other factors to be considered are the total distance of travel, the number of points visited, and the number of travelers."

The Federal Travel Regulations applicable here are prescribed pursuant to statutory authority. See 5 U.S.C. §§ 5702(a), 5704(a) and 5707. Accordingly, an agency's internal regulations implementing the Federal Travel Regulations must be consistent with and may not void any mandatory provisions contained in the Federal Travel Regulations. 40 Comp. Gen. 704(1961); B-171947.78, July 9, 1976; B-184789, October 30, 1975. Moreover, Executive Order 11491, as amended, 3 C.F.R. 254 (1974), entitled "Labor Management Relations in the Federal Service," provides in section 12(a) that labor management agreements are subject to applicable laws and regulations. Therefore, the issue here is whether the Department's regulation 1500.14 EA, SUP 5, supra, as interpreted by the arbitrator, is a proper exercise of the agency's authority in view of paragraph 1-2.2c of the Federal Travel Regulations and Executive Order 11491, supra. Or more simply, can regulation 1500.14 EA, SUP 5, supra, properly bind the agency to make a favorable disposition of employee requests to use POV as advantageous to the Government when the agency delays giving an employee a response to his request under the circumstances applicable to Mr. Pradarits' situation.

We hold that regulation 1500.14 EA, SUP 5, as interpreted by the arbitrator, contradicts the express requirements of the Federal Travel Regulations. Paragraph 1-2.2b. of those regulations states that "[i]n selecting a particular method of transportation to be used, consideration shall be given to the total cost to the Government * * *." Paragraph 1-2.2c(1) requires that the advantages of using common carrier transportation "* * * must be fully considered

by the agency before it is determined * * *" that an alternate mode may be used. Moreover, "[a] determination that use of a privately owned conveyance would be advantageous to the Government must be preceded by determinations that both common carrier and Government-owned vehicle transportation are not feasible in the circumstances or that transportation by those means would be more costly to the Government." Paragraph 1-2.2c(3).

It is evident that the above regulatory requirements would be completely nullified if an agency could set an arbitrary time limit within which, if it does not make the required determinations, it must allow the employee to use POV as advantageous to the Government regardless of the facts of the case.* An agency could evade the requirements of the Federal Travel Regulations merely by failing to make the appropriate findings within the specified period. The determining factors as to whether POV use is advantageous to the Government would be subordinated to an artificial constraint of time.

The purpose of the paragraphs of the Federal Travel Regulations cited above is quite clearly to prohibit the use of privately owned vehicles as being advantageous to the Government unless specified conditions have been determined to be met. The arbitrator however, held that the agency bound itself to grant approval of POV use as advantageous to the Government on a basis not sanctioned nor contemplated by the Federal Travel Regulations. Regulation 1500.14 EA, SUP 5, supra, as interpreted by the arbitrator, would allow constructive approval of POV use. Since the arbitrator's basis for his award would circumscribe the agency's responsibility to make certain determinations required by the Federal Travel Regulations, and since the agency is without authority to void those provisions of the Federal Travel Regulations, we find that the arbitrator's award is improper.

The fact an agency official indicated to Mr. Pradarits that his request would be approved does not bind the Government as that official was without authority to approve Mr. Pradarits' request. When a Government employee acts outside the scope of the authority actually held by him, the United States is not estopped to deny his unauthorized or misleading representations, commitments, or acts, because those who deal with a Government agent, officer, or employee are deemed to have notice of the limitations on his authority, and also because even though a private individual might be estopped, the public should not suffer for the act or representation of a single Government agent. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Bianco v. United States, 171 Ct. Cl. 719 (1965); Potter v. United States, 187 Ct. Cl. 28 (1964); cert. denied, 382 U.S. 817 (1965); Vest Bros. Mfg. Co. v. United States, 160 Ct. Cl. 578 (1960). The Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous. von Kalinowski v. United States, 151 Ct. Cl. 172 (1960), cert. denied, 368 U.S. 829 (1961).

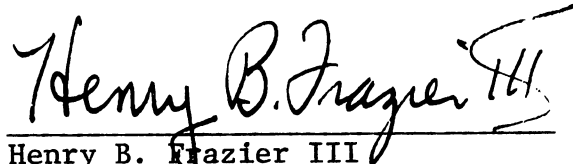
In view of the above, the arbitrator's award may not be implemented.

Based upon the foregoing decision by the Comptroller General, it is clear that the arbitrator's award, insofar as it directs the agency to reimburse the grievant for his travel expenses and correct his time and leave credits as though his travel by privately owned vehicle had been under conditions advantageous to the Government, is, under the circumstances of this case, contrary to the Federal Travel Regulations and may not be implemented.

Conclusion

For the reasons discussed above, we find that the arbitrator's award, under the circumstances of this case, violates appropriate regulations. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 18, 1977

AFGE, National Immigration and Naturalization Service Council and Department of Justice, INS. The dispute involved the negotiability under the Order of a union proposal that would permit uniformed law enforcement personnel to affix a conspicuous union affiliation patch on their official uniforms.

Council action (January 18, 1977). The Council concluded that the specific proposal here involved violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.28 of its rules, the Council sustained the agency head's determination that the proposal was nonnegotiable.

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

AFGE, National Immigration and
Naturalization Service Council

and

FLRC No. 76A-26

Department of Justice, INS

DECISION ON NEGOTIABILITY ISSUE

Background

In November, 1975 Immigration and Naturalization Service (INS) management advised the AFGE National Immigration and Naturalization Service Council (the union) that all uniformed personnel would be required to wear a Bicentennial patch on their right shoulders during the period January 1 to December 31, 1976.

In response, the union, claiming that removal of the patch after December 31 would leave a dark spot on the uniform sleeve, perhaps necessitating premature replacement of the uniform shirt, proposed that such dark spot be covered by an American Federation of Government Employees (AFGE) emblem, to be worn by uniformed personnel "for as long as they wish." The INS rejected the union proposal but, in recognition of the potential "dark spot" problem, determined that the Bicentennial patch "may be left on clothing bearing the patch until the article of clothing is replaced." The union then offered a specific proposal which would permit uniformed personnel to leave the Bicentennial patch on their uniform after December 31 or, at the option of the individual employee, to replace the patch with the AFGE shoulder emblem.^{1/} INS rejected this proposal, also, and proceeded to implement the requirement for the wearing of the Bicentennial patch. The union requested an agency head negotiability determination as to the dispute concerning the wearing of the AFGE patch on INS employees' uniforms. The Department of Justice (the agency) failed to render a timely determination and the instant appeal was initiated by the union in accordance

^{1/} The emblem which is the subject of the disputed proposal is a shield-shaped patch, measuring approximately three inches at its widest point by four inches at its longest. The letters "AFGE" appear near the top of the emblem and near the bottom are the letters "AFL-CIO."

with section 2411.24(c)(2)^{2/} of the Council's Rules and Regulations. Subsequently, the agency timely filed a statement of its position setting forth in detail its reasons as to why the disputed proposal to wear the AFGE patch on the INS uniform is nonnegotiable.

Opinion

The disputed proposal provides as follows:^{3/}

The Agency and the Union agrees [sic] to the wearing of the Bicentennial patch on the right shoulder of shirts worn by uniformed personnel, January 1, 1976, through December 31, 1976. The patch may be left on the shirts until the article of clothing is replaced. At the option of the employee, the Bicentennial patch may be removed after December 31, 1976, and the AFGE patch worn in its place.

The agency contends, principally, that the proposal is nonnegotiable because it violates section 12(b)(5) of the Order in that it would interfere with the Service's right to determine the "means" by which its operations are to be conducted. In support of this contention the agency presents the following argument:

2/ Section 2411.24(c)(2) of the rules provides as follows:

§2411.24 Time limits for filing.

.
(c) Review of a negotiability issue may be requested by a labor organization under this subpart without a prior determination by the agency head, if the agency head has not made a decision--

.
(2) Within 15 days after receipt by the agency head of a written request for such determination following referral through prescribed agency channels, or following direct submission if no agency channels are prescribed.

3/ In its appeal to the Council, the AFGE cited a slightly different proposal, one appearing in a letter to INS dated November 21, 1975. The proposal set forth here, however, appeared in a letter to management dated December 20, 1975 and was evidently intended to supersede the November submission. Although the record is not entirely clear on the subject, it appears that the later proposal was the one forwarded for an agency head determination and is the one principally addressed in the statement of position. Accordingly the later proposal is deemed the one in dispute, although the choice of proposal would not alter the conclusions reached herein.

The uniform worn by the Service's uniformed personnel is one of the tools, devices, or policies used by the Service for accomplishing or furthering safely and effectively the tasks assigned to its uniformed personnel -- i.e., the enforcement of those laws within the scope of the Service's responsibility. . . . It is well established that the safety of the public (and the safety of law enforcement personnel themselves) depends significantly on the ability of the public to recognize officers performing law enforcement functions immediately, and in such a fashion as to leave no question in their minds as to the officers' official status and authority. . . . Uniforms, in common with such devices as badges and appropriately marked vehicles, are designed to facilitate ease of recognition. It is axiomatic that a uniform which is nonunion [sic] or unofficial in appearance must fail to achieve this purpose. The wearing of uniforms bearing the AFGE patch could lead to a certain confusion in the minds of the public as to whether the personnel concerned were, in fact, officers of the United States Government or employees of some private organization. . . . [Citations omitted.]

The union denies the agency's contention that the wearing of the union emblem could lead to confusion in the mind of the public and contends, in pertinent part, that its proposal is negotiable because it concerns "personnel policies and practices and matters affecting working conditions" and, hence, is within the obligation to bargain under section 11(a) of the Order.

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

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

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

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

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization. [Additional emphasis supplied.]

The Council has frequently emphasized that section 12(b) expressly reserves to management certain rights under any negotiated agreement.^{4/} The mandatory nature of this reservation was underscored in the VA Research Hospital decision where, interpreting and applying section 12(b)(2), the Council said:^{5/}

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

The Council determined in its Tidewater decision that this reasoning is equally applicable to section 12(b)(5) of the Order.^{6/} Moreover, with particular regard to the meaning of the underscored portion of section 12(b)(5) as quoted above, the Council, in Tidewater, examined the "precise scope of the rights reserved to management" and determined that:

"Mean" is "something by the use or help of which a desired end is attained or made more likely: an agent, tool, device, measure, plan or policy for accomplishing or furthering a purpose." Synonyms for mean include instrument, agent, instrumentality, organ, medium, vehicle and channel. The term "means," as used in the Order, therefore includes the instruments (e.g., an in-house, Government facility or an outside, private facility; centralized or decentralized offices) or the resources (e.g., money, plant, supplies, equipment or materiel) to be utilized in conducting agency operations--in short, what will be used in conducting operations. [Additional emphasis supplied.]

Turning to the negotiability dispute in this case, it first should be plainly understood that no question has been raised as to whether or not a uniform, for the particular group of employees involved, is necessary. In fact, it is clear that, in the circumstances of this case,

4/ E.g., Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

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

6/ Tidewater, note 4; accord, Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York, FLRC No. 73A-42 (July 31, 1974), Report No. 55.

management's requirement that the law enforcement officers involved wear a uniform is an exercise of management's right under section 12(b)(5) of the Order to determine the "means" by which such law enforcement operations of the agency are to be conducted.

Therefore, with respect to the disputed proposal, the only question before us in the instant case is whether the union's proposal to bargain on the affixing of its patch to the uniform infringes on the section 12(b)(5) right reserved to management to determine the "means" by which these particular law enforcement operations of the agency are to be conducted; or, in the language of the Council's Tidewater decision, to establish what "tool, device, measure, plan or policy for accomplishing or furthering a purpose" will be used in conducting these operations. Clearly, not every proposal dealing with matters concerning which management has exercised its section 12(b)(5) rights would interfere with management's exercise of its rights under that provision.^{7/} Thus, where management has properly exercised its reserved right under section 12(b)(5) in determining that a uniform is a "means" by which particular agency operations must be conducted, a union proposal dealing with such uniforms (which proposal is otherwise consistent with applicable laws and regulations) is negotiable unless it negates the exercise of the management right.

In the instant case, the answer to the question of whether the union's proposal negates the section 12(b)(5) right which has been exercised by management, i.e., the agency's requirement that certain of its law enforcement employees wear a prescribed uniform, turns on whether the proposal will negate the purpose of that uniform. As indicated previously, the principal purpose of the INS law enforcement uniform, as indicated by the agency is the ready identification of the wearer as a representative of Governmental authority, because such identifiability is needed to accomplish or further the purpose of promoting safe, effective law enforcement operations. This purpose is in accord with

^{7/} See, e.g., National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98; VA Research Hospital, note 5; AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), 1 FLRC 71 [FLRC No. 70A-10 (Apr. 15, 1971), Report No. 6].

current, informed thought on the subject as typified by the views expressed in a recent decision of the U.S. Supreme Court^{8/} and in a text in the field of law enforcement.^{9/}

Having established the purpose of the INS law enforcement uniform, we can proceed to determine what is the impact of the proposal on the requirement that such uniform be worn. In this regard, the union's proposal would give each individual employee the option to replace the Bicentennial patch on the uniform with the union patch. As noted previously, the union patch is an approximately 3 by 4 inch shield upon which appear the letters "AFGE" and "AFL-CIO." Thus, to a member of the public viewing a uniformed officer who elected to wear the union patch, the officer would not be clearly and readily identifiable as an official of the Federal Government. To the contrary, the ambiguity which would arise from the display of a conspicuous union patch on the law enforcement uniform involved, could result in the officer being identified, mistakenly, as an employee of organizations not connected with the United States Government, i.e., the "AFGE" and the "AFL-CIO." Thus, the proposal would negate the agency's purpose for requiring the law enforcement uniform to be worn, as previously established herein.

Hence, in the Council's view, the proposal in this case to permit uniformed law enforcement personnel to affix a conspicuous union emblem to their official uniforms is proscribed by section 12(b)(5), inasmuch as that section reserves to management the right to determine the means by which its operations are to be conducted. The proposal here, which would give each uniformed employee affected the ability to create confusion as to his identity as a Government law enforcement agent, would negate the means, i.e., the law enforcement uniform, previously chosen by management to conduct its law enforcement functions.

While we conclude that the specific proposal involved herein violates section 12(b)(5) and is nonnegotiable, we must emphasize, as indicated above, that this decision does not foreclose all bargaining on matters relating to law enforcement uniforms. Proposals concerning, e.g.,

8/ Kelley v. Johnson, 425 U.S. 238 (1976). In its decision upholding a county police regulation governing the length of officers' hair, the Court, noting that most police are uniformed, stated:

This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable . . . to make police officers readily recognizable to members of the public. . . .

9/ O. WILSON & R. MCLAREN, POLICE ADMINISTRATION 565 (3d ed. 1972): "Police uniforms should be distinctive to avoid confusion with those of any other service and to ensure recognition by the stranger."

comfort and maintainability, or the wearing of inconspicuous union buttons or other indicia of union affiliation, which do not negate the purpose for which such uniforms are required, would not be violative of section 12(b)(5). Moreover, under the Order, proposals concerning the impact of agency-directed changes to the uniform are appropriate for collective bargaining to the extent that they do not conflict with applicable laws and regulations.

Conclusion

For the reasons stated above, and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposal here involved is nonnegotiable was proper and must be sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 18, 1977

U.S. Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 720. The Assistant Secretary dismissed the complaint filed by National Association of Government Employees, Local R14-32 (NAGE), which alleged, in essence, that the activity violated section 19(a)(1) and (2) of the Order by abolishing an employee's job and separating him from the service. NAGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (January 18, 1977). The Council held that NAGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of NAGE's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 18, 1977

Mr. Paul J. Hayes
National Vice President
National Association of
Government Employees
P.O. Box 515
Scott AFB, Illinois 62225

Re: U.S. Department of the Army, U.S. Army
Training Center Engineer and Fort Leonard
Wood, Fort Leonard Wood, Missouri, A/SLMR
No. 720, FLRC No. 76A-123

Dear Mr. Hayes:

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

In this case, the National Association of Government Employees, Local R14-32 (the union) filed an unfair labor practice complaint alleging that the U.S. Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri (the activity) violated section 19(a)(1) and (2) of the Order. The complaint alleged, in essence, that the activity eliminated a position held by a civilian employee at the Non-Commissioned Officers' (NCO) Club because the employee had been engaged in activities on behalf of the union. More particularly, the union contended that the employee's job was abolished and that he was separated from service because he had been involved in a survey of wage rates as a union designated data collector.

The Assistant Secretary, "noting particularly that no exceptions were filed,"^{*} adopted without modification the findings, conclusions

*/ In this regard, the Council, in Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108, stated, in pertinent part:

. . . While the Council's rules do not explicitly preclude the filing of an appeal . . . under [such] circumstances, in our view, such practice is not consistent with the orderly processing

(Continued)

and recommendations of the Administrative Law Judge (ALJ) that the union's complaint be dismissed, since the union "failed to establish by a preponderance of the evidence in the record considered as a whole that [the employee's] separation from employment was for reasons which violated the Executive Order." In so concluding, the Assistant Secretary adopted the ALJ's finding that the civilian position in question was eliminated for reasons of economy; and that, while a statement had been made to the employee (by a sergeant at the NCO Club) that his job would have to be abolished because he was too involved with the union, higher-level management disavowed such conduct and demonstrated a good faith effort to remedy it by issuing a letter of admonishment to the individual who made such statement--with notification to the union--when the matter was brought to its attention.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that he adopted the findings, conclusions and recommendations of the ALJ which were contrary to "the . . . preponderance of evidence." You also allege that the Assistant Secretary's decision presents the following major policy issue: "Can the Agency publicly state that an employee who participated as a Union nominated data collector in a wage survey, is too involved with the Union and, therefore, his job is going to be abolished and get away with carrying out such a threat?"

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12

(Continued)

of adjudicatory matters under the Order. That is, the needs of the Council in rendering an informed judgment in a contested matter would be best served by a party's filing exceptions with the Assistant Secretary, and by the Assistant Secretary's opportunity thereby to consider and pass upon such exceptions, before an appeal is submitted for consideration by the Council. . . .

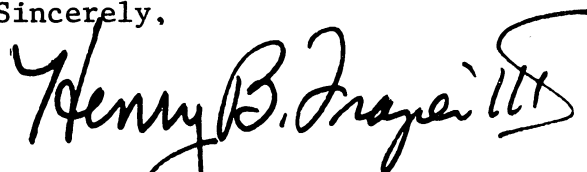
Of course we recognize that unforeseen events sometimes occur, such as the unfortunate heart attack suffered by the union's representative of record before the ALJ in the instant case shortly after the ALJ's recommended decision was issued, and that such events are to varying degrees mitigating or excusing factors. However, we reaffirm our previously expressed view, as set forth above, that exceptions should be filed with the Assistant Secretary under the foregoing circumstances so that he may consider them before an appeal is filed with the Council. In cases such as the one herein, for example, the union might file a motion for an extension of time or a waiver of time limits with the Assistant Secretary under his regulations, thus ensuring to the maximum extent possible that the issues presented will receive the most thorough consideration at each stage in the adjudicatory process.

of the Council's rules. That is, his decision does not appear arbitrary and capricious or present any major policy issues. As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in concluding that the union had "failed to establish by a preponderance of the evidence . . . that [the employee's] separation was for reasons which violated the Executive Order." Your assertion that such conclusion was contrary to the evidence thus constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual determinations and, therefore, presents no basis for Council review. Similarly, no major policy issue is presented warranting Council review in the circumstances of this case, noting particularly that the essence of your alleged major policy issue is merely a restatement of the union's disagreement with the Assistant Secretary's determination, based on the entire record herein, that the employee's position was not abolished for reasons which violated the Order.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

D. Dresser
Army

Defense Commercial Communications Office and 1400 Air Base Wing, Scott Air Force Base and National Association of Government Employees, Local Union No. R7-23 (Roberts, Arbitrator). The arbitrator sustained the grievance and directed the activity to promote the grievant to a particular position retroactively with appropriate backpay. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated the Federal Personnel Manual (FPM) and section 13 of the Order. The Council also granted the agency's request for a stay. (Report No. 89.)

Council action (January 19, 1977). Based on an interpretation rendered by the Civil Service Commission (CSC) in response to the Council's request, the Council concluded that the award, under the circumstances of this case, was not violative of CSC regulations or instructions. The Council further concluded that in the particular circumstances here involved, the award did not violate section 13 of the Order. Therefore, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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

Defense Commercial Communications Office
and 1400 Air Base Wing, Scott Air Force Base

and

FLRC No. 75A-87

National Association of Government Employees,
Local Union No. R7-23

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award which, in essence, directed that the grievant be promoted retroactively and receive backpay.

Based upon the findings of the arbitrator and the entire record, it appears that the grievant was employed by the activity as Assistant Accounts Manager on the Alaskan Account as a GS-5. That position was subsequently reclassified as a GS-7 position and was thereafter competitively filled by the activity with another employee while the grievant was reassigned elsewhere as a GS-5. The grievant filed a grievance under the negotiated grievance procedure of the parties' collective bargaining agreement^{1/} stating that applicable Civil Service rules providing for his upgrading were not followed, thereby constituting

1/ According to the award, Article XIX (NEGOTIATED GRIEVANCE PROCEDURE) of the collective bargaining agreement provides, in part, as follows:

Section 1: The purpose of this Article is to establish procedures for the consideration of grievances over the interpretation or application of the Agreement, and will be the exclusive procedure available to the Employer, the Union and the employees in the units for resolving such grievances. This procedure will not cover any other matters, including matters for which statutory appeals procedures exist -- such matters will be presented under an authorized procedure available for that purpose. This Article relates solely to the negotiated grievance procedure.

Section 2: Questions involving interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency will not be subject to the negotiated grievance procedure or to arbitration regardless of whether such policies, laws, or regulations are quoted, cited, or otherwise incorporated or referenced in the Agreement.

a violation of Article XV of the agreement.^{2/} The grievant protested the competitive filling of the GS-7 position by contending that as the incumbent he should have been noncompetitively promoted since he was not removed from the position by appropriate personnel action. The activity responded that it was required under appropriate regulations to competitively fill the position and therefore questioned whether the grievant was protesting competitive nonselection. In addition, the activity asserted that the grievance was excluded from the negotiated grievance procedure.

Following this refusal to proceed under the negotiated grievance procedure, the union applied to the Assistant Secretary of Labor for Labor-Management Relations for a decision on grievability and arbitrability. Subsequently, however, the activity agreed to process the grievance under the negotiated grievance procedure and the union withdrew its request from the Assistant Secretary. At the activity's request the grievant then clarified his grievance to allege that the activity had violated Article XV of the agreement by filling the GS-7 position by competitive procedures when, under Federal Personnel Manual (FPM) chapter 335, subchapter 4-3b,^{3/} he, as incumbent, should have been noncompetitively promoted to the position. The matter was ultimately submitted to arbitration and before the arbitrator the activity raised a question as to whether the grievance was arbitrable.

Arbitrator's Award

In his award the arbitrator stated the issues before him as follows:

2/ According to the award, Article XV of the collective bargaining agreement provides:

All promotions and/or hires to fill new or vacant positions will be made in accordance with applicable Civil Service Rules and regulations and other appropriate regulations. Selections will be free from favoritism, nepotism, patronage and discrimination.

3/ 4-3. Promotions as Exceptions to Competitive Procedures

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b. Promotion to positions upgraded without significant change in duties and responsibilities. An agency must provide for an exception to competitive promotion procedures to allow for the promotion of an incumbent of a position which has been upgraded without significant change in duties and responsibilities on the basis of either the issuance of a new classification standard or the correction of a classification error. If the incumbent meets the legal and qualification requirements for the higher grade, he must be promoted noncompetitively unless removed from the position by appropriate personnel action. (See FPM SUPPLEMENT 752-1.)

1. Whether or not the Arbitrator has authority under the terms of the Contract to rule upon the Grievance.
2. Whether or not the Employer violated Article XV of the Contract by failing to promote the Grievant noncompetitively to the position of Assistant Alaskan Accounts Manager, GS-7.

After determining the matter to be arbitrable, the arbitrator stated the dispositive question with respect to the merits of the grievance to be whether the position had been upgraded without significant change in duties and responsibilities on the basis of the correction of a classification error or, conversely, whether the grievant as Assistant Accounts Manager on the Alaskan Account, GS-5, performed substantially the duties and responsibilities of the new position description. Based upon evidence presented, the arbitrator concluded that the grievant had performed substantially the duties and responsibilities of the new position. He further concluded that FPM chapter 335, subchapter 4-3b required an appraisal of the duties and responsibilities that were in fact being performed by the incumbent of a reclassified position, rather than an appraisal of the duties and responsibilities formally prescribed by the position description of the position being reclassified. As a consequence, the arbitrator found that the new position was an upgrade of the grievant's position without significant change in duties to correct a classification error, and that the grievant, as incumbent, should therefore have been noncompetitively promoted. He accordingly sustained the grievance and directed the activity to assign the grievant to the position of Assistant Alaskan Accounts Manager, GS-7, with backpay in the amount of the difference in earnings between GS-5 and GS-7.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates the Federal Personnel Manual and section 13 of the Order.^{4/} The agency filed a brief.

Opinion

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

- (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award

^{4/} The agency requested and the Council granted a stay of the award pending determination of the appeal pursuant to section 2411.47(f) of the Council's rules of procedure.

violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review in part with respect to its exception which alleged that the arbitrator's award violates the Federal Personnel Manual. In its brief the agency contended that the arbitrator erred in his interpretation of FPM chapter 335, subchapter 4, and in his conclusion that subchapter 4-3b of FPM chapter 335 was the "controlling provision" in the disposition of the matter before him. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

The basic facts in the case are as follows: the grievant had been assigned to a GS-5 position that was subsequently upgraded to GS-7. The GS-7 position was filled competitively with someone other than the grievant, and the grievant was reassigned to another GS-5 position in the agency. The grievant alleged that the agency should have promoted him to the GS-7 job non-competitively because, in essence, the job was upgraded without significant change in duties or responsibilities on the basis of correction of a classification error. The grievant further claimed that the agency action in filling the position competitively was in violation of the contract and the requirements set forth in Subchapter 4-3b of Chapter 335 of the Federal Personnel Manual. The arbitrator found in favor of the grievant and ordered his promotion to the subject position retro-active to the date he was reassigned from the GS-5 Assistant Alaskan Accounts Manager position with appropriate backpay.

From the point of view of Commission requirements the critical question in this case is whether the grievant was, in fact, entitled to a non-competitive promotion in accordance with Section 4-3b of Chapter 335 of the Federal Personnel Manual. That section states:

"An agency must provide for an exception to competitive promotion procedures to allow for the promotion of an incumbent of a position which has been upgraded without significant change in duties and responsibilities on the basis of either the issuance of a new classification standard or the correction of a classification error. If the incumbent meets the legal and qualification requirements for the higher grade, he must be promoted noncompetitively unless removed from the position by appropriate personnel action. (See FPM Supplement 752-1)"

If, as the grievant claims, he was entitled to non-competitive promotion under the circumstances described above, then his reassignment,

other than for reasons unrelated to the upgrading of the position, would constitute a reduction-in-rank.

A reduction-in-rank is an adverse action within the meaning of Subpart B of Part 752 of the Commission's regulations (5 Code of Federal Regulations) and as such, carries an appeal right to the Commission. Specifically, FPM Supplement 752-1, Sl-4b(2), provides that a reduction-in-rank includes --

"Reassignment from a position which has been determined to be worth a higher grade, either on the basis of a new classification standard or as the result of correction of an original error, when the incumbent meets the legal requirements and qualification standards for promotion to a higher grade. The incumbent of a position is entitled to promotion to the grade determined appropriate for the work he has been performing, if he is eligible for promotion in two specific circumstances . . . (ii) when error in classification has deprived him of the proper grade . . . His assignment to a position in a grade below the proper grade of his position is a reduction-in-rank whether or not the upgrading decision has been put into effect by official classification action at the time of the assignment. The employee may be reduced in rank in this situation only for reasons unrelated to the upgrading decision--for reasons, that is, which would support a reduction-in-rank in any event, whether or not his position was being upgraded."

In summary, the substance of the grievant's complaint in the instant case amounts to an allegation that an adverse action has been taken against him. Adverse actions are subject to a statutory appeal procedure, which is grounded in § 7701 of title 5 U.S. Code, and described in Subpart B of Part 752 of the Commission's regulations.

With regard to your question as to whether the arbitrator's award in the instant case conflicts with Commission instructions we can only say that the award represents a possible remedy in a case of this kind. Its consistency with Commission requirements in this particular instance depends upon a determination by appropriate authority as to whether or not a wrongful reduction-in-rank occurred.

Based upon the foregoing interpretation by the Civil Service Commission, it would appear that there is no conflict between the arbitrator's award and the provisions of chapter 335 of the Federal Personnel Manual. Further, as noted in the Commission's response, the award represents a possible remedy in a case of this kind. Since, as the Commission notes, there has not been a determination in this case that the award is inconsistent with Commission requirements, we must conclude that the arbitrator's award of retroactive promotion to the grievant, with backpay, under the circumstances of this case, is not violative of Commission regulations or instructions.

As to the other part of the agency's exception upon which the Council granted the petition for review, i.e., that the award in this case violates section 13 of the Order, the agency did not specifically address this alleged violation in its merits brief filed in this matter. In its petition for review the agency asserted that under section 5112 of title 5, United States Code, disputes concerning job classifications are to be adjudicated by the Civil Service Commission and are thus not appropriate for a negotiated grievance procedure under section 13 of the Order.^{5/} However, the Commission's response indicates that the

5/ Section 13 of the Order provides in pertinent part as follows:

(a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. However, any employee or group of employees in the unit may present such grievances to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment.

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(d) Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision.

With regard to section 13(d) of the Order, the Council stated in the January 1975 report and recommendations on the amendment to the Order, as follows:

[S]ince some questions will arise because it is asserted that a grievance is over a matter subject to statutory appeal procedures, we foresee a continuing need for a single uniform body of case precedent in the decisions relating to the coverage of statutory appeal procedures. This need can be met best by continuing to refer such questions to the Assistant Secretary. We therefore recommend that section 13(d) be revised to provide for the resolution of those questions by referral to the Assistant Secretary for decision. Labor-Management Relations in the Federal Service (1975), at 44.

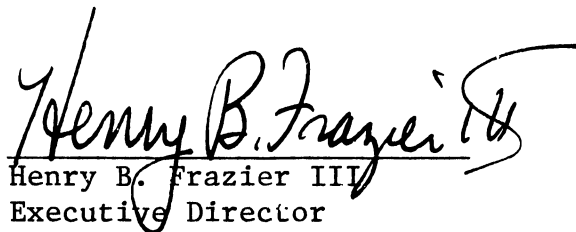
(Continued)

"critical question" in this case involves section 4-3b of chapter 335 of the Federal Personnel Manual and since there is no indication in that response that the grievance did, in fact, involve a classification appeal, we must conclude that, in the particular circumstances herein, the arbitrator's award does not violate section 13 of the Order by involving a matter for which a classification appeal exists.

Conclusion

For the foregoing reasons, we find that the arbitrator's award does not violate Civil Service Commission regulations or instructions, or the Order. Therefore, pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Frazier III
Executive Director

Issued: January 19, 1977

(Continued)

Thus, if a question arises between the time a grievance is filed and the time it goes to arbitration as to whether or not the grievance is on a matter for which a statutory appeal procedure exists, such question must be referred to the Assistant Secretary for determination. However, in the present case the record does not indicate that either party believed, prior to arbitration, that the grievance was on a matter for which a statutory appeal procedure exists. The basis upon which the activity initially asserted that this matter was nonarbitrable is not reflected in the record. And while the facts in the case evince the parties' confusion as to the grievability and arbitrability of the matter--the agency first asserted that the matter was nongrievable; the union applied to the Assistant Secretary for decision on grievability or arbitrability; the activity then agreed to process the grievance through the negotiated grievance procedure resulting in the union's withdrawal of its request from the Assistant Secretary; at the activity's request the grievant clarified his grievance; and then after the grievance went to arbitration the activity asserted before the arbitrator that the matter was nonarbitrable--there is no indication in the record that either party was aware that the matter was, or might be, subject to a statutory appeal procedure until after the award was issued when, on the basis of that award, the agency asserted in its petition for review to the Council that the dispute involved a classification appeal.

FLRC No. 76A-16; FLRC No. 76A-17; FLRC No. 76A-40; FLRC No. 76A-43; and
FLRC No. 76A-54

National Association of Government Employees, Local No. R14-87 and Kansas National Guard; National Army-Air Technicians Association, Local 371 and Department of Defense of the State of New Jersey; American Federation of Government Employees, Local 2999 and Minnesota Air National Guard; American Federation of Government Employees, Local 3061 and Kansas Air National Guard; and Association of Civilian Technicians and National Guard Bureau; respectively. The disputes in the above-named cases involved union proposals concerning the clothing and, in one case (FLRC No. 76A-16), the hair styles, which National Guard technicians wear while performing their duties as technicians. In each case, the agency head determined that negotiation of the proposal was barred by National Guard Bureau (NGB) regulations and, furthermore, denied the request of the respective union for an exception to the NGB regulation involved. Thereafter, the union in each case filed a petition for review of negotiability issues with the Council. The cases, consolidated for purposes of decision, presented the following common issues: (1) whether the NGB is a "primary national subdivision" of the agency within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules; and, if so, (2) whether a "compelling need" exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules for the NGB regulation which requires National Guard technicians to wear military uniforms while performing technician duties.

Council action (January 19, 1977). As to (1), the Council found that the NGB was a "primary national subdivision" of the Department of Defense within the meaning of the "level of issuance" provisions of the Order and the Council's rules. As to (2), the Council found that the agency had not supported its determination that a compelling need existed for the NGB regulation asserted as a bar to negotiations, under Part 2413 of the Council's rules. Accordingly, pursuant to sections 2411.22 and 2411.28 of its rules, the Council set aside the agency head's determinations in the five cases that the union's proposals were nonnegotiable.

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

National Association of Government
Employees, Local No. R14-87

and

FLRC No. 76A-16

Kansas National Guard

National Army-Air Technicians
Association, Local 371

and

FLRC No. 76A-17

Department of Defense of the
State of New Jersey

American Federation of Government
Employees, Local 2999

and

FLRC No. 76A-40

Minnesota Air National Guard

American Federation of Government
Employees, Local 3061

and

FLRC No. 76A-43

Kansas Air National Guard

Association of Civilian Technicians

and

FLRC No. 76A-54

National Guard Bureau

CONSOLIDATED DECISION ON NEGOTIABILITY ISSUES

Background

Each of the named unions in the above-entitled cases represents a bargaining unit of employees who are National Guard technicians.

National Guard technicians are employed pursuant to the National Guard Technician Act of 1968 in full-time, civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces.^{1/} Such technicians must, as a condition of their civilian employment under the Act, become and remain members of the National Guard (i.e., in a military capacity) pursuant to 32 U.S.C. § 709(b) and (e).^{2/} As a result, these technician positions are excepted from the competitive service under 32 U.S.C. § 709(d).^{3/} As members of the National Guard, technicians are required to perform military duties to the same extent as other civilians who are members of the Guard, i.e., they are required to attend four unit training assemblies per month, each four hours duration, and to attend a National Guard encampment during a period of fifteen days each year.^{4/}

1/ National Guard Technician Act of 1968, 32 U.S.C. § 709 (1970) provides in section 709(a) in relevant part as follows:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, . . . persons may be employed as technicians in—

- (1) the administration and training of the National Guard; and
- (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

2/ 32 U.S.C. § 709(b) provides in relevant part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e) provides in relevant part as follows:

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned [.]

3/ 32 U.S.C. § 709(d) provides in relevant part as follows:

[A] position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

4/ 32 U.S.C. § 502.

Additionally, all members of the National Guard, whether or not they happen to be also employed as technicians under the Act, are subject to be called into active service.^{5/}

Each of the above-named cases arose during negotiations between the respective parties when each union presented a proposal^{6/} dealing with the clothing which these employees would wear while performing their duties as technicians. In effect, each proposal would render inapplicable to the respective bargaining unit involved, for the term of the unit's collective bargaining agreement, the requirement established in National Guard Bureau (NGB) regulations,^{7/} as interpreted by the agency head, that National Guard technicians must wear military uniforms while performing technician duties. In one case [National Association of Government Employees Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16] the proposal also would render inapplicable to the particular unit concerned for the term of its agreement restrictions on technician hair styles.

The issue as to the negotiability of the respective union proposal which arose in each case was referred to the agency head for a negotiability determination. Upon such referral, the agency head determined in each case that negotiation of the union's proposal was barred by NGB regulations.^{8/} Furthermore, in each case, pursuant to section 2411.22(b) of the Council's rules,^{9/} the union requested an exception to the NGB

^{5/} See, e.g., 10 U.S.C. §§ 331, 332, 333, 3500, 8500; 32 U.S.C. § 102.

^{6/} The text of each proposal is set forth in an appendix to this decision.

^{7/} Technician Personnel Manual 200 (213.2) Subchapter 2-4 which provides in pertinent part:

Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties. . . .

^{8/} With regard to that portion of the proposal in National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16, already adverted to, which concerns the negotiability of technician hair styles, the agency takes the position that the observance of military grooming standards is inseparably related to the wearing of the military uniform and, therefore, negotiation on that portion of the proposal is barred by the same regulations. [Technician Personnel Manual 200 (213.2) Subchapter 2-4, note 7 supra.]

^{9/} 5 CFR § 2411.22(b) provides as follows:

(b) The Council will review a labor organization's appeal challenging an agency head's determination that an internal

regulation asserted as a bar to negotiation of the union's proposal. Each requested exception to the regulation was denied by the agency. Thereafter, in accordance with section 11(c)(4) of the Order, the respective union in each case petitioned the Council for review stating its belief in effect that the NGB regulation is not applicable to bar negotiation of the proposal involved because (1) the regulation was not issued at or above the level of a primary national subdivision of the agency;^{10/} and, moreover, (2) no compelling need for the regulation exists under the criteria established by the Federal Labor Relations Council.^{11/} The agency submitted a statement of its position in each appeal. The Association of Civilian Technicians, in addition to its individual appeal [Association of Civilian Technicians and National Guard Bureau, FLRC No. 76A-54], and the National Federation of Federal Employees filed respective briefs on the issues involved in these appeals, as amicus curiae.

Inasmuch as the resolution of each of the five appeals depends upon our decisions with respect to the two issues which they all share, the Council's action with respect to each such appeal is expressed in the instant consolidated decision which applies individually to each of the above-captioned cases. As indicated, these cases involve the applicability of the NGB regulation involved to bar negotiations on the union's proposals. The issues presented are: (1) whether the NGB is a "primary national subdivision" of the agency within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules so that its regulations serve to bar negotiations at the local level; and, if so, (2) whether a "compelling need" exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules for the NGB regulation which requires National Guard technicians to wear military uniforms while performing technician duties.

(Continued)

agency regulation bars negotiation only if the labor organization has first requested an exception to the regulation from the agency head and that request has been denied or has not been acted upon within the time limits prescribed by § 2411.24.

^{10/} Section 2411.3(e) of the Council's rules [5 CFR § 2411.3(e)] defines "primary national subdivision" as follows:

(e) "Primary national subdivision" of an agency means a first-level organizational segment which has functions national in scope that are implemented in field activities.

^{11/} Note 21 infra.

Opinion

The issues presented will be discussed separately below.

1. Is the NGB a primary national subdivision of the Department of Defense within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules?

Under section 11(a) of E.O. 11491 as amended by E.O. 11838^{12/} and applicable herein, only regulations which are issued at the agency headquarters level or at the level of a primary national subdivision will bar negotiations on otherwise negotiable personnel policies and practices and matters affecting working conditions at the local level.

In its 1975 Report and Recommendations to the President which led to adoption of this "level of issuance" provision, the Council explained the rationale for such a policy as follows:^{13/}

Under the present Order, negotiation at the local level is limited by any internal agency regulations issued above the local level. In some instances, this results in local negotiations being limited by a superstructure of regulations issued by agency headquarters and by each subdivision of the agency to which authority has been delegated, above the local level. These multiple levels of regulations have unduly constricted negotiations by reason of the complexity of issuances as well as by the diverse exercise of authority and discretion with regard to the issuance and implementation of regulations dealing with otherwise negotiable matters within subordinate levels of the same agency.

We do not question the statutory authority of agency heads to delegate regulation-issuing authority within their agencies. Moreover, . . . we believe that agency regulatory authority must be retained. However, we recommend that only those regulations issued at the agency headquarters level or at the level of a primary national subdivision serve to bar negotiations at the

^{12/} Section 11(a) of the Order as amended provides in relevant part, as follows:

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

^{13/} Labor-Management Relations in the Federal Service (1975), at 39.

local level. By thus delineating the levels of internal agency regulations which may bar negotiation, the confusion and anomalies previously encountered can be effectively eliminated without unreasonably circumscribing the respective agencies.

Disputes as to the level of issuance of an internal agency regulation asserted as a bar to negotiation should be resolved by the Council in negotiability appeals filed under section 11(c) of the Order.

Finally, in determining whether regulations are issued at the level of a "primary national subdivision," the meaning of that phrase should be consistent with that provided in Part 2412 of the Council's Rules and Regulations pertaining to National Consultation Rights and Termination of Formal Recognition: "Primary national subdivision of an agency means a first-level organizational segment which has functions national in scope that are implemented in field activities."

Following the adoption of the "level of issuance" provision in the Order, the Council promulgated section 2411.3(e) of its rules^{14/} defining "primary national subdivision" to mean "a first-level organizational segment" having "functions national in scope that are implemented in field activities." Turning now to the record before us, it is not disputed that the NGB "has functions national in scope that are implemented in field activities." Hence, the principal contentions of the parties address the question of whether or not the NGB falls within the ambit of the intended meaning of the phrase "first-level organizational segment" of an agency.

In this regard, the agency in essence contends that the NGB is a unique organization within the agency which "[i]n terms of actual functioning and operations regarding technician personnel matters . . . equates more directly with a 'primary national subdivision' than it does with any other organizational level within the Department of Defense." The unions contend principally, however, that based on various published organizational charts and functional statements which are contained in the U.S. Government Manual,^{15/} the NGB is not a first-level organizational segment of the agency but rather, like "major commands" of the Army and Air Force, the NGB is subordinate to the Departments of the Army and Air Force, which military departments, themselves, are the first-level organizational segments and thereby primary national subdivisions of the Department of Defense.

14/ Note 10 supra.

15/ Office of Federal Register, General Services Administration, U.S. Government Manual 1975/1976 (1975).

We find the agency's position to be persuasive in the circumstances presented in these cases. The NGB is a "joint bureau" of the Departments of the Army and Air Force; it is the designated channel of communication between the two military departments and the several states, territories, Puerto Rico, the Canal Zone and the District of Columbia; and the Chief of the NGB is advisor to both the Army and Air Force on National Guard matters.^{16/} Further, it appears uncontroverted from the record that regulations concerning personnel policies and practices and matters affecting working conditions applicable to National Guard technicians are developed by the NGB and promulgated in the Technician Personnel Manual (TPM). The TPM comprises an entirely separate body of personnel regulations from the regulatory scheme applicable to other Army and Air Force civilian employees and the personnel regulations applicable to other Army and Air Force civilians are not generally applicable to National Guard technicians. With particular regard to the unions' efforts to equate the NGB with the "major commands" within each military department, we find that the TPM personnel regulations are distinguished in several significant respects from the personnel directives issued by such "major commands." That is, the NGB regulations are issued on behalf of the Secretaries of the Army and Air Force; they are subject to the approval of the Secretary of Defense; and they apply across departmental lines uniformly to both Army and Air Force National Guard technicians.^{17/} In contrast, regulations issued by "major commands" of the Army and Air Force, the agency states without contradiction, ". . . do not carry with them the authority of the Service Secretary. Instead they are subordinate to regulations issued at the level of the Department of Army or the Department of Air Force and are applicable only to employees within that Command and not throughout a military department or across departmental lines."

Hence, it is evident that a finding that the NGB is a primary national subdivision, for purposes of issuing regulations concerning personnel policies and practices and matters affecting working conditions which

^{16/} 10 U.S.C. § 3015 which provides in relevant part:

(a) There is a National Guard Bureau, which is a Joint Bureau of the Department of the Army and the Department of the Air Force, headed by a chief who is the advisor to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communication between the departments concerned and the several States

^{17/} Section 10 of the National Guard Technician Act of 1968 provides:

Regulations prescribed by the Secretary of the Army and Secretary of the Air Force under this Act shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

might bar otherwise obligatory negotiations, would not in effect condone an exemplar of "multiple levels of regulations" which the Council in the 1975 Report characterized as having unduly constricted negotiations. To the contrary, in this specific regard, the agency expressly asserts without contradiction that, other than Department of Defense regulations, the only agency regulations which act as a bar to local National Guard negotiations are NGB regulations. In this regard the agency states:

Bargaining for units of National Guard technicians is conducted at the State level or below. The only agency personnel regulations which presently act as a bar to negotiations are those published by the National Guard Bureau and those of the Department of Defense. There are no intervening levels of personnel regulations, applicable to Title 32 technicians, between the Department of Defense level and the locus of bargaining authority for units of technicians except those of the National Guard Bureau. This is clearly distinguishable from a situation wherein Army or Air Force promulgate substantive civilian personnel policies and regulations within the framework of Department of Defense policies and these regulations are, in turn, supplemented by the major commands. It was the ensuing multiplicity of layers of regulations with which the "level of issuance" provisions of the amended Order were designed to deal rather than the situation which exists within the National Guard.

Thus, it is clear in our opinion that, contrary to the unions' contentions, the NGB is not equivalent to a "major command" of the Army or Air Force but, rather, is a first-level organizational segment of the agency in regard to the issuance of regulations concerning personnel policies and practices and matters affecting working conditions of National Guard technicians.

Therefore, based on all the foregoing considerations, we find that the NGB is a "primary national subdivision" of the Department of Defense within the meaning of the "level of issuance" provisions of the Order and the Council's rules.^{18/}

2. Does a "compelling need" exist, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules, for NGB regulations requiring the wearing of military uniforms by National Guard technicians while performing technician duties?

^{18/} Similarly, we note that the agency designated the NGB a "primary national subdivision" within the agency for the purpose of granting "national consultation rights." Consistent with this designation, the American Federation of Government Employees, the Association of Civilian Technicians, and the National Federation of Federal Employees sought and, in 1973, were granted national consultation rights by the NGB. Subsequently, for the past 3 years, these unions have consulted with the NGB regarding substantive changes to the NGB's personnel policies. See, Office of Labor-Management Relations, U.S. Civil Service Commission, Union Recognition in the Federal Government, 31 (1974).

As already indicated, section 11(a) of E.O. 11491 was amended by E.O. 11838 to provide that only agency regulations which are issued at the agency headquarters level or at the level of a primary national subdivision and for which a compelling need exists under criteria established by the Council will bar negotiations on otherwise negotiable personnel policies and practices and matters affecting working conditions at the local level.^{19/} Since we have already found that the NGB is a primary national subdivision within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules, we turn now to the question of whether a compelling need exists for the NGB regulation asserted as a bar to negotiation of conflicting union proposals.

In its Report and Recommendations which led to adoption by the President of the "compelling need" provisions of the Order, the Council explained the concept as follows:^{20/}

Experience under the Order, as well as testimony during the current review, establishes that, while considerable progress toward a wider scope of negotiation at the local level has been effected, . . . meaningful negotiations at the local level on personnel policies and practices and matters affecting working conditions have been unnecessarily constricted in a significant number of instances by higher level agency regulations not critical to effective agency management or the public interest. . . .

.

Under section 11(a) of the present Order, a higher level agency regulation bars negotiation on any conflicting bargaining proposal regardless of the degree of necessity for the regulation. To the extent that such regulations are asserted as a bar to negotiations, the goal of providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment is not fully achieved.

Some labor organizations and agencies suggested the concept of permitting internal agency regulations at a higher level, covering personnel policies and practices and matters affecting working conditions, to bar negotiations at the local level only if a "compelling need" for such regulations exists. Regulations, the need for which is not compelling, would not be available as a bar to negotiations although they would retain their full force and effect in all other respects. The Council finds merit in this suggestion and recommends that it be adopted.

^{19/} Note 12 supra.

^{20/} Labor-Management Relations in the Federal Service (1975), at 38.

Illustrative criteria for determining "compelling need" would be established in rules to be published by the Council after the views of interested persons have been fully considered in the rule-issuing process. . . .

Further, disputes as to whether an agency regulation, as interpreted by the agency head, meets the standard of "compelling need" should be resolved by the Council on a case-by-case basis in negotiability appeals filed under section 11(c) of the Order. . . .

It must be emphasized in connection with the foregoing recommendations, that we are here concerned only with the question of whether a higher level internal agency regulation covering personnel policies and practices or matters affecting working conditions should serve as a bar to negotiations on a conflicting proposal submitted at the local level.

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

As already mentioned, the Order was amended to provide that criteria for determining whether a compelling need exists for an agency regulation would be established by the Federal Labor Relations Council. Pursuant to this authority under the Order and after consideration of the views and suggestions of interested groups, the Council published part 2413 of its rules and regulations setting forth five "illustrative criteria," for determining whether a compelling need exists for particular agency policies or regulations concerning personnel policies and practices and matters affecting working conditions.^{21/}

21/ 5 CFR Part 2413.

§ 2413.2 Illustrative criteria.

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

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

(Continued)

In the present case, the agency claims that a compelling need exists with regard to the NGB regulation challenged herein, on two grounds, namely: a) the requirement to wear the military uniform is integrally related to the basic function of the National Guard; and b) the regulation establishes uniformity of dress for a substantial segment of the employees of the National Guard and this uniformity is essential to the effectuation of the public interest. In the opinion which follows, these two specific grounds upon which the agency rests its determination are discussed separately.

a. The agency claims it is necessary, in the circumstances of this case, to "supplement" the illustrative criteria contained in part 2413 of the rules. More particularly, the agency takes the position that a compelling need exists for the NGB regulation at issue because "the requirement to wear the military uniform is integrally related to the basic function of the National Guard." [Emphasis in original.]

As already indicated,^{22/} the compelling need provisions of the Order were designed and adopted to the end that internal "agency regulations not critical to effective agency management or the public interest" would be prevented from resulting in negotiations at the local level being "unnecessarily constricted." [Emphasis supplied.]

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

(Continued)

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

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

(d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

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

22/ Note 20 supra.

intent is clearly evidenced in the language of the criteria, several of which expressly establish that essentiality, as distinguished from merely helpfulness or desirability, is the touchstone. It follows, of course, that while it may be useful in some cases to apply criteria for determining compelling need which differ in substance from those set out in part 2413 of the rules, such criteria, as interpreted and applied, must set standards the stringency of which corresponds to the criticality implicit in a matter being "essential, as distinguished from helpful or desirable," as illustrated in part 2413.

Turning in this regard to the criterion which the agency proposes to be applied in this case (that the uniform wear regulation is ". . . integrally related to the basic function of the National Guard"), we are of the opinion that it is subject to two interpretations. On the one hand, this supplemental criterion may be interpreted as setting a standard for determining the necessity for the challenged NGB regulation which is less stringent than that discussed above. That is, e.g., it might be read to mean that the regulation is helpful or desirable to the accomplishment of the mission of the National Guard. As already indicated, it would be inconsistent with the intended meaning of part 2413 to apply the criterion if it were interpreted in this manner. On the other hand, this supplemental criterion may be interpreted to set a standard which does correspond to the collectively stringent standard contained in part 2413. However, in our view, the supplemental criterion, so construed, merely restates in essence all material elements of the Council's illustrative criterion contained in section 2413.2(a) of the rules. That is, no material difference can flow from substituting the concept suggested by the agency of being "integral to (and consequently determinative of) basic function" for the one expressed in section 2413.2(a) of the rules of being "essential (as distinguished from helpful or desirable) to accomplishment of mission." As previously specified, section 2413.2(a) provides as follows:

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

Moreover, the agency does not support the substitution of its proposed criterion for any of those contained in part 2413 by providing a basis for distinguishing it, in substance or in any other manner. Hence, we do not think it is useful in this instance to apply the criterion proposed by the agency. Consequently, we will treat the agency's arguments in support of its proposed criterion in terms of section 2413.2(a) of the rules, that is, whether the requirement that technicians wear military uniforms while performing technician duties is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the National Guard.

In this regard, the agency argues that the organizational structure of the National Guard is basically military and the daily work of the National Guard technician is totally involved with the military purpose of the

National Guard's preparedness for the contingency of a callup or mobilization. The agency further argues that an organization which is military in nature must manifest a military presence and, the requirement to wear the uniform, viewed in "the context of the chosen mode of organization for the National Guard," is the outward reflection of the military nature of the National Guard. Based on this contextual relationship, the agency concludes that a "rational connection" exists between the regulation and the military purpose of the National Guard. Finally, the agency argues that the requirement to wear the uniform prevents the National Guard from being "impeded in carrying out its basic military function" by reason of being "indistinguishable from many other organizations within the Federal Government."

The unions contend basically that, although employed in a military organization, National Guard technicians, qua technicians, are civilian employees in civilian positions and not military personnel.

For the reasons which follow, in our opinion the agency has not established that a compelling need exists for the challenged NGB regulations to bar negotiations on the disputed proposals under section 2413.2(a) of the Council's rules: The agency has not shown it is "essential, as distinguished from helpful or desirable, to the accomplishment of the mission" of the National Guard for technicians to wear military uniforms when performing technician duties, on a normal day-to-day basis. Thus, the National Guard Technician Act of 1968 does not establish such a dress requirement. Moreover, the legislative history of the Act indicates that it was the intent of Congress for technicians to serve the National Guard in three different ways, the first unique to the technicians and the other two in common with the nontechnician members of the National Guard.^{23/} That is, the technicians, as distinct from other National Guard members, would perform full-time civilian jobs in their units (e.g., administration, maintenance and repair). Second, the technicians, along with the nontechnician members, would perform the periodic, part-time military training duties with their units. And, third, the technicians, along with nontechnician members, would enter full-time Federal military service if their units should be "activated." In this regard, the union proposals herein disputed are expressly limited in their concern and application to only the first situation described above, i.e., when technicians are performing their normal, day-to-day tasks in a civilian status.

With respect to this day-to-day work performed by technicians, the agency specifically concedes the absence of any functional relationship between such work and the requirement to wear military dress: "[I]t is not the tasks themselves which mandate the wearing of the military uniform." Nor in our view, could a convincing argument to the contrary be made on the record before us. That is, even giving great weight to the fact, as stated by the agency, that the employment of technicians has a "purely military purpose" of mobilization readiness, the record does not show

^{23/} S. Comm. on Armed Services, National Guard Technician Act of 1968, S. Rep. No. 1446, 90th Cong. 2d Sess. 2 (1968).

technicians working in their full-time, civilian status are performing tasks which, individually or collectively, require peculiarly military attire in order to effectively be accomplished.

Turning now to the agency's specific arguments, previously set forth in greater detail, in support of its determination that a compelling need exists for the NGB regulation under this criterion, they may be summarized as follows: (1) There is a "rational connection" between the regulation and the military purpose or mission of the National Guard; (2) an organization which is military in nature must manifest a military presence; and (3) the requirement to wear the uniform prevents the National Guard from being "indistinguishable" from other Federal organizations. As to (1), (2), and (3), assuming arguendo these arguments, in our opinion, they do not themselves lend support to a finding that a compelling need exists. More particularly, as to (1), quite clearly, merely a "rational connection" between the regulation and the National Guard's mission could in the language of the applicable illustrative criterion (section 2413.2(a)) encompass matters only "helpful or desirable" but which would not be "essential" to the accomplishment of the National Guard's mission. As to (2) and (3), which are to some extent overlapping, in our opinion, these claims do not demonstrate in any manner the essentiality of the particular regulatory requirement here in issue to the accomplishment of the mission of the National Guard. In this regard, even though, as the agency indicates, "it was always the intention of the National Guard Bureau that the military uniform be worn by technicians it was not feasible to regulate on this matter" prior to conversion of technicians from state to Federal employment by the National Guard Technicians Act of 1968, the record before us shows that for many years preceding the 1968 Act and, to a lesser extent, following it, in some states technicians have been required to wear military uniforms while performing as technicians and in some they have not. However, there is no indication in the record that the nature of the National Guard, as well as its purpose, has not always been, as the agency presently characterizes it, essentially military. Moreover, in this regard, the record contains only an unsupported reference by the agency to an "adverse impact" resulting from technicians wearing attire other than the military uniform when performing technician duties as many apparently have done, prior to the promulgation of the NGB regulation in 1969. However, the agency does not contend and the record does not support a finding that any "critical" impact resulted from this fact. Thus, even assuming the "adverse impact" adverted to by the agency, such a general contention does not address and demonstrate the criticality implicit in a matter being "essential, as distinguished from helpful or desirable," to the accomplishment of the mission of the National Guard. Furthermore, as to (3), the unions' uncontroverted assertions in the record indicate that for the most part National Guard technicians are employed on military installations out of view of the general public or most other Federal Government organizations. Thus, it appears unlikely that members of the general public or even other Federal Government organizations normally have the opportunity to observe National Guard technicians performing technician duties. Moreover, apart from this consideration, the agency

does not establish why it is essential to the accomplishment of the National Guard's mission to distinguish National Guard technicians from other Federal civilian employees. Hence, the agency has failed to come forward with any showing of a critical linkage between the requirement that technicians wear the uniform on the one hand, and the accomplishment of the National Guard's mission on the other. In our view, such a causal relationship must be demonstrated to support a finding that the regulation in question is "essential, as distinguished from helpful or desirable, to the accomplishment of the mission" of the National Guard, so that a compelling need exists for such regulation to bar negotiations.

Accordingly, we must find that the agency has not supported its determination that a compelling need exists for the NGB regulation in question under section 2413.2(a) of the rules.

b. The second ground upon which the agency rests its determination that a "compelling need" exists for the NGB regulation in question is the illustrative criterion set out in section 2413.2(e) of the Council's rules.^{24/} That is, the agency claims that the regulation establishes uniformity of dress for a substantial segment of the employees of the National Guard and this uniformity of dress is essential to the effectuation of the public interest. In essence, the agency contends that the public interest, to which the requirement for technicians to wear military uniforms is essential, is the maintenance of the military preparedness of the National Guard for the contingency of a callup or mobilization.

To lend weight to the contention that its regulatory requirement is essential to the public interest, the agency cites what it considers to be evidence of a "substantial public interest concern in this matter," namely, a Federal District Court decision^{25/} which found a "rational basis" for the adoption of the NGB regulation in question and a statement, in support of the agency policy, contained in a United States House of Representatives committee report.^{26/}

Finally, the agency claims in effect that it is not valid or relevant to compare the NGB policy to the policy applicable to the Army and Air Force

^{24/} Note 21 supra.

^{25/} Bruton v. Schnipke, 404 F. Supp. 1032 (E.D. Mich. 1975).

^{26/} House Comm. on Armed Services, Authorizing Appropriations, Fiscal Year 1974, For Military Procurement, Research and Development, Active-Duty and Reserve Strength, Military Training Student Loads, and for other Purposes, H. Rep. No. 383, 93d Cong., 1st Sess. 76 (1973) which states in relevant part:

The Committee is concerned about the move on the part of certain technicians who are resisting the wearing of the military uniform while performing their military duties. The Committee strongly supports the policies promulgated by the Chief, National Guard Bureau . . . in which he directed that technicians should in all but the most unusual circumstances continue to wear military uniforms. . . .

Reserve technician programs which are established administratively^{27/} because the National Guard technician program is based on statute and involves major deviations from Federal civil service laws; consequently, "it was not possible to go as far in the direction of military requirements" with respect to the Reserves as with respect to the National Guard, in the absence of a statutory base. The unions do not dispute that the challenged NGB regulation establishes, as the agency contends, uniformity throughout the NGB. However, the unions take the position that such uniformity is not essential to the effectuation of the public interest in mobilization readiness because, principally, the number of technicians is very small compared to the number of nontechnician members of the National Guard who are not required to wear military uniforms except when performing periodic, part-time military training duties with their units; and, neither nontechnician civilian employees nor Reserve technician employees of the Army or Air Force are routinely required to wear military uniforms when working in a civilian capacity.^{28/}

27/ The Air Force Reserve Technician Program was established pursuant to a June 25, 1957, agreement between the Civil Service Commission and the Department of the Air Force and the Army Reserve Technician Program was established pursuant to a July 5, 1960, agreement between the Civil Service Commission and the Department of the Army. Under these programs specified Army and Air Force positions in the career civil service are filled only by persons who become and remain members of the respective active reserves. Reserve technicians are classified in the competitive service and are not removed from their technician employment when they involuntarily lose their Reserve status while, in contrast, National Guard technicians are in the excepted service and must maintain Guard membership as a condition of continued technician employment. Further, pursuant to the agreements between the military departments and the Civil Service Commission, Reserve technicians, as civilian employees, cannot be required to wear military uniforms while performing in their technician status. See FPM Supplement (Internal) 930-72, Appendix A.

28/ The unions also contend that the requirement to wear a military uniform may result in the improper imposition of disciplinary actions under the Uniform Code of Military Justice (U.C.M.J.) on technicians in their civilian status. The agency agrees that the U.C.M.J. does not apply to civilian technicians and, moreover, claims that the unions' contentions in regard to the use of military authority by technician supervisors are unsubstantiated. We find it inappropriate and unnecessary to rule on this question in these cases. These contentions do not state a ground for setting aside an agency determination of nonnegotiability but appear to conjecture, among other possible things, an unfair labor practice by agency management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case.

For the reasons which follow, in our opinion the agency has not established that a compelling need exists for the challenged NGB regulation to bar negotiations on the disputed proposals under section 2413.2(e) of the Council's rules: i.e., that the regulation establishes uniformity for a substantial segment of the employees of the National Guard and this uniformity is essential to the effectuation of the public interest. We assume for the purposes of this discussion that the public interest is, as the agency asserts, the maintenance of the military preparedness of the National Guard for the contingency of a callup or mobilization. It is axiomatic that such preparedness has always been the public interest served by the National Guard which has in the past and, as part of the "Total Force Policy," continues to play a vital role in meeting the military commitments and needs of this country. In this regard, the agency has not come forward with any evidence whatsoever to support its allegation that the unit readiness of the National Guard has suffered as a result of technicians wearing attire other than military uniforms while performing technician duties as many of them did prior to the NGB issuance of the regulatory requirement in 1969, and, to some extent thereafter, according to the unions' uncontroverted contentions. Further, although the tasks performed by technicians working in their full-time civilian status are concededly essential to and for the sole purpose of the maintenance of the military preparedness of the National Guard, the record does not show that such tasks, individually or collectively, require peculiarly military attire in order to effectively be accomplished.

Turning to the specific arguments urged by the agency in support of its determination that a compelling need exists for the NGB regulation, we find such arguments unpersuasive. As previously indicated they relate in summary to the following: (1) The substantial "public interest concern" in this matter as evidenced by a Federal District Court decision refusing to overturn the regulation and by a statement of support for the agency policy contained in a United States House of Representatives committee report; and (2) the impropriety of analogizing between the treatment of Army and Air Force Reserve technicians and National Guard technicians with regard to the requirement to wear military uniforms.

As to (1) we are of the opinion that the agency reliance upon the decision of the Federal District Court is misplaced. That decision merely upheld the regulation as not being arbitrary or capricious and as having a rational basis for its issuance. However, the court, although presented with evidence as to the need for the regulation, expressly refused to pass on the question of necessity. In regard to such evidence the court stated that: "Viewing it in the light most favorable to the plaintiffs, it tends to show that the uniform requirement is unnecessary. It does not demonstrate, however, that there is not a sufficiently rational basis for the regulation." As previously set forth in this decision, however, the amendments to section 11(a) of the Order specifically provide a procedure for challenging the necessity for agency regulations asserted

as a bar to the negotiation of conflicting union proposals which are otherwise negotiable and it is precisely the necessity for the NGB regulation to bar negotiation of conflicting union proposals which is at issue in this appeal. As to the agency's reliance on the statement of support for the agency policy contained in a 1973 United States House of Representatives committee report, we are of the opinion that this expression must be viewed in light of the fact, as previously indicated, that nothing in the National Guard Technician Act of 1968 or in its extensive legislative history indicates that it was the intent of Congress to establish a dress requirement for National Guard technicians during the time these technicians were performing in their technician status. And, while the committee expressed its support for the agency policy, nothing in its report indicates a belief by the committee that the requirement for National Guard technicians to wear military uniforms while performing technician duties was essential to the effectuation of the public interest.

We next turn to the agency's contention that it is invalid to analogize between the Army or Air Force Reserve technician program and the National Guard technician program because of certain characteristics, previously adverted to herein,^{29/} which distinguish the two programs. In our opinion, notwithstanding the differences cited by the agency, there is a basic similarity of function and purpose between the two programs, as the unions assert, which makes such comparison useful, though not determinative. In this regard the agency has provided no evidence tending to show that the military preparedness of the Reserves has been in any way impaired as a result of Army and Air Force Reserve technicians wearing attire other than military uniforms while performing Reserve technician duties. Consequently, although not dispositive of the issue before us, the fact that the military preparedness of the Army and Air Force Reserves is not shown to have suffered as a result of Reserve technicians wearing attire other than military uniforms, lends weight to the unions' position that the uniform is not "essential" to the maintenance of the military preparedness of the National Guard.

Hence, the agency has failed to come forward with any showing of a critical linkage between the requirement that technicians wear military uniforms while performing as technicians and the effectuation of the public interest in the maintenance of the military preparedness of the National Guard. In our view, such a causal relationship must be demonstrated to support a finding that the uniformity of dress established for a substantial segment of the employees of the NGB by the regulation in question is essential to the effectuation of such public interest.

Accordingly, we must find that the agency has not supported its determination that a compelling need exists for the NGB regulation in question under section 2413.2(e) of the rules. In deciding that no compelling

^{29/} See note 27 supra.

need exists for the NGB regulation requiring all National Guard technicians working in their technician status under virtually all circumstances to wear military uniforms and, as interpreted by the agency head, to observe military grooming standards, we must emphasize that no questions are raised in the instant cases as to whether or not the military uniform can be prescribed by management with respect to particular instances of assigned technician duties. Hence, we make no ruling as to whether requiring technicians to wear the military uniform in those more limited circumstances would, e.g., constitute a determination under section 12(b) (5) of the Order of the "means" by which such operations are to be conducted.^{30/}

Conclusion

For the reasons discussed above, and pursuant to section 2411.22 and 2411.28 of the Council's rules and regulations, we find that the agency head's determinations in the cases herein consolidated, as to the nonnegotiability of proposals concerning technician attire and hair styles, were improper and must be set aside since no compelling need exists, within the meaning of section 11(a) of the Order and part 2413 of the Council's rules, for the NGB regulation upon which such determinations were based. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the unions' proposals. We decide only that, as submitted by the unions and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Attachment:

APPENDIX- Unions' Proposals

Issued: January 19, 1977

30/ See American Federation of Government Employees, National Immigration and Naturalization Service Council and Department of Justice, Immigration and Naturalization Service, FLRC No. 76A-26 (Jan. 18, 1977), Report No. 120.

APPENDIX

Proposals

National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16

Article XIX, Section 10

Technicians in the excepted service will be authorized to wear civilian clothes while performing their duties as technicians. The clothing worn by technicians will be uniform and will be maintained in a presentable manner. Selection of the style and material of civilian type uniforms (clothing) will be by majority of the technicians at each installation or shop. There will be no restrictions on employees hair styles.

National Army-Air Technicians Association, Local 371 and Department of Defense of the State of New Jersey, FLRC No. 76A-17

Uniforms

The employer agrees to dispense with the requirement that employees be attired in military uniform. Further, the employer allows its employees their choice of work clothing with exception to the following:

1. When conditions warrant special protective clothing in accordance with safety regulations.
2. When the employer desires to identify its employees by type of civilian work uniform and provides employees a uniform maintenance allowance.

American Federation of Government Employees, Local 2999 and Minnesota Air National Guard, FLRC No. 76A-40

The wearing of the military uniform will be at the individual's option while performing civilian technician duties.

American Federation of Government Employees, Local 3061 and Kansas Air National Guard, FLRC No. 76A-43

Article XXVIII, Section 1

In accordance with the policy stated in paragraph 2-4, TPP 904, the parties have determined that the wearing of the military uniform by Air Technicians performing technician duties in their

civilian status is inappropriate. Therefore the Adjutant General, exercising the authority delegated him by paragraph 2-4, will authorize other appropriate (non-military) attire for employees covered by this Agreement and performing technician duties in the following specified positions and functions. [There follows a list of 91 job titles not enumerated herein.]

Association of Civilian Technicians and National Guard Bureau, FLRC
No. 76A-54

The employer agrees to eliminate the requirement to wear military uniforms while in civilian status.

National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard; Association of Civilian Technicians, Montana Army and Air Chapter and State of Montana National Guard; and Association of Civilian Technicians, Michigan State Council and Adjutant General, State of Michigan; respectively. The above-named cases, consolidated for purposes of decision, involved union proposals concerning the clothing, military grooming standards and the observance of military courtesy by National Guard technicians while performing their technician duties. In each case, the agency head determined that negotiation of the proposal or proposals was barred by National Guard Bureau (NGB) regulations and, furthermore, denied the request of the respective union for an exception to the NGB regulation involved. Thereafter, the union in each case filed an appeal with the Council.

Council action (January 19, 1977). The Council held that the proposals here in dispute were not materially different from those before the Council in National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16, et al. and that these three cases presented the same issues for Council resolution. Accordingly, based on the applicable discussion and analysis in the Council's consolidated decision in FLRC No. 76A-16, et al., and pursuant to sections 2411.22 and 2411.28 of its rules, the Council set aside the agency head's determinations in the three cases consolidated herein that the union's proposals were nonnegotiable.

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

National Federation of Federal Employees,
Local 1636

and

FLRC No. 76A-75

State of New Mexico National Guard

Association of Civilian Technicians,
Montana Army and Air Chapter

and

FLRC No. 76A-76

State of Montana National Guard

Association of Civilian Technicians,
Michigan State Council

and

FLRC No. 76A-84

Adjutant General, State of Michigan

CONSOLIDATED DECISION ON NEGOTIABILITY ISSUES

Background

Each of the named unions in the above-entitled cases represents a bargaining unit of employees who are National Guard technicians. National Guard technicians are employed pursuant to the National Guard Technician Act of 1968 in full-time, civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces.^{1/} Such technicians

^{1/} National Guard Technician Act of 1968, 32 U.S.C. § 709 (1970) provides in section 709(a) in relevant part as follows:

- (a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, . . . persons may be employed as technicians in—
- (1) the administration and training of the National Guard; and
 - (2) the maintenance and repair of supplies issued to the National Guard or the armed forces

must, as a condition of their civilian employment under the Act, become and remain members of the National Guard, (i.e., in a military capacity) pursuant to 32 U.S.C. § 709(b) and (e).^{2/} As a result, these technician positions are excepted from the competitive service under 32 U.S.C. § 709(d).^{3/} As members of the National Guard, technicians are required to perform military duties to the same extent as other civilians who are members of the Guard, i.e., they are required to attend four unit training assemblies per month, each four hours duration, and to attend a National Guard encampment during a period of fifteen days each year.^{4/} Additionally, all members of the National Guard, whether or not they happen to be also employed as technicians under the Act, are subject to be called into active service.^{5/}

Each of the above-named cases arose during negotiations between the respective parties when each union proposed to negotiate concerning one or more of the following:^{6/} (1) The clothing which these employees would wear while performing their duties as technicians; (2) the compliance with military grooming standards by these employees while performing technician duties; and (3) the observance of military courtesy by these employees while performing their duties as technicians. In effect, the unions' proposals would render inapplicable in whole or in part to the respective bargaining unit involved, for the term of the

^{2/} 32 U.S.C. § 709(b) provides in relevant part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e) provides in relevant part as follows:

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned[.]

^{3/} 32 U.S.C. § 709(d) provides in relevant part as follows:

[A] position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

^{4/} 32 U.S.C. § 502.

^{5/} See, e.g., 10 U.S.C. §§ 331, 332, 333, 3500, 8500; 32 U.S.C. § 102.

^{6/} The text of each proposal is set forth in an appendix to this decision.

unit's collective bargaining agreement, the requirements established in National Guard Bureau (NGB) regulations,^{7/} as interpreted by the agency head, that National Guard technicians must wear military uniforms, comply with military grooming standards and observe military courtesy while performing technician duties.

The issue as to the negotiability of the respective union proposal or proposals which arose in each case was referred to the agency head for a negotiability determination. Upon such referral, the agency head determined in each case that negotiation was barred by NGB regulations.^{8/} Furthermore, in each case, pursuant to section 2411.22(b) of the Council's rules,^{9/} the union requested an exception to the NGB regulation asserted as a bar to negotiation. Each requested exception to the regulation was denied by the agency. Thereafter, in accordance with section 11(c)(4) of the Order, the respective union in each case petitioned the Council for review stating its belief in effect that the NGB regulation is not applicable to bar negotiation of the proposal or proposals involved because (1) the regulation was not issued at or above the level of a

^{7/} Technician Personnel Manual 200 (213.2) Subchapter 2-4 provides in pertinent part:

Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties and will comply with the standards of the appropriate service pertaining to grooming and the wearing of the military uniform

^{8/} With regard to that portion of the proposal in Association of Civilian Technicians, Montana Army and Air Chapter and State of Montana National Guard, FLRC No. 76A-84, already adverted to, which concerns the negotiability of the use of military courtesy by technicians while performing technician duties, the agency takes the position that the use of military courtesy, although not expressly referred to in its regulation, is inseparably related to the wearing of the military uniform and, therefore, negotiation on that portion of the proposal is barred by the same NGB regulation. [Technician Personnel Manual 200 (213.2) Subchapter 2-4, note 7 supra.]

^{9/} 5 CFR § 2411.22(b) provides as follows:

(b) The Council will review a labor organization's appeal challenging an agency head's determination that an internal agency regulation bars negotiation only if the labor organization has first requested an exception to the regulation from the agency head and that request has been denied or has not been acted upon within the time limits prescribed by § 2411.24.

primary national subdivision of the agency;^{10/} and, moreover, (2) no compelling need for the regulation exists under the criteria established by the Federal Labor Relations Council.^{11/}

Opinion

The issues presented to the Council are: (1) Whether the NGB is a "primary national subdivision" of the agency within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules so that the regulations serve to bar negotiation at the local level; and, if so, (2) whether a compelling need exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules for the NGB regulation which requires National Guard technicians to wear military uniforms, comply with military grooming standards and observe military courtesy while performing technician duties.

10/ Section 2411.3(e) of the Council's rules [5 CFR § 2411.3(e)] defines "primary national subdivision" as follows:

(e) "Primary national subdivision" of an agency means a first-level organizational segment which has functions national in scope that are implemented in field activities.

11/ 5 CFR Part 2413.

§ 2413.2 Illustrative criteria.

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

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

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

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

(d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

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

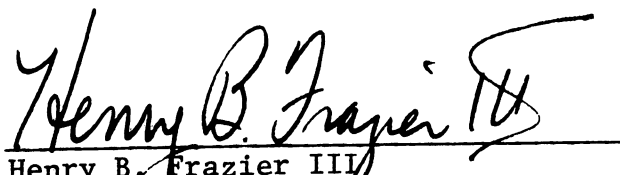
In our view, the provisions here in dispute bear no material difference from the ones before the Council in National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16, National Army-Air Technicians Association, Local 371 and Department of Defense of the State of New Jersey, FLRC No. 76A-17, American Federation of Government Employees, Local 2999 and Minnesota Air National Guard, FLRC No. 76A-40, American Federation of Government Employees, Local 3061 and Kansas Air National Guard, FLRC No. 76A-43 and Association of Civilian Technicians and National Guard Bureau, FLRC No. 76A-54, consolidated for decision and decided this date. In its consolidated decision, the Council determined that the NGB is a "primary national subdivision" of the Department of Defense within the meaning of section 11(a) of the Order and section 2411.3(e) of the Council's rules, and that no compelling need exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules for the National Guard Bureau regulation requiring the wearing of military uniforms by National Guard technicians while performing technician duties. Consequently, the Council set aside the agency head's determinations of nonnegotiability in the aforementioned cases.

Accordingly, based on the applicable discussion and analysis in the aforementioned consolidated decision, we must set aside the agency head's determinations that the unions' proposals in the instant cases are nonnegotiable.

Conclusion

For the foregoing reasons and pursuant to section 2411.22 and 2411.28 of the Council's Rules and Regulations, we find that the agency head's determinations in the cases herein consolidated, as to the negotiability of proposals concerning technician attire, grooming standards and the use of military courtesy were improper and must be set aside since no compelling need exists, within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules, for the NGB regulation upon which such determinations were based. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the unions' proposals. We decide only that, as submitted by the unions and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Attachment

Issued: January 19, 1977

APPENDIX

Proposals

National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard, FLRC No. 76A-75

The Wearing of Military Uniforms

An accepted [sic] technician employed in the Army National Guard or the Air National Guard shall not be required to wear the military uniform (as the case may be) while performing their [sic] duties in a civilian status.

Association of Civilian Technicians, Montana Army and Air Chapter and State of Montana National Guard, FLRC No. 76A-76

Article 28 - Personnel Clothing and Appearance Standards

1. All personnel, while in civilian technician status, will be authorized optional wear of civilian attire or the appropriate military uniform.
2. Hair length, beards and mustaches will be optional while performing in civilian technician status.
3. Military courtesy will not be required while performing in civilian technician status.

NOTE: Personnel performing duty in military status, (Annual Training, Equivalent Training, Special Active Duty, etc) will be required to meet the standards as stipulated in AFR 35-10/AR600-20/670-5/670-30.

Association of Civilian Technicians, Michigan State Council and Adjutant General, State of Michigan, FLRC No. 76A-84

Article 8, Section 12

Employees will not be required to wear military uniforms while performing technician duties.

Article 8, Section 13

Personal grooming standards will be at the discretion of the individual.

Defense Contract Administration Services Region, Los Angeles, Assistant Secretary Case No. 72-5929. The Assistant Secretary, in agreement with the Regional Administrator (RA), and based on the RA's reasoning, found that a reasonable basis had not been established for the complaint filed by the individual complainant, Mr. Mark D. Tremayne, which alleged, in substance, that the activity violated section 19(a)(1) and (2) of the Order by interfering with, coercing, and threatening him in the exercise of rights assured by the Order at a meeting which he was "forced to attend" and at which he was denied his rightful representation. Accordingly, the Assistant Secretary denied Mr. Tremayne's request for review seeking reversal of the RA's dismissal of the complaint. Mr. Tremayne appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (January 19, 1977). The Council held that Mr. Tremayne's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear arbitrary and capricious and Mr. Tremayne neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of Mr. Tremayne's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1977

Mr. Mark D. Tremayne
7413 Bradley Drive
Buena Park, California 90620

Re: Defense Contract Administration
Services Region, Los Angeles,
Assistant Secretary Case No. 72-5929,
FLRC No. 76A-114

Dear Mr. Tremayne:

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

This case arose when you, as an employee, filed an unfair labor practice complaint against Defense Contract Administration Services Region, Los Angeles (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(1) and (2) of the Order by interfering with, coercing, and threatening you in the exercise of rights assured by the Order at a meeting which you were "forced to attend" and at which you were refused your rightful representation.

The Regional Administrator (RA), following an investigation of such allegations, found that:

[A] reasonable basis for the complaint has not been established. In this regard . . . the evidence established, contrary to your allegation, that you were provided ample opportunity to bring your representative to the meeting of July 31, 1975, in which an oral admonishment was administered. Moreover, there is no evidence to establish that the oral admonishment was motivated by your union activity but, rather, was due to your failing to follow check out procedures [pertaining to the removal of certain materials from activity files].

The Assistant Secretary, in agreement with the RA and based on his reasoning, decided that further proceedings were unwarranted inasmuch as a reasonable basis for the complaint had not been established. Accordingly, he denied your request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review, you allege, in essence, that the decision of the Assistant Secretary is arbitrary and capricious in that he either ignored or failed to indicate in his decision that he considered additional evidence and arguments which you presented to him after the RA's decision,

most of such additional evidence having previously been withheld by agency management. You also assert that the "boilerplate" appearance of his decision indicates "arbitrariness and pro-management bias."

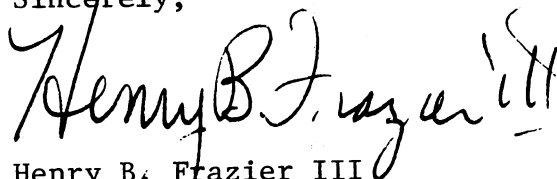
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you do not allege, nor does it appear, that it presents a major policy issue.

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in dismissing your complaint herein. Further, nothing in your appeal indicates that any persuasive evidence was adduced which was not properly considered by the Assistant Secretary in reaching his determination that a reasonable basis for the complaint had not been established. In this regard, we note that the Assistant Secretary indicated that he had "considered carefully your request for review." Similarly, your appeal contains no basis to support your imputation of bias or other impropriety in the circumstances of this case.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Gen. M. E. DeArmond
DSA

National Association of Government Employees, Assistant Secretary Case No. 22-6662(CO). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), and based on the ARA's reasoning, found that a reasonable basis had not been established for the complaint filed by the individual complainant, Ms. Joan Greene, which alleged that the agent of the certified labor organization for a unit of employees at Langley Air Force Base, Virginia, violated section 19(b)(1) and (2) of the Order by negotiating an agreement with the activity which did not meet the expectations of the members of the negotiating committee and which failed to adequately consider their recommendations and suggestions. Accordingly, the Assistant Secretary denied Ms. Greene's request for review seeking reversal of the ARA's dismissal of the complaint. Ms. Greene appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (January 19, 1977). The Council held that Ms. Greene's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of Ms. Greene's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1977

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: National Association of Government
Employees, Assistant Secretary Case
No. 22-6662(CO), FLRC No. 76A-124

Dear Ms. Greene:

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

In this case, you filed an unfair labor practice complaint alleging that the agent of the certified labor organization for a unit of employees at Langley Air Force Base, Virginia (i.e., the appointed President of the National Association of Government Employees (NAGE)) violated section 19 (b)(1) and (2) of the Order by negotiating an agreement with the activity which did not meet the expectations of the members of the negotiating committee and which failed to adequately consider their recommendations and suggestions. The investigation of the complaint revealed that the President of NAGE Local R4-106 was properly appointed as negotiator for the union and clothed with the authority to execute an agreement, and that he did so in the face of objections by the negotiating committee. The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), and based on his reasoning, found that further proceedings were unwarranted, since "a reasonable basis for the instant complaint has not been established." Accordingly, he denied your request for review seeking reversal of the ARA's dismissal of the complaint.

In your petition for review, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary sustained the ARA's decision which failed to consider your allegation that NAGE, through its agent, "violat[e] Section 1, 10, 11, 20 and the Preamble of Executive Order 11491, as set forth in the complaint and detailed in the charge, and constitutes an unfair labor practice under Sections 19(b)(1) and 19(b)(2) of the Order." In support of this allegation, you set forth, in detail, a number of contentions regarding the actions of the appointed President of NAGE Local R4-106 concerning the subject negotiations and resulting agreement. You further allege that the Assistant Secretary's decision presents a major policy issue, namely: "Does the Order provide for self-organization and self-government by an autonomous local of federal employees? How can a local protect itself from an onslaught by the national office?"

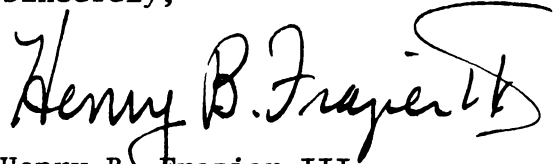
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, nor does it present any major policy issues.

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision. Your allegations in this regard amount only to a claim that a reasonable basis has been established for the unfair labor practices as filed, and, as such, constitute nothing more than a disagreement with the Assistant Secretary's contrary determination. Likewise, your alleged major policy issues constitute nothing more than a contention that the facts, as alleged and characterized, constitute a violation of the Order.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

K. Lyons
NAGE

4500 Air Base Wing, Langley Air Force Base, Virginia, A/SLMR No. 760.

The decision of the Assistant Secretary was dated December 6, 1976, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, the appeal of Ms. Joan Greene, was due in the office of the Council no later than the close of business on January 10, 1977. However, Ms. Greene's appeal was not filed with the Council until January 14, 1977, and no extension of time for filing was either requested by Ms. Greene or granted by the Council.

Council action (January 19, 1977). Because Ms. Greene's appeal was untimely filed, and apart from other considerations, the Council denied her petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 19, 1977

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: 4500 Air Base Wing, Langley Air Force
Base, Virginia, A/SLMR No. 760, FLRC
No. 77A-5

Dear Ms. Greene:

This refers to your petition for review in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated December 6, 1976, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on January 10, 1977. However, your appeal, which is postmarked January 11, 1977, was not filed with the Council until January 14, 1977, and no extension of time for filing was either requested by you or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. E. K. Brehl
Air Force

4500 Air Base Wing, Langley Air Force Base, Virginia, Assistant Secretary Case No. 22-6699(CA). The decision of the Assistant Secretary was dated December 9, 1976, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, the appeal of Ms. Joan Greene was due in the office of the Council no later than the close of business on January 13, 1977. However, Ms. Greene's appeal was not filed with the Council until January 17, 1977, and no extension of time for filing was either requested by Ms. Greene or granted by the Council.

Council action (January 21, 1977). Because Ms. Greene's appeal was untimely filed, and apart from other considerations, the Council denied her petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 21, 1977

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: 4500 Air Base Wing, Langley Air Force Base,
Virginia, Assistant Secretary Case
No. 22-6699(CA), FLRC No. 77A-7

Dear Ms. Greene:

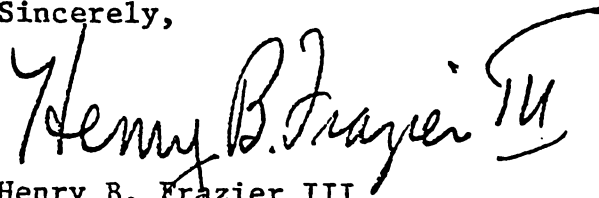
This refers to your petition for review in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated December 9, 1976, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on January 13, 1977. However, your appeal was not filed with the Council until January 17, 1977, and no extension of time for filing was either requested by you or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. E. K. Brehl
Air Force

Community Services Administration, Dallas, Texas, Assistant Secretary Case No. 63-5997(GA). The Assistant Secretary, in agreement with the Acting Regional Director (ARD), and based on the ARD's reasoning, found that the grievance filed by Local 2649, American Federation of Government Employees, AFL-CIO (AFGE), involved a matter for which a statutory appeal procedure exists and that, in accordance with section 13(a) of the Order, the grievance was neither grievable nor arbitrable under the terms of the parties' negotiated agreement. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the ARD's Report and Findings on Grievability or Arbitrability. AFGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and raised a major policy issue.

Council action (January 25, 1977). The Council found that AFGE's petition did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied AFGE's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

January 25, 1977

Mr. Phillip R. Kete, President
National Council of CSA Locals
American Federation of Government
Employees, AFL-CIO
1200 19th Street, NW., Room 204
Washington, D.C. 20506

Re: Community Services Administration,
Dallas, Texas, Assistant Secretary
Case No. 63-5997(GA),
FLRC No. 76A-110

Dear Mr. Kete:

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

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, AFL-CIO, Local 2649 (AFGE), filed a grievance on behalf of three unit employees of the Community Services Administration, Region VI, Dallas, Texas (the activity), asserting that the grievants should be promoted pursuant to provisions of the parties' negotiated agreement and amendments thereto. AFGE sought arbitration but the activity refused, asserting that the issue raised by the grievance was subject to resolution under a statutory classification appeal procedure. The activity then filed an application for decision on grievability.

While there is some dispute as to the actual content, it appears the grievance as stated by AFGE in its letter to the Area Director during the processing of the activity's application involved the alleged violation of two provisions of the negotiated agreement; one dealing with the principle of equal pay for equal work and the other requiring that "each employee serving below the journeyman level in a career ladder will be promoted to the next grade level when he has met the qualifications"

The Acting Assistant Regional Director (ARD), based upon an investigation of the matter, including an inquiry addressed to the U.S. Civil Service Commission (CSC), found that:

[A] procedure . . . grounded in section 5112 of Title 5, U.S. Code . . . accords the [CSC] final and binding authority regarding the classification of positions. Section 5101 of the same title establishes the principle of equal pay for equal work as the very cornerstone of the classification system the [CSC] is charged with administering.

This section also makes clear that the principle is to be achieved by comparing positions with standards issued by the [CSC]. Detailed procedures for the filing of classification appeals -- both through the agency and directly with the [CSC] -- may be found in Subpart F of Part 511 of the Code of Federal Regulations.

Based on all the foregoing, I conclude that this matter is not grievable or arbitrable because there exists a statutory classification appeal procedure for its resolution.

The Assistant Secretary, in agreement with the ARD, and based on his reasoning, found that "the grievance herein involves a matter for which a statutory appeal procedure exists. Thus, in accordance with Section 13(a) of the Order, the grievance is neither grievable nor arbitrable under the terms of the parties' negotiated agreement." Accordingly, he denied AFGE's request for review seeking reversal of the ARD's Report and Findings on Grievability or Arbitrability.

In your petition for review on behalf of AFGE, you allege that "[t]he Assistant Secretary's adoption of the CSC ruling on arbitrability was arbitrary and capricious because (a) there was no finding that the CSC interpretation was reasonable, (b) the CSC ruling was no more than a conclusion unsupported by reasoning, (c) the CSC ruling was unreasonable on its face, [and] (d) the Assistant Secretary gave no consideration to the union's arguments regarding the CSC ruling and this constituted an abdication of his responsibility to determine arbitrability." [Capitalization and underscoring omitted.] In this latter regard, you assert that the Assistant Secretary's failure to consider AFGE's arguments and to determine for himself whether a statutory appeal procedure covered the matter raised herein rather than allowing the CSC to do so was inconsistent with the Council's decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63. You also allege, without further identification or explanation, that the Assistant Secretary's decision raises a major policy issue.

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

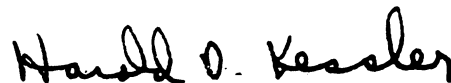
With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision, based upon the reasoning of the ARD, that "the grievance herein involves a matter for which a statutory appeal procedure exists [and] [t]hus . . . is neither grievable nor arbitrable under the terms of the parties' negotiated agreement." In this regard, your appeal fails to disclose that the Assistant Secretary's decision was in any manner inconsistent with applicable Council

precedent or with the purposes and policies of the Order. More particularly, section 13(a) of the Order provides that the parties' negotiated grievance procedure "may not cover matters for which a statutory appeal procedure exists," and section 13(d) of the Order states that "[q]uestions . . . as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision." In carrying out this function, the action of the Assistant Secretary in obtaining and relying on advice from the CSC (the agency responsible for administering the statutory appeal procedure in question) regarding the applicability of such procedure to the particular facts and circumstances of a case pending before him presents no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

P. M. Weightman
CSA

Army and Air Force Exchange Service, Capitol Exchange Region Headquarters, Assistant Secretary Case No. 22-6657(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that a reasonable basis had not been established for the complaint filed by Local 1622, National Federation of Federal Employees (NFFE), which alleged that the activity had violated section 19(a)(1) and (6) of the Order by refusing to negotiate on NFFE's proposal that it be granted the use of the employee breakroom (snackbar) to conduct a union membership drive. Accordingly, the Assistant Secretary denied NFFE's request for review seeking reversal of the ARA's dismissal of the complaint. NFFE filed an appeal with the Council, pursuant to section 2411.17 of the Council's rules of procedure, contending, in essence, that the subject matter involved in the dispute was negotiable.

Council action (February 15, 1977). The Council found that the Assistant Secretary did not make a negotiability determination in this case and therefore held that NFFE's appeal failed to provide any basis for Council review under section 2411.17 of its rules. The Council further held that since NFFE neither alleged, nor did it appear, that the Assistant Secretary's decision was arbitrary and capricious or that it raised a major policy issue, no basis was presented for Council review under section 2411.12 of the Council's rules. Accordingly the Council denied review of NFFE's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 15, 1977

Ms. Janet Cooper, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Army and Air Force Exchange Service,
Capitol Exchange Region Headquarters,
Assistant Secretary Case No. 22-6657(CA),
FLRC No. 76A-120

Dear Ms. Cooper:

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

In this case, as found by the Assistant Secretary, the President of the National Federation of Federal Employees, Local 1622 (NFFE), the exclusive representative of a unit of employees at the Army and Air Force Exchange Service, Capitol Exchange Region Headquarters (the activity), by letter requested the activity's permission to conduct a membership drive. Subsequently, he met with the activity's Labor Relations Representative and its Personnel Manager to discuss the details of the drive. At this meeting, NFFE's President requested the use of the employee breakroom (snackbar) to conduct the membership drive. The activity's officials informed him that the employee breakroom was inappropriate because the drive would bother supervisors who also used the eating facilities. They did, however, offer NFFE the use of the small conference room for the membership drive. Thereafter, on a number of occasions during the ensuing months, NFFE's President made similar requests of the activity—by letter, by telephone, and at a labor-management meeting—for the use of the employee breakroom to conduct a membership drive; the activity's representatives consistently responded by denying the request, specifying the reasons for its decision, and offering the small conference room instead. Following a series of such exchanges, NFFE filed an unfair labor practice complaint alleging that the activity had violated section 19(a)(1) and (6) of the Order by refusing to negotiate on NFFE's proposal that it be granted the use of the employee breakroom (snackbar) to conduct a union membership drive.

The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that a reasonable basis for the complaint had not been established and that, consequently, further proceedings in this matter were unwarranted. In reaching this disposition, the Assistant Secretary:

. . . noted that the parties' negotiated agreement provides for union membership drives, although the use of agency facilities for such purposes is not specifically outlined therein. Further, the evidence establishes that the parties, in fact, met and conferred over the use of the employee breakroom requested by [NFFE] and that when its use was denied by the [activity] the latter offered a conference room as an alternative. Under these circumstances, I find that there is insufficient evidence to establish a reasonable basis for the allegation that the [activity] failed to discharge its bargaining obligations in this matter.

Accordingly, the Assistant Secretary denied NFFE's request for review seeking reversal of the ARA's dismissal of the complaint.

Your appeal, filed on behalf of NFFE herein pursuant to section 2411.17 of the Council's rules of procedure, alleges that "the matter of where to hold a membership drive, the right to which is granted by the contract between the parties, is negotiable," asserting that "[i]f management had a duty to negotiate with [NFFE] initially about holding a membership drive, they have a continuing duty to negotiate about the procedures for holding that drive" and that "[s]uch procedures include the place for the drive." Your appeal therefore requests that "the decisions of the Assistant Regional Director [sic] and the Assistant Secretary be overturned, that this matter be declared negotiable, and that the Activity-Respondent be ordered to negotiate with [NFFE] about this matter, including impasse resolution if necessary."

In the Council's opinion, your appeal fails to provide any basis for Council review of the Assistant Secretary's decision in the instant case. By virtue of the most recent amendments to the Order contained in E.O. 11838, particularly the amendments to sections 4(c)(1), 6(a)(4), and 11(d), the Assistant Secretary was expressly authorized to resolve negotiability issues arising in the context of unfair labor practice proceedings wherein it is alleged that one party has unlawfully refused to negotiate by unilaterally changing an established personnel policy or practice, or matter affecting working conditions; and a party adversely affected by a negotiability determination of the Assistant Secretary "necessary to resolve the merits of the alleged unfair labor practice" in such cases was given the right to have the determination reviewed on appeal by the Council. In promulgating section 2411.17 of its rules to implement the foregoing amendments to the Order, the Council expressly provided, in pertinent part:

§ 2411.17 Determinations of negotiability.

(a) Notwithstanding the procedures of this subpart, the Council, as provided in this section, will, upon an appeal by a party, review a decision of the Assistant Secretary wherein it was necessary for him to make a negotiability determination in order to resolve the

merits of an unfair labor practice complaint resulting from an alleged unilateral change in established personnel policies or practices or matters affecting working conditions. [Emphasis added.]

Neither the amendments to the Order nor the Council's implementing regulation set forth above was intended to require the Council to review a decision of the Assistant Secretary wherein he did not make a negotiability determination or wherein it was not necessary for him to do so in order to resolve the merits of an unfair labor practice complaint.

Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, FLRC No. 76A-87 (Dec. 20, 1976), Report No. 119.

In the Council's view, the Assistant Secretary did not make a negotiability determination in the instant case. Rather, as previously noted, the Assistant Secretary held that "the evidence establishes that the parties, in fact, met and conferred over the use of the employee breakroom requested by [NFFE] and that when its use was denied by the [activity] the latter offered a conference room as an alternative." Therefore, as the Assistant Secretary found that, under these circumstances, there was insufficient evidence to establish a reasonable basis for the allegation that the activity failed to discharge its bargaining obligations herein, rather than making a negotiability determination, no basis is presented for Council review of your appeal under section 2411.17 of the Council's rules. Further, since you neither allege nor does it appear that the Assistant Secretary's decision is arbitrary and capricious or raises a major policy issue, no basis is presented for Council review under section 2411.12 of the Council's rules.

Accordingly, since no basis for Council review of your appeal is presented under either section 2411.17 or 2411.12 of the Council's rules of procedure, such appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. E. Edwards
AAFES

Headquarters, United States Air Force and Headquarters, Tactical Air Command, Assistant Secretary Case No. 22-6643(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that further proceedings were unwarranted on the complaint filed by Ms. Joan Greene, on behalf of herself and 2 named employees, which alleged that a memorandum issued from the Headquarters, Tactical Air Command, constituted violations of section 19(a)(1), (2), (5) and (6) of the Order. Accordingly, the Assistant Secretary denied Ms. Greene's request for review seeking reversal of the ARA's dismissal of the complaint. Ms. Greene appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (February 15, 1977). The Council held that Ms. Greene's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of Ms. Greene's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 15, 1977

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: Headquarters, United States Air Force
and Headquarters, Tactical Air Command,
Assistant Secretary Case No. 22-6643(CA),
FLRC No. 76A-125

Dear Ms. Greene:

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

According to the documents submitted with your petition, this case arose when you filed a complaint, on behalf of yourself and two named employees, alleging that a memorandum issued from Headquarters, Tactical Air Command constituted violations of section 19(a)(1), (2), (5) and (6) of the Order. You alleged that this memorandum, which required the review of regulatory issuances to determine whether those considered essential may be incorporated in Air Force or Department of Defense regulations, had the effect of coercing, interfering with, restraining and discouraging civilian employees of the Air Force and further constituted a failure by the Air Force to accord appropriate recognition to and negotiate with the exclusive representative as required by the Order. The Acting Regional Administrator (ARA) dismissed the complaint in its entirety. The Assistant Secretary, in agreement with the ARA, found that further proceedings were unwarranted, stating:

Thus, I agree that the obligations on the part of an Activity to meet and confer and accord appropriate recognition flow to a labor organization which is the exclusive representative, and not to any individual. As the instant complaint was filed by individuals, and not by the exclusive representative, it follows that such individuals have no standing to allege violations of Section 19(a)(5) and (6) of the Order. Moreover, no evidence has been submitted to support a reasonable basis for the Section 19(a)(1) and (2) allegations of the complaint.

Accordingly, he denied your request for review seeking reversal of the ARA's dismissal of the complaint.

In your petition for review, you allege that the Assistant Secretary's decision is arbitrary and capricious, contesting: (1) the finding of lack of standing to allege violations of section 19(a)(5) and (6) of the Order, since, at the time of the filing of the complaint, two of the individuals filing the complaint were officers of the labor organization which is the exclusive representative, but signed the complaint as "employee representatives"

rather than as officers of the labor organization in order to retain jurisdiction over the case; and (2) the finding of lack of evidence to support a reasonable basis for the section 19(a)(1) and (2) allegations, contending, apparently, that the Assistant Secretary failed to enforce his regulations with respect to precomplaint charges. You also allege, without any explanation, that the following major policy issue is present: "Is Respondent subject to the Assistant Secretary's Rules and Regulations at § 203.2(a)(4) or not? Is the Respondent an involved 'party' as defined in § 201.21, who must investigate the charge and attempt informal resolution? Is the Respondent an 'activity' under § 203.1 and therefore a proper party?"

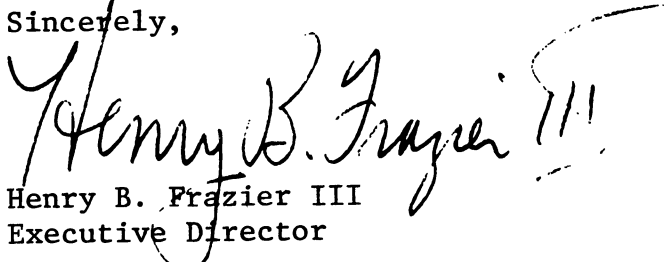
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in dismissing your complaint herein. As to your contention concerning standing to file a section 19(a)(5) and (6) complaint, it is noted that the complaint was filed by the named persons as individuals and not by the exclusive representative. Cf. Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary Case Nos. 22-6261(CA) and 22-6263(CA), FLRC No. 75A-123 (Apr. 12, 1976), Report No. 102. As to your further contention, regarding the Assistant Secretary's failure to enforce his regulations, your appeal neither established that the Assistant Secretary was without authority to promulgate his regulations nor that he applied them in a manner inconsistent with the purposes of the Order in the circumstances of this case. Likewise, no major policy issue is presented, noting particularly that the alleged major policy issue is, at most, merely a restatement of your assertion that the Assistant Secretary failed to apply his regulations properly in the instant case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Captain E. K. Brehl
Air Force

United States Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, dismissed the complaint filed by the National Treasury Employees Union, Chapter 10 (NTEU), which alleged that the activity had violated section 19(a)(1) and (6) of the Order by its conduct at a meeting to discuss certain NTEU proposals. NTEU appealed to the Council, contending that the Assistant Secretary's decision presented a major policy issue.

Council action (February 15, 1977). The Council held that NTEU's petition for review did not meet the requirements in section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue and NTEU neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied NTEU's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 15, 1977

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

Re: United States Department of the Treasury,
Internal Revenue Service, Chicago District,
A/SLMR No. 711, FLRC No. 76A-126

Dear Mr. Persina:

The Council has carefully considered your petition for review, and the opposition thereto filed by the agency, in the above-entitled case.

This case arose upon the filing of an unfair labor practice complaint by the National Treasury Employees Union, Chapter 10 (NTEU) against the United States Department of the Treasury, Internal Revenue Service, Chicago District (the activity). The complaint alleged that the activity had violated section 19(a)(1) and (6) of the Order by stating and taking the position, at a meeting to discuss NTEU's written proposals, that 14 of the 18 proposals submitted were nonnegotiable and that it would not negotiate on the 4 admittedly negotiable proposals until NTEU agreed that the remaining 14 proposals were not negotiable or until their negotiability was determined by the Council.

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), ordered that the complaint be dismissed. Relying upon the Council's decision in Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77 (Aug. 8, 1975), Report No. 79, for the proposition that a slight interruption of the bargaining process was not a violation of the obligation to negotiate, it was determined that whatever the management representative may have said at the beginning of the bargaining meeting at issue, when the union refused to make the concession requested, the respondent promptly continued meeting and conferring and what actually took place thereafter did in fact satisfy the agency's obligation to negotiate.

In your petition for review on behalf of NTEU, you allege that the decision of the Assistant Secretary presents a major policy issue as to "whether management's position that there was no need for union bargaining proposals, and that if there was such a need an affected employee could come to management individually to discuss that need, constitutes good faith collective bargaining under Executive Order 11491, as amended." In this regard, you assert that the activity's conduct at the meeting in question did not constitute good faith negotiating based upon the plain language of the Order, prior decisions of the Assistant Secretary and the Council, and

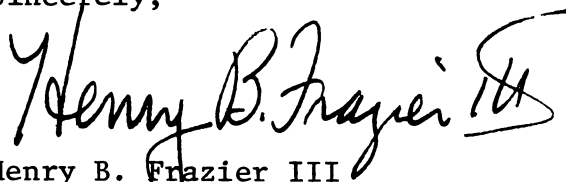
private sector law, in that the activity was attempting to deal directly with employees concerning the subject matter of the proposals rather than with the union on a "give-and-take" basis.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious. With respect to your allegation that the activity's conduct did not constitute good faith collective bargaining, such contention constitutes, in effect, nothing more than disagreement with the Assistant Secretary's conclusion that, in the circumstances of this case, the activity satisfied its obligation to negotiate in good faith. Further, as to your contention that the Assistant Secretary's decision herein was contrary to applicable precedent, your appeal fails to establish that there is a clear, unexplained inconsistency between the Assistant Secretary's decision in the instant case and his previously published decisions or those of the Council. Moreover, it does not appear from the ALJ's Recommended Decision and Order and the Assistant Secretary's Decision and Order that the issue of alleged attempted direct dealings with employees was presented as part of the unfair labor practice complaint in the proceeding before the Assistant Secretary.^{*/} Accordingly, no major policy issue is presented warranting Council review.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. J. O'Rourke
IRS

*/ In this regard, section 2411.51 of the Council's rules provides, in pertinent part:

Consistent with the scope of review set forth in this part, the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary, an agency head, or an arbitrator.

U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673.

The Assistant Secretary, upon a complaint filed by Local 902, American Federation of Government Employees, AFL-CIO (AFGE), found that the activity violated section 19(a)(1) and (6) of the Order by unilaterally instituting a change in the reporting and quitting practice for certain unit employees without providing AFGE with reasonable notice of its intended action. The Assistant Secretary issued a remedial order requiring the activity to cease and desist from the conduct found violative of the Order and to take certain affirmative action, but found that the status quo ante remedy sought by AFGE was inappropriate since the parties had executed a negotiated agreement with a reporting and quitting practice provision. AFGE appealed to the Council, contending that the Assistant Secretary's denial of a status quo ante remedy was arbitrary and capricious.

Council action (February 25, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision raised any major policy issues. Accordingly, the Council denied AFGE's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

February 25, 1977

Mr. James R. Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Army Corps of Engineers, Philadelphia
District, A/SLMR No. 673, FLRC No. 76A-94

Dear Mr. Rosa:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 902, AFL-CIO (the union) represents a unit of nonsupervisory employees at the Fort Mifflin Project Office of the U.S. Army Corps of Engineers, Philadelphia District (the activity). Negotiations between the union and the activity for a new collective bargaining agreement resulted in an impasse with respect to the issue of reporting and quitting practice for certain unit employees (as well as one other issue which is not relevant herein). Thereafter, the activity unilaterally, and without notice to the union, implemented the procedure it had proposed during the negotiations on this issue. The union subsequently requested the Federal Service Impasses Panel (FSIP) to consider the impasse. In addition, while the matter was pending before the FSIP, the union filed an unfair labor practice complaint alleging, in substance, that the activity unilaterally and without notice to the union changed an existing working condition, and thereby violated section 19(a)(1) and (6) of the Order.

The Assistant Secretary concluded, in pertinent part, that:

In the instant case, . . . it is undisputed that the [union] was not notified prior to the institution of the change in the reporting and quitting practice and was not given the opportunity to invoke the procedures of the [FSIP] prior to the [activity's] instituting a change in existing terms or conditions of employment. Under these circumstances, I find that the [activity] violated Section 19(a)(1) and (6) of the Order by unilaterally instituting the change herein without providing the [union] with reasonable notice of its intended action.

As a remedy, the Assistant Secretary issued an order requiring the activity to cease and desist from the conduct found violative of the Order and to take certain affirmative action. However, since he found that the parties had "executed a negotiated agreement including a provision covering reporting and quitting practice," the Assistant Secretary considered a status quo ante remedy inappropriate under the circumstances.

In your petition for review on behalf of the union, you allege that "the Assistant Secretary's failure to . . . [order] the parties to return to the status quo which existed prior to management's . . . unilateral change of working conditions, is based on a clearly erroneous assumption of fact and is therefore arbitrary and capricious." In this regard you contend, in substance, that the agreement negotiated by the parties did not, as the Assistant Secretary found, resolve the issue of reporting and quitting practice, and that the Assistant Secretary's denial of a status quo ante remedy was based upon his misreading of the negotiated agreement.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

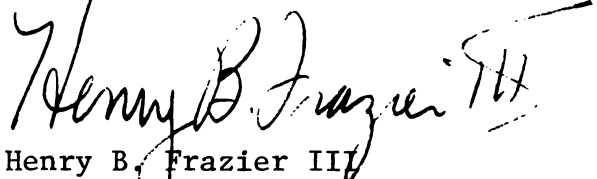
With respect to your allegation that the Assistant Secretary's denial of a status quo ante remedy was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in deciding that such a remedial order was not considered appropriate in the circumstances of this case. Your assertion to the contrary based upon the Assistant Secretary's alleged misreading of the parties' negotiated agreement constitutes, in effect, nothing more than disagreement with a factual determination by the Assistant Secretary in exercising his authority under section 6(b) of the Order to fashion such remedial action as he considers appropriate to effectuate the policies of the Order, and therefore presents no basis for Council review. Moreover, mere dissatisfaction with the Assistant Secretary's remedy in a particular case, without more, constitutes no basis for Council review. As the Council has previously stated, section 6(b) of the Order "confers considerable discretion on the Assistant Secretary," and his remedial directives therefore will not be reviewed by the Council unless it appears that the Assistant Secretary has exceeded the scope of his authority under section 6(b), has acted arbitrarily and capriciously or in a manner inconsistent with the purposes and policies of the Order. Cf. Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486, FLRC No. 75A-59 (Aug. 14, 1975), Report No. 80; New York Army and Air National Guard, Albany, New York, A/SLMR No. 441, FLRC No. 75A-79 (Nov. 18, 1975), Report No. 91.*

*/ In so ruling, we do not pass upon the Assistant Secretary's statement, which was not necessary in reaching his decision in the instant case and

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. J. Schrader
Army

(Continued)

was therefore merely dictum, concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the FSIP have been requested and to avoid effectuating any unilateral changes in terms or conditions of employment until the FSIP's processes have run their course. Such dictum has not been appealed to the Council herein and therefore, apart from other considerations, is not properly before the Council for review.

U.S. Marine Corps Supply Center, Albany, Georgia and American Federation of Government Employees (King, Arbitrator). This appeal arose from the arbitrator's award directing the payment of overtime compensation for certain employees who were delayed in leaving the premises of the activity after regular working hours as the result of a search of privately owned vehicles by the activity. The Council accepted the agency's petition for review, insofar as it related to the agency's exception which alleged that the award violated applicable law and regulation; and granted the agency's request for a stay (Report No. 93).

Council action (March 8, 1977). Since the Civil Service Commission is authorized to prescribe directives to implement certain statutory provisions dealing with overtime compensation in the Federal service, the Council, in accordance with established practice, sought an interpretation from the Commission of the relevant statutes and implementing directives as they pertain to the arbitrator's award in this case. Based upon the interpretation of the Commission rendered in response to the Council's request, the Council found that the arbitrator's award did not violate applicable law or Civil Service Commission regulations and instructions. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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

U.S. Marine Corps Supply Center,
Albany, Georgia

and

FLRC No. 75A-98

American Federation of Government
Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award, wherein he directed the payment of overtime pay for certain employees.

According to the arbitrator's award, on June 26, 1974, at about 2 p.m., the U.S. Marine Corps Supply Center, Albany, Georgia (the activity) discovered that certain Government property was missing. The Provost Marshal's office, which had responsibility for organizing and conducting the search to locate the property, was not notified until 4 p.m. Thereafter, seven military police were used to man the six exits from which all vehicles left the parking lot at 4:30 p.m., the end of the workday.^{1/} The police searched all of the 300 to 350 vehicles as they left the lot; the typical search took from 1 to 1-1/2 minutes, but some vehicles were detained as long as 35 minutes or longer. The missing property was later discovered in another building on the premises with no evidence that it had ever left the activity.

A grievance was filed, and ultimately submitted to arbitration, alleging that the search was conducted in a manner that resulted in the detention of the employees on the premises for some 35 minutes or more for the purposes of the employer, and that therefore the employees are entitled to overtime pay for that time.

The Arbitrator's Award

The issue before the arbitrator was defined by the parties as follows:

^{1/} The number of police available to conduct the search was much smaller than it could have been had the Provost Marshal's office received notice earlier, because the military personnel's normal workday ends at 4 p.m.

Has the Command violated the negotiated Agreement between Marine Corps Supply Center, Albany, and AFGE Local 2317, specifically Article . . . [VIII],^{2/} and pertinent regulations when it denied overtime pay to [the grievant] and group^{3/} for the purpose of subjecting them to a search? [Footnotes added.]

The arbitrator noted that the union does not contest the right of the activity to make necessary searches. Rather, "the Union's complaint is against the timing of the search and the inadequate number of personnel assigned to accomplish the search which resulted in what it sees as unreasonable delay of employees going about their personal business at the end of the day." The arbitrator stated that "the delay in notifying the Provost Marshal's office . . . appears unreasonable." He found that the employees "were required to remain on the premises of the employer for its benefit and they had no freedom to use the time for themselves," and that "the denial of overtime pay to [the grievant] and group for the purpose of subjecting them to search was in violation of the Negotiated Agreement" As a remedy, the arbitrator determined that: "Any employee proved to have been detained longer than six minutes [the normal time required for vehicles to exit the parking lot without any search] in the parking lot on June 26, 1974, shall have his overtime pay calculated by the same method regularly used by the employer in calculating overtime."^{4/}

Agency's Appeal to the Council

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

^{2/} According to the award, Article VIII (HOURS OF WORK) of the agreement states:

Section 1. The basic 40-hour workweek will consist of five (5) consecutive 8-hour days, normally Monday through Friday, except for personnel employed in security and service-type functions and employees of the Commissary Store.

Section 2. The regular workday will consist of eight (8) hours of work which normally shall be from 0800 to 1630 as excepted in Section 1 above for Commissary, security, and service-type personnel with a 30-minute lunch period, normally between the hours of 1130 and 1300.

^{3/} The group apparently included all of the employees who were detained in the parking lot as a result of the search.

^{4/} The arbitrator also stated:

Because the testimony of the grievant . . . given under oath at the hearing and unchallenged, was that he was delayed thirty-five minutes on June 26, 1974, the Arbitrator finds that to be the fact. . . .

the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and regulation.^{5/} The union filed a brief.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review with respect to its exception which alleged that the arbitrator's award violates applicable law and regulation. Since the Civil Service Commission is authorized to prescribe directives to implement certain statutory provisions dealing with overtime compensation in the Federal service, the Council, in accordance with established practice, sought from the Civil Service Commission an interpretation of the relevant statutes and implementing Commission directives as they pertain to the arbitrator's award in this case. The Commission replied in pertinent part:

In applying the FLSA to this case, the arbitrator has ruled on a subject for which a statutory appeal procedure exists. Pursuant to our authority under section 4(f) of the Act, we have established a procedure whereby employees may submit complaints to the Commission concerning alleged violations of the FLSA. However, while we were accepting complaints and investigating alleged violations that came to our attention at the time the events in this case occurred, our formal procedures were not yet in place. (The procedures are now described in detail in FPM Letter 551-9, Civil Service Commission System for Administering the Fair Labor Standards Act (FLSA) Compliance and Complaint System, dated March 30, 1976.) For this reason, we are not objecting, after the fact, to the arbitrator's assumption of jurisdiction concerning this case.

In this case, the union alleges that the agency violated the "hours of work" provision of the negotiated agreement by refusing to pay overtime pay to employees who were detained on the premises of the activity after regular working hours while a security check of their private vehicles was being conducted. The arbitrator found for the

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

grievants and directed in part that the activity pay the appropriate amount of overtime pay to any employee proved to have been detained longer than six minutes. The arbitrator's award was based on the fact that the employees were required to remain on the premises of the agency for its benefit and they had no freedom to use the time for themselves. The arbitrator concluded that the time the employees remained on agency premises was within the acceptable definition of "hours worked" (Attachment 5 to FPM Letter 551-1, Interim Instructions for Implementing the Fair Labor Standards Act, dated May 15, 1974) by virtue of their being detained in the parking lot by the employer. Furthermore, in the judgment of the arbitrator, the period of detention was "unreasonable", and was due to management's "failure to plan adequately the operation with resulting serious inconvenience to a number of employees."

In finding the arbitrator's award to be consistent with law, appropriate regulations, and Commission instructions, we believe it necessary to amplify an important principle concerning "hours of work" determinations under FLSA. This principle was addressed by the arbitrator when he acknowledged that the agency could have been justified in refusing to pay the employees for the time they were detained had the cause for the delay been the result of an emergency situation outside the control of management. Whether delays or periods of detention on an agency's premises are compensable as "hours of work" must be determined on the facts and circumstances of the case. Two important criteria are applied in making such determinations: 1) the agency must be responsible for the action which causes the employees to be delayed on the premises, and 2) the period of detention must be significantly in excess of the normal exiting time from the premises. Unless both of these conditions are met, the agency has no legal obligation under FLSA to consider the period of detention as "hours worked" and hence compensable.

The arbitrator considered any time less than six minutes to be de minimis and not compensable for the reason that six minutes would be the "normal time generally required for the vehicles to exit the parking lot without any search and, therefore, would represent no overtime". As a point of technical clarification, however, the six minute period represents a "postliminary" activity as provided for in the Portal to Portal Act of 1947.* Under that Act, which has

*The de minimis rule is properly applied in the crediting of fractional hours of irregular, unscheduled overtime worked. In the case at hand it would be applied to the time in excess of six minutes the employees were detained in the agency's parking lot. Attachment 2 to FPM letter 551-6, Additional Instructions for Implementing the Fair Labor Standards Act (FLSA), dated June 12, 1975, contains instructions for crediting fractional hours worked (including the de minimis rule) for overtime pay.

application in this and similar cases, the normal time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is excludable. Thus, as the arbitrator correctly found, the employees in this case would be entitled to have counted as "hours worked" only the additional time spent "traveling (or waiting in line)" in excess of six minutes. To illustrate further, if an employee "traveled (or waited in line)" to exit the parking lot a total of 36 minutes, the first six minutes would be excluded from hours worked under the Portal to Portal Act, and the employee would be credited with 30 minutes of irregular, unscheduled overtime work. Provided this employee otherwise performed 40 hours of work during the workweek, he would be entitled to one-half hour's overtime pay under the FLSA.

There is a possibility -- not addressed by the arbitrator -- that the time provisions of title 5, U.S. Code, apply to this case as well as the FLSA. This could have two major implications. Employees who were detained by the security check and who are determined to be "exempt" from the FLSA (if any), may have an overtime entitlement under title 5. It is also possible that some employees covered by both the FLSA and title 5 would receive a greater benefit if their overtime pay were computed under title 5. (When both FLSA and title 5 apply, Commission instructions require the employee be paid the one which accords the greater overtime pay benefit.) Since the Comptroller General is the ultimate arbiter of pay entitlements under title 5, it would be appropriate to request a ruling on this matter from him if it appears that a positive determination would increase either the number of employees entitled to overtime pay or the amount payable to any individual.

In summary, we conclude that the arbitrator's award is consistent with law, regulations, and Commission instructions in ordering overtime payment to employees, provided that the employees are determined by the agency to be covered by the Fair Labor Standards Act and as long as the initial six minutes of detainment is excluded from the agency computation of individual overtime entitlement. To insure, however, that all the employees who were detained receive the greatest benefit to which they may be entitled, it may be necessary for the agency to secure a ruling on the applicability of the pay provisions of title 5 from the Comptroller General.

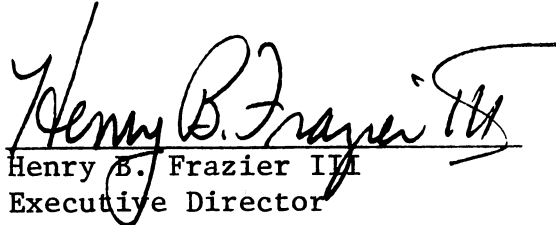
Based upon the foregoing interpretation of the Civil Service Commission, it is clear that the arbitrator's award, to the extent that it provides for the payment of overtime compensation to employees covered by the Fair Labor Standards Act for that period of time in excess of six minutes that the employees were detained in the activity's parking lot, is consistent with applicable law and appropriate regulation. As to the Commission's observations with regard to the possible application of certain provisions of title 5 to this case, we note that the arbitrator directed the agency

"to calculate overtime pay by the same method regularly used by the employer in calculating overtime." Determinations as to the applicability of title 5 (including, if necessary, seeking a decision in that regard from the Comptroller General) can be made by the agency during the course of implementing the award and calculating the overtime pay directed in this case.

Conclusion

For the foregoing reasons, we find that the arbitrator's award does not violate applicable law or Civil Service Commission regulations and instructions. Therefore, pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 8, 1977

Veterans Administration Hospital, New Orleans, Louisiana, A/SLMR No. 637. The Assistant Secretary found that the representation petition filed by the American Federation of Government Employees was timely, and not barred by a new negotiated agreement between the National Federation of Federal Employees (NFFE) and the activity. NFFE appealed to the Council, contending that the decision of the Assistant Secretary presented a major policy issue and was arbitrary and capricious.

Council action (March 8, 1977). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision did not present a major policy issue and did not appear arbitrary and capricious. Accordingly, the Council denied NFFE's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 8, 1977

Mr. John P. Helm, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Veterans Administration Hospital, New Orleans, Louisiana, A/SLMR No. 637, FLRC No. 76A-108

Dear Mr. Helm:

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

In this case, as found by the Assistant Secretary, the National Federation of Federal Employees (NFFE) was granted exclusive recognition in 1969 for a unit of all nonsupervisory, nonprofessional employees at the Veterans Administration Hospital, New Orleans, Louisiana (the activity). The parties' first negotiated agreement, effective September 17, 1970, was for a 2-year period and contained an automatic renewal provision "for a like period thereafter." This agreement did not contain a negotiated grievance procedure. In 1971, Executive Order 11491 was amended, in pertinent part, to provide in section 13^{1/} for the inclusion of grievance procedures in negotiated agreements.

On September 17, 1972, the negotiated agreement between NFFE and the activity was automatically renewed without the addition of a procedure for the consideration of grievances over the interpretation or application

1/ As amended by Executive Order 11616, section 13 of E.O. 11491 provided, in pertinent part:

Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. . . .

.
(e) No agreement may be established, extended or renewed after the effective date of this Order which does not conform to this section. However, this section is not applicable to agreements entered into before the effective date of this Order.

of the agreement. On June 5, 1974, NFFE and the activity executed a 3-year agreement, which was substantially similar to their previously renewed agreement except that it included a negotiated grievance procedure in conformity with section 13 of the Order. This agreement became effective on July 12, 1974. On July 15, 1974, AFGE filed the representation petition involved in the instant case.^{2/}

The Assistant Secretary found that, under the foregoing circumstances, the representation petition filed by AFGE was timely, and was not barred by the new agreement executed on June 5, 1974. In the latter regard, as to the 1974 agreement, the Assistant Secretary found:

[T]he parties chose prior to the termination of their [1972] agreement to negotiate a new agreement for a new three-year period with the addition of the required grievance procedure. In my view, such action constituted, in effect, a premature extension of the original agreement between the Activity and the NFFE, and was not in keeping with the requirements of Section 202.3(e)^{3/} of the Assistant Secretary's Regulations.

Accordingly, the Assistant Secretary ordered that an election be held in the appropriate unit.

In your petition for review on behalf of NFFE, you allege that the decision of the Assistant Secretary presents a major policy issue as to "whether the premature extension rule is applicable to the negotiation of a new agreement prior to the expiration of an agreement which did not comply with the section 13(e) requirements of Executive Order 11491, as amended." You further allege that the decision of the Assistant Secretary is arbitrary and capricious "insofar as it denies a labor organization the opportunity to enjoy the benefit of an agreement bar by correcting the deficiencies in a labor management collective bargaining agreement which because it lacks a negotiated grievance procedure is contrary to the Executive Order and ineffectual as a contract bar to a petitioning organization."

^{2/} The Assistant Secretary stated that the "open period" for the original agreement between NFFE and the activity, renewed on September 17, 1972, was from June 19 to July 19, 1974.

^{3/} Section 202.3(e) of the Assistant Secretary's rules provides:

When an extension of an agreement has been signed more than sixty (60) days before its terminal date, such extension shall not serve as a basis for the denial of a petition submitted in accordance with the time limitations provided herein.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision does not appear arbitrary and capricious nor does it present a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of his regulations, and your petition presents no persuasive reasons to show either that the Assistant Secretary was without authority to establish such regulations, or that his application thereof in the circumstances of this case was inconsistent with the purposes of the Order, noting particularly that the decision of the Assistant Secretary does not give effect to nonconforming provisions of the agreement, but only precludes the prematurely extended agreement from serving as a bar to an election.^{4/} Similarly, it does not appear that the Assistant Secretary, in finding that the petition filed by AFGE was timely, acted without reasonable justification in the circumstances of the case, again noting that the decision only precludes the prematurely extended agreement from serving as a bar to an election.

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

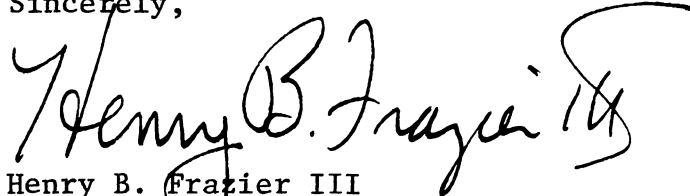
^{4/} In so ruling, however, we do not adopt the additional reasoning of the Assistant Secretary that the agreement automatically renewed in 1972 without addition of a grievance procedure complying with section 13 of the Order could not constitute an agreement bar. See General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333, FLRC No. 74A-9 (May 9, 1975), Report No. 68, wherein the Council, citing and quoting from its decision in Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-4939(GA), FLRC No. 74A-8 (Mar. 17, 1975), Report No. 65, and applying the principles enumerated therein, stated as follows:

[I]t is clear that the alleged failure of the parties to negotiate grievance procedures that conformed in certain respects to section 13(a) of the Order as amended would not be sufficient to invalidate the parties' agreements for the purpose of asserting them as bars to an election unless it could be shown that the Assistant Secretary's decision in confirming the existence of the bars would somehow "give effect to" the alleged nonconforming provisions. However, nothing has been presented by the agency, nor is there anything in the record, to show that the conformity of the negotiated grievance procedures herein to section 13 of the Order was relevant to the agreement bar issues which were before the Assistant Secretary. [Emphasis in original.]

fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. A. Smith
VA

R. J. Malloy
AFGE

National Aeronautics and Space Administration, Lyndon B. Johnson Space Center, Houston, Texas, Assistant Secretary Case No. 63-6138(GA). The Assistant Secretary, upon an application for decision on grievability by Local 2284, American Federation of Government Employees, AFL-CIO (AFGE), found, contrary to the Acting Regional Administrator (ARA), that a grievance filed by AFGE under a provision in the parties' negotiated agreement (which incorporated therein the requirements of section 12(a) of the Order), was not grievable under that agreement provision. Accordingly, the Assistant Secretary granted the activity's request for review seeking reversal of the ARA's Report and Findings on Grievability and dismissed AFGE's application. AFGE appealed to the Council, contending (1) that the Assistant Secretary's decision raised a major policy issue, and (2) that the union sought the inclusion of the subject provision in the parties' agreement with the intent that grievances could be submitted concerning violations of specific regulations thereunder.

Council action (March 8, 1977). As to (1), the Council determined that AFGE's appeal failed to establish that the Assistant Secretary's decision was inconsistent with either applicable Council precedent or with the purposes and policies of the Order; and as to (2), that the union's contentions in that regard did not present any basis for Council review. The Council therefore held that because the decision of the Assistant Secretary did not present a major policy issue, and since AFGE neither alleged, nor did it appear, that the decision was arbitrary and capricious, AFGE's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, the Council denied AFGE's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 8, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: National Aeronautics and Space
Administration, Lyndon B. Johnson
Space Center, Houston, Texas, Assistant
Secretary Case No. 63-6138(GA), FLRC
No. 76A-115

Dear Mr. Mulholland:

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

In this case, as described in the Report and Findings on Grievability, a grievance was filed under the negotiated grievance procedure of an existing agreement alleging that the National Aeronautics and Space Administration, Lyndon B. Johnson Space Center, Houston, Texas (the activity), denied a unit employee special consideration for repromotion as provided in the Federal Personnel Manual (FPM) and the NASA Merit Promotion Plan. The activity issued a formal rejection of the grievance on the basis that it did not come within the scope of the negotiated grievance procedure. American Federation of Government Employees, Local 2284, AFL-CIO (AFGE), the exclusive representative, then filed an application for decision on grievability.

The Acting Regional Administrator (ARA), in the Report and Findings on Grievability, concluded that the matter raised in the grievance was

covered under Article 2^{1/} and Article 29, Section 7^{2/} of the parties' negotiated agreement, and was therefore grievable.

The Assistant Secretary, upon consideration of the activity's request for review seeking reversal of the ARA's grievability determination, concluded that the matter was not grievable under the parties' negotiated agreement. In so concluding, the Assistant Secretary stated:

The [ARA], in reaching this conclusion that the instant matter was grievable, relied, in substantial part, on the wording of Article 29, Section 7, of the parties' agreement. However, the record clearly shows that the Activity herein suggested to [AFGE] that it would accept a grievance filed under Article 29, Section 7 (a fact the [ARA] was not made aware of), but felt the matter not grievable under Article 2, the article under which [AFGE] was filing. [AFGE], however, indicated that it chose to file under Article 2 only, and I cannot agree that the instant matter is grievable under the provisions of that article. In this regard, the Federal Labor Relations Council has recently held that: "Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements." Department of the Air Force, Scott Air Force Base, FLRC No. 75A-101.^{3/} Under these circumstances, I find

1/ Article 2 of the parties' negotiated agreement, entitled Restrictions of Law, Regulations, and Executive Order 11491, As Amended, provides:

It is agreed and understood by the EMPLOYER and the UNION that, in the administration of all matters covered by this Agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published NASA policies and regulations in existence at the time the Agreement was approved; and by subsequently published NASA policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

2/ As found by the ARA, Section 7 of Article 29, Reduction in Force, states in pertinent part:

An employee demoted in NASA in a reduction in force will be given special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means.

3/ Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96.

that the mere inclusion of the exact words of Section 12(a) of the Order in Article 2 of the parties' negotiated agreement, without evidence to show that the parties meant thereby to do more than fulfill what was required by the Order, is not sufficient to serve as a basis of a grievance under the negotiated agreement. [Emphasis in original; footnote added.]

Accordingly, the Assistant Secretary granted the activity's request for review seeking reversal of the ARA's Report and Findings on Grievability and dismissed AFGE's application.

In your petition for review on behalf of AFGE, you allege that the decision of the Assistant Secretary raises the following major policy issue: "[T]he decision limits unilaterally the scope of the negotiated grievance and arbitration procedure and such limitation should be done through the collective bargaining process." In this regard, you assert that the inclusion of Article 2 in the agreement was the result of negotiation between the parties, and the requirement of section 12 of the Order that such language be included does not make it any less a part of the agreement. You further contend that the union sought the inclusion of Article 2, as it was their intent that grievances could be submitted on violations of specific regulations under that Article.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to the alleged major policy issue, in the Council's view, the Assistant Secretary's determination that Article 2 of the parties' negotiated agreement was insufficient to serve as a basis of a grievance under the negotiated agreement in the circumstances of this case presents no basis for Council review. In this regard, your appeal fails to establish that the Assistant Secretary's decision herein was inconsistent either with applicable Council precedent^{4/} or with the purposes and

^{4/} Thus, in Scott Air Force Base (supra, n. 3), the Council, in a footnote to its decision denying review of the union's exceptions to an arbitrator's award, stated:

The theory which appears to underlie the union's contention is that by operation of section 12(a) of the Order, which is incorporated in . . . the subject agreement, the coverage and scope of the negotiated grievance procedure is extended to include grievances alleging violations of all laws, regulations of appropriate authorities and policies, including agency policies and regulations. However,

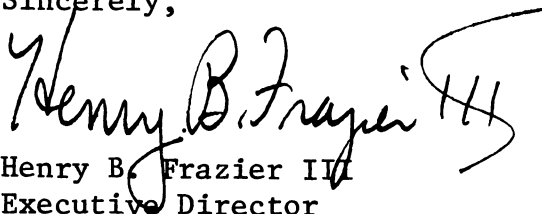
(Continued)

policies of the Order. Nor is any basis for Council review presented by your further contentions with respect to the union's intentions by the inclusion of Article 2. Such a contention, in the circumstances of this case, constitutes, in essence, nothing more than a disagreement with the Assistant Secretary's finding, "without evidence to show that the parties meant thereby to do more than fulfill what was required by the Order"

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. A. Sjoberg
NASA

(Continued)

section 13 of Executive Order 11491 provides "[t]he coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." [Emphasis added.] The union's theory concerning the interpretation of section 12(a) of the Order would render section 13 meaningless. The scope of the negotiated grievance procedure is to be negotiated by the parties. Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements. [Emphasis in original.]

See also, Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Kane, Arbitrator), FLRC No. 76A-31 (Oct. 22, 1976), Report No. 114.

IAFF Local F-103 and U.S. Army Electronics Command. The dispute involved the negotiability under the Order of certain provisions in the local parties' agreement, which the agency head determined to be nonnegotiable and disapproved during review of that agreement pursuant to section 15 of the Order. The provisions in question related (1) to the assignment or limitations on the assignment of particular tasks or duties to the fire department employees in the bargaining unit; and (2) to the temporary performance by driver-operators and fire-fighters of the respective duties of crew chiefs and driver-operators during the temporary absences of the latter employees.

Council action (March 22, 1977). As to (1), the Council, distinguishing the disputed provisions in the instant case from those in Tidewater, 1 FLRC 431 (July 29, 1973), relied upon by the agency, found, contrary to the agency's contentions, that the provisions here involved were not violative of section 12(b)(5) of the Order, but, rather, concerned job content which falls within the ambit of section 11(b) on which an agency may but is not required to bargain. Likewise, as to (2), the Council found, contrary to the agency's assertions, that the disputed provisions were not violative of section 12(b)(1) or (2) of the Order, but concerned the job content of the designated employees, which is outside the agency's obligation to bargain under section 11(b) of the Order. However, as to both (1) and (2), the Council further found, consistent with established precedent, that since the local activity had negotiated and reached agreement on the subject provisions, thereby exercising its option to negotiate on these matters, the agency was foreclosed during the section 15 review process from determining the disputed provisions to be nonnegotiable under section 11(b) of the Order. Accordingly, based on reasons detailed in its decision, and pursuant to section 2411.28 of its rules and regulations, the Council held that the agency's determination as to the nonnegotiability of the provisions here involved (which provisions had been negotiated and agreed to by the local parties) was improper and must be set aside.

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

IAFF Local F-103

and

FLRC No. 76A-19

U.S. Army Electronics Command

DECISION ON NEGOTIABILITY ISSUES

Background

Local F-103 of the International Association of Fire Fighters (union) represents an activity-wide unit of firefighting personnel at the U.S. Army Electronics Command, Fort Monmouth, New Jersey. Following negotiations, the local parties entered into an agreement, subject to agency approval under section 15 of the Order.^{1/} The U.S. Army Materiel Command disapproved of various provisions in the agreement as violative of the Order; and, upon referral, the Department of Defense (agency) upheld the Materiel Command's position as to the nonnegotiability of the provisions here involved, which provisions are detailed in the "Opinion" below.

The union thereupon filed a petition for review with the Council under section 11(c)(4) of the Order, disagreeing with the agency's determination that the subject provisions violate the Order. The agency did not file a separate statement of position, but relied on the reasons set forth in its prior determination of nonnegotiability.

Opinion

The provisions in dispute are contained in sections 1, 5, 7 and 8 of Article XV of the negotiated agreement, under the heading "Working Conditions." The agency asserts, contrary to the union, that sections 1

^{1/} Section 15 of the Order provides in relevant part as follows:

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

and 5 of the agreement violate section 12(b)(5) of the Order, and that sections 7 and 8 of the agreement violate section 12(b)(1) and (2) of the Order.^{2/} We shall consider these respective issues below.

1. Sections 1 and 5 of agreement. The contested (underscored) provisions of sections 1 and 5 of the local agreement are as follows:

Section 1. The following areas of responsibility and limitations are outlines for the delineation of Fire Fighter work assignments.

A. Fire House The Facilities Engineer is responsible for the maintenance of the building in accordance with the AR-420 series.

B. Snow Removal Fire Department personnel will be responsible for assuring that the apron in front of the firehouse and all fire hydrants are maintained free of snow to provide egress for fire apparatus.

C. Grass Cutting Fire Department personnel will be responsible for cutting the grass in the immediate vicinity of the firehouse.

D. Fire Hydrants The painting of fire hydrants is the responsibility of the fire department. Work clothes and materials to perform this task will be furnished by Facilities Engineer. Assistance will be provided by Facilities Engineer whenever possible. Every effort will be made to furnish this support when resources are available.

E. Fire Boxes The painting and maintenance of fire boxes is not the responsibility of the Fire Department.

.

2/ Section 12(b)(1), (2) and (5) of the Order provides in relevant part:

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

.

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

(1) to direct employees of the agency;

(2) to . . . assign . . . employees in positions within the agency . . . ;

.

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

Section 5. The Employer recognizes that the primary functions of the Unit Employees are Fire Fighting/Aircraft Rescue and Structural Fire Prevention.

A. Fire Department Personnel will not perform trouble shooting duties for the Facilities Engineer. However, the Fire Department will respond on any emergency that endangers personnel and Government property.

The agency, relying on the Council's decision in the Tidewater case,^{3/} contends that these provisions improperly restrict management's retained right to determine the "personnel" by which its operations are to be conducted, under section 12(b)(5) of the Order and are therefore nonnegotiable. We cannot agree with the agency's position.

In the Tidewater case, the Council was concerned with proposals which would have affected the agency's discretion to assign supervisors, military personnel and other nonbargaining unit personnel to perform work historically performed by bargaining unit employees; and would have affected the agency's discretion to contract or transfer out work normally performed by personnel in the bargaining unit. The Council ruled that these proposals, in substance, sought to establish a "work-preservation" principle for bargaining unit employees, which is proscribed by section 12(b)(5) of the Order. In so ruling, the Council defined the term "personnel" as used in section 12(b)(5) to mean:

. . . the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations. [Emphasis in original.]

Applying this definition to the proposals in that case, the Council held that the proposals would limit management's judgment in determining the composition of the total body of persons, whether including contract, military, supervisory or other nonunit personnel, who would be used to perform the work normally performed in the unit and would thereby improperly constrict management in its right to determine the personnel who would conduct the agency operations there involved.

The decision in Tidewater clearly is not dispositive in the instant case. Here, unlike in Tidewater, the disputed provisions seek neither to establish

^{3/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

a "work-preservation" principle for the employees in the bargaining unit, nor in any other manner to prevent the assignment of work normally performed by firefighting employees to any group of nonunit personnel. Instead, as is apparent from the language of the agreement and the expressed intent of the union in its appeal, the subject provisions simply relate to the assignment or limitations on the assignment of particular tasks or duties to the fire department employees in the unit. That is, the provisions merely identify and describe specific work assignments—building maintenance, snow removal, grass cutting, painting, "trouble shooting," and the like—which unit employees will or will not be required to perform under the terms of the negotiated agreement.

In substance, therefore, the provisions in question principally concern the assignment of duties to positions and employees or, in other words, the job content of the fire department employees in the bargaining unit. And, as the Council has consistently indicated,^{4/} such provisions fall not within the ambit of section 12(b), but within the meaning of the phrases agency "organization" and "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" in section 11(b) of the Order.^{5/} While, under section 11(b), the agency may but is not required to bargain on job content, here the agency's local bargaining representative exercised such option by negotiating and entering into an agreement on the disputed provisions. Accordingly, consistent with established Council precedent, the agency was without authority during the section 15 review process to determine these provisions nonnegotiable on the basis of section 11(b) of the Order.^{6/}

For the foregoing reasons, we find that the agency's determination that sections 1 and 5 of the local agreement are nonnegotiable is improper and must be set aside.

4/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36]. See also AFGE Local 1738 and VA Hospital, Salisbury, North Carolina, FLRC No. 75A-103 (July 8, 1976), Report No. 107, n. 4; American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, FLRC No. 74A-67 (Nov. 28, 1975), Report No. 92, n. 10; and AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75, n. 4.

5/ Section 11(b) of the Order provides in relevant part:

. . . the obligation to meet and confer does not include matters with respect to the . . . [agency's] organization; . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

6/ E.g., Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110, at 4-5 of Council decision; AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75, at 4-5 of Council decision.

2. Sections 7 and 8 of agreement. These provisions of the agreement, which are here in question, read as follows:

Section 7. In the absence of a Crew Chief, the duties of the Crew Chief will be assumed by qualified GS-5 driver-operator on a rotation basis.

Section 8. In the absence of a Driver-Operator, the duties of the driver will be assumed by qualified Fire Fighters on a rotation basis.

The agency asserts that the above provisions would negate management's authority "to direct employees of the agency" and to "assign . . . employees in positions within the agency" in violation of sections 12(b)(1) and 12(b)(2) of the Order. We find these contentions to be without merit.

The subject provisions plainly relate to the temporary performance by driver-operators and firefighters of the respective duties of crew chiefs and driver-operators during the temporary absences of the latter employees. Contrary to the agency's contentions, nothing in the provisions constricts the agency's right to direct employees on the job, or limits the agency's authority to make assignments of employees in agency positions under section 12(b) of the Order.^{7/}

As already mentioned, the specific duties to be performed by employees, i.e., the job content of such employees, are matters concerning which an agency may but is not required to bargain under section 11(b) of the Order. As the local activity negotiated and reached agreement on the subject provisions concerning the assignment of duties, thereby exercising its option to negotiate on these matters, the agency was foreclosed during the section 15 review process from determining the disputed provisions to be nonnegotiable under section 11(b) of the Order.^{8/}

Accordingly, we hold the agency's determination that sections 7 and 8 of the local agreement are nonnegotiable is unsupported and must be set aside.

Conclusion

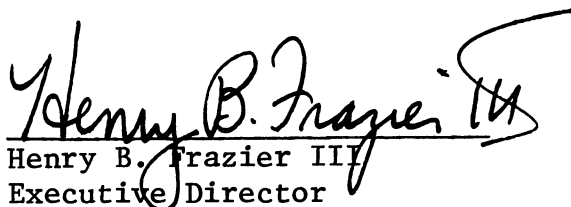
Based on the reasons detailed above, and pursuant to section 2411.28 of the Council's rules and regulations, we find that the agency's determination as to the nonnegotiability of the provisions here involved (which provisions

^{7/} See cases cited at n. 4 supra; cf. Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75, at 6-8 of Council decision.

^{8/} See cases cited at n. 6 supra.

had been negotiated and agreed to by the parties at the local bargaining level) was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of these provisions. We decide only that, in the circumstances here presented, the provisions were properly subject to negotiation by the parties concerned under section 11(a) of the Order and, once agreed upon, could not be disapproved under section 15 of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 22, 1977

American Federation of Government Employees, AFL-CIO, Local 41, A/SLMR No. 701. The Assistant Secretary, upon a complaint filed by the agency (Headquarters, Office of the Secretary, Department of Health, Education, and Welfare), determined that the union violated section 19(b)(6) of the Order by refusing to negotiate with the agency because a member of the bargaining unit was serving as a member of the management negotiating team. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue. The union also requested a stay of the Assistant Secretary's decision and order.

Council action (March 22, 1977). The Council held that the union's petition for review failed to meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of the union's appeal. The Council likewise denied the union's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 22, 1977

Mr. James R. Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government
Employees, AFL-CIO, Local 41, A/SLMR
No. 701, FLRC No. 76A-119

Dear Mr. Rosa:

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

In this case, the Department of Health, Education, and Welfare, Office of the Secretary, Headquarters (the agency) filed an unfair labor practice complaint alleging that the American Federation of Government Employees, Local 41, AFL-CIO (the union) had violated section 19(b)(6) of the Order by its refusal to continue the negotiation of a basic agreement in which the parties had been engaged during the previous 5 months. As found by the Assistant Secretary, in February 1973, discussions commenced between the agency and the union with respect to ground rules for negotiation of a basic agreement. In March of 1973, a budget analyst, whose name had previously appeared on an agency list of employees eligible for inclusion in the bargaining unit, was recommended to the agency's chief negotiator by the Comptroller as a possible member of the management negotiating team. This budget analyst volunteered to serve and did serve as a member of the management negotiating team after March 1973. A ground rules agreement was signed in May 1973, and negotiation of the basic agreement began in November 1974 and continued until April 21, 1975, when the dispute giving rise to this unfair labor practice complaint arose. During this period, the budget analyst attended 53 of the 56 negotiating sessions which the parties held. Her primary role was to act as a resource person and render budget information on the cost of contract proposals made by both the agency and the union. At the session which gave rise to the instant complaint, the employee took exception to a statement made by the union's spokesman and chief negotiator, who then objected to her participation as a management representative on the basis that she was a member of the bargaining unit. A dispute then arose as to whether the employee was or was not a management official, and the union's chief negotiator thereafter refused to resume negotiations, saying that he could not continue

to negotiate until such time as the employee was removed from the agency's negotiating team, whereupon he left the room.*

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge, determined that the union violated section 19(b)(6) of the Order by refusing to negotiate because a bargaining unit employee was serving as a member of the management negotiating team. In this regard, the Assistant Secretary noted that:

[T]here is no evidence that [the employee's] presence on the management's negotiating team gave the [agency] any specific or unfair advantage or worked to the [union's] disadvantage. Moreover, there is no evidence that [the employee] was actively engaged in the negotiating process or was involved in the development or implementation of management policies in connection therewith. Rather, the evidence establishes that [the employee] served only as a resource person rendering budget information and that the [union] voiced no objection to her role on the management negotiating team during 56 negotiating sessions. Under these circumstances, I find that [the employee's] presence on the management negotiating team did not justify the [union's] refusal to negotiate in this matter. [Footnotes omitted.]

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

Whether agencies and labor organizations in the absence of specific empirical evidence of conflicts of interest are each free to utilize the talents of agency employees for collective bargaining negotiation purposes without regard to whether agency employees are part of agency management or part of an exclusive bargaining unit i.e., may agency management utilize bargaining unit members as part of their bargaining team, and may labor organizations use management officials and supervisors as part of their collective bargaining team in the absence of empirical evidence of the existence of actual conflict of interest considerations.

In addition, you allege that:

[M]ajor policy issues are raised by the Assistant Secretary's decision to deviate from private sector law by requiring [the union] to present empirical evidence of actual conflicts of interest and

*/ Upon the filing of a clarification of unit petition, the Assistant Secretary subsequently determined that the employee was not a management official. Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596 (Dec. 10, 1975).

by his failure to recognize the private sector's exception to the general rights of parties to choose freely their bargaining representatives in those cases in which bargaining team members possess a dual status i.e. represent one side of the table while having interests on both sides of the table.

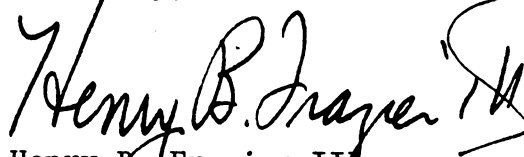
In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision in the circumstances of this case. With regard to your alleged major policy issue concerned generally with the use by agency management of bargaining unit members as part of its bargaining team, in the Council's view, no major policy issue is thereby presented warranting Council review. In this regard, we note particularly the Assistant Secretary's finding that there was no evidence either that the employee's presence on management's negotiating team gave the agency any specific or unfair advantage or worked to the union's disadvantage or that the employee was actively engaged in the negotiating process or was involved in the development or implementation of management policies in connection therewith, but that the evidence established that the employee served only as a resource person rendering budget information. As to your related contention that the Assistant Secretary's decision deviated from private sector law, your appeal fails to establish any clear, unexplained inconsistency with prior decisions of the Assistant Secretary and the Council in the circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier II
Executive Director

cc: A/SLMR
Labor

M. B. Jones
HEW

NASA, John F. Kennedy Space Center, Florida, Assistant Secretary Case No. 42-3378(GA). The Assistant Secretary determined that the request for review filed by the individual grievant, Ms. Dolores M. Hickman, seeking reversal of the Regional Administrator's dismissal of her Application for Decision on Grievability, was untimely filed, and therefore denied the request for review. Ms. Hickman appealed to the Council, contending, in effect, that the Assistant Secretary's decision appeared arbitrary and capricious or presented a major policy issue.

Council action (March 22, 1977). The Council held that Ms. Hickman's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of Ms. Hickman's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 22, 1977

Ms. Dolores M. Hickman
271 Palmetto Avenue
Merritt Island, Florida 32954

Re: NASA, John F. Kennedy Space Center,
Florida, Assistant Secretary Case
No. 42-3378(GA), FLRC No. 76A-135

Dear Ms. Hickman:

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

In this case, the Assistant Secretary denied your request for review seeking reversal of the Regional Administrator's dismissal of your Application for Decision on Grievability. Specifically, the Assistant Secretary noted that you were advised that a request for review had to be received by him not later than the close of business on September 29, 1976, and that your request for review postmarked on September 28, 1976, was received subsequent to September 29, 1976. The Assistant Secretary concluded that since your request for review was filed untimely, the merits of your case had not been considered and the request for review was denied.

In your petition for review, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue in that the Assistant Secretary's denial of your request for review of the Regional Administrator's decision "was not in accordance with [Section] 206.4(a)" of his regulations.^{1/} In this regard, you assert that the request for review "was deposited in the United States mail on September 28, 1976, which was a day before the required date of service"

1/ Such regulation provides as follows:

§ 206.4 Service of pleading and other papers under this chapter.

(a) Method of service. Notices of hearing, decisions, orders and other papers may be served personally or by registered or certified mail or by telegraph. When service is by mail, the date of service shall be the day when the matter served is deposited in the United States mail.

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

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of his regulations, and your petition presents no persuasive reasons to show either that the Assistant Secretary was without authority to establish such regulations, or that his application thereof, in the circumstances of this case, was inconsistent with the purposes and policies of the Order. Nor does it appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. Council of Customs Locals, AFGE, Locals 2652, 2768, and 2899, AFL-CIO, Assistant Secretary Case No. 30-5569(CO), FLRC No. 74A-72 (Feb. 5, 1975), Report No. 63.^{2/}

^{2/} In so ruling, the Council notes, as it has previously, that "[requests] for review filed with the Assistant Secretary must of course be filed pursuant to and are governed by his regulations," Social Security Administration, Baltimore, Maryland, Assistant Secretary Case No. 22-6272(AP) FLRC No. 76A-33 (July 27, 1976), Report No. 109, and that he, "as the issuer of [such] regulation[s] is responsible for [their] interpretation and implementation," Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412(RO), FLRC No. 73A-60 (Oct. 30, 1974), Report No. 59. The Assistant Secretary has consistently interpreted and applied his regulations in circumstances such as here involved so that "[t]he controlling date is the date of receipt of the request for review by the Assistant Secretary and not the date of mailing by the party filing the request for review." See, e.g., United States Air Force, Aeronautical Systems Division, Wright-Patterson AFB, Ohio, Assistant Secretary Case No. 53-6147 (Feb. 22, 1973), Rulings on Requests for Review of the Assistant Secretary, Vol. 1, p. 267. In this regard, your assertion to the contrary, based upon Section 206.4(a) of the Assistant Secretary's rules, is misplaced. Thus, pursuant to Section 205.6(b) of the Assistant Secretary's rules, the filing of your request for review was governed by Section 202.6(d) which provides, in pertinent part:

The petitioner or party requesting intervention may obtain a review of such dismissal or denial by filing a request for review with the Assistant Secretary within ten (10) days of service of the notice of such action.

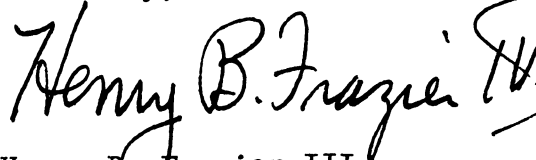
As to Section 206.2 to which you referred, it provides, in pertinent part:

Whenever a party has the right or is required to do some act pursuant to these regulations within a prescribed period after service of a

Since it does not appear that the Assistant Secretary's decision is arbitrary and capricious or presents a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

S. S. Devries
NASA

(Continued)

notice or other paper upon him and the notice or paper is served on him by mail, five (5) days shall be added to the prescribed period

Finally, Section 206.1 of the Assistant Secretary's rules provides, in pertinent part:

When these regulations require the filing of any paper, such document must be received by the Assistant Secretary or the office or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing

To avoid any confusion, the Regional Administrator's decision dismissing your application stated the precise date by which your request for review "must be received by the Assistant Secretary of Labor for Labor-Management Relations, U.S. Department of Labor, Washington, D.C. 20216." As found by the Assistant Secretary, your request for review was received subsequent to the last day it could have been timely filed.

Department of the Air Force, Headquarters Tactical Air Command, Langley Air Force Base, Virginia, A/SLMR No. 742. The Assistant Secretary, noting particularly that no exceptions were filed, adopted the findings, conclusions and recommendations of the Administrative Law Judge, and dismissed the unfair labor practice complaint against the activity. The complaint alleged that the activity violated section 19(a)(1) of the Order by denying the employee/grievant the right to be represented by her exclusive representative at a discussion of the grievance. Ms. Joan Greene appealed to the Council on behalf of the employee, contending, among other things, that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (March 22, 1977). The Council held that Ms. Greene's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Ms. Greene neither alleged, nor did it appear, that any major policy issues were presented. Accordingly, the Council denied review of Ms. Greene's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 22, 1977

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: Department of the Air Force, Headquarters
Tactical Air Command, Langley Air Force
Base, Virginia, A/SLMR No. 742, FLRC
No. 77A-3

Dear Ms. Greene:

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

In this case, an unfair labor practice complaint was filed against the Department of the Air Force, Headquarters Tactical Air Command, Langley Air Force Base, Virginia (the activity), alleging that the activity violated section 19(a)(1) of the Order by denying an employee union representation at a grievance meeting.

The Assistant Secretary, "noting particularly that no exceptions were filed,"^{1/} adopted the findings, conclusions, and recommendations of the

1/ In this connection, the Council, in Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108, stated, in pertinent part:

While the Council's rules do not explicitly preclude the filing of an appeal . . . under [such] circumstances, in our view, such practice is not consistent with the orderly processing of adjudicatory matters under the Order. That is, the needs of the Council in rendering an informed judgment in a contested matter would be best served by a party's filing exceptions with the Assistant Secretary, and by the Assistant Secretary's opportunity thereby to consider and pass upon such exceptions, before an appeal is submitted for consideration by the Council.

We reaffirm our previously expressed view, as set forth above, that exceptions should be filed with the Assistant Secretary by a party contesting the findings, conclusions, or recommendations of the ALJ, as here, so that he may consider them before an appeal is filed with the Council. See U.S. Department of the Army, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 720, FLRC No. 76A-123 (Jan. 18, 1977), Report No. 121.

Administrative Law Judge (ALJ), noting the ALJ's finding that discussion of the grievance between the grievant and the activity stopped when the grievant unilaterally determined that it should not continue without her representative and that the grievant's representative was present at all subsequent discussions of the grievance. Under these circumstances, the Assistant Secretary concluded that "the evidence establishes that the [activity] did not, in fact, deny the [employee/grievant] the right to be represented by her exclusive representative at a discussion of the grievance . . .," and ordered that the complaint be dismissed.

In the petition for review which you filed on behalf of the employee, you allege, insofar as is pertinent to the findings of the Assistant Secretary, that the decision of the Assistant Secretary is arbitrary and capricious because "the facts and truth were suppressed during the investigation and hearing" ^{2/}

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that any major policy issues are presented.

With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, the Council notes particularly the Assistant Secretary's finding, based upon the entire record in the subject case, that "the evidence establishes that the [activity] did not, in fact, deny the [employee/grievant] the right to be represented by her exclusive representative" Thus, your contention, in effect, constitutes nothing more than disagreement with the Assistant Secretary's contrary determination and, therefore, presents no basis for Council review.

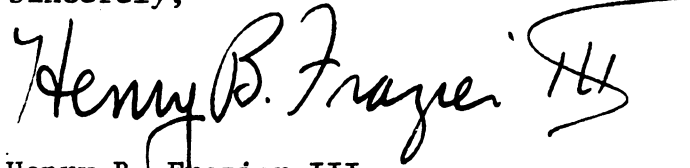
^{2/} You also assert in your appeal that it was inequitable for the activity to be provided with "free legal counsel at the taxpayers' expense" while the employee was not, and that lie detector tests should have been administered to the parties and witnesses involved in this case. However, it does not appear from the documents filed with your appeal to the Council herein that such issues were presented to or passed upon by either the ALJ or the Assistant Secretary in the instant unfair labor practice proceeding. Accordingly, and apart from other considerations, they provide no basis for your appeal. In this regard, section 2411.51 of the Council's rules provides, in pertinent part:

Consistent with the scope of review set forth in this part, the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that any major policy issues are presented, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. E. K. Brehl
Air Force

Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio, A/SLMR No. 706. The Assistant Secretary, upon an amended petition filed by the Area IV Local Committee, Cleveland, Ohio, American Federation of Government Employees, AFL-CIO (AFGE), seeking to consolidate eight separate units of employees of the activity (represented exclusively by constituent member locals of AFGE) into a single bargaining unit, and contrary to the activity's contention that the proposed consolidated unit was inappropriate because it excluded the unrepresented employees at a particular district office of the activity, found that the proposed consolidated unit was appropriate. Following an election in the consolidated unit, and certification of AFGE as the exclusive representative, the agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues.

Council action (March 23, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 23, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
6401 Security Boulevard
Room G-2608, West High Rise Building
Baltimore, Maryland 21235

Re: Department of Health, Education, and
Welfare, Social Security Administration,
Bureau of Field Operations, Region V,
Area IV, Cleveland, Ohio, A/SLMR No. 706,
FLRC No. 76A-151

Dear Mr. Becker:

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

In this case, as found by the Assistant Secretary, the Area IV Local Committee, Cleveland, Ohio, American Federation of Government Employees, AFL-CIO (AFGE) sought to consolidate eight separate units consisting of employees of the Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio (the activity) into a single bargaining unit. These units were represented exclusively by constituent member locals of AFGE. The proposed consolidated unit in the union petition as amended excluded, among others not relevant to this appeal, the unrepresented employees at the activity's District Office in Lorain, Ohio. The employees of the Lorain District Office were the only unrepresented employees within the activity at the time the amended petition for consolidation was filed. (These employees, a few months earlier, had voted in a representation election not to be exclusively represented in a separate unit.) The activity contended in the instant case that the proposed consolidated unit was inappropriate because it excluded the employees of the Lorain District Office, the activity asserting, among other things, that the Order encourages the inclusion of unrepresented employees along with currently represented employees within the context of a unit consolidation proceeding.

With regard to the activity's contention that the proposed consolidated unit was inappropriate because it excluded the unrepresented employees of the Lorain District Office, the Assistant Secretary found that the Report and Recommendations of the Council which accompanied the issuance of E.O. 11838 indicated clearly that "the special procedure established

by the Council for consolidation is applicable only to the consolidation of existing exclusively recognized units." In summary, he concluded:

. . . I find that their inclusion in the proposed consolidated unit would be inconsistent with the purposes and policies of the Order. Under these circumstances, and noting also that no timely petition had been filed raising a question concerning representation with regard to the employees of the Lorain District Office, I conclude that the subject petition to consolidate existing exclusively recognized units was not rendered defective by virtue of the fact that it excluded the employees of the Lorain District Office.
[Footnote omitted.]

The Assistant Secretary, again relying on the Council's Report and Recommendations, further concluded that the employees in the proposed consolidation shared a clear and identifiable community of interest and that the creation of such a comprehensive unit would promote effective dealings and efficiency of agency operations and would be consistent with the policy of the Council. Following an election in the consolidated unit so found appropriate, excluding the Lorain employees, the union was certified as the exclusive representative of that unit.

In your petition for review on behalf of the activity, you allege, in effect, that the Assistant Secretary erred in finding appropriate the proposed consolidated unit which did not include the unrepresented Lorain employees, and that his decision in this case raises the following major policy issues:

- A. Is it the intent of the Order to exclude all unrepresented employees from unit consolidation elections?
- B. If currently unrepresented employees may be included in consolidated units, what conditions should apply?
- C. Should election bars apply if unrepresented employees may be included in a unit consolidation election?
- D. If unrepresented employees may be included in consolidation petitions, would such a petition constitute a question concerning representation which would preclude negotiations pending its final disposition?

In support of these allegations, you assert that it was the intent of the Council, as demonstrated by the Council's 1975 Report and Recommendations,^{1/} that unrepresented employees be provided with an opportunity to vote in unit consolidation elections. In this regard, you quote the following sentence from the Council's Report and Recommendations:

1/ Labor-Management Relations in the Federal Service (1975), at 37.

Where a labor organization seeks a unit which includes its existing units together with employees who are currently unrepresented, the unrepresented employees should have the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented in that unit by any intervening labor organization. [Emphasis supplied by SSA.]

You also rely upon the Council's conclusion that "election bars" should not apply in consolidation proceedings, inferring therefrom that "it is clear that the inclusion of unrepresented employees [in consolidation proceedings] was contemplated."^{2/} You also assert that the Assistant Secretary's "absolute exclusion of unrepresented employees appears to represent an overly narrow interpretation of section 10(d)(4) of the Order and the Council's Report and Recommendations upon which it was based"

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not present any major policy issues, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to the major policy issues which you allege are raised by the Assistant Secretary's decision, the first three relate to the propriety of the exclusion of unrepresented employees from a consolidated unit. The fourth relates to the effect that inclusion of unrepresented employees in a consolidation petition may have upon the parties' bargaining obligation, an issue which was neither raised before the Assistant Secretary nor considered by him in reaching his decision herein and which therefore presents no basis for Council review. As to the first three alleged major policy issues, in the Council's view, where, as in the circumstances of this case, a petition seeks to consolidate existing bargaining units excluding unrepresented employees and the Assistant Secretary finds the proposed consolidated unit appropriate, such decision does not present the broad major policy issues which you allege. In this regard, we note particularly, as did the Assistant Secretary, that the consolidation procedure provided in the amended Order is applicable to

^{2/} In more detail, the Council's Report and Recommendations stated, in pertinent part, that:

[P]arties should be free to consolidate units bilaterally notwithstanding when a valid election might have been held That is, "election bar" . . . rules should not apply to the parties when they seek bilaterally to consolidate existing units. Labor-Management Relations in the Federal Service (1975), at 36.

units currently represented by the labor organization seeking consolidation.^{3/} More specifically, the Council's 1975 Report and Recommendations provides:

The procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation. Where a labor organization seeks a unit which includes its existing units together with employees who are currently unrepresented, the unrepresented employees should have the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented in that unit by any intervening labor organization.

Your reliance upon the second sentence quoted above in asserting that the Assistant Secretary's decision herein was in error is misplaced. This passage from the Council's Report and Recommendations describes the general approach which the Assistant Secretary should follow when a labor organization seeks to represent unrepresented employees and to include them in a proposed consolidated unit. That is, the options afforded such unrepresented employees in such circumstances differ from those accorded represented employees in a consolidation proceeding. However, in the circumstances in this case, the union, as already mentioned, sought only to consolidate existing bargaining units; unrepresented employees under the union's petition as amended were not sought to be included in the consolidated bargaining unit.^{4/}

Furthermore, your reliance upon the inapplicability of election bars in consolidated proceedings presents no major policy issue in the circumstances of this case because the Assistant Secretary's decision regarding the propriety of the proposed consolidated unit is not based upon the

^{3/} Section 10(a) of the Order provides for an agency to accord exclusive recognition to a labor organization, without an election, where the appropriate unit is established through the consolidation of existing exclusively recognized units represented by that organization, and, similarly, section 10(d)(4) provides for elections to determine whether a labor organization should be recognized as the exclusive representative of employees in a unit composed of employees in units currently represented by that organization or continue to be recognized in the existing separate units.

^{4/} Although the original petition filed by AFGE sought to include the unrepresented employees of the Lorain District Office in the proposed consolidated unit, the petition was subsequently amended to exclude the unrepresented employees of the Lorain District Office.

application of election bar rules.^{5/} Clearly, had the AFGE sought to represent the unrepresented employees and to include them in the proposed consolidated unit, election bar rules would not have prevented it from doing so.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Lowe
AFGE

^{5/} With respect to his reference to the absence of "a timely petition raising a question concerning representation with regard to the employees of the Lorain District Office," we do not construe that reference to imply that an election bar rule would have prevented their being provided the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented therein by any intervening union, if such request for inclusion of the unrepresented employees were before him. In this regard, as already mentioned, the Report specifically provides that:

Where a labor organization seeks a unit which includes its existing units together with employees who are currently unrepresented, the unrepresented employees should have the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented in that unit by any intervening labor organization.

U.S. Department of Commerce, National Ocean Survey, National Oceanic and Atmospheric Administration, A/SLMR No. 703. The Assistant Secretary, upon an application for decision on grievability and arbitrability filed by the National Marine Engineers Beneficial Association, AFL-CIO, found, contrary to the agency's position, that the grievance was arbitrable under the negotiated arbitration procedure in the parties' agreement. The agency appealed to the Council, contending that the decision of the Assistant Secretary presented a major policy issue and was arbitrary and capricious. The agency also requested a stay of the subject decision.

Council action (March 31, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issue, nor did it appear arbitrary and capricious. Accordingly, the Council denied review of the agency's appeal. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1977

Mr. C. A. Blake, Chief
Labor Management Relations Branch
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce
Rockville, Maryland 20852

Re: U.S. Department of Commerce, National
Ocean Survey, National Oceanic and
Atmospheric Administration, A/SLMR
No. 703, FLRC No. 76A-112

Dear Mr. Blake:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the union, in the above-entitled case.

This case concerns an Application for Decision on Grievability and Arbitrability filed by the National Marine Engineers Beneficial Association, AFL-CIO (MEBA), seeking a determination regarding the arbitrability of a grievance under a negotiated grievance procedure contained in a collective bargaining agreement between MEBA and the U.S. Department of Commerce, National Ocean Survey, National Oceanic and Atmospheric Administration (the activity). As found by the Assistant Secretary, the grievance involved the entitlement of engineer officers, employed on vessels of the activity, to quarters allowances for weekends while the vessels were in shipyards and the individuals in question were not actually performing work for the activity. After the grievance was pursued through the initial steps of the grievance procedure, the grievant sought to arbitrate the matter. The activity refused to arbitrate, asserting that the matter did not involve the interpretation or application of the parties' negotiated agreement but, instead, involved the application of an agency regulation (National Oceanic and Atmospheric Administration (NOAA) Finance Handbook, Chapter 13-06(2)(h)) which provides that "room and meal allowances will not be provided to employees who are ashore in an off-duty status." It argued that it never intended these regulations to be subject to interpretation under the negotiated grievance procedure. MEBA contended, in pertinent part, that the grievance involved the interpretation of Article III, Section 9 of the agreement,^{1/} inasmuch as that provision provided for the payment of quarters allowance when certain conditions had been met.

1/ Article III, Section 9(c)(4) (Room and Allowances) of the agreement provides, in pertinent part:

The Assistant Secretary found that "the instant dispute . . . clearly embodies the interpretation and application of Article III, Section 9 (c)(4) of the negotiated agreement" and, therefore, concluded that the grievance was arbitrable under the negotiated arbitration procedure contained in the parties' agreement. In so concluding, the Assistant Secretary, relying upon a number of Council decisions,^{2/} as well as the 1975 Report and Recommendations,^{3/} also stated:

. . . I find that where, as in this case, a party disputing the interpretation and application of a negotiated agreement introduces an agency regulation which deals with the same subject matter as the provision in the negotiated agreement, i.e., Chapter 13-06 of the NOAA Finance Handbook and Article III, Section 9 of the negotiated agreement, an arbitrator could consider such regulation in resolving a grievance arising under the agreement, whether or not the regulation was expressly incorporated in the agreement. [Emphasis in original.] Consequently, I reject the Administrative Law Judge's conclusion that an arbitrator would be precluded from interpreting an agency regulation which was not referenced or embodied in the negotiated agreement. [Footnote omitted.]

(Continued)

Employees shall be entitled to quarters allowances if they have notified the Commanding Officer/Master that one or more of the following conditions exist when the vessel is in port, and it is impossible for the Commanding Officer/Master to arrange for suitable quarters and the affected employees actually go ashore to sleep. . . . At all times when vessel is in drydock overnight and lodging with facilities, including heat, light, hot and cold running water and sanitary facilities, are not provided aboard the vessel, or by the shipyard nearby.

2/ In this regard, the Assistant Secretary cited, quoted and relied upon the following decisions: Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63; Bureau of Prisons and Federal Prison Industries, Inc., Washington, D.C. and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74; American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94; and Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96.

3/ Labor-Management Relations in the Federal Service (1975), at 42-44.

In your petition for review on behalf of the agency, you allege that the decision of the Assistant Secretary presents a major policy issue as to "[w]hether a valid regulation of the agency in effect prior to the existence of the relevant collective bargaining agreement between the parties, and not specifically incorporated by reference or otherwise in said agreement, is subject to the grievance and arbitration procedure contained therein." You further contend that the Assistant Secretary's decision is arbitrary and capricious in that: he has failed to satisfy the agency's right guaranteed by section 13(d) of the Order, as amplified in the Council's Crane decision (supra note 2), to a determination of the arbitrability of the issue inasmuch as he did not make a determination concerning the applicability of the agency's regulation to the issue but left such a determination to the arbitrator; he ignored the mandate of section 12(a) of the Order in that he made no specific findings concerning the relevance of the agency regulation to the provisions of the negotiated agreement; he has failed to consider or make any findings as to the agency's contentions that the parties herein never intended to make agency regulations subject to the negotiated grievance and arbitration procedure and that the agency's past practice has been to deny claims for quarters allowances for employees ashore in an off-duty status; he has failed to consider evidence presented by the activity concerning prevailing industrywide practice pertaining to the entitlement of crew members to quarters allowances; and he has erroneously relied on irrelevant Council decisions in reaching his decision to the prejudice of the agency.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present any major policy issue, nor does it appear arbitrary and capricious.

As to the alleged major policy issue, in the Council's view, noting particularly the Assistant Secretary's finding that the instant grievance involved the interpretation and application of the parties' negotiated agreement, specifically Article III, Section 9(c)(4), no major policy issue is raised warranting Council review. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his conclusion that the grievance herein was arbitrable. More particularly, as to your contentions that the Assistant Secretary acted in a manner inconsistent with the Order and the Council's Crane decision by failing to make a determination concerning the applicability and relevance of an agency regulation, noting that the Assistant Secretary resolved the issue before him as to whether the grievance was arbitrable under the negotiated arbitration procedure contained in the parties' agreement, it does not appear that the arbitrability determination

is inconsistent with the Order^{4/} or applicable Council decisions^{5/} in the circumstances of this case. With respect to your further contentions

4/ In so ruling, we note that the instant dispute arose under the terms of an agreement negotiated prior to the amendments made to section 13 of the Order by E.O. 11838 on February 6, 1975. Therefore, this agreement was negotiated at a time when the permissible scope of the negotiated grievance procedure and arbitration was restricted to grievances over the interpretation and application of the agreement and could not include grievances over agency regulations and policies, whether or not the regulations and policies were contained in the agreement.

However, as the Council noted in its Report and Recommendations leading to the 1975 amendments:

Under the present section 13 [prior to the 1975 amendments] arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation.

Thus, while such pre-1975 negotiated grievance procedures could not cover grievances over the interpretation and application of regulations, arbitrators, in resolving grievances over the interpretation and application of the negotiated agreement, should and did consider such regulations, as well as other relevant legal provisions, to ensure that their awards were consistent with such requirements. This obligation of arbitrators to consider such requirements continues to apply under the Order, as amended.

5/ In Crane, the Council held, in pertinent part, that when a dispute arises as to whether a grievance is on a matter subject to a negotiated grievance procedure and that dispute is referred to the Assistant Secretary, he must resolve it. Further, the Council held that in resolving such a dispute the Assistant Secretary must consider the relevant agreement provisions in the light of related provisions of statute, the Order, and regulations. Thus, where, as in Crane, the same words or phrases appear in the agreement and in statute, the Order or regulation and there is no indication that the parties intended such words and phrases to mean anything other than what they mean in statute, the Order or regulation, the Assistant Secretary must consider the applicability of the established meaning of such words and phrases when resolving the grievability dispute.

As noted previously, the Assistant Secretary resolved the grievability dispute in the instant case by finding that the grievance involved the

(Continued)

that the Assistant Secretary failed to consider or make ~~specific findings~~ concerning the agency's evidence and arguments, your appeal does not disclose any relevant evidence which the Assistant Secretary failed to consider in reaching his decision, which was based on the entire record in the case. Finally, as to your assertion that the Assistant Secretary erroneously relied on certain Council decisions, involving appeals from arbitration awards and negotiability determinations, your appeal fails to establish that the Assistant Secretary's conclusion herein was inconsistent with applicable Council precedent.^{6/}

(Continued)

interpretation and application of a provision of the negotiated agreement. Further, even though there was no dispute herein, as there was in Crane, as to whether words and phrases used in both the agreement and in regulations had similar or dissimilar meanings, the Assistant Secretary considered relevant and related provisions of agency regulations and found that they would not bar arbitration of the dispute.

^{6/} In this regard, however, we do not adopt the Assistant Secretary's reasoning in which he sought to rely on the Council's decisions in Bureau of Prisons, Scott Air Force Base, and Griffiss, supra note 2. As to his reliance upon Bureau of Prisons, the passage which he quoted refers to agreements negotiated after the 1975 amendments to the Order; as previously noted, this case arose under the terms of an agreement negotiated prior to those amendments, supra note 3. As to his reliance upon Scott Air Force Base, while the Assistant Secretary correctly quoted the Council to the effect that under section 13 of the Order, even prior to the 1975 amendments, ". . . arbitrators of necessity . . . consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation," it must be emphasized that the purpose for consideration of such law and regulation is to ensure that an award is consistent with law and regulations as required by section 12(a) of the Order, supra note 3.

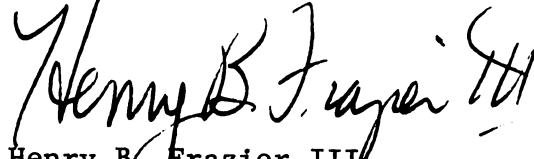
Finally, the Council's denial of the agency's petition for review in Griffiss was based upon the Council's interpretation and application of its own rules governing the review of arbitration awards. In Griffiss, an arbitrator, in rendering his award, considered and applied an agency regulation which dealt with the same subject matter as the disputed provision in the negotiated agreement and which had been introduced by the parties to the dispute. The agency challenged the award on the ground that it violated the agency regulation. The Council denied review of the agency's appeal, holding that the agency regulation did

(Continued)

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. C. Glanstein
MEBA

(Continued)

not constitute an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules. Since the Council's action in Griffiss was based solely upon the application of its own regulations, the Council did not reach, in that particular case, the question of the extent to which an arbitrator is obligated to consider an agency regulation in resolving grievances arising under agreements negotiated prior to the 1975 amendments to section 13 of the Order.

Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator). The arbitrator dismissed a grievance which arose from the activity's realignment of one of its shifts, concluding that under the relevant provision in the parties' agreement, union chief stewards did not have superseniority. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the arbitrator exceeded his authority; and (2) that the award does not draw its essence from the parties' agreement. The union also requested a stay of the award.

Council action (March 31, 1977). The Council held that the union's exceptions were not supported by facts and circumstances described in the petition. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the union's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1977

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

Re: Department of the Air Force, Newark Air Force
Station and American Federation of Government
Employees, Local 2221 (Atwood, Arbitrator)
FLRC No. 76A-116

Dear Mr. Roth:

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

According to the arbitrator, the dispute in this matter arose when the activity realigned its third shift. As a result of the realignment, one WG-10 platform repairer position remained on that shift. There were two third shift employees qualified to perform the duties of the position. One of these employees was a union steward and the other was a union chief steward. When the activity granted a grievance filed by the steward asserting that he was entitled to the third shift platform repairer position because he had contract superseniority,^{1/} the chief steward filed the instant grievance asserting that, by virtue of his

1/ Article 27, Section B of the parties' collective bargaining agreement provides as follows:

The Employer recognizes that for the futherance [sic] of good labor-management relations, as provided for in Executive Order 11491, as amended, and other applicable rules and regulations, duly elected Local 2221 officers, stewards, and other Union representatives which will be recognized by AGMC, have the responsibility of carrying out such representation duties as may be appropriate to their office. For the purpose of this agreement, the station is divided into zones according to the attached layout. The stewards for each of the zones will be determined by the Union and the list of stewards will be provided to Management (the LRO) on a quarterly basis. Stewards will have super seniority, and therefore, may not be bumped off a shift on which they are a steward. The names of stewards and the zones they represent will be posted in the Union section of the official bulletin board by Local 2221. When new stewards are appointed, the union will notify the stewards, immediate supervisors and the LRO of the names, organizational symblos [sic] and phone numbers of the new stewards.

position as chief steward, he had contract superseniority and could not be bumped off the third shift. The activity denied the chief steward's grievance and the matter went to arbitration.

The arbitrator dismissed the grievance, concluding that, under Article 27, Section B of the parties' collective bargaining agreement, "chief stewards have no superseniority."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of two exceptions discussed below and it requests a stay of the award. The agency filed an opposition.^{2/}

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

In its first exception, the union contends that the arbitrator exceeded his authority by violating an express restriction on his authority set forth in the parties' negotiated agreement. Article 19, Section H of the parties' agreement provides that:

The arbitrator will not consider evidence or information offered by either party, or any issue, which was not presented in the proceedings under the negotiated grievance procedure.

According to the union, the cited provision of the agreement is an unambiguous provision that was intended by the parties to be a restriction on an arbitrator's authority and, in this case, the arbitrator exceeded this specific contract limitation on his authority by considering the steward's earlier grievance in arriving at his decision on the question subsequently presented in the chief steward's grievance. In support of this exception, the union refers to a portion of the opinion accompanying the arbitrator's award in which he made reference to the steward's grievance. The union asserts that evidence and circumstances concerning the steward's grievance were not presented in the processing of the chief steward's grievance under the parties' grievance procedure and therefore that grievance should not have been considered by the arbitrator.

^{2/} In its opposition to the petition for review, the agency, in part, requests dismissal of the union's petition, filed with the Council on October 8, 1976, on the basis that it was untimely filed. However, by letter dated September 9, 1976, a copy of which was sent to the activity, the union was granted until the close of business on October 8, 1976, to file its petition and therefore the agency's request to dismiss the union's petition on this basis is denied.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, the Council will grant a petition for review where it appears that the exception presents grounds that an arbitrator exceeded his authority by awarding relief under the negotiated agreement to two nongrievants, American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479 [FLRC No. 72A-3 (July 31, 1973), Report No. 42]; or by determining an issue not included in the question(s) submitted to arbitration, Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62; or by going beyond the scope of the submission agreement, Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101; or by violating a specific limitation or restriction on his authority which is contained in the negotiated agreement.

In the instant case, however, the Council is of the opinion that the union's petition does not describe facts and circumstances to support its exception that the arbitrator exceeded his authority by violating a specific contract limitation on his authority. Initially, the Council notes that the arbitrator held that in "view of all the circumstances, including contract language, and giving the words of Article 17 [sic- Article 27], Section B, their ordinary meaning . . . it is held that chief stewards have no superseniority." There is no indication that the arbitrator's award dismissing the grievance resulted from improper consideration of circumstances surrounding the steward's grievance, as asserted by the union; instead there is every indication that his award is based essentially upon his interpretation of Article 27, Section B and the union presents no facts and circumstances to demonstrate otherwise. In the Council's opinion the arbitrator's passing reference to the steward's grievance does not, in the context of the award, present facts and circumstances that the arbitrator violated Article 19, Section H by considering evidence or information which was not presented in the grievance proceedings, thereby exceeding his authority.^{3/} Accordingly, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitrator's award does not draw its essence from the parties' collective bargaining agreement. In support of this exception, the union asserts that the portion of Article 27, Section B of the collective bargaining agreement which provides that "[s]tewards will have super seniority, and therefore, may

^{3/} It should also be noted that the union's factual assertion that the steward's grievance was not presented during the processing of the chief steward's grievance is specifically disputed by the agency in its opposition to the petition for review.

not be bumped off a shift on which they are a steward" is clear and that it means that all stewards have superseniority. Thus, according to the union, in the face of such clear language, the arbitrator's determination that chief stewards do not have superseniority resulted from his delving into "circumstances beyond the four corners of the agreement," such circumstances being those of the steward's grievance which the arbitrator was prohibited from considering under Article 19, Section H of the parties' collective bargaining agreement.

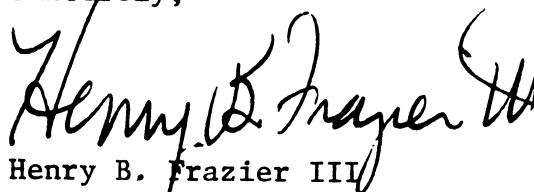
The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, the Council is of the opinion that the union's second exception is not supported by the facts and circumstances described in the petition. In this regard, the union has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon his interpretation and application of Article 27, Section B of the parties' agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or could not in any rational way be derived from the agreement; or evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma, supra, at 6 of the Decision. Furthermore, to the extent that the union's second exception is derived from the union's disagreement with the arbitrator's interpretation of Article 27, Section B of the parties' collective bargaining agreement, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitrator's award. American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), 1 FLRC 544 [FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44]. Finally, to the extent that the union's second exception is based on an assertion that the essence of the arbitrator's award was drawn from, or influenced by, circumstances surrounding the steward's grievance in violation of Article 19, Section H of the agreement, rather than from the arbitrator's interpretation of Article 27, Section B of the agreement, as previously indicated the union has failed to describe facts and circumstances to support such exception. Accordingly, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In summary, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The union's request for a stay of the award is also denied. Similarly, the union's alternative request that

the award be remanded, preferably to another arbitrator, is denied because there is no basis on which to take such action. See, Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO, (Durham, Arbitrator), FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: N. F. Galloway
Air Force

Department of the Navy, Naval Aviation Supply Office, Philadelphia, Pennsylvania and American Federation of Government Employees, Local 1698 (Quinn, Arbitrator). The arbitrator dismissed the grievance, holding that the activity took disciplinary action against the grievant for "just cause" in accordance with the parties' agreement. The union filed exceptions to the award, in essence disagreeing with the arbitrator's reasoning and conclusions in reaching his award, and questioning his findings of fact.

Council action (March 31, 1977). As to each exception, the Council held that the exception did not assert a ground upon which the Council will grant review of an arbitration award. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

March 31, 1977

Mr. Joseph B. Meranze
Meranze, Katz, Spear and
Wilderman
1200 Lewis Tower Building
Philadelphia, Pennsylvania 19102

Re: Department of the Navy, Naval Aviation
Supply Office, Philadelphia,
Pennsylvania and American Federation
of Government Employees, Local 1698
(Quinn, Arbitrator), FLRC No. 76A-118

Dear Mr. Meranze:

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

According to the award, the grievance in this case arose as a result of two instances of disciplinary action taken by the Naval Aviation Supply Office (the activity) against the grievant for his alleged refusal to comply with supervisory orders to accept service of process at the activity from the city government in a dispute over payment of a city wage tax. The issue before the arbitrator, as stated in the award, was:

Was the disciplinary action invoked by management against the grievant . . . in accordance with Article XIX, Section 1^{*/} of the negotiated agreement . . . ?

The arbitrator dismissed the union's grievance, holding that the activity took disciplinary action against the grievant for "just cause" in accordance with the agreement. The arbitrator found that the orders given to the grievant were legal and proper, having been issued pursuant to procedures developed by the activity in accordance with the agency's Joint Instruction dealing with service of process. Thus, the arbitrator concluded that, while there was a basis for the grievant's feeling of

^{*/} According to the award, Article XIX, Section 1 provides:

The Employer agrees that disciplinary action will only be taken for just cause and will be in accordance with the Department of the Navy and Civil Service Commission regulations.

harassment by the City of Philadelphia, absent any evidence that the activity aided in or cooperated with a continued course of harassment, the grievant's refusal to obey the orders of his supervisors on two occasions was a valid basis for disciplinary action under the relevant provision of the parties' negotiated agreement.

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

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

In its first exception, the union contends that the arbitrator failed to find that the Joint Instruction pursuant to which the discipline was imposed was inconsistent with regulations of the Judge Advocate General (JAG) and was thus improper and invalid. This exception does not assert a ground upon which the Council will grant review of an arbitration award. Moreover, it is noted from the contentions of the parties set forth by the arbitrator that the union apparently made the same arguments before the arbitrator. In the opinion accompanying his award the arbitrator addressed these contentions and, in the course of determining that the disciplinary action was for just cause, concluded that "[c]orrespondence from the office of the Judge Advocate General clearly supports management's contention that the order given to [the grievant] was legal and proper." In the Council's opinion, the union's contention that the arbitrator "failed to find that the Joint Instruction . . . was inconsistent with the [JAG] regulations . . .," is, in essence, nothing more than mere disagreement with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. Hence this exception does not state a ground for review under section 2411.32 of the Council's rules. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111; Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Therefore, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitrator failed to find that the Joint Instruction pursuant to which the discipline was imposed was not approved by the union as required, and, therefore, that

the Joint Instruction was void and unenforceable. However, it is noted that in the opinion accompanying his award the arbitrator specifically addressed and disposed of the union's allegation in this regard. In effect, the union is contending that the arbitrator was incorrect in his interpretation of the agreement. Council precedent is clear that a challenge to an arbitrator's interpretation of the collective bargaining agreement between the parties does not assert a ground upon which the Council will accept a petition for review of an arbitrator's award under section 2411.32 of the Council's rules. E.g., Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Accordingly, the union's second exception provides no basis for acceptance of the petition for review.

In its third exception the union contends that the arbitrator's finding that there was a violation of the Joint Instruction and a refusal to accept service of process on two occasions was not supported by the evidence and therefore there is no basis for discipline in the case. The Council has consistently held that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (Dec. 20, 1974), Report No. 61; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Therefore, this exception does not present a ground upon which the Council will grant review of an arbitration award.

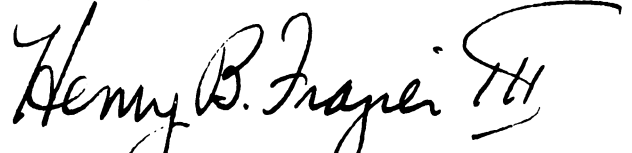
The union's fourth exception alleges that the arbitrator failed to find that the agency should have properly refused to require its employees to accept service of process when the City of Philadelphia had available to it another method of serving process on the employees, i.e., service of process through the mail. The arbitrator considered the union's contentions in this regard and concluded that "[t]he question of service of process by mail offers the parties a possible suggestion for a future negotiated procedure but is not properly a matter for arbitration." Again, in the Council's view, the union is merely disagreeing with the arbitrator's reasoning and conclusion in arriving at his award which, as previously indicated, does not assert a ground for review under section 2411.32 of the Council's rules.

In its fifth exception the union contends that that even though the arbitrator recognized that the grievant was being harassed, he still upheld the position of the employer and the imposition of the disciplinary fifteen-day suspension. The union submits that, since there was such a clear case of harassment, disciplinary action was improper under all the circumstances. In his decision the arbitrator addressed the harassment issue, concluding that the source of the harassment was not the activity and that there was no evidence that the agency "aided in or cooperated with a continued course of harassment." Again, the union is merely disagreeing with the reasoning and conclusion of the arbitrator which, as indicated above, is not a ground for review.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: M. Abbott
Navy

Community Services Administration, CSA Region V and American Federation of Government Employees (AFL-CIO) for the National Council of OEO Locals, Local #2816 (Sembower, Arbitrator). This appeal arose from the arbitrator's award wherein he determined that the agency had violated its collective bargaining agreement with the union by reorganizing the Grants Processing Unit in its Chicago office without following the procedures required by the negotiated agreement. As his award, the arbitrator, in two paragraphs, directed the agency, in essence, (1) to follow the procedures which it had agreed it would follow in arriving at the reorganization; and (2), to fill a position which it had not only vacated, but, in fact, abolished, and decided not to refill. The Council accepted the agency's petition for review, insofar as it related to the agency's exception which alleged that the award violated sections 11(b) and 12(b) of the Order; and granted the agency's request for a stay (Report No. 99).

Council action (April 7, 1977). The Council found that paragraph (1) of the award did not violate either section 11(b) or 12(b) of the Order and must be sustained. However, the Council found that paragraph (2) violated section 12(b)(2) of the Order and must be set aside. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the second paragraph thereof. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Community Services Administration,
CSA Region V

and

FLRC No. 75A-120

American Federation of Government
Employees (AFL-CIO) for the National
Council of OEO Locals, Local #2816

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award wherein he determined that the Community Services Administration, Region V (the agency) had violated its collective bargaining agreement with Local 2816 of the National Council of OEO Locals (the union) by reorganizing the Grants Processing Unit in the agency's Chicago office without following the procedures required by the parties' negotiated agreement.^{1/}

1/ In his award the arbitrator sets forth several provisions of the agreement relied upon by the union, among them the following:

ARTICLE 3. UNION RIGHTS.

Section 6. No new regulations on matters affecting personnel policies, practices, or working conditions shall be adopted by the Employer without full and complete consultation in good faith with the Union. No substantive changes shall be made in any existing regulation concerning personnel policies, practices, or working conditions without such consultations with the Union. The Parties shall meet with each other to discuss and consult ten (10) working days before the draft issuance is distributed for comments.

Copies of directives of higher authority which require or authorize amendments or new issuances will be provided to the Union with the draft document.

If the Union has justifiable and reasonable reason to believe that full and complete consultation was not carried out, a written notice specifying such reason will be given the Employer. In such a case there will be no change in the conditions of any regulations, mutually acknowledged agreements, or mutually acknowledged understandings applicable to such issue until full and complete consultation is held.

(Continued)

Based on the findings of the arbitrator and the entire record, it appears that after the GS-12 Chief of the Grants Processing Unit retired, the agency, instead of posting a vacancy announcement for the Unit Chief position at that grade, posted an announcement for a Supervisory Processing Clerk at GS-7/9--for which position it then selected one of the two remaining Unit employees. The union grieved, contending that the agency had failed to notify the union as required under the agreement prior to "reorganizing" the Unit by redistributing the duties of the former Unit Chief among the Unit's lower grade employees. The agency denied that any reorganization had taken place, asserting, in effect, that it had merely abolished an unnecessary and overgraded position. The union thereupon invoked arbitration.

The Arbitrator's Award

The arbitrator sustained the grievance. Stating that "the parties virtually stipulate and agree that the issue herein is whether or not a 'reorganization' occurred within the Agreement's definition in Article 13, Section 18 [sic: Section 17]," the arbitrator concluded that, under the facts of the case, such a reorganization had occurred. Quoting from Article 13, Section 17 of the parties' agreement, the arbitrator found that, even before the Unit Chief's retirement, the agency "was contemplating the 'planned elimination' of his job" and therefore, "[o]f necessity, his functions had to be an 'addition or redistribution of functions or duties' among Processing Clerks [in the Unit]" He further found that none of the prescribed steps for accomplishing a "reorganization" under the agreement had been followed. The arbitrator then made the following award:

(Continued)

ARTICLE 11. POSITION CLASSIFICATION.

Section 6. In cases where the Employer intends to begin a reclassification survey of a suit [sic], the Employer will notify the Union two weeks before such actions are begun. In each affected office the personnel specialist and the manager involved will meet with the designated Union representative to discuss the concerns of the employees in the organization scheduled to be surveyed.

ARTICLE 13. REDUCTION-IN-FORCE, TRANSFER OF FUNCTION, OUTSIDE WORK, AND REORGANIZATION.

Section 17. Reorganization is defined as the planned elimination, addition, or redistribution of functions or duties in an organization.

Section 18. The Employer shall notify the Union as soon as possible of a pending reorganization.

1. The Agency shall conduct a reorganization with necessary preliminary studies conducted by appropriate Personnel Specialists with full Notice to the Union and conferences with its duly authorized representatives in accordance with the clauses of the Agreement set forth in the Grievance
2. If the parties reach impasse in their negotiations relative to a reorganization of the Department, the Agency shall immediately post a vacancy for Chief, Grants Processing Department, GS-12, and if [the employee selected for the GS-7/9 Supervisory Processing Clerk position] qualifies for said position, she shall receive retroactive pay represented by the differential between the pay for the GS-12 position and what she has received in GS-7/9.^{2/} [Footnote added.]

Agency's Appeal to the Council

The agency filed with the Council a petition (opposed by the union) for review of the arbitrator's award, excepting to the award on the ground, among others, that it violates sections 11(b) and 12(b) of the Order. Under section 2411.32 of the Council's rules of procedure, the Council accepted the agency's petition for review insofar as it related to the stated exception.^{3/} The agency filed a brief.

Opinion

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

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

The two parts of the award are considered separately below.

First Part of the Award. The agency asserts that the first part of the arbitrator's award violates section 12(b) of the Order^{4/} "by ordering the

^{2/} The third part of the award, relating to the allocation of the costs of the arbitration, is not at issue before the Council.

^{3/} The agency also requested, and the Council granted under section 2411.47(f) of its rules of procedure, a stay of the arbitrator's award.

^{4/} Section 12(b) provides, in pertinent part, as follows:

(Continued)

Agency to take an action which is clearly a management prerogative under section 12(b)" It appears from the record that the "action" referred to by the agency relates to the position of the Chief of the Grants Processing Unit, and that the agency believes that by directing it to "conduct a reorganization" the arbitrator has directed the agency to rescind its abolishment of the Unit Chief position and to restore that position, and the rest of the Unit, to the status quo ante. Thus, the agency argues that the arbitrator has ordered it to "conduct a reorganization [which] is clearly beyond the scope of the Order."

The Council is of the opinion that the agency has misinterpreted the first part of the arbitrator's award. The Council understands this part of the award as simply directing the agency to comply with the procedures to which it had agreed in the collective bargaining process. Thus, the arbitrator determined that the agency violated the agreement by conducting a reorganization of the Unit without following certain negotiated procedures--in particular, without notifying the union of the reorganization and without permitting the union's representatives to present and discuss their views with the agency.^{5/} But nowhere in the first part of his award does the arbitrator direct that the Grants Processing Unit be restored to its status quo ante, nor does the agency present any reason why, in order for it to comply with those procedural portions of the agreement which the arbitrator found it violated, such a directive must be inferred. In our opinion, therefore, the only clear requirement of the first part

(Continued)

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

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency

^{5/} The arbitrator did not find, nor did the union contend, that the agency's basic authority to reorganize the Unit was in any respect at issue in this case.

of the award is that the agency now complete the procedural course of action to which it had agreed in the collective bargaining agreement but which it failed to complete initially.^{6/} The agency does not contend that these procedural provisions of the agreement, with which the arbitrator has directed it to comply, violate section 12(b) of the Order, nor do we have any indication that the agency raised such a contention during the course of negotiating these provisions. We find no basis for holding these provisions contrary to section 12(b). We thus conclude that there is no support for the agency's contention that the first part of the award violates section 12(b).

The agency also objects to the first part of the award on the ground that it conflicts with section 11(b).^{7/} This objection, however, proceeds from the same interpretation of the award which underlies the agency's contentions regarding section 12(b); that is, the agency in effect views the first part of the award as requiring it to set aside the abolishment of the position of Chief of the Grants Processing Unit before meeting with the union. As discussed previously, the first part of the arbitrator's award may be implemented without requiring the agency to nullify what the arbitrator found to be a reorganization, for the award in essence directs only that the agency follow the procedures which it had agreed it would follow in arriving at the reorganization.

Accordingly, we hold that the first part of the arbitrator's award does not conflict with either section 12(b) or section 11(b) of the Order and must be sustained.

Second Part of the Award. We consider next the second part of the award and its provision that, in the event "negotiations" under the first part

^{6/} Should the agency find reason to modify the Unit's reorganization as a result of meeting with the union, it of course remains free to do so. But since the final choice as to the nature of the reorganization is left to the agency--and since the agency may therefore choose, even after meeting with the union, to retain the Unit as it now stands--we find a fortiori no reason to attribute to the arbitrator an unstated intention to set that reorganization aside before the parties have had an opportunity to meet at all.

^{7/} Section 11(b) provides, in relevant part, as follows:

[T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

result in impasse, the GS-12 Unit Chief position will be announced as vacant and the current GS-7/9 Supervisory Processing Clerk, if qualified for that position, will be selected and given backpay. The agency objects to this portion of the award on the ground that because the arbitrator has directed the agency to fill a position, the award violates section 12(b) of the Order. For the reasons which follow, we agree with the agency.

The second part of the arbitrator's award would in substance provide that, by bargaining to impasse on matters such as the impact of the reorganization, the union may indirectly compel the agency to fill the Unit Chief position. However, the Council has held that "implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action."^{8/} Thus, an arbitrator's award which directs an agency to fill a position which the agency has vacated and decided not to refill cannot be permitted to stand.^{9/} The effect of the second part of the arbitrator's award in the instant case would be to require the agency to fill a position which it has not only vacated, but, in fact, abolished, and decided not to refill. As a result, since rights reserved to agency management by section 12(b) may not be infringed by an arbitrator's award under a negotiated agreement,^{10/} we conclude that the second part of the award in this case must be set aside.

Conclusion

For the foregoing reasons, we find that (1) the first paragraph of the arbitrator's award does not violate either section 11(b) or section 12(b) of the Order and must be sustained; and (2) the second paragraph of the

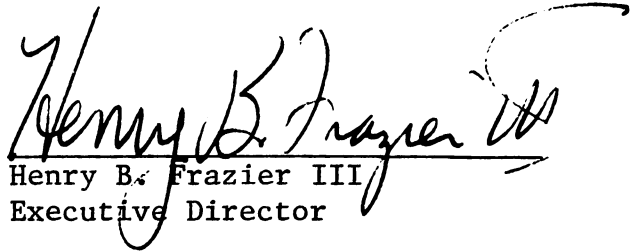
^{8/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 297 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61 at 4 of the Decision].

^{9/} Id. at 298 [Report No. 61 at 5 of the Decision]; accord, Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (Di Stefano, Arbitrator), FLRC No. 74A-99 (Apr. 27, 1976), Report No. 104 at 5 of the Decision, n. 4.

^{10/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 298 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61 at 5 of the Decision].

award violates section 12(b)(2) of the Order and must be set aside. Accordingly, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the second paragraph thereof. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.



Henry B. Frazier III
Executive Director

Issued: April 7, 1977

National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII. The dispute involved the negotiability under the Order of union proposals concerning (1) travel costs for labor-management relations activities; (2) conduct of union-employer business during overtime; (3) dangerous health and safety conditions; and (4) employee exchanges of shift, overtime and placement assignments.

Council action (April 7, 1977). As to (1), the Council held that since the agency had misinterpreted the meaning of the proposal in question, it had failed to establish that either General Services Administration or agency regulations were applicable so as to preclude negotiation of the proposal under section 11(a) of the Order; and, further, held that the question of whether travel costs should be paid for the activities enumerated in the proposal was not for sole resolution by the agency, but was a matter properly subject to negotiation by the parties under section 11(a) of the Order. As to (2), the Council, contrary to the agency's contentions, held that the proposal was not outside the agency's obligation to bargain under section 11(b), and was not violative of section 12(b), including specifically 12(b)(6), of the Order. Similarly, with regard to (3) and (4), the Council ruled that the proposals were not excepted from the agency's obligation to bargain under section 11(b), and were not violative of various provisions of section 12(b) of the Order, as contended by the agency. Accordingly, for the reasons fully detailed in its decision, and pursuant to section 2411.28 of its rules and regulations, the Council held that the agency's determination that the union's proposals involved in this case were nonnegotiable was improper and must be set aside.

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

National Treasury Employees Union

and

FLRC No. 76A-28

Department of the Treasury,
U.S. Customs Service,
Region VII

DECISION ON NEGOTIABILITY ISSUES

Background

National Treasury Employees Union (union) represents about 1,100 non-professional employees in an activity-wide unit in Region VII of the United States Customs Service, Department of the Treasury (agency). During negotiations between the local parties, a dispute arose concerning the negotiability of six union proposals, set forth in the "Opinion" below. Upon referral, the agency determined that these proposals are nonnegotiable because they variously conflict with applicable law, regulations or the Order.

The union filed with the Council a petition for review of the agency determination, together with a clarification statement, under section 11 (c)(4) of the Order. The agency filed a statement of its position, and supplements thereto, pertaining to the union's appeal.

Opinion

The matters in dispute are considered separately below.

1. Travel costs for labor-management relations activities. The union submitted the following proposal (Article 6, Section 3D) providing in part for the payment of travel costs for designated labor-management relations activities:

A Union Steward and affected employee will receive necessary administrative time and travel costs pursuant to Article 27, where the situation requires, for the following purposes:

1. Attendance at grievance meetings as provided in Article 35 (Grievance Procedure) or Article 36 (Binding Arbitration);
2. Attendance at binding arbitration hearings as provided in Article 36;

3. Attendance at an oral reply meeting pursuant to the terms of Article 34 (Adverse Actions);
4. Attendance at an adverse action hearing as provided in Article 34; and
5. Attendance at any other statutory appeal meeting and/or hearing. [Emphasis supplied.]

The agency asserts that this proposal is nonnegotiable because travel costs, under GSA and agency regulations, may be paid only in connection with work performed on "official time," or, more particularly, may be paid only to employees engaged in "official business,"^{1/} and, since the subject work would be performed on "administrative time" which, according to the agency, was not intended to encompass "official time" or "official business," the proposed payment of travel costs would violate the cited regulations. The agency further asserts that, in any event, the determination of what activities constitute "official business," for which alone travel costs may be paid, lies within the exclusive province of the agency; and that, as the agency has not made such determination in this case, the proposal is nonnegotiable. We cannot agree with these contentions.

As to the agency's contention that the proposal violates GSA and agency regulations, the union clearly states in its appeal that, contrary to the agency's interpretation of its proposal, the phrase "administrative time" in the disputed proposal is intended to mean "official time."^{2/} Further, the union indicates in its appeal that the work delineated in the proposed

1/ Paragraph 1-1.3.b. of General Services Administration's Federal Travel Regulations (FPMR 101-7, par. 1-1.3.b.), relied upon by the agency, provides as follows:

1-1.3. General rules.

.

- b. Reimbursable expenses. Traveling expenses which will be reimbursed are confined to those expenses essential to the transacting of the official business.

Section 190.10(a) of the Customs Accounting Manual, also relied upon by the agency, provides in relevant part:

190.10 Travel on official business. (a) . . . Travel shall be performed by customs officers and employees only when it is absolutely necessary and on strictly official business

^{2/} The union analogizes its use of "administrative time" to that in FLRC No. 75P-1 (Dec. 17, 1975), Report No. 90, where the parties agreed to provide "official time" for a union representative "administratively excused" during certain periods of time to perform labor-management related activities.

Article 6, Section 3D, is fully intended to represent "official business" (i.e., work in the required best interests of the agency) to be performed by the union stewards and the employees involved. Accordingly, we so construe the union's proposal for purposes of this decision.^{3/} Since the agency thus misinterpreted the meaning of the proposal in question, it has failed to establish that either the GSA regulations or its own regulations are applicable so as to preclude negotiation of the union's proposal under section 11(a) of the Order.^{4/}

With respect to the agency's additional contention that, in any event, it is vested with the sole legal authority to determine whether particular activities afford the benefit to the agency required to constitute "official business," the agency clearly has administrative discretion in the payment of travel costs^{5/} and it fails to cite any law, regulation, provision of the Order, or other controlling directive to establish that the exercise of this discretion lies exclusively with the agency. Moreover, as indicated in the union's appeal, the agency has in fact negotiated and entered into a binding agreement with the union (Article 37, Section 3) to pay travel costs for employees to attend periodic meetings of the Labor-Management Relations Committee, for the discussion and exchange of information on matters of concern or interest involving personnel policies and practices and matters affecting working conditions. Thus, the agency has tacitly recognized the nonexclusivity of its determination as to the payment or nonpayment of travel costs for matters of mutual interest such as here presented. In our opinion, therefore, the question of whether travel costs should be paid for the activities enumerated in the subject proposal, or, in other words, whether these activities should be regarded as "official business," is not for sole resolution by the agency, but is a matter properly subject to negotiation by the parties under section 11(a) of the Order.^{6/}

3/ Neither party claims and it does not appear that the proposal is intended to apply to union stewards acting other than in a representational capacity. Therefore, we additionally interpret the reference to "union stewards" in the proposal as limited to those stewards attending the meetings or hearings adverted to in the proposal as the acknowledged representatives of the employees concerned.

4/ See Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110, and cases cited therein at n. 19.

5/ 46 Comp. Gen. 21, 22 (1966).

6/ Cf. American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 1 FLRC 616, 618 [FLRC No. 73A-36 (Dec. 27, 1973), Report No. 47], rev'd and remanded on other grounds, sub nom. National Broiler Council v. FLRC, 382 F. Supp. 322 (E.D. Va. 1974); Council Supplemental Decision in the same case, at 2 (June 10, 1975), Report No. 73, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. Va., Sept. 5, 1975).

For the foregoing reasons, we find that the agency's determination that the union's proposed Article 6, Section 3D, is nonnegotiable was in error and must be set aside.

2. Conduct of union-employer business during overtime. This disputed proposal as submitted by the union (Article 6, Section 3F) reads as follows:

It is understood that the conduct of Union-Employer business by either the Union representative or the employee performing work which is compensable under overtime laws is not permitted except in emergencies.

The agency contends that the proposal conflicts with sections 11(b) and 12(b) of the Order^{7/} because it "limits and interferes with management's rights to identify the work to be performed and to ensure that the identified work is completed," and "limits management's rights to assign and direct employees in the performance of their duties or to relieve employees from such duties." The agency further argues that, with specific reference to section 12(b)(6) of the Order, the proposal violates management's right to identify and take necessary action to carry out its mission in emergency situations; and that the proposed payment of overtime for the conduct of union-employer business in emergencies would violate (unspecified) overtime laws. We find the agency's position to be without merit.

7/ Section 11(b) of the Order provides in relevant part:

. . . the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. . . .

Section 12(b) of the Order provides:

[M]anagement officials of the agency retain the right, in accordance with applicable laws and regulations—

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency

The subject proposal, based on its literal language and the expressed intent of the union, simply provides that a union representative or affected employee who is already working on overtime should not be permitted to conduct union-employer business, except in emergency situations. Such emergencies, as delineated by the union at the bargaining table and in its appeal, are intended to be brief in nature and number and would include, for example, instances where: An employee is called into an emergency interrogation session with the agency Internal Security Division and must contact a union attorney through the steward to obtain legal representation; or an employee is summoned to a meeting with management at which proposed disciplinary or adverse action is to be discussed and the employee seeks union representation under the parties' agreement.

Contrary to the agency's contentions, the proposal neither limits nor interferes with management's identification of work to be performed or completed, and does not in any manner limit the agency in its direction of employees on the job, assignment of employees in positions within the agency, or relief of employees from duties because of lack of work or for other legitimate reasons. Rather, the proposal simply concerns when the union representative or affected employee will or will not be permitted to engage in the union-employer business which the parties have agreed to be in their mutual interest. Nothing in the Order prevents an agency and a union from agreeing between themselves to conduct their mutual business at designated times as they deem appropriate;^{8/} likewise, nothing in the Order precludes their agreement not to conduct such business at other times—including overtime. Accordingly, we reject the agency's initial claim that the proposal violates section 11(b)^{9/} and section 12(b) of the Order.

As to the agency's argument that the proposal would specifically violate the agency's right to take necessary actions to carry out its mission in situations of emergency, as reserved to management under section 12(b)(6) of the Order, it is obvious that the "emergencies" adverted to in the proposal during which union-employer business may be conducted while the union representative or affected employee is on overtime relate solely to personal exigencies of the individual employees and not agency emergencies in carrying out its mission. Consequently, the proposal plainly does not constrict any agency right under section 12(b)(6) of the Order.

^{8/} See FLRC No. 75P-1 (Dec. 17, 1975), Report No. 90.

^{9/} The union asserts that the agency is precluded from relying on section 11 (b) in its determination of the nonnegotiability of the instant proposal, as well as the proposals discussed hereinafter, because of an alleged agreement between the local parties on these proposals prior to a court action also involving the parties, which was settled on October 8, 1975 (NTEU v. Acree, Civil Action No. 75-1458, D.D.C.). However, in view of our decision in the present case, we find it unnecessary to pass upon this contention by the union.

Finally, with respect to the conflict alleged by the agency between the subject proposal and overtime laws, the agency failed to cite any law whatsoever in support of this allegation, and neither the record nor careful research by the Council disclosed any law which would render illegal the payment of overtime to employees engaged in conducting union-employer business in the restricted circumstances provided in the proposal. Accordingly, the agency's claim that the proposal is violative of law must likewise be rejected.

Based on the foregoing, we hold unsupported the agency's determination that the union's proposed Article 6, Section 3F is nonnegotiable, and we shall set aside this determination.

3. Dangerous health and safety conditions. Article 21, Section 3A, as submitted by the union, provides as follows:

Whenever a designated health and safety official determines, based on inspection, that conditions or practices exist in any place of employment which could reasonably be expected to cause death or physical harm immediately, or before the imminence of such danger can be eliminated through normal abatement procedures, he shall inform the employees and the official in charge of the establishment of the danger. The official in charge of the establishment or person authorized to act for him in his absence shall take immediate abatement procedures and the withdrawal of employees not necessary for abatement of dangerous conditions.

The agency argues that the proposal is nonnegotiable because it requires corrective actions to be taken by the "official in charge of the establishment" or his representative, who is not an employee of the agency but of GSA (which is responsible for space utilization), and who cannot therefore be bound by the agreement with the union. Additionally, the agency argues that, even if the phrase "official in charge of the establishment" is intended to relate to an agency official, the proposal is violative of sundry provisions in sections 12(b) and 11(b) of the Order. We are not persuaded by these contentions.

As to the agency's claim that the phrase "official in charge of the establishment" refers to personnel of GSA and not to an official of the agency, the union states explicitly in its appeal that the agency has misinterpreted this provision, and that the proposal merely sets up a procedure whereby management takes specified actions to protect the well-being of its employees, under certain emergency conditions. Moreover, neither the language of the proposal nor the record reflects any intent by the union that a nonagency official would be subject to the required initiation of the protective measures as provided in the proposal. Accordingly, we reject the contrary claim of the agency.

Regarding the agency's further contention that, in any event, the proposal conflicts with section 12(b) of the Order, the essence of the subject proposal is simply that employees will not be required to work where "conditions or practices exist . . . which could reasonably be expected to cause death or physical harm immediately, or before the imminence of such danger can be eliminated through normal abatement procedures." We find no material difference between this proposal and the proposals found consistent with 12(b), and thereby negotiable, in FLRC Nos. 74A-48 and 74A-63, which proposals likewise provided that employees shall not be required to work under hazardous conditions.^{10/} For the reasons set forth in the cited cases, we find that the proposal in the instant case does not violate section 12(b) of the Order.

Finally, as to section 11(b), the agency asserts in effect that the proposal concerns the job content of positions or employees which is outside its obligation to bargain under this section of the Order. However, contrary to the agency's position, the proposal is not concerned with the assignment of specific duties to particular positions or employees, but with the procedures for the amelioration of health and safety hazards which are outside the ambit of section 11(b) of the Order.^{11/}

Accordingly, we shall set aside as in error the agency determination that the union's proposed Article 21, Section 3A, is nonnegotiable.

10/ In AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75, the proposal found negotiable reads (at 5 of Council decision):

It is agreed that no employee shall be required to perform work on or about moving or operating machines without proper precaution, protective equipment and safety devices, nor shall any employee be required to work in areas where conditions are detrimental to health without proper protective equipment and safety devices.

In AFGE Local 2456 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-63 (July 21, 1975), Report No. 77, the proposal also found negotiable by the Council states in relevant part (at 3 of the Council decision):

An employee shall not be required to work in areas where conditions exist detrimental to health until such conditions have been removed or remedied. . . .

11/ Cf. International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322, 333 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

4. Employee exchanges of shift, overtime and placement assignments. Three proposals submitted by the union on these matters provide as follows:

Article 22, Section 4

An employee, upon request, will be allowed to swap shift assignments and/or days off if a qualified replacement, approved by the supervisor, is available and willing to work and if the work flow is not impaired.

Article 23, Section 3(A)

An employee will, upon request, be released from an overtime assignment if a qualified replacement, approved by the supervisor, is available and willing to work, and if the work flow is not impaired.

Article 29, Section 3

An employee will, upon request, be allowed to swap placement assignments, if a qualified replacement, approved by the supervisor, is available and willing to work and if the work flow is not impaired.

The agency asserts that the subject proposals violate various management rights under section 12(b) of the Order and are excepted from the agency's obligation to bargain under section 11(b) of the Order. These contentions are without merit.

The intent and meaning of the proposals are clear: Employees would be permitted to exchange their shift assignments (and/or days off), overtime assignments, and placement assignments,^{12/} provided qualified replacements, approved by the agency's supervisors, are available and willing to accept such assignments, and provided the work flow of the agency would not be impaired by the requested exchange.

Contrary to the agency's position, nothing in the proposals constricts the agency's right to direct employees on the job, or to assign employees to positions within the agency, in violation of section 12(b)(1) or (2) of the Order.^{13/} Moreover, while the agency claims that the proposals would

^{12/} "Placement assignments," as indicated in the union's appeal, are positions within particular shifts to which employees are periodically assigned as, for instance, the assignment of inspectors at a border post, during certain periods, to commercial or pedestrian traffic, baggage inspection, or a separate search area.

^{13/} Cf. Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75, at 3 of Council decision.

cause increased costs or reduced effectiveness in operations (because they might lower the quality of performance or result in third-party hearings with regard to the application of the proposals), the agency failed to provide any substantial demonstration that increased costs or reduced effectiveness "are inescapable and significant and are not offset by compensating benefits" (such as improved morale and employee motivation, referred to by the union); and, apart from other considerations, the agency thereby failed to establish that the proposals would violate section 12(b)(4) of the Order.^{14/} Likewise, the agency failed to establish that the proposals (which would merely sanction the exchange of similarly qualified employees within the unit under certain limited conditions) would in any manner interfere with the agency's right to set the "methods," "means," or "personnel" by which its operations are to be conducted, within the meaning of those terms as used in section 12(b)(5) of the Order.^{15/}

Turning to section 11(b) of the Order, the agency argues mainly that the proposals are nonnegotiable because they concern the agency's staffing patterns, i.e., "the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty."^{16/} However, the agency misunderstands the import of the quoted language of section 11(b) and its application to the proposals here involved.

The critical language of section 11(b) was inserted in the Order to clarify the uncertainty which had previously arisen concerning the meaning of the

14/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219, 223-225 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

15/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 434-439 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

16/ Although the agency further asserts that the proposals concern the "technology" of the agency in performing its operations, it is manifest that the proposals relate not to the technology employed by the agency, but simply to the assignment of personnel for purposes of implementing that technology and, therefore, the proposals are not excepted from bargaining as matters of "technology" under section 11(b) of the Order. Cf. International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322, 329 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36]; and AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), 1 FLRC 71, 74 [FLRC No. 70A-10 (Apr. 15, 1971), Report No. 6].

phrase "assignment of its personnel" in E.O. 10988.^{17/} As explained in the Report accompanying E.O. 11491:^{18/}

We believe there is need to clarify the present language in section 6(b) of [E.O. 10988]. The words "assignment of its personnel" apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work—the number of employees in the agency and the number, type, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

To remove any possible future misinterpretation of the intent of the phrase "assignment of its personnel," we recommend that there be substituted in a new order the phrase "the number of employees, and the numbers, types and grades of positions, or employees assigned to an organizational unit, work project or tour of duty". . . . [Emphasis supplied.]

Consonant with the language of section 11(b) and the explanation of this language in the Report, the Council has consistently ruled that matters related to an agency's "staffing patterns" are excepted from an agency's bargaining obligation. More specifically, it is well-established, for example, that an agency is not required to negotiate on either the number of shifts or the organizational structure of activities within those shifts, *viz.*, the number of employees, or the number or categories of positions or employees assigned to organizational units, work projects or tours of duty.^{19/} Likewise, an agency is not required to bargain on whether or not work on overtime (as well as on regular time) is needed, the times for the performance of the overtime work, or the number or job

^{17/} Section 6(b) of E.O. 10988 provided in relevant part that the bargaining obligation "shall not be construed to extend to such areas of discretion and policy as the . . . [agency's] organization and the assignment of its personnel." [Emphasis supplied.]

^{18/} Labor-Management Relations in the Federal Service (1975), at 70-71.

^{19/} See, e.g., American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Supplemental Decision, FLRC No. 73A-36 (June 10, 1975), Report No. 73, at 14-19, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. Va., Sept. 5, 1975).

constituency of the personnel to be utilized during the overtime activities.^{20/} Further, the agency is not obligated to negotiate on the nature of the work to be performed on each shift or the tasks to be assigned various job categories and accomplished on the respective shifts.^{21/}

At the same time, and also consistent with the Order and the Report, the Council has uniformly held that, once management has determined such staffing patterns, section 11(b) does not except from the obligation to bargain matters concerning the selection of individual employees for assignment to the particular shifts, overtime work, or job placements, which the agency has established for the conduct of its operations. Thus, for example, in the Plum Island case,^{22/} the Council noted:

. . . [A]s indicated in the Report, bargaining may be required on the criteria for the assignment of individual employees to particular shifts; or appropriate arrangements for employees who are adversely affected by the realignment of the work force; and the like. Indeed, the agency stated in the instant case, "There is no disagreement that matters such as procedures for determining how qualified individuals will be assigned to a particular shift or tour and advance notice of such changes before they are made are negotiable and agreement has, in fact, been reached on those matters."

Similarly, in the Charleston Naval Shipyard case,^{23/} the Council observed:

In this case, the intent of the union's proposals, as characterized by the union in its petition to the Council and during oral argument, was, for example, to deal with the selection of personnel for overtime assignments and to insure equity and fairness in the selection of unit employees for training. Had the union's proposals as written clearly reflected such an intent, the proposals could

20/ See, e.g., AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, 2 FLRC 207, 211-215 [FLRC No. 73A-25 (Sept. 30, 1974), Report No. 57].

21/ See, e.g., International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322, 329-333 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

22/ AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., 1 FLRC 100, 104 [FLRC No. 71A-11 (July 9, 1971), Report No. 11].

23/ Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 610, 615 [FLRC No. 72A-46 (Dec. 27, 1973), Report No. 47].

very well have been determined to fall within the obligation to bargain imposed by section 11(a) of the Order, absent any showing by the agency that the proposals would violate applicable law, regulation of appropriate authority outside the agency or agency regulations. . . . [Footnote omitted.]

Applying the foregoing principles and precedents to the instant case,^{24/} we are of the opinion that, contrary to the agency's contention, the subject proposals are not excepted from the agency's bargaining obligation under section 11(b) of the Order, since they do not concern the structure of the shifts, the job constituency of the overtime activities, or the nature or components of placement assignments. Rather, the proposals are related solely to the procedures, including the criteria, for the selection of individual personnel to be assigned to those shifts, overtime activities, and placement assignments. And it does not appear that such procedures would interfere in any manner with the agency's own determination of the staffing patterns for those shifts, overtime work, and placement assignments.^{25/}

Accordingly, we hold that the agency erred in its determination that the union's proposed Article 22, Section 4, Article 23, Section 3(A) and Article 29, Section 3, are nonnegotiable. We shall, therefore, set aside this determination of nonnegotiability by the agency.

Conclusion

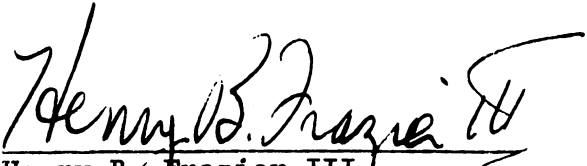
For the foregoing reasons, and pursuant to section 2411.28 of the Council's rules and regulations, we find that the agency's determination that the union's proposals involved in this case are nonnegotiable was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union

^{24/} See also Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75, at 3-4 of Council decision; and AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, 2 FLRC 207, 213-214 [FLRC No. 73A-25 (Sept. 30, 1974), Report No. 57].

^{25/} Contrary to the agency's argument, it is without controlling significance that the proposals involve a "swapping" or exchange of assignments, instead of an initial selection of personnel for those assignments. As already mentioned, the procedures to be employed in making individual assignments such as here presented are negotiable under the Order, and a different result is not militated by reason of the time when these procedures become operative.

proposals. We decide only that, as submitted by the union and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 7, 1977

National Treasury Employees Union, Chapter 101 and U.S. Customs Service, Office of Regulations and Rulings, Washington, D.C.. The dispute involved the negotiability under the Order of identical union proposals related to the selection of candidates for promotion, which the agency determined were nonnegotiable because they conflicted with, among other things, the Federal Personnel Manual (FPM).

Council action (April 7, 1977). Since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, including the Federal Personnel Manual, the Council, in accordance with established practice, sought an interpretation from the Commission of those directives as they pertain to the question raised in this case. Based on the Commission's reply, the Council concluded that the proposals conflicted with policies set forth in the FPM. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council held the agency determination of nonnegotiability was proper and must be sustained.

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

National Treasury Employees
Union, Chapter 101
(Union)

and

FLRC No. 76A-102

U.S. Customs Service, Office
of Regulations and Rulings,
Washington, D.C.
(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposals

Article 11, sections 3c and 7 provide as follows:^{1/}

When a selecting official is considering a group of best qualified candidates and narrows his choice to two (2) or more candidates on the best qualified list he determines to be equally well qualified, he will select the candidate with the greatest length of service in the Office of Regulations and Rulings.

Agency Determination

The agency head determined that the proposals are nonnegotiable because they conflict with the Federal Personnel Manual Chapter 335, subchapters 2, 3 and 5; and section 12(b) of the Order.^{2/}

Question Before the Council

Whether the proposals conflict with FPM Chapter 335.

Opinion

Conclusion: The proposals conflict with policies set forth in FPM Chapter 335. Thus, pursuant to section 2411.28 of the Council's rules and regulations, the agency determination, that the proposal is nonnegotiable, was proper and must be sustained.

^{1/} The parties' submissions indicate that both proposals at issue were intended to be identical.

^{2/} In view of our decision herein, it is unnecessary to reach, and we therefore make no ruling upon this contention.

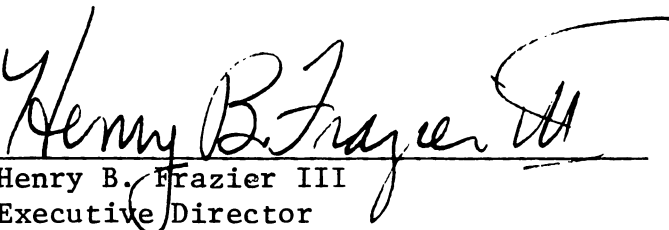
Reasons: Since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, including the Federal Personnel Manual, that agency was requested, in accordance with Council practice, for an interpretation of Commission directives as they pertain to the question raised in the present case. The Commission replied in relevant part as follows:

We find that the proposal is in violation of FPM Chapter 335, specifically of Requirement 6 of Subchapter 2. That requirement states that "Each plan shall provide for management's right to select or non-select." Its purpose is to preserve management's discretion in the actual selection decision. The proposal would infringe on and, in fact, eliminate that discretion by requiring an official considering two or more equally well-qualified candidates to select the one with the greatest length of service.

Management's discretion in making final selections is reiterated and elaborated upon in other parts of the Chapter. Section 3-7c provides that "selecting officials are entitled to make their selections from any of the candidates on a promotion certificate" (emphasis added). Section 5-1d provides that reserved management rights include the right to determine which candidate among the best qualified is selected for promotion. Further, as a corollary to the reserved management discretion in final selections, the Commission has long held that non-selection from a group of properly ranked and certified candidates is not a grievable matter. [FPM Supplement 990-1, Book III, Section 771.302 (b) (3)] [Citation in original; footnote omitted.]

Based on the foregoing interpretation by the Civil Service Commission of its regulations, we find that the union's proposals violate Commission directives.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 7, 1977

Long Beach Naval Shipyard, Long Beach, California and American Federation of Technical Engineers, Local 174 (AFL-CIO-CLC) (Gentile, Arbitrator). The arbitrator determined that the grievance, concerning the activity's denial of overtime pay for a number of employees for time spent for travel, was not arbitrable under the parties' agreement. The union filed an exception to the award with the Council, alleging (1) that the award violated applicable law and appropriate regulation; and (2), that the arbitrator was in error and the matter was a proper subject for arbitration.

Council action (April 7, 1977). As to (1), the Council held that the union's petition failed to present the necessary facts and circumstances in support of its exception. As to (2), the Council held that the union's assertion did not present a ground upon which the Council will grant review of an arbitrator's award. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 7, 1977

Mr. Thomas Martin
4647 Long Beach Boulevard
Suite D-10, Park Place
Long Beach, California 90805

Re: Long Beach Naval Shipyard, Long Beach, California
and American Federation of Technical Engineers,
Local 174 (AFL-CIO-CLC) (Gentile, Arbitrator),
FLRC No. 76A-107

Dear Mr. Martin:

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

According to the arbitrator's opinion and award, this case arose when the Long Beach Naval Shipyard (activity) denied seven employees two and one-half hours pay at overtime rates for time spent in travel from San Diego, California, to Long Beach, California, on December 10, 1975. The union filed a grievance on behalf of the seven employees alleging that the activity violated the collective bargaining agreement when it denied the employees overtime pay. The only issue decided by the arbitrator was whether the grievance was arbitrable. The arbitrator stated the arbitrability issue as follows:

Is the Arbitrator precluded from reaching the merits of the grievance, in that his doing so would entail his interpreting statutory law and Civil Service Commission regulations, rather than the contract itself?

Before the arbitrator, the activity contended that the dispute rested solely on the interpretation of statutory law and regulations of the Civil Service Commission which govern the matter, and that it is the sort of question which the parties intended to exclude from the grievance and arbitration procedure when they negotiated certain restrictive language contained in the agreement.^{1/}

^{1/} According to the arbitrator, the pertinent provisions of the agreement relied on by the activity provide as follows:

Article XXI, Section 4, Paragraph 5:

Questions as to the interpretation of published Department of Navy policies or regulations, provisions of law, or regulations . . . outside the agency . . . shall not be subject to the Negotiated Grievance Procedure regardless of whether such policies, laws or regulations are quoted, cited, or otherwise incorporated . . . in the agreement.

On the other hand, the union argued that the issue was arbitrable under the collective bargaining agreement, since it involved the employer's "pay practice."^{2/} The union further contended that the agreement did not preclude arbitration of the issue, since the relevant regulations were not Department of Navy regulations, but Shipyard Instructions and Civil Service Commission Federal Personnel Manual documents.

The arbitrator stated that the collective bargaining agreement does not contain specific language entitling the employees to overtime pay under the

(Continued)

Article XXII, Section 1:

. . . this (arbitration) article applies only to the interpretation or application of the agreement and does not extend to interpretation or change of the Dept. of the Navy or higher authority regulations or policy.

^{2/} According to the arbitrator, the union relied on the following provisions of the agreement:

Article XXI, Section 2:

The purpose of this article is to provide a mutually satisfactory method for the settlement of grievances of the parties and unit employees involving the interpretation or application of this Agreement.

Article V, Section 1:

Matters appropriate for consultation and negotiation between the parties are personnel policies, practices and procedures, affecting working conditions of the unit which are within the discretion of the Employer, including, but not limited to . . . pay practices . . . and hours of work.

Article VII:

[According to the arbitrator, "covers hours of work."]

Article VIII, Section 1:

Employees required to perform authorized overtime services shall be compensated in accordance with applicable rules and regulations.

Article XXV, Section 4:

Employees assigned to duty aboard a ship underway are considered to be in a travel status whether or not in standby status. Appropriate per diem rates will be prescribed when employees are in a travel status.

circumstances in question. Thus, the arbitrator stated that if he were to resolve the issue he would be obliged to look outside the agreement at extraneous documents. In his view, it was evidently contemplated at the time the contract was drawn that pay would be governed by rules and regulations not incorporated in the agreement itself, since the agreement provides that authorized overtime shall be compensated "in accordance with applicable rules and regulations." But, the arbitrator pointed out that "it is nowhere stated in the contract, nor does either of the parties specify, just which rules and regulations should apply." Therefore, noting the alternative forum open to the employees under the Fair Labor Standards Act and "the restrictive language of the applicable Collective Bargaining Agreement," the arbitrator made the following award:

The issue at hand is not arbitrable because the Arbitrator must interpret statutory law, principally the Fair Labor Standards Act, and Civil Service Commission regulations in order to address and resolve the merits of this controversy.

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

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


The union takes exception to the arbitrator's award on the ground that the award "violates applicable laws and regulations with respect to pay policies for Federal Employees in that said decision has unlawfully denied the aggrieved Federal Employees overtime compensation." The Council will grant review of an arbitrator's award where it appears, based upon facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulations. However, the union has not established a nexus between such applicable law and appropriate regulation and the arbitrator's award dismissing the instant grievance as nonarbitrable under the negotiated agreement. In this regard, it should be emphasized that the question decided by the arbitrator in this case was not whether the employees were entitled to overtime compensation, but rather whether the parties' negotiated grievance procedure encompassed the instant dispute. The arbitrator decided that the grievance procedure did not encompass the dispute and dismissed the grievance as nonarbitrable. Therefore, the union's petition fails to present the necessary facts and circumstances in support of this exception that the award violates applicable law and appropriate regulation and no basis is thus provided for the acceptance of the union's petition under section 2411.32 of the Council's rules. See Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard (Seidenberg, Arbitrator), FLRC No. 75A-110 (Apr. 13, 1976), Report No. 103.

Further, the union asserts that the arbitrator was in error, that the matter in issue was covered by Shipyard Instructions and that the matter was a proper subject for arbitration. The union argues that the dispute in this case requires an interpretation and application of Activity Instructions and not an analysis of Federal statutes. In the Council's opinion, the union's assertions in this regard do not present a ground upon which the Council will grant review of an arbitration award. Instead, the union is, in substance, disagreeing with the arbitrator's rationale for the award, specifically his interpretation of the collective bargaining agreement as excluding such a dispute from arbitration. In other words, the union is arguing that the arbitrator reached an incorrect result in his interpretation of the agreement. The Council has consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. E.g., Long Beach Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO (Leventhal, Arbitrator), FLRC No. 76A-59 (Nov. 5, 1976), Report No. 115; Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard (Seidenberg, Arbitrator), FLRC No. 75A-110 (Apr. 13, 1976), Report No. 103. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.^{3/}

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: H. P. T. Von Nostitz
Navy

3/ The Council notes that the Civil Service Commission is authorized to prescribe directives to implement certain statutory provisions dealing with overtime compensation in the Federal service and that the Commission has a statutory appeal procedure available to adjudicate claims of overtime entitlement under the Fair Labor Standards Act. See Wing Commander, 29th Flying Training Wing, Craig Air Force Base, Alabama and American Federation of Government Employees, AFL-CIO, Local Union No. 2574 (Williams, Arbitrator), FLRC No. 75A-121 (Sept. 14, 1976), Report No. 112. The formal procedures for adjudicating claims of overtime entitlement under FLSA for Federal employees are described in detail in Federal Personnel Manual Letter No. 551-9, Civil Service Commission System for Administering the Fair Labor Standards Act (FLSA) Compliance and Complaint System, dated March 30, 1976.

Veterans Administration Hospital, Wilkes-Barre, Pennsylvania and American Federation of Government Employees, Local 1699 (Pollock, Arbitrator). The arbitrator held that the activity violated the parties' agreement by assigning certain recurring duties to the employees involved, which were not included in the position descriptions of those employees; and sustained the grievance. However, the arbitrator did not direct any remedy for the violation. The agency filed an exception to the award with the Council, alleging that the award, if interpreted in a certain manner, would violate section 12(b) of the Order.

Council action (April 7, 1977). The Council held that the agency's exception was not supported by the facts and circumstances described in the petition, since nothing in the arbitrator's award required the activity to take any specific action, including action which might be contrary to section 12(b) of the Order. In addition, the Council determined that the agency, by hypothesizing, without supporting facts and circumstances, that the award might require it to take action contrary to section 12(b), was merely requesting an advisory opinion on the validity of a hypothetical award; and held that such a request does not present facts and circumstances to support an allegation that the award violates the Order; and, further, citing section 2411.53 of its rules of procedure, noted that it does not issue advisory opinions. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements of section 2411.32 of the Council's rules.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 7, 1977

Mr. Stephen L. Shochet
Office of the General Counsel
Veterans Administration
Washington, D.C. 20420

Re: Veterans Administration Hospital,
Wilkes-Barre, Pennsylvania and
American Federation of Government
Employees, Local 1699 (Pollock,
Arbitrator), FLRC No. 76A-129

Dear Mr. Shochet:

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

According to the award, the grievance in this case arose from the activity's assignment to nursing assistants and police officers of certain recurring duties not included in those employees' position descriptions. The union contended that these duties were not "reasonably related" to the employees' normal duties and qualifications and were therefore assigned in violation of the parties' agreement.^{1/} The arbitrator sustained the grievance, finding that "[t]here is no basis on which the added assigned duties are reasonably related to the position and qualification of the individual as provided for in Article 28, Sec. 1." The arbitrator further found, based upon his reading of pertinent Council decisions,^{2/} that the agreement provision in question did not conflict with rights reserved to the

^{1/} The provision of the agreement relied upon by the union (Article 28, Section 1) is set forth by the arbitrator as follows:

Employees will be furnished a copy of their job descriptions initially and as changes are made. The phrase "other duties as assigned" must be reasonably related to the position and qualifications of the individuals. The employer further agrees to consider the views and recommendations of the Union in matters relating to details.

^{2/} The arbitrator cites International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36] for his proposition that "the Agency may, in its discretion, under 11b determine whether it wishes to bargain on job content," and concludes that the activity

(Continued)

activity under sections 11(b) or 12(b) of the Order. Although the arbitrator held that the activity had violated the agreement, he directed no remedy for the violation.

The agency requests that the Council accept its petition for review of the arbitrator's award, and grant a stay thereof, on the ground that the award violates section 12(b) of the Order.

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

The agency prefaces its exception by asserting that it and the union cannot agree on the meaning of the award. According to the agency:

It was not clear to management whether the award barred the assignment of [the duties in question] to employees completely, or whether management could amend the position descriptions of the affected employees to specify the recurring duties, and, thereafter, assign those duties.

Management believed that under the reserved rights contained in section 12(b) of Executive Order 11491, it has the right to assign any duties to any employees subject only to the Arbitrator's admonition that the position description must accurately reflect all duties. However, the union disagreed, contending that, under the award, management could not assign unrelated duties to nursing assistants or police officers and could not change the position descriptions to include those specific duties.

(Continued)

in this case, by agreeing to Article 28, Section 1 "did so bargain." The arbitrator also refers to "other cases" in which there appears "authority . . . to the effect that it is in order to seek a definition and clarification of the terms of the Agency's position descriptions," (cf. Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, 2 FLRC 280 [FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60]) and notes finally that "[n]othing in this opinion or award dilutes management's rights under the Executive Order in Sections 11b and 12b."

The agency therefore asks that the Council rule on the following question:^{3/}

Assuming, arguendo, that the Arbitrator's award bars management from assigning the disputed duties to nursing assistants and police officers even after the position descriptions are changed to include such duties, does such an award constitute a violation of section 12(b)(1)(2)(4) and (5) of Executive Order 11491, as amended?

The agency cites various Council decisions in support of its assertion that the award, if interpreted as described above by the agency, violates section 12(b) of the Order.

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates section 12(b) of the Order. However, in this case the Council is of the opinion that the agency's exception is not supported by the facts and circumstances described in the petition. As previously indicated, while the arbitrator determined that the activity had violated the collective bargaining agreement, he directed no specific remedy. Thus, nothing in the arbitrator's award requires the activity to take any

3/ In the alternative, the agency requests that the Council direct the union to join with it in asking the arbitrator to clarify his award. The Council will direct the resubmission of an award for the limited purpose of clarifying or interpreting an award. Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100. Thus, where an arbitrator has instructed a party to take a specific action and a question has arisen as to the meaning of the award with respect to that action, the Council will direct the parties to resubmit the award to the arbitrator to clarify his award as to the specific action in question. American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), 2 FLRC 82 [FLRC No. 73A-4 (Feb. 12, 1974), Report No. 49]. However, in the instant case, the arbitrator's award does not direct the activity to take any specific action (see n. 4 infra, and accompanying text) and therefore there appears to be nothing in the award that requires clarification. Accordingly, the agency's request is denied.

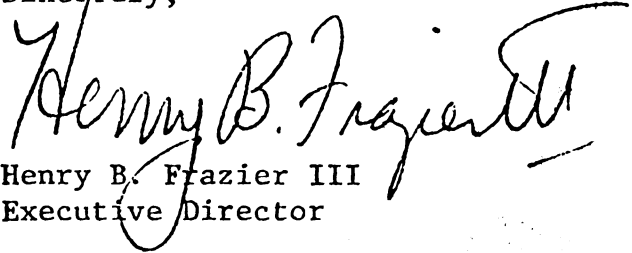
Likewise, to the extent that the agency's request may be construed as an exception to the award on the ground that the award is "incomplete, ambiguous or contradictory so as to make implementation of the award impossible," the Council finds that the agency has presented no facts or circumstances in support of such an exception. Cf. National Weather Service, N.O.A.A., U.S. Department of Commerce and National Association of Government Employees (Strongin, Arbitrator), FLRC No. 75A-63 (Aug. 15, 1975), Report No. 82.

specific action, including action which may be contrary to section 12 (b).^{4/} Moreover, in its opposition to the agency's petition, the union states that implementation of the award in a manner violative of the Order "is not, in fact, required by the arbitrator's award" and is "only an agency interpretation of the award, to which an alternative interpretation not violative of the Order admittedly exists." It appears from the record that the "alternative interpretation" to which the union refers is one which would permit the activity to assign the disputed duties to the positions in question by including those duties in the position descriptions. Since there appears to be nothing in the arbitrator's opinion or award which would express or imply an intention to bar the activity from doing so, the Council is of the opinion that the agency, by hypothesizing, without supporting facts and circumstances, that the award might require it to do otherwise, is merely requesting an advisory opinion on the validity of such a hypothetical award under section 12(b) of the Order. Such a request does not present facts and circumstances to support an assertion that the award violates the Order; further the Council does not issue advisory opinions.^{5/}

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. H. Broda
AFGE Local 1699

^{4/} The question before the arbitrator, according to the award, was: "Whether the assignment of specified duties to nursing personnel and policemen on a recurring basis was in violation of Article 28, Section 1?" The arbitrator's award was: "1. The grievance is sustained. 2. The Agency violated Article 28, Section 1 of the labor agreement when it assigned extra duties to nursing personnel and policemen."

^{5/} Section 2411.53 of the Council's rules of procedure provides that "[t]he Council shall not issue advisory opinions." Cf. Community Services Administration and National Council of CSA Locals (American Federation of Government Employees) (Edgett, Arbitrator), FLRC No. 75A-48 (Aug. 15, 1975), Report No. 81.

Internal Revenue Service, St. Louis District Office, Assistant Secretary Case No. 60-4633(GA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that the application for decision on grievability or arbitrability filed by the National Treasury Employees Union (NTEU) was untimely. Accordingly, the Assistant Secretary denied NTEU's request for review seeking reversal of the RA's dismissal of the application. NTEU appealed to the Council, contending that the Assistant Secretary's decision presented a major policy issue and was arbitrary and capricious.

Council action (April 7, 1977). The Council held that NTEU's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue or appear arbitrary and capricious. Accordingly, the Council denied NTEU's petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 7, 1977

Mr. Frank D. Ferris
National Field Representative
National Treasury Employees Union
4510(T) Oakland Gravel Road
Columbia, Missouri 65201

Re: Internal Revenue Service, St. Louis
District Office, Assistant Secretary
Case No. 60-4633(GA), FLRC No. 77A-2

Dear Mr. Ferris:

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

In this case, the Assistant Secretary, in agreement with the Regional Administrator (RA), found that the application for decision on grievability or arbitrability filed by the National Treasury Employees Union (NTEU) in the instant case was untimely filed. In reaching his determination, the Assistant Secretary stated:

[T]he instant Application is procedurally defective because it was not filed within 60 days after the final written rejection of your request for arbitration was served on you by the Activity. Thus, it is clear that, although the Activity's final decision, specifically designated as such, rejecting arbitrability was dated March 2, 1976, the Application herein was not filed until June 14, 1976, more than 60 days after such decision. Therefore, such Application was not timely filed within the requirements of Section 205.2(a) of the Assistant Secretary's Regulations.

Accordingly, the Assistant Secretary denied NTEU's request for review seeking reversal of the RA's dismissal of the application for decision on grievability or arbitrability.

In your petition for review on behalf of NTEU, you allege that the Assistant Secretary's decision concerning the timeliness of an application presents a major policy issue in light of recent amendments to the Order and the parties' agreement, asserting in substance that the activity's final written rejection of the grievance as nonarbitrable failed to state clearly that the activity also refused to submit the question of arbitrability to an arbitrator for resolution as permitted by the amended Order and the parties' agreement. You further allege that the decision of the

Assistant Secretary is arbitrary and capricious because he decided the timeliness issue "in vacuo," contrary to the Council's decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63, by failing to examine either the "relevant provisions of the agreement" or the "scope and coverage of the negotiated grievance procedure."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision does not appear arbitrary and capricious or present a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of Section 205.2(a) of his regulations, and your petition presents no persuasive reasons to show either that the Assistant Secretary was without authority to establish such regulation, or that his application thereof in the circumstances of this case was inconsistent with the purposes of the Order or with applicable precedent. Moreover, your contentions in support of the alleged major policy issue constitute, in essence, mere disagreement with the Assistant Secretary's finding that the activity's letter of March 2, 1976, was a final written decision, specifically designated as such, rejecting your request for arbitration. Nor does it appear that the Assistant Secretary, in finding that the application filed by NTEU was untimely, acted without reasonable justification in the facts and circumstances of this case, noting particularly that such finding was based upon his application of his regulations, as pointed out above.

Since the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T. J. O'Rourke
IRS

Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island. The dispute involved the negotiability under the Order of a union proposal concerning the establishment of specific procedures and criteria to be applied by hospital management in selecting individual personnel, employed as registered nurses by the agency, for assignment to particular shifts. The agency determined that the proposal was contrary to published agency policy and sections 11(b) and 12(b) of the Order, and was therefore nonnegotiable. Thereafter, the union filed an appeal with the Council.

Council action (April 21, 1977). The Council determined that the agency had clearly misinterpreted the meaning of the critical language in the union's proposal and therefore held, consonant with its prior decisions, that the agency failed to establish the applicability of its published policy as a bar to negotiation of the proposal under section 11(a) of the Order. The Council further found that the proposal was not excepted from the agency's obligation to bargain under section 11(b), and, finally, that the proposal was not violative of section 12(b)(2), (4) or (5) of the Order, as determined by the agency. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council held that the agency's determination as to the nonnegotiability of the union's proposal was improper and must be set aside.

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

Laborers' International Union
of North America, Local 1056

and

FLRC No. 75A-113

Veterans Administration Hospital,
Providence, Rhode Island

DECISION ON NEGOTIABILITY ISSUE

Background

Local 1056 of the Laborers' International Union of North America (union) represents a unit of registered nurses at the Veterans Administration Hospital in Providence, Rhode Island. During negotiations between the local parties, a dispute arose concerning the negotiability of the following union proposal:

In the event of a vacancy on the second or third shifts, management shall recruit and advertize for those existing vacancies on the second or third shifts. Registered nurses shall have the right to request the first, second or third shifts. Change requests shall be granted wherever and whenever possible. If two or more nurses request a specific shift, seniority shall be considered for preference. This section shall apply only provided that the needs of the VA Hospital are first considered and met.

Upon referral pursuant to section 11(c)(2) of the Order, the Veterans Administration (agency) determined that the union proposal is contrary to published agency policy and sections 11(b) and 12(b) of the Order, and is therefore nonnegotiable.

The union appealed to the Council from the agency determination, under section 11(c)(4) of the Order, and the agency filed a statement of its position pertaining to the union's appeal.

Opinion

The question presented is whether the subject proposal of the union is rendered nonnegotiable by reason of either published agency policy or by section 11(b) or section 12(b) of the Order. However, before discussing this issue, we shall briefly consider the intent and meaning of the disputed proposal as reflected in its language and in the record before the Council.

The basic objective of the proposal, as reflected in its language and in the record before the Council, is the establishment of specific procedures and criteria to be applied by hospital management in selecting individual personnel, employed as registered nurses by the agency, for assignment to particular shifts in the hospital's operations.

In more detail, the proposal would provide that, if a vacancy occurs on the second or third shift (which vacancy management decides to fill), management would be obligated to post and recruit for the vacancy on that particular shift, rather than unilaterally transferring an individual employed as a nurse from another shift and then posting and recruiting to fill the vacant nurse position on the shift from which the employee had been transferred. Further, nurses would have a general right to request assignment to shifts of their own choice; such requests for change would be granted by management wherever and whenever possible; and, if two or more nurses request the same shift, seniority would be considered for preference in the selection for assignment. Finally, application of the entire proposal would be conditioned on the requirement that the needs of the hospital must first be considered and satisfied.

We turn now to the specific grounds relied upon by the agency in claiming that the subject proposal is nonnegotiable.

1. Published agency policy. The agency asserts that, under published agency policy as interpreted by the agency head, employees are entitled to every possible consideration in arranging their work schedules, as long as that consideration is consistent "with the professional obligation to the patient."^{1/} However, according to the agency, the instant proposal

^{1/} The agency cites Department of Medicine and Surgery (DM&S) Supplement to VA Manual MP-5, part II, chapter 7 (issued pursuant to authority in 38 U.S.C. § 4108(a) (Supp. V, 1975)), which states:

7.04 General Provisions.

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

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

c. In the exercise of the authority to prescribe tours of duty, it will be the policy . . . (4) to give each full-time employee every possible consideration in arranging schedules so long as such consideration is compatible with the professional obligation to the patients.

makes "seniority the determining factor for shift assignments of nurses" and, because the proposal would therefore "establish seniority rather than proper patient care as the primary consideration for assigning and scheduling hours of duty," it violates the referenced agency policy. We find this contention to be without merit.

Contrary to the agency's position, the union's proposal would not make seniority either a "determining factor" or "primary consideration" in the selection of nurses for shift assignments. Instead, the proposal by its express terms simply provides that, if multiple requests for a shift are submitted, "seniority shall be considered for preference" in effecting the assignment. Moreover, as the union explains in its appeal, the critical language in its proposal is not intended to "foreclose the possibility of management considering factors other than seniority"; rather, if "two or more fully qualified registered nurses apply for a given assignment or tour of duty and the efficiency of the Federal Services and the professional obligation to the patients can be met by any one of the registered nurses the hospital should then permit seniority to be a factor" in the selection of a nurse for assignment. [Emphasis supplied.] Further, as previously indicated, application of the entire proposal would be conditioned on the requirement that the needs of the hospital first be considered and satisfied.

The agency has thus clearly misinterpreted the meaning of the critical language in the union proposal and we therefore hold, consonant with prior Council decisions, that the agency has failed to establish the applicability of its published policy as a bar to negotiation of the union proposal under section 11(a) of the Order.^{2/}

2. Section 11(b) of Order. The agency argues that the disputed proposal concerns the agency's staffing patterns, i.e., "the numbers, types, and grades of positions or employees assigned to . . . [a] tour of duty." which is a matter outside the agency's obligation to bargain under section 11(b) of the Order.^{3/} We cannot agree with this contention.

The Council considered at length the negotiability of union proposals, analogous in part to that here involved, in the recent Customs Service case.^{4/} There, the proposals sought to establish procedures, including criteria, for the selection of individual personnel to be assigned to particular shifts, overtime activities, and placement assignments within

^{2/} See, e.g., Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110, and cases cited therein at n. 19.

^{3/} Section 11(b) provides in relevant part that "the obligation to meet and confer does not include matters with respect to . . . the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty"

^{4/} National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123.

the agency. The agency similarly took the position that the proposals concern the agency's staffing patterns and are thereby nonnegotiable under section 11(b) of the Order. In rejecting the agency's argument and finding the proposals negotiable, the Council first discussed the "legislative history" of the pertinent provisions in section 11(b)^{5/} and then stated (at 10-12 of Council decision):

Consonant with the language of section 11(b) and the explanation of this language in the Report, the Council has consistently ruled that matters related to an agency's "staffing patterns" are excepted from an agency's bargaining obligation. More specifically, it is well-established, for example, that an agency is not required to negotiate on either the number of shifts or the organizational structure of activities within those shifts, viz., the number of employees, or the number or categories of positions or employees assigned to organizational units, work projects or tours of duty. Likewise, an agency is not required to bargain on whether or not work on overtime (as well as on regular time) is needed, the times for the performance of the overtime work, or the number or job constituency of the personnel to be utilized during the overtime activities. Further, the agency is not obligated to negotiate on the nature of the work to be performed on each shift or the tasks to be assigned various job categories and accomplished on the respective shifts.

At the same time, and also consistent with the Order and the Report, the Council has uniformly held that, once management has determined such staffing patterns, section 11(b) does not except from the obligation to bargain matters concerning the selection of individual employees for assignment to the particular shifts, overtime work, or job placements, which the agency has established for the conduct of its operations.

.

Applying the foregoing principles and precedents to the instant case, we are of the opinion that, contrary to the agency's contention, the subject proposals are not excepted from the agency's bargaining obligation under section 11(b) of the Order, since they do not concern the structure of the shifts, the job constituency of the overtime activities, or the nature or components of placement assignments. Rather, the proposals are related solely to the procedures, including the criteria, for the selection of individual personnel to be assigned to those shifts, overtime activities, and placement assignments. And it does not appear that such procedures would interfere in any manner with the agency's own determination of the staffing patterns for those shifts, overtime work, and placement assignments. [Emphasis supplied in part; footnotes omitted.]

^{5/} See Labor-Management Relations in the Federal Service (1975), at 70-71.

As in the Customs Service case, the union's proposal in the present case does not relate in any manner to the agency's staffing patterns, such as the number of shifts, or the number, types and grades of positions including classifications and specialities within classifications^{6/} as well as specialized skill and experience requirements, needed on each shift—all of which remain within the province of management to determine. Instead, as already mentioned, the proposal is designed solely to establish specific procedures and criteria to be applied by management in selecting individual personnel employed as registered nurses by the agency for assignment to particular shifts, which procedures and criteria would not in any respect impede the determination by management of its staffing patterns.

Accordingly, for the reasons set forth in the Customs Service case, we find that the union's proposal is not excepted from the agency's obligation to bargain under section 11(b) of the Order.

3. Section 12(b) of Order. The agency argues that the subject proposal violates agency rights "to hire, . . . assign, and retain employees in positions within the agency," under section 12(b)(2); "to maintain the efficiency" of its operations, under section 12(b)(4); and "to determine the methods, means, and personnel by which [its] operations are to be conducted," under section 12(b)(5), of the Order. These contentions, in our opinion, are without merit.

As to 12(b)(2), the proposal, contrary to the agency's assertion, does not negate the agency's right to hire new employees in nursing positions within the agency. The decision to hire in such positions would remain exclusively with management; and the newly hired employees, instead of receiving priority shift selection as now provided under agency procedures, would simply be afforded the same opportunity for shift selections as the other individuals already employed as registered nurses by the agency. Likewise, the proposal does not seek to limit the agency's right to assign or retain employees in nursing positions within the agency. Rather, as previously indicated, the proposal merely relates to the procedures and criteria for an individual nurse to select a particular shift on which management has determined that the work of that position shall be performed. Accordingly,^{7/} the proposal is plainly not violative of section 12(b)(2) of the Order.

With respect to 12(b)(4), while the agency alleges in substance that the proposal would interfere with management's training of less senior nurses and would thereby impede the "efficiency" of its operations, nothing

^{6/} As to nurse specializations, see generally U.S. Civil Service Commission, Position-Classification Standards, Nurse Series GS-610 and U.S. Civil Service Commission Handbook X-118, Qualification Standards for White-Collar Positions under the General Schedule, GS-610 Nurse Series.

^{7/} National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123, at 8 of Council decision.

whatsoever in the proposal restricts the agency in its structuring of shifts for training purposes, its assignment of duties to the positions on the respective shifts, or its conduct of other training activities within the agency. Moreover, the agency has failed to provide any substantial demonstration that reduced effectiveness is "inescapable and significant," and "not offset by compensating benefits" such as would here potentially derive from the proposal. Thus, the agency has failed to establish that the proposal is violative of section 12(b)(4) of the Order.^{8/}

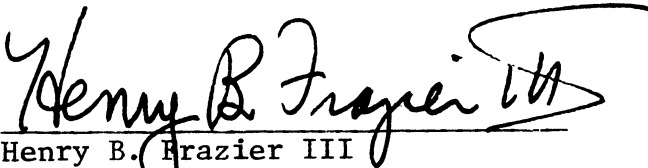
Finally, as to 12(b)(5), the agency has failed to demonstrate that the proposal would infringe in any way on the agency's right to establish either the "methods," "means," or "personnel" by which its operations are to be conducted within the recognized meaning of those terms as used in that section of the Order.^{9/} We therefore reject the agency's reliance on section 12(b)(5) in support of its determination of the nonnegotiability of the disputed proposal.

In summary, we hold that the union's proposal is not violative of section 12(b)(2), (4) or (5) of the Order, as determined by the agency.

Conclusion

For the foregoing reasons, and pursuant to section 2411.28 of the Council's rules and regulations, we find that the agency's determination as to the nonnegotiability of the union's proposal here involved was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council on the merits of the union proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 21, 1977

^{8/} Id., at 9 of Council decision.

^{9/} Id. Contrary to the agency's contention, the possible arbitration of a grievance relating to the application of the union proposal does not render the proposal violative of any management right under section 12(b) of the Order. Id.

National Labor Relations Board Union and the General Counsel of the National Labor Relations Board (Fallon, Arbitrator). The arbitrator determined that under the circumstances here involved, the General Counsel of the agency violated the parties' agreement in appointing another employee rather than the grievant to a GS-14 nonsupervisory attorney position, and directed the General Counsel to promote the grievant immediately and compensate him with appropriate backpay. The agency filed exceptions to the award with the Council, alleging (1) that the award violated appropriate regulations, namely, the Federal Personnel Manual; (2) that the arbitrator exceeded his authority; and (3), that the award was based upon a mistake of fact. The agency also requested a stay of the award.

Council action (April 21, 1977). As to (1), (2) and (3), the Council held that the agency's petition did not present the necessary facts and circumstances to support its exceptions. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 21, 1977

Mr. George Norman
Counsel for the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW.
Washington, D.C. 20570

Re: National Labor Relations Board Union and
the General Counsel of the National Labor
Relations Board (Fallon, Arbitrator), FLRC
No. 76A-90

Dear Mr. Norman:

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

According to the arbitrator's award, in October 1975 the grievant and another employee were GS-13 field attorneys in the National Labor Relations Board (NLRB) Boston Regional Office (the activity). The GS-13 position is the full performance (journeyman) level for field attorneys. All GS-13 attorneys are evaluated annually by the Regional Office as part of the contractually mandated career development system. Included as part of such evaluation is a recommendation for or against promotion to GS-14 supervisory and nonsupervisory positions. However, according to the award, a favorable recommendation does not necessarily mean a promotion to a GS-14 position is immediately forthcoming since the NLRB Division of Operations Management must first review the evaluation and recommendation and determine the attorney's eligibility for promotion. Further, after eligibility has been determined, only a limited number of GS-14 level positions are available. Thus, the arbitrator pointed out, in some regions attorneys are recommended and determined eligible for promotions which are not currently available.

The grievant had been first recommended for promotion to a GS-14 position in January 1972 and the other employee in November 1973, with both recommended during each subsequent annual evaluation. However, no GS-14 position was available until the fall of 1975, when a nonsupervisory GS-14 position became available at the activity. The other employee was promoted to fill the position under the criteria for selection for competitive promotion set forth in the parties' negotiated agreement. The grievant filed a grievance resulting in the instant arbitration, contending that the other employee's appointment was made in "total disregard of the seniority and experience" of the grievant.

The arbitrator stated the grievance before him as follows:

Did the General Counsel violate the collective bargaining agreement in the appointment of [the other employee] as GS-14 nonsupervisory attorney? If so, what should the remedy be?

In his discussion section of his decision, the arbitrator stated that "[a] central issue in resolving this dispute is whether the promotion to GS-14 nonsupervisory attorney is competitive or noncompetitive. If, under the contract, it is competitive, the General Counsel's actions in promoting [the other employee] were absolutely proper." Noting that the parties' collective bargaining agreement is unclear in this regard and referring to certain articles of the agreement which indicated the position was competitive and others which indicated it was noncompetitive, the arbitrator found that the parties had created "a hybrid position." With regard to employees outside the region where an opening exists, the arbitrator found the nonsupervisory attorney position to be "clearly competitive." With regard to attorneys within that region, however, he stated that the position had at least some of the characteristics of a noncompetitive promotion and "[e]xactly how much it parallels the noncompetitive promotions up to the full performance level hinges on the reading given § 2(f)7.a., especially the word 'normally.'"^{1/}

The arbitrator then concluded, based on his reading of the agreement, that where there are eligible attorneys within a region, the General Counsel must promote these attorneys to available GS-14 nonsupervisory attorney positions in a noncompetitive manner. Further, noting that the contract does not provide a solution and that therefore he "must adopt the most reasonable and equitable system," the arbitrator directed that in those instances when there are more recommended and eligible attorneys than positions available and a GS-14 nonsupervisory attorney position becomes available within a region, the General Counsel should promote the GS-13 attorney who was determined eligible on the earliest date and who has maintained that eligibility continuously. The arbitrator then awarded as follows:

The General Counsel violated the collective bargaining agreement in the appointment of [the other employee] as GS-14 nonsupervisory attorney. Under the contract, the General Counsel should have

^{1/} Section 2(f)7.a. of Article VI (CAREER DEVELOPMENT) states:

Section 2. Promotion Policy

(f) Competitive Promotions for Field Examiners and Attorneys.

7. Grade GS-14, Non-Supervisory Field Attorney

- a. Positions will normally be filled by noncompetitive promotion of employees within the Region.

appointed [the grievant]. The General Counsel is therefore directed to promote [the grievant] immediately and reimburse him for all wages and benefits lost as a result of not being promoted on October 12, 1975.

The agency takes three exceptions to the arbitrator's award on the grounds discussed below and requests a stay of the award. The union filed an opposition.

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

In its first exception, the agency contends that the arbitrator's award conflicts with Civil Service Commission regulations. In support of this exception, the agency asserts that the award will force the agency to violate Federal Personnel Manual chapter 335, subchapter 4-2(b)(2), which provides that positions in the competitive service in grades above the full performance level are to be filled under competitive promotion procedures. The agency concedes that nonsupervisory attorneys are not in the competitive service, but argues that it has treated such employees in the same manner as field examiners who are in the competitive service and whose promotions are subject to the above regulation. Therefore, it concludes that if the arbitrator's decision is upheld and the nonsupervisory attorney position is deemed noncompetitive, then "Agency practice and the parties' intent, as evidenced by the collective bargaining agreement, would require that the field examiner specialist position also be considered noncompetitive . . . a result . . . clearly contrary to the Civil Service Commission regulations."

The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulations. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception that the arbitrator's award is contrary to the Federal Personnel Manual. In this regard, the Council notes that the agency is not contending that the arbitrator's award, which dealt with GS-14 nonsupervisory attorneys in the excepted service, violates the Federal Personnel Manual, but instead predicates its assertion on an extension of the award by the agency to field examiners in the competitive service--positions which were not involved in the matter before the arbitrator. However, there is nothing in the arbitrator's award itself which specifically requires such an extension. Instead, the arbitrator only directs that "when a GS-14 nonsupervisory attorney position becomes available within a region, the General Counsel should promote the GS-13

attorney who was determined eligible on the earliest date, and who has maintained that eligibility continuously," and finds that "[t]he General Counsel violated the collective bargaining agreement in the appointment of [the other employee] as GS-14 nonsupervisory attorney." Therefore, noting that nothing in the award requires the agency to extend this award to employees in the competitive service and that the union, in its opposition to the petition for review, points out that competitive service positions are "not encompassed by the award," the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances to support its exception that the award violates the Federal Personnel Manual, and therefore this exception provides no basis for acceptance of the petition under section 2411.32 of the Council's rules.

In its second exception the agency contends that the arbitrator exceeded his authority by modifying or rewriting the contract. The agency asserts that by formulating his own method for determining what procedure is to be used when there are more eligible employees than nonsupervisory attorney positions available within a region, the arbitrator modified, rather than merely interpreted, the collective bargaining agreement. The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority by adding to or modifying any of the terms of the agreement. Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator), FLRC No. 75A-7 (June 26, 1975), Report No. 76.

In this case, however, the Council is of the opinion that the agency's exception is not supported by the necessary facts and circumstances. It is noted that the issue presented to the arbitrator expressly included the question of what the remedy should be. In the Council's opinion, the agency, in substance, is simply challenging the remedy as fashioned by the arbitrator. The Council follows a policy, as do courts in the private sector, in favor of allowing arbitrators discretion in fashioning remedies so long as those remedies do not violate applicable law, appropriate regulation or the Order. Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78; and Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), 2 FLRC 185 [FLRC No. 74A-12 (Sept. 9, 1974), Report No. 56]. Therefore, this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

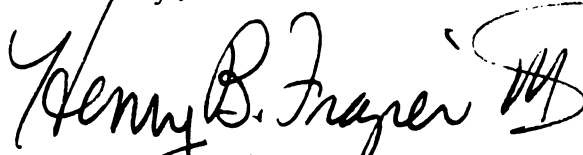
The agency's third exception alleges that the arbitrator's interpretation of the language at issue was based on his erroneous conclusion that at the time the language was negotiated, there were always GS-14 nonsupervisory attorney positions available when persons became eligible for such positions. Thus, the agency concludes that the entire decision is based upon a "mistake of fact" and, therefore, the award must be set aside. In support of this exception, the agency cites Office of Economic

Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81, in which the Council stated that it will grant a petition for review of an arbitration award under section 2411.32 of its rules where it appears, based upon the facts and circumstances described in the petition, that the central fact underlying the award is concededly erroneous and constitutes a gross mistake of fact but for which a different result would have been reached. However, the Council is of the opinion that this exception is not supported by necessary facts and circumstances. That is, the agency has not presented facts and circumstances to indicate that the central fact underlying the award is the arbitrator's statement that in 1970 "apparently all people . . . determined eligible were promoted" and that but for this statement of fact a different result would have been reached. In essence, the agency, in asserting that the arbitrator reached this conclusion "[i]n spite of . . . uncontested record testimony," appears to be taking issue with the arbitrator's reasoning and conclusion in arriving at his interpretation of the agreement provision before him. The Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Therefore, this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. Droker
NLRBU

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Walsh, Arbitrator). This appeal arose from the arbitrator's award directing that the agency pay the grievant an amount of money claimed by him for 60 days temporary storage of household effects. The Council accepted the agency's petition for review, insofar as it related to the agency's exception which alleged that the award violated applicable law and appropriate regulation. The agency also requested a stay of the award. (Report No. 118)

Council action (April 21, 1977). Because the case concerned an issue within the jurisdiction of the Comptroller General's Office, the Council requested a decision from him as to whether the arbitrator's award violated applicable law and appropriate regulations. Based on the subsequent decision of the Comptroller General, the Council held that the arbitrator's award did not violate applicable law and appropriate regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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

Professional Air Traffic Controllers
Organization

and

FLRC No. 76A-98

Federal Aviation Administration,
Department of Transportation

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing that the agency pay to the grievant an amount of money claimed by him for 60 days temporary storage of household effects.

According to the arbitrator's award, this matter arose when the Federal Aviation Administration (the agency) refused to reimburse the grievant, a newly hired Flight Service Station Specialist, for 60 days temporary storage of household effects after the grievant, upon completing a training course in Oklahoma, accepted a position in Anchorage in lieu of another position in a remote area of Alaska as originally contemplated. The agency denied payment to the grievant on the basis that "applicable regulations and rulings of the Comptroller General . . . precluded the requested payment." The union ultimately invoked arbitration.

The Arbitrator's Award

The arbitrator determined that the agency violated Article 19, Section 1 of the parties' collective bargaining agreement "because the Grievant was not reimbursed for his 'moving expenses.'" He also determined that Article 19, Section 5 of the agreement had been violated since "at no time was the Grievant informed of 'all pertinent directives'" concerning reimbursement of moving expenses.^{1/} As his award the arbitrator directed the agency to pay the grievant \$250.41, the amount claimed by him for the 60 days of storage.

^{1/} According to the award, Article 19, Sections 1 and 5 provide as follows:

ARTICLE 19 - MOVING EXPENSES/PERMANENT CHANGE OF STATION

(Continued)

Agency's Appeal to the Council

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

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the arbitrator's award directing the grievant's reimbursement for 60 days temporary storage of household effects under the circumstances of the case violates applicable law and appropriate regulations. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulation. The Comptroller General's decision in the matter, B-187405, March 22, 1977, is set forth in relevant part below:

The facts as found by the arbitrator are as follows. Mr. Crumpacker entered on duty with the FAA on March 16, 1975, as a Flight Service Station Specialist. Prior to being employed, Mr. Crumpacker and his family lived in Auburn, Washington, but he maintained a post

(Continued)

Section 1. Employees will be reimbursed for moving expenses to the maximum extent permissible under Public Law 89-516, as amended, and implementing agency directives as set forth in FAA Order 1500.14 and appendices thereto

Section 5. The Employer shall make available to an employee who is changing station, all pertinent directives in connection with moving expenses and shall assist the employee in obtaining answers to any questions the employee may have.

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

office box at Chugiak, Alaska, and he was considered locally hired. His first duty station was the Anchorage Flight Service Station, Anchorage, Alaska, where he was assigned for a period of approximately 7 weeks of initial training in the Flight Service Station (FSS) option. He moved his family and household goods to Chugiak at his own expense and has not claimed those expenses. He was then assigned for further training at the Academy Flight Service School in Oklahoma City, Oklahoma.

The arbitrator determined that both the FAA and the employees in the FSS option, including the grievant, clearly anticipated that upon completion of their training, the employees would be assigned to the remote area of Alaska known as the "bush." For that reason, the FAA gave a briefing to the grievant and three other trainees on April 21, 1975, and disseminated to them information concerning their rights and entitlements upon transfer. Among the matters discussed were the difference between a permanent change of station and temporary duty travel, and an employee's entitlement to 60 days temporary storage of his household goods incident to a permanent change of station. In anticipation of his ultimate assignment to the remote area, Mr. Crumpacker placed his household goods in temporary storage.

While receiving training in Oklahoma City, Mr. Crumpacker received a letter dated May 12, 1975, from the Chief, Anchorage Air Route Traffic Control Center (ARTCC), stating that, if he wished to do so, Mr. Crumpacker could apply as a candidate for the "enroute option" at the Anchorage ARTCC. The letter explained that, if accepted into the enroute option, Mr. Crumpacker would receive training as a developmental air traffic controller. On May 17, 1975, because he wanted to become an air traffic controller, Mr. Crumpacker sent a written notice to the Anchorage ARTCC applying for the position. He knew at the time that, if selected, he would be stationed in Anchorage and not sent to the bush. He was ultimately selected for the enroute option, and on July 7, 1975, he reported for duty at the Anchorage ARTCC. No travel orders were ever issued transferring him to another location.

The Chief of the Anchorage ARTCC testified that he had written to the grievant and the other FSS trainees explaining the enroute option to them and inviting bids. He said he did so because "the Center had not been getting bidders from those in the Flight Service option * * *."

Mr. Crumpacker's claim for storage expenses was denied by FAA on the ground that he was ineligible for relocation expenses under the applicable regulations and Comptroller General's rulings because he had not transferred to a duty station outside Anchorage. In addition, the claim was denied on the ground that under para. 2-8.5a of the Federal Travel Regulations (FPMR 101-7) (May 1973), temporary

storage of household goods at Government expense may only be allowed when such storage is incident to their transportation at Government expense, and that no such transportation was provided in this case. Mr. Crumpacker then filed a grievance and the matter was submitted to arbitration under the labor agreement.

The arbitrator awarded the grievant the full amount of his claim based upon a determination that the FAA had violated the collective bargaining agreement with the Professional Air Traffic Controllers Organization. In particular, the arbitrator determined that, by failing to inform Mr. Crumpacker that his temporary storage charges would not be paid if he returned to Anchorage, the FAA breached Article 19, Section 5, of the agreement which required it to provide to transferred employees "all pertinent directives" concerning reimbursement of relocation expenses. The arbitrator also concluded that Article 19, Section 1 of the agreement was violated by the FAA's failure to pay the grievant's "moving expenses." He, therefore, awarded temporary storage costs to the grievant.

We hold, for the reasons stated below, that the arbitrator's award is consistent with applicable law and regulations.

The arbitrator specifically found that the Federal Aviation Administration definitely intended to transfer Mr. Crumpacker and the other trainees to a remote area upon completion of their training. They were given an extensive briefing on their transfer entitlements, and Mr. Crumpacker was advised that it would be advantageous for him to place his household goods in temporary storage pending the transfer. The intended transfer was not effected because the FAA selected Mr. Crumpacker for a position as an air traffic control specialist in Anchorage. Because that selection occurred prior to the execution of the intended transfer, formal travel orders authorizing a transfer to a remote station were not issued. Thus, the transfer--which was clearly intended by the agency, anticipated by the employee, and resulted in his incurring expenses for temporary storage--was not effected because of the agency's action in selecting the employee for another position in the same city as his prior duty station.

FAA does not dispute the arbitrator's finding that it definitely intended to transfer the grievant to another location upon his return from training. In fact the FAA's post hearing brief submitted to the arbitrator concedes that if the grievant had remained in the FSS option, "he would have been entitled to a PCS travel order with all related benefits." (brief, p. 13) However, FAA contends that Mr. Crumpacker voluntarily applied for and accepted the new position in Anchorage for reasons to his personal benefit. We disagree because the agency solicited applications from the trainees in order to broaden its recruitment program and then selected Mr. Crumpacker for the position. Thus, his selection and appointment to the new position were made in the best interests of the agency. His voluntary acceptance of the agency's offer does not preclude reimbursement of his storage expenses.

We now turn to the FAA's argument that the award may not be paid because the grievant was not transferred to a remote duty station. We have held that, where a transfer has been cancelled and certain expenses would have been reimbursable had the transfer been effected, an employee may be reimbursed for expenses incurred in anticipation of the transfer and prior to its cancellation. B-177439, February 1, 1973. Further, when by reason of the cancellation, the employee's duty station is not changed, we have treated the employee for reimbursement purposes, as if the transfer had been consummated and he had been retransferred to his former station. B-177898, April 16, 1973; B-170259, September 15, 1970. The expenses which have been held reimbursable under these decisions include temporary storage of household goods and personal effects. B-177439, supra.

The operative factors governing our decisions concerning reimbursement of expenses incurred incident to cancelled transfers are the agency's clear intention to effect the transfer, the communication of that intention to the employee, and the employee's good faith actions taken in reliance on the communicated agency intention. Although the Federal Travel Regulations do not expressly state what constitutes the authorization of a transfer, travel orders are generally recognized as being the authorizing document. 54 Comp. Gen. 993, 998 (1975). Thus, in the ordinary case, the agency's intention to authorize a transfer is objectively manifested by the execution of travel orders. However, the absence of travel orders is not fatal if there is other objective evidence of the intention to make a transfer. B-173460, August 17, 1971.

In the present case, no travel orders were issued, but the arbitrator specifically found that the FAA clearly intended to transfer the grievant to a remote duty station upon completion of his training, and the FAA concedes such intention. We accept the arbitrator's uncontroverted determination that the agency clearly intended to effect the transfer as constituting the requisite objective evidence of agency intent which is manifested by travel orders in the ordinary case.

Accordingly, in view of the arbitrator's determination that the FAA clearly intended to transfer Mr. Crumpacker to a remote duty station, that the intended transfer was not effected by reason of his selection for and acceptance of another position offered to him by the FAA in Anchorage, and that the expenses were incurred in good faith at a time when the agency's intentions were clearly expressed, we hold that the grievant's storage charges may be reimbursed. B-177439, supra.

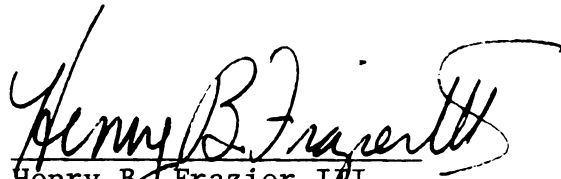
Accordingly, if otherwise proper, the arbitration award may be implemented.

Based upon the foregoing decision by the Comptroller General, we conclude that the arbitrator's award does not violate applicable law and appropriate regulations.

Conclusion

For the foregoing reasons, we find that the award directing payment by the agency to the grievant for an amount of money claimed by him for 60 days temporary storage of household effects does not violate applicable law and appropriate regulation. Pursuant to section 2411.37(b) of the Council's rules of procedure, we therefore sustain the arbitrator's award and vacate the stay.

By the Council.


Henry B. Frazier III
Executive Director

Issued: April 21, 1977

U.S. Department of the Interior, Geological Survey, Gulf of Mexico OCS Operation, Assistant Secretary Case No. 64-3040(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that further proceedings were unwarranted on the complaint filed by Local 3457, American Federation of Government Employees, AFL-CIO (AFGE), which alleged that the activity violated section 19(a)(1) and (2) of the Order by denying an employee a promotion because of her union activities. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the RA's dismissal of the complaint. AFGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and raised major policy issues.

Council action (April 21, 1977). The Council held that AFGE's petition did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of AFGE's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

April 21, 1977

Mr. Raymond J. Malloy
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Department of the Interior,
Geological Survey, Gulf of Mexico OCS
Operation, Assistant Secretary Case
No. 64-3040(CA), FLRC No. 77A-14

Dear Mr. Malloy:

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

In this case, Local 3457, American Federation of Government Employees, AFL-CIO (AFGE) filed an unfair labor practice complaint alleging that the U.S. Department of the Interior, Geological Survey, Gulf of Mexico OCS Operation (the activity) violated section 19(a)(1) and (2) of the Order by denying an employee a promotion on three different occasions because of her union activities. On the basis of an investigation of the complaint, the Regional Administrator (RA) found that AFGE had not established that the activity, in failing to promote the employee, had based its actions, in whole or in part, on anti-union considerations. Accordingly, he concluded that AFGE had "failed to sustain the burden of proof imposed by Section 203.6(e)" of the Assistant Secretary's regulations and therefore dismissed the complaint. The Assistant Secretary, in agreement with the RA, found that further proceedings were not warranted because "the evidence is insufficient to establish a reasonable basis for the instant complaint." Accordingly, he denied AFGE's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of AFGE, you allege that the decision of the Assistant Secretary is arbitrary and capricious and raises

major policy issues. In essence, you contend that it was arbitrary and capricious to dismiss the subject complaint "at the administrative investigative stage," without a hearing, since AFGE had submitted substantial evidence to support its complaint and to sustain its burden of proof under the Assistant Secretary's regulations. You further allege that the Assistant Secretary's decision raises major policy issues as to "[t]he degree of burden of proof necessary to support a case going to a hearing," and "as to whether a complaint . . . can be dismissed at the investigatory stage when evidence of union animus is present in the investigative record."

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

With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that he acted without reasonable justification in reaching his decision. Section 6(d) of the Order provides: "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order," one of which is to "decide unfair labor practice complaints . . ." pursuant to section 6(a)(4) of the Order. Section 203.8(a) of the Assistant Secretary's regulations provides:

If the Assistant Regional Director determines that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint.

Further, Section 203.6(e) states:

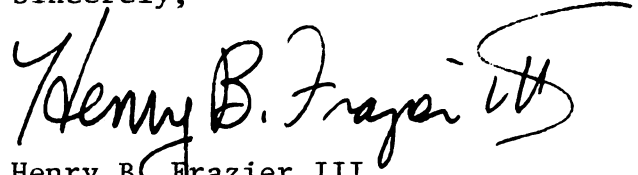
The complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, and on a number of subsequent occasions, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he applied these regulations in a manner inconsistent with the Order in the circumstances of this case. Similarly, for the reasons stated above, no major policy issues warranting Council review are presented by your petition.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. F. McKune
Interior

Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C., A/SLMR No. 608. This appeal arose from a decision and order of the Assistant Secretary who, upon a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1960, found, in agreement with the Administrative Law Judge (ALJ), that the Department violated section 19(a)(1) of the Order by directing its subordinate activity to terminate environmental differential pay awarded to certain employees in arbitration proceedings; and that the activity violated section 19(a)(1) and (6) of the Order by unilaterally terminating such pay. As part of his remedial order, the Assistant Secretary directed the activity to reimburse the employees involved any monies deducted or withheld from them by reason of the termination of payments. The Council accepted the Department's petition for review, concluding that the decision of the Assistant Secretary raised certain major policy issues, namely: (1) Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) of the Order by such agency management at that level of the agency and/or by other agency management at a lower organizational level of the agency where a unit of exclusive recognition exists; and (2) whether it is consistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payments is in reasonable doubt. The Council also granted the Department's request for a stay. (Report No. 108)

Subsequent to Council acceptance, the Comptroller General, in response to a request from the Department initiated after its exceptions to the ALJ's findings were filed with the Assistant Secretary, ruled, in effect, that the environmental differential pay involved herein was legal and may be reinstated and, further, that employees who lost the environmental differential after such pay was terminated were entitled to backpay for the period of termination (56 Comp. Gen. 8 (1976)). The union then requested the Council to vacate the stay insofar as it related to that part of the Assistant Secretary's remedial order which provided for the payment of monies to the employees involved. The Council thereafter granted the union's request. With respect to the remainder of the Assistant Secretary's decision and order, the stay continued in effect.

Council action (May 4, 1977). As to (1), the Council held that the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by "agency management," but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational level of the agency where a unit of exclusive recognition exists. Applying the principles enunciated in its decision to the facts and circumstances of this case, the Council

concluded that "agency management" violated sections 19(a)(6) and 19(a)(1) of the Order. This conclusion was predicated solely upon the actions of the Department in initiating the conduct which the Assistant Secretary found violative of these sections of the Order, rather than upon the ministerial conduct of the activity in the circumstances of this case. As to (2), the Council held that it is inconsistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt. Rather, such a remedial order either must await or be made contingent upon the Comptroller General's ruling as to the legality of the payment. In the instant case, as the Comptroller General had upheld the legality of the payments directed by the Assistant Secretary, the remedial order in this regard was therefore sustained by the Council. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council sustained in part and set aside in part the Assistant Secretary's decision and order and remanded the case to him for appropriate action consistent with its decision.

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

Naval Air Rework Facility
Pensacola, Florida

and

Secretary of the Navy,
Department of the Navy,
Washington, D.C.

A/SLMR No. 608
FLRC No. 76A-37

and

American Federation of Government
Employees, AFL-CIO, Local 1960

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This case arose when the American Federation of Government Employees, AFL-CIO, Local 1960 (the union), filed an unfair labor practice complaint against the Department of the Navy (the Department) and the Naval Air Rework Facility, Pensacola, Florida (the activity). The complaint alleged that the Department and the activity had violated section 19(a)(1) and (6) of the Order^{1/} when the Department directed the activity to terminate environmental differential pay for certain employees at the activity and the activity complied with that direction and terminated such pay. (The environmental differential pay had been awarded the employees in arbitration proceedings processed under the negotiated agreement between the union and the activity.) The Assistant Secretary found that the activity violated section 19(a)(1) and (6) of the Order by its termination of the environmental differential pay and that the Department violated section 19(a)(1) by ordering the activity to do so. The Department appealed the Assistant Secretary's decision to the Council.

1/ Section 19(a) of the Order provides in pertinent part:

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: The activity and the union had been parties to two negotiated agreements containing certain provisions authorizing additional pay for employees engaged in hazardous or "dirty" work at the activity's facility. Pursuant to the parties' agreement, two arbitrators issued awards directing the activity to pay environmental differential pay to two categories of its employees. The activity did not file exceptions to these awards with the Council but, after accepting both awards by letter, began paying the differentials to the affected employees—which payment continued for over a year. During an ensuing review of the Department's adherence to, and proper administration of, applicable pay laws, the Department's Office of Civilian Manpower Management (OCMM) questioned the propriety of these differential payments made by the activity pursuant to the two arbitration awards. Because it believed that the payments were improper under applicable laws and the Federal Personnel Manual (FPM), OCMM wrote to the Civil Service Commission (CSC) expressing its concern; noting (without specifying) that there were arbitration awards with respect to these matters; and setting forth its views as to why the employees should not be considered eligible for differential pay. In response to the Department's letter, the CSC advised OCMM that the latter's interpretation of the FPM with respect to the propriety of such differential pay was in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials.^{2/}

Thereafter, the OCMM Director notified the activity that OCMM could no longer condone the payment of these differentials for employees of the activity and directed the discontinuance of the differential payments as soon as possible. Although the activity's Commanding Officer disagreed with this conclusion, he was informed that he had no leeway in this matter. Subsequently, he provided the union with a copy of OCMM's correspondence, requested that the union study and evaluate the impact of the action on unit employees, and invited it to meet and confer on the matter prior to the activity's taking any action. Approximately 2 weeks later, having received no response from the union, the Commanding Officer of the activity wrote to the union's local president, citing the union's failure to forward

^{2/} With respect to the CSC advice to OCMM, in reaching his decision in the instant case the Assistant Secretary concluded that the Department's letter constituted merely a request for clarifying information regarding the CSC's interpretation of the FPM provisions concerning environmental differentials. He further concluded that the CSC response did not, and was not intended to, reflect a CSC policy interpretation that any particular arbitration award, based on the pertinent facts developed during a specific arbitration proceeding, was invalid under the pertinent provisions of the FPM. In this regard, the Assistant Secretary quoted from a subsequent letter from CSC to the union setting out the FPM procedures on environmental differentials and concluding, "we have made no determinations regarding a specific case nor do we contemplate doing so." [Emphasis in Assistant Secretary's decision.]

the matter to its National Office, and informing the union of the activity's intent to comply with OCMM's instructions by terminating the environmental differentials in question about 2 1/2 weeks later. The union did not respond to this letter and made no request or demand to meet and confer concerning this action. Thereafter the payment of environmental differentials, pursuant to the two arbitration awards, was terminated. The union then filed the complaint alleging that the Department and the activity violated section 19(a)(1) and (6) of the Order. The case was heard before an Administrative Law Judge (ALJ) who issued a Report and Recommendations finding that the activity and Department had engaged in certain unfair labor practice conduct. The Department filed exceptions to these findings.^{3/}

The Assistant Secretary found, in pertinent part, that the Department violated section 19(a)(1) of the Order by directing the activity to terminate the environmental differential pay. He found further that the activity violated section 19(a)(1) and (6) by unilaterally terminating such payments.^{4/} As a remedy, the Assistant Secretary ordered that the activity and Department cease and desist from the unfair labor practice conduct, that the activity reimburse to each of the affected employees all monies deducted or withheld from them by reason of the termination of the environmental differential pay, and that the usual notice be posted at the activity.

The Department appealed the Assistant Secretary's decision to the Council, alleging that the decision presented major policy issues. The Council accepted the Department's petition for review, concluding that the decision of the Assistant Secretary raises certain major policy issues, namely:

- (1) whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding

^{3/} In a footnote in its brief before the Assistant Secretary, the Department noted that it was considering, and had taken the preliminary steps to effectuate, an appeal to the Comptroller General with respect to the pay questions raised by the arbitration awards involved in the proceedings.

^{4/} The union's section 19(a)(6) complaint against the Department was dismissed by the Assistant Regional Director, and such dismissal was sustained by the Assistant Secretary, who found that:

[T]he obligation to meet and confer under Section 11(a) of the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition. In this regard, . . . the [a]ctivity herein and not the [Department] accorded recognition to the exclusive representative and is a party to the negotiated agreement that was in effect at all times material herein.

a violation of section 19(a) of the Order by such agency management at that level of the agency and/or by other agency management at a lower organizational level of the agency where a unit of exclusive recognition exists; and

(2) whether it is consistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt.

The Council also granted the Department's request for a stay, having determined that the request met the criteria set forth in section 2411.47 (e)(2) of its rules (5 CFR 2411.47(e)(2)). The union filed a brief with the Council as provided in section 2411.16 of the Council's rules (5 CFR 2411.16). The Department did not file a brief.

Subsequent to Council acceptance, the Comptroller General ruled, in effect, that the environmental differential pay involved herein was legal and may be reinstated and, further, that employees who lost the environmental differential after such pay was terminated, were entitled to backpay for the period of termination (56 Comp. Gen. 8 (1976)). The union then requested that the Council vacate the stay insofar as it relates to that part of the Assistant Secretary's remedial order which provides for the payment of monies to the employees involved. The Council thereafter granted the union's request. With respect to the remainder of the Assistant Secretary's decision and order, the subject stay continued in effect.

Opinion

1. The first major policy issue is:

Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) of the Order by such agency management at the level of the agency and/or by other agency management at a lower organizational level of the agency where a unit of exclusive recognition exists.

As noted above, the Assistant Secretary found that the Department violated section 19(a)(1) of the Order by directing the activity to terminate the environmental differential pay, and that the activity violated section 19(a)(1) and (6) of the Order by unilaterally terminating such payments. As noted previously, the Assistant Secretary sustained the dismissal of the 19(a)(6) complaint against the Department because, in his view, the obligation to meet and confer under section 11(a) of the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded

exclusive recognition (see note 4). Further, the Assistant Secretary found that the activity had violated section 19(a)(6) by terminating the payments, notwithstanding the fact that the activity did so under direction by higher level management within the Department and did so only after the activity's Commanding Officer expressed disagreement with this higher level direction. In our view, these findings and conclusions by the Assistant Secretary are inconsistent with the purposes of the Order.

Section 19(a) of the Order provides a list of specified unfair labor practices in which "agency management" may not engage, including 19(a)(6) which prohibits "agency management" from refusing to consult, confer, or negotiate with a labor organization as required by the Order. The phrase "agency management" is specifically defined in section 2(f) of the Order:

"Agency management" means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program established under this Order[.]

Accordingly, it is clear that the acts and conduct of any individual found to be agency management, as defined in section 2(f), may provide the basis for a section 19(a) violation. Of course, pursuant to section 6(a)(4) of the Order, it is the responsibility of the Assistant Secretary to decide whether specific acts and conduct constitute an unfair labor practice. Where he finds that an act or conduct constitutes an unfair labor practice and that the individuals who committed the act are agency management, there is no basis in the Order to draw artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order.

We turn now to the question of whether a difference exists between alleged violations of 19(a)(6), on the one hand, and alleged violations of the remainder of 19(a) on the other, when the acts and conduct are attributed to agency management at a higher organizational level within the agency than the level of exclusive recognition. We see no distinction. That is, when acts and conduct constitute a refusal to confer, consult, or negotiate as required by the Order, such acts and conduct may properly be found violative of section 19(a)(6) regardless of the organizational level of the member of agency management who committed the violative conduct.

While it is true, as the Assistant Secretary noted, that the obligation to meet and confer under section 11(a) applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition, contrary to the Assistant Secretary's conclusion, this does not mean that the acts and conduct of agency management from a higher level may not provide the basis of a 19(a)(6) finding when such acts and conduct constitute a violation of that section. The extent of the obligation to negotiate

coincides with the unit of exclusive recognition. However, agency management above the level of exclusive recognition may engage in acts and conduct which are violative of that obligation where, for example, such management, as here, initiated the unlawful conduct involved. In other words, when the obligation to negotiate is breached by the acts and conduct of agency management, such a breach may properly provide the basis for a 19(a)(6) finding regardless of the location of that agency management in the agency chain of command.^{5/}

Hence, in the facts of the instant case where agency management at the departmental level directed the termination of the environmental differential pay and such pay was terminated as a result of such direction, such acts and conduct could be found to be a violation of section 19(a)(6) of the Order. Further, where, as found by the Assistant Secretary in the facts of this case, agency management at the activity level complied with such direction from agency management at a higher level because the activity had no choice but to do so, a separate finding of a violation would not lie against the activity as such, solely on the basis of its ministerial actions in implementing the direction from higher agency authority.

Accordingly, with reference to the first major policy issue, we conclude that the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by "agency management," but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational level of the agency where a unit of exclusive recognition exists.

Applying the foregoing principles to the facts and circumstances of this case, we conclude that "agency management" violated sections 19(a)(6) and 19(a)(1) of the Order. This conclusion is predicated solely upon the actions of the Department in initiating the conduct which the Assistant Secretary found violative of these sections of the Order, rather than upon the ministerial conduct of the activity in the circumstances of this case.

2. The second major policy issue is:

Whether it is consistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt.

The Assistant Secretary's authority to prescribe remedial orders is set forth in section 6(b) of the Order:

5/ See United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519, FLRC No. 75A-65 (Dec. 24, 1975), Report No. 94.

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.

(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

As the Council has previously stated, section 6(b) confers considerable discretion on the Assistant Secretary to fashion such remedial action as he considers appropriate to effectuate the policies of the Order.^{6/} However, such discretion is not without limitation. For example, as the Council stated in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC No. 74A-46 (Mar. 20, 1975), Report No. 67, at 7 of its decision:

[T]he Assistant Secretary, in fashioning a remedial order in unfair labor practice cases, may not require a party to engage in an illegal action. In this connection, the Assistant Secretary's remedial order must "effectuate the purposes of the Order." Obviously, it would be inconsistent with such purposes to require a party to violate applicable law, appropriate regulation or the Order. [Footnote omitted.]

When a remedy involves the possible payment of monies by an agency, the Assistant Secretary, consistent with his responsibilities under the Order, must be reasonably assured that such payment is proper pursuant to law and decisions of the Comptroller General. In most situations, established precedent will provide the Assistant Secretary with reasonable assurance as to the propriety of a monetary remedy and the Assistant Secretary can issue such a remedy without prior authorization.^{7/} Where the Assistant Secretary lacks reasonable assurance as to the propriety of a monetary payment remedy, he should, as the Council does,^{8/} obtain an advance

6/ See U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122, and cases cited therein.

7/ In this regard, such decision and remedy are subject to appeal to the Council, consistent with its requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 472 [FLRC No. 72A-30 (July 25, 1973), Report No. 42].

8/ See, e.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration, Eastern Region (Wolf, Arbitrator), FLRC No. 76A-10 (Jan. 18, 1977), Report No. 121; Department of Transportation, Federal Aviation Administration, Montgomery RAPCON/Tower, Montgomery,

(Continued)

decision from the Comptroller General as to the legality of such a payment.^{9/} In this way, the Assistant Secretary can eliminate the possibility of ordering a party to violate law or decision of the Comptroller General.

In this latter regard, if the legality of a monetary payment has already been referred to the Comptroller General, the Assistant Secretary must await the Comptroller General's ruling as to the legality of such payment before requiring a party to make the payment. He may do this either by awaiting the ruling of the Comptroller General before fashioning a remedial order directing such payment, or by making such requirement in a remedial order contingent upon the Comptroller General's subsequent ruling.^{10/} Of course, should the Comptroller General rule that the payment of monies at issue is not proper, the Assistant Secretary may not require such payment.^{11/}

(Continued)

Alabama and Professional Air Traffic Controllers Organization (Amis, Arbitrator), FLRC No. 75A-32 (Dec. 20, 1976), Report No. 119; and Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91 (June 14, 1976), Report No. 106.

^{9/} The Assistant Secretary has previously sought advance decisions from the Comptroller General with respect to such payment questions. For example, the Assistant Secretary requested a decision from the Comptroller General as to whether he has the authority to employ make-whole remedies under the Back Pay Act (5 U.S.C. § 5596 (1970)) or any other relevant statute when he finds violations of the Order involving the discriminatory failure to promote, to hire and/or to pay overtime. In response, the Comptroller General ruled that the Assistant Secretary does have such authority. 54 Comp. Gen. 760 (1975), at 762.

^{10/} In affirming the authority of the Assistant Secretary to employ make-whole remedies, the Comptroller General has stated:

We also point out that although the A/SLMR may order an agency head to take remedial action with respect to an employee, including the payment of backpay, allowances and differentials and other substantial employment benefits, his order does not preclude the agency head or the authorized certifying officer of the agency from exercising their statutory rights under provisions of 31 U.S.C. 74 and 31 U.S.C. 82d in requesting an advance decision from this Office as to the propriety of such payments. Accordingly, an agency may properly delay the implementation of an order issued by the A/SLMR involving the expenditure of funds until it has obtained an advance decision from this Office. [54 Comp. Gen. 760 (1975), at 764.]

^{11/} In such situations, the Assistant Secretary may, pursuant to his section 6(b) authority, fashion alternative remedies—consistent with applicable law, appropriate regulation and the Order—as he deems appropriate.

In our view, the foregoing approach is consistent with the purposes of the Order, properly acknowledges the respective jurisdictions of the General Accounting Office and the Assistant Secretary in such circumstances, and avoids the enforcement difficulties which would otherwise arise if the Assistant Secretary's remedial order requiring the payment of monies were to become effective prior to the Comptroller General's resolution of the reasonable doubt concerning the legality of such payments.

In the instant case, while the Department had requested a decision from the Comptroller General as to the legality of the payment of monies prior to the Assistant Secretary's issuance of his decision and order, it is unclear from the record whether the Department apprised the Assistant Secretary that it had, in fact, requested a ruling from the Comptroller General.^{12/} In any event, subsequent to the issuance of the Assistant Secretary's decision, the Comptroller General ruled that the payment of monies directed by the Assistant Secretary's remedial order was legal. Accordingly, as there no longer exists a dispute concerning the legality of the payment of monies in this case, the Assistant Secretary's remedial order in this regard is hereby sustained.^{13/} However, in all future cases wherein the Assistant Secretary, after finding that an unfair labor practice was committed, fashions a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, he must do so in a manner consistent with the purposes of the Order as set forth above.

Conclusion

In summary, with regard to the major policy issues presented herein, we conclude that:

^{12/} As previously indicated, supra note 3, in a footnote in its brief before the Assistant Secretary, the Department stated only that it "is considering, and has taken the preliminary steps required by the Department of Defense to effectuate, an appeal to the Comptroller General" with respect to the pay question.

^{13/} The Comptroller General's ruling, following the Assistant Secretary's issuance of his remedial order herein, that both arbitration awards are legal and may be reinstated, and that employees who lost the environmental differential after the awards were terminated are entitled to backpay as ordered by the Assistant Secretary, does not resolve the major policy issue as to the nature of the Assistant Secretary's responsibilities in fashioning remedial orders which are consistent with the purposes of the Order in circumstances such as those in the instant case. Accordingly, the foregoing ruling by the Comptroller General does not render this major policy issue moot, and the union's motion to dismiss the issue on that basis (dated Feb. 9, 1977) is therefore denied.

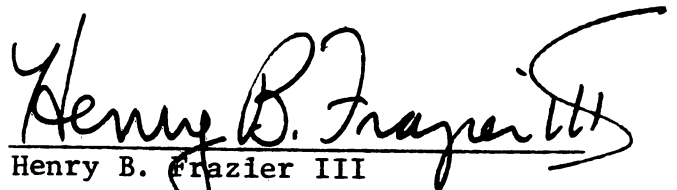
(1) The acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by "agency management," but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational level of the agency where a unit of exclusive recognition exists.

Applying the foregoing principles to the facts and circumstances of this case, we conclude that "agency management" violated sections 19(a)(6) and 19(a)(1) of the Order. This conclusion is predicated solely upon the actions of the Department in initiating the conduct which the Assistant Secretary found violative of these sections of the Order, rather than upon the ministerial conduct of the activity in the circumstances of this case.

(2) It is inconsistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt. Rather, such a remedial order either must await or be made contingent upon the Comptroller General's ruling as to the legality of the payment. In the instant case, as the Comptroller General has upheld the legality of the payments directed by the Assistant Secretary, the remedial order in this regard is therefore sustained.

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we sustain in part and set aside in part the Assistant Secretary's decision and order and remand the case to him for appropriate action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 4, 1977

Veterans Administration Hospital, Montrose, New York, Assistant Secretary Case No. 30-5611(RO). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found that the objections filed by American Federation of Government Employees Local 2440 (AFGE), which alleged that certain conduct on the part of the activity and National Federation of Federal Employees Local 1119 had improperly affected the outcome of the election, were without merit. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the ARD's report and findings on objections. AFGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (May 4, 1977). Following clarification by the Assistant Secretary of his decision in response to the Council's request, the Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision as clarified did not appear in any manner arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of AFGE's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1977

Mr. Joseph D. Gleason
Executive Vice President
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Veterans Administration Hospital,
Montrose, New York, Assistant Secretary
Case No. 30-5611(RO), FLRC No. 76A-56

Dear Mr. Gleason:

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

This case arose as a result of a representation election held in a unit of general schedule employees of the Veterans Administration Hospital, Montrose, New York (the activity), in which National Federation of Federal Employees Local 1119 (NFFE), the incumbent, received a majority of the valid votes cast. Objections to conduct allegedly affecting the results of the election were filed by the petitioning union, American Federation of Government Employees Local 2440 (AFGE). The objections specified therein alleged that certain conduct on the part of NFFE and the activity had improperly affected the outcome of the election. The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found the objections to be without merit and denied AFGE's request for review seeking reversal of the ARD's Report and Findings on Objections.

Specifically, insofar as relevant herein, the Assistant Secretary found as follows:^{1/} Regarding Objection No. 1, in which AFGE alleged that the activity did not provide an internal telephone for AFGE as it did for NFFE (whose access to the telephone predated the filing of AFGE's election petition), the Assistant Secretary noted that no evidence was presented to indicate that the incumbent union, NFFE, used its office telephone for campaign purposes or that the activity had any knowledge of such use. With respect to Objection No. 3, the Assistant Secretary concluded that the activity's conduct in granting NFFE permission to sponsor an Easter egg hunt did not warrant setting the election aside, in the absence of any evidence that the activity proposed that NFFE sponsor the egg hunt or that any campaigning occurred during the event. As to Objection No. 5,

1/ Objection Nos. 2 and 4 are not before the Council on appeal.

concerning alleged misrepresentations in NFFE campaign literature, the Assistant Secretary found it "unnecessary to decide whether the statements in the NFFE's leaflets concerning a 'free' insurance policy and an alleged AFL-CIO strike fund constituted gross misrepresentations of material facts inasmuch as the evidence established that [AFGE] was aware of the leaflets' contents at least as early as March 28 [the election having been held on April 1 and 3] and, thus, had adequate time to respond to the leaflets prior to the election." Further, in clarification of his decision with respect to this objection, the Assistant Secretary stated, in pertinent part, that the facts and circumstances in this case were clearly distinguishable from those which were present in the previous decision in Norfolk Naval Shipyard, A/SLMR No. 31 (Apr. 26, 1971).^{2/} He noted that, in the instant case, the evidence indicated that the statements were made in the context of listing what gains unit employees, as NFFE members, had already received by having had NFFE as their incumbent exclusive representative, rather than, as in Norfolk, in the context of a promise or offer by a challenging labor organization of a future economic benefit contingent upon the outcome of an election. Moreover, he concluded that, unlike Norfolk, there was no evidence in the instant case to indicate that the availability of the "free" insurance was in fact contingent upon the incumbent exclusive representative's victory in the election. Therefore, the Assistant Secretary determined that such statements, standing alone, did not constitute an offer of a tangible economic benefit contingent upon the outcome of the election and, hence, such conduct would not have impaired the employees' freedom of choice in the election. Finally, a further objection regarding a NFFE letter to its members offering payment of \$5 for each dues withholding form solicited by the member was found by the Assistant Secretary to have been untimely filed pursuant to Section 202.20(b) of his regulations and, therefore, was not considered by him.

In your petition for review filed with the Council on behalf of AFGE, you contend that the decision of the Assistant Secretary is arbitrary and capricious. In support of this contention, you assert that, with respect to the Assistant Secretary's determination as to Objection No. 1, while there was no evidence available to prove that NFFE used its telephone for campaign purposes, AFGE was nonetheless entitled to equal treatment with regard to the activity's services and facilities under the "equal status" doctrine that the Assistant Secretary has established in previous cases. Further, you assert with respect to the Assistant Secretary's determination as to Objection No. 3 dealing with the sponsorship of an Easter egg hunt that the activity should have granted equal sponsorship to both unions instead of continuing to favor NFFE. With respect to

^{2/} Following receipt of the petition for review which alleged, among other things, an inconsistency with the Assistant Secretary's decision in Norfolk, the Council requested that the Assistant Secretary further consider and clarify the relevance of that decision to the facts and circumstances of the instant case.

Objection No. 5, which dealt with statements concerning "free" insurance, you assert that leaflets containing deliberately false information were distributed at a time which did not permit AFGE any time in which to rebut. You further contend that, regardless of whether there was an opportunity for reply, the statement constituted an offer of a tangible economic benefit which the Assistant Secretary has previously found in Norfolk to be improper since it was contingent upon the outcome of the election. Finally, you assert as to the additional objection which the Assistant Secretary found to have been untimely filed under his regulations, that AFGE had no way to learn promptly of NFFE's allegedly improper conduct, but raised the issue as soon as it was discovered. Consequently, you argue that the ARD should be permitted to consider this additional evidence to support a related timely filed objection.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision as clarified does not appear in any manner arbitrary and capricious, and you neither allege, nor does it appear, that the decision presents a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. More particularly, as to Objection Nos. 1 and 3, your appeal, which contends that the decision was arbitrary and capricious in that it did not sustain the objections based upon the "equal status" doctrine as established in previous cases, fails to establish any clear, unexplained inconsistency with prior decisions of the Assistant Secretary. Rather, your contentions constitute, in effect, nothing more than disagreement with the Assistant Secretary's conclusion that the facts presented with respect to the telephone and Easter egg hunt did not warrant setting the election aside. As to your contention that the Assistant Secretary's disposition of Objection No. 5 dealing with statements concerning "free" insurance is contrary to the Assistant Secretary's decision in Norfolk, in the Council's view, your appeal again fails to establish that there is a clear, unexplained inconsistency between his decision as clarified herein and the Assistant Secretary's previously published decisions.^{3/} Finally, with respect to the Assistant Secretary's ruling as to the untimeliness of your additional objection, the Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. His decision in the instant case was based on the application of these regulations, specifically Section 202.20(b), and your petition presents no persuasive reasons to show that the Assistant

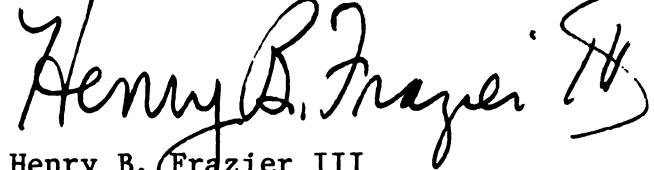
^{3/} In so ruling, of course, the Council does not adopt the Assistant Secretary's reasoning in the Norfolk decision, which has not been appealed to the Council and is therefore not properly before the Council for review.

Secretary was without authority to establish such regulations or that his regulations or his application thereof in the circumstances of this case was inconsistent with the purposes of the Order.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Helm
NFFE

W. Massaro
VA Hospital

United States Information Agency, A/SLMR No. 763. The Assistant Secretary dismissed the 19(a)(1) and (6) complaint filed by Local 1418, National Federation of Federal Employees (NFFE) concerning the inclusion by the agency of a particular data source in a wage survey. NFFE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (May 4, 1977). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1977

Ms. Janet Cooper
Associate General Counsel
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: United States Information Agency,
A/SLMR No. 763, FLRC No. 77A-4

Dear Ms. Cooper:

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

In this case, National Federation of Federal Employees, Local 1418 (NFFE Local 1418), the exclusive representative of all nonsupervisory radio broadcast technicians employed by the Voice of America, Washington, D.C. (the activity), filed a complaint against the United States Information Agency (the agency), alleging, in substance, that the agency violated section 19(a)(1) and (6) of the Order by unilaterally abrogating its acceptance of a recommendation of the Joint Wage Council^{1/} to exclude television channel 26 (WETA) as a data source from a wage survey.

The Assistant Secretary, in agreement with the Administrative Law Judge (ALJ), concluded that dismissal of NFFE's complaint was warranted. The Assistant Secretary concluded that, "[u]nder all of these circumstances, and noting particularly the agreement by the General Counsel of the NFFE . . . that the [agency] could put the new wage rates into effect and the Joint Wage Council's approval . . . of the inclusion of WETA as a data source, . . . the [agency's] action in including WETA as a data source was not in derogation of its bargaining obligation under the Order."

In your petition for review on behalf of NFFE Local 1418, you allege that the decision of the Assistant Secretary presents the following major policy issues:

^{1/} As found by the Assistant Secretary, pursuant to the parties' agreement, the Joint Wage Council considers and makes recommendations to the agency concerning wage survey procedures and the proposed wage schedule to be established by the agency. It is composed of an equal number of voting representatives from the agency and the unions representing units of the agency's prevailing rate employees.

I. Whether the conduct of another local, whose leader is about to defect to another union, controls the outcome of this local's unfair labor practice complaint.

II. Whether an interim agreement to accept partial wages while a dispute over additional amounts is resolved blocks a finding that the Order was violated by the dealings which led to the dispute.

You further allege that the Assistant Secretary's decision is arbitrary and capricious in that his decision is contrary to past decisions based upon similar factual situations, specifically: (1) there was a breach of the contract which the Assistant Secretary has traditionally held to be a violation of the Order; (2) there was a unilateral change in working conditions which the Assistant Secretary has consistently held to be a violation of the Order; (3) the failure to find a violation of section 19 (a)(1) of the Order is contrary to precedent; and (4) the agency's reliance on the Civil Service Commission is contrary to reality, and such conduct by an agency has consistently been held to be a violation of the Order.

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

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. More particularly, with respect to your assertions that the Assistant Secretary's decision in the instant case is contrary to his prior decisions, your appeal fails to establish any clear, unexplained inconsistency with the Assistant Secretary's previously published decisions in the circumstances of this case. Rather, your allegations constitute, essentially, a disagreement with the Assistant Secretary's conclusion that the agency's conduct, in the facts and circumstances of this case, did not violate its duty to bargain under the Order. Nor, in the Council's view, are major policy issues presented warranting review, again noting that your allegations in this regard essentially constitute mere disagreement with the Assistant Secretary's finding that the agency did not violate section 19(a)(1) and (6) of the Order in the particular facts and circumstances of this case.^{2/}

^{2/} In so ruling, the Council notes that the provisions of Public Law 92-392, the prevailing wage law, are not at issue in the facts and circumstances of this case. Thus, prior to the effective date of that Act (August 19, 1972), as previously noted, the Joint Wage Council was established by agreement of the parties to recommend wage survey procedures and proposed wage schedules to the agency. Accordingly, such matters are exempt from the provisions of Public Law 92-392 by virtue of Section 9(b)(1) thereof, which states:

(Continued)

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.^{3/}

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Futch
USIA

(Continued)

(b) The amendments made by this Act shall not be construed to—

(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees.

^{3/} Your request that the Chairman of the Civil Service Commission should not participate in the consideration of this case is denied, no basis to support your request having been established by your appeal.

Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington, A/SLMR No. 768. The Assistant Secretary dismissed the 19(a)(1) and (2) complaint filed by the Bremerton Metal Trades Council (the union) concerning the temporary detailing of an employee shop steward by the activity to a new position. The union appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (May 4, 1977). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1977

Mr. John E. Cleary, President
Bremerton Metal Trades Council
P. O. Box 448
Bremerton, Washington 98310

Re: Puget Sound Naval Shipyard, Department
of the Navy, Bremerton, Washington,
A/SLMR No. 768, FLRC No. 77A-17

Dear Mr. Cleary:

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

In this case, Bremerton Metal Trades Council (the union) filed an unfair labor practice complaint alleging that the Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington (the activity) violated section 19(a)(1) and (2) of the Order by virtue of its actions in transferring an employee shop steward to a new position because of his union activities.

The Assistant Secretary, in adopting the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), found that the activity's action in temporarily detailing the employee shop steward to a new position without any loss of grade or pay and without restricting the shop steward's union activities in any manner, particularly in the absence of any evidence of union animus, was not violative of section 19 (a)(1) and (2) of the Order. Accordingly, he ordered that the complaint be dismissed.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that he "failed to address the true facts presented in the Exception [to the ALJ's recommended decision and order] filed by the [union] . . ." In this regard, you assert that the ALJ "acted in a pro-management, biased manner that completely ignored [the employee's] rights under Executive Order 11491, as amended." You further contend that the Assistant Secretary's decision presents a major policy issue as to whether "management has the right to re-assign or transfer an employee because of his Union Activities."

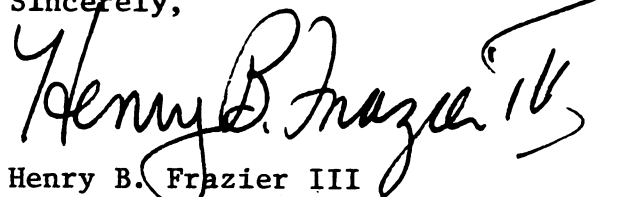
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the temporary detailing of the employee was not violative of section 19(a)(1) and (2) of the Order in the facts and circumstances of this case. In this regard, with respect to your assertion that the Assistant Secretary failed to address the true facts presented in your exceptions to him, your appeal does not disclose any probative evidence or relevant arguments which the Assistant Secretary failed to consider in reaching his decision. Further, the appeal contains no basis to support your imputation of bias or other impropriety in the circumstances of this case. Nor is a major policy issue presented, as alleged, with regard to whether "management has the right to re-assign or transfer an employee because of his Union Activities," noting particularly that your assertion constitutes nothing more than disagreement with the Assistant Secretary's determination that the employee was not reassigned or transferred because of his union activities in the circumstances of this case. Accordingly, no basis for Council review is thereby presented. See Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 537, FLRC No. 75A-89 (Nov. 18, 1975), Report No. 91.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in dark ink and includes a stylized flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. L. McFall
Navy

Department of the Air Force, 4392D Aerospace Support Group (SAC) and National Federation of Federal Employees (NFFE), Local 1001 (Vandenberg Air Force Base, California) (Pollard, Arbitrator). The arbitrator determined that the suspensions of the grievant were for just and sufficient cause under the parties' collective bargaining agreement. The union filed exceptions to the arbitrator's award with the Council, alleging that the award violated applicable law, appropriate regulation or the Order.

Council action (May 4, 1977). The Council held that the union's petition did not present sufficient facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1977

Ms. Marie C. Brogan, President
National Federation of Federal
Employees, Local 1001
P.O. Box 1935
Vandenberg Air Force Base, California 93437

Re: Department of the Air Force, 4392D Aerospace
Support Group (SAC) and National Federation
of Federal Employees (NFFE), Local 1001
(Vandenberg Air Force Base, California)
(Pollard, Arbitrator), FLRC No. 77A-24

Dear Ms. Brogan:

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

According to the arbitrator's award, the grievant, president of the union, was transferred from the Procurement Office to the Civil Engineering Squadron at Vandenberg Air Force Base and, under the negotiated agreement, allowed to spend a certain portion of her working time on labor-management relations matters while being required to devote the rest of her time to her assigned Air Force job. The grievant was dissatisfied with the new job and felt her supervisors were making improper efforts to restrict her labor relations work. Her supervisors were dissatisfied with her performance since they felt she was spending nearly all of her time on labor relations matters. Ultimately, the grievant was suspended for 10 days in April 1976 and for 30 days in June 1976. Management's justification for these suspensions included the grievant's abnormal absences from her duty station without prior approval, her excessive tardiness, her disruptive meetings on labor relations matters at her work desk, her refusal to obey work directives and insubordination to her supervisor.

The issues before the arbitrator, as stated in the award, were:

1. Were the ten-day and thirty-day suspensions of [the grievant] for just and sufficient cause under the collective bargaining Agreement?
2. If not, what is the proper remedy?

In the opinion accompanying his award, the arbitrator, apparently in response to issues raised at the arbitration hearing, noted that he did

not consider whether actions by the grievant's supervisors constituted an unfair labor practice since that issue was being handled through ULP proceedings within the Department of Labor. With respect to the two suspensions, the arbitrator determined that the suspensions imposed on the grievant were justified "in view of her persistent failure to perform enough work in her classification for which the Air Force was paying her." He found that the Air Force did not violate the collective bargaining agreement by its requirement that grievant spend a certain portion of her time on Air Force work or by instructions to grievant relating to that requirement. The arbitrator's award was that "the . . . suspensions . . . were for just and sufficient cause under the collective bargaining Agreement."

The union takes exception to the arbitrator's award on the basis that the award:

. . . violates applicable law, appropriate regulation, or the Order in that it fails to take into consideration a substantial issue of fact, to wit, whether the Air Force's charges of failure to perform "official duties" which included representational duties under the Executive Order constituted an ULP and hence a viable defense to the charges.

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

As indicated, the union contends that the award violates applicable law, appropriate regulation or the Order. However, it does not specify in its petition which provision(s) of law, regulation or the Order it believes the award to violate, nor does it provide any explanation as to why the award is considered violative of applicable law, appropriate regulation or the Order except to state that "it fails to take into consideration . . . whether the Air Force's charges . . . constituted an ULP and hence a viable defense to the charges." The petition contains no further description of facts and circumstances to support this exception. The Council has consistently held that a petition for review of an arbitrator's award will not be accepted where there appears in the petition no support for the stated exception to the award. E.g., American Federation of Government Employees, Local 3239, AFL-CIO and Social Security Administration, Cleveland Region, Area One Office, Southfield, Michigan (Ott, Arbitrator), FLRC No. 76A-67 (Aug. 31, 1976), Report No. 111. Therefore, that part of the union's exception which alleges that the award violates applicable law and appropriate regulation provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

With regard to the alleged violation of the Order, if the union's exception is read as contending that the arbitrator failed to decide during the course of the grievance arbitration hearing whether an unfair labor practice had been committed under section 19 of the Order, this does not state a ground upon which the Council will accept a petition for review of an arbitration award. Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81, citing sections 6(a)(4) and 19(d) of the Order.^{1/} Further, the arbitrator specifically addressed the unfair labor practice issue, noted (based upon the union's exhibit 12) that it was "being handled through ULP proceedings within the Department of Labor," and concluded that it was not part of the controversy before him. The union presents no facts and circumstances to demonstrate that this conclusion is contrary to the Order.^{2/} Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure.

1/ Section 6(a)(4) of the Order provides:

The Assistant Secretary shall decide unfair labor practice complaints . . .

Section 19(d) of the Order provides, in part:

All complaints under this section [Sec. 19. Unfair labor practices] that cannot be resolved by the parties shall be filed with the Assistant Secretary.

2/ It should be noted that section 19(d) of the Order provides, in part:

Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. [Emphasis added.]

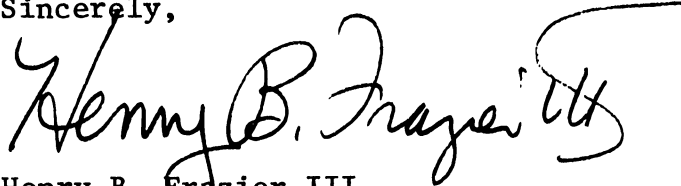
The language of this provision of the Order was based on the recommendation of the Council in its 1971 Report and Recommendations to the President on the amendment of the Order:

We propose . . . that when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made optional with the aggrieved party whether to seek redress under the grievance procedure or under the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure. Labor-Management Relations in the Federal Service (1975), at 57-58.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: Robert T. McLean
Air Force

Overseas Education Association, NEA, Decision of Director, LMSE. It appeared from the supplemental appeal of the individual, Mr. Cecil Driver, that the decision of the Director, Labor-Management Standards Enforcement (LSME), was dated June 29, 1976, and was served on Mr. Driver by mail on or soon after that date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules, Mr Driver's appeal was due in the office of the Council on or soon after August 3, 1976. However, Mr. Driver's appeal was not filed with the Council until March 2, 1977, or more than six months late, and no extension of time for filing was either requested by him or granted by the Council. Tacitly recognizing that his petition was untimely filed, Mr. Driver requested, in effect, a waiver of the expired time limits.

Council action (May 4, 1977). Based on the express language in its rules of procedure and Council precedent in like cases, the Council determined that the grounds adverted to by Mr. Driver in support of his request for a waiver failed to constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules, and, therefore, denied the request. Accordingly, because Mr. Driver's appeal was untimely filed, and apart from other considerations, the Council denied his petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 4, 1977

Mr. Cecil Driver
Box 3038
APO New York 09194

Re: Overseas Education Association, NEA,
Decision of Director, LMSE, FLRC
No. 77A-26

Dear Mr. Driver:

Reference is made to your petition for review of a decision of the Director, Labor-Management Standards Enforcement (LMSE) in the above-entitled case, filed with the Council on March 2, 1977, as supplemented by your letter of April 4, 1977, filed on April 7, 1977.

As you were advised by Council letter of March 22, 1977, preliminary examination of your initial appeal disclosed a number of apparent deficiencies in meeting cited requirements of the Council's rules of procedure (a copy of which was enclosed for your information). You were also advised that insufficient information was presented by your initial appeal to establish whether other procedural requirements, such as those related to timeliness in sections 2411.13(b) and 2411.45 of the Council's rules, had been met; and that Council decision on such matters was reserved. You were then granted time to take necessary action and file additional materials with the Council in compliance with the designated provisions of the rules.

In your letter of April 4, 1977, you request a determination as to the timeliness of your appeal before completing such appeal in compliance with the Council's letter of March 22, 1977.

For the reasons indicated below, the Council has now determined that your petition for review was untimely filed under the Council's rules of procedure and cannot be accepted for review.

It appears from your appeal, as supplemented, that the decision of the Director, LMSE, is dated June 29, 1976, and was served on you by mail on or soon after that date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, any appeal from the subject decision was due in the office of the Council on or soon after August 3, 1976. However, as stated above, your appeal was not filed with the Council until March 2, 1977, or more than six months late, and no extension of time for filing was requested by you or granted by the Council.

In your letter of April 4, 1977, you tacitly recognize that your petition was untimely filed under the Council's rules of procedure. However, you

request, in effect, a waiver of the expired time limits because: (1) You were not informed or otherwise aware of your right to file an appeal with the Council from the decision in question; (2) you did not actually receive the decision until late July or early August 1976; (3) from the date of such receipt until January 1977, you sought reconsideration of the decision within the Department of Labor; and (4) the alleged arbitrary and capricious nature of the subject decision warrants the granting of a waiver.

Section 2411.45(f) of the Council's rules provides that any expired time limit in Part 2411 of the rules may be waived in extraordinary circumstances. However, based on the express language of the Council's rules of procedure, and Council precedent in like cases, the grounds adverted to in your letter of April 4, 1977, fail to constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules.

More specifically, as to (1), the fact that a party is not informed or otherwise aware of a right to file an appeal with the Council does not warrant waiver of the Council's timeliness requirements. See, e.g., National Association of Government Employees, Local R4-45 and Navy Commissary Store Region [Department of the Navy] (Kleeb, Arbitrator), FLRC No. 76A-89 (July 23, 1976), Report No. 108, request for reconsideration denied: September 22, 1976. Moreover, the Council has previously indicated in its reported decisions, that appeals from decisions of the Director, LMSE, such as here involved, are subject to the usual time requirements in the Council's rules. National Federation of Federal Employees, Decision (unnumbered) of Acting Director, LMSE, FLRC No. 75A-52 (June 4, 1975), Report No. 72, request for reconsideration denied: June 25, 1975.

Regarding (2), namely your contention concerning the approximate date of receipt by you of the subject decision, even assuming that the decision was not served on you until immediately before your receipt thereof, your appeal was not filed until March 2, 1977, or still some six months late. Therefore, the asserted approximate date of receipt of the subject decision provides no basis for a waiver of the Council's time limits. See, e.g., FLRC No. 75A-52, supra.

With respect to (3), that is, your contention as to seeking reconsideration of the subject decision within the Department of Labor before filing the instant appeal, section 2411.45(d) of the Council's rules provides specifically that requests for reconsideration, such as those adverted to in your submission to the Council, do not operate to extend the time limits prescribed in the Council's rules. See, American Federation of Government Employees, AFL-CIO (Marine Corps Recruit Depot Exchange, San Diego, California), Assistant Secretary Case No. 72-5382(CO), FLRC No. 76A-49 (May 13, 1976), Report No. 105.

Finally, as to (4), the nature of the alleged impropriety of the decision sought to be appealed is not a ground that warrants waiver of expired time

limits. See, e.g., State of New Jersey Department of Defense and National Army-Air Technicians Association, Local 371 (Howard, Arbitrator), FLRC No. 76A-72 (May 27, 1976), Report No. 105, request for reconsideration denied: August 3, 1976.

For the foregoing reasons, therefore, your request for a waiver must be denied.

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

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: (w/c letters of 2/23/77, 3/22/77 and 4/4/77, w/o enclosures thereto)

A/SLMR
Labor

C. Rolnick
LMSE

C. D. Moore
OEA

FLRC No. 76A-16

National Association of Government Employees, Local No. R14-87 and Kansas National Guard (and other cases consolidated therewith); and

FLRC No. 76A-75

National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard (and other cases consolidated therewith). The agency requested reconsideration and stay of enforcement of the Council's decisions of January 19, 1977 (Report No. 120), in the subject consolidated cases.

Council action (May 18, 1977). The Council held that the agency did not raise any matters not previously considered and correctly decided by the Council; and did not advance any other persuasive reasons to warrant Council reconsideration and reversal of its decision in the consolidated cases. Accordingly, for reasons fully detailed in its decision letter, the Council denied the agency's requests for reconsideration and stay of enforcement.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Mr. James C. Hise
Chief, Office of Legal Advisor
Departments of the Army and the
Air Force
National Guard Bureau
Washington, D.C. 20310

Re: National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith); and National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard, FLRC No. 76A-75 (and other cases consolidated therewith)

Dear Mr. Hise:

The Council has carefully considered your submissions on behalf of the Department of Defense (the agency) of February 22, 1977, and February 24, 1977, requesting that the Council reconsider and stay enforcement of its respective decisions in the above-entitled consolidated cases. The Council likewise has considered the statements opposing your requests, submitted by the American Federation of Government Employees on March 3, 1977, the National Association of Government Employees on March 14, 1977, the Association of Civilian Technicians on March 16, 1977, the National Army-Air Technicians Association on March 16, 1977, and the National Federation of Federal Employees on March 21, 1977.

In the subject consolidated cases the Council held, as here relevant, that the agency had not supported its determination that a "compelling need" exists, under the Order and Part 2413 of the Council's rules, for the National Guard Bureau (NGB) regulation relied upon (requiring all National Guard technicians to wear military uniforms while performing technician duties) to bar negotiations on the conflicting disputed proposals and therefore set aside that determination.

In your submissions you contend that the respective decisions in the consolidated cases are in error in essence because: (1) The Council inverted traditional standards of judicial review of the validity of administrative regulations by requiring the agency in these cases to prove affirmatively that a compelling need exists for its regulations; (2) the Council assigned little or no weight to the agency's "subjective evidence," i.e., the agency head's determination and the claimed intent of Congress, thereby in effect indicating that only "quantitative objective evidence" will be considered by the Council as supportive of a

compelling need determination; and (3) the Council failed to find the union proposals infringe on the agency's reserved right under section 12(b) (5) of the Order to determine the "means" by which agency operations are to be conducted.

As to your first contention concerning review of agency regulations, you claim that under the proper standard for reviewing the "validity" of administrative regulations the burden is on the challenging party to produce evidence sufficient to establish at least a prima facie case in support of its contention, whereas the Council's decision in the consolidated cases erroneously placed the burden on the agency to support its determination of compelling need which will result in the Government's being put to great expense to combat unsupported union contentions. This position is without merit. Your analogy to court review concerned with challenges to the "validity" of agency regulations is inapposite. The Council's compelling need decision is not concerned with and, hence, does not affect the "validity" of agency regulations. That is, a Council determination that a compelling need does not exist for an agency regulation to bar negotiations does not render the regulation in question "invalid"—such regulation remains completely operative and in full force and effect throughout the agency or primary national subdivision involved, except in those local situations where the agency and the union negotiate an agreement which contains conflicting provisions.^{1/} In addition, the Council's insistence that the agency come forward with affirmative support for its determination that a compelling need exists is fully consistent with the overall policy with respect to negotiability disputes stated in the September 24, 1975, Information Announcement, issued in conjunction with the Council's "Criteria for Determining Compelling Need for Agency Policies and Regulations," wherein the Council admonished agency heads to support in detail their determinations of nonnegotiability. Further, the circumstances surrounding the development and issuance of a challenged regulation generally lie within the agency's knowledge and, since the agency is relying on the regulation to bar negotiation of proposals which are otherwise negotiable under the Order, the agency is properly required to adduce such circumstances. Finally, in the consolidated cases the unions did provide extensive and detailed support for their contention that a compelling need does not exist for the NGB regulation to bar negotiations on the disputed proposals.

With respect to your second contention, namely that the Council assigned little or no weight to the agency head's determination and the claimed intent of Congress, this contention is clearly without merit: It is based in major part on your apparent misinterpretation of the decision in the consolidated National Guard cases. Contrary to your position, the Council did not base its decision only on the agency's failure to show a functional relationship between the technician's day-to-day performance and the requirement to wear military uniforms (which relationship the agency expressly conceded, in its statement of position in the consolidated cases, did not exist). Rather, the decision is based on the Council's finding that the

^{1/} Labor-Management Relations in the Federal Service (1975), at 38-39.

agency had failed to come forward with any showing of a critical linkage between the requirement to wear military uniforms, on the one hand, and the accomplishment of the National Guard's mission or the effectuation of the public interest in maintaining the military preparedness of the National Guard, on the other. Further, contrary to your claim, the Council did not arrive at its decision in the consolidated cases by giving "no weight whatsoever" to the agency head determination and the House Armed Services Committee report. Instead, the Council, with all due deference, carefully considered the determination and the report and concluded that they failed to demonstrate a critical linkage between the requirement to wear the uniform and the accomplishment of the National Guard's mission or the effectuation of the public interest. Finally, the Council did not require, as you claim, that the agency in these cases come forward with some particular type or amount of evidence to sustain its compelling need determination (or that some particular type or amount of evidence will be required of agencies in future cases concerning newly developed, innovative regulations). Moreover, in this regard, your reliance on a portion of the Preamble^{2/} to the Order is misplaced. Such reliance ignores the express intent of the Order, reflected in the Preamble and in the succeeding substantive provisions (including the "compelling need" provisions), i.e., that the participation of employees in the formulation of the personnel policies and practices affecting their working conditions is in the public interest.^{3/}

With regard to your last contention that the union proposals violate section 12(b)(5) of the Order, the Council, consistent with established practice,^{4/} considered the applicability of section 12(b)(5) to the disputed proposals and found that such proposals were not violative of that section of the Order. In this regard, the Council in its decision in the consolidated cases distinguished the Department of Justice, INS case^{5/} from the instant cases, stating:

2/ The portion of the Preamble to the Order upon which you rely provides:

. . . the public interest requires . . . the continual development and implementation of modern and progressive work practices

3/ Labor-Management Relations in the Federal Service (1975), at 38.

4/ Id. at 39; Information Announcement dated Sept. 24, 1975 at 4-5.

5/ AFGE, National Immigration and Naturalization Service Council and Department of Justice, INS, FLRC No. 76A-26 (Jan. 18, 1977), Report No. 120. In that case the union's proposal would have permitted uniformed law enforcement personnel to affix a conspicuous union affiliation patch on their official uniforms. In the Council's opinion, the display of a conspicuous union patch on the law enforcement uniform involved would create an ambiguity which could result in the officer being identified, mistakenly, as an employee of organizations not connected with the United States Government and

(Continued)

In deciding that no compelling need exists for the NGB regulation requiring all National Guard technicians working in their technician status under virtually all circumstances to wear military uniforms and, as interpreted by the agency head, to observe military grooming standards, we must emphasize that no questions are raised in the instant cases as to whether or not the military uniform can be prescribed by management with respect to particular instances of assigned technician duties. Hence, we make no ruling as to whether requiring technicians to wear the military uniform in those more limited circumstances would, e.g., constitute a determination under section 12(b)(5) of the Order of the "means" by which such operations are to be conducted. (Footnote omitted.)

In the Council's opinion, therefore, by your submissions of February 22, 1977, and February 24, 1977, you do not raise any matters not previously considered and correctly decided by the Council; nor do you advance any other persuasive reasons to warrant the Council's reconsidering and reversing its decision in the consolidated cases. Accordingly, your requests that the Council reconsider and stay enforcement of its decision in the subject consolidated cases are denied.

By the Council.

Sincerely,



Henry H. Frazier III
Executive Director

cc: (See p. 5.)

(Continued)

thereby negate the purpose for which such uniforms are required, i.e., the ready identification of the wearer as a representative of Governmental authority since such identifiability is needed to accomplish or further the promotion of safe effective law enforcement operations. Thus, the Council sustained the agency's determination that the proposal infringed on management's 12(b)(5) right to determine the means by which agency operations are to be conducted.

cc: P. J. Hayes
NAGE

B. W. Hurlock
NGB

D. Montoya
NFFE

J. W. Mulholland
AFGE

V. J. Paterno
ACT

W. A. Robertson
NGB

R. W. Spencer
NAATA

G. Tilton
NFFE

W. C. Valdes
DOD

Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator). This appeal arose from the arbitrator's award which, in essence, directed that the grievant be promoted to a particular position retroactively and be compensated with backpay. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated the Federal Personnel Manual and the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970). The Council also granted the agency's request for a stay. (Report No. 111)

Council action (May 18, 1977). Based on cited precedent decisions of the Council and the Comptroller General, the Council concluded that the arbitrator's award, insofar as it directed that the grievant be promoted to the particular position involved, was violative of the Federal Personnel Manual (FPM) and could not be sustained. Further, the Council concluded that the award, insofar as it directed that the grievant be compensated with backpay, was violative of the Back Pay Act of 1966 and could not be sustained. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the paragraphs thereof found violative of the FPM and the Back Pay Act of 1966. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Tooele Army Depot

and

FLRC No. 76A-24

American Federation of Government
Employees, Local 2185, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award which, in essence, directed that the grievant be promoted retroactively and receive backpay.

Based upon the findings of the arbitrator and the entire record, it appears that the grievance concerned the activity's attempted filling of several vacant Fork Lift Operator, Wage Grade 5, positions from the same group of candidates in a short period of time. Specifically, the grievant, an employee whose name appeared on the referral selection rosters utilized to fill the vacancies, but who was not selected for any of the vacancies actually filled by the activity, filed a grievance contending that the number of names on the referral lists should have been limited as provided by Article XXIII, Section 8^{1/} of the parties' collective bargaining agreement; and that she, as "best qualified," should be retroactively promoted to one of the vacancies not filled by the activity.

Arbitrator's Award

The parties submitted to the arbitrator a stipulated issue:

Was the promotion Referral Selection Roster for the position of Fork Lift Operator, Wage Grade 5, properly constituted and was the grievant deprived of the opportunity for promotion in accordance with applicable regulations and labor-management agreement?

1/ According to the award, Article XXIII, Section 8 provides:

Section 8: The selection roster will be limited to the five (5) best qualified candidates. For each additional vacancy, one additional name may be added to the roster. The roster will be prepared by listing the best qualified candidates alphabetically. It will be available for review by interested parties in the Recruitment and Placement Branch, Civilian Personnel Division.

In response to this stipulation, the arbitrator determined that the promotion referral selection roster was not properly constituted and, since the grievant's opportunity for promotion was necessarily controlled by properly constituted rosters which were absent in this case, that the grievant was deprived of the opportunity for promotion in accordance with applicable regulations and the labor-management agreement. The arbitrator sustained the grievance, making the following "AWARD":

1. Article XXIII, Section 8 of the Negotiated Agreement was violated.
2. The promotion Referral Selection Roster for the position of Fork Lift Operator, Wage Grade 5, was not properly constituted.
3. Grievant was deprived of the opportunity for promotion in accordance with applicable regulations and labor-management agreement.
4. Grievance is sustained.
5. Grievant shall be compensated for any difference in compensation earned in her present position and such compensation as she would have earned if she had been promoted as of 28 May 1975.
6. Grievant shall be placed on one of the three vacant positions, as Fork Lift Operator, Wage Grade 5, as of such date the first vacancy is open to be filled.
7. The Arbitrator reserves jurisdiction to resolve any question the Parties may not be able to settle between themselves with respect to back pay computation and filling of promotion vacancy under the Award in this case. [Emphasis in original.]

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions which alleged that the award violates the Federal Personnel Manual and the Back Pay Act of 1966, 5 U.S.C. § 5596.^{2/} Neither party filed a brief.

2/ 5 U.S.C. § 5596 (1970) pertinently provides:

.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

(Continued)

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that the award violates the Federal Personnel Manual and the Back Pay Act of 1966. With respect to the issue presented by acceptance of the agency's exception which alleged that the award violates the Federal Personnel Manual, the Council has previously considered the question of whether an arbitration award directing a retroactive promotion with backpay violates the Federal Personnel Manual. In Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99 and Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (July 7, 1976), Report No. 108, the Council sought and applied Civil Service Commission interpretations of applicable legal requirements and Commission regulations pertaining to arbitration awards of retroactive promotion with backpay.

In the first of those cases, the Commission announced as a general rule that, consistent with the Federal Personnel Manual, an agency may not be constrained to select a particular individual from a promotion certificate.^{3/} More particularly, in the second of those cases, the Commission observed

(Continued)

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period

^{3/} Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99 at 4 of the Council's decision.

that FPM chapter 335, subchapter 2 (Requirement 6)^{4/} sets forth management's right to select or nonselect, a right which can only be abridged if a direct causal connection is established between improper agency action and the agency's failure to select a specific employee for promotion.^{5/} In those cases, the Commission concluded, noting the series of decisions of the Comptroller General dealing with arbitration awards of backpay,^{6/} that the only circumstances under which an agency may be required to promote a particular individual, consistent with the Federal Personnel Manual, and accord that individual backpay, is when a finding has been made by an arbitrator, or other competent authority, that such individual would definitely (and in accordance with law, regulation and/or the negotiated agreement) have been promoted at a particular point in time but for an administrative error of the agency, an agency violation of a Commission or agency regulation, or an agency violation of its negotiated agreement.

In the present case, however, there is no finding by the arbitrator that the requisite direct causal relationship exists between the violation of the negotiated agreement and the grievant's failure to be promoted, a finding essential to sustaining as consistent with the Federal Personnel Manual an award of a retroactive promotion. Although the arbitrator in the present case found that the agency had violated the parties' negotiated agreement, he concluded that the consequence of this violation was that the grievant "was deprived of the opportunity for promotion." [Emphasis added.] Obviously, the arbitrator's finding that the grievant was deprived of the opportunity for promotion is not a finding that but for the defective promotion referral selection rosters that the grievant would definitely have been selected for promotion. Furthermore, the agency, while agreeing that the referral selection rosters were improperly constituted, states that the grievant was referred and considered for all the vacancies concerned and that "[t]here is no evidence that the grievant would have been selected had a properly constituted roster been used."

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

5/ Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (July 7, 1976), Report No. 108 at 3 of the Council's decision.

6/ The Commission cites the "series of Comptroller General decisions dealing with retroactive promotion, all numbered B-180010, and issued on and subsequent to October 31, 1974."

Accordingly, we conclude that the arbitrator's award, insofar as it directs that the grievant be promoted to the position of Fork Lift Operator, Wage Grade 5, is violative of the Federal Personnel Manual and cannot be sustained.

With respect to the issue presented by acceptance of the agency's exception which alleged that the award violates the Back Pay Act of 1966, it is now well established by the Comptroller General's decision in 54 Comp. Gen. 312 (1974) and its progeny,^{7/} that in order for an arbitrator's award of backpay to be sustained under the Act and the implementing regulations thereto, that the arbitrator must specifically find that the agency violated the collective bargaining agreement, or find other improper agency action constituting an unjustified or unwarranted personnel action within the meaning of the Act, and that the arbitrator must further specifically find that such improper agency action directly caused the aggrieved employee to suffer a withdrawal, reduction or denial of pay, allowances, or differentials -- that is, that the withdrawal, reduction or denial of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action.

In the present case these decisions required the arbitrator to specifically find both that the agency violated the collective bargaining agreement and that but for the agency's violation of the agreement by improperly constituting the selection rosters the grievant would have been selected for promotion. As previously indicated with respect to the agency's exception alleging that the award violates the Federal Personnel Manual, the arbitrator in the present case failed to find that the grievant would have been selected for promotion but for the agency's violation of the collective bargaining agreement. Accordingly, we conclude that the arbitrator's award, insofar as it directs that the grievant be compensated for the difference in compensation between her present position and the compensation she would have earned had she been promoted as of May 28, 1975, is violative of the Back Pay Act of 1966 and cannot be sustained.

Conclusion

For the foregoing reasons, we find that those portions of the arbitrator's award which order the grievant promoted, effective retroactively, and paid appropriate backpay -- specifically paragraphs "5" and "6" of the arbitrator's "AWARD" -- violate the Federal Personnel Manual and the Back

7/ In the matter of a retroactive promotion with backpay pursuant to arbitration award, B-180010, October 31, 1974. See n. 6, supra.

Pay Act of 1966 and may not be implemented. Accordingly, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the paragraphs numbered "5" and "6" thereof. As so modified, the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 18, 1977

American Federation of Government Employees, Local 2498 and National Aeronautics and Space Administration, John F. Kennedy Space Center (Bode, Arbitrator). The arbitrator concluded that the activity had not violated the parties' agreement in the filling of certain positions and therefore denied the union's grievance. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the award lacked entirety; (2) that the award was contrary to the Order, as interpreted and applied by the Council; (3) in substance, that a portion of the award disregarded the contract and certain Federal Personnel Manual and agency requirements; (4) that the arbitrator's findings were completely contrary to the record evidence and were totally unsupported by Federal promotion procedures; and (5) that the award did not draw its essence from the parties' agreement. The union also requested a stay of the arbitrator's award.

Council action (May 18, 1977). As to (1) and, in part, (4), the Council held, in essence, that the union's exceptions did not state a ground for review. With regard to (2), (3), (4), in part, and (5), the Council held that the union's petition did not present facts and circumstances to support those exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the union's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Ms. Maralyn G. Blatch, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees,
Local 2498 and National Aeronautics and Space
Administration, John F. Kennedy Space Center
(Bode, Arbitrator), FLRC No. 76A-70

Dear Ms. Blatch:

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

According to the arbitrator's award, this matter arose when the Kennedy Space Center (the activity) decided to fill four positions^{1/} through outside recruitment and appointment procedures (rather than through internal promotion procedures). The union filed a grievance which was ultimately submitted to arbitration.^{2/} The grievance sought certain remedial action, including the removal of the four employees hired and the filling of the positions under the merit promotion plan.

In the opinion accompanying his award, the arbitrator discussed each of the agreement provisions alleged to have been violated and made, inter alia, the findings which are summarized below:

- 1) One of the four positions involved, namely, Supervisory Contract Specialist GS-1102-13, is supervisory as defined in Executive Order 11491, as amended, and, in accordance with the Order, is excluded from the bargaining unit and thus does not fall within its coverage. Therefore all "charges in the grievance" relating to this position are dismissed.

^{1/} According to the award, the four positions were: Contract Specialist, GS-1102-12; Contract Price Analyst, GS-1102-13; Contract Administrator, GS-1102-11; Supervisory Contract Specialist, GS-1102-13.

^{2/} According to the award, the union claimed that the activity had violated the Preamble of the parties' agreement as well as Article III (Obligations of Employer) Sections 1 and 4; Article V (Union Rights) Sections 5 and 6; Article XX (Placement and Promotion) Sections 1, 2, 10 and 14; Article XXII (Equal Employment Opportunity) Section 3; Article XXV (Repromotions) Sections 1 and 2; and Article XXIX (Training) Sections 1, 2, 3, and 5.

- 2) The Contract Price Analyst position is "primarily administrative or managerial in nature," and "therefore is outside the bargaining unit and does not fall within its coverage, and the union is prohibited by the Order from intervening." Therefore, all charges in the grievance are dismissed with respect to this position and only those grievances relating to the Contract Specialist and Contract Administrator positions will be considered.
- 3) As to the two remaining positions (Contract Specialist GS-1102-12 and Contract Administrator GS-1102-11), the arbitrator found that the agency had not violated the collective bargaining agreement in filling them by outside recruitment. In so finding, the arbitrator further concluded that provisions of the agreement relating to priority consideration for repromotion eligibles were complied with.

The arbitrator therefore denied the grievance, concluding as follows:

For the reasons set forth in the Opinion And Findings, the arbitrator hereby finds that the employer did not violate the Preamble, Paragraph 2; Article III Sections 1 and 4; Article V Sections 5 and 6; Article XX Sections 1, 2, 10, and 14; Article XXII Section 3; Article XXV Sections 1 and 2; and Article XXIX Sections 1, 2, 3 and 5.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exceptions discussed below and requests a stay of the award. The agency filed an opposition.

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

In its first exception, the union alleges that the arbitrator's award lacks entirety since the arbitrator did not resolve the issue that he was paid to resolve when he concluded that the union had no right to grieve over the GS-13 Contract Price Analyst position because the position is "administrative or managerial" [emphasis by union] and therefore not in the bargaining unit. The union contends that if the position is managerial it is out of the unit, but if it is administrative only then it is "clearly within the unit." An exception that an award lacks entirety does not assert a ground upon which the Council has previously granted review of an arbitration award nor does the union cite any private sector cases in which courts have sustained challenges to arbitration awards on similar grounds. See American Federation of Government Employees, Local 3239, AFL-CIO and Social Security Administration, Cleveland Region, Area One Office, Southfield, Michigan (Ott, Arbitrator), FLRC No. 76A-67 (Aug. 31, 1976), Report No. 111.

Furthermore, noting that the question addressed by the arbitrator was whether the union has a right to grieve over this position under the terms of the agreement and that he specifically found that it did not, the Council is of the opinion that the union, in essence, is disagreeing with the arbitrator's interpretation of the labor agreement. The Council, however, has consistently held that the interpretation of the agreement is a matter to be left to the arbitrator's judgment and does not state a ground for review under section 2411.32 of the Council's rules. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Accordingly, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception the union contends that the award is contrary to the Order as interpreted and applied by the Council. In support of this exception the union asserts that the "rationale of the arbitrator [is] completely illogical" in a part of his opinion in which he cites section 13 of the Order in the course of concluding that two of the positions being grieved over by the union were outside the bargaining unit and hence outside the scope of the grievance procedure in the negotiated agreement. The union also asserts that certain of the arbitrator's determinations in his opinion and findings are contrary to the Order as interpreted and applied by the Council in its decisions in Texas ANG Council of Locals^{3/} and Social and Rehabilitation Service.^{4/}

While the exception that the award violates the Order states a ground upon which the Council will grant review of an arbitration award, the Council is of the opinion that the petition does not contain a description of facts and circumstances to support this exception. In this regard the union's assertion that the rationale of the arbitrator is "completely illogical" goes to the arbitrator's reasoning rather than to whether the award itself violates the Order. The Council has consistently indicated that it is the award rather than the conclusion or the specific reasoning employed by an arbitrator that is subject to review. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96; Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (Nov. 14, 1975), Report No. 89. Likewise, as to the union's assertions that certain of the arbitrator's determinations in his opinion and findings are inconsistent with the Council's interpretation and application of the Order in Texas ANG, supra, and Social and

^{3/} Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100.

^{4/} Social and Rehabilitation Service, Department of Health, Education, and Welfare and American Federation of Government Employees, Local 41, AFL-CIO (Mallet-Prevost, Arbitrator), FLRC No. 75A-42 (Apr. 27, 1976), Report No. 104.

Rehabilitation Service, supra, the union does not present facts and circumstances to show that the arbitrator's award violates the Order as interpreted by the Council in those cases. While the arbitrator made numerous references to the Order in his "Opinion and Findings" accompanying his award, it is noted that each of his findings is specifically related to pertinent provisions of the agreement. Again it appears that the essence of the union's contentions in support of this exception is that the arbitrator reached an incorrect result in his interpretation of the agreement. However, as previously indicated, this does not state a ground upon which the Council will accept a petition for review under section 2411.32 of the Council's rules. Accordingly, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.^{5/}

In its third exception the union contends that the portion of the award relating to the two positions found by the arbitrator to be outside the bargaining unit is "so arbitrary and capricious as to manifest a complete disregard for the principles of contract construction and [Federal Personnel Manual] and agency requirements regarding the rights of repromotion eligibles" and states that "[t]he arbitrator is confined to interpretation of the agreement and related documents, he does not sit to dispense his own brand of industrial justice." However, the union's exception consists only of the bare assertion set forth above and, other than to cite four private sector cases^{6/} (without explaining the applicability of those cases to the instant case), presents no facts and circumstances to support its exception. The Council has consistently declined to review arbitration awards where the petition fails to set forth any support for the exceptions presented. Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82 and cases cited therein. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its fourth exception the union alleges that the arbitrator's findings are completely contrary to the record evidence and are totally unsupported by Federal promotion procedures. The union contends that the arbitrator, in reaching conclusions regarding the union's allegations of preselection, "abandoned all logic" and "reached conclusions which lack any rational

^{5/} In so finding, however, the Council does not pass upon and therefore in no manner adopts any of the arbitrator's references or remarks concerning the Order.

^{6/} The union cites United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); Mogge v. Dist. 8, IAM, 454 F.2d 510 (7th Cir. 1971); and Butcher Workmen Local 641 v. Capitol Packing Co., 413 F.2d 668 (10th Cir. 1969).

basis" since the activity claimed that the successful outside candidate was selected because of specialized experience in the administration of construction contracts but the successful candidate himself testified that he had no such specialized experience and that he had been contacted by the activity before he applied for the job.

As to that part of the union's exception which alleges that the arbitrator's findings were unsupported by record evidence, the Council has consistently held that an arbitrator's findings of facts are not to be questioned on appeal, Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81; and that it is for the arbitrator to determine the credibility of witnesses and the weight to be given their testimony, and such determinations are not to be reviewed. Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82.

Further, with regard to the union's contentions regarding Federal merit promotion procedures, it appears that the union is, in essence, contending that the agency's actions with regard to the hiring of the outside employees were contrary to Federal merit promotion procedures. Such a contention, however, does not in and of itself assert a ground upon which the Council will grant a petition for review of an arbitration award. Moreover, even if the union's petition were read as contending that the arbitrator's award is contrary to Federal merit promotion procedures and thus violates Civil Service Commission regulations or the Federal Personnel Manual, the union has failed to be specific. That is, it has failed to cite any relevant and pertinent provisions of either Civil Service Commission regulations or the Federal Personnel Manual which it believes the award to violate. See Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator), FLRC No. 75A-95 (Jan. 22, 1976), Report No. 96. As previously indicated, the Council will not accept a petition for review of an arbitrator's award where there appears in the petition no support for the stated exception to the award. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure.

The union's final exception alleges that the award does not draw its essence from the agreement and represents the arbitrator's own brand of industrial justice. The union asserts that the arbitrator erred by equating repromotion rights with reinstatement rights, by denying regulatory rights to an admitted repromotion eligible, and by ignoring all evidence of preselection. The union further contends that the arbitrator "completely ignores" particular pertinent provisions of the activity's merit promotion plan regarding repromotion eligibles.

The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described

in the petition, that the award fails to draw its essence from the negotiated agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, the Council is of the opinion that the union's petition does not present facts and circumstances in support of this exception to demonstrate that the arbitrator's award is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or that the award could not in any rational way be derived from the agreement; or that it evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 138. Therefore, the union's fifth exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure. Likewise, the union's request for a stay of the award is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: S. A. Weissenegger
KSC

Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656. This appeal arose from a decision and order of the Assistant Secretary who, upon a complaint filed by National Federation of Federal Employees, Local 1613, found that the activity had violated section 19(a)(1) and (6) of the Order by unilaterally changing the workhours of certain of its employees. In resolving the merits of the unfair labor practice complaint, the Assistant Secretary concluded that the change in workhours was not excepted by section 11(b) from the activity's obligation to bargain, but, rather, was a negotiable matter within the meaning of section 11(a) of the Order. The Assistant Secretary further concluded, in the alternative, that even if the activity's change in workhours herein were found to be within the ambit of section 11(b) and thus excepted from the activity's obligation to negotiate, the activity had chosen to make the scheduling of workhours a negotiable matter by virtue of certain provisions in its agreement with the union. The activity appealed to the Council, contending (1) that the negotiability determination rendered by the Assistant Secretary in the process of deciding this case was incorrect; and (2) that the alternative conclusion of the Assistant Secretary raised major policy issues.

Council action (May 18, 1977). As to (1), the Council, upon review pursuant to section 11(d) of the Order and section 2411.17(a) of its rules, concluded, as did the Assistant Secretary, that the change in the workhours of certain of the activity's employees was not excepted by section 11(b) from the activity's obligation to bargain, but, rather, was a negotiable matter under section 11(a) of the Order in the facts and circumstances of this case. As to (2), the Council concluded that in view of its disposition with respect to (1), it was unnecessary to reach or pass upon the question of whether the Assistant Secretary's alternative conclusion presented major policy issues, as alleged by the activity. Since it was unnecessary to reach that question and since the activity neither alleged, nor did it appear, that the Assistant Secretary's decision was arbitrary and capricious, the Council held that the activity's petition for review failed to meet the requirements of section 2411.12 of the Council's rules. Accordingly, the Council held that the Assistant Secretary's negotiability determination was proper and, pursuant to section 2411.17(i) of its rules of procedure, sustained that portion of the Assistant Secretary's decision. Moreover, as the activity's petition for review failed to meet the requirements of section 2411.12 of the Council's rules, the Council denied the petition.

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

Southeast Exchange Region of
the Army and Air Force Exchange
Service, Rosewood Warehouse,
Columbia, South Carolina

and

National Federation of Federal
Employees, Local 1613, Independent

A/SLMR No. 656
FLRC No. 76A-85

11

11

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary that the Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina (the activity) had violated section 19(a)(1) and (6) of the Order^{1/} by unilaterally changing the workhours of certain of its employees who were exclusively represented by the National Federation of Federal Employees, Local 1613 (the union).

The relevant and essentially undisputed facts, as found by the Assistant Secretary, are as follows: The activity decided to change the workhours of certain receiving, storage, and related office employees from the scheduled hours of 7:45 a.m.—4:30 p.m. to 7:15 a.m.—4:00 p.m. Prior to the change, receiving and storage employees came to work 90 minutes prior to the shipping employees.¹ Management observed that "at times" shipments would be delayed because sufficient merchandise had not been "pulled" and made ready for shipping when the shipping employees reported for work. Accordingly, the activity decided to change the hours of receiving and storage employees so that there would be a 2-hour work

1/ Section 19(a)(1) and (6) of the Order provides as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

period prior to the time that the shipping employees reported for work, thereby providing an additional one-half hour for preshipment preparation. The activity posted a notice announcing the work schedule change, which became effective 17 days later, and the union subsequently filed its section 19(a)(1) and (6) complaint against the activity.

Based upon the foregoing facts, the Assistant Secretary found, in pertinent part, and in agreement with the Administrative Law Judge (ALJ), that the change in hours of work of certain employees herein was not excepted as a subject for bargaining by the terms of section 11(b) of the Order. In so finding, he relied on the Council's Supplemental Decision in Animal and Plant Health Inspection Service,^{2/} which stated:

[A] proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under Section 11(b) unless, based on the special circumstances of a particular case . . . , the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency. [Emphasis added.]

The Assistant Secretary concluded:

In my view, under the circumstances of this case, the change in work hours . . . was not "integrally related to and consequently determinative of the staffing patterns" of the . . . Activity. Thus, the record herein discloses merely that the [activity] determined to make the change in work hours in the instant case in order "to improve the flow of work" by providing an additional one-half hour for pre-shipment preparation. Accordingly, applying the principles enunciated in the Council rulings cited above,^{3/} I conclude . . . that the change in work hours of certain unit employees herein, being a matter affecting working conditions, was a negotiable item within the meaning of Section 11(a) of the Order. [Footnote added.]

2/ American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 1 FLRC 616 [FLRC No. 73A-36 (Dec. 27, 1973), Report No. 47], rev'd and remanded on other grounds, sub nom. National Broiler Council v. FLRC, 382 F. Supp. 322 (E.D. Va. 1974); Council Supplemental Decision in the same case, at 18 (June 10, 1975), Report No. 73, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. Va., Sept. 5, 1975).

3/ In addition to the Animal and Plant Health Inspection Service case (supra note 2), the Assistant Secretary cited the Council's decisions in AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., 1 FLRC 100 [FLRC No. 71A-11 (July 9, 1971), Report No. 11], and Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, 1 FLRC 235 [FLRC No. 71A-52 (Nov. 24, 1972), Report No. 31].

The Assistant Secretary further concluded that even if the activity's change in workhours herein were found to be within the ambit of section 11(b) of the Order in that it was "integrally related to and consequently determinative of" the numbers and types of employees in question, and thus excepted from the obligation to negotiate, the activity had chosen to make the scheduling of workhours a negotiable matter by virtue of certain provisions in its agreement with the union. In so concluding, the Assistant Secretary quoted and relied upon part of Article V, Section 1 of the parties' negotiated agreement which stated that "[t]he scope of negotiations includes, but is not limited to, such matters as . . . [s]hift assignments . . . [and] . . . [s]cheduling of work hours and meal periods. . . ."

The activity appealed the Assistant Secretary's decision, alleging that:

1. The negotiability determination rendered by the Assistant Secretary in the process of deciding this case is incorrect in that:

[T]he work shift change for the receiving, storage and related office employees at the Rosewood Warehouse was integrally related to and determinative of the numbers and types of employees assigned to those tours of duty and that, therefore, under the Plum Island rationale [supra note 3] is excepted from the obligation to bargain under Section 11(b). [Footnote omitted.]

2. The Assistant Secretary's decision raises two major policy issues: (A) that the Assistant Secretary, in essence, misinterpreted the parties' collective bargaining agreement in finding that the activity had chosen to make the scheduling of workhours a negotiable matter, and, furthermore, improperly refused to overturn the ALJ's rejection of certain evidence the activity had proffered at the hearing concerning the proper interpretation of the agreement; and (B) that the Assistant Secretary should have referred the parties to the grievance and arbitration provisions of their agreement, since the instant complaint involved an asserted contract violation rather than a violation of the Order.

The union filed an opposition to the activity's appeal.

As to the first question concerning the negotiability determination which was adverse to the activity, the activity may appeal this determination to the Council as a matter of right pursuant to section 11(d) of the Order^{4/}

^{4/} Section 11(d) of the Order provides as follows:

Sec. 11. Negotiation of agreements.

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(Continued)

and section 2411.17 of the Council's rules.^{5/} That is, the activity has appealed from an adverse negotiability determination that the Assistant Secretary was required to render in order to resolve the merits of an unfair labor practice complaint which alleged that the activity had unilaterally changed established personnel policies and practices and matters affecting working conditions. Accordingly, the Council will review the Assistant Secretary's negotiability determination in the opinion below. As to the alleged major policy issues raised by the activity, the Council will consider the acceptability of the petition for review on these grounds under section 2411.12 of the Council's rules.^{6/}

(Continued)

(d) If, as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal to consult, confer or negotiate as required under this Order, the Assistant Secretary may, in the exercise of his authority under section 6(a)(4) of the Order, make those determinations of negotiability as may be necessary to resolve the merits of the alleged unfair labor practice. In such cases the party subject to an adverse ruling may appeal the Assistant Secretary's negotiability determination to the Council.

5/ Section 2411.17 of the Council's rules provides, in pertinent part:

§ 2411.17 Determinations of negotiability.

(a) Notwithstanding the procedures of this subpart, the Council, as provided in this section, will, upon an appeal by a party, review a decision of the Assistant Secretary wherein it was necessary for him to make a negotiability determination in order to resolve the merits of an unfair labor practice complaint resulting from an alleged unilateral change in established personnel policies or practices or matters affecting working conditions.

6/ Section 2411.12 of the Council's rules provides:

§ 2411.12 Considerations governing review.

A petition for review of a decision of the Assistant Secretary is not a matter of right, but of discretion, and, subject to the requirements of this part, will be granted only where there are major policy issues present or where it appears that the decision was arbitrary and capricious.

Opinion

As already indicated, this appeal presents two questions, namely: (1) the propriety of the Assistant Secretary's negotiability determination, and (2) whether the Assistant Secretary's decision raises major policy issues.

(1) Did the Assistant Secretary properly determine that the change in workhours of certain of the activity's employees was a negotiable matter in the facts and circumstances of this case?

As previously stated, the Assistant Secretary's negotiability determination is based on a conclusion that the change in workhours of certain unit employees herein was not excepted from the activity's bargaining obligation under section 11(b). The question before the Council is whether the Assistant Secretary properly determined that the change in workhours was a negotiable matter in the circumstances of this case. For the reasons which follow, we agree with and therefore sustain the Assistant Secretary's negotiability determination herein.

As noted above, the activity unilaterally changed the workhours of the receiving, storage, and related office employees. The activity contended in its appeal that such change was integrally related to and determinative of the numbers and types of employees assigned to those tours of duty, and was therefore excepted from the duty to bargain by section 11(b) of the Order pursuant to the rationale of the Council's Plum Island decision. In this regard, the activity asserted that the hours were changed herein to move a particular group of employees so that their presence at the worksite "coincided with the occurrence of the specific types of work they were hired to do and were peculiarly qualified to do, and . . . did not interfere with the performance of required work by other interdependent employee groups"; and that "a staffing adjustment accomplished in the manner and for the reasons present in the instant case does bear an integral relationship to staffing pattern and is excepted from the duty to meet and confer under [s]ection 11(b)."

On a number of occasions, the Council has decided cases dealing with the negotiability of proposals relating to employees' hours of duty such as involved in the instant case. As the Assistant Secretary noted in his decision herein, the Council summarized its earlier rulings in this regard in its supplemental decision in the Animal and Plant Health Inspection Service case, supra note 2. To quote more fully from that decision, the Council (at 15-18) stated:

[T]he agency in Plum Island [note 3, supra] operated a research facility and, in order to provide for round-the-clock operation and maintenance, it employed four crews of 11 men each, who worked on three rotating, weekly shifts and who supplemented a regular, one-shift crew of maintenance employees. The agency had decided to

eliminate the entire third shift in one of its two laboratory buildings and to establish two new fixed shifts working on a five day basis. While the total number of workers employed by the agency would not be reduced thereby, the changes in the staffing on the first and second shift resulting from the termination of the rotating third shift were intended by the agency to result in improved staffing of those two shifts. However, the union proposed that any such changes in tours of duty (and hence the staffing of the new fixed first and second shifts and the restaffing of the rotating shifts) be proscribed unless negotiated with the union.

The Council held that the union's proposal was excepted from the agency's obligation to bargain under section 11(b), and, more particularly under the exclusion in that section relating to "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." As observed by the Council, this language of the Order, according to section E.1. of the Report accompanying E.O. 11491, clarified the right of an agency to determine the "staffing patterns" for its organization and for accomplishing its mission. The Council found in substance that the number and duration of the work shifts, or tours of duty, as intended to be changed by the agency in that case, were integrally related to and determinative of the numbers and types of employees assigned to those tours of duty of the agency; and therefore that, under the facts of that case, the union's proposal to bargain on such changes was nonnegotiable under section 11(b).

The Plum Island decision was subsequently explained and distinguished in the Charleston case, FLRC No. 71A-52 (note 3, supra). There, the facility provided round-the-clock service to the fleet, seven days a week. The union proposed to establish a basic workweek of five (5) eight (8) hour days, Monday through Friday for employees (other than those having jobs required to be performed on a continuous basis or directly related to certain functions performed at an activity operating on a continuous basis). The agency, in addition to its contentions that the proposal would require the agency to pay avoidable overtime for Saturday and Sunday work, argued that negotiation was not required under section 11(b), based on the Plum Island case. The Council rejected this contention, stating (at pp. 4-5 of Council decision):

2. Section 11(b). The agency mistakenly relies on the Council's Plum Island decision as a basis for declaring the proposal non-negotiable under this section of the Order. In Plum Island, we pointed out that the provision of section 11(b) in question was intended to apply to an agency's right to establish staffing patterns for its organization and the accomplishment of its work, as explained in the report accompanying Executive Order 11491. In the facts of that case, which deal with a situation

of round-the-clock operations and a work schedule of rotating tours of duty, the number and duration of the tours were integrally related to the numbers and types of workers assigned to those tours. Together they determined the agency's staffing pattern for accomplishing the work. Thus, the union's proposal in that case, which would require bargaining on any changes in existing tours of duty, would also have established an obligation to bargain on any changes in the numbers and types of workers assigned, matters which section 11(b) expressly excluded from such obligation.

In the instant case, the circumstances in the bargaining unit and the union's proposal are materially different from those in Plum Island. There is no indication that the proposal to affirm Monday through Friday as the basic workweek for unit employees (other than those whose jobs are directly related to continuous operations and certain named functions of the activity) would require bargaining on the 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.' For it does not appear that the basic workweek for employees here proposed is integrally related in any manner to the numbers and types of employees involved. Absent this integral relationship to staffing pattern, the proposal does not conflict with section 11(b), and Plum Island is inapposite. [Footnote omitted.]

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In summary, therefore, as decided by the Council in Plum Island, Charleston, FLRC No. 71A-52, and related cases,^{7/} a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under section 11(b) unless, based on the special circumstances of a particular case (as in Plum Island), the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency. [Footnote added.]

^{7/} The Council cited and discussed, as related cases in this regard, its decisions in Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 450 [FLRC No. 72A-35 (June 29, 1973), Report No. 41]; and American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, 1 FLRC 584 [FLRC No. 72A-41 (Dec. 12, 1973), Report No. 46].

Applying the foregoing principles to the facts and circumstances in the instant case, the Assistant Secretary, as previously stated, found that the change in workhours of certain of the activity's receiving, storage, and related office employees was not integrally related to and consequently determinative of the staffing patterns of the activity, and therefore concluded that such change in workhours was a negotiable item within the meaning of section 11(a) of the Order. In our view, his determination is clearly consistent with the principles enunciated by the Council in its prior decisions and fully supported by the record herein, and therefore must be sustained. Thus, unlike in Plum Island, the change in workhours has not been shown to be integrally related to and determinative of either the types of employees or the number of employees assigned to the particular tour of duty at the activity. That is, the activity neither asserted nor does it appear that, subsequent to the change in workhours, employees other than the receiving, storage, and related office employees would be performing the preshipment preparation or that a different number of such employees would be performing that work. Rather, as the record shows and the Assistant Secretary found, the activity decided to make the change in workhours to provide an additional one-half hour of preshipment preparation before the shipping employees arrived at work. Accordingly, the Council concludes, as did the Assistant Secretary, that the change in workhours herein was not excepted by section 11(b) from the activity's obligation to bargain under section 11(a) of the Order.

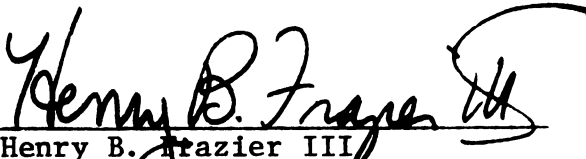
(2) Does the Assistant Secretary's decision present major policy issues as alleged by the activity?

As stated above, the Assistant Secretary further concluded, in the alternative, that even if the activity's change in workhours herein were found to be within the ambit of section 11(b) and thus excepted from the activity's obligation to negotiate, the activity had chosen to make the scheduling of workhours a negotiable matter by virtue of certain provisions in its agreement with the union. The activity's alleged major policy issues, concerning the Assistant Secretary's asserted misinterpretation of the parties' negotiated agreement and misapplication of the grievance and arbitration provisions contained therein, are all related to the Assistant Secretary's alternative conclusion. In view of the Council's disposition with respect to question 1, supra, it is unnecessary for the Council to reach or pass upon the question of whether the Assistant Secretary's decision presents the major policy issues as alleged by the activity. Since it is unnecessary to reach the question of whether the Assistant Secretary's alternative conclusion presents the alleged major policy issues and since the activity neither alleges, nor does it appear, that his decision is arbitrary and capricious, the activity's petition for review fails to meet the requirements of section 2411.12 of the Council's rules of procedure.

Conclusion

For the foregoing reasons, the Council concludes that the change in workhours of certain of the activity's employees was a negotiable matter under section 11(a) of the Order in the facts and circumstances of this case. Accordingly, that portion of the Assistant Secretary's decision wherein it was necessary for him to make a negotiability determination is proper and, pursuant to section 2411.17(i) of the Council's rules, is hereby sustained. Moreover, as the activity's petition for review fails to meet the requirements of section 2411.12 of the Council's rules, the petition for review is hereby denied.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 18, 1977

The Adjutant General, State of New Hampshire and Granite State Chapter, Association of Civilian Technicians (Reinke, Arbitrator). The arbitrator in part denied and in part sustained the grievance, which related to the filling of a particular position by the activity. The union filed an exception to the arbitrator's award with the Council, alleging that the award violated appropriate regulations of the Civil Service Commission and the Department of the Air Force in that the individual selected for promotion failed to meet mandatory qualification requirements and was allowed by the arbitrator to remain in the position involved.

Council action (May 18, 1977). Without passing upon the question of whether the Department of the Air Force regulation cited by the union was an appropriate regulation within the meaning of section 2411.32 of the Council's rules of procedure, or the question of whether the cited regulation, in any event, applied to the civilian technicians employed by the New Hampshire National Guard, the Council held that the union's petition did not present sufficient facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Mr. John W. Chapman
Executive Assistant
Association of Civilian Technicians
348A Hungerford Court
Rockville, Maryland 20850

Re: The Adjutant General, State of New Hampshire
and Granite State Chapter, Association of
Civilian Technicians (Reinke, Arbitrator),
FLRC No. 76A-95

Dear Mr. Chapman:

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

According to the award, the dispute in the matter arose when the activity filled the position of "Military Personnel Supervisor." An unsuccessful candidate for the position filed a grievance in substance contending that the "mandatory requirements" of the Job Announcement were not followed by the activity in filling the position. Before the arbitrator, the grievant contended that two of the five individuals whose names appeared on the promotion certificate did not meet the mandatory requirements of the announcement. Consequently, he proposed that only the three candidates meeting the requirements be evaluated and considered for the position. In the discussion accompanying his award, the arbitrator indicated that the "mandatory requirements" in question were:

1. Be qualified in AFSC 70270, 70490, 73270, or 73293.
2. Must be assigned to Headquarters, State ANG, in administrative and/or personnel position.

First, concerning the requirement that the applicant "be qualified in" the designated AFSC, the union representing the grievant contended before the arbitrator that the phrase "be qualified in" meant that the applicant must possess or have possessed one of the required AFSCs at the time of application. The arbitrator determined that in this case, "the language of the job announcement . . . means . . . that if the individual applicant is qualified, that is, able to perform the tasks specified for one of the AFSC in question, he is eligible." The arbitrator then stated that he was not in a position to rule as to whether any or all five of the certified candidates were qualified and, in the absence of contrary evidence, he would accept the judgment of the Technician Personnel Officer

and the Area Specialist Officer as to whether the applicants were able to perform the duties of the position. Thus, the arbitrator denied the grievance as it related to the AFSC requirement.

Second, with respect to the requirement that the applicant "must be assigned to Headquarters, State ANG, in administrative and/or personnel position," the arbitrator found that none of the candidates met this requirement, rejecting the contention of the Adjutant General that this particular requirement could be fulfilled after selection of the successful candidates. Thus, the arbitrator sustained the grievance with respect to this qualification requirement.

Accordingly, the arbitrator fashioned the following remedy:

In light of my findings on the substantive issues, I have carefully considered what remedy should be applied. Obviously, under my ruling, the grievant . . . and the other unsuccessful candidates, as well as the successful candidate . . ., would be ineligible. On the basis of his assignment and occupation of position for nearly ten months it would appear that [the successful candidate], although wrongly designated in the first place, would now be the only qualified candidate under the mandatory qualifications of Job Announcement NH 75-36.

Therefore, rather than disturb the existing situation, I direct that in the future Job Announcements be clear and specifically refrain from such language as has given rise to this proceeding. It should be [reasonably] simple to state that upon selection the successful candidate will be assigned to the state Headquarters or wherever the position calls for and by the same token use the words "possess" or "have possessed" appropriate AFSC if that is the desire of the appointing authority.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency filed an opposition.

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

The union states its exception to the award as follows:

[T]he arbitrator's award violates appropriate regulations of the Civil Service Commission and the Department of Air Force in that the individual selected for promotion failed to meet mandatory qualification requirements and has been allowed to remain in the position.

The union's exception and supporting contentions are addressed to two distinct parts of the award. First, the union takes exception to the arbitrator's denial of the grievance with respect to the AFSC requirements, arguing that this part of the award violates Air Force Regulations. Secondly, the union takes exception to the arbitrator's decision, after sustaining the grievance concerning the requirement that the applicant be assigned to an administrative or personnel position, to leave the successful candidate in the position, arguing that this decision not to remove the wrongfully selected candidate violates Civil Service Regulations as formulated in the Federal Personnel Manual and prior Council decisions. For purposes of discussion, the union's exception insofar as it relates to each part of the award will be considered separately.

In its exception to that part of the arbitrator's award denying the grievance concerning the AFSC requirements, the union contends that this part of the award violates Department of Air Force Regulation 35-1. The union asserts that "[u]nder this regulation the selected employee would not have been qualified while three of the candidates on the certified list of applicants would have been qualified." The union further asserts that the arbitrator, in accepting the opinion of individuals, in lieu of regulatory requirements, as to the qualifications of the applicants, is in violation of a higher agency regulation.

As previously indicated, the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates an appropriate regulation. However, in this case (without passing on whether the cited Department of the Air Force Regulation is an appropriate regulation within the meaning of section 2411.32 of the Council's rules^{1/} or whether the cited regulation, in any event, applies to the civilian technicians employed by the New Hampshire Air National Guard) the Council is of the opinion that the union's petition does not present sufficient facts and circumstances to support its exception. In this regard, there is a lack of a clear and sufficient explanation in the union's petition as to how the arbitrator's award, interpreting the language of the job announcement and, as a result, denying the grievance concerning the AFSC requirements, violates Air Force Regulation 35-1. Instead the union's assertions appear to be, in essence, that the agency's action in the selection of an employee for the vacancy in dispute herein was contrary to Air Force Regulation 35-1 rather than that the arbitrator's interpretation of the phrase "be qualified in" as contained in the AFSC qualification requirement of the job announcement was violative of Air Force Regulation 35-1. Such an exception does not assert a ground upon which the Council will

1/ See American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (Dec. 5, 1974), Report No. 61; Cf. American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94.

accept a petition for review of an arbitration award. See Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator), FLRC No. 75A-95 (Jan. 22, 1976), Report No. 96. Accordingly, the union's exception to this part of the award provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its exception to that part of the arbitrator's award wherein the arbitrator determined that the successful applicant was originally ineligible and wrongfully designated but he allowed the individual to be retained in the position, the union contends that the arbitrator's action permitting such retention is a violation of Federal Personnel Manual Chapter 335, subchapter 6-4 which states in 6(1)(b) that "an employee may be retained in the position only if reconstruction of the promotion action shows that he could have been selected had the proper procedures been followed at the time the action was taken." In support of its exception, the union cites Civil Service Commission policy as expressed in two Council decisions.^{2/} However, the Council is of the opinion that the union's petition for review does not present sufficient facts and circumstances to establish that this part of the award violates appropriate regulations, specifically the Federal Personnel Manual. In this regard the union has made no showing whatever that the cited provisions of the Federal Personnel Manual apply in the facts and circumstances of this case.^{3/} Thus, the union's exception to this part of the award on the

^{2/} The union cites Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees, Local 3407 (Ables, Arbitrator), FLRC No. 75A-33 (Apr. 27, 1976), Report No. 104; Social and Rehabilitative Service, Department of Health, Education, and Welfare and American Federation of Government Employees, Local 41, AFL-CIO (Mallet-Prevost, Arbitrator), FLRC No. 75A-42 (Apr. 27, 1976), Report No. 104.

^{3/} In this regard, the Council notes that positions which require membership in the National Guard under the provisions of 32 U.S.C. § 709(d) are outside the competitive service. Thus, 32 U.S.C. § 709(d), codifying in part section 2 of the National Guard Technicians Act of 1968, provides in pertinent part as follows:

[A] position authorized by this section is outside the competitive service if the technician employed therein is required . . . to be a member of the National Guard.

Further under the provisions of section 210.101(b), of title 5, Code of Federal Regulations (CFR), the Civil Service Commission's regulations in Part 335, CFR, concerning Promotion and Internal Placement do not apply to positions in the excepted service or incumbents in those positions. 5 CFR § 210.101(b) provides:

(Continued)

ground that the award violates the Federal Personnel Manual provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: B. E. Cook
NH ANG

(Continued)

Parts 315 through 339 of this chapter apply to all positions in the competitive service and to all incumbents of those positions; and, except as specified by or in an individual part, these parts do not apply to positions in the excepted service or to incumbents of those positions.

Local 2151, American Federation of Government Employees, AFL-CIO and General Services Administration, Region 3. The dispute involved the negotiability under the Order of a union proposal, presented during the term of the parties' existing basic agreement, concerning official time for union representatives. More specifically, the proposal would provide official time for negotiations desired by the union (in connection with agency implementation of a change in policy that was required by regulation of an appropriate authority), during the term of the parties' basic agreement, but not undertaken pursuant to a reopener clause. The agency determined that the proposal was nonnegotiable because it conflicted with section 20 of the Order and the union appealed to the Council.

Council action (May 18, 1977). The Council held that the union's proposal conflicted with section 20 of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the proposal was nonnegotiable. To avoid any misunderstanding, however, the Council also ruled, consistent with its previous ruling in FLRC No. 75P-1 (Dec. 17, 1975), that where the parties have so agreed, official time may be granted, in accordance with applicable guidelines, for negotiations in connection with management-initiated midcontract changes in personnel policies and practices and matters affecting working conditions.

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

Local 2151, American Federation of
Government Employees, AFL-CIO
(Union)

and

FLRC No. 76A-106

General Services Administration,
Region 3
(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal reads as follows:

Three employee representatives of the union will be on official time for a maximum of forty (40) hours spent in negotiations. It is understood that all time spent in proceedings before the FMCS and FSIP shall be included in the forty (40) hours maximum.

Agency Determination

The agency determined that the proposal (which is intended to sanction the application of the "40 hours or . . . up to one-half the time spent in negotiations" provision of section 20 of the Order to midterm negotiations) is nonnegotiable because it conflicts with section 20 of the Order.

Question Before the Council

Whether, under the facts and circumstances of this case, the proposal is nonnegotiable under section 20 of the Order.

Opinion

Conclusion: The proposal conflicts with section 20 of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 20, as amended, currently provides in pertinent part as follows:

Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

Thus, section 20 prohibits the use of official time by union representatives when negotiating an agreement with agency management. However, as an exception to this proscription, it grants a right to bargain for the use of limited amounts of official time by union representatives engaged in negotiations. As reflected in the "legislative history" of the amendment to section 20, this right does not encompass official time to be used in all negotiations but only those:^{1/}

. . . in connection with the negotiation of an agreement, from preliminary meetings on ground rules, if any, through all aspects of negotiations, including mediation and impasse resolution processes when needed.

That is, the right to bargain under section 20 on the use of official time by union negotiators relates only to the negotiation or renewal of a basic collective bargaining agreement or negotiations undertaken pursuant to a reopener clause contained in such an agreement. The official time authorized under section 20 does not apply to subsequent negotiations arising, as here, out of circumstances which develop during the term of a basic agreement already in force. Thus, when the parties to an existing basic agreement undertake further negotiations arising out of such circumstances during the term of their basic agreement, they are not negotiating an agreement as envisioned by section 20 and therefore the use of 40 hours or one-half the time spent by union representatives is not authorized for such "midterm" negotiations.

The union presented the proposal herein disputed during the term of the parties' existing basic agreement. The record shows the proposal is to provide official time for negotiations desired by the union in connection with agency implementation of a change in policy required by regulation issued by an appropriate authority.^{2/} Under these circumstances, it is evident that the proposal, while on its face consistent with section 20, actually would require the use of official time for negotiations during the term of the parties' existing basic agreement, not undertaken pursuant to a reopener clause, a matter which conflicts with section 20. Hence, we must find that the agency correctly determined that the proposal is nonnegotiable.

^{1/} See FLRC, Labor-Management Relations in the Federal Service (1975) at 58.

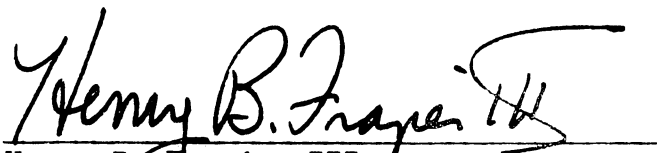
^{2/} 34 C.F.R. § 232 App. B (1976) (applicable on an interagency basis in the executive branch, concerning assignment of parking spaces).

To avoid misunderstanding, however, we note, as the Council has previously ruled,^{3/} that nothing in section 20 or elsewhere in the Order prohibits agreement on the use of official time by union representatives engaging in contract administration and other representational activities which are of mutual interest to both the agency and the union--so long as they relate to the labor-management relationship and not to "internal" union business. The Council stated in this regard as follows:^{4/}

The maintenance of a constructive and cooperative relationship between labor organizations and management officials involves more than the successful negotiation of a collective bargaining agreement because the labor-management relationship does not end with the negotiation process. Following the negotiation of an agreement, the parties must direct their efforts toward satisfactorily administering that agreement

Thus, in our view, where the parties have so agreed, official time may be granted, in accordance with applicable guidelines,^{5/} for negotiations in connection with management-initiated midcontract changes in personnel policies and practices and matters affecting working conditions. That is, where management initiates a midterm change either, as here, as the result of being required to implement an applicable regulation of authority outside the agency or for other reasons internal to the agency, and the union seeks to negotiate with respect to the bargainable aspects of such change or its impact, the parties may agree to the use of official time for such negotiations by union representatives, consistent with the guidelines referred to above, when such activity is of benefit to both the agency and the union, and if the matters relate to the labor-management relationship.

By the Council.


Henry B. Frazier III
Executive Director

Issued: May 18, 1977

^{3/} FLRC No. 75P-1 (Dec. 17, 1975), Report No. 90 at 5-8.

^{4/} Id. at 7.

^{5/} U.S. Civil Service Commission Federal Personnel Manual System, FPM Letter 711-120 (Oct. 14, 1976) "Guidance and Advice on the Use of Official Time for Employee Representational Functions."

National Association of Air Traffic Specialists, Southwest Region and Department of Transportation, Federal Aviation Administration, Southwest Region, Fort Worth, Texas (Sisk, Arbitrator). The arbitrator determined, in essence, that the activity did not violate the parties' agreement when it changed the hours of work of an employee to fill in for another employee, who was absent as the result of unscheduled surgery. As his award, the arbitrator denied the grievance. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the award was based on a nonfact; and (2) that the award did not draw its essence from the parties' collective bargaining agreement.

Council action (May 18, 1977): As to both (1) and (2), the Council held that the union's exceptions were not supported by facts and circumstances described in the petition. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Mr. James D. Hill, Counsel
Suite 202
1220 19th Street, NW.
Washington, D.C. 20036

Re: National Association of Air Traffic Specialists,
Southwest Region and Department of Transportation,
Federal Aviation Administration, Southwest Region,
Fort Worth, Texas (Sisk, Arbitrator), FLRC No. 77A-8

Dear Mr. Hill:

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

According to the arbitrator's award, the dispute in this matter arose when the activity changed the hours of work of an Air Traffic Control Specialist to fill in for another Air Traffic Control Specialist who was absent because he was required to undergo unscheduled surgery. Because of this change, the union filed a grievance and the matter was ultimately submitted to arbitration.

In the opinion accompanying the award, the arbitrator determined that the issue was whether the employer violated Article 19, Section 5^{1/} of the parties' negotiated agreement when it changed the employee's hours of work on January 13, 14, 15, 16 and 17, 1976. The arbitrator concluded that, as to the first sentence of the provision, the employer did make a reasonable effort to avoid the change. Secondly, the arbitrator concluded, as to the second sentence of the provision, "that the burden carried by the Union is one of showing through a preponderance of the evidence that it was the purpose of the Employer to avoid the payment of overtime or other premium pay." [Emphasis in award.] He found that "the Union did not bear its burden of proof and show that the purpose of the action was to avoid the payment of overtime." The arbitrator found that management had initiated the change in schedule in response to an unforeseen change in the status of a person assigned to a specific watch. As his award, the arbitrator denied the grievance in its entirety.

1/ Article 19--WATCH SCHEDULES provides, in part, as follows:

Section 5. The Employer recognizes that changes of individual assignments on the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. Changes with less than seven days notice shall not be made for the purpose of avoiding payment of overtime, holiday or other premium pay.

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

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

In its first exception to the award, the union asserts that the award is based on a nonfact. In support of this exception, the union contends that there was no evidence to support the arbitrator's finding that the employer had made a reasonable effort to avoid the reassignment and that the strength of the evidence is contrary to the arbitrator's finding that the reassignment was not made for the purpose of avoiding the payment of overtime. The Council will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 12, 1975), Report No. 81.

However, the Council is of the opinion that the union's first exception is not supported by the facts and circumstances described in the petition. In this regard, the union's petition for review does not present the necessary facts and circumstances to demonstrate that the central fact underlying this arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO, supra at 3 of the Decision. Rather, the union appears to be disagreeing with the arbitrator's finding as to the facts and, in essence, arguing that his findings of fact are not supported by the record. The Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (Dec. 20, 1974), Report No. 61; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Thus, the union's first exception does not present the necessary facts and circumstances to support a ground upon which the Council grants review under section 2411.32 of its rules of procedure.

In its second exception, the union contends that the award does not draw its essence from the parties' collective bargaining agreement. In support of this exception the union asserts that the arbitrator's decision is not based on the provisions of the agreement, but rather that it is grounded on the arbitrator's understanding of general industrial practice. The Council will grant a petition for review of an arbitrator's award in cases where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, it is the Council's view that the union's second exception is not supported by the facts and circumstances described in the petition. The union has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon his interpretation and application of the parties' collective bargaining agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or that the award could not in any rational way be derived from the agreement; or evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123. Rather, the union appears to be disagreeing with the arbitrator's interpretation and application of the collective bargaining agreement and his reasoning in connection therewith. The Council has consistently held that the interpretation of contract provisions and, hence, resolution of the grievance, is a matter to be left to the arbitrator's judgment. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Furthermore, it is the arbitrator's award rather than his conclusion or specific reasoning that is subject to challenge. Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (Nov. 14, 1975), Report No. 89. Therefore, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: Hugh S. Parker
FAA

Interstate Commerce Commission, A/SLMR No. 773. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, dismissed the 19(a)(1) and (2) complaint, as amended, filed by the individual, Mr. Joseph E. Wilson, against the agency, concerning his discharge as a Federal employee while serving as president of the local union. Mr. Wilson appealed to the Council, contending that a major policy issue was presented by the Assistant Secretary's decision.

Council action (May 18, 1977). The Council held that Mr. Wilson's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue, and Mr. Wilson neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied Mr. Wilson's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Mr. Joseph E. Wilson
Local 1779, American Federation
of Government Employees, AFL-CIO
P. O. Box 7509
Ben Franklin Station
Washington, D.C. 20044

Re: Interstate Commerce Commission,
A/SLMR No. 773, FLRC No. 77A-10

Dear Mr. Wilson:

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

In this case, you filed an unfair labor practice complaint, alleging, as amended, that the Interstate Commerce Commission (agency) violated section 19(a)(1) and (2) of the Order. You argued that your discharge as a Federal employee, while serving as president of the local union, had an inherently coercive effect on the employees' union activities, and that the reason for the discharge was the agency's desire to rid itself of an aggressive union leader. The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), who had concluded that the evidence was insufficient to establish that the cause for your discharge, either in whole or in part, was your union activity. Consequently, the Assistant Secretary ordered that your complaint be dismissed.

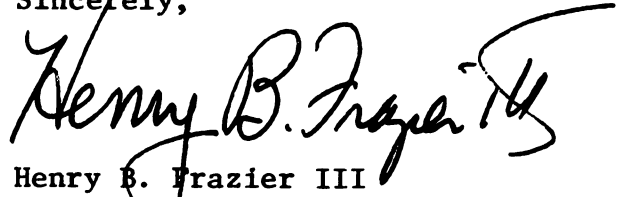
In your petition for review, you allege that a major policy issue is presented as to "whether in fact the right of labor organizations and the right of each employee in the Federal government . . . freely and without fear of penalty or reprisal to form, join and assist a labor organization [sic]; and further, as to whether each shall be protected in the exercise of these rights from unwarranted and prejudicial abuse." In this regard, you further assert that "a question arises as to whether the management of the [agency] may single out an officer of an authorized union, particularly the president of a union, as a special target and an example in this and in other instances, for disadvantage, denial of equality in employment and denial of a fair opportunity to reply to and to defend against abuses generated because of such holding." In addition, you contend that the Assistant Secretary improperly relied upon the ALJ's Recommended Decision and Order which was contrary to the evidence presented and to private sector law, and which reflected erroneous credibility determinations by the ALJ.

In the Council's view, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision was arbitrary and capricious. Thus, your allegation that the Assistant Secretary's decision presents a major policy issue as set forth above constitutes, in essence, nothing more than disagreement with the conclusion that the evidence presented failed to establish a violation of the Order in the circumstances of this case and, as such, your contentions provide no basis for Council review. Moreover, your appeal fails to establish that such decision is inconsistent with applicable precedent of the Assistant Secretary or the Council.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. W. Heifetz
ICC

Department of Health, Education and Welfare, Public Health Service,
Indian Health Service, Phoenix Indian Medical Center, A/SLMR No. 798.

The Assistant Secretary denied as untimely the request of the National Federation of Federal Employees (NFFE) for an extension of time to file exceptions to the Chief Administrative Law Judge's recommended decision and order. NFFE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (May 18, 1977). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and NFFE neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied NFFE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 18, 1977

Mr. George Tilton
Associate General Counsel
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix Indian Medical Center, A/SLMR No. 798, FLRC No. 77A-32

Dear Mr. Tilton:

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

In this case, the Chief Administrative Law Judge (ALJ) issued his Recommended Decision and Order dated December 3, 1976, in which he recommended that an unfair labor practice complaint filed by an individual employee against the Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix Indian Medical Center (activity) be dismissed in its entirety. In a Notice of Transmittal of Recommended Decision and Order also dated December 3, 1976, the Chief ALJ notified the parties of their right to file exceptions to his attached Recommended Decision and Order, and that "such exceptions must be received by the Assistant Secretary in Washington, D.C., on or before December 17, 1976." The National Federation of Federal Employees (NFFE), representing the employee, thereafter, by mailgram dated December 14, 1976, and received by the Assistant Secretary on December 16, 1976, requested an extension of time in which to file exceptions in this case.

The Assistant Secretary denied NFFE's request for an extension of time to file exceptions, finding that such request was "procedurally defective since it was filed untimely." In so ruling, he stated, in pertinent part:

According to Section 203.23(c) of the Assistant Secretary's Regulations, requests for an extension of time in which to file exceptions "must be received no later than three (3) days before the date the exceptions are due." Your mailgram request for an extension of time, dated December 14, 1976 was, in fact, received by the Assistant Secretary on December 16, 1976.*

*/ The Assistant Secretary thereafter denied a request for reconsideration and reversal of his ruling that NFFE's request for an extension of time in which to file exceptions had been untimely filed.

In your petition for review on behalf of NFFE, you allege that the Assistant Secretary's decision "was arbitrary and capricious and inconsistent with the Assistant Secretary Rules and Regulations." In this regard, you assert that "the Assistant Secretary's decision is hyper technical, is certainly not a 'liberal' construction of the rules [as required by Section 206.9 thereof] and does in fact interfere with the 'proper effectuation' of the Order."

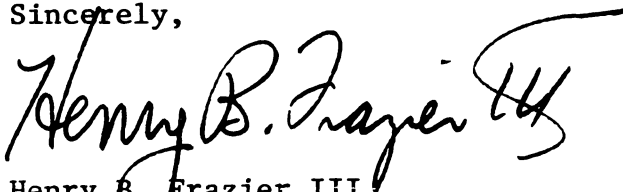
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of Section 203.23(c) of his regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such regulation, or that his application thereof in the circumstances of this case was inconsistent with the purposes of the Order or with his previous decisions. See, e.g., Community Services Administration, Washington, D.C., Assistant Secretary Case No. 22-6494(AP), FLRC No. 76A-48 (July 27, 1976), Report No. 109. Moreover, it does not appear that the decision of the Assistant Secretary was without reasonable justification in the facts and circumstances of this case.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Egan
PHS

Community Services Administration and National Council of CSA Locals, AFGE, AFL-CIO (Seldin, Arbitrator). This appeal arose from the arbitrator's award ordering the agency to vacate the position of Personnel Director pending consultation with the union in accordance with the terms of the parties' negotiated agreement. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the arbitrator's award, in directing the removal of an employee pending consultation with the union, violated appropriate regulation -- the Federal Personnel Manual. The Council also granted the agency's request for a stay. (Report No. 122)

Council action (May 20, 1977). Based on the applicable discussion and conclusion in its decision in the Defense Mapping Agency case, FLRC No. 75A-33, the Council concluded that the portion of the arbitrator's award in the instant case which directed that the position of Personnel Director be vacated in advance of consulting with the union in accordance with the terms of the negotiated agreement, violated Civil Service Commission policy and instructions and could not be sustained. Accordingly, the Council, pursuant to section 2411.37(b) of its rules of procedure, modified the award by striking that portion of the award found violative of Commission policy and instructions. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Community Services Administration

and

FLRC No. 76A-154

National Council of CSA Locals,
AFGE, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award ordering the agency to vacate the position of Personnel Director pending consultation with the union in accordance with the terms of the negotiated agreement.

Based upon the findings of the arbitrator and the entire record, it appears that the union was notified on January 6, 1976, that a Director of Personnel for the agency had been "selected" and was "scheduled to enter on duty in about two weeks from the date" of the letter of notification. Following receipt of this letter, the union filed a grievance alleging a violation of Section 3^{1/} of the amendments to its negotiated agreement because it was not "consulted" in the matter. It requested that the selection be cancelled and that it be consulted on the appointment of the Director of Personnel. The agency rejected the grievance and the union requested arbitration.

The Arbitrator's Award

The arbitrator sustained the grievance, concluding that "[t]he clear meaning [of Section 3 of the amendments] is that the Union shall have an

^{1/} According to the award, Section 3 of the amendments to the parties' agreement reads as follows:

SECTION 3. KEY OFFICIALS

Both Parties agree that all appointments made to top level management positions (office heads, directors of regional legal services, personnel directors, regional directors, and EEO officers), not subject to higher authority, will be professionally qualified, appointed in accordance with Civil Service regulations and, when possible, after consultation with the union.

opportunity to discuss the filling of a position before a choice is made. Under the Order the final choice must be made by the Agency, but by agreeing to the contract clause it gave the Union some role, even if purely advisory, in the process." [Emphasis in original.] As a remedy the arbitrator directed that:

The position of Personnel Director should be vacated pending a realistic consultation with the Union in accordance with the terms of the collective bargaining agreement.

If during or after the aforesaid consultation, the Agency is persuaded by the Union's presentation of its views that [the incumbent] was not a proper choice or that for any other reason another candidate was more desirable, the Agency shall replace [the incumbent].

If the Agency, after such consultation, is not so persuaded, it shall reinstate [the incumbent] to the position of Director of Personnel.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the arbitrator's award, in directing the removal of an employee pending consultation with the union, violates appropriate regulation — the Federal Personnel Manual.^{2/} Neither party filed a timely brief on the merits.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it alleged that part of the award violates an appropriate regulation — the Federal Personnel Manual.

In our view, the arbitrator's award in the instant case, to the extent that it requires the agency to vacate the position of Personnel Director pending

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

consultation with the union in accordance with the negotiated agreement, bears no material difference from that part of the arbitrator's award which was modified by the Council, on the basis of a Civil Service Commission interpretation of the Federal Personnel Manual, in Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees, Local 3407 (Ables, Arbitrator), FLRC No. 75A-33 (Apr. 27, 1976), Report No. 104. In the cited decision the Civil Service Commission, in response to a request from the Council, stated with regard to certain corrective action directed by an arbitrator:

The only part of this award that poses a problem as far as Commission requirements are concerned, is the order to vacate the position before the development of the new experience criteria and the re-running of the promotion action.

Under Commission policy an erroneously promoted employee may be retained in the position only "if the promotion action can be corrected to conform essentially to all Commission and agency requirements as of the date the action was taken" (FPM Chapter 335, 6-4(b)). The employee should not be removed from the position in advance of the corrective action (in this case the re-running of the promotion), however, unless it has been determined by an arbitrator or other competent authority that he could not properly have been considered for the position in the first place and hence, should not be allowed to compete in the second round. In the absence of such a determination, no action should be taken with regard to the employee pending the outcome of the reconstructed promotion.

Based on the cited provision of the Federal Personnel Manual, we conclude that that part of the arbitrator's award in the instant case which requires the vacating of the position in advance of the re-running of the promotion action violates Commission policy and instructions.

In the present case there has been no determination, as required by the Commission, that the incumbent of the position of Personnel Director could not properly have been considered for that position in the first place. Therefore, there is no basis for removing the incumbent from the position in advance of taking the corrective action directed by the arbitrator.

Accordingly, based on the applicable discussion and conclusion in Defense Mapping Agency, supra, the Council concludes that the portion of the arbitrator's award in the instant case, which directs that the position of Personnel Director be vacated in advance of consulting with the union in accordance with the terms of the negotiated agreement, violates Commission policy and instructions and cannot be sustained.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking

that portion of the award which directs the agency to vacate the position of Personnel Director in advance of a realistic consultation with the union pursuant to the collective bargaining agreement. As so modified, the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier II
Executive Director

Issued: May 20, 1977

Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois, A/SLMR No. 748. Upon an application for a decision on arbitrability, filed by the National Treasury Employees Union (NTEU) after the activity rejected NTEU's invocation of advisory arbitration with respect to an adverse action, the Assistant Secretary found, contrary to the conclusions of the Administrative Law Judge, that he had jurisdiction to resolve the arbitrability dispute in the circumstances of this case; and that the matter was arbitrable under the parties' negotiated agreement. The activity appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues. The activity also requested a stay of the subject decision.

Council action (May 20, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 20, 1977

Mr. Robert F. Hermann
Staff Assistant to the Regional Counsel
Internal Revenue Service
North-Atlantic Region
26 Federal Plaza - 12th Floor
New York, New York 10007

Re: Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois, A/SLMR No. 748, FLRC No. 76A-156

Dear Mr. Hermann:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto,^{1/} in the above-entitled case.

In this case, as found by the Assistant Secretary, the Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois (the activity) issued a notice of proposed adverse action to an employee in a unit of employees represented by Chapter 10, National Treasury Employees Union (the union). The notice charged the employee with falsification of her employment application. After she submitted a written response denying the charges, the activity advised her that the charges were sustained and she was removed from the service. The union sought to invoke advisory arbitration with respect to the adverse action pursuant to Article 34 of the parties' negotiated agreement, which provided for advisory arbitration of adverse actions. The activity rejected the invocation of arbitration, stating that the adverse action against the employee "is a matter specifically excluded from the advisory arbitration provisions of the contract." The union then filed an application for a decision on arbitrability.

The Assistant Secretary, contrary to the conclusion of the Administrative Law Judge (ALJ), found that he did have jurisdiction to resolve the arbitrability dispute in the circumstances of this case. In so finding, he concluded that the requirements of sections 6(a)(5) and 13(d) of the Order had been met based upon the record herein and cited the Council's

^{1/} The union's assertion in its opposition that the petition for review herein was untimely filed is misplaced. Pursuant to section 2411.45(e) of the Council's rules of procedure, the Council had granted the agency's request for an extension of time until the close of business on December 27, 1976, to file an appeal in this case. The agency's petition for review filed with the Council on December 21, 1976, was therefore timely.

decisions in Internal Revenue Service, Austin Service Center, Austin, Texas and National Treasury Employees Union, Assistant Secretary Case No. 63-4995(G&A), FLRC No. 74A-81 (Jan. 15, 1976), Report No. 95 and Internal Revenue Service, Greensboro District Office, Greensboro, North Carolina, Assistant Secretary Case No. 40-5314(AP), FLRC No. 74A-79 (Mar. 3, 1976), Report No. 99 as support for his conclusion. As to the arbitrability dispute itself, the Assistant Secretary found that "the instant matter is not excluded from advisory arbitration under Article 33, Section 4(c)(4)^{2/} of the [parties'] negotiated agreement. . . . Under the circumstances, I find that the instant matter is arbitrable under the parties' negotiated agreement." [Footnote added.]

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision is arbitrary and capricious and raises major policy issues, contending, in summary, that: (1) his finding of jurisdiction to determine the arbitrability issue herein is inconsistent with the language and legislative history of the Order and Council decisions; (2) he failed to make the necessary determinations enunciated in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63; (3) he erroneously quoted a nonexistent passage from Crane; and (4) he usurped the functions of the ALJ and deprived the agency of administrative due process by making initial findings of fact and conclusions of law on the merits of the case rather than remanding the case to the ALJ.

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue. With respect to your allegations that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case.

As to your allegation regarding the Assistant Secretary's finding of jurisdiction in this case, without passing upon or adopting the Assistant Secretary's reasoning in reaching such conclusion, the Council is of the opinion that no major policy issue is presented warranting review. In

^{2/} As quoted by the Assistant Secretary, Article 33, Section 4(c)(4) of the parties' agreement provides:

An employee dissatisfied with the decision may, with the concurrence of the Union, appeal pursuant to Article 34, except that the following matters will not be subject to [advisory] arbitration:

.

4. falsification of a material fact in an employment application, which if such fact had been known would have prevented the employee from being hired for the position for which he applied.

this regard, the Council notes that your appeal fails to show that the Assistant Secretary's finding of jurisdiction herein is inconsistent with the Order or applicable Council precedent. With respect to whether the Assistant Secretary made the necessary determinations enunciated in Crane in the circumstances of this case, noting that your appeal fails to show that his determination of arbitrability herein was inconsistent with the Order or the fundamental principles stated in Crane, in the Council's view no issue is raised warranting review. Nor is any issue presented warranting review with regard to the Assistant Secretary's allegedly erroneous quotation from Crane, noting particularly that the Assistant Secretary, in setting forth the contentions contained in the union's exceptions to the ALJ's recommended decision and order, was merely quoting the union's summary of the Crane principles and was not relying upon such quotation in reaching his decision. Finally, no issue is raised with respect to your contentions that the agency has been deprived of administrative due process by the Assistant Secretary's failure to remand the case to the ALJ for consideration on the merits. The Assistant Secretary, pursuant to his authority under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, has provided in Section 205.11(a) of his regulations:

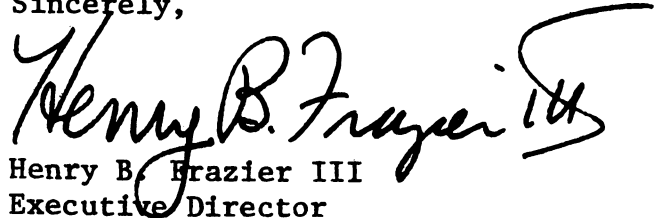
After considering the Administrative Law Judge's recommended decision and order and the record and any exceptions filed thereto, the Assistant Secretary shall issue his decision affirming or reversing the Administrative Law Judge, in whole or in part, or make any other disposition of the matter he deems appropriate.

Your appeal fails to establish that the Assistant Secretary's decision issued pursuant to his regulations and based upon "consideration of the [ALJ's] Recommended Decision and Order and the entire record" in the instant case presents a major policy issue warranting review, or that you were in any way prejudiced by his decision in this regard.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

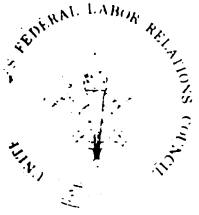

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. E. Persina
NTEU

Department of Health, Education, and Welfare, U.S. Office of Education, Headquarters, A/SLMR No. 803. Upon a clarification of unit petition (CU) jointly filed by the activity and the American Federation of Government Employees, Local 2607, AFL-CIO, seeking to clarify the status of certain employees in the activity's Equal Opportunity Office, the Acting Assistant Secretary found, among other things, that the record did not support a finding that a particular GS-5 clerical employee should be excluded from the unit as a confidential employee. The activity appealed to the Council, contending that the decision of the Acting Assistant Secretary was arbitrary and capricious. The activity also requested a stay of the Acting Assistant Secretary's decision.

Council action (May 20, 1977). The Council held that the activity's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Acting Assistant Secretary did not appear arbitrary and capricious and the activity neither alleged, nor did it appear, that the decision presented major policy issues. Accordingly, the Council denied the activity's petition for review. The Council likewise denied the activity's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

May 20, 1977

Mr. F. J. Loevi, Jr.
Labor Relations Officer
U.S. Office of Education
Washington, D.C. 20202

Re: Department of Health, Education, and
Welfare, U.S. Office of Education,
Headquarters, A/SLMR No. 803, FLRC
No. 77A-34

Dear Mr. Loevi:

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

In this case, the Department of Health, Education, and Welfare, U.S. Office of Education, Headquarters (the activity) and the American Federation of Government Employees, Local 2607, AFL-CIO (AFGE) jointly filed a CU petition seeking to clarify the status of two clerical employees (among others not relevant herein) in the activity's Equal Opportunity Office (EEO Office). The Acting Assistant Secretary found that the more senior clerical (GS-7) should be excluded as a confidential employee from the unit exclusively represented by AFGE, based upon her duties as personal secretary in a confidential capacity to the EEO Officer. The EEO Officer is responsible for the formulation of agency labor relations policy with respect to EEO matters, and he also is responsible for internal labor relations matters within the EEO Office itself. With respect to the other clerical (GS-5), the Acting Assistant Secretary determined that the record did not support a finding that she should be excluded from the unit as a confidential employee, noting that she "does not act in a confidential capacity to an official engaged in the formulation or effectuation of management policies in the field of labor relations."

In your petition for review on behalf of the activity, you contend that "[t]he decision of the Acting Assistant Secretary . . . is arbitrary and capricious in that it cites in support of the determination to deny confidential employee status to [a clerical employee], facts which do not appear in the testimony, factual conclusions unequivocally contradicted by the testimony and factual conclusions which are the apparent result of a misreading of the testimony." [Capitalization omitted.] In this regard, you assert, in effect, that the record in the case does not support the Acting Assistant Secretary's determinations with respect to the clericals, since "[t]he clerical functions and staff relationship from which the conflict of interest flows are shared equally by both."

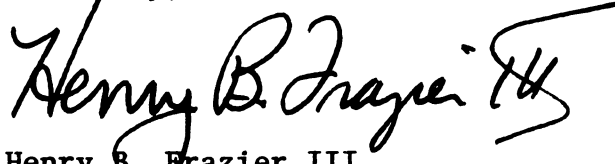
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Acting Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that it presents any major policy issues.

With respect to your contention that the decision of the Acting Assistant Secretary is arbitrary and capricious, it does not appear that the Acting Assistant Secretary acted without reasonable justification in reaching his decision, noting particularly, as to your contentions, that the Acting Assistant Secretary found that the senior clerical employee was a confidential employee "based upon her duties as personal secretary to the EEO Officer" and that the other clerical "does not act in a confidential capacity to an official engaged in the formulation or effectuation of management policies in the field of labor relations." Your contentions constitute, in effect, only a disagreement with the Acting Assistant Secretary's conclusions as to the different status of the two employees and hence provide no basis for Council review.

Since the Acting Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that it presents any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied, and your request for a stay of the Acting Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

B. H. Kemp
AFGE

Department of the Army, Fort McPherson, Georgia, A/SLMR No. 655. This case arose from a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 1759, seeking to include in its exclusively recognized unit at the activity (Fort McPherson, Georgia), by accretion, certain employees in a unit at Fort Gillem, Georgia, who, as the result of an agency reorganization, had been transferred to Fort McPherson with duty stations at Fort Gillem. In his supplemental decision and order, the Assistant Secretary set forth a standard to be applied in determining whether a reorganization has resulted in an accretion or an addition of one unit to another. Applying that standard, the Assistant Secretary found, among other things, that the reorganization here involved did not so thoroughly combine and integrate the unit at Fort Gillem with the unit at Fort McPherson that the unit at Fort Gillem had lost its independent identity, but rather that such unit continued to remain clearly identifiable. Accordingly, the Assistant Secretary dismissed AFGE's CU petition. The Council accepted AFGE's petition for review, concluding that a major policy issue was presented by the Assistant Secretary's supplemental decision and order, namely: Whether the Assistant Secretary's standard for resolving questions as to appropriate unit which arise in the context of a claimed accretion is consistent with the purposes of the Order, especially those reflected in section 10(b). (Report No. 118)

Council action (June 2, 1977). The Council held that the Assistant Secretary's supplemental decision and order was based upon a standard which was inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for action consistent with the Council's decision.

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

Department of the Army,
Fort McPherson, Georgia

and

A/SLMR No. 655
FLRC No. 76A-82

American Federation of Government
Employees, AFL-CIO, Local 1759

DECISION ON APPEAL FROM
ASSISTANT SECRETARY SUPPLEMENTAL DECISION

Background of Case

This appeal arose from a supplemental decision and order of the Assistant Secretary dismissing a clarification petition filed by the American Federation of Government Employees, AFL-CIO, Local 1759 (AFGE Local 1759), the exclusive representative of certain employees of the Department of the Army, Fort McPherson, Georgia.^{1/} The clarification petition sought to clarify AFGE Local 1759's existing exclusively recognized unit so as to include all nonsupervisory and nonprofessional employees of Fort Gillem, Georgia (formerly the Atlanta Army Depot), who currently are employed by Fort McPherson but are located physically at Fort Gillem. Fort McPherson agreed with AFGE Local 1759 that the employees assigned to Fort Gillem do not constitute a separate organizational entity but, instead, are merely an extension of Fort McPherson and should be included in AFGE Local 1759's unit.

The factual background of this case, as found by the Assistant Secretary, is essentially uncontroverted and is as follows: Fort McPherson, which is part of the U.S. Army Forces Command,^{2/} accorded AFGE Local 1759 exclusive recognition for a unit of all nonsupervisory and nonprofessional employees in 1963. In 1964, American Federation of Government Employees,

1/ Having found initially that the record did not provide an adequate basis upon which to determine the appropriateness of the clarification action sought by AFGE Local 1759, the Assistant Secretary first had remanded the case to the Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence. Department of the Army, Fort McPherson, Georgia, A/SLMR No. 586 (Nov. 26, 1975).

2/ The mission of the U.S. Army Forces Command is to organize, equip, station, train, and maintain combat readiness of active U.S. Army units and U.S. Army Reserve Forces.

AFL-CIO, Local 81 (AFGE Local 81) was granted exclusive recognition for a unit of all nonsupervisory and nonprofessional employees of the Atlanta Army Depot (ATAD), Forest Park, Georgia (now Fort Gillem), then a part of the Army Materiel Command (AMC).^{3/}

On June 30, 1974, pursuant to a Department of the Army reorganization, the AMC discontinued operation at the ATAD; all real property was transferred to Fort McPherson and was placed under the U.S. Army Forces Command; and the ATAD was renamed Fort Gillem.^{4/} As a result of the Department of the Army reorganization, some 110 employees at Fort Gillem, all of whom were represented by AFGE Local 81, were transferred to Fort McPherson with duty stations at Fort Gillem. These employees continued to perform the same work as they performed prior to the reorganization; remained physically in the same locations; and did not interchange with other employees located at Fort McPherson performing similar duties, except for two maintenance engineering employees.^{5/}

Since the reorganization, the employees located at Fort Gillem represented by AFGE Local 81 and the employees at Fort McPherson represented by AFGE Local 1759 have all been serviced by a single personnel office located at Fort McPherson and have all been included in one area of consideration for merit promotions and one competitive area^{6/} for reductions-in-force; whereas prior to the reorganization, the ATAD and Fort McPherson each had its own personnel office and separate areas of consideration and competitive areas. On July 25, 1975, AFGE Local 81 issued a disclaimer of interest for the former ATAD employees now employed by Fort McPherson, but with duty stations at Fort Gillem.

In his supplemental decision herein, the Assistant Secretary stated that in attempting to determine whether a reorganization, such as that involved in this case, has resulted in an accretion or an addition of one unit to another:

^{3/} The name of the Army Materiel Command has since been changed to the Army Materiel Development and Readiness Command (DARCOM). Its mission involves the management and procurement of inventories throughout the United States for the Department of the Army.

^{4/} Prior to the above-noted reorganization, on July 1, 1973, the Commissary operations at the ATAD and 54 ATAD Commissary employees were transferred to Fort McPherson. Between July 9, 1973, and December 10, 1973, the duty stations of 57 Fort McPherson employees were changed to the ATAD.

^{5/} The remaining employees of ATAD were terminated, although some were eventually rehired by various activities serviced by the Civilian Personnel Office at Fort McPherson.

^{6/} The Assistant Secretary inadvertently referred to "areas of consideration" in regard to reductions-in-force, rather than to "competitive areas."

[T]he primary consideration is whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate [identity] and the employees in that unit have lost their separate and distinct community of interest. [Footnote omitted.]

Applying this standard, the Assistant Secretary concluded that the reorganization did not so thoroughly combine and integrate the unit at Fort Gillem with the unit at Fort McPherson that the AFGE Local 81 unit at Fort Gillem had lost its independent identity, but rather that such unit "continue[d] to remain clearly identifiable."

In so finding, the Assistant Secretary further stated:

[I]n view of the clear disclaimer of interest by AFGE Local 81, I find that the former ATAD employees currently located at Fort Gillem are unrepresented and that the sole procedure available to the AFGE Local 1759, or any other labor organization, to enable it to gain exclusive recognition for such employees would be the filing of an appropriate petition for an election.

Accordingly, the Assistant Secretary dismissed AFGE Local 1759's petition for clarification of unit.

AFGE appealed the Assistant Secretary's supplemental decision and order to the Council. The Council accepted AFGE's petition for review, concluding that a major policy issue was present, namely: whether the Assistant Secretary's standard for resolving questions as to appropriate unit which arise in the context of a claimed accretion is consistent with the purposes of the Order, especially those reflected in section 10(b). The agency filed a brief with the Council as provided in section 2411.16 of the Council's rules.

Opinion

The major policy issue presented in this case is whether the Assistant Secretary's standard for resolving questions as to appropriate unit which arise in the context of a claimed accretion (particularly as applied in the circumstances of a reorganization as here involved) is consistent with the purposes of the Order, especially those reflected in section 10(b). The Assistant Secretary's standard in determining whether a reorganization has resulted in an accretion or an addition of one unit to another, as noted above, is whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. For the reasons stated below, we find that the standard as enunciated and applied herein is inconsistent with the purposes of the Order.

Section 10(b) of the Order provides, in pertinent part, that:

A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

In the report accompanying E.O. 11838, the Council, in discussing reorganization-related problems, stated:

[T]he resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of the Order that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations. . . . This policy must be applied so that controlling weight is not given to any one of the criteria; equal weight must be given to each criterion in any representation case arising out of a reorganization just as it is in any other case involving a question as to the appropriateness of a unit.^{7/}

The Council has frequently considered the meaning and application of section 10(b) in the establishment of appropriate units. In particular, the Council has stated that before it may be found that a proposed unit is appropriate for purposes of exclusive recognition under the Order, an affirmative determination must be made that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, the evidence going to each of the three criteria must be considered equally and, as required by section 10(b), only those units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations may be found appropriate. Moreover, and most importantly, the necessary affirmative determinations must be made that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.^{8/}

^{7/} Labor-Management Relations in the Federal Service (1975), at 51. The Council further noted in its report that reorganization-related questions "can involve myriad combinations of variable factors," and therefore recommended that "each reorganization-related problem should be dealt with on a case-by-case basis within the particular factual context in which it has arisen." Id. at 50.

^{8/} Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, FLRC

(Continued)

In the Council's opinion, appropriate unit determinations, including those arising in the context of a claimed accretion of one unit to another resulting from a reorganization, as here, require the same proper application of the three criteria specified in section 10(b) of the Order.^{9/} Thus, in circumstances such as here involved,^{10/} where a reorganization results in an issue as to whether a previously existing unit continues to be appropriate, or whether the employees in that previously existing unit have accreted into another unit, appropriate unit determinations must equally satisfy each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. More specifically, unit determinations in cases involving claimed accretions may not turn solely on whether the previously existing unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. Rather, unit determinations in such cases must be based upon equal application of the three criteria of section 10(b) in recognition of and in a manner fully consistent with the above discussed purposes of the Order. That is, if the previously existing unit does not meet these criteria, it can no longer be appropriate for purposes of exclusive recognition under the Order.^{11/} Similarly, decisions as to whether employees

(Continued)

No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4 (Dec. 30, 1976), Report No. 119; Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

9/ See Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558, FLRC No. 75A-122 (Apr. 23, 1976), Report No. 103.

10/ Consistent with the previously expressed policy (supra note 7), the Council's decision in the instant case is limited to the particular reorganization-related problem presented in the circumstances of this case.

11/ Certainly a past bargaining history involving a labor organization which continues to claim representational status is a relevant consideration in determining whether a previously existing unit continues to be appropriate under the Order. This, however, is not a factor in the instant case where the incumbent union (AFGE Local 81) disclaimed interest in representing the employees at issue. Additionally, a finding of such

(Continued)

in a previously existing unit have accreted into another unit must take into account the equal application of the three criteria and the purposes and policies of the Order sought to be achieved.^{12/}

In the instant case, the Assistant Secretary applied his standard of whether employees of one unit have been so thoroughly combined and integrated into the remaining unit that one unit has lost its separate identity and the employees in that unit have lost their separate and distinct community of interest. It was concluded that the reorganization did not so thoroughly combine and integrate the unit at Fort Gillem with the unit at Fort McPherson so as to require a finding that the unit at Fort Gillem had lost its independent identity, but rather that such unit continued to remain clearly identifiable. In determining the status of the employees at Fort Gillem, exclusive consideration and controlling weight was given to community of interest considerations. No apparent consideration was given to whether the continuation of the previously existing unit at Fort Gillem would promote effective dealings and efficiency of agency operations. Further, no apparent consideration was given to whether the accretion of the employees at Fort Gillem to the Fort McPherson unit, as requested by the activity and AFGE Local 1759, would promote effective dealings and efficiency of agency operations.^{13/} The Council must therefore conclude that the Assistant Secretary's standard for resolving questions as to appropriate unit which arise in the context of a claimed accretion is inconsistent with the purposes of the Order, especially those reflected

(Continued)

thorough integration of the employees sought to be accreted into the existing unit is not dependent upon thorough physical integration. That is, some geographical separation, as here, standing alone, need not preclude a finding by the Assistant Secretary of thorough integration where the three 10(b) criteria are otherwise satisfied.

^{12/} In this regard, we recognize that the determinations described above are not totally separate and distinct processes, and may involve many of the same evidentiary considerations.

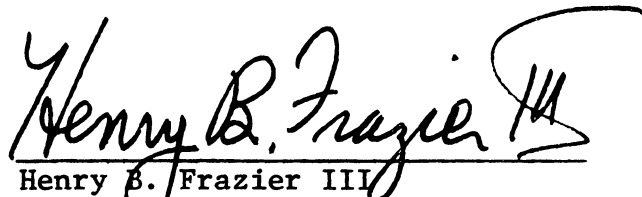
✓ ^{13/} Thus, if the Assistant Secretary should find that the accretion of the employees at Fort Gillem to the Fort McPherson unit meets the three criteria in section 10(b), such determination does not require an election. The Assistant Secretary's conclusion that the sole procedure available to AFGE Local 1759, or any other labor organization, to enable it to gain exclusive recognition for the employees at Fort Gillem would be the filing of an appropriate petition for an election was premised on the finding that the Fort Gillem unit remained appropriate and had not accreted to the Fort McPherson unit.

in section 10(b), and that his application of that standard in the instant case must be set aside.^{14/}

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's supplemental decision and order in the above-entitled case, based upon a standard which is inconsistent with the purposes of the Order, must be set aside. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 2, 1977

^{14/} The Council notes that the Assistant Secretary, subsequent to his decision in the instant case, has issued published decisions in factual contexts not involving previously recognized units under the Order in which he considered the three 10(b) criteria in determining whether or not a reorganization has resulted in an accretion. See e.g., National Aeronautics and Space Administration, Lewis Research Center, Cleveland, Ohio, A/SLMR No. 678 (July 23, 1976); General Services Administration, Federal Supply Service, A/SLMR No. 699 (Aug. 12, 1976).

General Services Administration and American Federation of Government Employees, Local 2792 (Finston, Arbitrator). The arbitrator concluded that management's behavior as a whole was not violative of the parties' agreement with respect to the proposed changes in the agreement submitted by the union; and therefore denied the union's grievance. The union filed an exception to the arbitrator's award with the Council, alleging that the arbitrator's "entire action and opinion was moot and contradictable."

Council action (June 2, 1977). The Council held that the union's exception did not assert a ground upon which the Council will grant review of an arbitration award. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 2, 1977

Mr. Raymond J. Malloy
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: General Services Administration and American
Federation of Government Employees, Local 2792
(Finston, Arbitrator), FLRC No. 76A-134

Dear Mr. Malloy:

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

According to the award, the dispute in this matter arose when the union filed a formal grievance alleging that the activity had not complied with the parties' negotiated agreement in responding to proposed changes to this agreement submitted by the union. The matter ultimately went to arbitration.

The arbitrator stated the issue before him as "whether or not General Services Administration (GSA) failed to comply with Article XXV, Section 2(b)^{1/} of the Labor-Management Agreement in responding to Union proposed amendments and supplements" [Footnote added.] According to the arbitrator, "the union argument in essence is that Management breached Article XXV, Section 2(b) of the collective agreement after the Union had submitted proposals for contract amendments and supplements . . . [by] [r]efusing to negotiate . . . , [r]efusing to bargain in good faith . . . , [and insisting] upon applying the 1974 agreement on negotiation procedures rather than meet with the union to determine new negotiation procedures."

^{1/} According to the award, Article XXV (DURATION AND CHANGES), Section 2(b) (Other Changes) provides as follows:

This agreement may not be opened for amendment(s) and/or supplement(s) more than twice each year. Notification of a proposed change shall contain the proposed change and shall specify the articles, paragraphs or provisions of the agreement affected by the proposed change. Within 30 days of receipt of notification of the proposed change the other party will return any counter proposal and the parties will meet to determine negotiation procedures.

The arbitrator discussed each of the union's contentions in light of the relevant provision of the agreement and denied the grievance, concluding as follows:

. . . it appears to the arbitrator that Management assumed initial positions with respect to both renegotiation and negotiation procedures that were inconsistent with the contract. It is equally true, however, that Management modified its positions in both instances, which suggests a responsible, good faith approach to collective bargaining. Had the Union filed a formal grievance shortly after receiving the Employer's first response to their request for contract reopening, that grievance may well have been sustained. Failing such action, however, and in view of subsequent discussions and negotiations between the Employer and the Union, one must conclude that Management's behavior as a whole was not in violation of the collective agreement.

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

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

In taking exception to the award, the union requests that the arbitrator's opinion "be overturned and that management be held in violation of the contract" on the ground that the arbitrator's "entire action and opinion is moot and contradictable, when the facts and evidence preponderantly indicates management [was and is] now in violation of the contract, by its insistence to negotiate amendments and [the] supplement under the anti-quoted 1974 procedures rather than as stipulated in the current contract." In support of its exception, the union contends that the arbitrator's opinion is "paradoxical" in that "he contradicts his supporting facts for the basis of his opinion and summary." The union states that "despite . . . the . . . facts, [the arbitrator] permits an alleged phone conversation to change the explicit contract negotiation procedures." According to the union, "[the arbitrator] had in his possession more than ten exhibits clearly showing management['s] position to violate the contract."

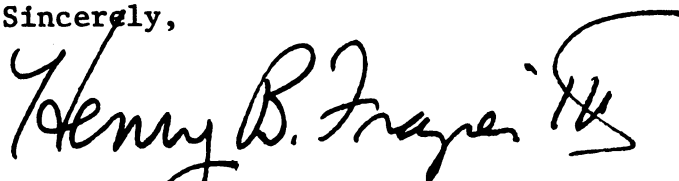
The union's specific exception, that the arbitrator's "entire action and opinion is moot and contradictable," does not assert a ground upon which the Council will grant review of an arbitration award. In the Council's opinion, when the substance of the union's contentions is examined, it appears that the union is disagreeing with the arbitrator's findings as

to the facts. The Council has consistently held that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), 2 FLRC 300 [FLRC No. 74A-49 (Dec. 20, 1974), Report No. 61]; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Therefore, the union's exception does not present a ground upon which the Council grants review of an arbitrator's award under section 2411.32 of the Council's rules of procedure.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: G. C. Gardner, Jr.
GSA

Commander, Keesler Technical Training Center, Keesler Air Force Base, Mississippi and National Federation of Federal Employees, Local 943 (Oppenheim, Arbitrator). The arbitrator concluded that the civilian training instructors were not "professionals" in the circumstances of this case and that the supervisory duties they were required to perform were not demeaning; and therefore denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging, in essence, that the arbitrator exceeded his authority.

Council action (June 2, 1977). The Council held that the union's petition did not describe facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 2, 1977

Mr. Gerald C. Tobin
Staff Attorney
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Commander, Keesler Technical Training Center,
Keesler Air Force Base, Mississippi and
National Federation of Federal Employees,
Local 943 (Oppenheim, Arbitrator), FLRC No. 76A-138

Dear Mr. Tobin:

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

According to the arbitrator, the union grieved the activity's practice of assigning certain supervisory duties to civilian training instructors. Specifically, the union contended that the activity violated Article IV, Section 4 of the parties' negotiated agreement when it required civilian training instructors to supervise cleanup details of military students. Article IV, Section 4 of the parties' negotiated agreement provides, in pertinent part, that:

The employer will not promulgate rules, regulations, or procedures, or engage in practices which demean the professional or technical standing of employees.

In support of its grievance that the activity violated the cited provision of the parties' agreement, the union asserted that civilian training instructors were "professional" employees and, as such, they were exempt from supervising cleanup details. The union also asserted that supervising cleanup details was demeaning.

The arbitrator denied the union's grievance. He concluded that the civilian training instructors were not "professionals" in the circumstances of this case. He also concluded that the supervisory duties in issue were not demeaning.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency filed an opposition.

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

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

In its exception, the union contends that the arbitrator "violate[d] his contractual authority" by going outside the parties' agreement for a definition of the term "professional" used in Article IV, Section 4 of that agreement. In support of this exception, the union points out that the arbitrator, in determining that civilian training instructors were not "professionals," used the definition of "professional employee" applied in certain Federal sector matters by the Assistant Secretary of Labor for Labor-Management Relations. According to the union, the Assistant Secretary's definition does not appear in the parties' collective bargaining agreement and thus, because the parties have not bargained for that definition, it does not apply to the parties' contract relationship. Rather, in such circumstances, according to the union, the Assistant Secretary's definition applies only to cases before the Assistant Secretary and to the appeal of those cases to the Federal Labor Relations Council. The union further asserts that since the definition of "professional employee" is not in the negotiated agreement, the arbitrator should have used a definition which gave a meaning to those words in "the generic sense."

In essence, the union's exception appears to be that the arbitrator exceeded his authority. The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, for example, the Council will grant a petition for review where it appears that the exception presents grounds that the arbitrator exceeded his authority by adding to or modifying any of the terms of the agreement, Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator), FLRC No. 75A-7 (June 26, 1975), Report No. 76; or by violating a specific limitation or restriction on his authority which is contained in the negotiated agreement. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123.

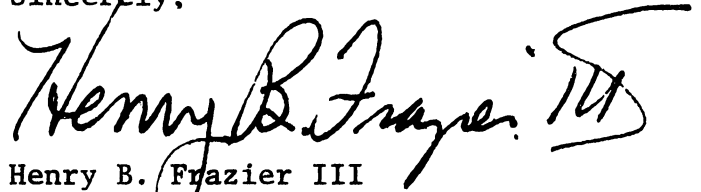
In the instant case, however, the Council is of the opinion that the union's petition does not describe facts and circumstances to support its exception that the arbitrator exceeded his authority. The union has failed to provide support for its assertion that, in the circumstances of this case, the arbitrator did not have the authority to go outside the terms of the contract for a definition of the term "professional." Instead, it appears that the union's exception is based not so much on the arbitrator's going outside the agreement for a definition of the contract term "professional," as it is based on the particular definition the arbitrator applied. The union suggests that the arbitrator should have applied another definition. In effect, the union is disagreeing with the arbitrator's

reasoning and conclusion in arriving at his award. The Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111; Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Therefore, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive style with a large, sweeping initial "H" and a distinct "III" at the end.

Henry B. Frazier III
Executive Director

cc: R. T. McLean
Air Force

National Association of Air Traffic Specialists (NAATS) and Federal Aviation Administration, Department of Transportation (Gilson, Arbitrator). The arbitrator denied the union's grievance related to the staffing of a particular shift by the activity, on the basis that the union had failed to meet its burden of proof with respect to a particular aspect of the matter before the arbitrator. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging that the arbitrator exceeded his authority.

Council action (June 2, 1977). The Council held that the union's petition did not describe facts and circumstances to support its exception in the circumstances of the case. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 2, 1977

Mr. Benjamin C. Sigal
Shim, Sigal, Tam & Naito
333 Queen Street, Suite 800
Honolulu, Hawaii 96813

Re: National Association of Air Traffic Specialists
(NAATS) and Federal Aviation Administration,
Department of Transportation (Gilson, Arbitrator),
FLRC No. 76A-143

Dear Mr. Sigal:

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

According to the arbitrator, the dispute in this matter arose when the activity did not assign the number of bargaining unit employees to a particular shift that the union asserted was specified under the Basic Watch Schedule. The union contended that the activity's failure to schedule the specified number of bargaining unit employees to the watch was motivated by a desire to avoid the payment of overtime by assigning a supervisor to perform bargaining unit work. The union grieved, contending that the activity had violated Article 3,^{1/} Article 19, Sections 1 and 5^{2/} and Article 20, Section 2^{3/} of the parties' collective bargaining agreement.

^{1/} Article 3 sets forth the requirements of section 12(a) and (b) of the Order.

^{2/} Article 19, Section 1 provides:

Basic watch schedules shall be developed in consultation between the Employer and the Facility Representative. The basic watch schedule is defined as the days of the week, hours of the day, the rotation of shifts and change in regular days off. Assignments of individual employees to the watch schedule are not considered as changes to the basic watch schedule. The basic watch schedule shall not be changed without prior consultation with the Facility Representative or his designee.

Article 19, Section 5 provides:

The Employer recognizes that changes of individual assignments on the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. Changes with less than seven days notice shall not be made for the purpose of avoiding payment of overtime, holiday or other premium pay.

^{3/} Article 20, Section 2 provides in part:

(Continued)

In the opinion accompanying his award, the arbitrator identified several questions raised by the parties to the grievance, including the question of "whether the management is compelled to establish a certain level of staffing" at the activity. The arbitrator denied the union's grievances on the basis that:

. . . the union failed to sustain the burden of proving that the established staffing for the 1400-2200 watch was other than a normal or maximum pattern which would be deviated from if any of [certain] causes . . . necessitated a change. There was also no determination as to what the minimum pattern would be for that watch. . . . Specific evidence would need to have been presented concerning past practice and management's decision as to what such a minimum would be. Only with this type of evidence could the union have sustained the grievances at hand.

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

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

In its exception, the union contends that the arbitrator exceeded his authority. In support of this exception, the union asserts that the arbitrator exceeded his authority when he based his decision denying the union's grievances on the union's failure to present evidence concerning the activity's past staffing practices. The union contends that past staffing practices was not an issue in the case before the arbitrator and, in its petition for review, the union identifies all of the issues which, in its view, were before the arbitrator. According to the union, of the issues that the parties put before the arbitrator, none concerned past staffing practices and, as a result, the arbitrator could not raise that particular issue because it was not raised by the parties.

The Council will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that the arbitrator exceeded his authority by deciding an issue not before him. Pacific Southwest Forest and Range Experiment Station,

(Continued)

Whenever overtime work is to be performed, it shall be made available to qualified employees on an equitable basis. . . .

Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101. However, the Council is of the opinion that, in the instant case, the union's petition does not contain a description of facts and circumstances to support this exception. In Pacific Southwest Forest and Range Experiment Station, supra, the Council said:

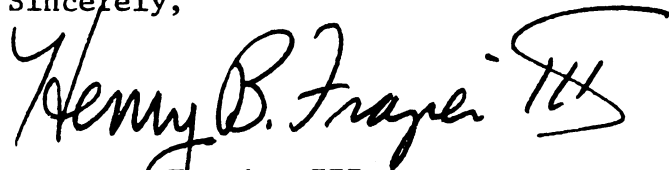
. . . if there is not a submission agreement with a precise issue, an arbitrator in the Federal sector has unrestricted authority to pass on any dispute presented to him so long as it is within the confines of the collective bargaining agreement.

In the instant case, the union has not demonstrated that the parties entered into a submission agreement with a precise issue. The arbitrator's decision does not contain any reference to a submission agreement and the union's petition does not suggest that there was such an agreement. Thus, the union's petition does not describe facts and circumstances to support its exception that the arbitrator exceeded his authority in the circumstances of this case. Accordingly, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Henry B. Frazier III". The signature is written in a cursive, flowing style with a large, stylized "H" at the beginning and a long, sweeping tail that ends in a small loop.

Henry B. Frazier III
Executive Director

cc: Stewart L. Hinds
FAA

Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education, and Welfare, A/SLMR No. 778. The Assistant Secretary, upon separate representation petitions (RO) filed by Local Union No. 1376, Laborers International Union of North America, AFL-CIO (Laborers) and the Arizona Nurses Association (AzNA), found that the more comprehensive existing unit (represented by Local 189, National Federation of Federal Employees), in which the Laborers sought an election, continued to be appropriate for the purposes of exclusive recognition. The Assistant Secretary further found, among other things, that no "unusual circumstances" existed which would warrant severance of the registered nurses employed by the activity from the existing unit, as sought by AzNA in its petition; and that head nurses were supervisors within the meaning of section 2(c) of the Order. Accordingly, the Assistant Secretary dismissed AzNA's RO petition and excluded head nurses from the unit he found appropriate and in which he directed an election. The American Nurses Association (ANA) appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (June 2, 1977). The Council held that ANA's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of ANA's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 2, 1977

Mr. David H. Schnabel
Field Representative
Economic and General Welfare Department
American Nurses' Association
2420 Pershing Road
Kansas City, Missouri 64108

Re: Indian Health Service Area Office,
Window Rock, Arizona, and Public
Health Service Indian Hospital, Fort
Defiance, Arizona, Department of Health,
Education, and Welfare, A/SLMR No. 778,
FLRC No. 77A-16

Dear Mr. Schnabel:

The Council has carefully considered your petition for review of the Assistant Secretary's decision (your request for a stay having been denied previously by the Council), and the oppositions thereto filed by the agency and the Navajo Nation Health Care Employees, Local Union No. 1376, Laborers International Union of North America, AFL-CIO (Laborers), in the above-entitled case.

In this case, two separate representation petitions (RO) were filed. The first, filed by the Laborers, sought an election in a unit consisting essentially of all General Schedule and Wage Grade professional and non-professional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education, and Welfare (the activity), which unit has been exclusively represented since 1970 by the National Federation of Federal Employees, Local 189 (NFFE). The second petition, filed by the Arizona Nurses Association (AzNA), sought an election in a unit consisting essentially of all full-time and regular part-time registered nurses employed by the activity who have been included within the above-mentioned exclusively recognized unit.

The Assistant Secretary determined that the employees in the unit petitioned for by the Laborers, which included all of the eligible employees of the activity,^{*/} shared a clear and identifiable community of interest, and

^{*/} The Assistant Secretary noted that Public Health Nurses who are members of the Commissioned Officers Corps were excluded from the existing unit and should continue to be excluded from any unit found appropriate.

that such unit would continue to promote effective dealings and efficiency of agency operations. Accordingly, he found that the unit represented by NFFE was appropriate for the purpose of exclusive recognition.

The Assistant Secretary further found that dismissal of the AzNA's petition was warranted. In this regard, he noted that the Assistant Secretary has held, in United States Naval Construction Battalion Center, A/SLMR No. 8 (Jan. 15, 1971), that absent "unusual circumstances," where the evidence shows that an established, effective, and fair collective bargaining relationship has existed, severance from an established more comprehensive unit will not be permitted. In the instant case, the Assistant Secretary found that no "unusual circumstances" existed which would warrant severance of the registered nurses from the existing unit, or from a unit of other professional employees. He further noted, in this respect, that the fact that the Laborers' petition raised a question concerning representation in the overall existing unit did not warrant a contrary result. Accordingly, he dismissed AzNA's petition.

Finally, the Assistant Secretary found that the head nurses employed at the activity were supervisors within the meaning of section 2(c) of the Order "inasmuch as they assign and review work, evaluate performance, and have made effective recommendations with respect to promotions, disciplinary actions, and awards," and therefore excluded them from the unit found appropriate and in which he directed an election.

In your petition for review on behalf of the American Nurses' Association, you allege that the decision of the Assistant Secretary is arbitrary and capricious and presents major policy issues for the following reasons: (1) the instant case is distinguishable from United States Naval Construction Battalion Center, supra, since the case herein also involves not only a petition seeking to represent a limited identifiable grouping from within the overall existing unit, but also a petition seeking to replace the incumbent union as representative of the existing overall combined professional/nonprofessional unit; (2) the registered nurses should be allowed their separate unit based on the "carve out" criteria set forth in Naval Construction Battalion Center in that they have a clear and identifiable community of interest, the activity made no case that a separate unit for registered nurses would not promote effective dealings and efficiency of agency operations, and there has not been effective and fair representation of the registered nurses within the existing unit; (3) implicit in the Assistant Secretary's decision is an automatic denial of any unit differing in scope from an established unit, contrary to the clear purposes of the Order; (4) by excluding registered nurses who hold reserve commissions in the Public Health Service Commissioned Corps from any unit found appropriate, the Assistant Secretary has exceeded his authority since the Order itself neither excludes such employees nor authorizes the Assistant Secretary to promulgate such an exclusion; and (5) in excluding the activity's head nurses as supervisors, the Assistant Secretary has ignored the record evidence and the language of section 2(c) of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues. Thus, with respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the facts and circumstances of this case.

Your allegation that the instant case is distinguishable from the Naval Construction Battalion Center case does not, in the circumstances of this case, present a major policy issue warranting review. The Council has specifically approved the Assistant Secretary's criteria for granting a request for severance of a proposed bargaining unit from a more comprehensive unit. Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, 1 FLRC 375 [FLRC No. 72A-24 (May 22, 1973), Report No. 39]. In the Council's view, the application of the approved severance criteria to a request for severance of a group of employees from a bargaining unit where a petition has also been filed to replace the incumbent union which represents that bargaining unit does not raise a major policy issue.

Your further allegations that the nurses should have been severed from the existing unit under the Naval Construction Battalion Center criteria and that the denial of severance is inconsistent with the Order constitute nothing more than a disagreement with the Assistant Secretary's application of the criteria contained therein. In this regard, your appeal fails to establish that the Assistant Secretary's dismissal of the instant petition was inconsistent with or contrary to applicable precedent.

With respect to the Assistant Secretary's exclusion of registered nurses who are members of the Commissioned Corps from the unit found appropriate, without adopting his specific reasoning, no basis is presented for Council review, noting particularly that your appeal fails to establish that the Assistant Secretary's decision in this regard is inconsistent with the provisions of the Order, specifically section 2(b). See, e.g., Volunteers in Service to America (VISTA), A/SLMR No. 95, 1 FLRC 266 [FLRC No. 71A-55 (Mar. 7, 1973), Report No. 34].

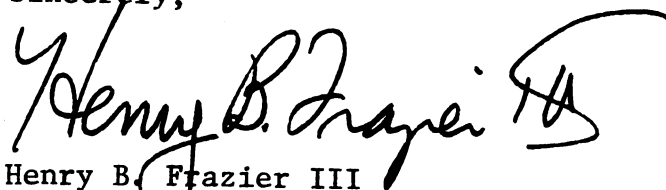
Finally, with respect to your contention that the Assistant Secretary ignored the record evidence and language of section 2(c) of the Order in excluding head nurses as supervisors, such contention constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore does not present a basis for Council review.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12

of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. Egan
PHS

H. Wilson
LIUNA

S. Benavidez
NFFE

Department of the Interior, U.S. Bureau of Reclamation, Mid-Pacific Regional Office, Assistant Secretary Case No. 70-5111 (GA). It appeared from the appeal filed on behalf of Local Union No. 1245, International Brotherhood of Electrical Workers, AFL-CIO (IBEW) that the decision of the Assistant Secretary was dated December 23, 1976, and was served on IBEW by mail on or about the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, IBEW's appeal was due in the office of the Council on or about January 27, 1977. However, the appeal was not filed with the Council until March 22, 1977, or more than seven weeks late, and no extension of time for filing was requested by or on behalf of IBEW, or granted by the Council. In its petition for review, as supplemented, IBEW asserted that its appeal was timely filed, but that in any event a waiver of the time limits for filing such appeal should be granted on various grounds.

Council action (June 2, 1977). The Council held that IBEW's petition for review clearly was filed beyond the time limits provided in the Council's rules for the filing of such appeal. With respect to IBEW's alternative assertion, in effect requesting a waiver of the applicable time limits, the Council, consistent with its precedent decisions in like cases and rules of procedure, held that the grounds adverted to in IBEW's petition for review, as supplemented, in support of the waiver request, failed to establish the presence of extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules. The Council therefore denied IBEW's request for a waiver. Accordingly, since IBEW's appeal was untimely filed, and apart from other considerations, the Council denied the IBEW petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 2, 1977

Mr. Jerome M. Garchik
Nayhart and Anderson
Attorneys at Law
100 Bush Street, Suite 2600
• San Francisco, California 94104

Re: Department of the Interior, U.S. Bureau
of Reclamation, Mid-Pacific Regional Office,
Assistant Secretary Case No. 70-5111(GA),
FLRC No. 77A-33

Dear Mr. Garchik:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, filed with the Council on March 22, 1977, on behalf of Local Union No. 1245, International Brotherhood of Electrical Workers, AFL-CIO (IBEW); to the agency's opposition filed on April 20, 1977; and to your supplemental submission filed on May 23, 1977, in response to the agency's opposition.

For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

It appears from your appeal that the subject decision of the Assistant Secretary is dated December 23, 1976, and was served on you by mail on or about the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure (5 C.F.R. §§ 2411.13(b) and 2411.45(a) and (c)), your appeal was due in the office of the Council on or about January 27, 1977. However, as stated above, your appeal was not filed with the Council until March 22, 1977, or more than seven weeks late, and no extension of time for filing was requested by or on behalf of the IBEW, or granted by the Council.

In your petition for review, as supplemented, you assert that your appeal was timely filed, but that in any event a waiver of the time limits for filing such appeal should be granted because: (1) You were not informed by the Assistant Secretary in his decision of a right to file a petition for review of that decision with the Council, or of the time limits for filing such an appeal; (2) you timely sought to obtain reconsideration of the Assistant Secretary's decision by a request to the Secretary of Labor, dated January 27, 1977, and your appeal to the Council was mailed within 30 days of receiving the Secretary's response in effect denying your request for reconsideration; (3) you were advised for the first time of the right to seek Council review of the subject decision in the Secretary of Labor's

response; (4) while recognizing that the rules and regulations of the Council appear in Title 5 of the Code of Federal Regulations, you did not have actual knowledge of such regulations since they are not reprinted in the reporting services to which your office subscribes; (5) the amount of time involved and alleged unreasonable delay in the processing of this case by the Assistant Secretary and in the processing of other cases by the Assistant Secretary and the Council, indicate that it would be inappropriate for the Council strictly to apply the time limits prescribed in its regulations in this case; and (6) no prejudice to the agency resulted from the late filing of your appeal.

However, for the reasons already indicated above, your petition for review clearly was filed beyond the time limits provided in the Council's rules for the filing of such appeal.

With respect to your alternative assertion, in effect requesting a waiver of the applicable time limits, section 2411.45(f) of the Council's rules (5 C.F.R. § 2411.45(f)) provides that any expired time limit in Part 2411 may be waived in extraordinary circumstances. However, as stated more fully below, consistent with Council precedent in like cases and the Council's rules of procedure, the grounds adverted to in your petition for review, as supplemented, in support of your request, fail to establish the presence of extraordinary circumstances within the meaning of section 2411.45(f) of the rules.

As to the grounds numbered (1), (3) and (4) above, i.e., in essence, that you were not informed by the Assistant Secretary, or otherwise immediately aware, of a right to file an appeal with the Council from the Assistant Secretary's decision, or of the Council's rules of procedure for filing an appeal, such grounds do not constitute extraordinary circumstances such as to warrant waiver of the applicable time limits established in the Council's rules. The current Part 2411 of the Council's rules and regulations (Review Functions of the Council), applicable in the instant situation, was promulgated in the Federal Register on September 24, 1975 (40 Fed. Reg. 43880). As you are aware, the rules of procedure set forth in Part 2411 were subsequently codified in Title 5 of the Code of Federal Regulations (See, e.g., 5 C.F.R. §§ 2411.1 et seq. (1976)). Congress has provided that the appearance of rules and regulations in the Federal Register is sufficient to give legal notice of their contents to a party subject to or affected by them (44 U.S.C. § 1507 (1970)). Moreover, the Council has uniformly held in similar cases that such grounds do not constitute extraordinary circumstances within the meaning of section 2411.45(f) of its rules. See, e.g., Overseas Education Association, NEA, Decision of Director, LMSE, FLRC No. 77A-26 (May 4, 1977), Report No. 124; and National Association of Government Employees, Local R4-45 and Navy Commissary Store Region [Department of the Navy] (Kleeb, Arbitrator), FLRC No. 76A-89 (July 23, 1976), Report No. 108.

With regard to the request for reconsideration adverted to in (2) above, section 2411.45(d) of the Council's rules (5 C.F.R. § 2411.45(d)) expressly provides that a request for reconsideration such as that described in your

submissions, does not operate to extend the time limits prescribed in the Council's rules. See, American Federation of Government Employees, AFL-CIO (Marine Corps Recruit Depot Exchange, San Diego, California), Assistant Secretary Case No. 72-5382(CO), FLRC No. 76A-49 (May 13, 1976), Report No. 105. Moreover, such a request does not establish a basis for granting a waiver of expired time limits under section 2411.45(f) of the Council's rules. See, FLRC No. 77A-26, supra.

As to (5), namely, your allegation concerning the amount of time involved and delay in the processing of this and other cases, such allegation fails to demonstrate the existence of an extraordinary circumstance that would warrant a departure from the Council's long-established and uniform policy and practice of requiring strict compliance with its timeliness requirements for the filing of appeals. Cf., AFGE Local 1923 and Social Security Administration, Headquarters Division and Payments Center, Baltimore, Md., 1 FLRC 59 [FLRC No. 70A-12 (Feb. 12, 1971), Report No. 4]; request for reconsideration denied: March 5, 1971.

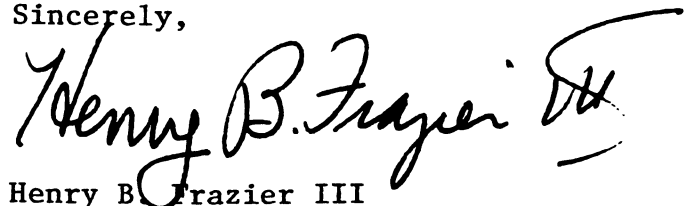
Finally, as to (6), in cases where a party has urged, among other grounds, the absence of prejudice to the opposing party as a reason for waiving the untimely filing of an appeal, the Council has consistently rejected this ground as a basis for granting a waiver of the prescribed time limits. See, e.g., Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506, FLRC No. 75A-62 (July 21, 1975), Report No. 77 (wherein the appeal was filed one day late and denied as untimely); request for reconsideration (wherein it was in effect argued, among other things, that the applicable time limits should be waived because the untimely filing resulted from a delay of the postal service and because of an asserted absence of prejudice to the opposing party) denied: Sept. 2, 1975, Report No. 81. Likewise, in the circumstances of the instant case, this ground fails to warrant waiver of the applicable time limits.

For the foregoing reasons, therefore, your request for a waiver must be denied.

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

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. F. McKune
Interior

National Federation of Federal Employees, Local 1485 and Coast Guard Base, Miami Beach, Florida. The dispute involved the negotiability under the Order of certain provisions in the local parties' agreement, which the agency determined to be nonnegotiable and disapproved during review of the agreement pursuant to section 15 of the Order. The provisions in question related to (1) the authority and obligations of the "Director of the agency"; and (2) orientation of new employees by the union.

Council action (June 6, 1977). As to (1), the Council held that revision by the local parties of the literal language of the agreement provisions here in issue was indicated, so as to reflect more precisely their intent (which intent the agency indicated was negotiable); and that unless and until the agency determines that such revised provisions are nonnegotiable, the conditions for Council review, as prescribed in section 11(c) (4) of the Order and section 2411.22 of the Council's rules of procedure, have not been met. Accordingly, without passing on the merits, the Council denied the union's petition for review with respect to the agreement provisions disputed herein as prematurely filed. As to (2), the Council found, contrary to the agency's position, that the particular provision of the local parties' agreement involved in this aspect of the dispute, when interpreted to reflect the intent of the local parties, was not violative of sections 19(a) or 20 of the Order. Accordingly, the Council held that the agency's determination as to the nonnegotiability of this provision was improper and, pursuant to section 2411.28 of its rules and regulations, set aside the determination.

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

National Federation of
Federal Employees, Local 1485

and

FLRC No. 76A-58

Coast Guard Base,
Miami Beach, Florida

DECISION ON NEGOTIABILITY ISSUES

Background

Local 1485, National Federation of Federal Employees (union), represents an activity-wide unit of wage grade employees at the Coast Guard Base in Miami Beach, Florida. The local parties negotiated an agreement which, pursuant to section 15 of the Order,^{1/} was forwarded to Coast Guard headquarters for review and approval. Following disapproval of provisions in the two articles here involved (which are detailed hereinafter), the negotiability dispute with respect to the subject provisions was submitted to the Department of Transportation (agency) for determination. The agency upheld the conclusions of the Coast Guard headquarters that the subject provisions in the two articles are respectively violative of agency regulations and the Order, and therefore nonnegotiable.^{2/}

The union appealed from this determination to the Council under section 11(c)(4) of the Order. The agency did not file a statement of position.

1/ Section 15 of the Order provides in relevant part:

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

2/ Other provisions of the local agreement which were determined to be nonnegotiable by the agency were previously considered by the Council in Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110.

Opinion

The provisions here in dispute are considered separately below.

1. Article III, Rights and Obligations of the Employer.

This portion of the agreement is, in relevant part, as follows:

Section 1. The employer retains the right in accordance with applicable laws, Executive Orders and regulations:

.

6. To take whatever actions may be necessary to carry out the mission of the agency in situations of emergency. The Director of the agency or his representative shall be the sole authority to declare what constitutes an emergency situation.

Section 2. In making rules and regulations relating to personnel policies and practices and matters affecting working conditions, the Director of the agency shall give due regard and consideration to the obligations to meet and confer imposed by this agreement, the provisions of Executive Order 11491, as amended, and the agency's regulations. [Underscoring reflects provisions in dispute.]

The agency asserts that, based on the definition of "agency" in section 2(a) of the Order^{3/} and absent any contrary definition in the agreement, the phrase "Director of the agency" in the foregoing provisions refers to the "head of the agency," i.e., the Secretary of Transportation. As thus read literally, the agency further argues, the disputed provisions impose obligations on the Secretary to take actions relating to personnel which conflicts with the delegation of authority over such matters from the Secretary to subordinates, under agency regulations (49 CFR 1.45(a)(1)),^{4/} and the provisions are therefore nonnegotiable. However, the agency also indicates in the record that, if the critical phrase were specifically

^{3/} Section 2(a) of the Order defines the term "Agency" as "an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office."

^{4/} 49 CFR 1.45(a)(1) provides:

1.45 Delegations to all Administrators.

(a) Except as otherwise prescribed by the Secretary of Transportation, each Administrator [the term "Administrator" is defined in 49 CFR 1.2 to include the Commandant of the Coast Guard] is authorized to--

(1) Exercise the authority of the Secretary over and with respect to any personnel within their respective organizations.

defined in the agreement to conform with the delegated authority of the immediate "Employer [of the unit employees] or his representative," the agency would consider the provisions negotiable.

The union states, in its appeal, that the phrase "Director of the agency" was not intended to refer to the Secretary of Transportation, but to the Commander of the Coast Guard Base at Miami Beach where the unit personnel are employed, and contends that the provisions are consequently negotiable.^{5/}

It would thus appear from the record that the local parties, and particularly the union, intended the disputed language to refer to the immediate employer or his representative, and that the agency would not contest the negotiability of the disputed provisions if the agreement were so revised. Under these circumstances and consistent with established Council precedent in similar cases,^{6/} we believe that revision of the literal language of these provisions, by the local parties, is indicated to reflect more precisely their intent. Unless and until the agency then determines that the provisions as revised are nonnegotiable, the conditions for Council review, as prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure, have not been met.

Therefore, without passing on the merits, the Council is of the view that the union's appeal with respect to Article III, sections 1 and 6, of the agreement is prematurely filed, and the petition for review, insofar as it adverts to these provisions, is denied on that ground.

2. Article XIV, Orientation of New Employees.

This article reads, in pertinent part, as follows:

Section 1. All new employees shall be informed by the Employer and the Union that the Union is the exclusive representative of employees

^{5/} The union also questions, among other things, the good faith of the agency in so relying on the literal provisions of the agreement during the review process. However, such issues in effect relate to allegations of unfair labor practices, which are not properly before the Council in the instant proceeding. See National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98, at n. 2 of Council decision. Moreover, the union previously filed an unfair labor practice complaint against the agency in this regard, which was dismissed by the Assistant Secretary, and no appeal was taken to the Council from that decision. Department of Transportation, U.S. Coast Guard, Washington, D.C., Assistant Secretary Case No. 22-6296(CA), Feb. 26, 1976.

^{6/} See Local Lodge 2331, IAM&AW and 2750th Air Base Wing, Wright-Patterson Air Force Base, FLRC No. 75A-40 (Sept. 18, 1975), Report No. 82, and cases cited therein at n. 2 of Council decision.

in the unit. Each new employee shall be informed of the provisions of this agreement and of their unrestrained right to representation and to join or refrain from joining the employee organization. Each new employee shall receive a copy of this agreement from the Employer together with a list of the officers and representatives of the Union, including the designated union representatives and the chief representatives.

Section 2. . . . Representatives of the Union shall be afforded a reasonable period of time to orientate new employees as to the purposes, goals and achievements of the Union. [Underscoring reflects provisions in dispute.]

While tacitly recognizing that the subject language is ambiguous, the agency construes that language as authorizing the union to espouse the benefits of union membership and to solicit new employees to join the union, at a meeting of new employees arranged by management. Relying on such construction, the agency takes the position that the provisions violate management's obligation to refrain from endorsing union membership under section 19(a) of the Order,^{7/} and conflicts with the prohibition of union solicitation of membership on official time under section 20 of the Order.^{8/} We find the agency's position to be without merit.

Contrary to the agency's interpretation of the subject language in the agreement, it was intended by the local parties, as explained by the union in its appeal, simply to entail "a brief introduction to the union (without a membership pitch) during an orientation session" held by management with the new employees of the agency.

7/ Section 19(a) of the Order provides in relevant part:

Sec. 19. Unfair labor practices. (a) Agency management shall not—
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

.
(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]

8/ Section 20 of the Order reads in pertinent part:

Sec. 20. Use of official time. Solicitation of membership dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. . . .

More particularly, it appears that the critical provisions were intended, and we so interpret these provisions, merely to sanction a union explanation of such matters as: The status of the union as an exclusive bargaining representative under the Order; the identity of its officials and representatives; the rights and obligations of the union established by the Order; the purposes and goals of an exclusive bargaining representative as provided in the Order; the terms of any agreement with management achieved by the union, including the details of the negotiated grievance procedure; and the like.

As expressly recognized by the union, the subject provisions do not authorize the union to make any "plea for membership" at the orientation meetings. Thus, under such a provision, the union would not be permitted to distribute membership forms, solicit members, collect initiation fees or dues, or otherwise engage in organizational activities or other "internal business" of the union at these meetings—which actions would be clearly violative of section 20 of the Order.

In our opinion, nothing in either section 19(a) or section 20 of the Order precludes an agency from granting the exclusive representative an opportunity to orient new personnel, in the manner described above, concerning the role and functions of the representative under the Federal labor-management relations program. An understanding of these matters is not of primary concern and advantage only to the labor organization. Rather, such understanding is potentially beneficial to the employees of the agency. Further, it relates to and implements the labor-management relationship between the parties and is potentially beneficial both to the union and the agency involved.

The Council has previously ruled:^{9/}

[N]othing in the Order prohibits an agency and a labor organization from negotiating provisions . . . which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" union business [i.e., not to "activities which are of primary concern and benefit only to the labor organization"].

We believe those principles are applicable to the subject provisions as interpreted by the local parties in the present case and render such provisions negotiable. Accordingly, we hold that the agency erred in its determination that Article XIV, section 2, of the agreement was violative

^{9/} See FLRC No. 75P-1 (May 23, 1975), Report No. 90, at 4-5 of Council ruling.

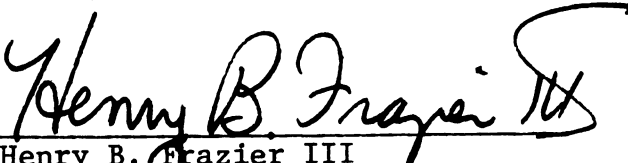
of sections 19(a) and 20 of the Order, and we shall set aside that determination.^{10/}

Conclusion

For the reasons discussed above, and pursuant to sections 2411.22 and 2411.28 of the Council's rules and regulations, we find that:

1. The union's appeal for review of the agency determination as to the nonnegotiability of Article III, sections 1 and 2, of the local parties' agreement is prematurely filed, and the petition for review, insofar as it refers to these provisions, must be denied.
2. The agency determination as to the nonnegotiability of Article XIV, section 2, of the local parties' agreement is improper and must be set aside. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of these provisions. We decide only that, as submitted by the union and based on the record before the Council, the provisions are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 6, 1977

10/ If the union attempts to conduct "internal" union business during the orientation meetings, such activities would of course conflict both with the agreement and section 20 of the Order (which prohibits the conduct of internal union business during duty hours) and would be promptly remediable by the agency under the Order.

American Federation of Government Employees, Local 2017 and Department of the Army, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia (Dallas, Arbitrator). The arbitrator determined, in substance, that the activity violated the parties' agreement in the method it used in selecting employees for overtime work on a weekend; and, as a remedy, awarded each of the grievants five hours of overtime. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award, based on an exception alleging that the award violated the Order. The agency also requested a stay of the arbitrator's award.

Council action (June 6, 1977). The Council held that the agency's exception was not supported by facts and circumstances described in its petition. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 6, 1977

Mr. W. J. Schrader, Chief
Labor & Employee Relations Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: American Federation of Government Employees,
Local 2017 and Department of the Army, U.S.
Army Signal Center and Fort Gordon, Fort Gordon,
Georgia (Dallas, Arbitrator), FLRC No. 76A-127

Dear Mr. Schrader:

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

According to the award, the dispute in this matter arose following the crash of an Air Force bomber in the vicinity of Fort Gordon, Georgia, in September 1975. An investigation of the crash ensued, and the Air Force requested that Fort Gordon provide printing support to the investigating team. When it became necessary for the Printing Plant, which was staffed with both military and civilian employees, to operate on a Saturday and Sunday in the course of providing the required printing support work, the Printing Plant manager decided to utilize the military personnel, but none of the civilian employees, who worked in the Plant to do the overtime work. As a result, three of the civilian employees filed a grievance which ultimately went to arbitration. Before the arbitrator, the union representing the grievants contended that management had violated Sections 1 and 2 of Article 20 (OVERTIME) in the agreement.^{1/}

1/ According to the award, Sections 1 and 2 of Article 20 (OVERTIME) provide:

Section 1. The Local agrees that the determination of the necessity for overtime work (including the nature of the work, the need for special employees required) is a function of the Employer. Overtime shall normally be given to those employees who are currently assigned to the job. Second consideration will be given to those other employees performing similar work in the area and who are qualified to do the job. It is understood, however, that when special circumstances prevail or special technical skills are required, employees possessing these special skills may be assigned

(Continued)

The issue before the arbitrator, as stated in the award, was as follows:

Was the assignment of the military personnel on September 27, 28, 1975, to perform printing support to the Air Force investigating team in violation of the labor agreement, and if so, what shall be the remedy?

In the opinion accompanying his award, the arbitrator stated that the Printing Plant Manager "knew that he was going to work employees on the weekend prior to the termination of their work shift [on Friday], yet he completely ignored the labor contract when he made his decision to work the military personnel." The arbitrator noted that the Printing Plant Manager had said that "he could pay off the military personnel in equivalent time off the following week" The arbitrator pointed out that the agreement requires that callback rosters be developed, and in the absence of a callback roster, it specifies that "a list of employees who desire to work overtime will be established where necessary." He found that neither such a roster nor such a list had been established and further, that the Printing Plant Manager "didn't bother to contact the employees about their overtime interests." The arbitrator noted that the agreement also "requires that overtime shall normally be given to those employees who are currently assigned to the job with second consideration being given to those other employees performing similar work in the area and who are qualified to do the job." The arbitrator found that "[a]ll of the grievants are more experienced and have more seniority than the military employees." The arbitrator concluded that the contract had been violated and as a remedy awarded each of the grievants compensation for 5 hours of overtime.

The agency requests that the Council accept its petition for review of the arbitrator's award based on the exception discussed below.

(Continued)

to the overtime involved. In directing overtime, the supervisor will make every effort to make an equitable rotation of overtime among the employees of the unit concerned. Supervisors shall not assign overtime work to employees as a reward or penalty. Any complaint or disagreement on the distribution of overtime shall be processed in accordance with applicable grievance procedures. In such disputes, overtime records of the employees involved will be made available by the Employer.

Section 2. Employees on call-back rosters will respond to emergency call-back. Where a call-back roster does not exist, a list of employees who desire to work overtime will be established where necessary. In an emergency, if no volunteer is available, selection for call-back will normally be made from the least senior employee based on seniority in the work unit.

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

In its exception, the agency contends that the award violates the Order. In support of this exception the agency alleges that the award restricts management's right under section 12(b)(5)^{2/} of the Order to determine the personnel by whom agency operations are conducted. The agency states that the provisions of the agreement do not, and indeed could not without violating the Executive Order, restrict management to the use of civilian employees to the exclusion of military personnel. The agency further contends that the provisions of the agreement do not become operative in the use of bargaining unit employees unless management decides to use such employees, and that the award would "negate" a previous Council decision.^{3/}

The Council will accept a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents the ground that the award violates the Order. Thus the Council has held that rights reserved to agency management by section 12(b) of the Order may not be infringed by an arbitrator's award under a negotiated agreement.^{4/} However, in the present case the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception that the award infringes upon the agency's reserved right under section 12(b)(5) to determine the methods, means and personnel by which its operations are to be conducted. In this regard no facts and circumstances are presented in the petition to show that the award would

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

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

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

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

3/ The agency cites Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

4/ National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 298 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61 at 5 of the decision].

restrict management in the selection of the type of personnel (e.g., civilian or military) to conduct agency operations in the Printing Plant here involved.^{5/} (In fact, as has already been noted, both military and civilian personnel conduct such operations.) Further, no facts and circumstances are presented to show that the award would "prohibit management from assigning other . . . [than bargaining unit] personnel to work on a particular project or from hiring part-time personnel to perform the work during regular worktime in order to avoid the necessity of overtime"^{6/} or that it would "prohibit management from assigning nonunit personnel along with unit members during overtime periods in order to finish the work more quickly."^{7/} Instead, as previously indicated, the arbitrator only determined that the activity had violated the negotiated agreement in the method it used in selecting employees for work it had previously determined would have to be performed outside the employee's normal workweek on an overtime (weekend) basis in order to meet its obligation to provide the Air Force with necessary printing support work. The Council has previously found that agreement provisions concerning procedures for the assignment of overtime are negotiable and do not violate section 12(b)(5) of the Order,^{8/} and the agency's petition in the present case presents no facts and circumstances to support an exception that the arbitrator's award interpreting the contract provision involving the assignment of work which management has designated as scheduled overtime violates section 12(b)(5) of the Order or is contrary to Council

5/ See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

6/ See NAGE, Local R12-58 and McClellan Air Force Base, FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114.

7/ Id.

8/ In Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 456 [FLRC No. 72A-40 (June 29, 1973), Report No. 41], the Council stated, regarding a proposal concerning the assignment of overtime:

The union's proposal in this [Philadelphia] case is significantly different in scope and effect from [the Tidewater] proposal. Here, unlike in that case, the union proposal would only affect assignment of overtime. The proposal, if agreed to, would not restrict management in any way in otherwise assigning to nonunit employees work usually performed by unit employees, during nonovertime periods. Further, and equally important, under the union's proposal in this case, assignment to nonunit personnel of work normally assigned to employees in the unit could be made even in situations involving overtime, for any purpose determined by management to be valid, except "for the sole purpose of eliminating the need for such [unit] employees on overtime."


(Continued)

precedent interpreting that section. Therefore, the agency's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: K. T. Blaylock
AFBE

(Continued)

Thus, while the agency contends that the proposal violates management's reserved right under section 12(b)(5) of the Order to determine the type of personnel by whom certain work of the Philadelphia Naval Shipyard would be accomplished, such contention is without merit because, as we noted above, the proposal, in effect, is solely concerned with the assignment of overtime.

See Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110, wherein the Council found the disputed provision to be concerned solely with "a procedure for the assignment of overtime" similar to the proposal in the Philadelphia case, and explained further that:

Under the disputed provision in the present case, if management determines that "normal scheduled overtime" work is necessary to accomplish certain tasks, which are assigned to and performed "during the week" by particular employees at the base, then management shall not assign the same tasks to other employees to perform on overtime, "except in emergency situations." Thus, it is clear that the instant provision, unlike the proposal in Tidewater: (1) is concerned only with the type of work which management has previously assigned to unit employees to perform on a regular-time basis, i.e., "during the week"; (2) relates to such work only when the agency has specifically designated it to be performed as scheduled overtime; and (3) would not restrict management in any way in otherwise assigning to unit or nonunit employees work to be performed during periods which have not been designated as scheduled overtime. [Emphasis in original.]

American Federation of Government Employees, Local 987, AFL-CIO and Department of the Air Force, Robins Air Force Base. The dispute involved the negotiability under the Order of a union proposal concerning the meaning of the term "such other duties as may be assigned" or its equivalent when used in job descriptions.

Council action (June 6, 1977). Relying on its decision in the Louisville Naval Ordnance case, FLRC No. 73A-21, the Council concluded, contrary to the agency's contentions, that the union's proposal did not infringe upon management's reserved right under section 12(b) of the Order to assign duties, or restrict management's ability to determine job content under section 11(b). Accordingly, the Council held that the agency head's determination that the union proposal here involved was nonnegotiable was improper, and, pursuant to section 2411.28 of its rules and regulations, set aside that determination.

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

American Federation of Government
Employees, Local 987, AFL-CIO
(Union)

and

FLRC No. 76A-139

Department of the Air Force,
Robins Air Force Base
(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal reads as follows:

Article 19, "Job Descriptions"

When the term "such other duties as may be assigned" or its equivalent is used in a position description, the term is mutually understood to mean "tasks that are normally related to the position and are of an incidental nature." It is understood that the above language does not relieve any employee from keeping his immediate work area clean, neat and orderly.

Agency Determination

The agency head determined that the proposal is nonnegotiable on the asserted grounds that it would restrict management's right to "assign duties" in violation of section 12(b) of the Order and, in addition, that the proposal would restrict management's determination of job content, based on the Council's Griffiss decision,^{1/} under section 11(b) of the Order.

Question before the Council

Whether the proposal violates section 12(b) of the Order or is excepted from the obligation to bargain by section 11(b) of the Order.

1/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36]. In that case, the union's proposals would have prohibited the assignment of allegedly unrelated duties to positions in the unit. The Council sustained the agency's determination of nonnegotiability, because the specific duties assigned to particular jobs, including duties allegedly unrelated to the principal functions of the employees concerned, are excepted from the agency's obligation to bargain under section 11(b).

Opinion

Conclusion: The proposal does not infringe upon management's reserved right under section 12(b) of the Order or restrict management's determination of job content under section 11(b) of the Order. Thus, pursuant to section 2411.28 of the Council's rules and regulations, the agency head's determination that the union proposal here involved is nonnegotiable was improper and is hereby set aside.

Reasons: The provision here in dispute bears no material difference from the union's proposal concerning position descriptions which was before the Council and held negotiable in the Louisville Naval Ordnance case.^{2/} That proposal provided as follows:

Article 18, Section 6

a. When the term, 'such other duties as may be assigned' or its equivalent is used in a position description, the term is mutually understood to mean 'tasks that are normally related to the position and are of an incidental nature.'

b. It is understood that the language of (a) above does not preclude the Employer from assigning unrelated work to employees when:

- (1) a general plant cleanup is required;
- (2) work as defined in an employee's position description is not available.

As the Council pointed out in that case, such a proposal, unlike the one at issue in the Griffiss case, is expressly directed at the meaning of language in position descriptions, which descriptions do not determine but reflect the assignment of duties. Additionally, the Council stated:

The union's proposal thus would not restrict the agency's right to prescribe specifically in the job description any duties which it wishes to assign to an employee or position and to change the job description without limitation to reflect such changes in assignments. Moreover, the agreement would of course be subject to section 12(b) of the Order, the provisions of which must be included in every agreement. Under section 12(b), for example, the agency retains the complete right, in accordance with applicable laws and regulations, to assign duties to employees or positions in such manner as to maintain the efficiency of Government operations, and to carry out the mission of the agency in emergency situations.

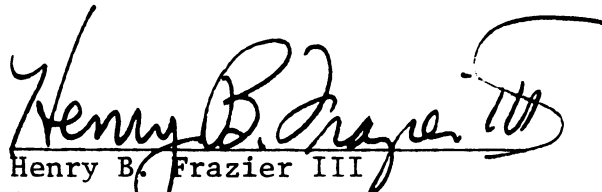
2/ Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy.
2 FLRC 55 [FLRC No. 73A-21 (Jan. 31, 1974), Report No. 48].

In summary, nothing in the Order renders the mere definition and clarification of general terms in job descriptions, as proposed by the union, outside the agency's obligation to negotiate under section 11(b) of the Order [Footnote omitted.]

Contrary to the agency's contention that the union's proposal in this case would restrict management's ability to determine job content and assign duties to unit employees, such proposal would not constrain management from assigning the employee any duties by changing the position description to reflect such assignment.

Accordingly, for the reasons more fully set forth in the Louisville Naval Ordnance case,^{3/} we find that the union proposal here involved is negotiable.^{4/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 6, 1977

3/ See also Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, 2 FLRC 280 [FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60]; American Federation of Government Employees, Local 53 and Navy Regional Finance Center, Norfolk, Virginia, 2 FLRC 88 [FLRC No. 73A-48 (Feb. 28, 1974), Report No. 49].

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

American Federation of Government Employees, Local 1858, AFL-CIO, Redstone Arsenal, Alabama and U.S. Army Missile Command, U.S. Army Communications Command Agency, Redstone Arsenal, Alabama (Griffin, Arbitrator). The arbitrator found that the activity did not violate the parties' agreement when it denied several employees the opportunity to exercise seniority rights for the selection of shifts and days off during a particular month; and denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging, in substance, that the arbitrator considered provisions in the parties' agreement other than the one the union asserted in its grievance had been violated, but that he did not consider still other provisions that would have been favorable to the union's position.

Council action (June 6, 1977). The Council, consistent with its prior decisions in precedent cases, as cited in its decision in the instant case, held that the union's exception provided no basis for Council acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 6, 1977

Mr. Raymond B. Swain, President
Local 1858, American Federation
of Government Employees, AFL-CIO
Building 7132
Redstone Arsenal, Alabama 35809

Re: American Federation of Government Employees,
Local 1858, AFL-CIO, Redstone Arsenal, Alabama
and U.S. Army Missile Command, U.S. Army
Communications Command Agency, Redstone Arsenal,
Alabama (Griffin, Arbitrator), FLRC No. 77A-6

Dear Mr. Swain:

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

According to the award, the grievance arose when the activity denied several employees, assigned to the Midnight Operations Section of its Commercial Operations Branch, the opportunity to exercise seniority rights for the selection of shifts and days off during the month of January 1976. The union's grievance asserted that the activity's action violated Article XII, Section 3 of the Agreement. The matter ultimately went to arbitration.

The arbitrator stated the question before him as follows:

[W]hether or not this loss was the result of a violation of the Agreement by the Employer or simply the legitimate implementation of various employer rights contained in the Agreement.

The arbitrator found that a Table of Distribution and Allowances dated August 11, 1975, for the Commercial Operations Branch indicated that the Branch had been reorganized into three sections. The arbitrator found that the grievants were assigned to the Midnight Operations Section and he determined that Article XII, Section 2c^{1/} limits the accrual and

1/ Article XII, Section 2c provides:

Seniority - An employee's length of continuous service (DMIS employees includes present grade) in the lowest affected official organizational element dating from the effective date of his or her official assignment by SF-50 to that organizational element. During or as a result of reorganizations, length of continuous service will include service in previous organizations that were combined into the current established organization. Length of continuous service will also include

(Continued)

exercise of seniority to the lowest affected organizational element which in this case was the Midnight Operations Section. Hence, he concluded that exercise of the fixed shift change provision in Article XII, Section 3c^{2/} in accordance with such seniority is limited in all cases to the lowest affected official organizational element. Additionally, according to the arbitrator, under the agreement the right to exercise shift changes is further limited to only those employees who are assigned to fixed shifts. The arbitrator found the Midnight Operations Section to be a regular non-fixed shift organizational element which means that the opportunity to change shifts as provided in Article XII, Section 3c "does not apply." As his award, the arbitrator denied the grievance finding that the activity "did not violate the Agreement as charged by the Grievants."

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

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

The union takes exception to the arbitrator's award on the basis that "the Arbitrator considered other articles in the contract in making his decision . . . but did not consider articles that would have been favorable to the Union." In support of its exception the union cites two provisions of the agreement to which the arbitrator "should have given consideration." In essence, the union appears to be disagreeing with

(Continued)

service in or outside the bargaining unit. In determining seniority, career and career-conditional employees, in that order, shall have their total continuous length of service made creditable for the purpose of determining seniority under this article. Absence due to military service, provided the employee makes application and is reemployed after military service, as prescribed by appropriate regulations, will be included as continuous service time.

2/ Article XII, Section 3c provides as follows:

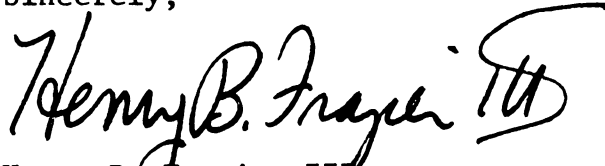
The Employer will allow employees the opportunity for fixed shift changes and selection of off days during the month of January each year in accordance with seniority as defined in Section 2c.

the arbitrator's application and interpretation of the collective bargaining agreement and his specific reasoning behind the award. The Council has consistently held that the interpretation of contract provisions and the resolution of the grievance are matters to be left to the arbitrator's judgment. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Further, the Council has held that the conclusion or specific reasoning employed by the arbitrator is not subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: John Mikitish
Army

General Services Administration, Region III, Washington, D.C., Assistant Secretary Case No. 22-6773 (AP). The Assistant Secretary found, in pertinent part, that the precedural matters raised by the grievance concerning the activity's issuance of a notice of proposed suspension to an employee had been raised before and were within the jurisdiction of the Federal Employee Appeals Authority, and that such matters could not be raised under the grievance/arbitration procedure of the agreement between the activity and Local 1733, American Federation of Government Employees (AFGE). AFGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (June 6, 1977). The Council held that AFGE's petition did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision raised any major policy issues. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20416

June 6, 1977

Mr. Major H. Travis, Vice President
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: General Services Administration,
Region III, Washington, D.C.,
Assistant Secretary Case No. 22-6773(AP),
FLRC No. 77A-15

Dear Mr. Travis:

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

In this case, as found by the Assistant Secretary, the Federal Protective Service Division of the General Services Administration (the activity) notified an employee of its intention to suspend him from duty for 3 days without pay for his possession of a firearm while off duty. Pursuant to the parties' agreement, American Federation of Government Employees, Local 1733 (the union) sought to invoke arbitration with respect to the merits of the disciplinary action and related procedural matters. Subsequently, the employee appealed his suspension to the Federal Employee Appeals Authority (FEAA), which concluded that the agency had complied with regulatory procedural requirements in effecting the employee's suspension and affirmed the agency's action suspending the employee. While the matter was pending before the FEAA, the agency, in response to the union's invocation of arbitration, requested a determination from the Assistant Secretary as to whether agency regulations concerning the suspension were subject to the grievance or arbitration procedures of the parties' negotiated agreement or to a statutory appeal procedure.

The Assistant Secretary found that the matter was not grievable or arbitrable. In so finding, the Assistant Secretary stated:

Because, in my view, the procedural matters raised by the instant grievance have been raised and are within the jurisdiction of the Federal Employee Appeals Authority, I find, contrary to the Regional Administrator, that such matters cannot be raised under the parties' negotiated grievance/arbitration procedure. Thus, Section 13(a) of Executive Order 11491, as amended, provides, in part, that a grievance procedure "may not cover matters for which a statutory appeal procedure exists." Under these circumstances, disagreement with any aspect of the decision of the Federal Employee Appeals Authority can

be raised only under the provisions of the Civil Service Commission's regulations, which provide for an appeal from the decision of the Federal Employee Appeals Authority to the Commission's Appeals Review Board.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary "that all procedural matters, including compliance with agency regulations prior to the issuance of a proposed notice are covered by statute and therefore not within reach of the negotiated grievance procedure . . . is erroneous, arbitrary, capricious, and not founded in Law." You also allege in this regard that "[a]lthough the Assistant Secretary finds that FEAA has jurisdiction on all procedural questions, thus barring any adjudication under the negotiated grievance procedure, he gives no basis for such finding, thus this [finding] must be found to be arbitrary and capricious."

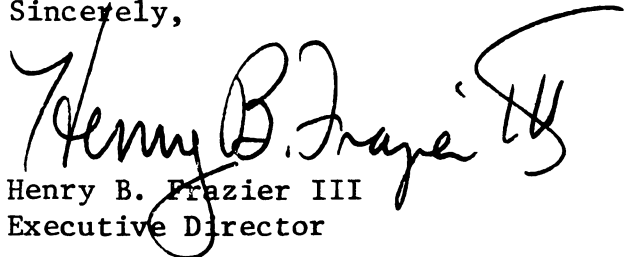
In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the procedural matters involved herein "cannot be raised under the parties' negotiated grievance/arbitration procedure." Your assertion thus constitutes, in effect, merely a disagreement with the Assistant Secretary's contrary determination and therefore presents no basis for Council review.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. P. Denney
GSA

U.S. Army Training Center, Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-4875 (GA). The Assistant Secretary determined that the application for decision on grievability or arbitrability filed by Local R14-32, National Association of Government Employees (NAGE) was procedurally defective under his regulations in the circumstances of this case; and denied NAGE's request for review seeking reversal of the Regional Administrator's dismissal of the application. NAGE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (June 6, 1977). The Council held that NAGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or raise any major policy issues. Accordingly, the Council denied NAGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 6, 1977

Mr. Paul J. Hayes
National Vice President
National Association of
Government Employees
87 Briwood Circle
Glens Falls, New York 12801

Re: U.S. Army Training Center, Fort Leonard
Wood, Missouri, Assistant Secretary Case
No. 62-4875(GA), FLRC No. 77A-19

Dear Mr. Hayes:

The Council has carefully considered your petition for review, and the agency's response thereto, in the above-entitled case.

In this case, as found by the Assistant Secretary, Local R14-32, National Association of Government Employees (the union) and the U.S. Army Training Center, Fort Leonard Wood, Missouri (the activity) were parties to a collective bargaining agreement which contained a grievance procedure and an arbitration provision. A grievance was filed concerning the activity's alleged failure to promote two employees. The activity rejected the grievance on the basis that it had been untimely filed under the negotiated agreement. The union then filed an Application for Decision on Grievability or Arbitrability which was dismissed by the Regional Administrator (RA).

The Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the Application for Decision on Grievability or Arbitrability. In so ruling, the Assistant Secretary stated:

The evidence reveals that [the union] filed the instant Application . . . although a final written rejection of a request to proceed to arbitration by the Activity had not yet been sought and received, inasmuch as arbitration was not invoked. Thus, in agreement with the Regional Administrator, I find that the instant application is procedurally defective, as an application will not be processed by the Assistant Secretary until all the remedies in the parties' negotiated agreement have been exhausted. Therefore, as the parties' negotiated agreement herein provides for arbitration, arbitration must have been invoked and rejected in writing, which was not done herein. In this connection, see Report On A Ruling Nos. 56 and 61
. . . .

In your petition for review on behalf of the union, you allege that "there is substantial evidence that the Assistant Secretary's decision is arbitrary and capricious and by such decision, a major policy issue is presented." More particularly, you contend, in substance, that the Assistant Secretary's dismissal of the application for a grievability decision because arbitration had not been invoked and rejected in writing is: a misapplication of his rulings; a departure from past practice, retroactively applied; and inconsistent with the purposes of the Order.

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

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the instant application was procedurally defective under his regulations in the circumstances of this case. Nor does the Assistant Secretary's decision raise any major policy issues warranting Council review, as alleged, in the circumstances of this case. In this regard, your allegations as set forth above all relate to the propriety of the Assistant Secretary's interpretation and application of his own regulations. As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.^{1/} In the instant case, the Assistant Secretary's decision was based upon the interpretation and application of his regulations, specifically Section 205.2, and your appeal fails to show that the Assistant Secretary's decision in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes of the Order.^{2/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet

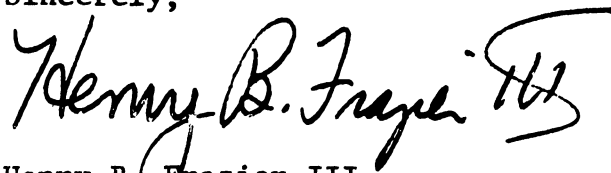
1/ NASA, John F. Kennedy Space Center, Florida, Assistant Secretary Case No. 42-3378(GA), FLRC No. 76A-135 (Mar. 22, 1977), Report No. 122, and cases cited therein.

2/ In so concluding, the Council does not construe the Assistant Secretary's decision herein as requiring a party to invoke arbitration as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, since section 13(d) of the Order states that such question is to be decided by the Assistant Secretary. In any event, such a question is not involved in the instant case.

the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. J. Schrader
Army

Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky and Professional Air Traffic Controllers Organization (Witney, Arbitrator). This appeal arose from the arbitrator's award directing the activity to pay the grievants, three GS-12 Air Traffic Controllers, backpay at a GS-13 rate for the period each of them served as Team Supervisor at the activity. The agency filed exceptions to the award with the Council; and the Council, by decision dated May 21, 1976, accepted the agency's petition for review insofar as it related to the agency's exceptions and so notified the parties (Report No. 105). Subsequently, by action of July 16, 1976, the Council rescinded its previous acceptance decision, in order to afford the union an opportunity to file an opposition to Council acceptance of the agency's petition (Report No. 108). Upon reconsideration of the agency's petition for review and consideration of the union's opposition thereto, the Council determined that acceptance of the petition was warranted; and notified the parties that it had accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged that the award violated the Federal Personnel Manual and that implementation of the award would violate the Back Pay Act of 1966, 5 U.S.C. § 5596 (Report No. 112).

Council action (June 7, 1977). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertained to the questions raised in the present case. Based on an interpretation provided by the Commission in response to the Council's request, the Council held that, in the circumstances of this case, the arbitrator's award, insofar as it directed the agency to compensate each of the grievants at the GS-13 rate for the time each served as Team Supervisor, was contrary to the Federal Personnel Manual and the Back Pay Act of 1966 and therefore could not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Federal Aviation Administration,
Standiford Air Traffic Control
Tower, Louisville, Kentucky

and

FLRC No. 76A-6

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing the activity to pay the grievants backpay at a GS-13 rate for the period that each of them served as Team Supervisors at the activity.

According to the arbitrator's award, this case involved the "detail or assignment" of the three grievants to a higher classification without increased compensation. Due to a reclassification program of FAA supervisory positions, the position of GS-13 Team Supervisor at Standiford Air Traffic Control Tower remained unfilled on a permanent basis from June 1974 until June 1975, at which time it was filled through the activity's merit promotion plan. Between June 1974 and January 9, 1975, this position was covered on a day-to-day basis. However, beginning January 9, 1975, the position was filled by three consecutive 45-day details of the three grievants, each of whom was a GS-12 Air Traffic Controller. The grievance arose because the three grievants believed that they should have been paid the GS-13 salary for the 45-day period that each of them performed the duties of the Team Supervisor position.

The Arbitrator's Award

The basic question, according to the award, to be determined by the arbitrator was:

Under the circumstances of this case, did the Federal Aviation Administration violate Article 23^{1/} of the Labor Agreement? If so, what should the remedy be? [Footnote added.]

1/ According to the award, Article 23 of the parties' labor agreement provides, in pertinent part:

Article 23 - Details and Assignments Above Grade

Section 1. Details shall be governed by CSC regulations and FAA directives. Details of bargaining unit employees shall not be used to avoid filling authorized permanent supervisory positions through promotion.

The arbitrator concluded that "the Grievants' details were not for the purpose '[of avoiding] filling authorized permanent supervisory positions through promotion' within the second sentence meaning of Article 23, Section 1 of the Labor Agreement. The details were made to reserve the vacancy for employees who were affected by the [job] reclassification program." [Footnote omitted.] He found that this was a proper action to avoid demoting employees already at the GS-13 level. However, the arbitrator went on to state that "the fundamental issue in this dispute is a determination of whether or not the FAA properly used the details in question under the policies established by the CSC and as repeated in the FAA rules and regulations." The arbitrator in resolving this issue determined that, although the FAA argument that a 45-day detail constitutes a "brief" period within the meaning of the material Federal agency regulations^{2/} has merit, in the final analysis, "the details must be viewed as a continuum," [emphasis in original] stating:

True, each detail was for 45-days and was filled by a different employee. However, these details simply cannot be viewed in isolation and as separate entities. They were made to fill a specific job - Team Supervisor. It is not a case where three (3) separate details were made to fill different positions. To the contrary, they were made concurrently and to fill the same position. In the judgment of the Arbitrator, the FAA did not carry out the intent of the procedures which govern details. . . . Though made to different employees at 45-day intervals, this was the same detail in substance and purpose. . . .

In short, the procedures which govern details, as laid down in the Federal Personnel Manual and by the FAA, do not contemplate the Grievants' details made under the circumstances of this case. When reduced to its essence, it was a 135-day detail. [Emphasis in original.]

^{2/} FPM, chapter 300, subchapter 8-3b(2) provides, in pertinent part:

8-3. PURPOSE OF DETAILS

b. When prohibited.

(2) Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained

FPM, chapter 300, subchapter 8-4e provides, in pertinent part:

8-4. AGENCY RESPONSIBILITIES WHEN USING DETAILS

e. Details to higher grade positions.

Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. . . .

The arbitrator thus granted the grievance, concluding that "[u]nder the circumstances of this case, the FAA used the detail procedure improperly under the material Federal agency regulations. Such regulations are incorporated into Article 23, Section 1. Therefore, the FAA violated this provision of the Labor Agreement." Accordingly, the arbitrator directed FAA "to pay to the three (3) aforecited Grievants GS-13 salary for the time they served as Team Supervisors at the Standiford Field Tower."

Agency's Appeal to the Council

The agency filed a petition (opposed by the union) for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exceptions which allege that the award violates the Federal Personnel Manual and that implementation of the award would violate the Back Pay Act of 1966, 5 U.S.C. 5596.^{3/} The union filed a brief incorporating by reference its arguments made in opposition to the agency's petition for review.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review with respect to its exceptions which alleged that the arbitrator's award violates the Federal Personnel Manual and that implementation of the award would violate the Back Pay Act of 1966, 5 U.S.C. 5596. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

In this case the arbitrator found that the consecutive 45-day details of three GS-12 Air Traffic Controllers to the same GS-13 Team Supervisor positions must be viewed as a continuum and as constituting a single detail of 135 days. He further found that a single detail of this duration to a higher-graded position without prior Commission approval violates the Federal Personnel Manual and the negotiated agreement. As a remedy he directed the agency to compensate each of the grievants at the GS-13 rate for the time he served as Team Supervisor.

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

We believe the arbitrator has misapplied the provisions of the Federal Personnel Manual governing details. Paragraph 8-3b(2) of subchapter 8, chapter 300 of the FPM provides:

Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum period of 120 additional days.

and further, paragraph 8-4e of subchapter 8, chapter 300, states:

Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead.

The Commission has long held that a "detail" refers to the temporary assignment of an employee to a position. The proscription against overlong details to higher graded positions is meant to insure that an employee is not required to serve in a higher grade position for an extensive period of time without appropriate compensation and recognition of his/her service at the higher grade. The proscription, then, applies to the length of time an employee may be detailed to a higher graded job -- 120 days without prior Commission approval. There is no provision in the FPM which limits the time a position may be staffed by means of detailed employees, whether their details be consecutive or not.

An award of retroactive compensation under the Back Pay Act requires a finding by an appropriate authority that an unjustified or unwarranted personnel action has occurred (5 U.S.C. 5596) and that but for such an act or failure to act the employee would have received the pay, allowances or differential for the period covered. As far as Commission requirements are concerned, the agency's assignment of the three employees to consecutive 45-day details does not constitute an unjustified or unwarranted personnel action and hence, provides no basis for back pay. Therefore, absent a specific finding by the arbitrator that an unjustified or unwarranted personnel action occurred and that but for such improper action the employee would have received the pay, allowances or differential for the period covered, the award cannot be implemented legally.

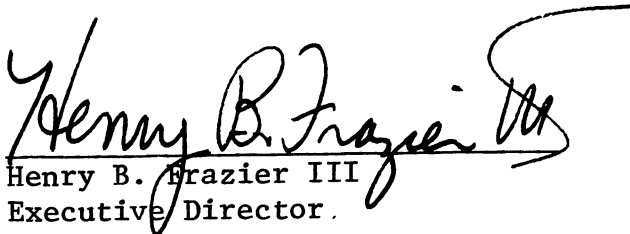
Based upon the foregoing interpretation of the Civil Service Commission, it is clear that, in the circumstances of this case, the arbitrator's award, insofar as it directs the agency to compensate each of the grievants

at the GS-13 rate for the time each served as Team Supervisor, is contrary to the Federal Personnel Manual and the Back Pay Act of 1966 and therefore may not be implemented.^{4/}

Conclusion

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

By the Council.


Henry B. Brazier III
Executive Director.

Issued: June 7, 1977

^{4/} As indicated, the Commission's determination in this matter is directed to the question of whether the arbitrator's award in the circumstances of this case is consistent with the pertinent provisions of the Federal Personnel Manual and with the Back Pay Act of 1966. Thus, nothing in the determination would appear to preclude the implementation of a remedy such as directed by the arbitrator in this case in circumstances where: The arbitrator finds that the parties' negotiated agreement provides that employees assigned to temporary details such as involved herein will be compensated at the higher rate; that the activity violated such provision of the negotiated agreement; and that but for that violation the employee would have received additional pay, allowances or differentials.

NFFE Local 1332 and Headquarters, U.S. Army Materiel Development and Readiness Command. The dispute involved the negotiability of a union proposal which would require the advertising within the activity of vacancies in bargaining unit positions covered by Army career programs, and acceptance of individual applications for such vacancies from current bargaining unit employees. Upon referral, the Department of the Army (agency) determined that the proposal was nonnegotiable, principally because it violated the published agency career program regulation, and asserted that there was a compelling need for the regulation. The agency subsequently denied the union's request for an exception to the regulation, and the union filed a petition for review of the negotiability issue with the Council.

Council action (June 7, 1977). For the reasons fully detailed in its decision, the Council found that no compelling need existed, within the meaning of section 11(a) of the Order and part 2413 of the Council's rules, for the relevant provisions in the agency regulation to bar negotiation on the union proposal. Therefore, pursuant to sections 2411.22 and 2411.28 of its rules and regulations, the Council held that the agency's determination as to the nonnegotiability of the union's proposal was improper and must be set aside.

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

NFFE Local 1332

and

FLRC No. 76A-29

Headquarters, U.S. Army Materiel
Development and Readiness Command

DECISION ON NEGOTIABILITY ISSUE

Background

NFFE Local 1332 (union) represents separate activity-wide units of nonprofessional and professional employees of the Headquarters, U.S. Army Materiel Development and Readiness Command (DARCOM Headquarters),^{1/} located in the Washington, D.C., metropolitan area, including Personnel and Services Support agencies. During negotiations between the local parties relating to these units, a dispute arose as to the negotiability of a union proposal (set forth in detail hereinafter) concerning the publicizing within DARCOM Headquarters of vacancies in bargaining unit positions covered by the Army career program,^{2/} and the accepting of voluntary applications for such vacancies from current bargaining unit employees.

Upon referral of the negotiability issue, the Department of the Army (referred to herein as Army or the agency) determined that such a proposal is nonnegotiable, principally because it violates Army Civilian Personnel Regulation (CPR) 950-1, which provides the basic regulatory framework for the Army-wide career management program for civilian employees, and because there is a compelling need for this agency regulation. Following the agency determination, the union requested an exception to CPR 950-1, which request was denied by the agency. Thereafter, the union appealed to the Council from the agency determination, under section 11(c)(4) of the Order. The agency filed a statement of position pertaining to the union's appeal.

^{1/} The name of the Command appears as redesignated during the pendency of the instant proceeding.

^{2/} The Army variously uses the same phrase, "career program," to refer to the overall departmental program and to the individual programs tailored for particular occupational areas, such as supply management, procurement, comptroller, and the like. For purposes of our decision, we shall employ the phrase "career program" to refer only to the overall program and shall separately describe the programs for the individual career fields.

Opinion

The principal issue before the Council is whether, as claimed by the agency, there is a "compelling need" for the applicable provisions of CPR 950-1 to bar negotiation on the union's proposal, within the meaning of section 11(a) of the Order^{3/} and within the intent of the illustrative criteria established for determining when a "compelling need" exists, under section 2413.2 of the Council's rules and regulations.^{4/}

3/ Section 11(a) reads in relevant part:

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

4/ Section 2413.2 of the Council's rules and regulations (5 CFR 2413.2) provides:

§ 2413.2 Illustrative criteria.

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

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

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

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

(d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

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

Before considering this question,^{5/} we shall briefly review the nature of the Army's civilian career management program as implemented by CPR 950-1, and the specific provisions of the disputed union proposal.

1. Civilian career management program of the Army. According to the Army, its civilian career management program is defined as "the continuous intake, appraisal, training, development and career assignment of personnel to meet civilian manpower requirements." The primary objectives of the program are to anticipate and meet worldwide staffing needs of the Army with the highest quality of civilian personnel available, and to provide foreseeable career opportunities which will attract, develop and retain qualified civilian employees in key positions.

As already mentioned, the basic regulatory framework for the program is contained in CPR 950-1. Additional regulations tailored to specific characteristics of individual career fields are contained in supplemental issuances of the CPR 950 series. The program covers some 70,000 employees in 18 separate professional, administrative and technical occupational areas. (There are about 860 employees in the units represented by the union at DARCOM Headquarters, who are covered by the program.)

Basic elements in the program which are common to all the career fields include: (a) Career patterns which depict developmental opportunities at successive grade levels; (b) planned annual intake based on long range forecasts of manpower needs; (c) career appraisal and counseling; (d) training and development; and, of particular relevance to the present dispute, (e) a central inventory and referral system. As stated by the Army, its program represents "the avenue through which requirements of the Federal Merit Placement and Promotion Program (FPM Chapter 335) are implemented for the key positions in each of the individual career programs. This is accomplished largely through detailed provisions of the . . . central inventory and referral program element." [Emphasis in original.]

In operation, mandatory referral levels are established for each career field, describing the scope of competition or minimum area of consideration which must be observed in promotion or assignment actions involving positions at specified grade levels. The areas of competition for most

^{5/} A number of other questions are also raised by the union's contentions in its appeal regarding (a) the alleged impropriety of the agency's interpretation of CPR 950-1, and (b) the asserted invalidity of the applicable provisions of the agency regulation under the Federal Personnel Manual (FPM). However, these contentions by the union are clearly without merit. As to (a), the Council is bound by the agency's interpretation of its own regulations in a negotiability dispute, under section 11(c)(3) of the Order. And, as to (b), the asserted provisions of FPM chapter 335 relied upon by the union were contained in a draft revision of the FPM released by the Civil Service Commission for comment, but these revisions were not adopted by the Commission and thus are without any dispositive significance in the present case.

positions are determined locally and identified in the applicable local merit placement and promotion plan. However, for key positions, the scope of the area of consideration is, in general, major command-wide (usually for grade GS-12) or Army-wide (usually for grades GS-13 and above); and CPR 950-1 prescribes the exclusive use of central inventories (skills files) at the command or Army level containing employee registration forms to locate the internal Army candidates to be referred for consideration in filling these key positions. This registration must be completed well ahead of any screening action for the individual Army employee to be accorded such consideration.^{6/}

Registration in the central inventories is mandatory for appropriate agency employees currently in positions covered by particular career programs, or is voluntary for agency employees who, by reason of prior experience or training, are eligible for referral within a particular career field and who are not currently occupying a position covered by a particular Army-wide career program. Multiple program registration is also authorized primarily for mandatory registrants qualified for and desiring consideration in career fields outside their current positions.

Registration in the central inventories is effected by means of a Qualification Record form (DA Form 2302), which includes, as here pertinent, a seven-digit "experience code" most nearly descriptive of experience gained in each of the employee's current and five prior positions, along with a narrative description of the work involved in each of those positions. The seven-digit code reflects four categories of information: Three digits for the occupational field; two for the specialty; and one each for the mission/functional/specialized duty area and for the functional level of the position.

When a vacancy occurs in a key position covered by a central inventory, the activity forwards its request for referral of candidates (DA Form 2302-2) to the appropriate headquarters organization, designating up to five sets of experience codes for the vacant position to be filled. Based in part on a matching of codes (particularly the five digits reflecting occupational fields and specialties) and assisted by computers, registrants are located in the applicable central inventory and are referred to the activity for selection.^{7/} In this procedure for referral of internal Army candidates

^{6/} Screening panels and the preparation of standing referral rosters are also provided for under CPR 950-1 and are established for a majority of the separate career areas.

^{7/} CPR 950-1 further provides, under certain circumstances, for consideration of candidates from other sources, such as outside recruitment, the Federal-wide referral system, special exceptions to the ordinary inventory and referral procedure, and the like, who are not included in the central inventories.

from a central inventory, CPR 950-1 prohibits the use of vacancy announcements, supervisory referrals, or individual applications from current Army employees for career program positions at established command-wide and Army-wide mandatory referral levels. For such employees, the central inventory and basic registration form comprise the exclusive means of locating candidates for referral against specific vacancies.

2. Union proposal. The union asserts in its appeal that many employees in the bargaining units are dissatisfied with the Army career program because the experience code associated with a vacant position at DARCOM Headquarters is not advertised to unit employees, and because applications for such a unit position are not accepted from unit employees who believe they qualify for the vacant position but whose registration in the skills file, including the experience code selected by the registrant, may not accurately or completely reflect their experience and/or qualifications.

More particularly in the above regard, the union states that selection of an experience code by a registrant in the central inventory is extremely difficult due to the numerous brief titles in the table of experience codes published as an appendix to CPR 950-1, from which the various digits must be chosen; and "hundreds, or possibly thousands, of code combinations," together with brief job descriptions, would have to be submitted by a registrant properly to reflect the employee's experience, especially if the experience was generalized in nature. Thus, according to the union, "Many employees are convinced that their names can be retrieved from the [Army] skills file for only a small percentage of the positions for which they actually qualify, as the file can register only a very limited amount of information on an employee for any experience code under which the employee is registered."

To remedy this situation within the bargaining units, the union submitted the following proposal, under the heading "Promotion and Internal Placement," relating to the publicizing at DARCOM Headquarters of vacancies in unit positions and the accepting of specific applications for such vacancies from unit employees:

SECTION G. The Employer agrees to publicize in the [DARCOM Headquarters] Bulletin all Career Program vacancies to include the title, series, grade, appropriate career program experience code number, occupational code number, and specialty code number and person to contact associated with the vacant position. The publication shall include: 1) the name of the appropriate career program manager and a statement that employees registered in the appropriate career program are encouraged to contact the career program manager; and 2) any special requirements for the position.

SECTION H. When a vacancy for a position covered by career programs has been advertized, employees who are not registered

in the appropriate career program, or who are not registered under the appropriate experience, occupational, and/or specialty code(s), but who believe that they qualify for the position advertized, may submit Standard Form 171 or AMC Form 255 to apply for the vacancy, and shall be considered on the same basis as other candidates.

As previously indicated, the agency determined that this proposal is nonnegotiable principally because it violates CPR 950-1, for which a "compelling need" exists to bar negotiation on the union's proposal, within the meaning of section 11(a) of the Order and section 2413.2 of the Council's rules and regulations.^{8/} We turn to a consideration of this claim of compelling need for CPR 950-1 as advanced by the agency.

3. Compelling need for applicable provisions of CPR 950-1. The agency takes the position that a compelling need exists for the "provisions of CPR 950-1 which preclude the use of vacancy announcements and submission of applications by current Army employees for individual career program vacancies at established command-wide and Army-wide referral levels." According to the Army, these provisions, applicable to key positions for which central inventories are maintained, meet the compelling need criteria in sections 2413.2(b) and 2413.2(e) of the Council's rules and regulations, discussed below.

a. Section 2413.2(b) of Council's rules and regulations. Under section 2413.2(b), a compelling need exists for a regulation or policy such as here involved if "[t]he policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision."

The Army, which is a "primary national subdivision" of the Department of Defense within the definition of that term in section 2411.3(e) of the

^{8/} The agency also asserts that the disputed proposal would require the use of a method (advertising of vacancies and submission of individual applications) not specifically identified in the promotion plan and would thereby violate FPM chapter 335.6-4a(2) (a) which provides that: "A procedural violation occurs when a promotion action does not conform to the requirements of the applicable promotion plan." This argument is not persuasive. Assuming the parties agreed to the union proposal, the agency would be obligated to amend its program in accordance with the agreement and any promotion action would then conform to the amended plan, consistent with the FPM directive. To hold otherwise would permit an agency, simply by procedural inaction, to frustrate the purpose of the Order to eliminate as bars to negotiations those agency regulations for which no critical need exists. Labor-Management Relations in the Federal Service (1975), at 37-40.

Council's rules,^{9/} argues that the subject provisions of CPR 950-1 are "essential" to the management of its organization as contemplated by section 2413.2(b). More specifically, the agency contends that: (1) Central inventories are vital tools to assist the agency in effectively meeting its worldwide needs for key civilian personnel and the union's proposed use of vacancy announcements and individual applications, contrary to the regulations, would lead to the breakdown of such inventories; (2) the union's proposal would prevent the timely recruitment for key positions now accomplished under the civilian career program and would add unnecessary administrative expenses to that program; and (3) the effective management of the agency requires the civilian personnel management system to complement the military personnel system which is highly centralized and includes well-defined and intensely managed career development programs, and this need would be defeated by the union's proposed changes in the central inventory and referral element of CPR 950-1.

In our opinion, these arguments by the agency are unsupported by the record before the Council and fail to establish that the subject regulatory provisions relied upon by the agency are "essential, as distinguished from helpful or desirable," to the management of Army operations, within the intent of section 2413.2(b).

Preliminarily, the Council recently explained the intended meaning of its compelling need criteria in the consolidated National Guard cases, as follows:^{10/}

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

Thus, the Council's illustrative criteria for determining compelling need, while distinctive from one another in substance, share one basic characteristic intended to give full effect to the compelling need concept: They collectively set forth a stringent standard for determining whether the degree of necessity for an internal agency regulation concerned with personnel policies and practices and

^{9/} Section 2411.3(e) provides:

"Primary national subdivision" of an agency means a first-level organizational segment which has functions national in scope that are implemented in field activities.

^{10/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 11-12.

matters affecting working conditions warrants a finding that the regulation is "critical to effective agency management or the public interest" and, hence, should act as a bar to negotiations on conflicting proposals at the local level. This overall intent is clearly evidenced in the language of the criteria, several of which expressly establish that essentiality, as distinguished from merely helpfulness or desirability, is the touchstone. [Emphasis in original.]

Turning now to the agency's first argument, namely that the union's proposal would lead to the breakdown of the central inventory system, it appears that, even assuming the central inventory system is critical to agency management, the agency has misinterpreted the provisions and impact of the union's proposal. As indicated by the union in its appeal, its proposal is not intended in any manner to supplant the inventory or skills files as provided for in the career management program. Rather, the union simply proposes that vacancies within the DARCOM Headquarters units be advertised, and that individual applications be accepted from unit employees for those vacancies, which actions are intended to augment and not replace the central inventory files. Furthermore, neither the advertising within DARCOM Headquarters of vacancies in unit positions, nor the acceptance of applications from unit employees for those vacancies, would alter in any respect the requirements in the career program relating to the locating of candidates for positions in the agency outside DARCOM Headquarters or, indeed, for supervisory or managerial positions within DARCOM Headquarters itself. Hence, for the overwhelming number of key positions in the world-wide operations of the agency, registration in the central inventories would remain the exclusive means by which unit employees could obtain appropriate consideration. It is thus clear that the union's proposed changes in CPR 950-1 would not cause careerists to lose any incentive to register or to maintain their existing registrations in the central inventories and would not, as claimed by the agency, lead to the ultimate breakdown of the central inventory system.

As to the agency's second argument that the union's proposal would unreasonably delay recruitment for key positions and result in unwarranted additional costs, the agency fails to establish that any significant delays would derive from the union's proposal and has failed to detail the extent, if any, of increased costs which the proposal would entail. More specifically, while the agency estimates a recruitment lag of at least 4 weeks for a vacancy announcement and acceptance of individual applications at DARCOM Headquarters (plus an additional 2 to 3 weeks if supervisory appraisals were not on file at the referral level), there is no showing that such period could not be substantially reduced if deemed necessary to meet agency exigencies. Moreover, as already mentioned, CPR 950-1 now provides for recruitment from sources outside the central inventories—with the attendant delays required for those activities—and it does not appear that the limited time requisite for vacancy announcements and individual applications at DARCOM Headquarters would materially extend such periods. Likewise, ad hoc screenings, which individual applications might necessitate, already occur in at least 6 of the 18 career fields

presently covered by the program, apparently without serious adverse effect on the inventory and referral system. Finally, the record discloses that vacancy announcements and the acceptance of individual applications, as here proposed by the union, were actually operative for a substantial period of time in at least one other command, the U.S. Army Tank Automotive Command (TACOM), located at Warren, Michigan, and the agency fails to advert to any specific evidence of either appreciable delay or excessive administrative costs resulting from that practice.^{11/} Thus, the agency's claim that unreasonable delays and unwarranted costs would derive from the union's proposed changes in CPR 950-1 is not supported by the present record.^{12/}

As to the agency's concluding argument that the union's proposed changes in CPR 950-1 would prevent the necessary complementing of the military and civilian career management systems, this claim is predicated on the agency's belief that the union's proposal would impede the timely filling of vacancies in key civilian positions where required throughout the world. However, for the reasons discussed above, the agency has failed to show that the proposed changes in CPR 950-1 would lead to any breakdown of the central inventory system used by the agency in timely filling key positions in the career fields covered by the civilian program. Likewise, the agency has failed to demonstrate that unreasonable delays in meeting the agency's worldwide civilian needs would result from the proposed advertising within DARCOM Headquarters of vacancies in unit positions and

^{11/} During local negotiations in the instant case, the union cited this ongoing practice at TACOM in support of its disputed proposal; and, while the agency thereafter in effect directed TACOM to terminate its practice (concerning which the agency had been "officially" uninformed), such agency action was predicated not on any unreasonable delays or excessive costs experienced by the agency, but merely on the stated need for conformity with the regulations here involved.

^{12/} In a related argument concerning alleged unreasonable delays, the agency claims that the union's proposal violates section 12(b)(2) of the Order, because it would so unreasonably delay the exercise of management's 12(b)(2) authority (i.e., "to hire, promote, transfer, assign, and retain employees in positions within the agency") as in effect to negate that authority. The agency relies in this regard on Local 63, American Federation of Government Employees, AFL-CIO, and Blaine Air Force Station, Blaine, Washington, FLRC No. 74A-33 (Jan. 8, 1975), Report No. 61 (where the Council found violative of 12(b)(2) a union proposal which would have delayed the permanent filling of a vacancy if a formal grievance was filed, until the agency grievance procedure was completely exhausted—a period which, in the past, averaged some 4 months). This argument by the agency herein is without merit. As already mentioned, there is no persuasive evidence in the present case that the union's proposal would in fact unreasonably delay the agency's filling of a vacancy in any key position within the agency. Consequently, the Blaine decision is inapposite, and the union's proposal is fully consistent with the agency's reserved authority under section 12(b)(2) of the Order.

the acceptance of individual applications from unit employees for those vacancies. Accordingly, we find unsupported the assertion by the agency that the union's proposal would prevent the effective complementing of the civilian personnel management system with the personnel system of the Army's military component.

In summary, we find that the agency has failed to establish that the provisions in CPR 950-1 which prohibit the use of vacancy announcements and individual applications by current Army employees for vacancies in key positions, as related to the union's proposal, are "essential, as distinguished from helpful or desirable," to Army management within the intent of section 2413.2(b) of the Council's rules and regulations.

b. Section 2413.2(e) of Council's rules and regulations. The test for determining compelling need under section 2413.2(e) is whether "[t]he policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest."

The agency contends in effect that a uniform procedure for locating candidates for key positions, and more particularly the proscription of vacancy announcements and submission of individual applications by current Army employees, is critical to the effective operation of the career management program; that such effective operation of the program serves the public interest; and that the subject regulations therefore meet the test for determining compelling need in section 2413.2(e).

In support of its position, the agency argues specifically that: (1) Attainment of the objectives of the program is contingent on the continued understanding and support of all participating employees, which would be vitiated by the disparate procedures here proposed by the union; and (2) the effective administration of the program is also dependent on conformity with principles established in sundry provisions of FPM chapter 335 which contemplate uniform methods of locating and evaluating candidates within minimum areas of consideration.

Assuming without deciding that the effective operation of the career management program may be equated with the public interest, the agency, in our view, has nevertheless failed to establish that the limited departure from uniform procedures sought by the union in the present case would necessarily defeat the effective administration of the program involved, and that a compelling need for the subject provisions of CPR 950-1 thereby exists under the criterion set forth in section 2413.2(e).

Considering first the agency's claim that the understanding and support of participating employees would be vitiated by the nonuniformity in procedures for locating candidates which would result from the union's proposal, it appears that diversity in the methods of locating candidates for vacancies is already fully countenanced under the program. For example, as to the

bulk of the positions covered by the career management program, namely those positions subject to installation-wide areas of consideration (usually GS-11 and below), the agency admits that the "[m]ethods of locating candidates and other procedures are open to local determination, including negotiation where exclusive bargaining units exist." Thus, for most employees under the program, nonuniform procedures for locating candidates to fill vacancies are sanctioned and such diversity is not deemed a threat to the viability of the program. Moreover, even as to key positions subject to command-wide or Army-wide mandatory referral, CPR 950-1, as already indicated, expressly authorizes recruitment from a variety of sources outside the central inventories, which recruitment entails a diversity of means for locating potential candidates to fill these positions.

Additionally, the union proposal, as stated hereinbefore, is designed to eliminate sources of dissatisfaction of unit employees with the present method of locating candidates for bargaining unit vacancies, and hence is intended to enhance rather than diminish employee participation in the program. Further, in those instances where the procedures sought by the union in the instant case were in fact operative, such as at TACOM, it does not appear that employee participation in the program was diminished either outside or within the organization involved.

Accordingly, the record fails to support the agency's position that the union's proposal would vitiate the continued understanding and support of participants in the career management program.

As to the alleged inconsistency of the union's proposal with principles established in the FPM, the proposal is concerned solely with procedures for the locating of candidates for key positions within the agency (not, as asserted by the agency, with the evaluation of candidates for those positions), and the agency fails to cite any specific language in the FPM which either expressly or impliedly mandates uniformity in such procedures.^{13/}

^{13/} The agency refers to FPM chapter 335.3-3(b), which relates simply to the standards to be followed in determining the minimum area of consideration in a merit promotion plan (i.e., by organization, occupation, grade level, geographic location, or the like), not the methods of locating candidates within the established area of consideration. Additionally, the agency adverts to the direction in FPM chapter 335.5-2(c) that an "agency must make clear when applications [for particular positions or job locations] may be filed and the procedures to be followed in filing them." However, as indicated in note 8, supra, the union's proposal, if adopted by the parties, would become part of the agency career management program and the employees would have notice thereof. Consequently, this FPM directive would be satisfied. And, while the agency speculates that a "proliferation of procedures" similar to that sought by the union would render unfeasible compliance with this directive, the agency has failed to show any multiplicity of proposals such as here involved, or any complexities in such proposals which would prevent the agency from clearly notifying employees concerning their provisions or otherwise seriously impede administration of the program.

Indeed, to the contrary, FPM chapter 335.3-4(a), relating to the "Methods of Locating Candidates" under a merit promotion plan, expressly states that:

There are a variety of methods that can be used to locate eligible candidates for a vacancy. Different methods and combinations of methods are appropriate for different occupations and grades. Among the methods are those described below [vacancy announcements, skills files, supervisory referrals]. Each promotion plan indicates which method or methods will be used. [Emphasis supplied.]

Thus, the FPM recognizes the propriety of adopting a diversity of procedures for the locating of candidates to fill vacancies in positions within an agency under a program such as presented in this case.

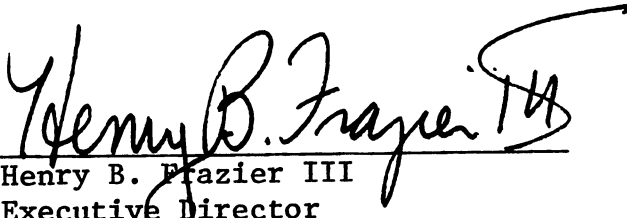
Accordingly, the agency has failed to establish that the union's proposal would contravene any principles in the FPM pertaining to uniform methods for locating candidates within minimum areas of consideration, which would prevent the effective administration of the career management program.

In summary, we hold that the agency has failed to show that uniformity in the procedures for locating candidates under CPR 950-1, as involved in the present case, "is essential to the effectuation of the public interest," and therefore failed to satisfy the test for the "compelling need" of the subject regulatory provisions under section 2413.2(e) of the Council's rules and regulations.

Conclusion

For the reasons discussed above, we find that no compelling need exists, within the meaning of section 11(a) of the Order and part 2413 of the Council's rules, for the relevant provisions in CPR 950-1 to bar negotiation on the union's proposal. Therefore, pursuant to sections 2411.22 and 2411.28 of the Council's rules and regulations, we hold that the agency's determination as to the nonnegotiability of the union's proposal here involved is improper and must be set aside. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.


Henry B. Prazier III
Executive Director

Issued: June 7, 1977

American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator). The arbitrator found that the activity violated the parties' agreement by not timely promoting the grievant on the date he would have been promoted except for administrative failure to timely process the promotion action involved. The arbitrator thereupon sustained the grievance and directed that the grievant be retroactively promoted with backpay. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on exceptions alleging (1) that the award violated applicable law, and (2) that the provision of the parties' agreement which the arbitrator found had been violated lacked specificity, and therefore there was no nondiscretionary agency requirement to promote the grievant. The agency also requested a stay of the award.

Council action (June 7, 1977). As to (1), the Council held that the agency failed to describe facts and circumstances to support this exception. As to (2), the Council found that this exception failed to state a ground upon which the Council grants review of an arbitration award. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 7, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
G-2608 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: American Federation of Government Employees,
Local 2327 and Social Security Administration,
Philadelphia District (Quinn, Arbitrator),
FLRC No. 76A-144

Dear Mr. Becker:

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

According to the arbitrator's award, this matter involves the career ladder promotion of the grievant from GS-7 to GS-9. The grievant met the requirements for a career ladder promotion as of November 23, 1975. He was recommended for promotion by his Branch Manager, and the required request for promotion action was prepared and forwarded in September 1975 to the Social Security (SSA) Regional Staff for further processing to the Department of Health, Education, and Welfare (DHEW) Regional Personnel Office, where final authority to effectuate promotions rests. However, the grievant's promotion was not effectuated at that time because neither the SSA Regional Staff nor the DHEW Regional Personnel Office had a record of receiving the promotion request. The activity investigated the matter and requested in January 1976 that the grievant be promoted retroactive to November 23, 1975, due to administrative error by the appointing authority. The request for retroactive promotion was rejected by the Acting Regional Representative on the basis that the appointing authority had no record of receipt of the promotion request. However, the grievant was promoted prospectively to GS-9 effective February 1, 1976. The grievant grieved his not being promoted in November, and the matter was ultimately submitted to arbitration.

The parties stipulated the issue to the arbitrator as follows:

Did the Employer violate the collective bargaining agreement . . . by failure to timely promote [the grievant] on the date he would have been promoted except for administrative failure to timely process the promotion action?

The arbitrator concluded that all the facts in the case indicated an administrative mistake at the Regional Personnel Office and that such a mistake constituted a violation of Article 6, Section 1^{1/} of the parties' negotiated agreement in that "[t]he merit promotion principles were not applied in a consistent manner and the Grievant was not treated with equity because someone misplaced the proper and timely request for personnel action." Thus, the arbitrator answered the stipulated issue affirmatively and sustained the grievance. In his "AWARD" the arbitrator ordered "[t]he Grievant's certification for GS-9 is retroactive to November 23, 1975 for promotion and privilege purposes. This remedy includes back pay retroactive to that same date."

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of the two exceptions discussed below, and it requests a stay of the award. The union filed an opposition.

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

In its first exception to the award, the agency contends that the award by directing the grievant's promotion retroactive to November 23, 1975, violates the Whitten Amendment.^{2/} In support of this exception, the agency asserts that the Whitten Amendment pertinently requires that an

1/ Article 6, Merit Promotion, provides as follows:

Section 1. The Employer and the Union mutually agree that the purpose and intent of the provisions contained herein is to implement the Region's Merit Promotion Plan, which will help to insure that merit promotion principles are applied in a consistent manner, with equity to all employees.

2/ The Whitten Amendment is the common name of section 1310 of the Act of November 1, 1951, 65 Stat. 757, as amended, 5 U.S.C. § 3101 note, and pertinently provides:

(c) The Civil Service Commission shall make full use of its authority to prevent excessively rapid promotions in the competitive civil service and to require correction of improper allocations to higher grades of positions subject to the Classification Act of 1949, as amended. No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade subject to such Act without having served at least one year in the next lower grade

employee must serve a full year in a GS-7 position before the employee can be eligible for promotion to GS-9. The agency states that the Comptroller General construes this "one full year" requirement to mean the period from a given date in one year to the close of the immediately preceding date in the following year.^{3/} Since the grievant's promotion to GS-7 was effective November 24, 1974, the agency maintains that the earliest possible date on which the grievant could have become eligible for promotion to GS-9 was November 24, 1975, and that therefore the arbitrator's award is contrary to law. The agency additionally asserts in support of this exception that by virtue of an agency policy, promotions are effectuated only at the beginning of a full two-week pay period for which an employee is eligible. Thus, it is argued that on this basis the earliest date upon which the grievant's promotion may be effective, "assuming the award was sufficient in other regards," is December 7, 1975.

Although the Council will grant review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law such as the Whitten Amendment, the Council is of the opinion that the agency's petition in the instant case fails to describe facts and circumstances to support its exception that the arbitrator's award violates the Whitten Amendment. In this respect, the Council notes that the agency in effect concedes that the statutory time-in-grade requirements of the Whitten Amendment, as interpreted by the Comptroller General in the decision cited by the agency, were satisfied as of the close of business on November 23, 1975. The award gives no indication on its face that the arbitrator ordered the grievant's promotion with backpay to be retroactive to the opening of business on November 23, 1975. Moreover, the agency has presented no facts and circumstances to show that the award must be implemented as of the opening of business on November 23, 1975, in violation of the Whitten Amendment, instead of the close of business on that date.^{4/} Accordingly, the agency's first

^{3/} The agency cites 46 Comp. Gen. 346 (1966).

^{4/} See section 12(a) of E.O. 11491, as amended, which pertinently provides:

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

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities

exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.^{5/}

In its second exception the agency contends that the collective bargaining agreement provision arbitrated lacks specificity, and therefore there was no nondiscretionary agency requirement to promote the grievant. In support of this exception, the agency asserts that Article 6, Section 1 of the negotiated agreement upon which the award is based does not incorporate by reference the entire Region III Merit Promotion Plan. Rather, the activity bilaterally established nondiscretionary agency policies limited to specific aspects of the regional plan that were within the activity's authority. Thus, the agency maintains that only a violation on the part of the activity of one of these specific contractual provisions could properly constitute an unwarranted personnel action that would permit retroactive promotion with backpay under the Back Pay Act of 1966.^{6/} Since the failure to process the promotion action was not due to any breach of contractual obligation on the part of the activity, and thus the "but for" test has not been met, the agency concludes that the award of backpay by the arbitrator is inappropriate.

The Council is of the opinion that the agency's second exception fails to state a ground upon which the Council grants review of an arbitration award pursuant to section 2411.32 of its rules of procedure. It appears that the agency's exception is derived from its disagreement with the arbitrator's interpretation of Article 6, Section 1 of the parties' collective bargaining agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitration award. E.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), 1 FLRC 544 [FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44]. Furthermore, as to the facts and circumstances described in support of this exception, the Council notes that although the agency asserts that there

^{5/} As to the agency's assertions in support of this exception that, on the basis of an agency policy that provides that promotions are to be effectuated only at the commencement of the first full pay period following eligibility, the grievant may not be promoted prior to December 7, 1975, the Council is of the opinion that the agency has failed to describe facts and circumstances to show in what manner the agency policy relates to its exception that the award violates the Whitten Amendment. In this regard, the agency fails to show that the statutory time-in-grade requirements of the Whitten Amendment provide for the additional constraints reflected in the agency policy. (The agency does not contend and the Council does not pass upon the question of whether the agency policy is an appropriate regulation within the meaning of section 2411.32 of the Council's rules of procedure.)

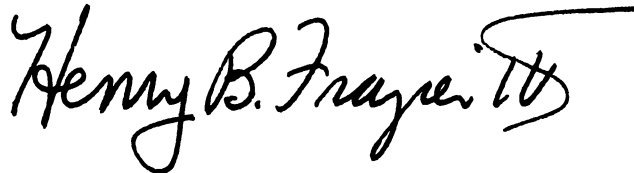
^{6/} 5 U.S.C. § 5596 (1970).

was no breach of the negotiated agreement and consequently an award of backpay is improper, the arbitrator specifically found that "[t]he facts before us, the testimony and exhibits introduced indicate a violation of Article 6 (Merit Promotion), Section 1." Moreover, he affirmatively answered the stipulated issue as to whether the activity violated the collective bargaining agreement by its failure to timely promote the grievant and whether, except for that failure, the grievant would have been promoted.^{7/} Accordingly, the agency's second exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In summary, the agency's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay of the award is also denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: M. G. Blatch
AFGE

7/ Cf. Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 125 at 5 of the Council's decision where the Council stated:

[I]t is now well established by the Comptroller General's decision in 54 Comp. Gen. 312 (1974) and its progeny, that in order for an arbitrator's award of backpay to be sustained under the Act and the implementing regulations thereto, that the arbitrator must specifically find that the agency violated the collective bargaining agreement, or find other improper agency action constituting an unjustified or unwarranted personnel action within the meaning of the Act, and that the arbitrator must further specifically find that such improper agency action directly caused the aggrieved employee to suffer a withdrawal, reduction or denial of pay, allowances, or differentials -- that is, that the withdrawal, reduction or denial of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action. [Emphasis in original; footnote omitted.]

Puget Sound Naval Shipyard and Bremerton Metal Trades Council, AFL-CIO (Smith, Arbitrator). The arbitrator concluded that there was insufficient evidence to justify the contention of the grievants that they should have been paid environmental pay for the work in question, and denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on exceptions alleging (1) in effect, that the arbitrator misinterpreted the submission agreement, and (2) that the shipyard violated applicable law and appropriate regulation.

Council action (June 7, 1977). The Council held that the union's exceptions did not state a ground upon which the Council will grant review of an arbitrator's award. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 7, 1977

Mr. William K. Holt, President
Bremerton Metal Trades Council
P.O. Box 448
Bremerton, Washington 98310

Re: Puget Sound Naval Shipyard and Bremerton
Metal Trades Council, AFL-CIO (Smith,
Arbitrator), FLRC No. 76A-146

Dear Mr. Holt:

The Council has carefully considered your petition for review of an arbitration award in the above-entitled case.

According to the arbitrator's award, the dispute in this matter arose when four shipwrights, having completed the construction of staging on the mast of the USS Bainbridge, requested environmental pay differential, claiming that the platform upon which the staging was constructed was unstable and that their footing was unsure. The shipyard, however, concluded that such pay was not warranted. The union then filed a grievance which proceeded to arbitration.

The stipulated issue submitted to arbitration was:

Did management violate the Negotiated Agreement (Article 15)^{1/} by denying the grievants four hours high work differential for constructing the staging on the structural platform of the main mast on the USS Bainbridge. [Footnote added.]

In his "DISCUSSION AND OPINION" accompanying his award, the arbitrator referred to the guidelines for the payment of environmental differential set forth in appendix J to Federal Personnel Manual Supplement 532-1 (incorporated in the agreement)^{2/} and stated that payment of environmental

^{1/} Article 15 of the parties' negotiated agreement is entitled "ENVIRONMENTAL DIFFERENTIALS" and, in general, provides for the payment of environmental differentials in accordance with the pertinent provisions of FPM Supplement 532-1 and appendix J thereto.

^{2/} FPM Supplement 532-1, appendix J, entitled "Schedule of Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature," provides in pertinent part:

(Continued)

differential in this case would depend upon the unusually severe nature of the work due to unsure footing and unstable structure. In this regard he found:

The time to have established this would properly have been while the work was being performed and the hazard existed. This was not done here due to the failure of the shipwrights to call attention of supervision to the alleged unsure footing or unstable structure while they existed. By the time the request for environmental pay was made the structure was found to be stable.

The arbitrator also found that no specific evidence had been presented that environmental pay due to unsure footing or unstable structure had ever been granted by the shipyard when the request was made after the hazardous work was completed. As his award the arbitrator denied the grievance, concluding that there was insufficient evidence to justify the contention of the grievants that they should have been paid environmental pay for the work in question.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exceptions discussed below:

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law,

(Continued)

PART I: PAYMENT FOR ACTUAL EXPOSURE

.

2. High Work.

.

b. Working at [a height less than 100 feet above the ground]:

(1) If the footing is unsure or the structure is unstable; or

(2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, a similar support;

.

appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception the union asserts that the arbitrator limited his authority to the interpretation of Article 15 of the agreement and, despite the union's allegations that Article 5 (Provisions of Law and Regulations) and Article 26 (Safety and Health) had been violated, the arbitrator nevertheless concluded that these two articles of the agreement would "not be covered by this report since they are outside his authority."

In effect, the union appears to be contending that the arbitrator misinterpreted the submission agreement when he concluded that his authority under that submission agreement was limited to consideration of Article 15 of the negotiated agreement and did not extend to Articles 5 and 26. This exception, that the submission agreement has been misinterpreted by the arbitrator, does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32 of the rules.^{3/} Cf. Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82. The Council has previously pointed out that "the basic purpose of a submission agreement is to specify in writing the disputed issue and to formulate it as a question or questions to be posed before the arbitrator. The submission agreement . . . sets forth issues to be arbitrated in precise language, which defines and circumscribes the authority of the arbitrator." [Emphasis in original; footnote omitted.] Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101 at 6 of the decision. In the present case the Council notes that the issue stipulated to by the parties refers only to Article 15 and that the arbitrator, apparently in response to the allegations of violations of

^{3/} The Council emphasizes that in its exception the union has not alleged, nor do there appear to be any facts and circumstances presented in the petition to indicate, that the arbitrator exceeded the scope of his authority under the submission agreement. See Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101. In fact, the union's petition in this case alleges the very opposite. That is, the union alleges herein that the arbitrator was mistaken in his conclusion that his authority was limited to an interpretation and application of Article 15 of the agreement. The union herein contends, in effect, that the scope of the arbitrator's authority went beyond Article 15 and extended to the interpretation and application of Articles 5 and 26.

other provisions of the agreement raised by the union at the arbitration hearing, stated that the stipulated issue agreed to by the parties limited his authority to deciding whether or not Article 15 of the agreement was violated. Thus, in these circumstances, the union's exception contending that the arbitrator failed to consider whether other provisions of the agreement had been violated does not state a ground upon which the Council will grant a petition for review. Therefore, no basis is provided by the first exception for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitrator "disregarded law and regulations of safety and health which have a direct bearing on any case that has its roots vested in environmental conditions" since the award is "not germane with P.L. 91-596 and not in keeping with OSHA standards governing provisions for erecting staging." In support of this exception, the union alleges that in the activity's design measurements for erecting the staging there was a violation of OSHA Standards.

The union's exception, on its face, alleges that the shipyard, by allegedly failing to comply with OSHA Standards in the design measurements for the staging, violated applicable law and appropriate regulation, rather than the arbitrator's award (wherein the arbitrator answered the question submitted to him and found that the employees were not entitled to environmental pay differential under the pertinent provision of the agreement) violates applicable law and appropriate regulation. This exception does not assert a ground upon which the Council will accept a petition for review of an arbitration award. See Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator), FLRC No. 75A-95 (Jan. 22, 1976), Report No. 96. Therefore, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. R. Nunneley
Puget Sound Naval Shipyard

Internal Revenue Service, Chicago District Office and National Treasury Employees Union Chapter 10 (Mueller, Arbitrator). This appeal arose from the arbitrator's award ordering the activity to pay two grievants per diem commensurate with their assignment to temporary posts of duty outside their normal commuting areas. The agency appealed to the Council; and, concurrently, submitted to the Comptroller General for his consideration the question of whether the arbitrator's award of partial day per diem expenses was in accord with governing laws and regulations and, thus, whether the agency had the authority to implement the award. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged, in substance, that the award violated applicable law and regulation as interpreted by the Comptroller General. In accepting the agency's petition for review of this issue, the Council also rejected the agency's attempted limitation of Council review as to matters of applicable law as improper under section 2411.32 of its rules of procedure. The Council also granted the agency's request for a stay of the arbitrator's award. (Report No. 122.) Subsequent to the Council's acceptance of the agency's appeal, and pending the filing of briefs by the parties, the Comptroller General issued a decision in response to the agency's above-mentioned request for a ruling.

Council action (June 7, 1977). The Council concluded that the arbitrator's award required clarification and interpretation as to his finding therein with regard to the extent of the particular commuting area involved, and as to whether the grievants lived within or without that area. Accordingly, as suggested by the Comptroller General in his decision, and pursuant to section 2411.37(b) of its rules of procedure, the Council remanded the award to the parties with direction to resubmit the award to the arbitrator for that limited purpose. The Council also vacated the stay of the award which it had previously granted.

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

Internal Revenue Service,
Chicago District Office

and

FLRC No. 76A-150

National Treasury Employees Union
Chapter 10

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award ordering the activity to pay two grievants per diem commensurate with their assignment to temporary posts of duty outside their normal commuting areas.

Based upon the findings of the arbitrator and the entire record, it appears that one grievant at the activity was temporarily assigned to a work location in Chicago which required him to leave home earlier and arrive home later than was usual when commuting to his permanent duty station in Joliet, Illinois. He filed vouchers averaging approximately \$100 per month in "partial per diem" for the additional expenses he incurred, and the vouchers were paid by the activity for several months. The grievant was then advised that such per diem payments were unauthorized and would be discontinued, and that he would be required to repay more than \$700 in per diem funds previously paid to him. A few months later the second grievant was temporarily assigned to a work location also in Chicago, thereby increasing his travel time and expenses over those normally incurred when commuting to his permanent duty station in Waukegan, Illinois. He filed a voucher requesting per diem reimbursement for the week of his temporary assignment, and the activity denied his voucher. When both grievants grieved, the activity asserted that the grievants had been temporarily assigned to work locations in the same "commuting area" as that in which they lived, and therefore, pursuant to agency travel regulations,^{1/} they could not be paid "short absence per diem."

^{1/} The applicable agency regulation in this case, section 341(2) of Internal Revenue [IR] Manual 1763, provides:

Per diem will be allowed employees assigned to temporary duty outside the commuting area of his official post of duty, except

(Continued)

Arbitrator's Award

The parties stipulated the issue before the arbitrator as whether the two grievants were entitled to certain payments "for per diem expenses under the provisions of Article 27, § 3(A) of the Multi-District Agreement."^{2/} The arbitrator found that the travel regulations set forth certain criteria for the establishment of commuting areas which the activity had failed to observe in this case. As a result, the arbitrator held that the activity's denial of per diem payments, being predicated on a commuting area not in conformance with the requirements of agency travel regulations, violated the negotiated agreement of which those regulations were a part. He went on to say, "It is anticipated and suggested that the IRS will subsequently establish a 'commuting area' pursuant to the criteria and considerations expressed in Section 341(2) [of Internal Revenue Manual 1763]." However, as his award, the arbitrator sustained the grievances and directed that the grievants "be made whole and compensated the per diem to which they are entitled within the meaning and application of the travel regulations on the basis that they were required to travel to a temporary post of duty from their residence outside of the commuting area of the temporary post." [Emphasis added.]

(Continued)

that per diem will not be allowed employees whose permanent residence (from which he commutes daily to his official station) is within the commuting area of the place of temporary duty. "Commuting area" is defined as the geographical area which usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities within which people live and can reasonably be expected to travel back and forth daily to their usual employment. The maximum extent of the area should be determined by the accepted practice, or what can reasonably be expected, based on availability and cost of public transportation, convenience and adequacy of highways, and/or the travel time to and from work.

2/ Article 27 § 3(A) of the Multi-District Agreement provides:

The Employer agrees to reimburse employees when in a travel status for per diem and mileage expenses incurred by them in the discharge of their official duties to the extent that:

A. The normal per diem will be the average of a traveler's lodging cost for the voucher period plus ten dollars (\$10) for meals and miscellaneous expenses up to a maximum of twenty-five dollars (\$25) per day.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Concurrently, the agency submitted to the Comptroller General for his consideration the question of whether the arbitrator's award of partial day per diem expenses is in accord with governing laws and regulations and thus whether the agency has the authority to implement the arbitration award in the instant case. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged, in substance, that the award violates applicable law and regulation as interpreted by the Comptroller General.^{3/}

Subsequent to the Council's acceptance of the agency's appeal, and pending the filing of briefs by the parties under section 2411.36 of the Council's rules, the Comptroller General issued a decision^{4/} in response to the agency's request for a ruling as to whether the agency has the authority to implement the arbitration award in the instant case. In that decision the Comptroller General concluded in part that the award should be resubmitted to the arbitrator essentially to clarify the extent of the Chicago commuting area under the criteria in Internal Revenue Manual 1763 § 341(2). Prior to further Council action, the Council requested that the parties notify it of "what action they plan to take with respect to the decision of the Comptroller General and whether there is a further need for processing the agency's petition for review." The parties were given an opportunity to submit their positions with respect to this matter, and both the agency and the union made submissions.

3/ In accepting this issue for review, the Council stated:

While the agency, in its appeal, indicated that this issue was submitted for separate consideration by the Comptroller General rather than by the Council, such attempted limitation of Council review as to matters of applicable law is improper under section 2411.32 of the Council's rules and is rejected. Under well-established Council procedures adopted in accordance with these rules, if an appeal is taken to the Council from an arbitration award and such appeal involves the propriety of that award under Comptroller General decisions, the Council, upon acceptance of the petition for review on this ground and if deemed appropriate, uniformly refers the matter to the Comptroller General along with all the relevant case papers and, following a ruling by the Comptroller General, issues its decision in the case. In this manner, all issues raised with respect to an appeal to the Council from an award are effectively resolved in a single proceeding and the rights of the parties are thereby preserved. [Citation omitted.]

4/ Comptroller General decision B-180010.11, March 9, 1977

In its brief, the agency takes the position that the Comptroller General's decision in the instant case "clearly establishes that there is no legal basis for making the payments" directed by the arbitrator since the arbitrator's decision "is contrary to governing regulations. Therefore, this award may not be implemented." The agency further asserts that "there is no contractual basis for remanding this matter to [the arbitrator] for definition of the commuting area for the Chicago District Office Headquarters. . . . [T]o remand this decision to [the arbitrator] . . . would require the parties to relitigate the initial controversy and would also require the arbitrator to modify his initial award."^{5/}

The union, in its submissions, contends that the Comptroller General's conclusion that the arbitrator did not determine the extent of the Chicago commuting area in this case is "incorrect," and that "[t]he arbitrator's award does in actuality contain a commuting area created by the arbitrator (i.e., one hour's commuting time from the Chicago District headquarters office) which satisfies the regulatory requirements referenced by the [Comptroller General]. For this reason, the arbitrator's award should be affirmed" In the alternative, the union asserts that "the award should be remanded to the arbitrator for further findings of fact on what the commuting area should be, consistent with the [Comptroller General's] decision." The union states that a remand or resubmission to the arbitrator is appropriate in this case because it "would merely serve to clarify or complete the arbitration process, and would not serve to relitigate the case or modify the award in any way."

Opinion

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

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

Upon careful consideration of both the union's and the agency's submissions, as well as the entire record in the case, the Council is of the opinion that the arbitrator's award requires clarification and interpretation. In this regard, the arbitrator's award is unclear as to whether he made the requisite finding of the extent of the Chicago commuting area which is critical in determining whether the grievants were entitled to "short absence per diem." Thus, as previously indicated, at one point in his award the arbitrator stated that "[i]t is anticipated and suggested that the IRS will subsequently establish a 'commuting area'

^{5/} The agency also contends, in effect, that the arbitrator is without authority to define the Chicago commuting area. In substance, the agency is challenging the Comptroller General's decision, not the award of the arbitrator. This is not a matter properly subject to Council consideration in this proceeding.

pursuant to the criteria and considerations expressed in [the applicable agency regulation]." On the other hand, the arbitrator later concluded that the grievants were "required to travel to a temporary post of duty from their residence outside of the commuting area of the temporary duty post," which implicitly indicates that the arbitrator had made a determination himself as to the extent of the commuting area. It is thus unclear from the language of the award whether the arbitrator defined the extent of the Chicago commuting area, and such conclusion is further supported by the conflict between the parties. In this respect, the agency's position reflects a basic premise, among others, that the arbitrator did not determine the extent of the Chicago commuting area in awarding the grievants per diem in this case, while the union maintains that he did define such commuting area. Thus, it is clear that there exists between the parties a dispute as to whether or not the arbitrator, in his opinion and award, made a finding satisfying requirements in the applicable agency regulation with respect to the extent of the Chicago commuting area in the circumstances of this case.

Conclusion

Accordingly, as suggested by the Comptroller General in his decision in the instant case and pursuant to section 2411.37(b) of the Council's rules of procedure, the award shall be remanded to the parties with direction to resubmit the award to the arbitrator for clarification and interpretation. The resubmission to the arbitrator is not for the purpose of relitigating or modifying the award but rather is for the limited purpose of clarifying and interpreting the award. Specifically, the resubmission is for the purpose of having the arbitrator clarify and interpret his award as to his finding therein with regard to the extent of the Chicago commuting area under the criteria contained in the applicable agency regulation and as to whether the grievants lived within or without that commuting area.^{6/}

For the foregoing reasons, the award is hereby remanded to the parties and the stay of the award previously granted by the Council is hereby vacated.^{7/}


Henry B. Frazier III
Executive Director

Issued: June 7, 1977

6/ Accord, Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100.

7/ Following clarification of the award by the arbitrator, either party may file a new petition for review of the award as clarified under section 2411.32 of the Council's rules.

Departments of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local Union 2921 (Schedler, Arbitrator). This appeal arose from the arbitrator's award wherein he found that the agency had violated the parties' agreement and directed the agency to offer the grievant a work assignment in Arlington, Texas, as a Procurement Assistant at the highest grade 8 step. On March 3, 1976, the Council denied the agency's petition for review as untimely filed (Report No. 100). Subsequently, on May 20, 1976, the Council granted the agency's request for reconsideration of that earlier decision, and extended the time limits for filing an opposition to Council acceptance of the subject petition (Report No. 105). The Council thereafter accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated section 12(b)(2) and 12(b)(5) of the Order, and granted the agency's request for a stay (Report No. 112).

Council action (June 21, 1977). The Council found that the arbitrator's award, insofar as it ordered the agency to offer the grievant a Procurement Assistant position at Arlington, Texas, at the highest grade 8 step, violated section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by striking the portion thereof found violative of the Order. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Departments of the Army and the Air Force,
Headquarters Army and Air Force Exchange
Service, Dallas, Texas

and

FLRC No. 76A-20

American Federation of Government
Employees, Local Union 2921

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing the activity to offer the grievant "a work assignment in Arlington, Texas as a Procurement Assistant at the highest grade 8 step."

Based upon the arbitrator's award and the entire record before the Council, it appears that this dispute concerns a grievance which contended that the grievant was denied equal opportunity for upward mobility primarily as a result of her position as a past union officer and in violation of the parties' negotiated agreement when the activity refused to promote the grievant to a grade 7 level and permit her to transfer to either Arlington, Texas, or Atlanta, Georgia.

The Arbitrator's Award

The parties submitted the following issue to arbitration:

Whether the Army - Air Force Exchange Service, under the facts stipulated and elicited at this Hearing, violated any part of the following provisions of the Agreement between the parties:

Article XX, Sections 1, 2, 3, 4, 5, & 6
Article XXIV, Section 1
Article XXVI, Section 1^{1/}

^{1/} According to the award, these articles of the negotiated agreement are entitled as follows:

Article XX - PROMOTIONS, DOWNGRADES AND DETAILS
Article XXIV - JOB ANALYSIS AND EVALUATIONS
Article XXVI - EMPLOYEE UTILIZATION

In the opinion accompanying his award, the arbitrator stated that it appeared to him, "after carefully reading Article XX Section 1 and Article V Section 1 [of the negotiated agreement], that it was incumbent upon the Agency to take extraordinary precautions to prevent anti-union bias from affecting an employee's [career] progression" and that "the Grievant's position as an officer in the Union made her vulnerable to anti-union bias" The arbitrator then concluded, "after carefully considering all the evidence, that the Grievant's lack of [career] progression . . . was due to her position as a past Union officer." The arbitrator further found that the evidence disclosed that the grievant was willing to transfer to Arlington, Texas, and that the agency was planning a position in Arlington. The arbitrator therefore made the following award:

After a careful consideration of all the evidence, the post Hearing briefs, and upon the foregoing findings of fact I find that the Agency has violated the Agreement. The Agency will immediately offer [the grievant] a work assignment in Arlington, Texas as a Procurement Assistant at the highest grade 8 step.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleges that the award violates section 12(b)(2) and 12(b)(5) of the Order.^{2/} The union filed a brief.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception which alleges that the award violates section 12(b)(2) and 12(b)(5) of the Order.^{3/}

^{2/} The agency requested and the Council granted under section 2411.47(f) of its rules of procedure a stay of the arbitrator's award.

^{3/} Section 12(b)(2) and 12(b)(5) provide:

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

.
(Continued)

With respect to the issue presented by acceptance of that portion of the agency's exception which alleges that the award violates section 12(b)(2), the Council has consistently held that the rights reserved to management under section 12(b)(2) of the Order are mandatory and cannot be bargained away. Thus, in VA Research Hospital, the Council stated:

Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel actions, i.e., to hire, promote, etc. The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority. [Emphasis added.]^{4/}

The Council applied its holding in VA Research Hospital in National Council of OEO Locals^{5/} wherein the Council held that management's reserved authority to decide and act concerning the personnel actions enumerated in section 12(b)(2) may not be infringed by an arbitrator's award under a negotiated grievance procedure. In that case the Council was presented with the question of whether a portion of an arbitrator's award directing management to fill the position in question conflicted with rights reserved to management under section 12(b) of the Order. In modifying the award by striking the portion thereof which directed management to fill a particular position, the Council stated that "implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action." [Emphasis in original.] Thus, the Council held that the arbitrator's award directing management to fill the position in question in that case interfered with management's reserved authority to decide whether or not to hire, promote, transfer or assign employees under section 12(b)(2) of the Order.

(Continued)

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

.

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

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

^{5/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

In the instant case, on the basis of the arbitrator's finding of a violation by the activity of the negotiated agreement that impeded the grievant's career progression, the arbitrator, in essence, ordered that a Procurement Assistant position at Arlington, Texas, be filled by the grievant at the highest grade 8 step. In the Council's opinion, based upon the principles stated in National Council of OEO Locals, supra, that portion of the arbitrator's award in the instant case that orders that the grievant be offered a work assignment as a Procurement Assistant at the highest grade 8 step infringes agency management's authority reserved by section 12(b)(2) not to act in filling a particular position. That is, management's reserved authority under section 12(b)(2) of the Order clearly includes the discretion and authority to decide not to fill the Procurement Assistant position at Arlington, Texas, by promotion of the grievant. The award, in the circumstances presented here, improperly directs the agency to fill the particular position without regard for agency management's authority to decide not to fill the position reserved to it by section 12(b)(2). The arbitrator's award abridges the agency's authority by ordering that a Procurement Assistant position at Arlington, Texas, be filled with the grievant at the highest grade 8 step.^{6/} Accordingly, that portion of the arbitrator's award ordering the agency to offer the grievant a Procurement Assistant position at Arlington, Texas, at the highest grade 8 step interferes with authority reserved solely to management under section 12(b)(2) "to hire, promote, transfer, assign, and retain employees in positions within the agency" and may not be sustained.

^{6/} The agency contended that the arbitrator in this case went even further than the arbitrator did in the OEO case in that here the arbitrator directed management to create and establish a position and then to fill the job by offering it to the grievant. To the contrary, the union maintains that the arbitrator did not direct the creation and establishment of such position, but rather that the arbitrator factually determined that such position existed and that the concomitant duties were being performed. According to the union, the arbitrator did no more than direct corrective action to redress the injury suffered by the grievant. Alternatively, the union asserts that in order for the Council to find that the award violates the Order, it must make a factual determination as to the existence of such position. Since it is contended that no such decision may be made without a hearing, the union requests a hearing as to this matter. However, in view of the Council's disposition of this case, resolution of the question of whether there exists the position which the arbitrator ordered offered to the grievant is not necessary. Thus, whether the particular position has already been established and still exists, or whether it remains to be established, is irrelevant to the propriety of the arbitrator's award ordering such position to be filled with the grievant. Regardless of whether the arbitrator found that the position exists or whether he ordered it to be established, management retains the authority under section 12(b)(2) to decide whether or not to fill the position.

Conclusion

For the foregoing reasons, we find that the arbitrator's award insofar as it orders the agency to offer the grievant a Procurement Assistant position at Arlington, Texas, at the highest grade 8 step violates the Order by interfering with rights reserved to management officials under section 12(b)(2).^{7/} Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's "Award" by striking the last sentence thereof that reads as follows:

The Agency will immediately offer [the grievant] a work assignment in Arlington, Texas as a Procurement Assistant at the highest grade 8 step.

As so modified, the award is sustained and the stay is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 21, 1977

^{7/} In view of our decision herein under section 12(b)(2), it is unnecessary to reach, and we therefore make no ruling upon the parties' contentions with respect to section 12(b)(5).

National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration. The dispute involved the negotiability under the Order of union proposals that would require the agency to give "preference" to the categories of individuals enumerated therein over other individuals when filling certain vacant positions.

Council action (June 21, 1977). The Council held that the proposals conflicted with section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the proposals were nonnegotiable.

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

National Maritime Union
of America, AFL-CIO

(Union)

and

FLRC No. 76A-79

National Oceanic and
Atmospheric Administration

(Agency)

DECISION ON NEGOTIABILITY ISSUE

Proposals

Proposal No. 1:

That hiring preference be given to applicants who have endorsements of the U.S. Coast Guard for the positions they seek.

Proposal No. 2:

Employees who have satisfactorily completed 90 days of employment and are thereafter laid off should be given rehire preference for positions in the same department over inexperienced seamen applicants when positions aboard NOAA agency vessels become available.

Agency Determination

The agency determined that both proposals are nonnegotiable because they conflict with section 12(b)(2) and section 12(b)(5) of the Order.

Question Before the Council

Whether the proposals are nonnegotiable under section 12(b)(2) or section 12(b)(5) of the Order.

Opinion

Conclusion: The proposals conflict with section 12(b)(2) of the Order. Thus, the agency determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(2) provides as follows:

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

.

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

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

Section 12(b) of the Order enumerates the rights reserved to management under any collective bargaining agreement. Specifically, in the VA Research Hospital case the Council stated:^{1/}

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

Both proposals would require the agency to give "preference" to the categories of individuals enumerated therein over other individuals when filling certain positions in the agency.

The union asserts that its proposals do not conflict with any rights reserved to management by section 12(b) of the Order. NMU argues in substance that the proposals constitute procedures to be followed in exercising reserved rights.^{2/} Specifically the union states:

The agency would retain the right to hire and determine the personnel by which to conduct their operations. They would, if the proposals were adopted, merely be required to give consideration to additional criteria in making such determinations.

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

2/ To support its contention that the proposals are negotiable, the union also cites two provisions in the current agreement which it alleges are analogous to the proposals herein and to which the agency raised no objections. Without passing upon the validity of these provisions under the Order or upon their alleged similarity to the proposals in dispute, the union's argument is without controlling significance. As we stated in International Association of Machinists and Aerospace Workers and U.S. Kirk Army Hospital, Aberdeen, Md., 1 FLRC 65 [FLRC No. 70A-11 (Mar. 9, 1971), Report No. 5]:

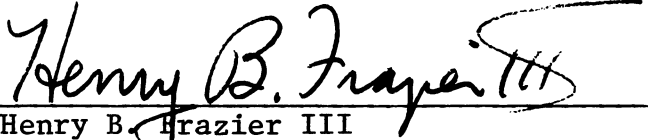
Although other contracts may have included such provisions, as claimed by the union, this circumstance cannot alter the express language and intent of the Order and is without controlling significance in this case.

We disagree. It is clear that the proposals at issue would require the agency to do more than "consider" certain additional criteria in hiring employees for agency vacancies.

Rather than calling for the "consideration" of certain criteria in selecting applicants for agency vacancies, the record indicates that the proposals would establish "preference" for the categories of job seekers described therein. That is, the proposals would establish a positive requirement that the categories of job seekers described therein be hired or rehired ahead of any other job seekers. Thus, the language of the proposals, through the use of the phrases "hiring preference" and "rehire preference" clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had been made to fill a position through the hiring process. The proposals would deprive the selecting official of the required discretion inherent in making such a decision.^{3/}

The union's proposals, which would require management to give preference to individuals who fall within the particular categories described therein, i.e., who meet the criteria described therein, impose constraints upon and clearly interfere with management's authority to hire employees in positions within the agency under section 12(b)(2) of the Order. Accordingly, we find that the proposals violate section 12(b)(2) of the Order.^{4/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 21, 1977

3/ Cf. Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Maryland, 1 FLRC 525 [FLRC No. 72A-18 (Sept. 17, 1973), Report No. 44] at 538 (promotion decision) and American Federation of Government Employees, AFL-CIO, Local 1960 and Naval Air Rework Facility, Pensacola, Florida, 1 FLRC 571 [FLRC No. 73A-24 (Oct. 18, 1973), Report No. 45] (promotion decision).

4/ Since the proposals have been found to infringe upon section 12(b)(2) rights, it is unnecessary to address the agency's contention that they also violate rights reserved to management by section 12(b)(5) of the Order.

General Services Administration, Region 3 and American Federation of Government Employees, Local 2151, AFL-CIO (Cass, Arbitrator). The arbitrator found that the activity violated a provision in the parties' agreement which required, in pertinent part, that a temporary assignment for more than 30 consecutive calendar days of an employee to a higher graded position be made by temporary promotion. As his award, the arbitrator, in essence, directed that the grievants be temporarily promoted for the period of time from the first day of the first pay period following the initial 30 calendar days of their assignments to the higher graded position in question, until the conclusion of those assignments, and that they be compensated with appropriate backpay. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception alleging that the award, insofar as it directed the temporary promotion of the grievants for periods in excess of 120 days, violated appropriate regulations. The agency also requested a stay of the award.

Council action (June 21, 1977). The Council held that the agency's petition failed to present the necessary facts and circumstances to support its exception. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 21, 1977

Mr. Edward P. Denney
Labor-Management Relations Officer
General Services Administration,
Region 3
Washington, D.C. 20407

Re: General Services Administration, Region 3 and
American Federation of Government Employees,
Local 2151, AFL-CIO (Cass, Arbitrator), FLRC
No. 77A-20

Dear Mr. Denney:

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

According to the arbitrator's award, the grievants were officially employed in the Public Buildings Service of the General Services Administration, Region 3 (the activity) as journeyman-level mechanics. For the period beginning July 21, 1975, and ending August 14, 1976, one of the grievants was detailed from the position of Boiler Plant Operator, WG-10, to the position of Boiler Plant Operator, WG-11. The other grievant was detailed from the position of Boiler Plant Operator, WG-10, to the position of Boiler Plant Operator, WG-11, for the period beginning October 1, 1974, and ending July 3, 1976. The position of Boiler Plant Operator, WG-11, to which both grievants were detailed is a position above the journeyman level. The grievants filed grievances resulting in the instant arbitration, contending that the activity had violated various provisions of the parties' negotiated agreement, including Article XII,^{1/} and that, therefore, for the periods of time they had been performing work at a higher grade than that to which they were officially assigned they were entitled to temporary promotions.

The arbitrator stated the issue before him as: "Should the temporary promotions of [the grievants] terminate at the end of 120 days or at the end of the higher-grade assignments?"

1/ Article XII (TEMPORARY PROMOTIONS) states:

A temporary assignment for more than 30 consecutive calendar days of an employee to a higher grade position which is above the journeyman level shall be made by temporary promotion. The temporary promotion shall become effective as of the beginning of the first pay period following the end of the said 30-day period.

Before the arbitrator the activity conceded that it had violated Article XII of the negotiated agreement and took the position that the grievants should receive temporary promotions from the beginning of the first pay period following the end of the initial 30 calendar day period of the assignment and continuing through the 120th day of the assignment as provided in the agreement, but stated that "granting the grievants temporary promotions, with back pay, beyond these dates . . . would constitute a violation of binding government regulations."2/

The arbitrator found that there was a violation of Article XII and that the temporary assignments should have been made by temporary promotions as required by that agreement provision. Further, the arbitrator concluded, "As made clear by the decisions of the Comptroller General and the Federal

2/ According to the award, the activity argued before the arbitrator that granting the grievants retroactive temporary promotions in excess of 120 days under the circumstances of this case would violate the provisions of subchapter 4, chapter 335 of the Federal Personnel Manual which provide in pertinent part as follows:

4-3. PROMOTIONS AS EXCEPTIONS TO COMPETITIVE PROCEDURES

a. General provisions. (1) An agency may make a promotion as an exception to competitive promotion procedures in any of the situations identified below if it finds the exception appropriate and if its internal instructions provide for exception under the circumstances.

.

e. Promotion to a higher grade for 120 days or less. An agency may make a temporary promotion limited to 120 days or less as an exception to competitive promotion procedures. This exception is not to be used to circumvent competitive promotion requirements by a series of temporary higher-level assignments. Therefore, competitive promotion procedures must be used if after completing the period of service under temporary promotion an employee will have spent more than 120 days (prior service under details and previous temporary promotions included) in high-grade positions during the preceding year.

4-4 TEMPORARY PROMOTIONS

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b. Making a temporary promotion. Competitive promotion procedures must be used when a temporary promotion will exceed 120 days. When a temporary promotion is made as an exception to competitive procedures (see section 4-3e), any extension beyond 120 days must comply with these procedures.

Labor Relations Council,^{3/} the Employer can and must process the temporary promotions for [the grievants] for the periods during which they performed the higher graded work and must compensate them with back pay for the wages they lost by performing the WG-11 assignments at their WG-10 rates of pay." [Footnote added.]

Accordingly, the arbitrator awarded as follows:

[That each grievant] be awarded a temporary promotion for the period beginning from the first day of the first pay period following the first 30 calendar days of his WG-11 assignment and continuing until the conclusion of that assignment and be compensated with back pay for the difference between the wages he actually received during that period and the wages he would have received at the WG-11 level.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below and requests a stay of the award. The union filed an opposition.

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

In its exception, the agency contends that the arbitrator's award directing noncompetitive promotions for periods exceeding 120 days violates title 5, Code of Federal Regulations, chapter 1, subchapter B, part 335, and the Federal Personnel Manual, chapter 335, subchapter 4-3 and 4-4^{4/} since competitive promotion procedures must be used for the periods of the temporary promotions in excess of 120 days. In addition, the agency refers

3/ The arbitrator referred to Social Security Administration, Headquarters Bureaus and Offices in Baltimore, Maryland and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Feldesman, Arbitrator), FLRC No. 75A-119 (Apr. 13, 1976), Report No. 103, wherein the Council, in denying a petition for review of an arbitration award granting a grievant a retroactive temporary promotion and backpay, stated with regard to agency arguments similar to those concerning FPM chapter 335, subchapter 4 made before the arbitrator in the instant case, that under applicable Civil Service Commission and Comptroller General decisions: "where an agency fails to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position." [Citing Comptroller General decision B-183086, December 5, 1975; emphasis in original.]

4/ See note 2, supra.

to the Council precedent relied upon by the arbitrator, FLRC No. 75A-119,^{5/} and asserts that such precedent is contrary to the Supreme Court's decision in United States v. Testan.^{6/}

The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulations. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception that the arbitrator's award is violative of the cited provisions of the Code of Federal Regulations and the Federal Personnel Manual. Thus, because the facts and circumstances described by the agency in support of its exception have been specifically addressed by the Civil Service Commission in its recent issuance concerning the relevant provisions of the Federal Personnel Manual to the effect that neither the Supreme Court's decision in Testan nor Commission regulations concerning competitive promotion procedures would bar the granting of a retroactive promotion and backpay in the circumstances of this case, as contended by the agency, the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances to support its exception that this award violates appropriate regulations.^{7/}

^{5/} See note 3, supra.

^{6/} 424 U.S. 392 (1976).

^{7/} In this regard, the Council notes that the Civil Service Commission has issued Bulletin No. 300-40, dated May 25, 1977, Subject: "GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Over-long Details to Higher Graded Jobs (B-183086)," wherein the Commission provided agencies information to assist in applying the Comptroller General's decision awarding backpay for retroactive temporary promotions of employees detailed to higher graded positions beyond 120 days without prior Civil Service Commission approval. (Comptroller General decision B-183086, December 5, 1975, reconsidered and reaffirmed, March 23, 1977. See note 3, supra.) In this Bulletin the Commission states with respect to the application of competitive promotion procedures for temporary promotions in excess of 120 days:

Application of competitive procedures is required for temporary promotions which will exceed 120 days. Therefore, an employee who served in a higher graded job beyond 120 days without Commission approval generally should have been initially selected under competitive procedures for that assignment. There may be instances where competition for the assignment should have but did not occur. Because of the limited applicability of the decision and because of the difficulty of applying retroactivity in this type of case, agencies will not be required to reconstruct past actions for purposes of retroactively granting promotion under competitive procedures in cases arising under that decision. [Emphasis added.]

(Continued)

Accordingly, the Council has denied review of the agency's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: M. Blatch
AFGE

(Continued)

Thus, it is indicated that in cases where an employee has been detailed to a higher graded position in excess of 120 days contrary to the requirements of the Federal Personnel Manual, the requirements contained therein concerning the use of competitive promotion procedures will not serve to bar the granting of a retroactive temporary promotion with backpay under such circumstances.

Further, with respect to application of the Supreme Court's decision in United States v. Testan the Commission states:

For purposes of this decision, the position must be an established one, classified under an occupational standard to a grade or pay level. As the decision notes, the Supreme Court recently ruled in United States v. Testan that classification actions upgrading a position may not be made retroactive so as to entitle an incumbent to backpay. Care must be taken to distinguish between employee claims based on details to higher graded positions, and to claims based on a classification action; only the former may be considered for retroactive correction under the decision. [Emphasis in original.]

Local 916, American Federation of Government Employees, AFL-CIO and Tinker Air Force Base, Oklahoma. The Council granted the American Federation of Government Employees (AFGE) an extension of time until the close of business on February 11, 1977, to file an appeal from the agency's determination that two AFGE proposals were nonnegotiable (a number of other proposals were declared to be negotiable by the agency in the same determination). Subsequent to the Council's action, the local parties executed a memorandum of understanding for the purpose of establishing ground rules for the negotiation of certain outstanding bargaining issues. The memorandum provided, among other things, that the scope of such negotiations was limited to those proposals declared negotiable by the agency in the above-mentioned determination. AFGE thereafter revised the language of the two proposals the agency had determined to be nonnegotiable and submitted the revised versions to the activity. The activity, however, declined to consider them at that time, and the agency declined to issue a negotiability determination on the revised proposals, as requested by AFGE, on the basis that the proposals were not properly before the agency pursuant to section 11(c)(2) of the Order. On April 12, 1977, AFGE filed the instant appeal seeking Council review of both the original and the revised proposals.

Council action (June 21, 1977). With regard to the original AFGE proposals, the Council found that as AFGE was informed when the Council granted its request for an extension, and as provided in section 2411.45(a) and (c) of the Council's rules of procedure, AFGE's appeal from the agency's determination concerning those proposals was due in the office of the Council no later than the close of business on February 11, 1977. However, since AFGE's appeal was not received until April 12, 1977, or about two months late, and no further extension of time for filing was requested by AFGE or granted by the Council, the Council held that AFGE's appeal as to the original proposals was untimely filed. As to the revised proposals, the Council held that AFGE's petition failed to meet the conditions for review prescribed by section 11(c)(4) of the Order and incorporated in section 2411.22 of the Council's rules of procedure. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 21, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Local 916, American Federation of
Government Employees, AFL-CIO and
Tinker Air Force Base, Oklahoma,
FLRC No. 77A-38

Dear Mr. Mulholland:

The Council has carefully considered your petition for review, and the agency's statement of position, in the above-entitled case. For the reasons indicated below, the Council has determined that your appeal must be denied.

The record in this case discloses the following facts, as here relevant. During negotiations between Local 916, American Federation of Government Employees, AFL-CIO (AFGE) and Tinker Air Force Base (the activity) on a new agreement, issues arose as to the negotiability of a number of AFGE proposals. Upon referral, the Department of Defense (DOD or the agency) determined, by letter dated November 19, 1976, that two of the proposals involved were nonnegotiable, but that the remainder were negotiable. In a letter to the Council dated December 16, 1976, you indicated, among other things, that the local parties were going to attempt, through the collective bargaining process, commencing in January 1977, to resolve the negotiability issues concerning the proposals which the agency had found to be nonnegotiable; and you requested an extension of time to file an appeal with the Council from that determination, in the event that the efforts of the parties were unsuccessful. By Council letter of December 22, 1976, confirming oral advice and pursuant to section 2411.45(e) of the Council's rules of procedure, AFGE was granted an extension of time until the close of business on February 11, 1977, to file an appeal from the agency's November 19, 1976, determination of nonnegotiability concerning the two proposals involved.

On January 25, 1977, the local parties executed a memorandum of understanding for the purpose of establishing ground rules for the negotiation of certain outstanding bargaining issues. The subject memorandum provided,

among other things, that the scope of negotiations was limited to those proposals declared negotiable by DOD on November 19, 1976. Subsequently, AFGE revised the language of the two proposals DOD had determined to be nonnegotiable, and submitted the revised versions to the activity.

The activity, by letter dated January 27, 1977, took the position, pursuant to the above-described memorandum of understanding and another memorandum appended to the parties' then-existing agreement (which provided for the reopening of negotiations should certain union proposals be found negotiable by the Department of the Air Force, DOD or the Council), that it was not obligated to bargain on the revised AFGE proposals and declined to consider them at that time. By letter of February 9, 1977, you then requested an agency head negotiability determination concerning the revised proposals. The agency, in a letter dated March 31, 1977, declined to issue such a determination, on the basis that the proposals were not properly before the agency pursuant to section 11(c)(2) of the Order.^{1/} In that letter, you were also informed by the agency that if there was an issue between the parties involving the revised proposals, it appeared "that the proper forum would be provided by the procedures established to implement section 19 of the Order, or such other procedures as the parties might jointly determine to be appropriate (e.g. arbitration)."

On April 12, 1977, you filed the instant appeal, seeking Council review of both the original and the revised AFGE proposals.

With regard to the original proposals, as you were informed in the Council's letter of December 22, 1976, and as provided in section 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on February 11, 1977. However, as indicated above, your appeal was not received by the Council until April 12, 1977, or about two months late, and no further extension of time

1/ Section 11(c)(2) of the Order provides, in pertinent part:

Sec. 11. Negotiation of agreements. . . .

.

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

.

(2) An issue . . . which arises at the local level may be referred by either party to the head of the agency for determination[.]

for filing was either requested by AFGE or granted by the Council. Therefore, since your appeal from the agency's determination as to the non-negotiability of the original AFGE proposals was untimely filed, and consistent with established Council precedent in like cases, your petition for review with respect to those proposals must be denied. See, e.g., National Treasury Employees Union and Chapter 071, National Treasury Employees Union and Department of Treasury, Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, FLRC No. 76A-60 (May 10, 1976), Report No. 105.

As to the revised proposals, you contend in your appeal, in substance, that the declinations by the activity to consider the proposals, and by the agency to render a negotiability determination thereon, were improper; and you request the Council to rule on the negotiability of the proposals involved.

We find, however, as argued by the agency in its statement of position, that no basis exists under section 11(c)(4) of the Order for an appeal to the Council concerning the revised proposals.

Section 11(c)(4) of the Order, which establishes the bases for an appeal to the Council on negotiability issues, provides only that:

A labor organization may appeal to the Council for a decision when--

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

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order. . . .

In this case, the agency did not determine that the revised proposals would "violate applicable law, regulation of appropriate authority outside the agency, or this Order. . . ." Nor did the agency determine that the proposals were contrary to its regulations. Rather, as previously noted, the agency declined to render a negotiability determination. Thus, the agency's action, or inaction, in the circumstances here involved, is not one which may be appealed to the Council under section 11(c)(4) of the Order.^{2/}

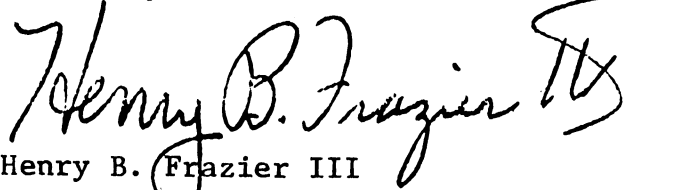
Therefore, because your petition for review with respect to AFGE's revised proposals fails to meet the conditions for review prescribed by section 11(c)(4) of the Order and incorporated in section 2411.22 of the Council's rules of procedure, that portion of your appeal must also be denied.

^{2/} We do not pass upon any questions concerning the propriety of the action, or inaction, of the activity or the agency, which may be raised in other proceedings.

Accordingly, for the foregoing reasons, your petition for review is hereby denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: W. C. Valdes
DOD

General Services Administration, Region 9, San Francisco, California, Assistant Secretary Case No. 70-5123(GA). The Assistant Secretary dismissed the application for decision on grievability or arbitrability filed by American Federation of Government Employees, Local 2126 (AFGE). AFGE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (June 21, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision raised any major policy issues. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 21, 1977

Mr. Ronald D. King, Acting Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: General Services Administration,
Region 9, San Francisco, California,
Assistant Secretary Case No. 70-5123
(GA), FLRC No. 77A-45

Dear Mr. King:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 2126, AFL-CIO (the union) and the General Services Administration, Region 9, San Francisco, California (the activity) were parties to a collective bargaining agreement which contained a grievance procedure and an arbitration provision. A grievance was filed concerning the activity's suspension of a union steward. The activity rejected the grievance on the ground that the suspension was precluded from being processed under the negotiated agreement. The union advanced the grievance through all four steps of the negotiated grievance procedure prior to arbitration, and at each step the activity rejected the grievance on essentially the same basis. The activity then informed the union that the matter could be pursued in the arbitration forum. The union responded that the arbitrability of the grievance was not at issue, but that the unresolved issue was whether the grievance was grievable under the parties' negotiated agreement. Accordingly, the union filed an Application for Decision on Grievability or Arbitrability. The Regional Administrator (RA) found that the grievance was grievable under the negotiated agreement.

The Assistant Secretary granted the activity's request for review seeking reversal of the RA's Report and Findings on Grievability. In so ruling, the Assistant Secretary stated:

Under all of the circumstances of this case, and contrary to the Regional Administrator, I find that the instant Application for Decision on Grievability or Arbitrability should be dismissed. It has previously been established that, when arbitration is the final appellate step in a negotiated grievance procedure, arbitration must

have been invoked, and a final written rejection of the request for arbitration by the other party to the agreement must have been received prior to the submission of an application for a determination of grievability or arbitrability. Thus, in my view, a party must exhaust its contractual remedies before seeking the intervention of the Assistant Secretary. (See Report on a Ruling No. 56)^{1/}
[Footnote added.]

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary is arbitrary and capricious. More particularly, you contend, in substance, that the Assistant Secretary retroactively applied his requirement that arbitration must be invoked prior to submitting an application for a decision on grievability or arbitrability, and that this new rule was not written clearly so that parties could understand its requirements.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the instant application was procedurally defective under his regulations in the circumstances of this case. In this regard, your allegation as set forth above relates to the propriety of the Assistant Secretary's interpretation and application of his own regulations. As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation. In the instant case, the Assistant Secretary's decision was based upon the interpretation and application of his regulations, specifically Section 205.2, and your appeal fails to show that the Assistant Secretary's decision in the circumstances of this case was arbitrary and capricious

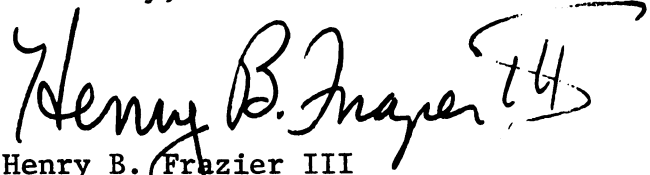
^{1/} In response to the union's subsequent request for reconsideration, the Assistant Secretary affirmed his prior decision that the subject Application for Decision on Grievability or Arbitrability was properly dismissed as untimely. In this regard, he stated that Report on a Ruling Nos. 56 and 61 were issued by the Assistant Secretary consistent with the philosophy that negotiated procedures for the arbitration of grievances contribute to labor peace and stability and should be afforded full opportunity to function, and that the interpretation and application of the Assistant Secretary's regulations in the instant case did not constitute a change in past policy.

or inconsistent with the purposes of the Order. U.S. Army Training Center, Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-4875(GA), FLRC No. 77A-19 (June 6, 1977), Report No. 127.^{2/}

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. Parker
GSA

^{2/} In so concluding, the Council does not construe the Assistant Secretary's decision herein as requiring a party to invoke arbitration as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, since section 13(d) of the Order states that such question is to be decided by the Assistant Secretary. In any event, such a question is not involved in the instant case.

AFGE Council of Prison Locals and Department of Justice, Bureau of Prisons and Federal Prison Industries. The dispute involved questions of whether, under the facts and circumstances of this case, (1) the union's proposal, which related to the negotiation of local supplements to a master agreement, was outside the agency's obligation to bargain under section 11(a) of the Order; and, if not, (2) certain sections of the proposal were violative of sections 11(b), 12(b) or 17 of the Order.

Council action (June 22, 1977). For the reasons fully detailed in its decision, the Council, contrary to the agency's position, held, as to (1), that the union's proposal was within the bargaining obligation established by section 11(a) of the Order; and, as to (2), that the individual parts of the subject proposal did not violate the Order. Accordingly, the Council held that the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, set aside the determination.

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

AFGE Council of Prisons
Locals

(Union)

and

FLRC No. 76A-38

Department of Justice, Bureau
of Prisons and Federal Prison
Industries

(Bureau)

DECISION ON NEGOTIABILITY ISSUE

Background

The AFGE Council of Prisons Locals is the exclusive representative for a nationwide bargaining unit of field employees in the Bureau. The Council is comprised of 34 local unions, none of which was separately certified as an exclusive bargaining representative. Under the terms of successive master agreements between the parties at the national level, many of the constituent local unions negotiated supplemental contracts with respective facilities of the Bureau. However, in the present case, which arose out of negotiations on a new master agreement at the national level, the agency took the position that the disputed proposal relating to the negotiation of local supplements to the master agreement is nonnegotiable. The agency's position, as detailed hereinafter, is based on its objective of protecting itself from being "required to agree to negotiate 'locally' issues which [are] suitable only for Bureau-wide negotiations."

The union proposal at issue provides as follows:

Disputes Regarding Matters Negotiable at Local Level

- I. If the national parties fail to reach agreement upon whether a matter is appropriate for local negotiations (in accordance with the above provisions), during negotiations of the master agreement, the dispute shall be submitted to the Federal Service Impasses Panel.
- II. If the national parties fail to reach agreement upon whether a specific provision of a supplemental agreement is appropriate for local negotiations, all such disputes shall be submitted to arbitration under the provisions of Article 29 and 30.
- III. Any other such disputes which arise during the lifetime of the agreement (such as midterm or impact bargaining) shall also be submitted to arbitration.

- IV. All articles of the local or national agreement shall become effective and the contract shall be reopened upon receipt of the arbitrators decision, decision of the FSIP or the FLRC in disputes whether the matter is negotiable under the Executive Order. [Emphasis in the original.]

Agency Determination

The Department of Justice determined that the proposal is nonnegotiable for the asserted reasons that: (1) it is outside the bargaining obligation under section 11(a) of the Order; and/or (2) individual sections thereof are violative of, principally, sections 11(b), 12(b) and 17 of the Order.

Questions Before the Council

Whether under the facts and circumstances of this case (1) the proposal is outside the agency's obligation to bargain under section 11(a) of the Order; or, if not, (2) whether certain sections of the proposal, as detailed in the following opinion, are violative of sections 11(b), 12(b) or 17 of the Order.

Opinion

Conclusions: As to (1), the proposal is within the bargaining obligation established by section 11(a) of the Order; and, as to (2), the individual parts of the proposal do not violate the Order. Thus, the agency determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is hereby set aside.

Reasons: Question (1). It is clear that an agency is obligated under section 11(a) of the Order^{1/} to negotiate an agreement concerning personnel policies and practices and matters affecting working conditions if requested

^{1/} Section 11(a) of the Order provides as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

to do so by a labor organization to which it has accorded exclusive recognition. Such negotiations must, of course, be appropriate under applicable laws and regulations, controlling agreements and the Order, itself. However, apart from these limitations expressly set forth in section 11(a) the parties are free to determine the substance of their agreement, as well as its form.^{2/} Thus, a proposal affecting the form or structure of the parties' master agreement as involved in the instant case, if not in conflict with one of the explicit limitations on negotiations set forth in section 11(a), would fall within the obligation to bargain under that section. In this regard, the proposal relates in our opinion to the form and structure of the master agreement as it concerns matters which pertain only to one or more particular facilities within the bargaining unit.

In more detail, if, in a comprehensive bargaining unit as is involved in the present case,^{3/} matters which pertain only to one or more facilities within the unit are proposed in negotiations at the level of recognition, such a proposal would not fall outside the obligation to bargain under section 11(a), as the agency in the instant case expressly acknowledges, simply by virtue of its less than unitwide applicability. Further, as the operation of section 11(a) is not altered by the form into which the parties might choose to cast their agreement, the agency would be obligated to bargain at the level of recognition on such a proposal even if it were to be included, e.g., in a "supplement," "addendum," or any other addition to the master agreement, instead of in the master agreement, itself. To like effect, the obligation to negotiate at the level of recognition under section 11(a) also encompasses a bargaining proposal to include, in the parties' master agreement, provisions relating to and directions concerning the negotiation of such supplements to the master agreement at local levels within the certified bargaining unit.^{4/} Applying the foregoing principles to the proposal at issue herein, we conclude that the union's proposal relating to the local negotiation of supplements to the master agreement is within the obligation to bargain under section 11(a) of the Order.

2/ Cf. National Federation of Federal Employees, Local 476 and Joint Tactical Communications Office, Ft. Monmouth, New Jersey, 1 FLRC 499, 504 [FLRC No. 72A-42 (Aug. 8, 1973), Report No. 43].

3/ In this connection, the agency takes the position that the proposal relates to a "question concerning the unit in which negotiations shall take place." In our view based on the proposal and the record before us there is no merit to this position: the bargaining unit is "nationwide" and the union's proposal does not purport to have effect outside that unit.

4/ See "Study Committee Report and Recommendations, August 1969, Which Led to the Issuance of Executive Order 11491" in Labor-Management Relations in the Federal Service (1975), at 71, which recognizes that disputes as to negotiability may involve "interpretation of a national or other controlling agreement at a higher level to which the local negotiations are subject" [Emphasis supplied.]

We must emphasize that under section 11(a) of the Order the obligation to negotiate agreements applies only at the level of recognition.^{5/} Thus, where as here a union holds recognition within an agency, agency management is not obligated to negotiate agreements below the level of recognition, absent an agreement to do so negotiated at the level of recognition. Hence, we find, only, that there is an obligation under section 11(a), if requested, to negotiate at the level of recognition on proposals for the master agreement concerning whether or not supplemental local negotiation will be required under the controlling agreement; and, in particular, we hold, that this obligation to bargain includes the proposal disputed herein which relates to the negotiation of local supplements to the master agreement.^{6/} Accordingly, the agency assertion that the proposal is outside the scope of bargaining under section 11(a) must be rejected.

Question (2). Since the proposal is within the obligation to bargain under section 11(a), we turn now to the additional grounds asserted by the agency to support its determination of nonnegotiability: sections 11(b), 12(b), and 17 of the Order.

With respect to sections 11(b) and 12(b) of the Order, the agency claims that the proposal (in particular sections I-III) would interfere with management's determination of its "organization" under section 11(b)^{7/} and with its determination of the "methods" by which agency operations will be conducted under section 12(b)(5),^{8/} because it would, in essence, require the

5/ Naval Air Rework Facility Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 1960, A/SIMR No. 608, FLRC No. 76A-37 (May 4, 1977), Report No.125, at 5-6. Also, see Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland and Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, A/SIMR No. 360, FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88, at 9.

6/ While not a controlling consideration, we note that our decision herein comports with the Council's stated policy to reduce existing bargaining unit fragmentation by facilitating the consolidation of units (see Labor-Management Relations in the Federal Service (1975), at 34-7). That is, in our view, the contrary conclusion, namely, that an agency unilaterally may determine that local supplemental bargaining will not be permitted under a master agreement, would tend to defeat the policy because it would provide a substantial reason for the members of the existing fragmentary units to withhold their support for consolidation.

7/ Section 11(b) provides in pertinent part that "the obligation to meet and confer does not include matters with respect to . . . [the agency's] organization"

8/ Section 12(b) provides in pertinent part that management officials retain the right, in accordance with applicable laws and regulations to "determine the methods, means, and personnel by which [agency] operations are to be conducted. . . ."

delegation of authority within the Bureau. The agency further claims (as to sections II-IV) that the proposal conflicts with that portion of section 17 of the Order^{9/} which provides that arbitration or third-party factfinding with recommendations to assist in the resolution of an impasse may be used only when authorized or directed by the Federal Service Impasses Panel (FSIP). The agency claims that the proposal conflicts with that section by requiring that contract terms will be determined by a third party, i.e., by "interest arbitration," when such action has not been authorized or directed by the FSIP. As to all these claimed conflicts with the Order, the agency position is essentially the same. That is, the agency contends principally that the proposal would require the Bureau to:

. . . delegate authority within the Bureau so as to conform to any agreement which might be struck at the "local" level as the result of the resolution of a bargaining impasse by . . . a third party who could require the Bureau to negotiate regarding, and eventually agree to, a particular substantive proposal at the "local" rather than the national level.

In this regard, the agency explains further, the proposal "would permit the Union to insist to impasse in 'local' negotiations that a provision be incorporated in the local agreement which would, in turn, require that authority to carry out personnel policies more appropriately controlled at the Bureau level be transferred to local management officials" We find this contention to be without merit. Contrary to the agency's position, the union's proposal clearly would not require the agency to "delegate authority," nor would it result in a third party's mandating the terms of local supplemental agreements. Rather, sections I-III of the disputed proposal have the overall objective, reflected in their language and the record before us, of designating the procedures to be used for resolving impasses in the negotiation of the master agreement, and disagreements over the meaning of provisions contained in the master agreement once it becomes effective. In more detail, section I, would require the parties, negotiating the master agreement, to submit to the FSIP their bargaining impasses with regard to matters proposed to be considered appropriate for supplemental local negotiation under the master agreement (and which are otherwise negotiable under applicable laws, regulations and the Order). In other words, this section of the proposal merely expresses an intention to exercise the right granted under section 17 of the Order^{10/} to request the FSIP to consider a negotiation impasse. Sections II and III of the proposal would relate to the

^{9/} Section 17 provides in relevant part that: "When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter Arbitration or third-party factfinding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel."

^{10/} Id.

interpretation and application of whichever provisions the parties ultimately might agree upon and include in their master agreement concerning the appropriate scope, thereunder, of supplemental local negotiations.^{11/} The proposed sections II and III would require that such disagreements with respect to interpretation and application of the master agreement, which arise (under section II) in connection with the negotiation of a supplemental local agreement, or (under section III) any other such disputes which arise during the lifetime of the agreement, will be submitted to arbitration. Hence, these sections of the proposal, too, are merely expressive of the parties' intention to exercise a right granted to them by the Order--in this instance, the right under section 13 of the Order^{12/} to negotiate the coverage and scope of their grievance and arbitration procedures subject only to the limitations expressly provided for in the Order, none of which apply in the present circumstances.^{13/}

Similarly, contrary to the agency's claim with respect to section 17 of the Order, the proposal would not require the inclusion of particular terms in local agreements as the result of a determination by a third party. Rather, as already indicated, arbitration pursuant to sections II and III of the proposal simply would resolve the parties' disagreements as to the meaning and application of the provisions contained in the master agreement. Hence, such arbitration would not mandate inclusion of any particular matters in a local supplemental agreement but merely would interpret the master agreement to determine whether a particular local proposal is appropriate for local

11/ In this regard we note that section 11(c)(1) provides that:

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

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

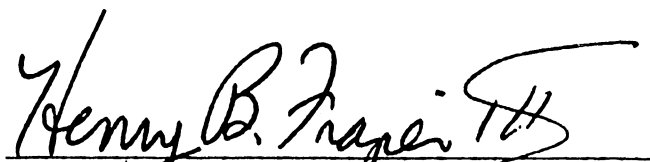
12/ Section 13(a) of the Order provides in pertinent part that, "The coverage and scope of the [grievance] procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." Section 13(b) provides that, "A negotiated procedure may provide for arbitration of grievances. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council."

13/ Cf. American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), 1 FLRC 361 [FLRC No. 72A-10 (May 15, 1973), Report No. 38] at 367 (section 13(a) prior to 1975 amendments) and Bureau of Prisons and Federal Prison Industries, Inc., Washington, D.C. and Council of Prison Locals, AFGE, FLRC No. 74A-24 (June 10, 1975), Report No. 74 at 3-10 (section 13(a) as amended in 1975).

negotiation, consistent with section 11(c)(1) of the Order (note 11 supra). As to section IV of the proposal, it merely would require "reopening" the agreement upon the occurrence of certain contingencies, a matter which clearly does not conflict with section 17 of the Order.^{14/}

Accordingly, as we do not find that the proposal would have the effects claimed by the agency, the agency assertion that the proposal violates sections 11(b), 12(b) and 17 of the Order must be rejected. Therefore, the agency determination that the proposal is nonnegotiable must be set aside.^{15/}

By the Council.


Henry B. Frazier II
Executive Director

Issued: June 22, 1977

^{14/} The agency also claims that section IV of the proposal would require the agency to negotiate an "incomplete" agreement at the national level. As indicated herein, we regard section IV as merely a provision for the reopening of the agreement upon receipt of the respective dispositions of the third parties referenced in the proposal.

^{15/} This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

United States Department of Justice, Bureau of Prisons and American Federation of Government Employees, Council of Prison Locals (Dorsey, Arbitrator). This appeal arose from the arbitrator's award wherein he found, among other things, that the Bureau violated the parties' agreement by its appointment of the incumbent to the particular position involved. The arbitrator sustained the union's grievance and directed the Bureau to terminate the employment of the incumbent, to follow the competitive procedures described in the Bureau's merit promotion plan (as incorporated in the parties' agreement) if the Bureau decided to fill the resulting vacancy, and to not consider the incumbent as an eligible applicant for any vacancy filled in accordance with certain provisions of that merit promotion plan. The Council accepted the agency's petition for review insofar as it alleged that the award violated applicable law and appropriate regulations. The Council also granted the agency's request for a stay of the award. (Report No. 105.)

Council action (June 30, 1977). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of Commission regulations as they pertained to portions of the arbitrator's award. Based upon the Commission's response to the Council's request, the Council found that the arbitrator's award, insofar as it directed the termination of the incumbent's employment and barred him from consideration as an eligible applicant for any vacancy covered by a provision of the Bureau's merit promotion plan, violated applicable Civil Service Commission rules and regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the parts thereof which were found violative of the Commission's rules and regulations. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

United States Department of Justice,
Bureau of Prisons

and

FLRC No. 76A-14

American Federation of Government
Employees, Council of Prison Locals

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he directed the Bureau of Prisons (Bureau) to terminate the employment of the incumbent of the position of Correctional Program Specialist (GS-11) in the Atlanta Office of the Bureau of Prisons, Community Services Branch (the activity); to follow the competitive procedures described in the Bureau's merit promotion plan if the Bureau decides to fill the resulting vacancy; and not to consider the incumbent as an eligible applicant for any vacancy filled in accordance with certain provisions of that merit promotion plan.

According to the award, after the Department of Justice reassigned the incumbent from his position as Deputy U.S. Marshal (GS-11) with the U.S. Marshal's Service in Washington, D.C., to the position of Correctional Program Specialist (GS-11) in the activity, the union grieved. The grievance alleged that (1) when the incumbent was reassigned, it was from a position not within the coverage of the collective bargaining agreement, and (2) the Bureau violated its merit promotion plan, incorporated into the collective bargaining agreement, in that it did not promulgate a vacancy announcement, as prescribed in the plan, for the vacant position to which the incumbent was appointed, thereby depriving Bureau employees in the career ladder of their contractual right to compete for the vacancy.

After the parties failed to resolve the grievance, the union invoked the arbitration provision of the agreement.

The Arbitrator's Award

The arbitrator set forth the issues before him as follows:

1. Did Item 4(b)^{1/} of the [merit promotion] plan reserve to the Bureau a contractual right to appoint [the incumbent] to a career position within the collective bargaining unit; and, if so, did the Bureau satisfy the indispensable condition precedent to exercising the right prescribed in said Item?
2. Should the vacancy in the position to which [the incumbent] was appointed have been filled in compliance with Item 4(a)^{2/} of the [merit promotion] plan?
3. If it is found that the Bureau's appointment of [the incumbent] violated the agreement, what is an appropriate remedy? [Footnotes added.]

The arbitrator sustained the grievance, finding that: (1) the vacancy to which the incumbent was appointed had a "known promotion potential"; (2) the Bureau was contractually required to fill the vacancy in the manner prescribed in Item 4(a) of the merit promotion plan; (3) the Bureau violated the parties' negotiated agreement by its appointment of the incumbent to the vacancy; and (4) the retention of the incumbent in the position is a continuing violation of the negotiated agreement in that it deprives eligible

1/ The arbitrator set forth Item 4(b) of the merit promotion plan as follows:

- b. This Plan does not cover any other type of placement action such as reassignments, transfers of employees from other agencies, selection from Civil Service registers or any other placement method not specifically covered in this section. When such an action is anticipated, the Employer will consult with the Union, in advance, on the reasons for such action.

2/ The arbitrator set forth the pertinent provisions of Item 4(a) of the merit promotion plan as follows:

4. COVERAGE.

- a. This plan applies to the promotion of all employees in the unit. It also covers the following placement actions:

- (1) Filling a position with known promotion potential by reassignment, promotion, transfer, detail, or reinstatement; e.g., apprentice, initial positions in a career ladder series, trainee positions, positions filled below the established or anticipated grade. . . .

qualified employees within the career ladder from applying for appointment to what otherwise would be a vacancy under the coverage of Item 4(a) of the merit promotion plan. The arbitrator therefore concluded that the Bureau's appointment of the incumbent to the position in question was "invalid ab initio" and that "his continuing employment in the Bureau violates the Agreement." As a remedy the arbitrator directed as follows:

- I. Bureau to terminate [the incumbent's] employment no later than fifteen (15) days after date of issuance of the Award [January 16, 1976] . . . ;
- II. If Bureau chooses to declare vacant the position that was occupied by [the incumbent] after it has terminated [the incumbent's] employment, it shall promulgate a Vacancy Announcement as prescribed in Item 10 of the Plan and comply with the procedures established in Items 11, 12, 13, 14, 15 and 16 of the Plan and related Items; and
- III. Since [the incumbent's] appointment to the GS-11 position violated the Agreement the employer-employee relationship between him and the Bureau wrongfully existed. The Bureau shall not consider [the incumbent] an eligible applicant for any vacancy covered by Item 4(a) of the Plan.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulations.^{3/} Both parties filed briefs.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it alleged that the award violates applicable law and appropriate

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

regulations. In its brief the agency contended that parts I and III of the remedy directed by the arbitrator violate certain applicable law and regulations promulgated by the Civil Service Commission pursuant to that law. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of Commission regulations as they pertain to parts I and III of the remedy directed by the arbitrator in his award. The Commission replied in pertinent part as follows:

The grievance which gave rise to this arbitration award occurred when the Department of Justice reassigned a GS-11 Deputy U.S. Marshal employed by the U.S. Marshal Service (a Department of Justice component agency) in Washington, D.C., to a GS-11 position in the Community Programs Division of the Bureau of Prisons in Atlanta, Georgia. The grievants in this case claim that the noncompetitive reassignment of this employee violated the negotiated agreement in that the position in question had known promotion potential and hence, should have been filled by competitive procedures. The arbitrator found in favor of the grievants and ordered that the Bureau 1) terminate employment of the incumbent of the position in question; 2) follow the competitive procedures described in the Plan if the agency decides to fill the resulting vacancy; and 3) not consider the incumbent as an eligible applicant for any vacancy filled in accordance with item 4(a) of the negotiated merit promotion plan. You requested our opinion concerning parts 1 and 3 of the award.

Part 1 of the arbitrator's award cannot legally be implemented because the arbitrator was without authority to order termination of the incumbent's employment. This is so because the authority to appoint persons to positions in the Federal Government, and as a corollary, to terminate such appointments, is vested in the heads of agencies by the U.S. Constitution and Civil Service Rule 7.

In regard to part III of the award, the arbitrator concluded (after determining that the position in question had known promotion potential) that the Bureau was obligated to fill the position pursuant to section 4(a) of the agreement, that is, under the competitive procedures of the merit promotion plan. Since [the incumbent] had moved from the U.S. Marshal Service to the Bureau of Prisons position, the arbitrator found, based on his finding that management had failed to consult with the union in accordance with item 4(b) of the plan, that [the incumbent's] appointment was void and ordered that the Bureau not consider [the incumbent] an eligible applicant for any vacancy covered by section 4(a) of the merit promotion plan. This direction is at variance with part II of the arbitration award in which he requires that the vacancy to be created by [the incumbent's] termination be filled in compliance "with the procedures established in items 11, 12, 13, 14, 15 and 16 of the plan and related items." These items, and particularly items 9 d, 15 a and b, clearly permit consideration of non-Bureau candidates for positions filled pursuant to item 4(a) as long as competitive procedures are followed, and as long as the union is consulted in advance on the reasons for such action. These

provisions are consistent with FPM Chapter 335, Subchapter 3-3d, which requires that "a promotion plan must provide for considering agency employees outside the minimum area of consideration." Thus, while the arbitrator could direct that [the incumbent] not be treated as a Bureau employee in re-filling the position at issue under item 4(a) since he found that he [the incumbent] attained status as a Bureau employee in violation of the negotiated agreement, he could not bar him from consideration as a non-Bureau employee. For future or subsequent promotion actions, [the incumbent] would be eligible to compete under any applicable portion of the Bureau's merit promotion plan.

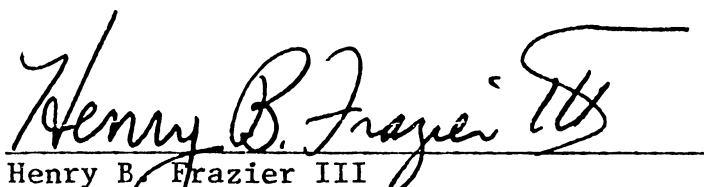
Therefore, we conclude that parts I and III of the arbitrator's award cannot legally be implemented because they violate applicable civil service rules and regulations.

Based upon the foregoing interpretation and conclusion by the Civil Service Commission, we must conclude that the arbitrator's award, insofar as it directs the termination of the incumbent's employment and bars him from consideration as an eligible applicant for any vacancy covered by Item 4(a) of the Bureau's merit promotion plan, violates applicable Civil Service Commission rules and regulations.

Conclusion

For the foregoing reasons we find that parts I and III of the remedy directed by the arbitrator in his award violate Civil Service Commission rules and regulations and must be set aside. Accordingly, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking parts I and III of the arbitrator's remedy. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 30, 1977

Aberdeen Proving Ground Command and U.S. Army Communications Command Detachment and Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO (Kleeb, Arbitrator). The arbitrator concluded that the grievant was entitled to a temporary promotion under the relevant provision of the parties' agreement for the entire period of his assignment to perform the duties of a particular higher graded position. (The agency had temporarily promoted the grievant for a 120-day period during the course of his assignment to the subject position.) As his award, the arbitrator directed that the activity compensate the grievant for any loss of pay and benefits he suffered because of the activity's failure to temporarily promote him for the entire period in question. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon two exceptions: (1) that the award violated a provision of the parties' agreement and certain provisions of the Federal Personnel Manual; and (2) that the award violated applicable law. The agency also requested a stay of the award.

Council action (June 30, 1977). As to (1), the Council held that the portion of the agency's exception alleging that the award violated the parties' agreement failed to state a ground upon which the Council will grant review of an arbitration award; and, although the portion of the exception alleging that the award violated provisions of the FPM did state such a ground, the agency's petition failed to present the necessary facts and circumstances to support this part of the exception. As to (2), the Council held that the agency's petition failed to present the necessary facts and circumstances to support its exception. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 30, 1977

Mr. W. J. Schrader, Chief
Labor & Employee Relations Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: Aberdeen Proving Ground Command and
U.S. Army Communications Command
Detachment and Lodge 2424, Interna-
tional Association of Machinists and
Aerospace Workers, AFL-CIO (Kleeb,
Arbitrator), FLRC No. 76A-83

Dear Mr. Schrader:

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

According to the arbitrator's award, the grievant, a WG-5 Tool and Parts Keeper, was temporarily assigned to perform the duties of a particular WG-6 position on July 8, 1974. He continuously performed the WG-6 duties until May 14, 1975, on which date he was returned to his regular assignment as a WG-5. During this time period, the grievant was compensated at his WG-5 rate of pay except for the 120-day period commencing November 25, 1974, and terminating March 26, 1975, during which period the grievant was temporarily promoted to and received the rate of pay of a WG-6. After his return to his regular assignment as a WG-5, the grievant filed a grievance claiming that the activity had violated the parties' negotiated agreement in numerous respects and requesting that he be compensated for the time he performed the higher grade duties at his regular grade rate of pay. The activity refused to pay the grievant backpay for the time periods in question, and the grievance was ultimately submitted to arbitration.

The arbitrator, noting that the parties had stipulated that the grievant was at all relevant times qualified to perform the WG-6 duties, concluded that the grievant was entitled to a temporary promotion under Article XX, Section 1^{1/} of the negotiated agreement from the first day of the assignment

^{1/} According to the award, Article XX (TEMPORARY PROMOTIONS), Section 1 provides:

Section 1. Employees assigned above the level of their position for periods in excess of sixty (60) calendar days-or where it is expected that the assignment will be for sixty (60) calendar days, or more, shall be temporarily promoted if qualified, to the higher level position.

to perform the WG-6 duties until the day the grievant was returned to his regular assignment as a WG-5. Accordingly, the arbitrator in his "AWARD" directed the activity "to reimburse the Grievant for any loss of pay and benefits he suffered because of [the activity's] failure to temporarily promote the Grievant to a WG-6 position from July 8, 1974 to Nov. 25, 1974 and Mar. 26, 1975 to May 14, 1975."

The agency requests that the Council accept its petition for review of the arbitrator's award based upon its two exceptions discussed below and requests a stay of the award. The union did not file an opposition.

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

In its first exception to the award, the agency contends that to implement the award would violate provisions of Federal Personnel Manual (FPM) chapter 335, subchapter 4-3e^{2/} and would violate Article XX, Section 2^{3/}

^{2/} Federal Personnel Manual chapter 335, subchapter 4-3 provides, in pertinent part:

4-3. PROMOTIONS AS EXCEPTIONS TO COMPETITIVE PROCEDURES

e. Promotion to a higher grade for 120 days or less. An agency may make a temporary promotion limited to 120 days or less as an exception to competitive promotion procedures. This exception is not to be used to circumvent competitive promotion requirements by a series of temporary higher-level assignments. Therefore, competitive promotion procedures must be used if after completing the period of service under temporary promotion an employee will have spent more than 120 days (prior service under details and previous temporary promotions included) in high-grade positions during the preceding year.

^{3/} According to the award, Article XX, Section 2 provides:

Section 2. Selections for temporary promotions of one hundred and twenty (120) calendar days or less in any twelve month period will be made on a noncompetitive basis by the appropriate supervisor. Competitive promotion procedures must be used if after completing the period of service under temporary promotion an employee will have spent more than 120 days in any twelve month period (prior service under details and previous temporary promotions included) in high-grade positions during the preceding year. However, if an appropriate register is available the supervisor should consider selection from such register.

of the negotiated agreement. In support of this exception, the agency asserts that the grievant was temporarily promoted noncompetitively for 120 days. However, since competitive procedures were not utilized to select the grievant for assignment to the higher grade position, the agency maintains that the requirement of FPM chapter 335, subchapter 4-3e and Article XX, Section 2 of the negotiated agreement that competitive procedures be used for temporary promotions in excess of 120 days prevent the grievant's temporary promotion for any additional period.

With respect to that portion of the agency's exception contending that the award violates Article XX, Section 2 of the negotiated agreement, the Council is of the opinion that the agency has failed to state a ground upon which the Council grants review of an arbitration award pursuant to section 2411.32 of its rules of procedure. In this regard, it is noted that the arbitrator specifically addressed and rejected the agency contention made before him that to pay the grievant backpay in this case would violate Article XX, Section 2 of the agreement, and thus it appears that the agency's contention is derived from its disagreement with the arbitrator's interpretation of the parties' negotiated agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of the negotiated agreement is not a ground upon which the Council will grant review of an arbitration award. E.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), 1 FLRC 544 [FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44]. However, with respect to that portion of the agency's exception contending that to implement the award would violate provisions of FPM chapter 335, subchapter 4-3e, the Council will grant review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulation, such as the FPM. E.g., Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception that the arbitrator's award is violative of the cited provisions of the Federal Personnel Manual. Thus, because the facts and circumstances described by the agency in support of its exception have been specifically addressed by the Civil Service Commission in its recent issuance concerning the relevant provisions of the Federal Personnel Manual to the effect that nothing in Commission regulations concerning competitive promotion procedures would bar the granting of a retroactive promotion and backpay in the circumstances of this case, as contended by the agency, the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances to support its exception that this award violates the Federal Personnel Manual.^{4/} Accordingly, the agency's first exception

^{4/} In this regard, the Council notes that the Civil Service Commission has issued Bulletin No. 300-40, dated May 25, 1977, Subject: "GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Over-

(Continued)

provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its second exception to the award, the agency contends that there is no legal authority to reimburse the grievant for any loss of pay and benefits under the Back Pay Act of 1966.^{5/} In support of this exception, the agency essentially maintains on the basis of observations made by the U.S. Supreme Court in United States v. Testan^{6/} that the remedy of backpay is unavailable under the Act in this case since the grievant was never appointed to the WG-6 position despite performing the duties of that position. In addition, the agency maintains that the requisite finding required under the Back Pay Act of 1966, that "but for" the violation of the negotiated agreement the grievant would not have suffered an improper personnel action, was not made by the arbitrator. In this respect, although the agency concedes that there was administrative error in failing to temporarily promote the grievant

(Continued)

long Details to Higher Graded Jobs (B-183086)," wherein the Commission provided agencies information to assist in applying the Comptroller General's decision awarding backpay for retroactive temporary promotions of employees detailed to higher graded positions beyond 120 days without prior Civil Service Commission approval. (Comptroller General decision B-183086, December 5, 1975, reconsidered and reaffirmed, March 23, 1977.) In this Bulletin, the Commission states with respect to the application of competitive promotion procedures for temporary promotions in excess of 120 days:

Application of competitive procedures is required for temporary promotions which will exceed 120 days. Therefore, an employee who served in a higher graded job beyond 120 days without Commission approval generally should have been initially selected under competitive procedures for that assignment. There may be instances where competition for the assignment should have but did not occur. Because of the limited applicability of the decision and because of the difficulty of applying retroactivity in this type of case, agencies will not be required to reconstruct past actions for purposes of retroactively granting promotion under competitive procedures in cases arising under that decision. [Emphasis added.]

Thus, it is indicated that in cases where an employee has been detailed to a higher graded position in excess of 120 days contrary to the requirements of the Federal Personnel Manual, the requirements contained therein concerning the use of competitive promotion procedures will not serve to bar the granting of a retroactive temporary promotion with backpay under such circumstances.

^{5/} 5 U.S.C. § 5596 (1970).

^{6/} 424 U.S. 392 (1976).

originally, the agency argues that once the grievant had worked in the temporary position for 120 days, the activity was required to fill the position through competitive procedures, and that there is no assurance that the grievant would have been selected but for the administrative error of the activity. Thus, the agency asserts that the grievant is not entitled to backpay.

The Council will grant review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law, such as the Back Pay Act of 1966. E.g., Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (Nov. 18, 1975), Report No. 91. In this case, however, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support its exception that the arbitrator's award is violative of the Back Pay Act of 1966. Since the facts and circumstances described by the agency in support of this exception have been specifically addressed by the Comptroller General and by the Civil Service Commission in its recent issuance^{7/} to the effect that nothing in the Back Pay Act of 1966, the U.S. Supreme Court decision in Testan, or the Commission regulations concerning competitive promotion procedures would bar the granting of a retroactive promotion and backpay in circumstances similar to those in this case, the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances to support its exception that this award violates the Back Pay Act of 1966.^{8/} Therefore, the agency's second exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

7/ See note 4, supra.

8/ In this regard, the Council notes the Comptroller General's recently issued decision, B-183086, March 23, 1977, In the Matter of: Reconsideration of Everett Turner and David L. Caldwell — Retroactive Temporary Promotions for Extended Details to Higher Grades. In that case, the Comptroller General stated:

[U]nder the detail provisions of the FPM, an agency head's discretion to make a detail to a higher grade position lasts no longer than 120 days, unless proper administrative procedures for extending the detail are followed. We . . . affirm that a violation of these provisions is an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1970), for which the corrective action is a retroactive temporary promotion and backpay, as set forth in our decision 55 Comp. Gen. 539 [(1975)]. Decision at 5.

Further, with respect to the application of the U.S. Supreme Court decision in Testan in circumstances such as involved in the instant case, the Comptroller General stated:

(Continued)

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: R. W. Fauntleroy
IAM

(Continued)

Despite dictum to the effect that entitlement to backpay can be founded only upon wrongful withdrawal of pay, we view the Testan case as limited to the issue of improper classification.

We have previously held that Testan does not preclude retroactive correction of unjustified and unwarranted personnel actions, whether they be acts of commission or failures to act, where the agency has failed to carry out a nondiscretionary regulation or policy. [Citations omitted.] Id.

Finally, with respect to the agency's contentions regarding the use of competitive procedures and the lack of assurance that the grievant would have been selected, the Council notes that, as previously indicated, the Civil Service Commission in its issuance concerning the aforesaid Comptroller General decision stated that "agencies will not be required to reconstruct past actions for purposes of retroactively granting promotion under competitive procedures in cases arising under that decision."

Federal Aviation Administration and Professional Air Traffic Controllers Organization (Epstein, Arbitrator). The arbitrator sustained the grievance under the parties' agreement concerning the cancellation of the grievant's scheduled overtime assignment and ordered the relief sought, that is, 8 hours of either overtime work or compensatory time or administrative leave. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award on the ground that the award violated section 12(b)(3) and 12(b)(5) of the Order. The agency also requested a stay of the award.

Council action (June 30, 1977). The Council held that the agency did not present facts and circumstances in its petition to support the exception. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 30, 1977

Mr. R. J. Alfultis
Director of Personnel
and Training
Office of the Secretary
of Transportation
Washington, D.C. 20590

Re: Federal Aviation Administration and Professional
Air Traffic Controllers Organization (Epstein,
Arbitrator), FLRC No. 76A-122

Dear Mr. Alfultis:

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

According to the award, the grievant was assigned, one month in advance, to perform 8 hours of overtime work. This assignment was then cancelled the day before it was to have been performed. The grievant asserted that cancellation of the scheduled overtime assignment on the day before he was scheduled to perform it violated the parties' negotiated agreement^{1/} and asked that he be given either 8 hours overtime work or 8 hours of "compensatory or administrative leave." Unable to resolve the grievance, the parties proceeded to arbitration.

^{1/} The provision of the agreement principally relied upon by the grievant, Article 33, Section 2, is set forth by the arbitrator as follows:

ARTICLE 33 - WATCH SCHEDULES AND SHIFT ASSIGNMENTS

Section 2. Assignments to the watch schedule shall be posted at least fourteen (14) days in advance, or for a longer period where local conditions permit. The Employer recognizes that changes of individual assignments to the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. When it is necessary to change an employee's posted shift assignment, the Employer shall use the following alternatives to the extent feasible prior to making the change:

- (a) overtime;
- (b) personnel on detail assignments;

(Continued)

The issue before the arbitrator, as stated in the award, was as follows:

Did the Federal Aviation Administration violate the terms of the Labor Agreement between the parties when it cancelled the overtime shift assignment of [the grievant]

The arbitrator found that, in all important respects, "the principle involved in this case is identical" with that involved in a previous case in which the parties submitted substantially the same provisions of their agreement to arbitration. So finding, the arbitrator expressly adopted his predecessor's determination that "scheduled overtime comes within the terms of Article 33 and that cancellation of scheduled overtime is covered by the posting requirements of Article 33." The arbitrator thus ruled, in effect, that Article 33, Section 2 of the parties' agreement precluded the activity from cancelling the grievant's scheduled overtime assignment fewer than 14 days before the date of its performance. Accordingly, the arbitrator upheld the grievance and ordered the relief sought.

The agency requests that the Council accept its petition for review of the arbitrator's award, and grant a stay thereof, on the ground that the award violates sections 12(b)(3) and 12(b)(5) of the Order.^{2/}

(Continued)

- (c) personnel on permanent assignments that are required to maintain currency;
- (d) line supervisors or staff;
- (e) rescheduling of training.

In the event the above alternatives are found not to be feasible, the employee's posted shift assignment can be changed.

^{2/} Section 12(b) provides, in relevant part, as follows:

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

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

.

- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;

.

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

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

In support of its exception that the arbitrator's award violates section 12(b)(3) of the Order, the agency contends that under this section management retains the right "to relieve employees from duties because of lack of work" and that in this case the grievant was relieved from duty because he was excess staffing and there was no work available for him. Thus, the agency concludes that the arbitrator's decision that the cancellation of the overtime shift was violative of the negotiated agreement violates section 12(b)(3) of the Order.

The Council will accept a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. In this regard, the Council has previously held that the emphasis of section 12(b) is on the reservation of the management authority prescribed therein^{3/} and that the rights reserved by that section may not be infringed by an arbitrator's award under a negotiated agreement.^{4/} Thus it is clear that management retains the right under section 12(b)(3) "to relieve employees from duties because of lack of work." However, the Council is of the opinion that the agency has not presented facts and circumstances to support its exception that the arbitrator's award in this case infringes on its reserved right to relieve employees from duties because of lack of work. The Council notes that in this case the arbitrator interpreted the negotiated provisions of Article 33 of the parties' agreement as requiring the activity, once it has decided and assigned a particular employee to work a particular shift on an overtime basis, to follow certain procedures in the cancellation of that overtime assignment. The Council has previously held that "there is no implication that . . . [the] reservation of decision making and action authority [in section 12(b)] is intended to bar the negotiations of procedures, to the extent consonant with law and

3/ E.g. Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31]; Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

4/ National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293, 298 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved."^{5/} In the Council's opinion the agency in this case presents no facts and circumstances in its petition for review to describe in what manner the arbitrator's award in the circumstances of this case negates management's authority to relieve employees from duties for lack of work rather than just requiring the activity to follow certain negotiated procedures in taking the action involved after the activity has decided to exercise that right.^{6/} Therefore, the agency's exception with respect to section 12(b)(3) of the Order provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

In support of its exception that the arbitrator's award violates section 12(b)(5) of the Order, the agency asserts that under that section management retains the right "to determine the methods, means, and personnel by which such operations are to be conducted" and that overtime work is a "means" by which agency operations are accomplished. Thus the agency argues that in this case management determined, for good and sufficient reasons, that the grievant's overtime assignment was no longer necessary as a means to conduct facility operations, and therefore the arbitrator's decision that cancellation of the overtime shift was violative of the negotiated agreement is contrary to section 12(b)(5) of the Order.

In the Council's opinion the agency has not described facts and circumstances in its petition to support its exception that the award violates section 12(b)(5). In this regard the agency cites no Council precedent to support its specific proposition that overtime is a "means" by which agency operations are to be conducted within the meaning of the term "means" as it is used in section 12(b)(5). Instead the agency only cites

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

6/ Without passing on the precise application of section 12(b)(3) or the precise circumstances which might give rise to the application of the reserved management right therein to relieve employees from duties because of lack of work, the Council notes that in this case the agency states in its petition for review that "the grievant was informed that his overtime shift . . . was cancelled because the employee on annual leave had cancelled his leave and was returning to work; therefore, the grievant's services were not required." Thus in this case it appears that there was in fact work to be performed, and that it was performed, but by an employee other than the one the activity had scheduled to perform it.

to the first part, of the Council's discussion in Tidewater^{7/} regarding the meaning of the term "means" and concludes that "[i]t is clear from this definition that overtime work is a 'means' by which agency operations are accomplished." In Tidewater the Council stated (at 1 FLRC 431, 436-7):

"Mean" is "something by the use or help of which a desired end is attained or made more likely: an agent, tool, device, measure, plan or policy for accomplishing or furthering a purpose." Synonyms for mean include instrument, agent, instrumentality, organ, medium, vehicle and channel. The term "means," as used in the Order, therefore includes the instruments (e.g., an in-house, Government facility or an outside, private facility; centralized or decentralized offices) or the resources (e.g., money, plant, supplies, equipment or material) to be utilized in conducting agency operations--in short, what will be used in conducting operations. [Additional emphasis supplied.]

In the Council's opinion the agency, by simply referring to the first part of the aforesaid quote from Tidewater, has not presented facts and circumstances to show that "overtime" falls within the class of "instruments" or "resources" that the Council has recognized is included in the term "means" in section 12(b)(5) and therefore the agency's petition in this case presents no facts and circumstances to support its exception that the arbitrator's award, by requiring the agency to follow certain negotiated procedures in cancelling an overtime assignment, infringes upon its reserved right to determine the methods, means and personnel by which agency operations are to be conducted.^{8/} Therefore, the agency's exception with respect to section 12(b)(5) of the Order provides no basis for acceptance of its petition under section 2411.32 of its rules.

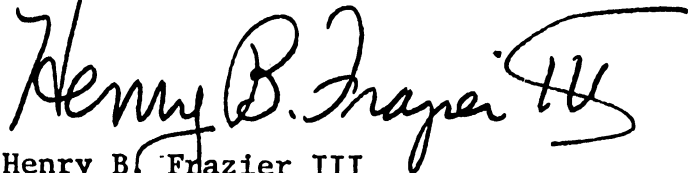
7/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

8/ The Council has previously found that agreement provisions concerning procedures for the assignment of overtime are negotiable and do not violate section 12(b)(5) of the Order. Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 456 [FLRC No. 72A-40 (June 29, 1973), Report No. 41]. Cf. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123; Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: W. B. Peer
PATCO

Federal Aviation Administration and Professional Air Traffic Controllers Organization (Sabella, Arbitrator). This appeal arose from the arbitrator's award in which he sustained the union's grievance, which alleged that certain weather observation and reporting duties--associated with the designation of the control tower as a Limited Airport Weather Reporting Station (LAWRS)--assigned to the air traffic controller grievant were not directly related to air traffic control and were therefore assigned in violation of the parties' agreement. The arbitrator directed the parties to meet for the purpose of reaching agreement on the issue and to establish fair and reasonable compensation for the extra work involved in performing the LAWRS duties. The Council accepted the agency's petition for review with respect to its exception which alleged that the award violated applicable law, appropriate regulation, and the Order. The Council also granted the agency's request for a stay of the award. (Report No. 122.)

Council action (June 30, 1977). Since the Civil Service Commission is authorized to prescribe regulations to implement certain statutory provisions related to the classification of positions and the compensation of employees in the Federal service, the Council requested from the Commission an interpretation of the relevant statutes and implementing regulations as they pertained to the questions raised by the arbitrator's award. Based on the response of the Commission to the Council's request, the Council held that the part of the arbitrator's award which directed the parties to meet for the purpose of establishing fair and reasonable compensation for the extra work involved in performing LAWRS duties violated applicable law and regulations and therefore must be set aside. The Council further held that in the circumstances of this case, the portion of the arbitrator's award requiring the parties to meet for the purpose of reaching agreement on the issue of the assignment of the LAWRS duties was contrary to section 11(b) of the Order and must be set aside. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portions found violative of applicable law and regulations and the Order. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Federal Aviation Administration

and

FLRC No. 76A-133

Professional Air Traffic
Controllers Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award in which he sustained the union's grievance alleging that certain duties were "not directly related to . . . air traffic control" and were therefore assigned in violation of the parties' agreement, and in which he directed the parties to take certain remedial actions.

According to the arbitrator's award and the entire record, this matter arose when the grievant, an air traffic controller at the St. Thomas, Virgin Islands, control tower, challenged the activity's assignment to him of certain weather-observation and reporting duties associated with the St. Thomas tower's designation as a Limited Airport Weather Reporting Station (LAWRS).^{1/} Specifically, the grievant alleged that the duties in question, which consisted chiefly of gathering and recording standard meteorological data, were not "directly related to the primary function of air traffic control," and that their assignment therefore violated Article 27 of the parties' negotiated agreement.^{2/} As corrective action,

^{1/} Such stations, according to the record, have been designated by the agency pursuant to a 1965 agreement for the provision of "aviation weather service and meteorological communications" between the agency and the Environmental Science Services Administration (now the National Oceanic and Atmospheric Administration (NOAA)).

^{2/} Article 27 (POSITION DESCRIPTIONS) provides in relevant part as follows:

.
Section 2: It is agreed that primary function for an air traffic controller consists of duties directly related to air traffic control. . . .

according to the arbitrator, the grievant requested (1) a "total review of the issue" by the parties; (2) "[r]edelegation of the function to the National Weather Service" (an agency within NOAA); and (3) "[e]xtra compensation for those controllers performing these duties." Unable to resolve the grievance, the parties proceeded to arbitration.

The Arbitrator's Award

The arbitrator stated the issue before him as "whether LAWRS observation has a reasonable relationship to the controller's primary function, to-wit, duties directly related to air traffic control." In this regard, although he found it "apparent that some phases of weather observation are directly related to traffic control," he also found that the meteorological service agreement between the agency and NOAA "generally recognizes [NOAA's] major role in the procurement of weather data," that an air traffic controller making LAWRS observations "is acting in an agency relationship to [NOAA]," and that such a controller's "training and certification are on standards established by [NOAA]." Accordingly, as his award, the arbitrator (1) sustained the grievance, and (2) directed the parties "to meet for the purpose of reaching agreement on the issue and to establish fair and reasonable compensation for the extra work involved in performing LAWRS duties."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition insofar as it related to the agency's exception which alleged that the award violates applicable law, appropriate regulation, and the Order.^{3/} Neither party filed a brief.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review with respect to its exception which alleged that the arbitrator's

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

award violates applicable law, appropriate regulation, and the Order. For purposes of discussion, we first consider the allegation that the award violates applicable law and appropriate regulation -- with particular reference to the arbitrator's requirement that the parties meet "to establish fair and reasonable compensation for the extra work involved in performing LAWRS duties."

Since the Civil Service Commission is authorized to prescribe regulations to implement certain statutory provisions relating to the classification of positions and the compensation of employees in the Federal service, the Council requested from the Commission an interpretation of the relevant statutes and implementing regulations as they pertain to the questions raised by the arbitrator's award. The Commission replied in relevant part as follows:

The grievant, an air traffic controller at a Limited Aviation Weather Reporting Station (LAWRS), alleged the duties assigned to him in connection with the observation and reporting of weather conditions bear no reasonable relationship to the primary function of a controller. In this regard he alleged that the assignment violated the FAA/PATCO agreement. Among the remedies sought was additional pay for performing the LAWRS duties.* The arbitrator sustained the grievance and ordered the parties to meet for the purpose of reaching agreement on the handling of LAWRS work and to establish fair and reasonable compensation for the extra work involved in performing LAWRS duties. The FAA petitioned for the award to be set aside on grounds that it violated title 5, U.S. Code as well as Executive Order 11491, as amended. Our concern deals with the alleged violation of title 5, U.S. Code.

It is well established that Federal employees are entitled to appropriate compensation for the positions, and only for the positions, to which they are appointed. The Supreme Court recently confirmed and reiterated this principle in the case of United States v. Testan by finding that "the Federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade."

*Grievant also sought (1) A total review of the LAWRS work issue by the FAA, the National Weather Service and PATCO; (2) The redelegation of the LAWRS duties back to the National Weather Service; (3) Payment of more money to air traffic controllers who perform LAWRS duties (not all controllers are required to do LAWRS work); and (4) the LAWRS duty to be shown on the position description of the controllers required to perform it, until such time as the LAWRS duty is removed from the facilities where it is now required. [Footnote in original.]

Appropriate compensation for General Schedule jobs is determined by the classification of the position according to series and grade. The classification decision is based, among other things, on the range of duties performed and their level of difficulty. An employee who disputes the classification of his position -- including the question of whether his grade accurately reflects the range and level of duties performed -- is entitled to request a determination of that issue by the Civil Service Commission under the statutory procedure for classification appeals (5 U.S.C. 5512; 5 CFR 511.603).

We know of no authority under which additional payment can be made for performing duties beyond those of the position to which an employee is appointed. Therefore, to the extent that the arbitrator's award directs additional payment for the weather monitoring and reporting work beyond that of the compensation authorized for his position, it cannot be implemented legally.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that that part of the arbitrator's award directing the parties to meet for the purpose of establishing "fair and reasonable compensation for the extra work involved in performing LAWRS duties" violates applicable law and appropriate regulation and therefore must be set aside.

As to that portion of the arbitrator's award which would require the parties "to meet for the purpose of reaching agreement on the issue," it seems clear that the "issue" to which the arbitrator refers is the proper assignment of the LAWRS duties. Thus, the effect of this portion of the award is one of requiring the agency to negotiate with the union about the assignment of these duties. As the Council has consistently held,^{4/} however, such matters as the assignment of specific duties and responsibilities to particular positions or employees (that is, matters of "job content") fall within the meaning of the phrases "organization" and "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" in section 11(b) of the Order -- and are therefore excluded from the obligation to bargain.^{5/}

^{4/} See generally American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, FLRC No. 74A-67 (Nov. 28, 1975), Report No. 92, and cases cited therein.

^{5/} Section 11(b) of the Order provides in relevant part:

[T]he obligation to meet and confer does not include matters with respect to the . . . [agency's] organization; . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

Accordingly, since the agency may, but cannot be compelled to, bargain about matters of job content,^{6/} this portion of the arbitrator's award requiring it to do so is contrary to section 11(b) of the Order and must be set aside.


Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the following sentence therefrom:

The parties are required to meet for the purpose of reaching agreement on the issue and to establish fair and reasonable compensation for the extra work involved in performing LAWRS duties.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: June 30, 1977

^{6/} In this case the arbitrator made no finding that the agency had in any respect agreed to negotiate about the assignment of duties not directly related to air traffic control, and thus the agency had not exercised its option to negotiate on such matters of unrelated duties under section 11(b). Cf. IAFF Local F-103 and U.S. Army Electronics Command, FLRC No. 76A-19 (Mar. 22, 1977), Report No. 122.

Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814. The decision of the Assistant Secretary was dated March 29, 1977, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, the appeal of the National Treasury Employees Union (NTEU) was due in the office of the Council no later than May 3, 1977. However, NTEU's appeal was not filed with the Council until May 4, 1977, and no extension of time for filing was either requested by NTEU or granted by the Council. In a supplemental submission filed with the Council in response to the agency's opposition, NTEU tacitly recognized that its appeal was untimely filed, but requested a waiver of the expired time limits on various grounds.

Council action (June 30, 1977). Based on the express language of its rules of procedure, and consonant with its uniform decisions in like cases, the Council held that the grounds adverted to in NTEU's supplemental submission in support of the waiver request, failed to constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules. The Council therefore denied the union's request for a waiver. Accordingly, since NTEU's petition for review was untimely filed, and apart from other considerations, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 30, 1977

Mr. John F. Bufe, Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006

Re: Department of Treasury, Internal Revenue
Service, Brookhaven Service Center,
A/SLMR No. 814, FLRC No. 77A-46

Dear Mr. Bufe:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, filed with the Council on May 4, 1977; to the agency's opposition filed on June 8, 1977; and to your supplemental submission filed on June 16, 1977, in response to the agency's opposition.

For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated March 29, 1977, and, as the Council has been administratively advised by the Assistant Secretary's office and as it likewise appears from your appeal, a copy of the decision was mailed to you on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council on May 3, 1977. However, as stated above, your appeal was not filed with the Council until May 4, 1977, and no extension of time for filing was either requested by you or any other representative of the National Treasury Employees Union, or granted by the Council. Consequently, your appeal was not filed within the time limitations provided in the Council's rules. See, e.g., Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506, FLRC No. 75A-62 (July 21, 1975), Report No. 77, request for reconsideration denied: Sept. 2, 1975, Report No. 81, and cases cited therein.

In your supplemental submission you tacitly recognize that your appeal was untimely filed. However, you request a waiver of the expired time limits because (1) you did not actually receive the decision until April 4, 1977, since you were out of town on business; and (2) your heavy workload in connection with other professional commitments during the period of time involved herein contributed to the late filing.

Section 2411.45(f) of the Council's rules provides that any expired time limit in Part 2411 of the rules may be waived in extraordinary circumstances. However, based on the express language of the Council's rules of procedure and consonant with uniform Council decisions in like cases, the grounds adverted to in your supplemental submission fail to constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules.

More specifically, as to (1), the Council has consistently held in similar circumstances that the asserted date of receipt of a decision by a party does not provide a basis for waiving the Council's time limits for filing an appeal from such decision. See, e.g., Overseas Education Association, NEA, Decision of Director, LMSE, FLRC No. 77A-26 (May 4, 1977), Report No. 124; and American Federation of Government Employees, Local 2677 and Office of Economic Opportunity (Kleeb, Arbitrator), 2 FLRC 192 [FLRC No. 74A-57 (Sept. 20, 1974), Report No. 56].

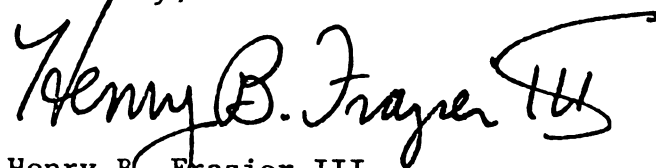
Similarly, with regard to (2), namely your heavy workload in connection with other professional commitments, the Council has uniformly held in like cases that such a ground fails to constitute extraordinary circumstances within the meaning of section 2411.45(f) of the Council's rules. Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, USN, Long Beach, California, A/SLMR No. 594, FLRC No. 76A-8 (Feb. 12, 1976), Report No. 98.

For the foregoing reasons, therefore, your request for a waiver must be denied.

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

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. A. Simms
Treasury

R. F. Hermann
IRS

Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard, Portsmouth, Virginia (Waters, Arbitrator). The arbitrator's award was dated April 29, 1977, and appeared to have been served on the parties by mail on or about the same date. Therefore, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, the union's appeal was due in the office of the Council on or about June 3, 1977. However, the union's appeal was not filed with the Council until June 22, 1977, or more than two weeks late, and no extension of time for filing was requested by or on behalf of the union, or granted by the Council.

Council action (June 30, 1977). Since the union's petition for review was untimely filed, and apart from other considerations, the Council denied the petition.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

June 30, 1977

Mr. Robert F. Haley II
Joannou and Haley
Attorneys at Law
Suite 506, Professional Building
Portsmouth, Virginia 23704

Re: Tidewater Virginia Federal Employees Metal
Trades Council, AFL-CIO and Norfolk Naval
Shipyards, Portsmouth, Virginia (Waters,
Arbitrator), FLRC No. 77A-67

Dear Mr. Haley:

This refers to your petition for review of the arbitrator's award in the above-entitled case, filed with the Federal Labor Relations Council on June 22, 1977, on behalf of the Tidewater Virginia Federal Employees Metal Trades Council (TVFEMTC). For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject arbitration award is dated April 29, 1977, and appears to have been served on you by mail on or about the same date. Therefore, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure (5 C.F.R. §§ 2411.33(b) and 2411.45(a) and (c)), your appeal was due in the office of the Council on or about June 3, 1977. However, as stated above, your appeal was not filed with the Council until June 22, 1977, or more than two weeks late, and no extension of time for filing was requested by or on behalf of the TVFEMTC, or granted by the Council.

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

For the Council.

Sincerely,


Henry B. Frazier III
Executive Director

Enclosure

cc: J. M. Garner P. J. Burnsky
Navy MTD

American Federation of Government Employees, Local No. 1482 and U.S. Marine Corps Supply Center, Barstow, California (Fleming, Arbitrator). The arbitrator determined that the activity violated the parties' agreement to the extent that the grievant's promotion was not made retroactive to a particular date, and ordered that the grievant be promoted retroactively to that date with backpay. The agency filed a petition for review and a request for a stay of the award with the Council. The Council, upon initial consideration, concluded that the award required clarification and interpretation, particularly with respect to whether but for the violation found by the arbitrator, the grievant would have been selected for promotion on the date in question. Accordingly, the Council directed the parties to resubmit the award to the arbitrator for that purpose, and ordered that the case be held in abeyance pending receipt of the award as clarified and interpreted together with any exceptions thereto. After a hearing, the arbitrator issued a clarification in which he found a number of "errors and circumventions" in the promotion process involved and concluded, in essence, that but for those "errors and circumventions," the grievant would have been promoted on the date in question. The agency then requested that the Council accept its petition for review of the arbitrator's award as clarified based on an exception alleging that the award of retroactive promotion and backpay violated the Back Pay Act of 1966 and its implementing regulations.

Council action (July 11, 1977). The Council held that the agency's petition for review did not present facts and circumstances to support its exception. Accordingly, the Council denied the agency's petition for review because it failed to meet the requirements of section 2411.32 of the Council's rules of procedure. Additionally, the Council denied the agency's initial request for a stay, and dismissed the order of abeyance previously issued by the Council.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 11, 1977

Mr. John J. Connerton
Labor Relations Advisor
Labor Disputes & Appeals Section
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

Re: American Federation of Government Employees,
Local No. 1482 and U.S. Marine Corps Supply
Center, Barstow, California (Fleming, Arbitrator),
FLRC No. 76A-2

Dear Mr. Connerton:

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

According to the arbitrator's award, this dispute involves civil service employees of the activity^{1/} employed as firefighters. Firefighters at the activity are classified at the GS-4 and GS-5 levels. The grade level depends upon the nature of the duties performed. When a new fire chief was appointed, he reviewed the firefighting operation and concluded that "some promotions were in order to properly classify some of the men in accordance with the duties performed." A total of 15 out of 19 GS-4 firefighters referred for promotion consideration were promoted to GS-5 on June 22, 1975. A grievance was filed by one of the four GS-4 firefighters not promoted to GS-5 on that date, and the grievance was ultimately submitted to arbitration. At the arbitration hearing the activity announced that due to certain circumstances which were not explained, the promotion list had been reopened, the qualified non-selections had been reviewed again and that the grievant had been selected for upgrade and was to be promoted effective December 7, 1975.

1/ On July 1, 1976, the name of the activity was changed to Marine Corps Logistics Support Base, Pacific.

Among the issues stipulated by the parties and submitted to arbitration was:

- A. Did the Center violate Article 19, Sec. 1 and 2,^{2/} thereby causing the nonselection from promotion list # 84 of 28 May, 1975 in the case of [the grievant]? [Footnote added.]

In his award the arbitrator answered this issue by stating:

The [activity] did violate this Article to the extent that [the grievant's] promotion from GS-4 to GS-5, effective December 7, 1975 is not retroactive to June 22, 1975.

The arbitrator therefore ordered that the grievant's subsequent promotion to GS-5 be made retroactive to June 22, 1975, and that he be paid accordingly.

The agency filed a petition for review of the award with the Council, and, upon initial consideration of the agency's petition for review, the Council concluded that the award required clarification and interpretation. Accordingly, the Council directed the parties to resubmit the award to the arbitrator for the purpose of having the arbitrator clarify and interpret his award, particularly with respect to whether the activity's action in not selecting the grievant for promotion on June 22, 1975, violated the parties' collective bargaining agreement and, if so, whether such violation directly caused the grievant's nonselection; that is, whether but for the violation, the grievant would have been selected for promotion on June 22, 1975.

After a hearing the arbitrator issued a clarification in which he noted, in an "EVALUATION OF FACTS AND TESTIMONY," that the selecting official in this case had neither requested nor been given the numerical ratings of the employees certified as eligible for promotion to GS-5 and placed upon the referral and selection list for the promotion in question. With regard to this fact, the arbitrator stated that in view of the language of the collective bargaining agreement, the objective of the activity's Merit Promotion Plan is to promote among the most highly qualified applicants and that if the rating procedure was to be meaningful, the promoting

2/ Article 19, Sections 1 and 2, provide:

Section 1. Promotions will be effected as provided in the Center promotion policies established in consonance with the provisions of Civil Service Commission rules and regulations, Navy Department regulations, and the provisions of this Agreement.

Section 2. The Center agrees to avoid such practices as last-minute additions to promotion certificates, reappraisal of candidates, unreasonable delays in selection, and personal favoritism in selecting employees for promotion.

supervisor needed to be advised of the ratings received by the employees certified as eligible for promotion. The arbitrator also stated that the matter "presents a real case of conflict of interest," since the Assistant Fire Chief sat on the promotion reviewing panel and his son-in-law was one of the employees certified as eligible for promotion and was selected for promotion on June 22, 1975. The arbitrator stated that the Assistant Fire Chief should have disqualified himself or been disqualified from the promotion reviewing panel. The arbitrator observed in his clarification that upon discovery of these matters, the activity reviewed the ratings of the employees certified as eligible for promotion and upgraded the ratings of nine employees, including the grievant, from 85 to 91, a higher rating than the Assistant Fire Chief's son-in-law who was among the employees selected for promotion on June 22, 1975. Yet, the grievant was not selected for promotion at that time. The arbitrator then concluded:

In view of all the errors and circumventions noted herein, it is very clear to me that should this whole procedure be recycled from the May 28 date, any fair-minded authority with full knowledge of all the facts would have promoted [the grievant] in place of another man, possibly [the Assistant Fire Chief's son-in-law].

Therefore, I feel that no further clarification is necessary and retroactive pay is ordered in accordance with my previous award. How else can he be made whole?

The agency requests that the Council accept its petition for review of the arbitrator's award as clarified on the basis of the exception discussed below.^{3/} The union filed an opposition.

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

In its exception to the award as clarified, the agency contends that the arbitrator's award of retroactive promotion and backpay violates the

^{3/} In its petition for review of the clarified arbitration award in this case, the agency does not request a stay of execution of the clarified award. However, the agency did request a stay in its initial petition and the Council ordered this case held in abeyance pending receipt of the award as clarified and interpreted together with any exceptions thereto.

Back Pay Act of 1966^{4/} and its implementing regulations^{5/} and, therefore, cannot be implemented.

In support of this exception, the agency asserts that although the arbitrator referred to various alleged violations of the parties' collective bargaining agreement by the activity, the arbitrator failed to establish, nor could it be established, that there was a causal relationship between these alleged contractual violations and the grievant's failure to be selected for promotion in June 1975. That is, the agency asserts that the arbitrator failed to find that "but for" the alleged contractual violations, the grievant would have been selected for promotion in June, a finding essential to granting backpay under applicable law, regulations and Comptroller General decisions.

4/ 5 U.S.C. § 5596 (1970) pertinently provides:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period

5/ The implementing regulations to the Back Pay Act of 1966 are contained in 5 CFR chapter I, part 550, subpart H. The criteria for an unjustified or unwarranted personnel action are set forth in 5 CFR §§ 550.803(d)-(e) which provided at all times relevant to this case:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of any agency which results in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

The Council will grant review of an arbitrator's award where it appears based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation such as the Back Pay Act of 1966 and its implementing regulations. E.g., Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (Nov. 18, 1975), Report No. 91. However, in this case the Council is of the opinion that the agency's petition for review does not present facts and circumstances to support its exception that the arbitrator's award of retroactive promotion with backpay violates the Back Pay Act of 1966 and its implementing regulations. In this respect, the Council notes that the Comptroller General has held that in order for an arbitrator's award of backpay to be sustained under the Back Pay Act of 1966 and the implementing regulations thereto, the arbitrator must specifically find that the agency violated the collective bargaining agreement, or find other improper agency action constituting an unjustified or unwarranted personnel action within the meaning of the Act, and that the arbitrator must further specifically find that such improper agency action caused the aggrieved employee to suffer a withdrawal, reduction or denial of pay, allowances, or differentials -- that is, that the withdrawal, reduction or denial of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action. See Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126 at 5 of the Council's decision.

In the Council's opinion, the agency has not presented facts and circumstances in its petition to indicate that the award in this case is inconsistent with the Act, the decisions of the Comptroller General interpreting it or the regulations which implement the Act. The Council notes that the arbitrator, in his original award, specifically found that the activity had violated Article 19 of the parties' collective bargaining agreement and, in his clarification, found that the activity, upon review of the June 1975 promotion action, upgraded the grievant's numerical promotion certificate rating such that he was rated higher than employees actually selected for promotion. Thus, in his clarification the arbitrator concluded that "in view of all the errors and circumventions" it was clear to him that should the whole procedure be "recycled," "any fair-minded authority . . . would have promoted [the grievant]"

The agency simply states in its petition for review the determinations necessary for implementation of an arbitration award of backpay under the provisions of the Back Pay Act of 1966 and asserts that those determinations are not present in this case. However, in the Council's opinion, the agency thus has not described sufficient facts and circumstances to show that the arbitrator's award is violative of the provisions of the Act and implementing regulations thereto or inconsistent with Comptroller General decisions interpreting them. That is, the agency fails to describe facts and circumstances to show that the arbitrator has failed either to make a determination that the grievant

has undergone an unjustified or unwarranted personnel action or to make a determination that such action directly resulted in a withdrawal of pay, allowances, or differentials, especially in light of the arbitrator's specific finding of a violation of the negotiated agreement and his finding of "errors and circumventions," including in the circumstances of this case the fact that the grievant's reconstructed rating after the original promotion action was higher than the ratings of employees originally selected, all of which led him to conclude in essence that, but for those "errors and circumventions," the grievant would have been promoted.^{6/} Therefore, the agency's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. In addition, the agency's initial request for a stay of the award is denied and the order of abeyance dismissed.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: R. J. Malloy
AFGE

^{6/} The agency further maintains in support of its exception that Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (Feb. 13, 1976), Report No. 99, is dispositive of this case in its favor. Referring to the cited case, the agency states that it does not concede that the grievant would have been selected "but for" the violations found by the arbitrator. However, the Council is of the opinion that VA Center is not applicable in the circumstances of the instant case. VA Center is strictly circumscribed by its particular facts and circumstances which included, in contrast to the instant case, the failure of the arbitrator to find that but for the violation of the negotiated agreement, the aggrieved employee would have been promoted. As indicated, however, the Council is of the opinion that in the circumstances of this case, the requisite determinations under the Back Pay Act of 1966 are present in the arbitrator's award. The Council emphasizes, however, that nothing herein should be construed as giving an arbitrator authority to substitute his judgment for that of the selecting official in a particular case, but rather that under the facts and circumstances of this case it appears to the Council that the arbitrator made the requisite finding that if the agreement had not been violated and the "errors and circumventions" had not occurred, the selecting official would have originally selected the grievant for promotion. Further, the agency, upon review, did select the grievant for promotion at a later date.

International Brotherhood of Electrical Workers, AFL-CIO, Local 640 and Parker-Davis Project Office, Bureau of Reclamation, United States Department of the Interior (Irwin, Arbitrator). This appeal arose from the arbitrator's award wherein he denied the union's grievance, without ruling on the merits, based on a conclusion that if a certain disputed provision of the parties' agreement was interpreted in the manner contended by the union it would be invalid under section 12(b) of the Order. The Council accepted the union's petition for review insofar as it related to the question of whether the arbitrator's award interpreting and applying section 12(b) of the Order with respect to his authority to rule on the grievance was contrary to, and therefore violated, the Order (Report No. 111).

Council action (July 12, 1977). Without expressing an opinion as to the proper interpretation and application of the provision of the parties' agreement in question, and without in any manner passing upon the merits, if any, of the union's grievance, the Council held that the arbitrator's award as to the "validity" of the union's interpretation of the subject provision and as to his own authority to resolve the merits of the grievance here involved was contrary to and therefore violative of section 12(b) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

International Brotherhood of
Electrical Workers, AFL-CIO,
Local 640

and

FLRC No. 76A-44

Parker-Davis Project Office,
Bureau of Reclamation, United
States Department of the Interior

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award wherein he denied the union's grievance because he determined that, if a certain disputed provision of the parties' agreement were interpreted in the manner contended for by the union, the provision so interpreted would be "invalid" under section 12(b) of the Order.

Based upon the findings of the arbitrator and the entire record, it appears that the grievant was temporarily assigned to perform certain oil reclaiming duties. The union challenged this assignment, contending that because the grievant was classified as a lineman, and because the duties to which he had been assigned were usually performed by electricians, the grievant's assignment was to "work outside his classification" in violation of the parties' supplemental agreement. The union based its grievance specifically upon section 6.2 of that agreement, set forth by the arbitrator as follows:

Employees shall not be required to perform work outside of their classification, except for small amounts of related and incidental work in cases of necessity. In such cases the employees affected shall be under the direct supervision of a Foreman or other qualified workman regularly performing this work.

The Arbitrator's Award

The grievance proceeded to arbitration, where, according to the arbitrator, the union argued chiefly that section 6.2 of the supplemental agreement should be interpreted as permitting the activity to "work employees outside of their classification under only very limited and rare circumstances" -- circumstances which, according to the union, did not exist in this case.

The activity argued in response that "Section 6.2 was only intended to restrict the Employer from requiring employees to perform work for which there is higher pay without being paid that higher rate" -- a practice not in issue in the grievance -- and that, in any event, the union's interpretation of the agreement conflicted with rights reserved to management by section 12(b) of the Order.^{1/} The arbitrator did not determine which, if either, of the conflicting interpretations was correct, but, stating that "[t]he first issue to be decided is whether or not the Arbitrator is barred by [the Order] from deciding the validity of a contention that Section 12(b) of [the Order] invalidates Section 6.2 if the Union's interpretation of that contractual provision is accepted," concluded that "[s]ection 6.2 of the supplemental agreement if interpreted as the Union contends it should be . . . would, it clearly seems to the Arbitrator, severely limit the employer's actual assignment of duties." Adding that "[t]hat kind of interpretation is one which the Federal Labor Relations Council . . . stated was one which the arbitrator could not make,"^{2/} the

1/ Section 12(b) provides as follows:

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

-
- (b) management officials of the agency retain the right, in accordance with applicable laws and regulations --
 - (1) to direct employees of the agency;
 - (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
 - (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
 - (4) to maintain the efficiency of the Government operations entrusted to them;
 - (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
 - (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency

2/ The arbitrator cites the Council's decision in Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), 2 FLRC 164 (FLRC No. 73A-42 (July 31, 1974), Report No. 55]. In that case the arbitrator

(Continued)

arbitrator found that "if Section 6.2 of the supplemental agreement were interpreted as contended for by the Union it would be invalid under Section 12(b) of [the Order]." Accordingly, the arbitrator denied the grievance.

Union's Appeal to the Council

The union filed with the Council a petition (opposed by the agency) for review of the arbitrator's award, excepting to the award on the ground, in substance, that it is contrary to and therefore violates the Order. Under section 2411.32 of the Council's rules of procedure, the Council accepted the union's petition for review insofar as it related to the question of whether the arbitrator's award interpreting and applying section 12(b) of the Order with respect to his authority to rule on the grievance is contrary to, and therefore violates, the Order. Both parties filed briefs.

Opinion

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

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

(Continued)

found that the hospital's management had violated the seniority clause of the parties' negotiated agreement when it determined that where no Registered Nurses (RN's) were available, Licensed Practical Nurses (LPN's) should be placed "in charge" of certain buildings on the midnight shift. As a remedy, he directed the hospital, in effect, to utilize such personnel as Nursing Assistants (NA's) with less seniority before assigning the grievants to the shift. The Council concluded that the award would prevent implementation of management's determination that LPN's should conduct "in charge" operations on the midnight shift and thereby negate management's exercise of its right under section 12(b)(5) of the Order to determine the "personnel" to conduct these operations. In Canandaigua there was no determination by the arbitrator regarding the assignment of specific duties to the LPN's or to the NA's; instead the award compelled the agency to equate NA's as functional equivalents and interchangeable with LPN's, thereby preempting the agency's right to decide "who" will conduct the operations involved in that case.

As noted previously the arbitrator ruled that if section 6.2 of the supplemental agreement were interpreted as the union contends, i.e., to mean that the activity could work employees outside of their classification under only very limited and rare circumstances, it would be invalid under section 12(b) of the Order. Thus, the arbitrator in this case did not rule on the merits of the grievance. That is, the arbitrator did not determine whether the proper interpretation of section 6.2 of the supplemental agreement was in fact that contended by the union or whether some other interpretation (such as that advanced by the agency or reached independently by the arbitrator himself) should prevail. In substance, therefore, the arbitrator confined his decision to the arbitrability of the grievance. Thus he found, in effect, that his authority to resolve the grievance was limited by the apparent conflict between section 12(b) of the Order and the union's contentions regarding the proper interpretation of section 6.2 of the supplemental agreement. Thus, the following question is before the Council: Whether the arbitrator's award as to the "validity" of the union's interpretation of section 6.2 of the supplemental agreement (and hence as to his own authority to resolve the merits of the grievance) is contrary to, and therefore violative of, section 12(b) of the Order.

As already indicated the union contended before the arbitrator that section 6.2 should be interpreted as permitting the activity to "work employees outside of their classification under only very limited and rare circumstances." The arbitrator, relying upon arguments advanced by the activity, found that such an interpretation would conflict with rights reserved to management by section 12(b) of the Order because it would severely limit the activity's actual assignment of duties. In order to determine whether this award is contrary to section 12(b), the Council must therefore decide whether a contract provision which permits an activity to work employees outside their classification under only very limited and rare circumstances and hence limits the activity's assignment of duties violates section 12(b) of the Order.

The Council has frequently considered proposals or agreement provisions governing the assignment of duties -- i.e., the duties which will (or will not) be assigned to a given position or to a given employee. In those decisions the Council has consistently held that such "job content" of a position falls "not within the ambit of section 12(b), but within the meaning of the phrases agency 'organization' and 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty' in section 11(b) of the Order. [Footnote omitted.]"^{3/} The Council has further held that an agency may choose to

^{3/} IAFF Local F-103 and U.S. Army Electronics Command, FLRC No. 76A-19 (Mar. 22, 1977), Report No. 122 at 4 of the decision; see also American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, FLRC No. 74A-67 (Nov. 28, 1975), Report No. 92, n. 10; AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75, n. 4.

negotiate about a matter falling within section 11(b) even though it is under no obligation to do so.^{4/} It follows that any agreement provision which results from such negotiation and which otherwise conforms to law, regulation, and the Order, may be enforced through the arbitral process.

Therefore, applying these principles to the instant case, a contract provision which limits the assignment of duties by permitting an activity to work employees outside their classification under only very limited and rare circumstances does not violate section 12(b) of the Order. It follows that the arbitrator in the instant case is not precluded by section 12(b) of the Order from finding that the activity agreed to certain limitations upon the job content of its positions, provided the arbitrator is otherwise satisfied that the relevant contract provisions should be so interpreted. That is to say, the arbitrator is not precluded by section 12(b) of the Order from ruling on the merits of the union's grievance in this case. Section 12(b) does not preclude him from determining whether the proper interpretation of section 6.2 of the supplemental agreement is, in fact, that contended by the union or whether some other interpretation should prevail. Therefore, the arbitrator's award as to the "validity" of the union's interpretation of section 6.2 of the supplemental agreement and as to his own authority to resolve the merits of the grievance in this case is contrary to and therefore violates section 12(b) of the Order and must be set aside.

The Council emphasizes, however, that in setting aside the arbitrator's award in this case we express no opinion as to the proper interpretation and application of section 6.2 of the parties' supplemental agreement, nor do we in any manner pass upon the merits, if any, of the union's grievance. Rather, we hold that the arbitrator's award as to the "validity" of the union's interpretation of section 6.2 of the supplemental agreement (and hence as to his own authority to resolve the merits of the grievance) is contrary to and therefore violative of section 12(b) of the Order.^{5/}

4/ Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 610 [FLRC No. 72A-46 (Dec. 27, 1973), Report No. 47]; International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 322 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36]; see also Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75, n. 13 and accompanying text.

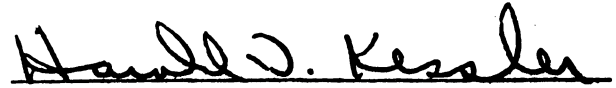
5/ While the arbitrator's award in this case was contrary to section 12(b) of the Order, that is not to say that the arbitrator's consideration of section 12(b) itself was improper. Indeed, as the Council pointed out in its Information Announcement of July 2, 1976:

(Continued)

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.^{6/}

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: July 12, 1977

(Continued)

The importance of the legal framework governing employees in the Federal sector is acknowledged in section 12(a) of the Order, which requires that the administration of each negotiated agreement be governed by laws, the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual, and certain agency policies and regulations. . . . As the January 1975 Report and Recommendations on the Amendment to the Order indicated, "arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation." . . . Further, the January 1975 Report went on to state:

Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. Thus, where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulation or the Order, the Council, under its rules, will grant review of the award. For example, should the Council find that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council would modify or set aside that award. [Footnotes omitted.]

^{6/} Since we have concluded that the arbitrator is not precluded by section 12(b) of the Order from ruling on the merits of the union's grievance, the parties may, if they choose, resubmit the grievance to the arbitrator or submit it to another arbitrator.

American Federation of Government Employees, Local 1170 and Department of Health, Education, and Welfare, Public Health Service Hospital, Seattle, Washington. The dispute involved the negotiability under the Order of union proposals related to (1) "standby" duty status, and (2) "on-call" status.

Council action (July 12, 1977). As to (1), the Council held that the union's proposal conflicted with section 12(b)(5) of the Order, and therefore sustained the agency's determination that this proposal was nonnegotiable. With regard to (2), however, the Council held that the union's proposal was not rendered nonnegotiable by section 12(b) of the Order, and was not excepted from the obligation to bargain by section 11(b), as contended by the agency, and therefore set aside the agency's determination of nonnegotiability as to this proposal.

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

American Federation of Government
Employees, Local 1170

(Union)

and

FLRC No. 76A-92

Department of Health, Education, and
Welfare, Public Health Service
Hospital, Seattle, Washington

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Proposal 1

The disputed portion of the union proposal provides as follows:

Section 2. In areas where twenty-four (24) hours coverage is required those who are utilized will have their homes designated as the official stand-by duty station.

Agency Determination

The agency head determined that the proposal is nonnegotiable because it conflicts with section 12(b) of the Order.^{1/}

Question Before the Council

Whether the proposal conflicts with section 12(b) of the Order.

Opinion

Conclusion: The union proposal conflicts with section 12(b)(5) of the Order. Thus, the agency determination, that the proposal is nonnegotiable, was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby sustained.

^{1/} The agency also determined that the proposal is outside the agency's obligation to negotiate under section 11(b) of the Order. However, in view of our decision herein, it is unnecessary to reach this issue. Additionally, the agency determined that the proposal conflicts with Civil Service Commission regulations, derivative agency regulations, and interpretative Comptroller General decisions. However, these contentions were subsequently abandoned by the agency.

Reasons: Section 12(b), as here dispositive, provides:

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

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

.
(5) to determine the methods . . . by which [Government] operations are to be conducted

The Council, in its Tidewater decision,^{2/} explained the meaning of 12(b)(5), in pertinent part, as follows:

"Method" is "a procedure or process for obtaining an object" or "a way, technique, or process of or for doing something." In other words, a method is the "procedure followed in doing a given kind of work or achieving a given end." Synonyms for method include mode, manner, way and system. The term "methods," as used in the Order, therefore means the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted—in short, how operations are to be conducted. [Emphasis in original.]

The union proposal herein disputed would, as claimed by the agency, require that when the agency places an employee in "standby" duty status the employee's home must be designated as the duty station. Standby status is described by the agency as, "An employee required to remain at his regular duty station or in his living quarters outside his regular duty hours, ready to respond to calls for his services" ^{3/} Hence, the effect of the proposal would be to prevent the agency from requiring unit employees to serve in a standby status at the regular hospital duty station.

2/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41] at 436.

3/ HEW Personnel Instruction 610-1-40 (1964). See also 5 U.S.C. § 5545 (1970), as amended, which provides, in part:

§ 5545. Night, standby, irregular, and hazardous duty differential.

.
(c) The head of an agency, with the approval of the Civil Service Commission, may provide that—

The operations of the hospital include the provision of direct health care to emergency patients and such operations require the availability of essential emergency health care team members. (It appears that the hospital's emergency team includes, among others, inhalation therapists, radiology technicians, operating room nurses, operating room nursing assistants and a nurse anesthetist.) As with any hospital, the number and nature of emergencies which might be seen at this particular hospital, and hence the frequency with which such operations are to be conducted, is relatively unpredictable. Whether such operations are to be conducted using emergency health care team members who are in standby status at the hospital or in standby status at their respective homes, is, in our view, a determination of "the methods by which the operations [of the activity] are to be conducted" within the meaning of 12(b)(5) of the Order. In other words, the determination that standby employees will be available at the hospital or at home is a determination regarding a "way, technique, or process" of or for conducting the operations of the hospital.

Consequently, we find the union proposal infringes the agency's right under section 12(b)(5) of the Order, as explicated in the Tidewater decision previously quoted herein, to determine the methods by which agency operations are to be conducted. Accordingly, we must find it nonnegotiable.

Proposal 2

The union's proposal provides:

Section 3. In those positions where twenty-four (24) hour coverage is required and it is the Employer's decision that "on call" rather than standby will be used, the parties agree that each individual employee assigned to "on call" status is strictly voluntary and that they have the right to refuse. It is further agreed that an employee assigned to "on call" may not be required to remain within a specified distance or time of the duty station and that no restriction will be placed on their movements. Further, refusal to serve in an "on call" status may not be considered in the annual performance evaluation or acceptable level of competence for a within grade increase. The Employer will

(Continued)

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour.

See also, related Civil Service Commission regulations published at 5 C.F.R. § 550.141 (1977).

not impose any restraint, interference, coercion, discrimination, or take any retribution against any employee who refuses to serve in an "on call" status or who when assigned "on call" should not be available when called.

Agency Determination

The agency determined that the proposal is nonnegotiable on the asserted grounds that it conflicts with sections 11(b) and 12(b) of the Order.

Question Before the Council

Whether the proposal conflicts with section 12(b) or is excepted from the obligation to bargain by section 11(b) of the Order.

Opinion

Conclusion: The proposal does not infringe management's rights under section 12(b) or restrict management's determination of staffing patterns under section 11(b) of the Order. Thus, the agency head's determination that the union proposal here involved is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is hereby set aside.^{4/}

Reasons: The underlying purpose of the proposal, according to the union, is to preserve the freedom of movement and activity of unit employees during the period outside their regular working hours when they are away from their duty stations and not receiving compensation. To this end, the proposal would prohibit unit employees being assigned involuntarily to "on-call" status^{5/} (also referred to by the agency as "periods of telephone availability"). To achieve this purpose the proposal would establish that assignments to on-call status will be on a "strictly voluntary" basis; would define

^{4/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union proposal. We decide only that, as submitted by the union and based on the record before the Council, the proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{5/} HEW Personnel Instruction 610-1-40 (1964) describes on-call time as follows:

An employee is "on call" when he is required to leave work at his duty station or at his living quarters as to where he may be reached after his regular working hours, but is free to move about away from his duty station or living quarters within a distance permitting a return to work within a reasonable time if needed.

on-call status in terms of its consensual nature; and, further, would prohibit the imposition of sanctions against employees who do not volunteer for such assignments or who cannot be reached when called to work while supposedly available in an on-call status.

The agency claims that by making on-call status voluntary the proposal would negate management's ability to assign essential overtime work and remove the assurance of emergency medical services staffing. Hence, the agency asserts, the proposal would require alteration of the hospital's staffing pattern, since additional tours of duty would need to be established, in conflict with sections 11(b), 12(b)(2), and 12(b)(5) of the Order. Further, the agency contends that the proposal similarly would negate management's rights under section 12(b)(1) and (2) to direct and assign employees. We cannot agree with these contentions.

As to the agency's contention that the proposal negates its asserted section 12(b) rights to assign certain work, and without passing on whether section 12(b) reserves to management a right to assign work,^{6/} in our view, the union's proposal does not in any way limit the assignment of work. On its face, the proposal concerns only the voluntariness of serving in an on-call status. The proposal does not in any manner affect the agency's assignment of overtime work on a scheduled basis or an unscheduled basis to any employee.

Moreover, the proposal does not preclude the agency from establishing specific mechanisms, such as service in a standby status,^{7/} to assure its absolute ability to contact employees in order to assign overtime work in emergencies.^{8/}

Similarly, as to the agency's contentions that the proposal would prevent the agency from exercising its section 12(b)(1) and (2) rights to direct

^{6/} Cf. Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20, FLRC No. 75A-13 (Oct. 3, 1975), Report No. 85, at 7 of the decision, where the Council reserved a similar question.

^{7/} See the agency's description of "standby" duty, supra.

^{8/} The proposal is not concerned with whether employees will or will not perform emergency overtime work. Further, in this connection, the union states that "When the employer locates an employee at home or within the geographical area of the worksite, the employer is within his rights to request and expect the employee to report to work on overtime." Thus, no issue is raised in this case as to whether an employee may refuse to return to work when actually contacted by his agency and requested to do so.

and assign its employees,^{9/} the agency has made no showing that the proposal infringes these rights. The agency retains the right to direct employees when they are in regular duty status, as well as the right to direct employees who are in a standby duty status to perform work in emergency situations, and the right to assign employees in positions within the agency.^{10/} Accordingly, we hold that the union's proposal is not rendered nonnegotiable as infringing the agency's section 12(b)(1) or (2) rights to direct or assign its employees, nor do we find that it would prevent the agency from assigning work in emergencies.

With regard to such emergencies, the agency also asserts a right under section 12(b)(5) of the Order to determine how coverage is to be provided. As we have indicated in our discussion of the union's first proposal relating to standby status, supra, such a determination relates to the provisions of section 12(b)(5) reserving to an agency the right to determine the methods by which its operations are to be conducted.

In finding the union's standby duty status proposal nonnegotiable, the Council characterized standby status served at the hospital worksite as a method of carrying out the agency's operations in providing emergency medical care coverage. However, the Council does not believe that on-call status can be viewed as such a method because it differs from standby status in significant ways.

Standby time served by employees at their duty stations must be compensated pursuant to law.^{11/} On the other hand, it is equally clear that on-call

9/ Sections 12(b)(1) and (2) of the Order state, in relevant part:

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

.

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

(1) to direct employees of the agency;

(2) to . . . assign . . . employees in positions within the agency

10/ See Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20, FLRC No. 75A-13 (Oct. 3, 1975), Report No. 85, at 6.

11/ See, e.g., Rapp v. United States, 167 Ct. Cl. 852 (1964).

time, as defined in agency personnel instructions,^{12/} need not be compensated.^{13/} Further, standby status is frequently characterized by various authorities as time spent predominantly for the employer's benefit, and on-call time is characterized as that time spent away from the worksite predominantly for the employee's benefit.^{14/} Thus, since standby status is for the employer's benefit, it is clearly related to the operations of the agency. However, on-call time, which is uncompensated time spent by the employee away from the worksite pursuing activities predominantly in his own interest, clearly cannot be regarded as part of the operations of the agency.

Thus, it is our view that management does not retain the right under the Order to determine, unilaterally, to use on-call time as a method of carrying out agency operations. Hence, where, as here, a union proposes to negotiate with respect to the use of on-call time, section 12(b)(5) may not be asserted as a bar to negotiations. Accordingly, the proposal is not rendered nonnegotiable by section 12(b)(5) of the Order.

The Council takes a similar view of the agency's contention that this proposal is nonnegotiable since it would require the agency to alter its staffing patterns. Such a contention relates to the provisions of section 11(b) of the Order which except "matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" from an agency's basic obligation to negotiate under section 11(a).^{15/} However, on-call time, which need not be compensated under applicable law as discussed above, is not such a "matter with respect to" an agency's staffing patterns. That is, since employees in on-call status legally are considered to pursue activities predominantly in their own, and not in the agency's interest, they are not, when in that status, "assigned to an organizational unit, work project, or tour of duty" within the meaning of section 11(b) of the Order.

^{12/} Supra, n. 5.

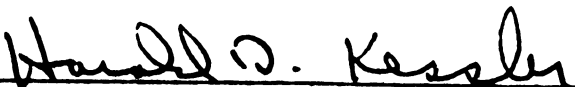
^{13/} See, e.g., Rapp v. United States, 167 Ct. Cl. 852 (1964); accord, Moss v. United States, 173 Ct. Cl. 1169 (1965); Aldridge v. United States, 202 Ct. Cl. 365 (1973); and Comptroller General decisions B-141846, Nov. 7, 1966; B-173899, Sept. 27, 1971; B-167742, Sept. 9, 1969; Overtime Compensation for Panama Canal Co. Pilots, 54 Comp. Gen. 617 (1975). See also 5 C.F.R. § 550.143(b)(3) (1977).

^{14/} See, e.g., cases cited in n. 13, supra.

^{15/} See AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., 1 FLRC 100 [FLRC No. 71A-11 (July 9, 1971), Report No. 11].

Therefore, we conclude that this proposal is not rendered nonnegotiable by section 12(b), and is not excepted from the obligation to bargain by section 11(b) of the Order. Accordingly, we find the proposal negotiable.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: July 12, 1977

Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 679. This appeal arose from a decision and order of the Assistant Secretary, wherein, upon a complaint filed by Local 476, National Federation of Federal Employees (NFFE), he found, among other things, that the activity was obligated to afford NFFE--the exclusive representative of certain employees who were in a particular competitive area for reduction-in-force purposes--the opportunity to meet and confer concerning a decision to remove certain other employees, not represented by NFFE, from that competitive area; and that the activity's failure to do so constituted a violation of section 19(a)(1) and (6) of the Order. The Council accepted the agency's petition for review, having determined that the decision of the Assistant Secretary presented a major policy issue, namely: Whether the Assistant Secretary's finding of an obligation to meet and confer (negotiate) in the circumstances of this case is consistent with the purposes of the Order (Report No. 119).

Council action (July 12, 1977). For the reasons fully detailed in its decision, the Council held that the finding of an obligation to negotiate in the circumstances of this case was inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for action consistent with its decision.

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

Department of the Army,
U.S. Army Electronics Command,
Fort Monmouth, New Jersey

and

A/SLMR No. 679
FLRC No. 76A-101

Local 476, National Federation
of Federal Employees

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary based upon a complaint filed by Local 476, National Federation of Federal Employees (NFFE Local 476). The Assistant Secretary found, in the circumstances of the case, that the Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey (ECOM) had violated section 19(a)(1) and (6) of the Order.^{1/} The violation occurred when ECOM failed to afford NFFE Local 476, the exclusive representative of certain employees who were in a competitive area for reduction-in-force (RIF) purposes, the opportunity to meet and confer on the removal of certain other employees (not represented by NFFE Local 476) from that competitive area.

The factual background of this case, as found by the Assistant Secretary, is essentially uncontroverted and is as follows: ECOM is a subordinate command of the U.S. Army Materiel Command (AMC),^{2/} a major command of the

1/ Section 19(a) of the Order provides in pertinent part:

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

2/ The name of the Army Materiel Command has since been changed to the Army Materiel Development and Readiness Command (DARCOM).

Department of the Army headquartered in Washington, D.C. ECOM consists of a number of organizational elements, each of which constitutes a competitive area for RIF purposes for its civilian employees. The Headquarters and Installation Support Activity (HISA) is one such organizational element and is denominated in ECOM's table of organization as Competitive Area No. 4. Prior to June 7, 1974, there were 13 separate organizational subelements included in the HISA competitive area. NFFE Local 476 was the exclusive representative of the employees in two of the organizational subelements included in the HISA competitive area.^{3/} Each constituted a separate bargaining unit and each was covered by a collective bargaining agreement between ECOM and NFFE Local 476.^{4/}

During the latter part of July and the first part of August 1972, AMC entered into an agreement entitled the Master Civilian Personnel Servicing Agreement, to become effective September 1, 1972, with the U.S. Army Strategic Communications Command (STRATCOM),^{5/} a major command of the Department of the Army headquartered in Ft. Huachuca, Arizona. Under that agreement, AMC would provide, upon request, civilian personnel services to STRATCOM for the latter's activities at the base level.^{6/} On August 8, 1973, the Commanding General of ECOM entered into a supplement to the Master Civilian Personnel Servicing Agreement with STRATCOM at Ft. Monmouth to provide civilian personnel service to the latter's activities located there.^{7/}

3/ The two organizational subelements represented by NFFE Local 476 in two separate bargaining units were the Guard Force employees of the Internal Security Division and the employees of the Pictorial and Audio-Visual Branch of the Administrative Services Division.

4/ Employees in the Stations Supply and Stock Control Division, Equipment Management Division, Facilities Engineer Division, and Communications Electronics Division, all organizational subelements within the HISA competitive area, were principally represented by the American Federation of Government Employees, with the exception of a bargaining unit of employees in the Facilities Engineer Division who were represented by the International Association of Firefighters.

5/ The name of the Strategic Communications Command has since been changed to the U.S. Army Communications Command (USACC).

6/ The Master Civilian Personnel Servicing Agreement contained the following provision:

Employees of the Service[d] Activity [STRATCOM] will be in a separate competitive area from employees of the servicing activity [AMC] unless a variation is justified and approved in advance by HQ, USASTRATCOM and HQ, USAMC and the variation is specified in individual supplements to this agreement.

7/ The supplemental agreement contained the following provision relating to reduction-in-force:

(Continued)

On June 7, 1974, the Commanding General of ECOM issued a command letter modifying the competitive areas for RIF purposes at ECOM by, among other things, removing from the HISA competitive area the Communications Command Agency (the STRATCOM activity at Ft. Monmouth)^{8/} and placing it in a separate competitive area designated Competitive Area No. 11.^{9/} The STRATCOM employees who were removed from the HISA competitive area and made a separate competitive area were represented by a different labor organization and not by NFFE Local 476. This modification was effectuated by ECOM without giving notice to or negotiating with any of the labor organizations (including NFFE Local 476) representing the employees in the various organizational subelements within the HISA competitive area. NFFE Local 476 thereafter filed an unfair labor practice complaint alleging, in substance, that ECOM violated section 19(a)(1) and (6) of the Order when it changed competitive areas for RIF purposes without first "consulting and conferring" with NFFE Local 476 as the exclusive representative of certain employees assigned to the affected competitive area.

The Assistant Secretary concluded, in pertinent part, that ECOM was obligated to afford NFFE Local 476, the exclusive representative of certain employees who remained in the HISA competitive area, the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the decision to alter the HISA competitive area, and that its failure to do so was violative of section 19(a)(1) and (6) of the Order. The Assistant Secretary, finding a status quo ante remedy necessary under the circumstances, ordered ECOM to rescind its command

(Continued)

For Reduction-in-Force purposes, Serviced Activity Employees located at Ft. Monmouth, New Jersey and Philadelphia, Pennsylvania will be considered under the same competitive area as the Headquarters and Installation Support Activity (ECOM) through 24 March 1974. Effective 25 March 1974, Serviced Activity employees will be considered under a separate competitive area, to be established, apart from other activities serviced by the Servicing Activity.

8/ The civilian employees in the Communications Command Agency (STRATCOM) operate the telephone system for ECOM. Their functions and job skills differ from those of the employees in the guard and audio-visual units exclusively represented by NFFE Local 476 within the HISA competitive area.

9/ This modification was brought about by a consolidation of the various elements of ECOM, the elimination of the Philadelphia office competitive areas, and organization designation changes which had occurred subsequent to the establishment of the existing competitive areas.

letter of June 7, 1974, modifying the HISA competitive area; to notify NFFE Local 476 of any intended changes in the composition of the HISA competitive area; and, upon request, to negotiate in good faith with NFFE Local 476, to the extent consonant with law and regulations, on the decision to effectuate such changes.

The Department of the Army (the agency), in conjunction with the Department of Defense, appealed the Assistant Secretary's decision and order to the Council. The Council accepted the agency's petition for review, concluding that a major policy issue is present, namely: whether the Assistant Secretary's finding of an obligation to meet and confer (negotiate) in the circumstances of this case is consistent with the purposes of the Order. The Council also granted the agency's request for a stay, having determined that the request met the criteria set forth in section 2411.47(e)(2) of its rules. Neither party filed a brief on the merits.

Opinion

The major policy issue for Council decision is whether the finding of an obligation to meet and confer (negotiate) in the circumstances of this case is consistent with the purposes of the Order. That is, the question presented is whether the Assistant Secretary's finding that ECOM was obligated to provide NFFE Local 476 the opportunity to negotiate, to the extent consistent with law and regulations, concerning the decision to remove certain employees (who were not represented by NFFE Local 476 and who, for that matter, were represented by a different labor organization) from the competitive area, is consistent with the purposes of the Order. For the reasons stated below, we conclude that the finding of such an obligation to negotiate in the circumstances of this case is inconsistent with the purposes of the Order.

Agency management is obligated to negotiate with a labor organization accorded exclusive recognition with respect to personnel policies and practices and matters affecting working conditions of employees in the bargaining unit.^{10/} Moreover, the Order requires, as a part of the

^{10/} It is undisputed that, in the circumstances of the case, the establishment of competitive areas for RIF purposes and the modifications of those competitive areas, such as the removal of employees as involved in this case, are negotiable. See in this regard Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52 (Sept. 17, 1976), Report No. 112. In discussing the obligation of an agency pending the resolution of representational issues which arise due to a reorganization, the Council ruled that "[w]here the agency, as a direct result of the reorganization and consistent with the necessary functioning of the agency, must make changes

(Continued)

obligation to negotiate, adequate notice and an opportunity to negotiate prior to changing "established personnel policies and practices and matters affecting working conditions during the term of an existing agreement, unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present."^{11/} Thus, an agency proposing to remove a group of exclusively represented employees from one competitive area to another could not make such a change in the personnel policies and practices and matters affecting working conditions of those employees without providing to the labor organization representing those employees adequate notice and an opportunity to request negotiations about the proposed change.

While an agency's obligation to the labor organization representing employees who are proposed to be removed from a competitive area is clear, the issue in the instant case concerns the nature of the obligation owed the labor organization which represents employees who remain in the competitive area after it is decided to remove other employees from that competitive area. In this circumstance, since these employees remain in the competitive area, there is no obligation to negotiate with their exclusive representative(s) on the decision to remove other employees. Instead, there is an obligation to negotiate concerning the impact of that decision on the employees who remain in that competitive area. More particularly, the agency must notify the labor organization(s) representing employees who are to remain in the competitive area of the decision to remove other employees and, upon request, negotiate concerning the impact of such removal on those remaining employees.^{12/}

(Continued)

in otherwise negotiable personnel policies and practices and matters affecting working conditions, . . . the agency must notify the incumbent union or unions of those proposed changes, and, upon request, negotiate on those matters covered by section 11(a) of the Order." [Emphasis added.] Applying such principle to the fact situation before it (which involved a unilateral change in competitive areas for RIF purposes), the Council held that "it is clear that if [the exclusive representative of the employees who were unilaterally removed from the established competitive area] was not informed of the agency's proposed change in competitive areas, or if [the exclusive representative] was so informed but the agency, upon request, refused to bargain thereon with [the exclusive representative], the agency must be deemed to have violated its obligation to negotiate under the Order."

^{11/} Labor-Management Relations in the Federal Service (1975), at 41.

^{12/} Cf. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra n. 9, at 12 of Council decision; Seattle Center Controller's Union and Federal Aviation Administration, 1 FLRC 349 [FLRC No. 71A-57 (May 9, 1973), Report No. 37.]

In this manner, the foregoing obligations reflect a careful balance among the respective interests of the agency which seeks to effectuate a change in an established competitive area, the different groups of employees within the competitive area who may be affected in varying degrees by such change (e.g., those employees who are removed as well as those who remain) and the labor organizations which represent them. Moreover, such obligations circumvent the practical difficulties which would arise if an agency were required, in these circumstances, to negotiate separately and independently with each labor organization exclusively representing employees within an established competitive area concerning the decision to effectuate a modification thereof, such as the removal of a group of employees represented by one such labor organization. That is, in such circumstances, the potential for negotiating inconsistent or conflicting agreements with different labor organizations on the one hand, or for reaching a series of impasses in negotiations with them on the other, is thus avoided.^{13/}

In the instant case, the Assistant Secretary's finding of a violation of section 19(a)(1) and (6) was based on ECOM's failure to give NFFE Local 476 an opportunity to negotiate concerning the decision to remove from the competitive area employees not represented by NFFE Local 476 but instead represented by a different labor organization. As discussed above, the activity was under no obligation to afford NFFE Local 476 an opportunity to negotiate about the decision to so alter the competitive area. Accordingly, the finding of a violation of section 19(a)(1) and (6) based on such failure is inconsistent with the purposes of the Order and must be set aside.^{14/} However, a finding of a violation of section 19(a)(1) and (6) and the according of an appropriate remedy, based on a

^{13/} In the Report and Recommendation of the Council on the amendment of Executive Order 11491, as amended, the Council noted that reorganization-related questions "can involve myriad combinations of variable factors," and therefore recommended that "each reorganization-related problem should be dealt with on a case-by-case basis within the particular factual context in which it has arisen." Consistent with this policy, the Council's decision in the instant case, which involves a reorganization-related problem, is limited to the particular circumstances of the case. Labor-Management Relations in the Federal Service (1975), at 50.

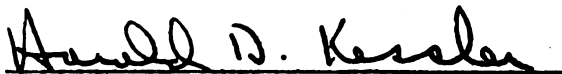
^{14/} In view of the Council's decision that the activity was under no obligation to afford NFFE Local 476 an opportunity to negotiate about the decision to remove certain employees not represented by NFFE Local 476 from the competitive area, but to negotiate, upon request, concerning the impact of such removal on any remaining employees in the bargaining units represented by NFFE Local 476, we find it unnecessary to pass upon the agency's contention that, at the time the competitive area was modified, a higher level agency regulation served as a bar to negotiations on the decision to effectuate the change.

failure to notify NFFE Local 476 of the decision to remove employees not represented by NFFE Local 476 from the competitive area and to afford NFFE Local 476 an opportunity, upon request, to negotiate concerning the impact of such removal on any remaining employees in the bargaining units represented by NFFE Local 476, would be consistent with the purposes of the Order.

Conclusion

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.

By the Council.


Harold D. Kessler
Harold D. Kessler
Acting Executive Director

Issued: July 12, 1977

General Services Administration Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO (Lippman, Arbitrator). This appeal arose from the arbitrator's award granting the grievant, and all other employees similarly situated, backpay equal to the difference in the rate of pay for grades WG-1 and WG-2 for specified periods while they were detailed to the higher graded positions. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged, in effect, that the award violated law and regulations including the Back Pay Act of 1966 (5 U.S.C. § 5596) and regulations as interpreted by the Comptroller General. The Council also granted the agency's request for a stay.

Council action (July 13, 1977). Because the case concerned issues within the jurisdiction of the Comptroller General's office, the Council requested a decision from him as to whether the arbitrator's award violated applicable law and appropriate regulation. Based on the Comptroller General's decision in this matter (B-183903, June 22, 1977), the Council found that to the extent the arbitrator's award did not grant the grievant and other similarly situated employees retroactive temporary promotions along with the award of backpay, and to the extent that the award of backpay was not consistent with the Comptroller General's Turner-Caldwell decision, 55 Comp. Gen. 539 (1975), and related decisions concerning extended details to higher grade positions, the award could not be implemented. However, the Council further determined, also based on the Comptroller General's decision in the instant case, that the award should be modified to provide that the grievant and other employees similarly situated be retroactively temporarily promoted with backpay to the higher graded positions beginning with the 121st day of the detail, and in the case of employees detailed during the Presidential freeze involved, that such employees be retroactively temporarily promoted with backpay to the higher graded positions beginning with the 121st day of the detail or the end of the Presidential freeze, whichever date is later. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council so modified the arbitrator's award, and, as modified, sustained the award and vacated the stay which it had previously granted.

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

General Services Administration
Region 3

and

FLRC No. 74A-58

American Federation of Government
Employees, Local 2456, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award granting the grievant, and all other employees similarly situated, backpay equal to the difference in the rate of pay for grades WG-1 and WG-2 for specified periods while detailed to the higher graded position.

Based on the findings of the arbitrator and the entire record, it appears that the grievant, at the time a WG-1 Custodial Laborer, was assigned to perform WG-2 duties on October 10, 1972. On January 22, 1973, the agency prepared a Standard Form (SF) 52 officially detailing the grievant to the WG-2 duties for 60 days. Thereafter, on April 16, 1973, the agency prepared a second SF-52 detailing the grievant to the WG-2 duties for another 60 days. The grievant performed the WG-2 duties at her WG-1 rate of pay throughout the period October 10, 1972, to November 11, 1973, when she was promoted to WG-2. The union filed a formal grievance on September 12, 1973, in its own name and on behalf of the grievant and all other employees similarly situated, alleging that the agency violated the collective bargaining agreement by denying employees increases in pay after assigning them work that entitled them to a higher rate of pay. The agency denied the grievance, contending that the assignments of the grievant to perform duties of a higher graded position were necessitated by the December 11, 1972, Presidential freeze on hiring and promotion and by two similar General Services Administration freezes from February 12 to April 2, 1973, and from August 8 to October 1, 1973. The matter was ultimately submitted to arbitration.

The Arbitrator's Award

The arbitrator determined that the agency had excessively detailed employees to higher graded positions in order to compensate for manpower shortages which had resulted from the agency's failure to maintain the

staffing allowance provision of the parties' negotiated agreement.^{1/} In his opinion the arbitrator stated, with respect to the agency's contentions that the Presidential freeze and the subsequent agency-imposed freezes on hiring and promotions excused the agency from abiding by the provisions of the agreement, that the Presidential freeze did not justify the agency's failure to maintain staffing allowances under the provisions of the collective bargaining agreement since the pertinent provision constituted a "prior commitment" which would not be impaired by the Presidential freeze, and that the agency freezes would not nullify contractual provisions already in existence since such freezes were not imposed by an appropriate authority under E.O. 11491, i.e., "an authority outside of the agency." The arbitrator further determined that the agency had violated certain collective bargaining agreement provisions and Civil Service Commission regulations governing details by assigning employees to perform higher graded duties for extended periods and by not officially recording such details. He also found that the agency had not followed competitive procedures in making details as required by Commission regulations. Finally, the arbitrator determined that because the agency's policy with respect to detailing applied to the collective bargaining unit as a whole and violated the negotiated agreement and Civil Service Commission regulations, class relief was the proper means of giving relief to all employees situated similarly to the grievant "without requiring a multiplicity of proceedings."

As his remedy, the arbitrator denied the union's request for retroactive promotions, but directed the agency to compensate the grievant and other employees similarly situated in an amount equal to the difference in the rate of pay between grades WG-1 and WG-2 during specified periods while detailed to perform the duties of the higher graded positions.^{2/} The arbitrator's award was as follows:

^{1/} According to the award, Article 27.9 of the agreement provides as follows:

Staffing allowances to provide for substitutes to cover absenteeism due to leave, will be allocated in accordance with the appropriate leave allowance requirements for each grade. Positions so established will be filled in accordance with the GSA Promotion Plan and this article.

^{2/} The arbitrator found that for the grievant, detailed prior to Presidential and agency freezes on hiring and promotion, this specified period consisted of all time she spent in higher graded work from the 31st day of her detail forward. For other employees first detailed during the freezes, the arbitrator found the period to consist of all time spent in higher graded work from the 61st day of the particular employee's detail or from the end of the freeze periods, whichever was sooner.

AWARD

The Agency shall compensate [the grievant] and other similarly situated employees in an amount equal to the difference in the rate of pay for WG-1 and WG-2 for the period as specified in the section entitled "Remedy." The administration of this relief is herewith referred to the parties. All claims for backpay must be submitted to the Agency within sixty days of the receipt of this opinion. If an impasse develops respecting the application of the principles expressed herein, either party may refer the matter to the Arbitrator for disposition. The Arbitrator retains jurisdiction for this purpose.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged, in effect, that the award violates law and regulations including the Back Pay Act of 1966 (5 U.S.C. § 5596) and regulations as interpreted by the Comptroller General.^{3/}

Opinion

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

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

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged, in effect, that the award violates law and regulations including the Back Pay Act of 1966. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulation. The Comptroller General's decision in the matter, B-183903, June 22, 1977, is set forth below:

This action involves a request dated May 9, 1975, for a decision from the Federal Labor Relations Council (FLRC) as to the legality of paying backpay awarded by an arbitrator in the matter of General Services Administration, Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO (Lippman, Arbitrator), FLRC

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

No. 74A-58. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

We regret that we were unable to rule on the legality of this arbitration award on a more timely basis. However, because this case involves excessive detailing of employees to higher grade positions, we found it necessary to delay this decision until after we had reconsidered our decision on that issue in Everett Turner and David Caldwell, 55 Comp. Gen. 539 (1975). We so advised the Federal Labor Relations Council by letter of September 29, 1976. Our decision on reconsideration of Turner-Caldwell was issued on March 23, 1977, B-183086, 56 Comp. Gen. 427.

American Federation of Government Employees Local 2456, hereinafter referred to as the union, represents the approximately 2,300 custodial employees and elevator operators employed in the Metropolitan Washington, D.C., area by the Public Buildings Service, General Services Administration (GSA), Region 3, hereinafter referred to as the agency.

On September 12, 1973, the union filed a grievance in its own name and on behalf of [the grievant] and all other employees similarly affected. The grievance alleged that the agency had violated certain provisions of the negotiated labor-management agreement in denying increases in pay to an unknown number of employees in the bargaining unit after they were assigned work that entitled them to higher rates of pay. The union requested that the grievance be adjusted by awarding promotions to [the grievant] and other similarly situated employees retroactively to the first day they were qualified for such under the provisions of the agreement after having been assigned higher-level duties.

Attempts by the parties to informally adjust the grievance were unsuccessful and the dispute, framed as a class action, was submitted to binding arbitration in accordance with Article 14 of the agreement. The first of a series of hearings was held on January 2, 1974. The arbitrator, with agency acquiescence, adopted the union's statement of the issue, which is as follows:

Did the Employer violate the Labor-Management Agreement when [the grievant] and other employees were assigned higher graded work for long and sustained periods without benefit of promotion?

II.

The facts, as brought out in the arbitration hearings, are as follows. [The grievant] is representative of a class consisting of an unknown number of similarly situated employees within the bargaining

unit. She was hired by the agency on July 3, 1972, as a wage grade (WG) 1 custodial laborer and assigned zone cleaning duties on the fifth floor of the Pentagon Building. About 3 months later, on October 10, 1972, [the grievant] was informally assigned WG-2 toilet cleaner duties in the same building. On January 22, 1973, the agency prepared a Standard Form (SF) 52 officially detailing her to such duties for a 60-day period. Several weeks thereafter, [the grievant] inquired whether she was entitled to a promotion and was informed by an agency official that President Nixon had, on December 11, 1972, imposed a freeze on hiring and promotions and therefore the agency was unable to promote her. By its terms the presidential freeze was scheduled to expire when the administration's budget was transmitted to Congress, which occurred on January 29, 1973. However, many agencies, including GSA, retained certain personnel ceiling restrictions in effect past the expiration date of the presidential freeze. The GSA, by memorandum of February 12, 1973, continued the freeze on hiring and promotions, and it was not lifted until April 2, 1973. Two weeks later, on April 16, 1973, the agency prepared a second SF 52 officially detailing [the grievant] to WG-2 duties for another 60-day period.

As a result of budgetary constraints, the Acting Commissioner, Public Buildings Service, on August 8, 1973, imposed a total freeze on all Public Buildings Service hiring, promotions, or reassignment personnel actions. The freeze remained in effect until October 1, 1973. Subsequently, on November 11, 1973, [the grievant] was promoted to a WG-2 position. Throughout the period from October 10, 1972, until November 11, 1973, [the grievant] had performed WG-2 toilet cleaning duties while being paid as a WG-1.

The union presented evidence concerning 13 employees who had been assigned to higher grade positions for periods in excess of 30 days while being paid their regular rate of pay. The evidence also indicated that, frequently, the agency assigned employees to higher grade positions without processing personnel action documents required for an official detail.

III.

The arbitrator focused his attention on Article 27.9 of the agreement concerning allocation of staffing allowances to provide for substitutes to cover absenteeism. This provision was the result of a compromise that the agency and the union had reached during negotiation of the agreement to insure that staffing levels of custodial workers were maintained at about 20 percent above actual manpower requirements to cover absentees. This was intended to alleviate the need to detail workers to higher grade positions. With regard to the issue of whether the agency maintained appropriate staffing allowances as required by Article 27.9, the arbitrator found that the evidence demonstrated a general pattern of manpower shortages. Therefore, he concluded that the excessive detailing to compensate for manpower

shortages resulted largely from the failure to maintain proper staffing allowances.

In reference to whether the presidential freeze and the subsequent agency-imposed freeze on hiring and promotions excused the agency from abiding by the provisions of the agreement, the arbitrator noted that under section 12(a) of Executive Order 11491 only regulations and policies subsequently promulgated by "appropriate authorities" may provide such relief. Since "appropriate" is defined to mean an authority outside of the agency, the arbitrator found that the agency-imposed freeze was not issued by an appropriate authority and, therefore, could not serve to excuse the agency from performance under the agreement. Also, although he found that the freeze imposed by the President was issued by an appropriate authority, he interpreted the presidential freeze as being inapplicable to prior commitments contained in collective-bargaining agreements, such as the staffing allowances provision in Article 27.9.

Moreover, the arbitrator found that the agency had on numerous occasions violated Civil Service Commission regulations governing employee details by assigning employees to perform higher grade duties for extended periods and by not officially recording such details. He also found that the agency had not followed competitive procedures in making details as required by Commission regulations.

The arbitrator found that class action relief was appropriate because the 13 employees who testified or were referred to in the record did not exhaust the class of employees adversely affected by the detailing. Further, he noted that class actions have the advantage of avoiding multiple proceedings and of preserving employee rights to obtain relief that might otherwise become barred by time limitations on presenting grievances under the agreement.

Finally, the arbitrator considered the proper remedy for the excessive use of details resulting from the agency's violation of Article 27.9 of the agreement obligating it to maintain staffing at certain prescribed levels. The arbitrator accepted GSA's argument that he could not grant retroactive promotions because such relief would be a violation of the merit system. However, he concluded that he had authority to grant backpay to employees for performing duties of the next higher grade. Therefore, he directed the agency to compensate [the grievant] who was detailed prior to the freeze, and other similarly situated employees, in an amount equal to the difference in the rate of pay for WG-1 and WG-2 beginning on the 31st day of the detail until it was terminated. He further determined that employees who were first detailed during the presidential freeze were entitled to backpay commencing with the 61st day of their detail or from the end of the freeze period, whichever occurred sooner. In applying this relief, details were to be cumulated to

avoid abuse. The arbitrator gave all employees 60 days to file their claims with the agency for backpay. He retained jurisdiction of the case for the purpose of resolving any impasses that might develop in applying the opinion and award.

IV.

In our recent decisions, we have held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 *id.* 403 (1974), 54 *id.* 435 (1974), 54 *id.* 538 (1974), and B-180010, January 6, 1976, 55 Comp. Gen. 629. The Back Pay Act, 5 U.S.C. § 5596 and Civil Service Commission implementing regulations contained in 5 C.F.R. Part 550, subpart H, are the appropriate statutory and regulatory authorities for compensating an employee for such violations of a negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 and backpay regulations, there must be a finding that the withdrawal, reduction, or denial of pay, allowances, or differentials was the clear and direct result of and would not have occurred but for the unjustified or unwarranted personnel action. See 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Federal Register 16125. See 54 Comp. Gen. 760, 763 (1975); and B-180010, January 6, 1976, 55 Comp. Gen. 629. Therefore, in order to make a valid award of backpay, it is necessary for the arbitrator to find not only that the negotiated agreement has been violated by the agency, but also that such improper action directly caused the grievants to suffer a loss, reduction or deprivation of pay, allowances, or differentials.

In this case, the arbitrator found that the agency violated the agreement by failing to maintain staffing at prescribed levels which resulted in excessive detailing of employees. Hence, he awarded the employees detailed during the period backpay for performing the higher level duties, but he did not award them retroactive promotions. However, promotion is the sine qua non to entitlement to additional pay, for it is a well-settled legal principle that service by a Government employee in an acting capacity does not entitle him to permanently occupy that position nor to receive the salary incident thereto, since his rights and salary are based solely on the position to which he has been officially appointed. See Bielec v. United States, 197 Ct. Cl. 550 (1972); Ganse v. United States, 180 Ct. Cl. 183, 186 (1967). See also 5 U.S.C. § 5535.

At the time the arbitrator made his award on July 19, 1974, there was no mandatory requirement upon an agency to grant a temporary promotion to an employee for an extended detail to a higher grade position. We so held in our decision 52 Comp. Gen. 920 (1973). Also, there was no such requirement in the collective bargaining agreement. Hence, the arbitrator did not then have the authority to award retroactive promotions in this case. However, after the arbitrator's award was issued, we reversed our holding in 52 Comp. Gen. 920, supra, and held in our Turner-Caldwell decision, 55 Comp. Gen. 539 (1975), that employees detailed to higher grade positions for more than 120 days, without prior Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated, provided they are otherwise qualified for such promotions. We affirmed this holding in Reconsideration of Turner-Caldwell, B-183086, March 23, 1977, 56 Comp. Gen. 427. It was made retroactively effective, subject to the statute of limitations on claims, in Marie Grant, 55 Comp. Gen. 785 (1976).

Accordingly, we are of the opinion that the arbitrator's award may be sustained if modified to conform to the requirements of our Turner-Caldwell line of decisions, cited above. Those decisions were issued subsequent to the date of the award and, therefore, were not available to guide and assist the arbitrator in fashioning his remedy.

[The grievant] and the other grievants covered by this award may be given retroactive temporary promotions and backpay consistent with the holdings of our Turner-Caldwell decisions. For example, [the grievant] was detailed to a WG-2 position on October 10, 1972, and no extension of the detail was obtained from the Commission. Thus she became entitled to a temporary promotion to the higher grade position on the 121st day of the detail, which occurred on February 7 1973. It should be noted that the presidential freeze on promotions, as distinguished from an agency-imposed freeze, would serve to bar any promotions for the duration of such freeze pursuant to section 12(a) of Executive Order 11491, as amended. However, the presidential freeze only covered the period from December 11, 1972, until January 20, 1973, which was well within the initial 120-day period of [the grievant's] detail and thus would not cause her retroactive temporary promotion incident to this award to be delayed.

Based on the foregoing decision by the Comptroller General, it is clear that in the circumstances of this case the arbitrator's award, to the extent that it does not grant the grievant and other similarly situated employees retroactive temporary promotions along with the award of backpay, and to the extent that the award of backpay is not consistent with the

Comptroller General's Turner-Caldwell decision, 55 Comp. Gen. 539 (1975) and related decisions concerning extended details to higher grade positions, cannot be implemented. However, the Comptroller General also indicated that if such award were modified to conform with the requirements of Turner-Caldwell, i.e., that employees detailed to higher grade positions for more than 120 days, without prior Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated, provided the employees are otherwise qualified for such promotions, and in addition, to provide that the Presidential freeze on promotions would serve to bar any promotions for the duration of such freeze, the award may be sustained. Therefore, we believe that the arbitrator's award should be modified to provide that the grievant be given a retroactive temporary promotion with backpay to the higher grade position beginning with the 121st day of her detail and that other employees detailed during the Presidential freeze be given retroactive temporary promotions with backpay to the higher grade positions from the 121st day of their individual details or from the end of the Presidential freeze, whichever is later.^{4/}

Conclusion

For the reasons discussed above, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the first sentence thereof and substituting therefor the following sentence:

The agency shall retroactively temporarily promote from WG-1 to WG-2, with appropriate backpay, the grievant and others similarly situated beginning with the 121st day of the detail or in the case of employees detailed during the presidential freeze, beginning with the 121st day of the detail or from the end of the presidential freeze, whichever date is later.

The award as modified will thus read as follows:

AWARD

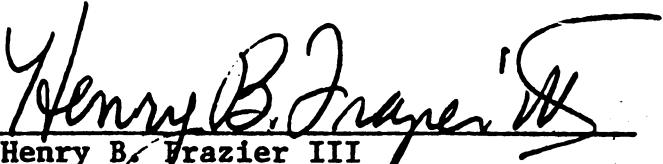
The agency shall retroactively temporarily promote from WG-1 to WG-2, with appropriate backpay, the grievant and others similarly situated beginning with the 121st day of the detail or in the case

^{4/} The Council notes that the Civil Service Commission has issued Bulletin No. 300-40, dated May 25, 1977, Subject: "GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs (B-183086)," wherein the Commission has provided agencies information to assist in applying the Comptroller General's Turner-Caldwell line of decisions.

of employees detailed during the presidential freeze, beginning with the 121st day of the detail or from the end of the presidential freeze, whichever date is later. The administration of this relief is herewith referred to the parties. All claims for backpay must be submitted to the Agency within sixty days of the receipt of this opinion. If an impasse develops respecting the application of the principles expressed herein, either party may refer the matter to the Arbitrator for disposition. The Arbitrator retains jurisdiction for this purpose.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

Marshall Engineers and Scientists Association, Local 27, International Federation of Professional and Technical Engineers, AFL-CIO and National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama. The dispute involved the negotiability under the Order of a union proposal concerning flexitime.

Council action (July 13, 1977). The Council held, contrary to the agency's position, that the union's proposal was neither violative of section 12(b)(1) or (5) of the Order, nor excepted from the agency's obligation to negotiate by section 11(b). Accordingly, the Council found that the agency head's determination that the union's proposal was nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, set aside that determination.

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

Marshall Engineers and Scientists
Association, Local 27, International
Federation of Professional and
Technical Engineers, AFL-CIO

(Union)

and

FLRC No. 76A-81

National Aeronautics and Space
Administration, Marshall Space
Flight Center, Huntsville,
Alabama

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal reads as follows:

Each daily tour of duty will include a core period to be worked by all employees from 9:00 a.m. to 2:30 p.m. The additional three (3) hours to be worked within the flexible time bands during the 6:00 a.m. to 5:30 p.m. time period.

Agency Determination

The agency determined that the proposal violates section 12(b)(1) and (5) of the Order and is excepted from the obligation to negotiate by section 11(b) of the Order.

Questions Before the Council

- I. Whether the proposal violates section 12(b)(1) or (5) of the Order.
- II. Whether the proposal is excepted from the obligation to negotiate by section 11(b) of the Order.

Opinion

I. Conclusion as to Question I: The proposal does not infringe upon management's reserved rights under section 12(b) of the Order.

Reasons: As indicated previously, the agency contends that the proposal violates section 12(b)(1) and (5) of the Order.^{1/} The contentions will be discussed separately below.

12(b)(1) - In support of this contention the agency asserts that the proposal limits the right of management to direct its employees.^{2/} More particularly, the agency contends that, "the proposal permits the individual employee to designate at his own discretion, the hours to be worked outside the core period. Management has no right under the clause to direct the employee to work any time during the flex period other than that time period the employee chooses to work."

In our view, the language and intent of the proposal fails to support the agency's contentions that the proposal violates management's reserved right to direct the employees of the agency. In this regard, on the basis of the record, it is clear that the agency has misinterpreted the proposal. As expressly stated by the union, it is not intended that the proposal give any employee the right "to refuse to perform work assigned to him, to refuse a direct management order, or to refuse to appear for work when ordered to do so." Nor is the proposal intended to limit management's right "to require that individual employees or groups of employees be assigned specific tours of duty outside the flexitime allowances when such assignment is necessary to accomplishing the mission." Consequently, it is clear that the proposal does not give the employee the right to refuse to work when directed to do so. Therefore, the proposal does not violate management's right to direct employees of the agency under section 12(b)(1).

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

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

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

(1) to direct employees of the agency;

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

2/ The bargaining unit consists of the approximately 1700 professional engineers and scientists employed by the activity. There is a second activity-wide nonprofessional bargaining unit at the activity, also consisting of approximately 1700 employees. The approximately 600 remaining employees are unrepresented.

12(b)(5) - In support of this contention, the agency asserts that the proposal interferes with management's right to determine the methods, means, and personnel by which its operations are to be conducted. Essentially, in this regard, the agency argues that the proposal allows the employees to dictate their work schedules and by so doing, cause additional shifts to be created, additional personnel (principally support employees) to be hired or transferred, and changes to be effected in the organizational structure of the activity. We cannot agree with this contention.

Here, again, on the basis of the entire record, it is clear that the agency has misinterpreted the union's proposal. As previously noted, the union concedes that the proposal does not give the employee the right to "refuse to appear for work when ordered to do so." Moreover, as expressly stated by the union, the proposal is not intended to limit management's right "to require that individual employees or groups of employees be assigned specific tours of duty outside the flexible allowances when such assignment is necessary to accomplishing the mission." Consequently, it is clear that the proposal would not require the creation of additional shifts, the hiring or transfer of additional personnel or changing the organizational structure of the activity. Therefore, apart from other considerations, the proposal does not violate management's right to determine the methods, means and personnel by which its operations are to be conducted under section 12(b)(5) of the Order.

Question I is therefore answered in the negative, i.e., the union's proposal does not violate section 12(b)(1) or (5) of the Order.

II. Conclusion as to Question II: The proposal is not excepted from the obligation to negotiate by section 11(b) of the Order.

Reasons: In support of its contention that the proposal is excepted from the obligation to negotiate by section 11(b) of the Order,^{3/} the agency, relying on the Council's decision in Plum Island,^{4/} contends that implementation of the proposal would have a direct and severe impact on the staffing

3/ Section 11(b) of the Order provides in relevant part:

[T]he obligation to meet and confer does not include matters with respect to the . . . [agency's] organization . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty [Emphasis added.]

4/ AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., 1 FLRC 101 [FLRC No. 71A-11 (July 9, 1971), Report No. 11]. There, the Council held that the union's proposal was excepted from the agency's obligation to bargain under section 11(b), and, more particularly under the exclusion in that section relating to "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" finding in substance that the

patterns of the activity and thus is integrally related to the numbers, types and grades of employees assigned to tours of duty at the activity. The agency contends that implementation of the proposal, resulting in an expanded time period (potentially from 6:00 a.m. to 5:30 p.m.) during which full support services (e.g., administrative, clerical and technical services) for the scientists and engineers will be necessary, would require management to increase the number and types of non-unit personnel assigned and to establish new tours of duty since the standard tours of duty will not provide adequate staffing to maintain support services during the extended workday. In this regard, the agency further contends that the proposal will affect the number and types of employees at the activity who perform duties in support of those members of the bargaining unit to whom the provisions of the proposal apply since such support personnel schedules will change, of necessity, to parallel those hours of work adopted by the scientists and engineers who utilize the flexitime provisions of the proposal. The union, in effect, disputes the agency's view as to the requirements of the proposal, contending that, by its express terms, the proposal involves merely the establishment of a "basic work week" and "hours of duty" for members of the bargaining unit and therefore is negotiable as a "personnel practice and matter affecting working conditions" under section 11(a) of the Order.

Under section 11(b), a proposal relating to the basic work schedule of employees is not excepted from an agency's bargaining obligation unless the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency.^{5/}

Applying these principles to the union's proposal concerning the basic workday of unit employees here involved, the proposal clearly is not excluded from the agency's obligation to negotiate under the "staffing pattern" provision of section 11(b) of the Order. For, unlike in Plum Island, the subject proposal in this case does not appear in any manner

(Continued)

number and duration of the work shifts, or tours of duty, as intended to be changed by the agency in that case, were integrally related to and determinative of the numbers and types of employees assigned to those tours of duty of the agency; and therefore that, under the facts of that case, the union's proposal to bargain on such changes was nonnegotiable under section 11(b).

5/ American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36, supplemental decision (June 10, 1975), Report No. 73, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. VA. Sept. 5, 1975)

to be integrally related to and consequently determinative of the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency.

Thus, contrary to the agency's contentions, implementation of the proposal, resulting in an expanded time period, will not require management to increase the number and types of nonunit support personnel assigned or to establish new tours of duty for such personnel. In this regard, as already indicated under question I, herein, the union expressly states that the proposal is not intended to give a unit employee the right "to refuse to appear for work when ordered to do so." Nor is it intended to limit management's right "to require that individual employees or groups of employees be assigned specific tours of duty outside the flexitime allowances when such assignment is necessary to accomplish the mission." In other words, it would appear that, if certain support facilities were available only at certain hours of the day and such facilities were needed by unit personnel, the proposal would not limit management's ability to assure that the work schedules of those personnel included hours when such facilities were available.

Hence, the language and intent of the proposal do not support the agency's contention that the proposal will have the kind of determinative effect on staffing patterns which is the test of whether a proposal is excepted from the obligation to negotiate by that portion of section 11(b) of the Order.

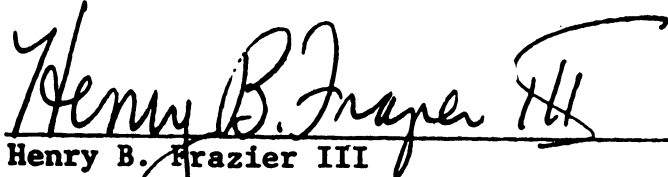
Question II is therefore answered in the negative, i.e., the union's proposal is not excepted from the agency's obligation to negotiate by section 11(b) of the Order.^{6/}

^{6/} The Council's decision regarding this flexitime proposal is limited to the facts and circumstances presented in this case. Where circumstances (not present here) mandate, a flexitime proposal could be found either to interfere with agency management in the exercise of rights assured by section 12(b) or to fall within the range of matters excepted from the obligation to bargain under section 11(b) of the Order. In reaching its decision in the instant case, the Council is cognizant that flexitime in general, or some facets thereof, may not be appropriate in some work situations. (In this regard see U.S. Civil Service Commission, Flexitime -- A Guide (1974), which summarizes the concept of flexitime, its advantages and disadvantages, problems and abuses and implementations, cautioning that flexitime may not be appropriate in some work situations within an organization, while it may be feasible in other situations and that schedule differences may produce employee-management problems.)

Conclusion

For the reasons discussed above, we find that the agency head's determination that the union's proposal in the instant case is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's Rules and Regulations, must be set aside.^{7/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

^{7/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposal. We decide only that, as submitted by the union and based upon the record before the Council, the proposal is properly subject to negotiations by the parties under section 11(a) of the Order.

AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma. The dispute involved the negotiability under the Order of two union proposals which in effect incorporated by reference cited regulations and directives of the agency and expressly concerned the agency's policies regarding the use of Government or contract personnel in performing custodial services, and conditions governing the filling of unit positions with military or civilian personnel.

Council action (July 13, 1977). The Council, relying on its decision in the Tidewater case, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41], held that both proposals of the union violated section 12(b)(5) of the Order. Accordingly, the Council concluded that the agency's determination that the proposals were nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, sustained that determination.

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

AFGE Local 916

and

FLRC No. 76A-96

Tinker Air Force Base,
Oklahoma City, Oklahoma

DECISION ON NEGOTIABILITY ISSUE

Proposals

Proposal No. 1:

Article 14, Section C, Custodial Service in the Bargaining Unit

Custodial Service in the Bargaining unit will be carried out in strict compliance with AF Regulations 91-30 in effect on the approval date of this contract.^{1/}

Proposal No. 2:

Article 43, Use of Civilian Slots for Military Personnel

When bargaining unit positions are to be filled with military personnel, it will be accomplished within strict compliance with DOD regulations (1400.5).^{2/}

1/ Air Force Regulation 91-30, July 31, 1973, "Custodial Service," referenced in the union's proposal, provides, as here relevant, that it is Air Force policy to:

Accomplish custodial services by contract and by the use of civilian employees employed solely or principally for such work, or by a combination of such means. Custodial duties will be assigned only where the performance of such duties is reasonably related to the civilian employee's position and qualifications. Under no circumstances will assignment, either voluntary or involuntarily of janitorial and other related custodial duties, either on a temporary or continuing basis, be made to civilian employees who are officially assigned to clerical, technical, administrative or professional positions. Shop personnel may be expected to perform minimal custodial and maintenance service, in and around their immediate work-areas, that are directly related to their duties. [Emphasis supplied.]

2/ DOD Directive 1400.5, June 16, 1970, "Statement of Personnel Policy for Civilian Personnel in the Department of Defense," referenced in the union's proposal, provides in relevant part (Part IV.A.):

(Continued)

Agency Determination

The agency determined that both proposals are nonnegotiable, relying in part on section 12(b)(5) of the Order.^{3/}

Question Before the Council

Whether the proposals are nonnegotiable under section 12(b)(5) of the Order.

Opinion

Conclusion: The proposals conflict with section 12(b)(5) of the Order. Therefore, the agency determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(5) of the Order, as here controlling, provides:

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

.

(Continued)

The Department of Defense is responsible for the security of our country. Civilian employees share fully in that responsibility. Use of civilian employees affords abilities not otherwise available, assures continuity of administration and operation, and provides a nucleus of trained personnel necessary for expansion in any emergency. Civilian employees shall, therefore, be utilized in all positions which do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, or which do not require a military background for successful performance of the duties involved.

^{3/} While the agency also relied on section 11(b) of the Order in support of its determination that both proposals are nonnegotiable, we find it unnecessary to pass upon this ground in view of our holding in this case. Additionally, although the agency did not expressly cite section 12(b)(5) in its determination regarding proposal no. 2, the Council, consistent with established practice, considered the applicability of section 12(b)(5) to this proposal, as well as to proposal no. 1. See National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith), Letter denying request for reconsideration (May 18, 1977), Report No. 125, at 3 of Council decision letter.

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

(5) to determine the . . . personnel by which [agency] operations are to be conducted

In its Tidewater decision,^{4/} the Council examined "the precise scope of the right reserved to management under section 12(b)(5)" and explained, as to the meaning of the term "personnel" in that section, as follows:

[A]s used in the Order, personnel means the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations. [Additional emphasis supplied.]

Further, the Council in interpreting and applying section 12(b)(5) in the Tidewater case, emphasized that this right reserved to management to determine the "personnel" by which agency operations are to be conducted "is mandatory and may not be relinquished or diluted."^{5/}

In the instant case, the disputed proposals, which in effect incorporate by reference cited regulations and directives of the agency, expressly concern the agency's policies regarding the use of Government or contract personnel in performing custodial services, and conditions governing the filling of unit positions with military or civilian personnel. As the Council ruled in the Tidewater case, these are matters relating to "who" will perform agency operations and fall within the exclusive province of the agency to resolve under section 12(b)(5) of the Order. It is, of course, without controlling significance that the agency has chosen to exercise its rights under section 12(b)(5) by establishing such policies through the issuance of internal agency regulations or directives.^{6/}

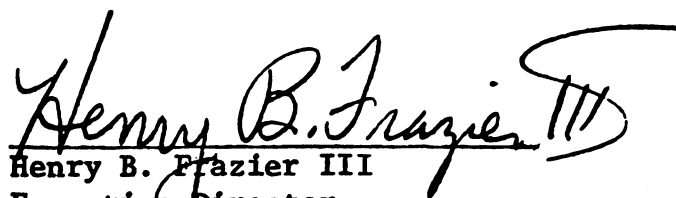
^{4/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41] at 436-437.

^{5/} Id.

^{6/} See AFGE Local 2118 and Los Alamos Area Office, ERDA, FLRC No. 74A-30 (May 22, 1975), Report No. 71, at 6 of Council decision.

Accordingly, we find that the union's proposals violate section 12(b)(5) of the Order and are thereby nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, California. The dispute involved the negotiability under the Order of a union proposal concerned exclusively with the presence of a union "observer" at meetings of the agency's Regional Budget Committee and with that observer's ability, in some unspecified manner, to make recommendations to the committee.

Council action (July 13, 1977). The Council held that the union's proposal was outside the bargaining obligation established by section 11(a) of the Order. Accordingly, the Council ruled that the agency's determination that the proposal was nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, sustained that determination.

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

National Treasury Employees Union

(Union)

and

FLRC No. 76A-111

U.S. Customs Service, Region VII,
Los Angeles, California

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal, orally presented by the union to the activity,^{1/} is characterized by the parties in the record before the Council as follows:

NTEU proposed a union representative to sit on the budget committee. . . . The union representative on the committee would only be permitted to present the union's viewpoint to the budgetary process and to make non-binding recommendations to the budget committee.

Agency Determination

The U.S. Customs Service determined principally that the proposal is outside the scope of the agency's obligation to bargain under section 11(a) of the Order.

Question Before the Council

Whether the proposal is outside the agency's obligation to bargain under section 11(a) of the Order.^{2/}

^{1/} The activity furnished to the union for the latter's "review and comments" an advance copy of a proposed "Regional Circular" (BUD 1-A:F, set forth in relevant part infra, n. 5) concerning establishment of a Region VII Budget Committee. The union presented its disputed proposal during a meeting with the activity in connection with the proposed circular.

^{2/} In view of our decision herein we find it unnecessary to reach and therefore make no ruling with respect to the agency's additional contention that the proposal is excepted from the agency's obligation to bargain under

Opinion

Conclusion: The proposal is outside the bargaining obligation established by section 11(a) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules, is hereby sustained.

Reasons: Section 11(a) of the Order^{3/} establishes, within specified limits not here in issue, an obligation to bargain concerning personnel policies and practices affecting the bargaining unit^{4/} and matters affecting bargaining unit working conditions. The Region VII Budget Committee, to which the disputed proposal relates is a body composed of high level management officials. The committee is concerned, in essence, with the monthly updating of the Region's program priorities in the context of available fiscal resources.^{5/} Its findings and recommendations are submitted to the Regional Commissioner for review and final approval.

(Continued)

section 11(b) of the Order. Furthermore, contrary to the agency's assertions, the proposal clearly does not infringe the agency's rights under section 12(b) (5). The agency would retain the right to decide to utilize a Regional Budget Committee, and to decide upon the personnel to conduct its operations, irrespective of whether a union representative were to "sit" at the meetings of the committee.

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

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order.

4/ The bargaining unit involved is regionwide.

5/ BUD 1-A:F provides, as here relevant:

SUBJECT: Region VII Budget Committee

1. PURPOSE

To establish a Regional Budget Committee to ensure cost effectiveness and the maximum utilization of all resources throughout the Region.

2. BACKGROUND

The resources provided the Region are not sufficient to fully cover all of our requirements. This requires, at the midpoint of each fiscal year, the imposing of severe budgetary restrictions to enable the Region to continue to operate within these fiscal constraints.

The proposal in dispute, by its express terms and as explained by the union in its submissions to the Council, is concerned exclusively with the presence of a union "observer" at the meetings of the Regional Budget Committee, and with that observer's ability, in some unspecified manner, to make the union's viewpoint known "to the budgetary process" and to make recommendations to the committee.

In our opinion, the proposal in dispute is outside the agency's obligation to bargain; it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Clearly, the presence of a union observer at the meetings of the Regional Budget Committee (a management body which monitors available financial resources, periodically reviews program needs and develops program priorities for top management approval), and submission of union views on budget matters do not, of themselves, involve such personnel policies or

(Continued)

3. ACTION

The Regional Budget Committee will be responsible for monitoring the available financial resources. The Committee will meet on the 15th of each month to review program needs, compare them to the available resources, and establish program priorities. When the 15th of the month falls on a non-workday, the meeting will be held on the preceding workday. The Regional Budget Committee will be composed of the following members:

Asst. Regional Commissioner (Admin)
(Chairman)

Asst. Regional Commissioner (Opns)
(Vice-Chairman)

Director, Financial Management Division

Budget Officer

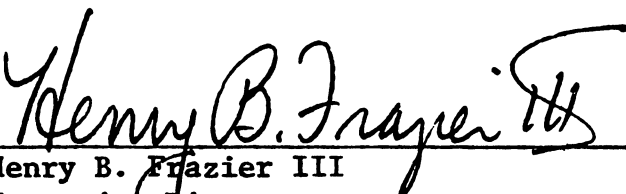
District Directors or Division Directors, Region, whose programs are to be reviewed, will be invited to attend the monthly budget meeting. Prior to attending the budget meetings, these managers shall be fully prepared to justify all funding requests.

Findings and recommendations of the Budget Committee will be submitted on a timely basis to the Regional Commissioner for review and final approval.

practices or matters affecting working conditions of bargaining unit employees.^{6/} Furthermore, the activities of the Regional Budget Committee itself, in developing and submitting findings and recommendations regarding overall program needs and priorities to the Regional Commissioner for review and approval, do not themselves involve personnel policies and practices, or other matters affecting working conditions.^{7/}

Accordingly, since the union's proposal falls outside the scope of required bargaining under section 11(a) of the Order, we must hold that the proposal is not one on which the agency is obligated to negotiate.

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

6/ Cf. AFGE Local 1738 and VA Hospital, Salisbury, North Carolina, FLRC No. 75A-103 (July 8, 1976), Report No. 107; Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100; National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98; Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 415 [FLRC No. 72A-27 (May 25, 1973), Report No. 40].

7/ The impact on personnel policies and practices concerning bargaining unit members, and on bargaining unit working conditions of a decision of the Regional Commissioner, based on a committee recommendation, would, of course, be a proper matter for negotiation under section 11(a) of the Order.

American Federation of Government Employees, Local 1626 and General Services Administration, Region 5. The dispute involved the negotiability under the Order of two union proposals concerning the assignment of office space to the union, and the reservation of a parking space for a union official at a particular facility, respectively. The agency determined that the first proposal was nonnegotiable under GSA internal regulations, for which a compelling need assertedly existed, and denied the union's request for an exception to the regulations; and that the second proposal was nonnegotiable because it conflicted with GSA interagency Federal Property Management Regulations. Since the regulations relied on by the agency in the determination concerning the second proposal apply on an interagency basis in the executive branch, the Council, consistent with its long-standing practice, requested from GSA, the agency having primary responsibility for the issuance and interpretation of the subject regulations, a formal interpretation of those regulations as they pertained to the circumstances of the present case.

Council action (July 13, 1977). The Council held that no compelling need existed, under section 11(a) of the Order or part 2411.13 of the Council's rules, for the internal regulations relied upon to bar negotiations on the first (office space) proposal; and therefore concluded that the agency's determination that this proposal was nonnegotiable was improper. The Council further held, based on GSA's response to the above-mentioned Council request, that the second (parking space) proposal conflicted with GSA interagency regulations, and therefore concluded that the agency's determination that this proposal was nonnegotiable was proper. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council set aside the agency's determination as to the first proposal and sustained the determination as to the second proposal.

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

American Federation of Government
Employees, Local 1626

(Union)

and

FLRC No. 76A-121

General Services Administration,
Region 5

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Proposal I

The union's proposal, as characterized by the parties in the record before the Council, provides as follows:

A request that GSA Region 5 management officials assign, on a continuing basis, office space to the union.

Agency Determination

The agency determined that the office space proposal is nonnegotiable under GSA internal regulations (set forth hereinafter) for which a "compelling need" exists and rejected the union's request for an exception from the regulations.

Question Before the Council

Whether a "compelling need" exists, within the meaning of section 11(a) of the Order and part 2413 of the Council's rules for the GSA internal regulations concerning office space for the union.

Opinion

Conclusion: No compelling need exists, under section 11(a) of the Order^{1/} or part 2413 of the Council's rules, for the GSA internal regulations relied

^{1/} Section 11(a) of the Order as amended provides in relevant part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at

(Continued)

upon to bar negotiations on the union's "office space" proposal. Accordingly, the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{2/}

Reasons: GSA internal regulations provide:^{3/}

(1) The use by labor organizations of space assigned to GSA services and staff offices, including office space, conference rooms, auditoriums, etc., will not be authorized on a continuing or permanent basis.

The agency asserts that a compelling need exists for this provision of its regulations to bar negotiations under section 2413.2(d) of the Council's rules^{4/} because the provision implements mandates to the agency contained in statute and Executive order, which implementation is essentially nondiscretionary in nature.

(Continued)

reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision . . . and this Order. [Emphasis added.]

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

3/ GSA Administrative Manual, OAD P 5410.1, Chapter 2-66.e.

4/ § 2413.2 Illustrative criteria.

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

.

(d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature[.]

The first mandate cited by the agency, contained in statute, provides as follows:^{5/}

All . . . public buildings . . . are expressly declared to be under the exclusive jurisdiction and control and in the custody of the Administrator of General Services, who shall have full power to take possession of and assign and reassign rooms therein to such Federal officials, clerks, and employees as in his judgment and discretion should be furnished with offices or rooms therein.

In this regard, the agency claims that its regulations must implement the "mandate" to preserve the exclusive decisional authority of the GSA Administrator with respect to the allocation of office space (whereas the disputed proposal would require negotiations to determine whether any such space would be allocated to the union).

In its Report and Recommendations which led to adoption by the President of the "compelling need" provisions of the Order, the Council stated:^{6/}

Experience under the Order, as well as testimony during the current review, establishes that, while considerable progress toward a wider scope of negotiation at the local level has been effected, . . . meaningful negotiations at the local level on personnel policies and practices and matters affecting working conditions have been unnecessarily constricted in a significant number of instances by higher level agency regulations not critical to effective agency management or the public interest. . . .

The Council further stated subsequently, in a decision applying the criteria and the compelling need provisions of the Order that:^{7/}

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

The criterion stated in section 2413.2(d) of the rules (note 4 supra), upon which the agency relies in the present case, takes into account, in this respect, that an agency may be required by law or other outside authority to implement, in an essentially nondiscretionary manner, the mandate of such

^{5/} 40 U.S.C. § 285.

^{6/} FLRC, Labor-Management Relations in the Federal Service (1975), at 38.

^{7/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977) Report No. 120 at 11 of the decision.

authority. However, the agency regulations in issue do not relate to the provision of law, cited by the agency herein as a basis for the asserted compelling need for such regulations, so as to meet the criterion stated in section 2413.2(d). That is, it is plain from the legislative history of the cited statute, that the provision thereof relied upon is concerned with the Administrator's governmentwide property management role,^{8/} whereas the agency regulations asserted as a bar to negotiations on the union's proposal are internal GSA regulations, the application of which is limited to "space assigned to GSA services and staff offices." Thus, there is no showing that these internal regulations, intended solely to restrict the assignment of office space within GSA, implement the mandate of the statute to the Administrator concerning governmentwide property management.

Furthermore, apart from the foregoing consideration, the provision of law relied upon explicitly provides that the Administrator shall exercise control over public buildings "as in his judgment and discretion" is appropriate. The implementation of this mandate would not be "essentially non-discretionary" but, rather, is expressly discretionary. Moreover, nothing in the language of the statute or its legislative history indicates that the "judgment and discretion" of the Administrator in assigning office space is intended to be solely and exclusively exercised by him personally.^{9/} In this regard, we note that, according to the Labor Agreement Information Retrieval System (LAIRS), "[t]he assignment of the use of office space to a labor organization for the purpose of conducting matters directly relating to Executive Order 11491 is negotiated in two out of three Federal agreements."^{10/} Thus, the negotiation by Federal agencies of provisions concerning the assignment of office space to unions appears to be a common practice.

Hence, based on all of the foregoing, we find that the agency has not supported its contention that the GSA regulations here involved implement in an essentially nondiscretionary manner the mandate (relating to the Administrator's interagency functions) contained in 40 U.S.C. § 285.

^{8/} See, e.g., H. Comm. on Expenditures in the Executive Departments, Federal Property and Administrative Services Act of 1949, H. Rep. No. 670, 81st Cong., 1st Sess. (1949).

^{9/} Cf. American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 1 FLRC 616, 618 [FLRC No. 73A-36 (Dec. 27, 1973), Report No. 47], rev'd and remanded on other grounds, sub nom. National Broiler Council v. FLRC, 382 F. Supp. 322 (E.D. Va. 1974); Council Supplemental Decision in the same case, at 2 (June 10, 1975), Report No. 73, aff'd sub nom. National Broiler Council v. FLRC, Civil Action No. 147-74-A (E.D. Va., Oct. 16, 1975).

^{10/} U.S. Civil Service Commission, Office of Labor-Management Relations, A Survey of Services to Unions (April, 1977), at 5.

The second "mandate" which the agency claims its regulations must implement in an essentially nondiscretionary manner is contained in Executive Order 11512 which provides:^{11/}

The Administrator . . . shall initiate and maintain plans and programs for the effective and efficient acquisition and utilization of federally owned and leased space

The agency provides no support for its claim but merely asserts that if a compelling need is not found for the internal agency regulations in question, "it could happen at some point in the future that there would not exist adequate office space fully to discharge all of GSA's mandated functions, by virtue of a union's having acquired, in contract negotiations, critical offices—the control over which the Congress and the President did not envision the Administrator relinquishing."

Executive Order 11512, like the statutory provision discussed above, is concerned with the Administrator's governmentwide property management role. Accordingly, for the reasons already stated in that discussion, we find that the agency has not supported its contention that the GSA internal regulations involved implement in an essentially nondiscretionary manner the mandate contained in Executive Order 11512.

As to the stated concern of the agency regarding negotiations on the proposal, we must emphasize that the obligation to negotiate does not include a concomitant obligation to agree to a particular proposal. Moreover, if the agency anticipates the possibility that changed circumstances may render any of an agreement's provisions inappropriate during the term of the agreement, it can seek, e.g., to negotiate various conditions and the right to make adjustments during the term of the agreement or to negotiate a reopener clause with regard to the provisions involved.

In summary the agency has not supported its contention that a compelling need exists for its internal regulations under section 2413.2(d) of the Council's rules. That is, the agency has not shown that the regulations constitute an essentially nondiscretionary implementation of mandates contained either in statute or Executive order.

The agency additionally contends that a compelling need exists for the regulations in question under section 2413.2(e) of the Council's rules,^{12/}

^{11/} Exec. Order No. 11512, 3 C.F.R. 269 (1970), reprinted in 40 U.S.C. § 490 at 9415 in note.

^{12/} Section 2413.2(e) provides that:

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

i.e., the regulations establish uniformity for a substantial segment of the employees of the agency where this is essential to the effectuation of the public interest. To support this contention the agency argues that:

Inasmuch as the permanent grant of an office by GSA to a Union would involve an expenditure of public funds—and one which steadily would be growing—the public interest would be subserved by a ruling upholding the essentiality of GSA's regulation, thereby precluding the undermining, in negotiations, of this salient public interest.

The agency provides no persuasive grounds to support this contention and we find it to be without merit. The mere assertion that "an expenditure of public funds" is prevented by the regulation is insufficient to demonstrate the essentiality of the regulation to bar negotiations.^{13/}

Thus, there is no showing, for example, that the reduced expenditures outweigh the clearly recognized benefits which may be derived from furnishing customary and routine services and facilities, such as office space, to the union. Moreover, E.O. 11491 in sections 19(a)(3) and 23^{14/} sanctions, and thereby implicitly recognizes, that it may be consistent with the public interest to do so.

In the Council's opinion, furnishing office space to the union is in the public interest when it relates to and implements the labor-management

13/ Cf. National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 supra note 7, at 11-12.

14/ Section 19(a)(3) provides:

Sec. 19. Unfair labor practices. (a) Agency management shall not—

.

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status; . . . [Emphasis added.]

Section 23 provides in relevant part:

Sec. 23. Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but is not limited to a clear statement of . . . policies with respect to the use of agency facilities by labor organizations Insofar as practicable, agencies shall consult with representatives of labor organizations in the formulation of these policies and regulations. [Emphasis added.]

relationship between the parties, that is, when it is beneficial to both the union and the agency involved.^{15/} Thus, we find that the agency has not supported its contention under section 2413.2(e) of the rules that its challenged regulation establishes uniformity for a substantial segment of the employees of the agency where this is essential to the effectuation of the public interest.

Proposal II

The proposal, as characterized by the parties in the record before the Council, provides as follows:

A request that a parking space be reserved for a union official at GSA's Battle Creek, Michigan facility.

Agency Determination

The agency determined that the parking space proposal is nonnegotiable because it conflicts with GSA Federal Property Management Regulations (FPMR's) which are generally applicable on an interagency basis throughout the U.S. Government (41 C.F.R. § 101-20.111-2(a)(1) through (6) (1976)).

Question Before the Council

Whether the proposal is nonnegotiable under the interagency Federal Property Management Regulations.^{16/}

Opinion

Conclusion: The proposal conflicts with GSA interagency regulations. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

15/ See National Federation of Federal Employees, Local 1485 and U.S. Coast Guard Base, Miami Beach, Florida, FLRC No. 76A-58 (June 6, 1977), Report No. 127 at 5.

16/ The union claims that a compelling need for the regulations does not exist. This contention is clearly inapposite where, as here, an interagency regulation is involved. As the Council plainly stated in its Information Announcement entitled "Revision of Council Rules" and dated September 24, 1975, at page 5: "Policies and regulations issued by an agency which are applicable to other agencies are not subject to a compelling need challenge."

Reasons: The regulations relied upon by the agency apply on an interagency basis in the executive branch. Thus, consistent with its longstanding practice,^{17/} the Council requested from GSA, the agency having primary responsibility for the issuance and interpretation of the subject interagency regulations, a formal interpretation of such regulations as they pertain to the circumstances of the present case.^{18/} GSA replied in relevant part as follows:

17/ See, e.g., cases previously referred to GSA—National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98 at 10; and National Treasury Employees Union; Chapter No. 22, National Treasury Employees Union; and United States Department of the Treasury, Internal Revenue Service, Philadelphia District, FLRC No. 75A-118 (Nov. 19, 1976), Report No. 118 at 4.

18/ As the Council stated in its letter requesting such formal interpretation:

When an appeal involves the question of whether a proposal is violative of the "regulation of appropriate authority outside the agency," i.e., a regulation which applies on an interagency basis in the executive branch, it has been the longstanding practice of the Council to request a formal interpretation of such regulation from the agency having primary responsibility for the issuance and interpretation of the subject interagency regulation, as it pertains to the particular circumstances of the case.

The instant case is without precedent in that GSA, which issued the interagency Federal Property Management Regulations here concerned, is also a party to the negotiability dispute. Nevertheless, the Council believes that, consistent with its established practice and its Memorandum of Understanding with your agency, the matter should be referred to your office for a formal interpretation of the subject interagency regulation as it pertains to the circumstances in this particular intra-agency negotiability dispute.

The Council, when an interagency regulation is pertinent to its decision, uniformly relies on the interpretation of such regulation by the issuing authority. Its decision in this case will be based upon such an interagency regulation, and will have a labor-management relations impact extending well beyond the bargaining relationship of the immediate parties to the case at hand. Therefore, the Council believes that the record should contain a formal interpretation of the subject directives rendered by your agency qua interagency regulator. The Council's decision should not be based solely upon GSA's prior determination regarding the applicability of that interagency regulation rendered in its role as an adversary in the intra-agency negotiability dispute. Thus, it is suggested that your response be based on a de novo interpretation and application of the subject interagency regulation as it pertains to the circumstances in this case. [Footnote omitted.]

The Federal Property Management Regulations (FPMR's) issued by GSA endeavor to make the criteria for space assignments uniform and equitable for all occupants of GSA-controlled space.

The primary mission of GSA's Public Buildings Service is to provide space (including parking) and related services adequate to permit Federal agencies to perform their missions, retaining for GSA the right and authority to assign and reassign such space when such actions are in the best interest of the Government.

GSA, in carrying out its responsibilities to provide space for vehicle parking, has established in FPMR 101-20.111, Vehicle parking facilities, criteria to permit the equitable assignment of available parking spaces. It is our opinion that the order of priority set forth thereunder recognizes, in as fair a manner as is possible, the various needs for parking and permits the most equitable distribution of available parking.

In requesting the assignments of parking space, agencies must justify their needs to GSA's satisfaction. Under most circumstances, GSA is the final judge of (1) the adequacy of that justification, (2) the relative urgency of that need, (3) the location assigned or the relocation of the requesting agency, (4) the amount of space to be provided, and (5) the alterations (if any), services and amenities to be furnished. As the monitor of the efficient use of Government space and to keep Government expenditures at a minimum, GSA has the authority and responsibility to reclaim from an agency space which GSA determines is in excess of the agency's needs or to move such an agency into a lesser area in another location.

GSA cannot permit itself to be placed in a position of providing space for a non-Federal activity (e.g., a labor organization) over which it would not have this same degree of control.

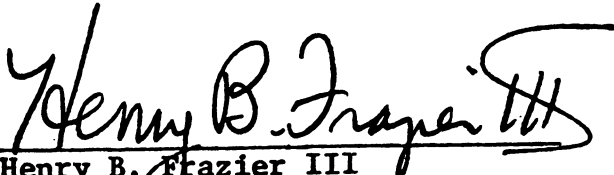
We must also point out that, as an agency, the primary mission of which is to furnish space to Federal agencies at minimal cost to the Government, GSA could not assign space to a labor organization representing employees in any space where there are or would be Federal agency needs that must be satisfied. It could not justify leasing parking for a Federal agency if a labor organization occupied Government owned parking space suitable for that agency.

For the reasons cited above, GSA cannot assign (i.e., commit for occupancy a specified area for an indefinite period of time) parking space for a labor organization. However, GSA will permit assignment of parking to individuals—some of whom might be employees who also happen to be officials of labor organizations—whose need for parking spaces conforms to the criteria outlined in FPMR 101-20.111 or FPMR 101-20.117, Carpool parking. . . .

Based on the foregoing interpretation by GSA of its own directives and the record before us, we find that the proposal calling for the reservation of a parking space for "a union official" would in essence require the assignment of a parking space for a labor organization, in conflict with the GSA regulations. In this regard, we note that under the regulations a "union official" may individually qualify for an assigned space by meeting the criteria referenced by GSA in the above-quoted material; ^{19/} however, the union's proposal does not provide for the assignment of a parking space on that basis.

Accordingly, the agency determination of nonnegotiability is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

19/ See also National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98 at 12.

U.S. Immigration and Naturalization Service, Burlington, Vermont and American Federation of Government Employees, Local No. 2538, AFL-CIO (Purcell, Arbitrator). This appeal arose from the arbitrator's award ordering the activity to compensate the grievants for the overtime work denied them in violation of the parties' agreement. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated section 12(b)(5) of the Order (Report No. 122).

Council action (July 13, 1977). The Council found that the arbitrator's award violated section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the award in its entirety.

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

U.S. Immigration and Naturalization
Service, Burlington, Vermont

and

FLRC No. 76A-131

American Federation of Government
Employees, Local No. 2538, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award that ordered the activity to compensate the grievants for the overtime work opportunity denied them in violation of the parties' negotiated agreement.

According to the arbitrator's award, it appears that this dispute arose as the result of the activity's decision to commence assigning "When Actually Employed" (WAE) Immigration Inspectors to inspect passengers of a regularly scheduled 7:30 p.m. airline arrival flight in order to reduce the expenditure of overtime costs. These WAE employees are intermittent employees with a GS-5 classification who customarily work under and assist a higher grade officer such as an Immigration Examiner who is classified as a GS-11. Previously, it was the consistent practice of the activity to assign Immigration Examiners to attend to the inspection needs of the 7:30 p.m. flights. Since the arrivals were after their regular workday, the Immigration Examiners received overtime pay for this work. The WAE Immigration Inspectors' hours of duty were from 4 p.m. to 8 p.m., and therefore they were not in an overtime pay situation when performing these duties. The union filed a grievance concerning the activity's use of WAE Immigration Inspectors in lieu of Immigration Examiners to perform the inspection duties, and the grievance was ultimately submitted to arbitration.

The Arbitrator's Award

The merits issue submitted to arbitration was stipulated by the parties as follows:

When the Agency determined to use "When Actually Employed" Immigration Inspectors rather than Immigration Examiners to perform the inspection function at Bradley International Airport from 5 p.m. to 8 p.m. during the basic workweek, did the Agency violate Article 4;

Section B, Article 25, Section A, and/or Article 5, Section C, of the negotiated agreement?^{1/} [Footnote added.]

The arbitrator held with respect to this issue that the activity had violated the negotiated agreement when it determined to use and commenced using WAE Immigration Inspectors rather than Immigration Examiners to perform the inspection duties. In discussing this holding, the arbitrator stated that the dispositive question was whether there existed a genuine past practice of assigning Immigration Examiners to attend to the inspection needs of the 7:30 p.m. flights, and, if so, whether the activity's unilateral discontinuance of the practice constituted a violation of an understanding that was binding upon the parties. The arbitrator concluded that the activity lacked the right to take such unilateral action, by reason of the "strong and unbroken" practice in the past of not assigning WAE Immigration Inspectors to the inspections. He further concluded that such a practice needed to be continued until joint negotiations were held by the activity and the union concerning the practice or until the activity employed an additional full-time Immigration Examiner to attend to the inspection needs of the flights. As a remedy, the arbitrator ordered the activity to compensate the grievants "in such amount as they would have been entitled to had they not been denied the overtime work opportunity in question."

1/ The cited provisions of the collective bargaining agreement provide as follows:

ARTICLE 4 - Rights and Obligations

B. In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

ARTICLE 25 - Overtime (other than uncontrollable overtime)

A. Overtime assignments will be distributed and rotated equitably among eligible employees. Supervisors shall not assign overtime work to employees as a reward or a penalty, but solely in accordance with the Agency's need. Complaints or disagreements on distribution of overtime shall be processed in accordance with the negotiated grievance procedure.

ARTICLE 5 - Relationship of the Agreement to Agency Policies, Regulations, and Practices

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleges that the award violates section 12(b)(5) of the Order.^{2/} Both parties filed briefs.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception which alleges that the award violates section 12(b)(5) of the Order.^{3/}

In the circumstances of this case, the activity, in order to reduce the expenditure of overtime costs, determined to use and commenced using WAE Immigration Inspectors to perform inspection duties previously performed by Immigration Examiners. The arbitrator, however, found on the basis of a past practice of reserving the work opportunities in question to Immigration Examiners in an overtime status that the activity violated the parties' negotiated agreement when it commenced using the WAE Immigration Inspectors on a nonovertime basis, and ordered the grievant Immigration Examiners

(Continued)

C. This agreement is not intended to abolish, solely by virtue of exclusion herefrom, any local understanding or agreements which are mutually acceptable at the local level.

^{2/} The agency requested and, under section 2411.47(f) of its rules of procedure, the Council granted a stay of the arbitrator's award.

^{3/} Section 12(b)(5) provides:

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

.

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

compensated for the denied overtime. In the Council's opinion, such an award interferes with rights reserved to agency management under section 12(b)(5) of the Order and hence violates that section.

The Council has consistently held that rights reserved to agency management by section 12(b) of the Order may not be infringed by an arbitrator's award under a negotiated agreement.^{4/} In the present case the arbitrator's award would prevent the activity from taking action to reduce or eliminate the need for continued overtime work by impairing the activity's ability to assign the inspections to personnel other than Immigration Examiners. Thus the activity would be effectively precluded from hiring part-time personnel to perform the work during their regular worktime in order to avoid the necessity of overtime by full-time personnel. Such an award, by ordering that the activity maintain its past practice of assigning the Immigration Examiners to the inspections, thereby negating the activity's determination to assign WAE Immigration Inspectors to the inspections during the latter's regular tour of duty, contravenes the right reserved to management by section 12(b)(5) of the Order to determine the "personnel" by which operations are to be conducted and therefore may not be sustained.

The Council's conclusion in this regard is consistent with its decision in the McClellan Air Force Base case.^{5/} There, the Council sustained an agency determination that a particular proposal was nonnegotiable on the basis that the proposal "involve[d] more than merely a procedure for the assignment of work which management has designated to be performed as scheduled overtime," but "by its plain language, would prohibit management from assigning other types of personnel to work on a particular project or from hiring part-time personnel to perform the work during regular worktime in order to avoid the necessity of overtime on the project." The Council concluded in that case that such a proposal "clearly contravenes 'the substantive right as reserved to management' by section 12(b)(5) of the Order 'to determine the type of personnel, or which personnel, will conduct particular agency operations.'"^{6/}

^{4/} E.g., National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

^{5/} NAGE, Local R12-58 and McClellan Air Force Base, FLRC No. 75A-90 (Oct. 22, 1976), Report No. 114. In that case the proposal in dispute provided as follows:

Employees will not be systematically excluded from receipt of overtime by Management employing other personnel for the purpose of denying overtime to said employees.

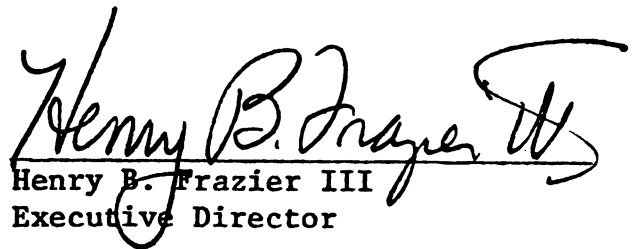
^{6/} Id. at 11-12 of Council decision.

The Council's decision in Philadelphia Naval Shipyard,^{7/} relied upon by the union in support of the arbitrator's award in the instant case, is not applicable in these circumstances. In Philadelphia Naval Shipyard, which concerned a proposal which would prevent management from making overtime assignments to nonunit employees of work normally performed by unit employees for the sole purpose of denying overtime to the unit employees, the Council noted that the proposal concerned solely the assignment of work that management had already determined was to be performed on overtime and that it would not restrict management in any manner in otherwise assigning to nonunit employees work performed by unit employees during nonovertime periods (or during overtime periods except for the sole purpose of eliminating the need for unit employees on overtime) and held the proposal within the parties' obligation to negotiate under section 11(a) of the Order. However, in the present case there is no indication that the activity had determined that the inspections were to continue to be performed on an overtime basis, but rather had determined that the inspections were to be performed by WAE Immigration Inspectors during their regular tour of duty.^{8/}

Conclusion

For the foregoing reasons, we find that the arbitrator's award violates section 12(b)(5) of the Order. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award in its entirety.

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 13, 1977

7/ Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 456 [FLRC No. 72A-40 (June 29, 1973), Report No. 41].

8/ In its brief the union states that, even assuming that management's reserved rights will be affected by the arbitrator's award, the award may be interpreted as merely compensating the employees for the activity's unilateral action without consultation over the impact and implementation of the work reassignment. Without passing on the merits of the union's arguments in this regard, the Council is of the view that the award as a grant of backpay for the failure by the activity to consult with the union regarding impact and implementation of the reassignment is precluded for the reasons set forth in the Council's decision in Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100. That is, there is no showing in the present case that but for the activity's failure to consult with the union the Immigration Examiners would have continued to receive overtime pay for the inspections.

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, A/SLMR No. 687.

This appeal arose from a supplemental decision of the Assistant Secretary in which he found that two proposed bargaining units in the agency's Cleveland region were appropriate and left undisturbed certifications previously issued to Local 3426, American Federation of Government Employees, and to Local 73, National Federation of Federal Employees, respectively. The Council accepted the agency's petition for review, having determined that a major policy issue was presented by the supplemental decision of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). (Report No. 119.) Pursuant to section 2411.16(b) of the Council's rules, the Assistant Secretary intervened in the case, becoming a party to the proceedings; and filed a brief, requesting that the Council reconsider its decision in the consolidated DCASR San Francisco cases (FLRC Nos. 75A-14, 75A-128, and 76A-4 (Dec. 30, 1976), Report No. 119), and urging that the Council let stand the two disputed unit certifications previously issued in the instant case.

Council action (July 20, 1977). The Council, in response to matters discussed by the Assistant Secretary in his brief, affirmed, and amplified in a number of respects, the policies and principles enunciated in its decision in the consolidated DCASR San Francisco cases, and applied them to the present case. The Council found that the Assistant Secretary's supplemental decision was inconsistent with and failed to promote the purposes of the Order, especially those reflected in section 10(b) and, further, that neither of the units sought by the unions here involved was appropriate for purposes of exclusive recognition under the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for action consistent with the Council's decision.

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

Defense Supply Agency, Defense
Contract Administration Services
Region (DCASR), Cleveland, Ohio,
Defense Contract Administration
Services Offices (DCASO's), Akron,
Ohio, and Columbus, Ohio

and

Local 3426, American Federation of
Government Employees, AFL-CIO

A/SLMR No. 687
FLRC No. 76A-97

and

Local 73, National Federation
of Federal Employees

DECISION ON APPEAL FROM
ASSISTANT SECRETARY SUPPLEMENTAL DECISION

Background of Case

This appeal arose from a supplemental decision of the Assistant Secretary in which he found that two proposed bargaining units in the Defense Supply Agency,^{1/} Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, were appropriate and left undisturbed certifications previously issued to Local 3426, American Federation of Government Employees (AFGE) and Local 73, National Federation of Federal Employees (NFFE), respectively.

The Assistant Secretary's decision and supplemental decision herein grew out of separate petitions filed by AFGE and NFFE seeking to represent units of certain employees of field activities of the Cleveland DCASR located in Akron and Columbus, respectively. The Cleveland DCASR is one of nine regions of the Defense Supply Agency (DSA or the agency), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The Cleveland DCASR covers Ohio, Kentucky, Michigan, western Pennsylvania, and Canada. It consists of a headquarters organization and field activities which are divided into five Defense Contract Administration Services Districts (DCASD's)—Detroit, Cincinnati, Grand Rapids, Dayton, and Cleveland—and nine Defense Contract Administration Services Offices (DCASO's) located in Toledo, Akron, Columbus, Ottawa and at five privately owned manufacturing plants. The field activities perform basic mission functions of the region

^{1/} Subsequent to the filing of this appeal, the name of the agency was changed to Defense Logistics Agency.

in their respective geographic areas. Generally, the DCASD's have administrative responsibility for the activities of the DCASO's. Approximately 2,000 civilian employees are employed throughout the Cleveland DCASR. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. In addition to units of 69 and 65 nonprofessionals respectively in the Akron and Columbus DCASO's, which are the subject of the instant case, there were, at the time of the Assistant Secretary's supplemental decision, five other exclusive bargaining units within the region: a unit composed of nonprofessional employees in headquarters and a plant DCASO in Cleveland; a unit of DCASR employees in three counties in the states of Ohio and Pennsylvania; a unit of employees in the Cincinnati DCASD; a unit in the Toledo DCASO; and a unit composed of employees assigned to the Detroit DCASD, the Grand Rapids DCASD, and the Ottawa DCASO.

In March 1974, the Assistant Secretary found appropriate the separate units in the Akron, Ohio DCASO and in the Columbus, Ohio DCASO sought by AFGE and NFFE, respectively.^{2/} (Elections were thereafter conducted in the units involved and certifications of representative were issued to AFGE and NFFE.) The Council subsequently set aside that decision, concluding that in reaching his decision the Assistant Secretary had relied on an erroneous interpretation and application of Merchant Marine,^{3/} and remanded the case to him for reconsideration and disposition consistent with its decision. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. In that decision, the Council further stated that the Assistant Secretary, upon reconsideration, should carefully examine the existing regulatory framework of DSA, including the DCASR's, and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) of the Order^{4/} could be properly applied. Moreover, the Council stated that in

2/ Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Columbus, Ohio, and Akron, Ohio, A/SLMR No. 372 (Mar. 25, 1974).

3/ United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30].

4/ Section 10(b) provides, in pertinent part, that:

A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838^{5/} "were not designed to render fragmented units appropriate."

In this regard, the Council referred to section V.1. of the Report accompanying E.O. 11838 for the proposition that the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units.^{6/} The Council stated that those recommendations (which were adopted by the President) had as their principal purpose "to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program." The Council quoted from section IV of the Report accompanying E.O. 11838 which concluded:^{7/}

We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.

Upon reconsideration, the Assistant Secretary found, based on the entire record, "consistent with the earlier determination herein, that the units sought are appropriate for the purpose of exclusive recognition under the Order." In so ruling, the Assistant Secretary determined that the employees in each of the claimed units share a clear and identifiable

5/ Section 11(a) provides, in pertinent part, as follows:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

6/ Labor-Management Relations in the Federal Service (1975), at 38.

7/ Id. at 37.

community of interest separate and distinct from other employees of DCASR Cleveland. Further, noting the Council's previous decision in these cases (FLRC No. 74A-41, supra) as well as the Council's Tulsa AFS decision,^{8/} the Assistant Secretary found that the claimed units would promote effective dealings and efficiency of agency operations, and that agency management's contentions to the contrary were "at best, conjectural and speculative and . . . not supported by the record herein."

In finding that the units sought would promote efficiency of agency operations, the Assistant Secretary, citing his decision in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559 (Sept. 16, 1975), rejected the agency's argument that such units would result in fragmentation of the region and increased costs and inconvenience because the administration of personnel and labor relations policies was centralized at region headquarters. In so ruling, he stated that the agency's argument "related more to the appropriateness of the broader unit, rather than to the potential adverse impact resulting from the establishment of the claimed units upon the efficiency of agency operations," and noted further the absence of any countervailing evidence that the already-existing less than regionwide units in the Cleveland DCASR have failed to promote the efficiency of the agency's operations. Similarly, in finding that the claimed units would promote effective dealings, the Assistant Secretary again cited the absence of countervailing evidence regarding any lack of effective dealings experienced in the other, less than regionwide units already in existence in the Cleveland DCASR, and noted further that, subsequent to the Assistant Secretary's initial decision herein (A/SLMR No. 372), the chief of the Akron DCASO negotiated a complete agreement which was approved by the Regional Commander, and that the chief of the Columbus DCASO was in the process of negotiating a complete agreement.

In conclusion, the Assistant Secretary, again citing and relying upon his decision in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, supra, stated that, in his view, the foregoing determination was not inconsistent with the expressed policy of the Report accompanying Executive Order 11838:

When Section 11(a) of the Order is considered in conjunction with the principle set forth . . . in the Preamble to the Order that efficient administration of the Government is benefited by employee participation in the formulation and implementation of personnel policies and practices affecting conditions of employment, it is evident that the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to

8/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

these matters, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

Accordingly, the Assistant Secretary left undisturbed the certifications previously issued to AFGE Local 3426 in Akron and to NFFE Local 73 in Columbus.

The Defense Supply Agency appealed this decision to the Council. Upon consideration of the agency's petition for review, the Council determined that a major policy issue is presented by the supplemental decision of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). None of the parties filed a brief on the merits. Pursuant to section 2411.16(b) of the Council's rules, the Assistant Secretary intervened in the case, becoming a party to the proceedings, and filed a brief. The Council, pursuant to section 2411.52 of its rules, granted the agency and unions leave to file supplemental arguments in response to the brief of the Assistant Secretary. The agency filed supplemental arguments.

Opinion

As previously described, the Assistant Secretary found in his supplemental decision that separate units of 69 and 65 nonprofessional employees at two DCASO's within the Cleveland DCASR were appropriate for the purpose of exclusive recognition, relying substantially upon his reasoning and conclusion in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559. The major policy issue raised herein is whether the instant decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b).

On December 30, 1976, the Council issued its consolidated decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4 (Dec. 30, 1976), Report No. 119, which presented, in a similar factual setting, the identical major policy issue involved in the instant case. In its consolidated decision, herein referred to as the consolidated DCASR decision or cases, the Council set aside and remanded the decisions of the Assistant Secretary. The Council concluded that the Assistant Secretary's decisions therein

finding appropriate and directing an election in each of three separate units in the San Francisco DCASR were inconsistent with the purposes of the Order and, further, that equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that none of the units sought constituted a unit appropriate for purposes of exclusive recognition under the Order.

The Assistant Secretary, as intervenor in the instant case, requests that the Council reconsider its decision in the consolidated DCASR decision and urges that the Council let stand the two disputed unit certifications previously issued in the Cleveland DCASR. The Council has carefully considered the entire record in the case, including the brief of the Assistant Secretary and the views of the agency in response thereto. The Council hereby reaffirms the principles enunciated in the consolidated DCASR decision and, for the reasons fully explicated by the Council in that decision, which are equally applicable herein, finds that the Assistant Secretary's supplemental decision in the instant case is inconsistent with and fails to promote the purposes and policies of the Order, especially those reflected in section 10(b) and, further, that neither of the units sought by the unions is appropriate for purposes of exclusive recognition under the Order.^{9/}

The Council, in response to matters discussed by the Assistant Secretary in his brief, wishes to amplify in a number of respects the policies and principles enunciated in the consolidated DCASR decision and applied in the present case:

1. Responsibility of the Assistant Secretary to develop a complete evidentiary record.

In Tulsa AFS, the Council stated (at 7-8):

^{9/} In so concluding, the Council must disagree with the Assistant Secretary's reliance in his supplemental decision upon the course of the parties' negotiations since his original decision and direction of elections in A/SLMR No. 372 as a factor to support his finding that the claimed units will promote effective dealings. Apart from other considerations, it is contrary to the purposes of the Order, in the Council's opinion, to require agency management to meet and confer in good faith with the unions certified as a result of the Assistant Secretary's decision and direction of elections and then to use the product of such negotiations to support the original appropriate unit determination, particularly where agency management's only recourse would be to refuse to meet and confer with the unions in good faith and thereby risk an unfair labor practice finding. See Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 473 [FLRC No. 72A-30 (July 25, 1973), Report No. 42].

The appropriate unit determination process is non-adversary in nature. It is designed to ensure that any unit found appropriate will provide a clear and identifiable community of interest among the employees involved, and will promote effective dealings and efficiency of agency operations. Before making a final decision concerning the appropriateness of a particular unit, therefore, the Assistant Secretary must develop as complete an evidentiary record as possible regarding each of the three criteria and must carefully consider and evaluate that evidence. The integrity and fairness of the process under the Order demands no less.

Where the Assistant Secretary believes that the evidence furnished by the parties is not sufficient to enable him to affirmatively determine that a particular unit will satisfy the three appropriate unit criteria of section 10(b), the Assistant Secretary must actively solicit such evidence from the parties in order to develop the requisite record. Where the parties fail or are unable to respond to the Assistant Secretary's solicitation, the Assistant Secretary will have to base his decision on the information available to him, making the best-informed judgment he can under the circumstances, keeping in mind, of course, the requirement that any unit found appropriate must meet the tests of section 10(b) of the Order.

Thus, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council further stated in Tulsa AFS (at 10 n. 8):

[T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

The Assistant Secretary, in finding appropriate one of the units sought in the consolidated DCASR cases, had particularly noted:

. . . the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements

In its consolidated DCASR decision, the Council dealt with this statement by relying on the requirements articulated in Tulsa AFS and found (at 22-23) that:

[A] review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations." While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.

[T]he Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the '0(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.^{10/} [Footnote omitted and footnote added.]

10/ The Council's decision in Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region and Weather Service Offices (Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota), A/SLMR No. 331, FLRC No. 74A-16 (July 21, 1975), Report No. 77 [hereinafter referred to as National Weather Service] is not to the contrary. In National Weather

(Continued)

Accordingly, in making an appropriate unit determination, the Assistant Secretary is not required to develop evidence on behalf of either party. Rather, the decisions of the Council, including the consolidated DCASR decision, emphasize the nonadversary nature of the Assistant Secretary's proceedings to determine the appropriateness of units and stress the affirmative role of the Assistant Secretary to develop as complete a record as possible in order to render an informed judgment with regard to each of the three section 10(b) criteria.^{11/}

2. Responsibility of the Assistant Secretary to give equal weight to each criterion of section 10(b).

The Council has clearly stated that, in making an appropriate unit determination, the Assistant Secretary must give equal weight to each

(Continued)

Service, the Assistant Secretary found four separate units within a single region of the agency appropriate, relying in part on a lack of any specific countervailing evidence as to whether the proposed unit would promote effective dealings and efficiency of agency operations. Upon review, the Council applied the principles enunciated in Tulsa AFS and determined, in contrast with its decision in the consolidated DCASR cases, that the Assistant Secretary's decision met the essential requirements of section 10(b). The difference in result is based on at least one significant factual distinction: Unlike in the consolidated DCASR cases, the union representative in National Weather Service, as noted by the Council, testified that the separate units would, if the union were certified, fall under an existing multi-unit agreement. Thus, viewing the small units as part of a multi-unit bargaining structure, the Council was of the opinion in National Weather Service that the decision of the Assistant Secretary did not conflict with the requirements of section 10(b) of the Order. (See National Weather Service n. 7 and accompanying text.)

^{11/} It should be noted that in the consolidated DCASR decision, the Council did not reach the question as to responsibility of the Assistant Secretary in the event that, after active solicitation by him, there is still insufficient evidence upon which he might make an affirmative determination as to effective dealings and efficiency of agency operations. In the consolidated DCASR decision the Council found that the Assistant Secretary had failed to actively solicit such evidence. Moreover, a situation in which the Assistant Secretary's active solicitation of evidence would fail to produce sufficient results should be rare indeed, since the Council's consolidated DCASR decision provided the Assistant Secretary with guidance with regard to subsidiary factors or indicators of effective dealings and efficiency of agency operations. See consolidated DCASR decision at 13.

criterion of section 10(b).^{12/} Therefore, a unit, in order to be appropriate under the Order, must clearly, convincingly and equally satisfy each of the 10(b) criteria; that is, only units which not only ensure a clear and identifiable community of interest among the employees concerned but also promote effective dealings and efficiency of agency operations are appropriate under the Order. Expressed another way: no greater reliance may be placed on one criterion, e.g., community of interest, than another, e.g., efficiency of agency operations. Further, where a proposed unit satisfies two of the criteria, e.g., community of interest and effective dealings, but does not satisfy the third criterion, namely, efficiency of agency operations, that unit may not be found appropriate. Thus, "equal weight" does not mean that evidence going to each criterion must be equal in amount and quality; it does mean that no one criterion or two criteria may be accorded greater weight, i.e. importance, than the other(s) in the appropriate unit determination.

Moreover, the requirement that the Assistant Secretary give equal weight to each criterion in section 10(b) does not compel the Assistant Secretary, as he put it, "to search for the most perfect conceivable bargaining unit." The Council's consolidated DCASR decision does not suggest that the Assistant Secretary is required to do so. In the consolidated DCASR decision, the Council found, among other things, that equal application of the three section 10(b) criteria would dictate a finding that the units sought were not appropriate for purposes of exclusive recognition under the Order. Furthermore, the Council stated that a regionwide unit would meet all of the section 10(b) criteria and would also be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. The Council did not hold that, of several appropriate units, the regionwide one would be "most" or "more" appropriate. The Council's consolidated DCASR decision reflects the basic policy that an appropriate unit must meet the three criteria of section 10(b) and that, in applying the three criteria, due consideration must be given to the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. Clearly, the proper application of the three criteria requires the Assistant Secretary to exercise considerable judgment, but it does not require him to find "the most perfect conceivable bargaining unit."

3. Responsibility of the Assistant Secretary regarding the Order's policy of reducing fragmentation in the bargaining unit structure.

In its consolidated DCASR decision, the Council specifically rejected the Assistant Secretary's interpretation of the Order to the effect that negotiations at the local level are to be encouraged to the maximum extent

^{12/} E.g., Labor-Management Relations in the Federal Service (1975), at 29; Tulsa AFS at 6.

possible. The Assistant Secretary had relied upon language in the Preamble^{13/} and in the revised section 11(a).^{14/}

It is beyond question that the Order, as evidenced by this Preamble language, encourages the participation of employees in the formulation and implementation of personnel policies and practices affecting conditions of their employment; however, the Order provides for this participation through exclusive recognition in an "appropriate" unit under section 10. Moreover, the Report accompanying E.O. 11838 clearly states that the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of existing units which would thereby reduce unit fragmentation.^{15/}

Further in the above regard, it is important to remember that the Order reflects a dual policy: not only to reduce existing fragmentation through unit consolidations but also to prevent further fragmentation through new appropriate unit determinations, thereby promoting a more comprehensive bargaining unit structure. The Council acknowledges that this dual policy may have the effect in some situations of forestalling the representation of some employees; however, these employees need not be denied the opportunity for representation altogether. Rather, as is customary in cases such as here involved, representation can be achieved by expanding organizational efforts to include those employees who would constitute an appropriate unit.^{16/} As the Council said in the consolidated DCASR decision (at 20):

[W]hile a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted.

^{13/} "[T]he well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment"

^{14/} See note 5 supra and accompanying text.

^{15/} See note 6 supra and accompanying text.

^{16/} It should be noted in this regard that section 10(b) provides in pertinent part: "A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized"

4. Council review of Assistant Secretary decisions.

Decisions of the Assistant Secretary are subject to a limited right of appeal to the Council.^{17/} In accordance with its rules, the Council reviews only those Assistant Secretary decisions in which major policy issues are present or where it appears that the decision was arbitrary and capricious.^{18/} Further, the Council will sustain a decision of the Assistant Secretary on review unless it is arbitrary and capricious or inconsistent with the purposes of the Order.^{19/} Where the Council finds that a decision of the Assistant Secretary is inconsistent with the purposes and policies of the Order, it customarily has set aside and remanded the decision.^{20/} Only in the most exceptional circumstances will the Council substitute its judgment for that of the Assistant Secretary in applying policy to the facts of a particular case. The consolidated DCASR cases presented such circumstances. In those cases, the Council was of the opinion that extraordinary measures, beyond setting aside and remanding the decisions of the Assistant Secretary, were required in order to insure the effectuation of the Order's unit structure policy. Therefore, the Council, in addition to setting aside the Assistant Secretary's decisions, determined that none of the units sought was appropriate for purposes of exclusive recognition under the Order.

The Council is likewise of the opinion that the instant case presents exceptional circumstances and warrants extraordinary action by the Council —because of its history of having once been remanded, because of the reasoning relied upon by the Assistant Secretary, and because of the close factual similarity of this case to the consolidated DCASR cases. Therefore, as concluded above at page 6, the Council here not only has set aside the Assistant Secretary's decision but also has determined that the units sought are not appropriate under the Order for purposes of exclusive recognition.

^{17/} The Study Committee Report and Recommendations, August 1969, which led to the issuance of Executive Order 11491, stated:

The Assistant Secretary should be authorized to issue decisions to agencies and labor organizations in all cases, subject to a limited right of appeal on major policy issues by either party to the Federal Labor Relations Council Labor-Management Relations in the Federal Service (1975), at 69.

^{18/} 5 CFR § 2411.12.

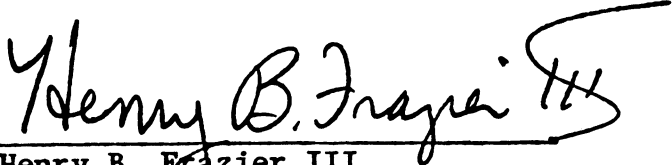
^{19/} 5 CFR § 2411.18(a).

^{20/} See e.g., Tulsa AFS; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88.

Conclusion

For the reasons set forth above, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's supplemental decision and remand the case to him for action consistent with our decision herein.^{21/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: July 20, 1977

21/ In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Logistics Agency, including the Akron DCASO unit involved herein. Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include this unit involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in this unit have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the election. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the Akron DCASO unit involved herein would have the options only of being represented in the consolidated unit or being unrepresented—unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a unit determined to be appropriate. See consolidated DCASR decision at 23.

National Association of Government Employees, Local R5-100 and Adjutant General, State of Kentucky; and National Association of Government Employees, Local R14-76 and Adjutant General, State of Wyoming. Each of the local unions of the National Association of Government Employees (NAGE) here involved sought to negotiate an identical proposal, which would modify in certain respects the reduction in force procedures for National Guard Bureau (NGB) technicians established by NGB regulation. The Department of Defense (agency) determined that the proposal, as here in dispute, was nonnegotiable because, among other things, it conflicted with the subject NGB regulation for which a "compelling need" existed within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules. The agency also denied each local union's request for an exception to the regulation. NAGE thereafter filed the instant petition for review with the Council.

Council action (July 20, 1977). The Council found that a "compelling need" existed, within the meaning of section 11(a) of the Order and Part 2413 (section 2413.2(d)) of the Council's rules for the subject NGB regulation to bar negotiation on the proposal involved. Accordingly, the Council held that the agency's determination that the proposal was nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, sustained the determination.

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

National Association of Government Employees,
Local R5-100

(Union)

and

Adjutant General, State of Kentucky

(Activity)

and

FLRC No. 76A-109

National Association of Government Employees,
Local R14-76

(Union)

and

Adjutant General, State of Wyoming

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

Each of the unions sought to negotiate an identical multi-part proposal, set forth in an appendix hereto, which would modify in certain respects the reduction in force (RIF) procedures for National Guard technicians^{1/}

^{1/} National Guard technicians are employed pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1970), in full-time civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces. Such technicians must, as a condition of their civilian employment under the Act, become and remain members of the National Guard (i.e., in a military capacity) and hold the military grade specified for the technician position pursuant to 32 U.S.C. § 709(b) and (e). (See note 10 infra.)

established by National Guard Bureau (NGB) regulations.^{2/} In essence, these regulations provide: (1) That a technician whose position is abolished in a RIF may compete with another technician or other technicians in the same competitive level^{3/} for assignment to an occupied position based on a composite measurement of technician performance and related military performance; and (2) that a technician in one competitive level in the same grade as a technician in another competitive level may be assigned to that position based on a comparison of each technician's qualifications for the military aspect as well as the technician aspect of the technician position in conjunction with a composite measurement of technician and military performance. In both of these respects, technician seniority is permitted to be used as a tie-breaking factor when competing technicians have equal composite performance ratings obtained by averaging a numerical technician performance rating with a numerical military performance rating. In contrast, the unions' proposal at issue herein would establish technician seniority as the primary factor in the determination of technician displacement rights within and across competitive levels. Thus, as determined by the agency, the unions' proposal is in conflict with the NGB regulations with respect to the use of technician seniority.

Agency Determination

The Department of Defense determined that the unions' proposal is nonnegotiable (except for sections 5-12(b) and (c) which are not disputed) because it conflicts with NGB regulations concerning RIF procedures for National Guard technicians, for which regulations a "compelling need" exists within the meaning of section 11(a) of the Order and Part 2413 of the Council's rules.^{4/} The agency denied each union's request for an exception to the regulation.

^{2/} The NGB regulations are set out in Technicians Personnel Pamphlet (TPP) 910. After the appeal was filed in this case, the Council was administratively informed that TPP 910 had been modified. Neither party has asserted that the modification materially affects the agency head's determination in this case. Thus, our decision herein relates only to the regulation (prior to its modification) asserted by the agency as a bar to negotiation of the unions' proposal in this case.

^{3/} TPP 910 provides that technician positions of one grade may be placed in the same competitive level when those positions are so similar in all aspects that the respective state adjutants general can readily move a technician from one position to another without unduly interrupting the work program.

^{4/} In view of our decision herein, it is unnecessary to consider the additional agency contentions that the proposal is violative of law and the Order.

Question Before the Council

Whether a "compelling need" exists within the meaning of section 11(a) of the Order^{5/} and Part 2413 of the Council's rules,^{6/} for the NGB regulation concerning RIF procedures for National Guard technicians.

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

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

6/ 5 CFR Part 2413.

§ 2413.2 Illustrative criteria.

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

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

Opinion

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

Reasons: The National Guard Technicians Act of 1968, as previously indicated, contains the authority for the employment of National Guard technicians. The Act provides further that RIF actions involving National Guard technicians are to be accomplished by the adjutants general of the respective jurisdictions concerned subject to the regulations of the appropriate military service secretary.^{7/} Additionally, it requires that, as far as practicable, such regulations should apply uniformly to both Army and Air Force National Guard technicians.^{8/} Other sections of the Act mandate that National Guard technicians be excepted from the application of veterans' preference and from the application of RIF procedures developed by the Civil Service Commission which apply veterans' preference.^{9/} Moreover, the Act

7/ 32 U.S.C. § 709(e) provides in relevant part as follows:

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

.

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

.

8/ Section 10 of the National Guard Technicians Act of 1968 provides:

Regulations prescribed by the Secretary of the Army and the Secretary of the Air Force under this Act shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

9/ 32 U.S.C. § 709(f) provides:

(f) Sections 2108, 3502, 7511 and 7512 of title 5 United States Code, [establishing entitlement to veterans' preference and effect of such entitlement in RIF and adverse actions] do not apply to any person employed under this section.

requires technicians to maintain military membership in the National Guard and hold the military grade specified for their technician position as a condition of continued technician employment.^{10/}

Thus, the NGB, acting on behalf of the Secretary of the Army and the Secretary of the Air Force, promulgated the RIF regulations involved herein, implementing these statutory mandates. That is, as relevant to this dispute, to implement the statutory mandate that technicians maintain military membership in the Guard and hold the military grades specified for their technician positions, even in a RIF situation, the regulations require technician RIF displacement rights within a competitive level to be based on a measurement of military job performance as well as technician job performance; and, similarly, that technician displacement rights across competitive levels be based on a technician's qualifications to hold the military grade specified for the technician position as well as the technician's qualifications for such position, in conjunction with a measurement of technician and military job performance. In both situations adverted to, i.e., displacement rights within a competitive level and displacement rights across competitive levels, technician seniority may be utilized only to determine relative standing when those competing are otherwise similarly qualified for both the technician position and the corresponding military grade and, in addition, have equal performance ratings based on a composite of technician and military job performance.

Hence, the NGB regulations implement in an essentially nondiscretionary manner the statutory mandate that technicians maintain military membership in the National Guard and hold the military grade specified for their technician positions, whereas, in contrast, the unions' proposal, would focus solely on the technician aspect of technician employment to the exclusion of the military aspect and thereby sanction technicians unqualified to hold the military grade for technician positions being retained in those positions as a result of a RIF. Accordingly, since the NGB regulation implements a statutory mandate (that a technician maintain military membership in the

10/ 32 U.S.C. § 709(b) provides in relevant part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e) provides in relevant part as follows:


.

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

.

National Guard and hold the military grade specified for that technician position) which implementation is essentially nondiscretionary in nature, we find that a compelling need exists for the regulation to bar negotiations on the unions' conflicting proposal, under section 11(a) of the Order and section 2413.2(d) of the Council's rules. Accordingly, we find that the agency determination that the proposal is nonnegotiable must be sustained.

By the Council.


Henry B. Frazier III
Executive Director

Attachment

Issued: July 20, 1977

APPENDIX

Proposal:

Reduction in Force

5-12 (a) Retention Standing. The retention standing of a technician affected by a RIF will be based on his technician service computation date. The technician's service date is one of the following dates that reflects his total length of service and performance.

(1) The date of his entrance on duty as a technician when he has no previous technician service.

(2) The date obtained by subtracting his total previous technician service from the date of his latest entrance on duty as a technician.

(3) The date obtained by subtracting from (1) or (2) the service equivalent allowed for a performance rating above satisfactory.

(b) Performance Rating.

(1) Value of rating. Four years are subtracted from the service date for an employee with an outstanding performance rating and two years for an employee with a rating between satisfactory and outstanding.

(c) Rating Frozen On Date of Notice.

(1) An employee's current official performance rating on the date of issuance of specific reduction-in-force notice is the rating that determines whether he is entitled to additional service credit. An employee's service date is not adjusted after the date of issuance of specific notice either by the assignment of a premium rating or by the expiration of a premium rating. Further, performance ratings that were due on or before the date of issuance of notice but were not officially approved and put on record until after the issuance of notice do not affect the employee's retention standing.

5-13 Assignment Rights.

General (a) Agency responsibility. When an agency selects a competing employee for release from his competitive level in the excepted service, it must do one of three things: assign him with his consent to a position he qualifies for and which will last at least three months, furlough him, or separate him. His entitlement to another position depends on (1) his tenure group, (2) his qualifications, and (3) the existence of positions held by employees with lower retention standing. The agency must offer assignment to employees entitled to offers under the regulations. Also, the agency may offer employees administrative assignments they are not entitled to as a matter of right, as discussed in this subchapter. Whether the agency offers

administrative assignment, the employee may refuse the offer. When he refuses an offer which is in accord with his rights, the agency may separate or furlough him by reduction-in-force.

(b) Employee right to assignment. The right to a released group I or II employee to assignment to a position in another competitive level depends on (1) the existence of a position held by a lower-standing employee he can displace and (2) his qualifications for the position. When the position exists and the released employee qualifies for it, the agency must offer him that position or something at least as good. However, regardless of how well the released employee qualifies for it, the existence of a vacant position does not entitle him to assignment, for the regulations do not require an agency to fill a vacancy in reduction-in-force. When the agency can satisfy the employee's right to assignment by offering him any of two or more positions with the same representative rate, it may offer whichever one it chooses. The employee has no right to choose his assignment.

5-14 Representative Rate.

(a) How established. Representative rate is the fourth step of the grade (except in GS-18) for a position under the General Schedule, the prevailing rate for a position under the Coordinated Federal Wage System or other wage-determining procedure and, for all other positions, the rate designated by the agency as representative of the position. Representative rate is a convenient, equitable, and uniform way to compare positions under different pay schedules or in the same ungraded schedule. It need not be used when direct comparison of grades or levels is possible, as in comparing one General Schedule position with another. Pay schedule means any one set of pay rates identified by statute or by an agency as applying to a group of occupations. For example, the General Schedule is one pay schedule, regardless of special rates or premium rates. Another example of a pay schedule is the Coordinated Federal Wage System. For General Schedule positions and other positions with a per annum salary, the hourly equivalent of the representative rate is obtained by dividing the annual rate by 2080 and rounding to the next higher cent. Under a wage system with five step rates for each grade, level or rating, the second step usually is based on the local prevailing rate and is usually designated the representative rate.

(b) Adjusted rate. Representative rates normally are basic rates, without augmentation by overtime, night differential, post differential, cost of living allowance, or premium pay. However, a representative rate includes augmentation which is an inherent part of the basic rate and cannot be isolated and subtracted. An example of this is found in positions not under the General Schedule in areas where additional pay approximating post differential or cost of living allowance, or both, is an inseparable part of the pay schedule. When it is necessary to compare this type of position with a General Schedule position with pay augmented by a post differential

or cost of living allowance, or both, the augmentation must be added to the General Schedule rate to derive the proper representative rate.

5-15 Assignment Involving Displacement.

(a) General. In the excepted service, when an agency releases a group I or II employee from his competitive level, it must offer him a position in another competitive level if a position is available, rather than furloughing or separating him.

(b) Available position. An available position is a position which has all of these characteristics: It is in the same competitive area, it will last at least three (3) months, it is occupied by an employee who is subject to displacement by the employee being released, it is a position which the employee being released is qualified for, and it has a representative rate no higher than the representative rate of the position from which the group I or II employee is being released. The existence of an available position does not oblige the agency to offer the employee that position, but it does establish the employee's right to be offered a position. For purposes of this paragraph, the representative rates to be compared are those in effect on the official date of issuance of specific notice, except when it has been announced before the date of notice that new pay rates have been approved and will be put into effect by the effective date of the reduction-in-force. In this case, the new pay scales must be used. The agency must establish a single, official date of issuance to all specific notices in each reduction-in-force in each separate competitive area. The date must be the same for all competing employees even when circumstances require the agency to issue some individual notices after the uniform official date.

(c) Level of offer. When an agency cannot retain a group I or II employee in his competitive level (and has no suitable vacancy or elects not to offer a vacancy) but has one or more available positions, the employee is entitled to the available position with the highest representative rate. In each of the following illustrations of this principle, each position is available because it has all of the characteristics listed in paragraph b.

(1) When there is only one position, the agency has no choice but to offer it to him.

(2) When there are two or more positions, one with a representative rate higher than the others, but no higher than that of his current position, the agency has no choice but to offer him the position with the higher representative rate.

(3) When there are two or more positions, all with the same representative rate, the agency must offer one of them, but which one is left entirely to agency discretion. Among positions with the same representative

rate, the employee has no right to a choice; any one of them satisfies his right to assignment.

(4) When there are two or more positions with the highest available representative rate, and one or more positions with lower representative rates, the agency cannot meet its obligation by offering a position with a lower rate, but it may offer any of the positions with the highest available rate. Here again, the employee has no choice among positions with the same representative rate.

(d) Limits on right of assignment. An employee has no right to assignment to a position with a grade higher than his own. He also has no right to assignment to a position with a representative rate higher than his own. An employee is entitled to only one proper offer. He is entitled to no further offers when: He accepts the offer; He rejects the offer (the rejection does not permit the agency to separate him by reduction-in-force before the date specified in the notice); He fails to reply to the offer within a reasonable time.

5-16 Displacement of Lower Sub-Groups-Bumping. When an agency chooses to, or has no choice but to satisfy an employee's right of assignment by offering him an occupied position, it looks first among the available positions occupied by employees in lower groups. In this situation a Group I employee can displace anyone in Group II or III. A Group II employee can displace anyone in Group III. This right to displace on the basis of group superiority is known informally as reassignment right or "bumping" right.

5-17 Displacement of Same Sub-Group-Retreating.

(a) The "retreat" right. When an agency chooses to, or has no choice but to satisfy an employee's right of assignment by offering him an occupied position, and when it cannot make a better offer on the basis of subgroup superiority, the agency looks also among the available positions from or through which the employee was promoted (including positions substantially the same as a position from or through which he was promoted), and which are occupied by employees with later services dates in the same subgroup. In this situation the group I or II employee can displace an employee with lower retention standing in the same group. For example, a I with a service date of March 17, 1958, can displace another I with a service date of March 18, 1958. This right to displace on the basis of higher standing in the same subgroup is known informally as "retreat" right. Only a group I or II employee can retreat and only to a position from which he was promoted, or to a position which he skipped over in a promotion of more than one grade, or to a substantially similar position. In determining whether an employee has a retreat right, the agency applies the following principles.

(1) The right is restricted to jobs in the employee's current competitive area although he may have served previously in a different area or in a different agency.

(2) Although the employee cannot retreat to a job currently in a different competitive area, he does have retreat rights in his current competitive area to a position substantially the same as one he was promoted from or through in a different competitive area of his current agency or in a different agency.

(b) The position. A position is considered substantially the same as a position the employee was promoted from or through when it is an additional identical position, or when the two positions are like enough that they would be in the same competitive level were they in the same competitive area. When the released employee was promoted one grade to a different line of work, the line of retreat follows the line of promotion exactly. However, the line of retreat is broader when he was promoted more than one grade to a different line of work. When a GS-2 fiscal clerk is promoted to GS-4 physical science aid, his line of retreat goes to both the GS-3 fiscal clerk and the GS-3 physical science aid, on the way back to fiscal clerk, GS-2. The employee must be qualified, at the time of retreat, for the position to which he otherwise has retreat rights.

(c) Alternative offer. When a released employee qualifies for a continuing position occupied by an employee vulnerable to bumping or retreat, he must be offered assignment in preference to separation or furlough. However, the agency may satisfy his right to assignment by offering him either the vulnerable position or any other position with a representative rate as high as that of the vulnerable position. The employee's right to assignment is not satisfied by an offer of a position with a lower representative rate except when, with full knowledge of his entitlement to the higher, he willingly accepts the lower.

5-18 Qualifications for Assignment.

(a) Requirements. To be entitled to assignment to a position in another competitive level an employee must be qualified for that position. He must meet the NGB's standards and requirements, including any minimum education requirement, must be qualified physically for the position's duties and must meet any special qualifying conditions the NGB sets for the position. Also, he must have the capacity, adaptability, and any special skills required for satisfactory performance of the duties and responsibilities of the position without undue interruption to the activity. When the position is formally designated as a trainee position or is occupied by an employee in a formally designated developmental program, an employee's right to be assigned to the position is not established by showing that he could perform whatever actual work the trainee is called upon to perform. To be considered qualified to bump or retreat into a trainee position or a developmental position an employee

must meet all of the conditions required for selection and entry into the training or developmental program. This means that a person who has completed a course of training or development, or who is otherwise fully trained, cannot bump or retreat back into the program. He no longer meets the conditions for entry into the program. These conditions make it impossible for a journeyman, for example, to bump or retreat back into an apprenticeship program or for the graduate of an intern program to bump or retreat back into an intern program. The principles of this section apply to only the second round of competition, for assignment to positions in other competition levels in the competitive area. No questions properly can be raised about an employee's qualification for, or ability to perform in, another position in his competitive level because, once the agency finds the position interchangeable, all employees in the level qualify for all positions in the level.

(b) Qualifications determination. When an employee released from his competitive level has retention standing enough to displace another employee, the agency must determine whether he is qualified in the sense of this section. In this determination, the agency must review carefully the employee's education, training and experience. When the agency finds him qualified in these respects, that is, in the terms of the NGB's standards and requirements, it must review ever more carefully to determine if he has any special skills and knowledge the position requires, as well as any less tangible attributes, such as adaptability and ability to meet and deal with others when these are required by the job. To be considered qualified, and thus entitled to be placed, the employee should not need a significant amount of training in the actual duties of the position, although some instruction may be necessary to familiarize him with the organizational structure and with the office policies and routines he will have to apply. In other words, he ought to be well-qualified for the position as if he had already performed successfully in a similar position, because he must be able to keep the work moving without serious interruption. It is not fair either to the agency or to the employee, to assign him to a position when there is good reason to doubt his qualifications to perform all the duties and carry out all the responsibilities. However, the determination of the qualification of an employee must not be based on the sex of the employee unless the position in question is one for which restriction of certification of eligibles by sex is found justified by the Commission.

Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784. The Assistant Secretary found, in pertinent part, that the activity had violated section 19(a)(2) and (1) of the Order by issuing written reprimands to a nonappropriated fund employee and later discharging her because she contacted, sought assistance from, and was active on behalf of Local 1486, American Federation of Government Employees, AFL-CIO. As a remedy, the Assistant Secretary ordered the activity, among other things, to reinstate the employee to the same or substantially equivalent position as she held prior to her discharge, and to make her whole for any loss of income she may have incurred. The agency appealed to the Council, alleging that the decision of the Assistant Secretary presented a major policy issue and appeared arbitrary and capricious. The agency also requested a stay of the Assistant Secretary's decision and order.

Council action (July 29, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not present any major policy issue and did not appear arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

July 29, 1977

Captain Thomas J. Thompson, USAF
General Litigation Division
Office of the Judge Advocate General
Headquarters, United States Air Force
Washington, D.C. 20314

Re: Department of the Air Force, Offutt Air Force
Base, A/SLMR No. 784, FLRC No. 77A-22

Dear Captain Thompson:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the union, in the above-entitled case.

In this case the Assistant Secretary found, in pertinent part, that the Department of the Air Force, Offutt Air Force Base (the activity), had violated section 19(a)(2) and (1) of the Order by issuing written reprimands to a waitress at its Noncommissioned Officers' Club (a nonappropriated fund activity) and later discharging her because she contacted, sought assistance from, and was active on behalf of the American Federation of Government Employees, AFL-CIO, Local 1486.^{1/} As a remedy, the Assistant Secretary ordered the activity, among other things, to reinstate the employee to the same or substantially equivalent position as she held prior to her discharge, and make her whole for any loss of income she may have incurred. In this latter regard, the Assistant Secretary noted particularly the absence of any statute specifically precluding the payment of backpay to nonappropriated fund employees, and found that his authority to direct backpay to the nonappropriated fund activity employee involved was clearly proper under the authority vested in the Assistant Secretary by section 6(b) of the Order.

^{1/} The Assistant Secretary concluded that the activity's procedure available to the employee for purposes of contesting her discharge (which procedure was never invoked) was not an "appeals procedure" within the meaning of section 19(d) of the Order. The Assistant Secretary's decision in this regard has not been appealed to the Council and therefore is not properly before the Council for review. Accordingly, we do not pass upon the Assistant Secretary's reasoning or conclusion with respect to the application of section 19(d).

In your petition for review on behalf of the activity, you allege that "[w]hether the remedial authority of the Assistant Secretary under section 6(b) of the Executive Order extends to directing a governmental nonappropriated fund instrumentality to pay back pay in removal actions is a major policy issue which the Federal Labor Relations Council should resolve." You also allege that, "assuming authority does exist under section 6(b) to order back pay in removal actions, the decision of the Assistant Secretary is arbitrary and capricious in that the Assistant Secretary did not apply proper standards concerning mitigation of back pay liability."

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

As to the alleged major policy issue regarding the extent of the Assistant Secretary's authority to issue remedial orders under section 6(b) of the Order, noting particularly his finding of "the absence of any statute specifically precluding the payment of back pay to nonappropriated fund employees," no major policy issue is presented warranting review. In this regard, as the Council has previously stated, section 6(b) of the Order confers considerable discretion on the Assistant Secretary, and his remedial directives therefore will not be reviewed by the Council unless it appears that the Assistant Secretary has exceeded the scope of his authority under section 6(b) or has acted arbitrarily and capriciously or in a manner inconsistent with the purposes and policies of the Order.^{2/}

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his formulation of the backpay portion of the remedial order in the circumstances of this case. In this regard, the Council notes that the remedial order and the cited provision of the Rules and Regulations of the Assistant Secretary (Section 203.27) provide for notification as to what steps have been taken to comply with the required remedial action. Such procedure provides ample opportunity for the raising, through compliance procedures, of relevant evidence concerning mitigation of backpay liability.

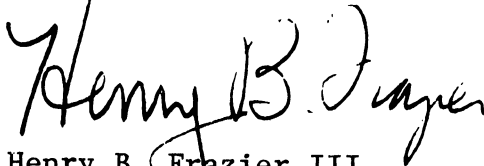
Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of

^{2/} U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122, and cases cited therein.

the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. G. Blatch
AFGE

Defense General Supply Center, A/SLMR No. 821. The Assistant Secretary dismissed the complaint filed by Local 2047, American Federation of Government Employees, AFL-CIO, which alleged, in substance, that the activity had misrepresented certain matters to the union in violation of section 19(a)(1) and (6) of the Order. The union appealed to the Council, alleging, in essence, that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue.

Council action (August 1, 1977). The Council held that the union's petition for review failed to meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 1, 1977

Mr. Jay J. Levit
Stallard & Levit
2120 Central National
Bank Building
Richmond, Virginia 23219

Re: Defense General Supply Center,
A/SLMR No. 821, FLRC No. 77A-48

Dear Mr. Levit:

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

In this case, the American Federation of Government Employees, Local 2047, AFL-CIO (the union) filed an unfair labor practice against the Defense General Supply Center (the activity). The complaint alleged, in substance, that the activity's Director of the Office of Civilian Personnel had misrepresented to the union that certain decisions concerning the area of consideration to be used for filling a vacant supervisory position and the decision to grant 20 hours of administrative leave to six union stewards to attend a labor relations seminar had been based on advice and decisions of representatives of the Defense Supply Agency (DSA) and that such misrepresentations constituted bad faith bargaining in violation of section 19(a)(1) and (6) of the Order.

The Assistant Secretary found^{*/} as to the allegation concerning the filling of a vacant supervisory position that, while the activity may have misrepresented that there had been discussions with DSA concerning the filling of the supervisory position, such misrepresentation, standing alone, did not violate section 19(a)(1) and (6) of the Order, noting in this regard the particular circumstances of the case, including that the record did not reveal that the activity precluded further discussions or negotiations. With respect to the allegation of the complaint pertaining to the granting of administrative leave, the Assistant Secretary found, in pertinent part, that there had been no clear misrepresentation of the facts and that there was no evidence that the alleged misrepresentation

^{*/} In response to an activity contention that the union had litigated and raised the issues covered by the complaint in an arbitration proceeding, the Assistant Secretary concluded that section 19(d) of the Order did not bar consideration of the matters alleged in the complaint. The Assistant Secretary's ruling in this regard has not been appealed to the Council and is therefore not properly before the Council for review. Accordingly, we do not pass upon the Assistant Secretary's reasoning or conclusion with respect to the application of section 19(d).

rendered further bargaining on the amount of administrative leave a futility or that the activity subsequently precluded further discussions or negotiations concerning the amount of administrative leave. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

In your petition for review on behalf of the union, you allege, in essence, that the Assistant Secretary's decision is arbitrary and capricious and raises a major policy issue. In this regard, you assert that the Assistant Secretary improperly found that there was no evidence that the alleged misrepresentations made further bargaining a futility, improperly intruded upon the province of the ALJ to make credibility determinations, and interfered with a paramount policy under the Order requiring good faith collective bargaining.

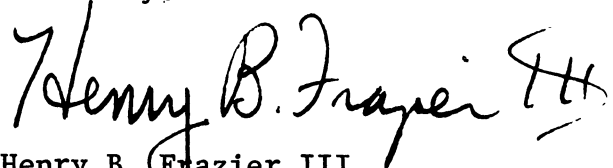
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the evidence was insufficient to establish a violation of the Order in the circumstances of this case. Rather, your allegations in this regard constitute, in essence, nothing more than disagreement with the Assistant Secretary's contrary determination and therefore present no basis for Council review. Similarly, in the Council's view, no major policy issue is presented warranting review, again noting that your allegation in this regard constitutes mere disagreement with the Assistant Secretary's finding that the activity did not fail or refuse to bargain in good faith in the particular circumstances of the instant case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

B. Baird
DGSC

Graphic Arts International Union, Local 234 and Energy Research and Development Administration, Technical Information Center, Oak Ridge, Tennessee. The dispute involved the negotiability under the Order of six union proposals. Four of the proposals concerned merit promotion, and, more specifically, would (1) incorporate the agency's merit promotion plan into the parties' agreement and require that promotions of unit employees to positions within the unit be made in accordance with the plan; (2) require that the union be "consulted" before any planned changes in the agency-wide merit promotion plan are effected; (3) provide that when promotion panels are established for the ranking of candidates, one of the panel members shall be a unit employee selected by management from a list of nominees submitted by the union; and (4) require management to make "every serious effort" to effect the training and promotion of well-qualified applicants from within the agency. The fifth and sixth proposals of the union concerned, respectively: (5) the assignment of unit work to nonunit personnel, such as supervisors; and (6) the number of employees assigned in connection with the operation of equipment.

Council action (August 2, 1977). As to (1), the Council held that this proposal was not violative of or otherwise barred from negotiation by agency regulations under section 11(a) of the Order. With regard to (2), the Council held that this proposal was outside the authority of the activity to negotiate under section 11(a) of the Order. As to (3), the Council found that the agency had misinterpreted the union's proposal and thus failed to show the applicability of the agency regulations asserted as a bar to negotiation on the proposal under section 11(a) of the Order. With respect to (4), the Council held that this proposal was not violative of section 12(b)(2) or 12(b)(5) of the Order. Regarding (5), the Council ruled that the union's proposal was violative of section 12(b)(5) of the Order. Finally, as to (6), the Council held that this proposal was excepted from the agency's obligation to bargain under section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council set aside the agency's determination of nonnegotiability as to the above-numbered proposals (1), (3) and (4); and sustained the determination that the proposals numbered (2), (5) and (6) were nonnegotiable.

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

Graphic Arts International Union,
Local 234

and

FLRC No. 76A-65

Energy Research and Development
Administration, Technical
Information Center, Oak Ridge,
Tennessee

DECISION ON NEGOTIABILITY ISSUES

Proposal I^{1/}

Article VI. Merit Promotion

Section 1. All promotions will be made in accordance with the Merit Promotion Plan of Energy Research and Development Administration.

Agency Determination

The agency (Energy Research and Development Administration) determined in effect that the proposal violates agency regulations which establish the agency's merit promotion plan, and for which a compelling need exists. Therefore, the proposal is nonnegotiable under section 11(a) of the Order.^{2/}

Question Before the Council

The question is whether the agency's regulations are applicable to bar negotiations on the union's proposal under section 11(a) of the Order.

1/ For convenience of decision, disputed sections, or portions of sections, of articles proposed by the union will be regarded as separate "proposals" and a separate ruling will be rendered on each such "proposal."

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

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

Opinion

Conclusion: The proposal is not violative of or otherwise barred from negotiation by agency regulations, under section 11(a) of the Order. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

Reasons: The union's proposal would incorporate the agency's merit promotion plan by reference into the parties' agreement and would require that promotions of unit employees^{3/} to positions within the unit be made in accordance with that plan. The agency claims that the proposal is violative of its regulations which establish the agency-wide merit promotion plan,^{4/} mainly because the plan would be subject to diverse interpretations by arbitrators, and uniformity in the merit selection system thus assertedly could not be maintained. We cannot agree with the agency's contentions.

The union's proposal clearly is not "violative" of the agency's regulations, since it merely incorporates those regulations by reference in its proposal.

Moreover, as to possible diverse interpretations by arbitrators, section 13(a) of the Order, as amended by E.O. 11838, provides that the coverage and scope of grievance procedures (which also may include provision for arbitration) "shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." In explaining these provisions, the Report accompanying E.O. 11838 expressly states that these provisions will permit the parties "to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from the negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures."^{5/} The Report adds concerning arbitrator actions:^{6/}

In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under

^{3/} The union is exclusive representative of a unit of 18 nonsupervisory wage grade employees engaged as lithographers, offset pressmen, photocopy specialists, and bindery workers, in the Printing Branch of the activity.

^{4/} The agency has no separately identified "merit promotion plan," but such plan is reflected in sundry parts of its comprehensive employment and selection system contained in agency Manual Appendix 4108 entitled "Employment."

^{5/} Labor-Management Relations in the Federal Service (1975), at 43.

^{6/} Id. at 44.

negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation. Under the proposed amendments, the scope and coverage of the negotiated grievance procedure would be fully negotiable so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. However, nothing in the proposed amendments of section 13 would prevent the parties from agreeing that the agency's interpretation of its regulations would be binding.

Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. Thus, where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulation or the Order, the Council, under its rules, will grant review of the award. . . .

Consequently, the possibility of diverse interpretations of the merit promotion plan by arbitrators is clearly not dispositive.

The agency does not contend, and it does not appear, that the merit promotion plan extends to matters excluded from negotiation by sections 11(b) and 12(b) of the Order, or subject to statutory appeal procedures. And as already mentioned, the proposal is not violative of agency regulations, but simply incorporates those regulations by reference in the agreement.^{7/}

Therefore, contrary to the agency's position, the union's proposal is not in violation of agency regulations or otherwise barred from negotiation by the agency's regulations under section 11(a) of the Order.^{8/}

Proposal II

Article VI. Merit Promotion

Section 3. The Union shall be consulted in connection with any proposed change in the Merit Promotion Plan.

^{7/} Likewise, as already indicated, the proposal extends only to those promotions of unit employees to positions within the unit. Cf. Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100, at 3-4 of Council decision.

^{8/} Cf. Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at n. 9 of Council decision. Since the union's proposal is not violative of agency regulations, we do not reach the compelling need issue in effect raised by the agency in its determination and statement of position.

Agency Determination

The agency determined that the proposal is outside the authority of the activity to negotiate under section 11(a) of the Order and is therefore nonnegotiable.

Question Before the Council

The question is whether the proposal requiring consultation with the local bargaining representative on planned changes in the agency-wide merit promotion plan is within the activity's authority to negotiate under section 11(a) of the Order.

Opinion

Conclusion: The union's proposal is outside the authority of the activity to negotiate under section 11(a) of the Order. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: As already indicated, the union, which represents a unit of Printing Branch employees at the activity, proposes in Article VI, Section 3, that the union must be "consulted" before any planned changes in the agency-wide merit promotion plan are effected.^{9/} The agency contends that, since the union has not been accorded national consultation rights under section 9 of the Order,^{10/} the proposal is outside the authority

^{9/} The union does not assert that its proposed incorporation by reference of the merit promotion plan, discussed under Proposal I, is intended to "freeze" the provisions of the plan or otherwise to require negotiations on changes in the plan, during the term of any agreement thereon.

^{10/} Section 9 of the Order provides in relevant part:

Sec. 9. National consultation rights. (a) An agency shall accord national consultation rights to a labor organization which qualifies under criteria established by the Federal Labor Relations Council as the representative of a substantial number of employees of the agency. . . .

(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. . . .

The Council's criteria for according national consultation rights are set forth in part 2412 of its rules and regulations (5 CFR part 2412).

of the activity to negotiate under section 11(a) of the Order. We agree with the agency's position.

As stated in the Report accompanying E.O. 11838, "In the Federal labor-management relations program, 'consultation' is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under section 9 of the Order."^{11/} The regulations here involved are agency-wide in scope and consultation on proposed changes in those regulations would therefore be obligatory only with labor organizations which have been accorded national consultation rights under section 9 of the Order. The union has not been accorded such rights and thus no obligation is imposed on the agency to consult with the union on proposed changes in the merit promotion plan.

While the union argues that the agency in any event has the discretion to sanction consultation on changes in these agency-wide regulations, thus rendering the proposal negotiable, there is no showing whatsoever that the agency has delegated any authority to negotiate on such changes to the activity under its regulations. On the contrary, the agency specifically indicates that local management has no such authority as pertains to the agency-wide merit employment policies involved in this case.

Accordingly, we find that Article VI, Section 3, which would require consultation with the union on proposed changes in the agency-wide merit promotion plan, is outside the activity's authority to negotiate under section 11(a) of the Order and, consequently, is nonnegotiable.^{12/}

Proposal III

Article VI. Merit Promotion

Section 4. When promotion panels are established for the purpose of ranking candidates to satisfy the requirements of staffing a vacant position within the unit, it is agreed that the Union may nominate from within the Unit, at least three non-candidates for the position of equal or higher grade, as proposed panel members. This list must be provided to the Director, Personnel Management Services Division (Code 1810) within three working days from date of request. The Director, Personnel Management Services Division, or his designee, will appoint one of the employees on the list to function as a promotion panel member. It is agreed that the nomination and selection of promotion panel members will be made without regard to affiliation or non-affiliation with an employee organization. It is further agreed that all proceedings of promotion panels will be regarded as privileged. . . .

^{11/} Labor-Management Relations in the Federal Service (1975), at 42.

^{12/} The Council's decision would not of course preclude negotiation on a proposal which provides simply for the activity's notification of the union as to intended changes in the merit promotion plan (if the activity is afforded ample notice of such proposed changes by agency headquarters) and for the transmittal of union comments thereon to the agency headquarters.

Agency Determination

The agency determined that the union's proposal would require the establishment of promotion panels, in violation of agency regulations for which a compelling need exists, and is therefore nonnegotiable under section 11(a) of the Order.^{13/}

Question Before the Council

The question is whether the union's proposal is barred from negotiation by agency regulations under section 11(a) of the Order.

Opinion

Conclusion: The agency has misinterpreted the union's proposal and thus failed to show the applicability of agency regulations as a bar to negotiation on the union's proposal under section 11(a) of the Order. Accordingly, the agency's determination of nonnegotiability was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

Reasons: The agency construes the subject proposal as requiring the establishment of promotion panels which must include an employee of the bargaining unit and which would serve to evaluate and rank candidates for promotion to vacant positions within the unit. Such proposal, the agency claims, violates agency regulations^{14/} for which a compelling need exists, and is thus nonnegotiable under section 11(a) of the Order. We find no persuasive support for this position of the agency.

The proposal of the union plainly does not require any establishment of promotion panels whatsoever, but, as expressly stated in the proposal, merely provides that when promotion panels are established for the ranking of candidates, one of the panel members shall be a unit employee selected by management from a list of nominees submitted by the union. In other words, contrary to the agency's interpretation, the proposal does not require the agency to create promotion panels upon which a unit employee would function as a member. Instead, it provides only that if the agency, within its own discretion, decides to establish such promotion panels (or possibly to convene an "advisory panel"^{15/}), a unit employee would be granted membership on that panel in the manner described in the proposal.

^{13/} See n. 2, supra.

^{14/} The agency cites its Manual Appendix 4108, Part I, Chart I, under which the merit system categorization process is prescribed as the joint responsibility of the supervisor and personnel officer.

^{15/} Part IV.C.3. of agency's Manual Appendix 4108 provides:

3. Use of Qualifications Advisory Panels. For some higher level positions, it is frequently advantageous in the selection process to have several people with varied perspectives assist in evaluating the qualifications of candidates for the position. Each person may

(Continued)

Thus, the agency has clearly misinterpreted the union's proposal and we therefore hold, consistent with controlling Council precedent, that the agency has failed to establish the applicability of its regulations as a bar to negotiation on the union's proposal under section 11(a) of the Order.^{16/}

Proposal IV

Article VI. Merit Promotion

Section 4. . . . Every serious effort will be made to train and promote well qualified applicants from within Energy Research and Development Administration.

Agency Determination

The agency determined that the proposal conflicts with management's rights to "promote" employees, and "to determine the methods, means, and personnel by which [its] operations are to be conducted," in violation of sections 12(b)(2) and 12(b)(5) of the Order, respectively, and is therefore nonnegotiable.

Question Before the Council

The question is whether the union's proposal is nonnegotiable under section 12(b)(2) or 12(b)(5) of the Order.

Opinion

Conclusion: The subject proposal does not conflict with management's rights under either section 12(b)(2) or section 12(b)(5) of the Order. Thus, the agency's determination of nonnegotiability was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.

(Continued)

provide his evaluation independently or they may as a group discuss their impressions and jointly evaluate the qualifications of each candidate. The panel's function, however, is advisory to the selecting official and personnel officer who are responsible for the final qualifications evaluation.

The agency does not question the negotiability of a proposal which would accord a unit employee membership on such an advisory panel, under appropriate circumstances and under the procedures here sought by the union. See American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, 2 FLRC 65, 69-74 [FLRC No. 73A-22 (Jan. 31, 1974), Report No. 48].

16/ See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC

(Continued)

Reasons: The agency argues that the union's proposal is violative of management's 12(b)(2) and (5) rights, because it would limit training and promotions to employees from within the bargaining unit, and because the required use of "every serious effort" to train and promote such employees would impede management in the exercise of its rights under the Order. We find these contentions to be without merit.

The agency has clearly misinterpreted the language and intent of the proposal. Contrary to management's position, the applicants to which the agency would be required to direct its serious efforts to train and promote are not limited to unit employees, but include employees throughout the agency. Further, as expressly stated by the union in its appeal, such efforts would not in any manner "prohibit the agency from selecting people outside ERDA." Rather, the proposal would simply require management to make "every serious effort" to effect the training and promotion of well qualified applicants from within the agency.

As thus properly construed, the proposal does not constrict management in its decision to promote employees to positions within the agency under section 12(b)(2) of the Order.^{17/} Likewise, the agency has failed to show that the proposal would infringe on the agency's right to set either "methods," "means," or "personnel" by which its operations are conducted within the recognized meaning of those terms as used in section 12(b)(5) of the Order.^{18/}

Accordingly, we hold that the union's proposal is not violative of section 12(b)(2) or 12(b)(5) of the Order, as determined by the agency.

Proposal V

Article XVIII-A. Operation of Equipment and Performance of Work

Section 1. No supervisor shall perform any production work covered under the terms of this contract. No supervisor shall be deemed to be a "working supervisor" without the consent of the Union.

Section 2. No working supervisor shall perform any bargaining unit work unless the full complement available in the relevant department is also working.

(Continued)

No. 75A-113 (Apr. 21, 1977), Report No. 124, at 3 of Council decision. As the union's proposal is not shown to violate agency regulations, we do not pass upon the compelling need for such regulations.

17/ Cf. AFGE Local 1923 and Social Security Administration Headquarters Bureaus and Offices, Baltimore, Maryland, 1 FLRC 390, 394-397 [FLRC No. 71A-22 (May 23, 1973), Report No. 39].

18/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, 434-439 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

Section 4. No work will be performed during lunch hours, except in cases of an emergency, and then only by the regular work complement.

Agency Determination

The agency determined that the union's proposal violates management's rights to "assign" employees, and to determine the "personnel" by which its operations are to be conducted, under sections 12(b)(2) and 12(b)(5) of the Order, respectively, and is consequently nonnegotiable.

Question Before the Council

The question is whether the union's proposal is nonnegotiable under section 12(b)(2) or section 12(b)(5) of the Order.

Opinion

Conclusion: The union's proposal conflicts with management's 12(b)(5) right to determine the "personnel" by which agency operations are to be conducted.^{19/} Therefore, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The agency asserts in substance that the subject proposal would constrain management in the assignment of unit work to nonunit personnel, such as supervisors, and thereby violates section 12(b)(5) of the Order. We agree with this contention by the agency.

The Council previously considered the negotiability of a proposal which similarly would have prohibited the assignment of work normally performed by unit employees to supervisors and other nonunit employees, except under limited circumstances, in the Tidewater case.^{20/} In ruling that such proposal violated section 12(b)(5) of the Order, the Council stated (at 437):

MTC's proposal relates to the exercise of the substantive right as reserved to management by section 12(b)(5) to determine the type of personnel, or which personnel, will conduct these particular agency operations. Therefore, the proposal clearly contravenes section 12(b)(5) since . . . management's reserved right--"to

^{19/} In view of our decision herein, we find it unnecessary to pass upon whether the union's proposal violates section 12(b)(2) of the Order.

^{20/} Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, supra, n. 17.

determine the . . . personnel by which such operations are to be conducted" is mandatory and may not be relinquished or diluted.^{21/}

Accordingly, for the reasons set forth in the Tidewater case, we hold that the union's proposed Sections 1, 2 and 4 of Article XVIII-A are violative of section 12(b)(5) of the Order and are, therefore, nonnegotiable.

Proposal VI

Article XVIII-A. Operation of Equipment and Performance of Work

Section 3. No person shall be permitted to work on more than one piece of equipment at a time.

.

Section 5. No employee may at any time operate any equipment by himself without someone else being present in this department or within call.

Agency Determination

The agency determined that the union's proposal is nonnegotiable because it violates section 12(b)(2), (4) and (5), and in effect is outside the agency's obligation to bargain under section 11(b), of the Order.

Question Before the Council

The question is whether the union's proposal is nonnegotiable by reason of section 12(b)(2), (4) or (5), or section 11(b), of the Order.

Opinion

Conclusion: The union's proposal, while not violative of the cited provisions of section 12(b), is excepted from the agency's obligation to bargain under section 11(b) of the Order. Consequently, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The agency principally asserts that the union's proposal concerns the agency's staffing patterns, i.e., "the numbers of employees assigned

^{21/} See also, e.g., Pattern Makers League of North America, AFL-CIO and Naval Ship Research and Development Center, Bethesda, Maryland, 1 FLRC 516, 518 [FLRC No. 73A-28 (Aug. 17, 1973), Report No. 43]. Even assuming, as claimed by the union, that other agencies and labor organizations have entered into agreements which included provisions analogous to that here sought by the union, such circumstance is without controlling significance. See, e.g., IAM and Kirk Army Hospital, Aberdeen, Md., 1 FLRC 65, 68 [FLRC No. 70A-11 (Mar. 9, 1971), Report No. 5].

to a job" and that, in effect, the proposal is therefore outside the agency's bargaining obligation under section 11(b) of the Order.^{22/} We find merit in this position of the agency.

The Council was confronted with a negotiability dispute involving an analogous proposal in the recent Coast Guard Base case.^{23/} There, the proposal in question provided:

The employee shall not be required to work in any location where other persons are not within observing distance unless he is assisted by other employees. Such persons may be military or civilian.

The Council upheld the agency's contention that the proposal was excepted from the agency's obligation to bargain under section 11(b), stating (at 3-4 of Council decision):

The agency further contends that the instant provision would require the agency to assign at least two employees to the performance of a "one-man job" if the work is located where other persons are not within observing distance and, therefore, the provision is excepted from the obligation to bargain by section 11(b) of the Order since it imposes a limitation on management's discretion to determine the number of employees assigned to a work project or tour of duty. We find merit in the agency's contention. Although it does not require assignment of a specific number of employees, plainly, the provision contemplates a limitation on management's authority to determine the number of employees assigned to a work project or tour of duty. As to the union's contention that the provision is "concerned only with the safety and health of unit members" and is therefore negotiable, we find such claim to be unpersuasive, since the disputed provision clearly does not prescribe a general standard of safety or of health. Thus, we must find that the provision presently before us is excepted from the obligation to bargain by section 11(b) of the Order. [Foot-notes omitted.]

For the reasons detailed in the Coast Guard Base decision, we hold that the union's proposal in the instant case is likewise outside the agency's obligation to bargain under section 11(b) of the Order.^{24/}

22/ Section 11(b) of the Order provides in relevant part:

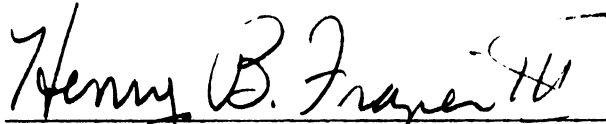
[T]he obligation to meet and confer does not include matters with respect to . . . the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

23/ Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110.

24/ The agency advanced no persuasive reasons in support of its claims that the union's proposal violates sundry provisions of section 12(b) of the Order, and accordingly these contentions are rejected. Id., at 2-3 of Council decision.

In summary, we find that the union's proposed Sections 1 and 4 of Article VI are negotiable.^{25/} We further conclude that the union's proposed Section 3 of Article VI, and Sections 1, 2, 3, 4 and 5 of Article XVIII-A are nonnegotiable, as determined by the agency.^{26/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: August 2, 1977

^{25/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the union proposals. We decide only that, as submitted by the union and based on the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

^{26/} The union also appealed to the Council from the agency determination as to the nonnegotiability of the union's proposed Article XVIII, Sections 1 and 2, relating to findings of the Interdepartmental Lithographic Wage Board (ILWB) on rates of pay and job evaluation standards. However, the Council is administratively advised that the ILWB is no longer operative by reason of 5 U.S.C. §§ 5341-5349 (Supp. V 1975). Accordingly, the parties' negotiability dispute concerning this proposal has been rendered moot and the union's appeal in this matter is therefore dismissed.

New York Regional Office, Bureau of District Office Operations, Social Security Administration, Department of Health, Education, and Welfare and Local No. 3369 New York-New Jersey Council of Social Security Administration District Office Locals, American Federation of Government Employees, AFL-CIO (Robins, Arbitrator). The arbitrator found that an error by the agency, which resulted in the grievant not being promoted on a certain date, constituted a violation of the parties' agreement; and directed the agency to promote the grievant retroactively to that date with backpay. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award, based on four exceptions: that the award violated applicable law and appropriate regulation; that the award was based on a nonfact; that the award did not draw its essence from the parties' agreement; and that the arbitrator exceeded her authority. The agency also requested a stay of the arbitrator's award.

Council action (August 2, 1977). The Council held that agency's petition did not present facts and circumstances to support its exceptions. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the agency's request for a stay.

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of



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 2, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
G-2608 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: New York Regional Office, Bureau of District Office Operations, Social Security Administration, Department of Health, Education, and Welfare and Local No. 3369 New York - New Jersey Council of Social Security Administration District Office Locals, American Federation of Government Employees, AFL-CIO (Robins, Arbitrator), FLRC No. 77A-13

Dear Mr. Becker:

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

According to the arbitrator, the grievant, along with other eligible employees under the same training agreement, was recommended by the District Manager of the Flatbush (Brooklyn) Social Security Office for a "career ladder," noncompetitive promotion to be effective March 28, 1976. All recommendations were forwarded, in accordance with agency procedure, to the Regional Personnel Officer of the Department of Health, Education, and Welfare for approval and authorization. All were mailed together on the same date. All of the grievant's eligible coworkers were promoted on March 28, 1976. However, the grievant's promotion was not effectuated on that date because the recommendation for grievant's promotion apparently never reached the Regional Personnel Officer. When the error was discovered, the District Manager resubmitted the recommendation and requested the promotion to be retroactively effective, as of March 28. The request for retroactivity was denied by the agency because the Regional Personnel Officer had no record of receipt of the recommendation and, according to the agency, Civil Service Commission regulations precluded making retroactive promotions in such circumstances. The grievant's promotion became effective on May 9, 1976.

The grievant filed a grievance which ultimately was submitted to arbitration. The parties stipulated the following issue to the arbitrator:

Did the Employer violate Article XXV, Section 12 of the agreement^{1/} by not giving the grievant a career ladder promotion as of March 28, 1976 and, if so, what shall be the appropriate remedy? [Footnote added.]

The arbitrator stated that "[i]t was stipulated that, but for the error, [the grievant] would have had the promotional increase as of March 28, 1976." The arbitrator concluded that the agency's application of a "no-retroactivity" rule in this case would result in a "lasting inequity"; that the agency's actions constituted a violation of Article XXV, section 12 of the agreement; and, finally, that decisions of the Comptroller General do not indicate a contrary result inasmuch as the "clear intent of the Agency to promote has been established." Thus, the arbitrator answered the issue in the affirmative and ordered the grievant's promotion to be effective as of March 28 with backpay to the same date.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of the exceptions discussed below and requests a stay of the award. The union filed an opposition.

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

The agency's first exception is that the award violates applicable law and appropriate regulation. In support of this exception, the agency in essence contends that the award violates "the general rule prohibiting retroactive promotion";^{2/} that the type of "administrative error" permitting an exception to the general rule has not occurred; and that the "nondiscretionary agency requirement" exception which would permit retroactive promotion and backpay is not present in this case.

^{1/} Section 12 of Article XXV (Equal Employment Opportunity) of the agreement provides as follows:

The Employer and the Union agree to the principle of equal pay for substantially equal work as well as providing distinctions in pay that are consistent with distinctions in work and work performance.

^{2/} According to the agency, the "general rule" prohibiting retroactive promotions is established in FPM Supplement 990-2, Book 531, Part S2-5b as follows:

A promotion cannot be made retroactively effective. It is effective only from the date administrative action is taken by the administrative officer vested with proper authority to take such action

The agency also cites Comptroller General Decision, B-183969, B-183985, July 2, 1975.

The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation. In this case, however, the Council is of the opinion that the agency's petition does not present facts and circumstances necessary to support its exception that the arbitrator's award violates applicable law and appropriate regulation. In this regard, the Council has previously noted that, consistent with Civil Service Commission instructions and Comptroller General decisions, it has been established that an agency may be required to promote a particular individual, consistent with the Federal Personnel Manual, and accord that individual backpay, when a finding has been made by an arbitrator, or other competent authority, that such individual would definitely (and in accordance with law, regulation and/or the negotiated agreement) have been promoted at a particular point in time but for, among other things, an agency violation of its negotiated agreement. Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126. As noted previously the arbitrator specifically found that the error by the agency constituted a violation of Article XXV, section 12 of the negotiated agreement. Moreover, as noted by the arbitrator, it was stipulated that, but for the error, the grievant would have been promoted on March 28. The agency's argument that the provision found to be violated, because of its lack of specificity, does not constitute a nondiscretionary agency requirement appears to constitute nothing more than disagreement with the arbitrator's interpretation of Article XXV, section 12 of the parties' collective bargaining agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitration award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Accordingly, the agency's first exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.^{3/}

^{3/} In support of its exception the agency cites decisions of the Comptroller General prohibiting retroactive promotions when the official having authority to approve the promotion has not done so. The agency alleges that in the facts and circumstances of the instant case the official with the appropriate delegated authority was the Regional Personnel Officer and that official had not approved the promotion. However, the Council notes that in at least two decisions the Comptroller General has permitted retroactive promotions in cases involving violations of collective bargaining agreement provisions even though the appropriate agency official has not approved the promotions. 55 Comp. Gen. 42 (1975); B-180010, August 30, 1976. Thus in B-180010, August 30, 1976, involving a question of whether an employee whose promotion was delayed could be given a retroactive promotion, and in which the agency involved made

(Continued)

In its second exception, the agency contends that the award is based on a nonfact. In support of this exception the agency contends that the award appears to be based on the "arbitrator's [erroneous] belief that the subject provision of the Equal Employment Opportunity article (1) concerns matters other than those related to discrimination, (2) requires the [District Manager] to establish the effective date of promotions, (3) renders the Regional Personnel Officer an agent of the [District Manager], and (4) represents the bilateral intent of the negotiating parties." The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81. However, in this case the Council is of the opinion that the agency's second exception is not supported by the facts and circumstances described in the petition. That is, the agency has not presented the necessary facts and circumstances to demonstrate that the central fact underlying the award is the alleged erroneous belief concerning the Equal Employment Opportunity article and that such belief is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. Rather, the agency is arguing, in effect, that the arbitrator's interpretation of the agreement provision found to be violated was erroneous. As previously stated, a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitration award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District, FLRC No. 76A-144, supra. Thus, the Council is of the opinion that the agency's petition does not present facts and circumstances necessary to support an assertion that the central fact underlying the award is concededly erroneous and constitutes a gross mistake of fact but for which a different result would have been reached. Accordingly, the agency's second exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

(Continued)

arguments before the Comptroller General similar to those made by the agency in the instant case, the Comptroller General concluded that "[s]ince the arbitrator has determined that but for the agency's undue delay the grievant would have been promoted earlier, we would have no objection to processing a retroactive promotion . . . and paying the appropriate backpay." (In the instant case the agency further asserts that the Supreme Court's decision in United States v. Testan, 424 U.S. 392 (1976) precludes payment of backpay in these circumstances. However, in B-180010, August 30, 1976, the Comptroller General also concluded that "the [Testan decision] is not applicable to the present case.")

The agency's third exception is that the award does not draw its essence from the collective bargaining agreement. In support, the agency contends that the award in this case evidences a manifest disregard of the agreement and thus represents an implausible interpretation thereof since no charge of discrimination is involved here and the District Manager performed the only action within his authority--that is, he timely recommended grievant's promotion. The agency states that the statutory and regulatory requirement that personnel actions are effective from the date of approval by the official with appointing authority "cannot reasonably be viewed as being related to the contractual provision here present." The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, the Council is of the opinion that the agency's third exception is not supported by the facts and circumstances described in the petition. In this regard, the agency has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon her interpretation and application of Article XXV, section 12 of the parties' agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or could not in any rational way be derived from the agreement; or evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123. Instead the agency advances in support of the exception its own views of what it "reasonably" believes the correct interpretation and application of Article XXV, section 12 to be. Thus, the agency's third exception constitutes nothing more than disagreement with the arbitrator's interpretation and application of Article XXV, section 12 of the parties' collective bargaining agreement. As indicated previously, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitrator's award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District, FLRC No. 76A-144, supra. Accordingly, the agency's third exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

The agency in its fourth exception contends that the arbitrator exceeded her authority by interpreting a statute, namely the Back Pay Act of 1966. The agency maintains that the interpretation of statutes was not intended to be within the authority of arbitrators and that the Comptroller General, not the arbitrator, is the authority on how the Back Pay Act may be legally applied.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present the ground that the arbitrator exceeded his/her authority by determining an issue not included in the

question(s) submitted to arbitration. Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101. However, in this case the Council is of the opinion that the agency's exception is not supported by facts and circumstances described in the petition. In this regard the Council has previously held that there was no basis for acceptance of a petition for review in a case in which it was alleged that an arbitrator exceeded his authority when, in the course of resolving the grievance before him, he considered the meaning of laws and regulations. Automated Logistics Management Systems Agency and National Federation of Federal Employees, Local 1763 (Erbs, Arbitrator), FLRC No. 76A-69 (Nov. 5, 1976), Report No. 115. In that case the Council cited the January 1975 report and recommendations on the amendment to the Order, as follows:

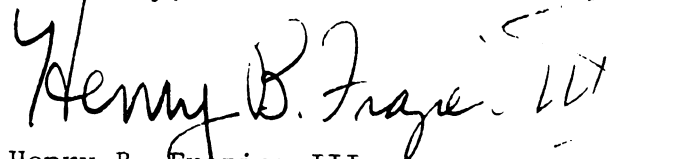
In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation Labor-Management Relations in the Federal Service (1975), at 44.

The Council notes that the arbitrator in the instant case specifically discussed and interpreted the contract provision at issue and found it to be violated. She considered the Back Pay Act of 1966 and relevant Comptroller General decisions in the course of resolving the grievance before her. Accordingly, the agency's fourth exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In summary, the agency's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay of the award is also denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: M. G. Blatch
AFGE

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Omaha, Nebraska (Moore, Arbitrator). The question before the arbitrator was whether the activity could cancel overtime assignments within the terms of the parties' agreement. The arbitrator concluded that the activity had acted reasonably in cancelling the overtime assignments in question and denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based upon an exception essentially alleging that the arbitrator exceeded his authority.

Council action (August 2, 1977). The Council held that the union's petition did not present facts and circumstances supporting its exception. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 2, 1977

Mr. William B. Peer
General Counsel, PATCO
Barr & Peer
1101 Seventeenth Street, NW.
Washington, D.C. 20036

Re: Professional Air Traffic Controllers
Organization and Federal Aviation
Administration, Omaha, Nebraska
(Moore, Arbitrator), FLRC No. 77A-36

Dear Mr. Peer:

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

According to the award, this case arose when, shortly before the end of the fiscal year, the activity was informed by agency headquarters that certain, previously available funds were to be "unexpectedly withdrawn." As a result, the activity determined that it could no longer support the then prevailing level of overtime work and so cancelled all "nonessential overtime" for the rest of the fiscal year. The union then grieved^{1/} on behalf of several employees whose scheduled overtime assignments were cancelled. The grievance proceeded to arbitration, where the arbitrator initially phrased the question before him as "whether the [activity] could, within the terms of the Agreement, cancel overtime assignments that had been made." The arbitrator ultimately concluded that the activity had "acted reasonably in cancelling the overtime," and as a result denied the grievance.

^{1/} The provision relied upon by the union appears to be Article 33, Section 2 of the parties' agreement, which is set forth by the arbitrator as follows:

Assignments to the watch schedule shall be posted at least fourteen (14) days in advance, or for a longer period where local conditions permit. The Employer recognizes that changes of individual assignments to the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. When it is necessary to change an employee's post[ed] shift assignment, the Employer shall use the following alternatives to the extent feasible prior to making the change:

(Continued)

The union's petition before the Council takes exception to the arbitrator's award on the ground discussed below. The agency did not file an opposition to the petition.

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

In its exception the union contends that this case "involves a significant and important question of the authority of an arbitrator to add to an agreement a condition which does not appear in the agreement." The condition to which the union refers is apparently one which would, in the union's words, "tolerate or excuse violations of [the] agreement based upon inability to pay." Thus, the union asserts that "[t]he contract under consideration by the arbitrator contains no such provision and there is no reason to believe that the parties intended for ability to pay to be a consideration in the enforcement or nonenforcement of the agreement."

The Council will grant a petition for review of an arbitrator's award when it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, for example, the Council will grant a petition for review when it appears that the exception presents grounds that the arbitrator exceeded his authority by adding to or modifying any of the terms of the agreement. Charleston Naval Shipyard and Federal Employees Metal Trades Council of Charleston (Williams, Arbitrator), FLRC No. 75A-7 (June 26, 1975), Report No. 76. In our view, however, the union's petition in this case does not describe facts and circumstances supporting its exception that the arbitrator exceeded his authority. That is, the union does not present facts and circumstances to

(Continued)

- (a) overtime;
- (b) personnel on detail assignments;
- (c) personnel on permanent assignments that are required to maintain currency;
- (d) line supervisors or staff;
- (e) rescheduling of training.

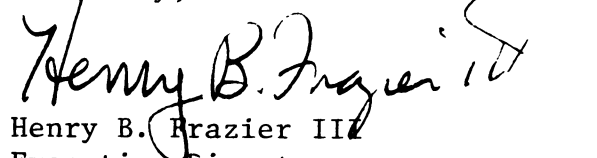
In the event the above alternatives are found not to be feasible, the employee's posted shift assignment can be changed.

demonstrate that the arbitrator, having been asked to rule on "whether the [activity] could, within the terms of the Agreement, cancel overtime assignments that had been made," necessarily exceeded his authority by answering the very question presented him. It appears, rather, that the union is simply disagreeing with the arbitrator's interpretation of the parties' agreement and with his resulting disposition of the grievance. In this respect, the Council has consistently held that the interpretation of provisions in a negotiated agreement is a matter to be left to the arbitrator's judgment. See, e.g., Department of the Navy, Naval Aviation Supply Office, Philadelphia, Pennsylvania and American Federation of Government Employees, Local 1698 (Quinn, Arbitrator), FLRC No. 76A-118 (Mar. 11, 1977), Report No. 123; American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), 2 FLRC 288 [FLRC No. 74A-17 (Dec. 5, 1974), Report No. 61]. Consequently, this exception provides no basis upon which to accept the union's petition for review under section 2411.32 of the Council's rules.^{2/}

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

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. J. Alfultis
DOT

^{2/} In its petition the union also states that the issue of "whether the [activity] properly refused to honor its contractual obligations to the Union based upon its inability to comply for financial reasons" is an "important and major policy issue for the Council" and "involves a significant issue concerning the proper interpretation and application of the Executive Order." Although the union does not specifically allege that the award violates any provision of the Order and does not specifically refer to any particular provision of the Order, it appears that the union's statements are directed to the arbitrator's reference to section 12(b)(6) of the Order in the discussion accompanying his award. Without passing upon the arbitrator's remarks or reasoning concerning the Order, the Council notes that the arbitrator concluded only that, in the circumstances which were present, the activity "acted reasonably in cancelling the overtime" and therefore denied the grievance. Further, an assertion that an award presents a major policy issue is not a ground upon which the Council will grant a petition for review of an arbitrator's award under section 2411.32 of the Council's rules. Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76, n. 5.

U.S. Customs Service, Region II, New York, Assistant Secretary Case No. 30-7232(RO). The Assistant Secretary, in agreement with the Regional Administrator (RA) and based on the RA's reasoning, found that dismissal of the objections, filed by American Federation of Government Employees, Region II Customs Council, AFL-CIO (AFGE), to conduct alleged to have improperly affected the results of the election and to the procedures under which the election was conducted, was warranted. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the RA's report and findings on objections. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious.

Council action (August 2, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and AFGE neither alleged, nor did it otherwise appear, that the decision presented a major policy issue. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 2, 1977

Mr. James L. Neustadt
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Customs Service, Region II, New
York, Assistant Secretary Case
No. 30-7232(RO), FLRC No. 77A-50

Dear Mr. Neustadt:

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

In this case, as found by the Assistant Secretary, an election by secret mail ballot was conducted in a unit of employees at the U.S. Customs Service, Region II (the activity) in accordance with the provisions of an Agreement for Consent Election. Each Notice of Election provided a date certain for the mailing of ballots and their return within 2 weeks to a designated post office box. The Agreement for Consent Election as well as each Notice of Election provided a procedure for eligible employees who had not received a ballot within the first week to request a duplicate ballot by telephone. The results of the election, as set forth in the official Tally of Ballots, indicated that, of the 1480 valid votes counted, plus one challenged ballot, 792 were cast for the National Treasury Employees Union (NTEU), 634 were cast for the American Federation of Government Employees, Region II Customs Council, AFL-CIO (AFGE), and 53 were cast against exclusive recognition. AFGE subsequently filed objections to conduct alleged to have improperly affected the results of the election and to the procedures under which the election was conducted, the objection pertinent herein being the contention that the mail ballot procedures were conducted in such a manner as to disenfranchise determinative numbers of voters. The Regional Administrator (RA), in his Report and Findings on Objections, reviewed at length the specific contentions of the AFGE concerning the balloting and concluded that "the election was fairly conducted . . . , that [AFGE's] Objection . . . is without merit with respect to the procedural conduct of the election and the proportion of eligible voters who cast their ballots," and that "no objectionable conduct occurred improperly affecting the results of the election." The Assistant Secretary, in agreement with the RA and based on his reasoning, found that dismissal of the objections in this case was warranted and denied AFGE's request for review seeking reversal of the RA's Report and Findings on Objections. He further directed that the RA cause an appropriate certification to be issued. (The record reflects that NTEU was certified as exclusive representative of the unit in question on April 11, 1977.)

In your petition for review on behalf of AFGE, you allege that the Assistant Secretary's decision was arbitrary and capricious in that: "(1) the . . . tally of election results finalized in the Report reveals that, among other patent inaccuracies, NTEU did not receive a majority of valid votes cast so as to materially affect the results of the election;*/ and (2) the election procedures were fatally deficient for reasonably ensuring all eligible employees an opportunity to vote so as to materially affect the results of the election." [Footnote added.] In the latter regard, you contend that the year-old mailing list of eligible employees was "highly inaccurate," and that the short time frame for mailing and the effectiveness of publicity as a safeguard for ensuring receipt of ballots were likewise deficient and disenfranchised eligible voters.

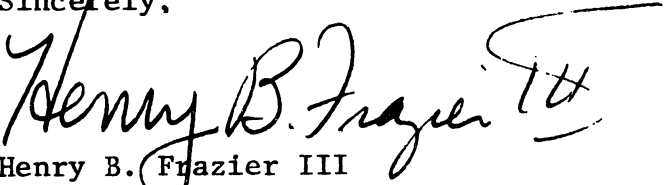
In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you have neither alleged, nor does it otherwise appear, that a major policy issue is presented.

As to your first contention concerning the Tally of Ballots, the decision neither appears arbitrary and capricious nor raises major policy issues warranting review, noting particularly that it is undisputed that the accurate Tally of Ballots served on the parties disclosed that NTEU received 792 votes, a majority of the valid ballots cast and counted. Nor is a basis for review provided with respect to the election procedures used, your contentions in this regard amounting essentially to a disagreement with the Assistant Secretary's finding that a fair election was held in the circumstances of the case.

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

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. Sansone
Customs

*/ In his Report and Findings on Objections, the RA's restatement of the Tally of Ballots mistakenly indicates that 702 ballots were cast for NTEU, rather than the 792 ballots as set forth in the official Tally of Ballots served on the parties. The accuracy of the 792 figure is not at issue herein.

Headquarters, Western Area Military Traffic Management Command and American Federation of Government Employees, Local 1157 (Grodin, Arbitrator). The arbitrator determined, in pertinent part, that AFGE Local 1157 violated the parties' agreement by apportioning space in an activity building and allowing the use of such space by other AFGE locals which did not represent activity employees. The arbitrator directed AFGE Local 1157, in pertinent part, to obtain the removal of the other AFGE locals from the premises. AFGE appealed to the Council, requesting that the Council accept its petition for review based on three exceptions, which alleged, respectively: that the arbitrator exceeded his authority; that the award was based on a nonfact; and that for the reasons stated in the first two exceptions, the award was incomplete so as to make implementation impossible. AFGE also requested a stay of the award.

Council action (August 2, 1977). The Council held that AFGE's petition did not describe facts and circumstances to support its exceptions. Accordingly, the Council denied AFGE's petition because it failed to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied AFGE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 2, 1977

Mr. James L. Neustadt
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Headquarters, Western Area Military Traffic
Management Command and American Federation of
Government Employees, Local 1157 (Grodin,
Arbitrator), FLRC No. 77A-57

Dear Mr. Neustadt:

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

According to the award, this matter arose out of a number of disputes concerning AFGE Local 1157's use of an agency facility at the Oakland Army Base (the activity) known as Building 833. Among the disputes, which resulted in grievances filed by the activity and cross-grievances filed by the union, was the apportionment of space in the building by Local 1157 for use by other AFGE locals which do not represent activity employees. The parties submitted eleven issues to the arbitrator, the first of which was as follows:

Did Local 1157 violate Article III, Section (5)^{1/} of the Agreement by apportioning space in and allowing the use of Building 833 by AFGE Locals 51, 1533, and 1113? [Footnote added.]

^{1/} Article III, Section 5, provides:

Section 5. Use of Official Facilities. The Employer agrees that the Union may be provided office space on the installation for use by the Union, depending on the availability of such space and subject to the following conditions.

a. The Union will be responsible for providing, at no expense to the Employer, any furnishings, equipment or utilities it deems desirable.

b. The Union shall be responsible for and shall hold the Employer free from any responsibility for any cost or claims for damage to or loss of such furnishings, equipment or utilities.

In the discussion accompanying his award, the arbitrator, for purposes of analysis, consolidated that issue and the remaining ten issues as: (A) the occupancy of Building 833 by other locals (encompassing the above-quoted issue); (B) the obligation of Local 1157 to pay or reimburse the activity for all utilities used in Building 833; (C) the obligation of Local 1157 to pay rent for the use of Building 833; and (D) the eviction notice sent to Local 1157 and the termination of utilities service to Building 833 (dealing with issues arising from the activity's attempt to oust Local 1157 from the building).

With respect to the issue of the occupancy of the building by other locals, the arbitrator stated that "[w]hat is involved here is not a commercial lease, with the lessee having full right of occupancy except as expressly limited, but a right of use arising out of and incident to a particular collective bargaining relationship." In this context, the arbitrator found that the plain meaning of the language of Article III, Section 5, of the agreement "contemplates use by Local 1157 and not by its relatives." Concerning the obligation of Local 1157 to pay for utilities, the arbitrator found on the basis of the evidence that Article III, Section 5 of the agreement provided free use of utilities to Local 1157, "[b]ut clearly did not require the agency to furnish free utilities to its sister locals" which, based upon the arbitrator's disposition of the first issue, were occupying the building in violation of the agreement. As to the obligation of Local 1157 to pay rent, the arbitrator determined that the parties had agreed to rent-free occupancy by Local 1157 and that "no applicable regulation appears to conflict with that agreement." Finally, regarding the eviction notice sent to Local 1157 by the activity and termination of utilities service to Building 833, the arbitrator concluded that under all the circumstances Local 1157 was not obligated to quit the premises following the

(Continued)

- c. The Union will be responsible for general housekeeping of the office space provided, and agrees to pay any costs involved in the use of such office space which may be required by any law or regulation.
- d. No additions or modifications will be made to the office space by the Union without the prior written consent of the Employer.
- e. The Employer reserves the right to withdraw the Union's privilege to use office space upon thirty days notice if the Employer determines that the office space provided is needed for official business or that the Union has violated any of the provisions of this section. Expulsion from office space provided by the Employer will not be a retaliatory measure against the Union because of actions, disputes or circumstances not connected with the provisions of the article.
- f. All internal Union business conducted in this office space will be during the nonwork hours of the employees involved (i.e., both Union officials who are employees and employees visiting the office).

eviction notice and that its failure to do so was not in violation of the agreement. Therefore, the arbitrator determined that the activity's termination of utilities service to the building was in violation of the agreement. Insofar as is pertinent herein, the arbitrator made the following award:

Local 1157 did violate Article III, Section (5) of the Agreement by apportioning space in and allowing the use of Building 833 by AFGE Locals 51, 1533, and 1113. By way of remedy, Local 1157 is directed to obtain removal of those locals from the premises within 30 days from the date hereof, or in the event exceptions to this award are filed with the Federal Labor Relations Council and this portion of the award is sustained, then within 30 days from the date of the Council's decision.^{2/} If the Union fails or chooses not to comply with this directive, it shall vacate the premises upon request by the Agency. In addition, Local 1157 shall reimburse the Agency on a pro rata basis for gas, electricity, and water utilities utilized by those locals. Commencing Dec. 2, 1975. [Footnote added.]

The union's petition takes three exceptions to the arbitrator's award on the grounds discussed below. The union also requests a stay of the award. The agency filed an opposition.

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

In its first exception, the union contends that the arbitrator exceeded his authority. In support of this exception the union contends that the arbitrator improperly extended enforcement of his award to sister locals not parties to the arbitration nor named parties to the agreement and cites the Council's decision in American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479 [FLRC No. 72A-3 (July 31, 1973), Report No. 42] as applicable precedent.

As is indicated in the case cited by the union, the Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority by awarding relief under the agreement to nongrievants. However, in this case, the Council is of the opinion that the union's petition does not describe facts and circumstances to support its exception that the arbitrator exceeded his authority by awarding relief under the agreement to

^{2/} The arbitrator noted, in this regard, that AFGE Locals 51, 1533, and 1113 were not parties to the proceeding before him and, therefore, he had no authority or jurisdiction over them. Rather, he stressed, it was Local 1157 which had violated the agreement and, accordingly, his order was specifically directed to Local 1157 to take the directed remedial action.

nongrievants. In this regard, the Council notes that the arbitrator, in response to the issue jointly submitted by the parties as to whether Local 1157 had violated the agreement by allowing sister locals to use the building, found that Local 1157 had violated the agreement and directed Local 1157 to "obtain for the removal of the other locals." In formulating this remedy, the arbitrator specifically addressed and discussed the question of his authority with respect to Local 1157's sister locals, and concluded that, since he had no authority or jurisdiction over the other locals not party to the proceeding, his order would be directed to Local 1157 alone. Thus, in the instant case the arbitrator, in answering affirmatively the question jointly submitted to him of whether Local 1157 had violated the agreement by apportioning space to the sister locals, specifically addressed his remedy to the parties to the proceeding, and recognized he had no jurisdiction over the other locals. In the Council's opinion, the union, in substance, is simply challenging the remedy as fashioned by the arbitrator. The Council follows a policy, as do courts in the private sector, in favor of allowing arbitrators discretion in fashioning remedies so long as those remedies do not violate applicable law, appropriate regulation or the Order. National Labor Relations Board Union and the General Counsel of the National Labor Relations Board (Fallon, Arbitrator), FLRC No. 76A-90 (Apr. 21, 1977), Report No. 124 and cases cited therein. The union does not allege that the remedy herein violates applicable law, appropriate regulation or the Order. Therefore, the union's first exception provides no basis for acceptance under section 2411.32 of the Council's rules.

The union's second exception alleges that the award is based on a nonfact in that the arbitrator erroneously found that Local 1157, a party to the arbitration, has authority or power for effectively removing the sister locals from the activity's premises. In support of this exception the union contends that "the record is completely bare of any such authority or power" and that "[t]he transcript contains testimony which, by no stretch of the imagination, supports any such a finding and, in part, reveals the contrary." The union further asserts that the constitutions of AFGE and the locals establish the autonomous nature of the locals.

The Council will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81.

However, the Council is of the opinion that the union's exception is not supported by the facts and circumstances described in its petition. In this regard, the union's petition for review does not present the necessary facts and circumstances to demonstrate that the central fact underlying this arbitrator's award is concededly erroneous, and in effect is a gross mistake

of fact but for which a different result would have been reached. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO, supra at 3 of the Decision. Rather, the union appears to be disagreeing with the arbitrator's finding as to the facts and, in substance, arguing that his findings of fact are not supported by the record. The Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), 2 FLRC 300 [FLRC No. 74A-49 (Dec. 20, 1974), Report No. 61]; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Thus, the union's exception does not present the necessary facts and circumstances to support a ground upon which the Council grants review under section 2411.32 of its rules of procedure.

The union's third exception is that for the reasons stated in its first two exceptions "the award is thus incomplete so as to make implementation of the award impossible." The union's petition, however, does not otherwise provide contentions in support of this exception. The Council will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible. National Weather Service, N. O. A. A., U.S. Department of Commerce and National Association of Government Employees (Strongin, Arbitrator), FLRC No. 75A-63 (Aug. 15, 1975), Report No. 82. However, in this case the union only refers to the contentions made in support of its first two exceptions. As previously indicated, in the Council's opinion the union, in those contentions, is, in substance, challenging the remedy as formulated by the arbitrator and arguing that his findings of fact are not supported by the record. Such contentions do not present facts and circumstances to support an exception on the ground that the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: C. Thomas
Army

Internal Revenue Service, Oklahoma City District, Assistant Secretary Case No. 63-7017(CA). The decision of the Assistant Secretary was dated June 23, 1977, and appeared to have been served on the National Treasury Employees Union (NTEU) by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, NTEU's appeal was due in the office of the Council no later than the close of business on July 28, 1977. However, NTEU's appeal was not filed with the Council until August 1, 1977, and no extension of time for such filing was requested by NTEU or granted by the Council.

Council action (August 3, 1977). Since NTEU's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 3, 1977

Mr. Henry H. Robinson
Assistant Counsel
National Treasury Employees Union
300 East Huntland Drive, Suite 104
Austin, Texas 78752

Re: Internal Revenue Service, Oklahoma City
District, Assistant Secretary Case
No. 63-7017(CA), FLRC No. 77A-81

Dear Mr. Robinson:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, filed with the Council on August 1, 1977. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated June 23, 1977, and appears to have been served on you by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on July 28, 1977. However, as indicated above, your appeal, which appears to have been mailed to the Council on July 29, 1977, was not filed with the Council until August 1, 1977, and no extension of time for such filing was requested by you or other representative of the National Treasury Employees Union, or granted by the Council.

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

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

Enclosure

cc: A/SLMR
Labor

D. N. Reda
IRS

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Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806. The union (National Treasury Employees Union) and 11 of its local chapters filed an unfair labor practice complaint against the agency and 11 of its centers, alleging that the agency and the centers violated section 19(a)(1) and (6) of the Order when they eliminated certain portions of the parties' multi-center agreement upon its expiration, and when the Commissioner of the agency issued a memorandum to all employees of the centers included under the subject agreement, thereby allegedly attempting improperly to deal with unit employees. The Assistant Secretary found that the unilateral elimination of certain provisions in the parties' agreement constituted a violation of section 19(a)(1) and (6) of the Order. The Assistant Secretary further found, with respect to the union's allegation concerning the memorandum to the employees of the centers, that since a grievance was filed under the parties' agreement at one of the centers over the same issue, he was precluded by section 19(d) of the Order from considering that aspect of the complaint. Both the agency and the union filed petitions for review of the Assistant Secretary's decision with the Council. The agency contended, among other things, that the Assistant Secretary's finding of a violation of the Order with respect to the elimination of certain portions of the parties' agreement presented major policy issues. The union alleged that the Assistant Secretary's decision that he was precluded by section 19(d) of the Order from considering that aspect of its complaint concerning the issuance of the memorandum was arbitrary and capricious and raised a major policy issue.

Council action (August 12, 1977). With regard to the agency's petition for review, the Council held that the decision of the Assistant Secretary raised a major policy issue, namely, the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. Accordingly, pursuant to section 2411.15 of its rules of procedure, the Council accepted the agency's petition for review and so notified the parties. Further, pursuant to section 2411.47(e)(2) of its rules, the Council granted the agency's request for a stay.

With regard to the union's petition for review, the Council held that the petition did not meet the requirements of section 2411.12 of the Council's rules; that is, that aspect of the decision of the Assistant Secretary concerning the application of section 19(d) in the facts and circumstances of this case did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 12, 1977

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Mr. John F. Bufe, Assistant Counsel
National Treasury Employees Union
Suite 1101
1730 K Street, NW.
Washington, D.C. 20006

Re: Internal Revenue Service, Ogden
Service Center, et al., A/SLMR
No. 806, FLRC No. 77A-40

Gentlemen:

The Council has carefully considered the petitions for review of the Assistant Secretary's decision, the respective oppositions thereto, and the agency's request for a stay filed in the above-entitled case.

In this case, as found by the Assistant Secretary, the Internal Revenue Service (the agency) and various agency Service Centers, the IRS Data Center and the IRS National Computer Center, are parties to a Multi-Center Agreement (MCA) with the National Treasury Employees Union (the union) and its local chapters holding exclusive recognition at the respective Centers. The union and 11 of its local chapters filed a complaint against the agency and the 11 Center activities alleging violations of 19(a)(1) and (6) of the Order. The alleged violations occurred when the agency and the Centers eliminated certain portions of the MCA upon its expiration, and when the Commissioner of the agency issued a memorandum to all employees of the Centers, included under the MCA, which memorandum allegedly constituted an improper attempt to deal directly with unit employees.

With respect to the allegation concerning the elimination of portions of the MCA upon its expiration, the Assistant Secretary drew a distinction between rights and privileges which are based solely on the existence of a written agreement and other rights and privileges accorded to exclusive representatives (characterized as "'institutional benefits' accruing to the union qua union"). The Assistant Secretary concluded that rights and privileges which are based solely on the existence of the written agreement terminate with the expiration of the agreement, while "'institutional benefits' . . . continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good

faith bargaining impasse has been reached." The Assistant Secretary concluded that the unilateral elimination of these agreement provisions related to the union's rights constituted an improper unilateral change in personnel policies and practices in violation of section 19(a)(1) and (6) of the Order.

With respect to the allegation concerning the memorandum to employees of the Centers, the Assistant Secretary found that as a grievance was filed under the MCA at the Detroit Service Center over the same issue, he was precluded by section 19(d) from consideration of this aspect of the complaint. In this regard, the Assistant Secretary concluded that the issue raised by the grievance clearly was the same as that raised by the unfair labor practice complaint. He went on to say:

In this regard, it was noted that both the grievance and the unfair labor practice complaint sought the withdrawal of the memorandum as a remedy. Moreover, although technically the grievance was filed only at one Service Center under the MCA, any resolution of that grievance would have been applicable to all of the Service Centers under the MCA, especially given the remedy sought by the grievant.

Both the agency and the union filed petitions for review of the decision of the Assistant Secretary.

In its petition the agency contended that the decision of the Assistant Secretary finding a violation of the Order with respect to the elimination of portions of the MCA upon its expiration was arbitrary and capricious and presents major policy issues warranting review. Upon careful consideration of the petition for review filed by the agency, and the opposition filed by the union, the Council is of the opinion that the subject decision of the Assistant Secretary raises a major policy issue: namely, the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement.

Accordingly, pursuant to section 2411.15 of the Council's rules of procedure, you are hereby notified that the Council has accepted the agency's petition for review, and you are reminded that briefs may be filed, as provided in section 2411.16(a) of the rules.

The Council has also carefully considered the agency's request for a stay of the Assistant Secretary's decision and order, and the union's opposition thereto, pending Council resolution of the instant appeal. Pursuant to section 2411.47(e)(2) of its rules, the Council has determined, based upon the facts and circumstances presented, that issuance of a stay is warranted in this case. Accordingly, the agency's request for a stay is granted.

In its petition for review the union alleged that the Assistant Secretary's decision is arbitrary and capricious and raises the following major policy

issue: "Where an unfair labor practice is committed in eleven (11) different bargaining units and one (1) grievance is filed in one (1) unit involving the same subject matter as the unfair labor practice complaint, does Section 19(d) of the Order require dismissal of the complaint in all eleven (11) units?" In this regard, the union asserted, in essence, that the agency's memorandum necessarily "bypassed, demeaned and disparaged" the union and undermined its status; and, as each local union chapter had been separately certified to represent a specific unit, the grievance filed by one such chapter alleging violation of the MCA could not waive the rights of the remaining chapters exclusively representing other units to process a complaint based upon a violation of the Order.

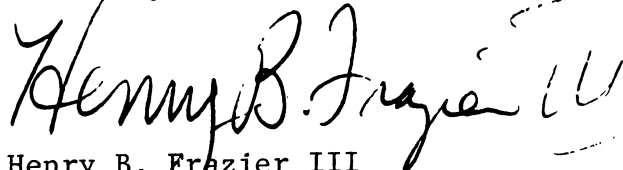
In the Council's opinion, the union's petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision, that as a grievance was filed under the MCA at the Detroit Service Center over the issuance of the memorandum, he was precluded by section 19(d) of the Order from consideration of this aspect of the complaint, does not appear arbitrary and capricious or present a major policy issue.

With respect to the union's allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision concerning the applicability of section 19(d) in the particular facts and circumstances of the instant case. Nor does this aspect of the Assistant Secretary's decision raise a major policy issue, noting particularly the Assistant Secretary's finding that, in the circumstances of this case, "any resolution of [the Detroit] grievance would have been applicable to all of the Service Centers under the MCA, especially given the remedy sought by the grievant." The contrary assertion by the union constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual determination in the instant case and, as such, does not present a major policy issue warranting Council review.

Since that part of the Assistant Secretary's decision related to the union's petition for review does not appear arbitrary and capricious and presents no major policy issues, the union's appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of the union's appeal is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Department of Justice, Immigration and Naturalization Service, Washington, D.C., Assistant Secretary Case No. 22-6812(AP). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that the grievance filed by the American Federation of Government Employees, National Immigration and Naturalization Service Council, AFL-CIO (AFGE), was not on a matter subject to the negotiated grievance procedure of the parties' agreement. The Assistant Secretary therefore denied AFGE's request for review seeking reversal of the RA's report and findings on grievability. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (August 16, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 16, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Department of Justice, Immigration and
Naturalization Service, Washington, D.C.,
Assistant Secretary Case No. 22-6812(AP),
FLRC No. 77A-49

Dear Mr. Mulholland:

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

In this case, as described in the Report and Findings on Grievability, the American Federation of Government Employees, National Immigration and Naturalization Service Council, AFL-CIO (the union) filed a grievance under its existing agreement with the Department of Justice, Immigration and Naturalization Service, Washington, D.C. (the activity). The grievance alleged that the activity violated Article 4, Section B and Article 5, Section A of the parties' negotiated agreement (corresponding to sections 12(a) and 11(b) of the Order, respectively) by making a unilateral change in its Administrative Manual without negotiating with the union. The union requested that the matter be submitted to arbitration and the activity thereafter filed an Application for a Decision on Grievability or Arbitrability with the Assistant Secretary.

The Assistant Secretary denied the union's request for review seeking reversal of the Regional Administrator's Report and Findings on Grievability and in agreement with the Regional Administrator found that the grievance was not on a matter subject to the negotiated grievance procedure. With respect to the incorporation of section 12(a) within the agreement, the Assistant Secretary noted that the mere inclusion of that language in the agreement does not extend the scope of the negotiated grievance and arbitration procedure to matters covered therein and cited the Council's decision in Scott Air Force Base.^{1/} As to the incorporation of section 11(b)

1/ Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. In its decision therein, the Council rejected a theory that the incorporation of section 12(a) in a

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of the Order within the agreement the Assistant Secretary found no evidence "that the parties intended to make the instant matter grievable under the terms of the agreement by incorporating the language of that portion of the Order." He went on to add that "the mere inclusion of the language of Section 11(b) of the Order, without any evidence to show that the parties intended thereby to make the matters contained therein subject to the negotiated grievance and arbitration procedure is not, in my view, sufficient to serve as a basis for including disputes over the matters contained in that Section within the negotiated grievance and arbitration procedure."

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious in that: (1) he disregarded the union's contentions that unlike in Scott there was no "mere" inclusion of the 12(a) language and he "failed to elicit any bargaining history evidence which would substantiate his decision that there was no intent to include the [12(a)] language under the grievance article"; and (2) he based his decision regarding the inclusion of the section 11(b) language in the agreement upon "bare assertions, unsupported by documents or testimony, when a reading of the contract tends to support an opposite conclusion." You further allege that the Assistant Secretary's decision presents a major policy issue as to "whether the Assistant Secretary should set a standard . . . that provides for issues to be decided on bare assertions and disputed facts, when no opportunity for presenting evidence in the form of relevant testimony was provided . . . in the face of clear and express terms of a negotiated agreement and no evidence in the record to substantiate a decision which is in apparent conflict with the very terms of the agreement."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegations that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the instant case. In this regard, your contrary assertions in effect constitute mere disagreement with the Assistant Secretary's finding that the instant grievance was not subject to the grievance and arbitration procedures

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negotiated agreement extends the coverage and scope of the negotiated grievance procedure to include grievances alleging violation of all laws, regulations of appropriate authorities, and policies including agency policies and regulations. The Council stated: "Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements." (See n. 8.)

contained in the parties' negotiated agreement and thus present no basis for Council review. Nor is a major policy issue presented in the circumstances of this case, as alleged, noting particularly the Assistant Secretary's finding of "no evidence herein that the parties intended to make the instant matter grievable under the terms of the agreement by incorporating the language of [section 11(b)] of the Order."^{2/} In this regard, your appeal fails to establish that the Assistant Secretary's decision was inconsistent with the purposes and policies of the Order.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.^{3/}

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

A. E. Ross
Justice

^{2/} In so concluding, the Council finds it unnecessary to reach or pass upon the further reasoning of the Assistant Secretary.

^{3/} In view of the Council's disposition herein it is unnecessary to pass upon the agency's assertion in its opposition that the Council's decision in AFGE, National Immigration and Naturalization Service Council and Department of Justice, INS, FLRC No. 76A-26 (Jan. 18, 1977), Report No. 120 "serves to moot the issues raised by the Union in the instant appeal."

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Community Services Administration, Washington, D.C., Assistant Secretary Case No. 22-6839(AP). The Assistant Secretary found that the issue raised by the National Council of CSA Locals, American Federation of Government Employees, AFL-CIO (AFGE) in its grievance, i.e., whether an agency witness lied during an arbitration hearing, involved the conduct of the particular arbitration proceeding, rather than a question of contract interpretation or application. Accordingly, the Assistant Secretary granted the agency's request for review seeking reversal of the Regional Administrator's report and findings on grievability or arbitrability. AFGE appealed to the Council, alleging that the Assistant Secretary's decision raised a major policy issue.

Council action (August 16, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issue, and AFGE neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied AFGE's petition for review.

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UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 16, 1977

Mr. Phillip R. Kete, President
National Council of CSA Locals
American Federation of Government
Employees, AFL-CIO
1200 19th Street, NW.
Washington, D.C. 20506

Re: Community Services Administration, Washington, D.C.,
Assistant Secretary Case No. 22-6839(AP), FLRC No. 77A-54

Dear Mr. Kete:

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

In this case, as found by the Assistant Secretary, the National Council of CSA Locals, AFGE, AFL-CIO (the union) filed a grievance contending that the Community Services Administration (the agency) violated the parties' collective bargaining agreement when an agency witness allegedly lied while testifying at an arbitration hearing held pursuant to the agreement in connection with an earlier grievance. After issuing a final rejection of the instant grievance as not being grievable under the parties' negotiated procedure, the agency filed an Application for Decision on Grievability or Arbitrability with the Assistant Secretary.

The Assistant Secretary found that the conduct involved in this case is not subject to the parties' negotiated grievance procedure. In this regard, he stated:

The issue raised by the [u]nion in its . . . grievance (whether an [agency] witness lied during an arbitration hearing) involves the conduct of a particular arbitration proceeding. There is no showing that the matter involved herein is a question of contract interpretation or application.

The Assistant Secretary went on to state that he "view[ed] the [u]nion's grievance herein as, in effect, a collateral attack upon the procedure of a prior arbitration hearing, as distinguished from raising an issue of

contract interpretation or application." Accordingly, he granted the agency's request for review seeking reversal of the Regional Administrator's Report and Findings on Grievability or Arbitrability.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary "raises the same major policy issue as the Council is considering in FLRC 76A-149: Does section 13(d) of the Order authorize the Assistant Secretary to determine the merits of a grievance or only whether the parties have agreed to arbitrate the grievance?"^{1/} In this regard, you assert that "[t]he Assistant Secretary determined the merits of the complaint rather than whether the parties had agreed that such a complaint would be resolved through their grievance/arbitration procedure, and thereby he exceeded his authority under the Executive Order."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not present any major policy issue, and you neither allege nor does it appear that his decision is arbitrary and capricious.

As to the alleged major policy issue regarding the extent of the Assistant Secretary's authority under section 13(d) of the Order, noting particularly his finding that "[t]here is no showing that the matter involved herein is a question of contract interpretation or application," in the Council's view no major policy issue is presented warranting review. In this regard, your assertions merely constitute essentially a disagreement with the Assistant Secretary's conclusion that the matter is not subject to the parties' negotiated grievance procedure and therefore present no basis for Council review.^{2/}

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither allege, nor does it appear, that his decision

^{1/} In the case cited by the union, Community Services Administration, A/SLMR No. 749, FLRC No. 76A-149, the specific major policy issue raised concerned "the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63) under the circumstances of the present case."

^{2/} Your further assertion that the instant grievance is neither a collateral attack on the judgment in the previous case nor an attack on the arbitrator's conduct of that hearing, but instead is a dispute over contract interpretation, again constitutes mere disagreement with the Assistant Secretary's finding that the matter at issue was not grievable inasmuch as it was not shown to be "a question of contract interpretation or application."

is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

R. W. Crittenden
CSA

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Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation, Alaska Region (Walsh, Arbitrator). This appeal arose from the arbitrator's award directing the agency to repay salary withheld from the grievant and to restore annual leave taken from him after the agency discovered that it had incorrectly granted the grievant home leave in the course of his transfer from Puerto Rico to Alaska. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law and appropriate regulation; and granted the agency's request for a stay of the award (Report No. 118).

Council action (August 17, 1977). Because the case concerned issues within the jurisdiction of the Comptroller General's Office, the Council requested a decision from him as to whether the arbitrator's award violated applicable law and appropriate regulation. Based on the decision of the Comptroller General rendered in response to the Council's request, the Council concluded that the arbitrator's award did not violate applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the award and vacated the stay which it had previously granted.

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

Professional Air Traffic
Controllers Organization

and

FLRC No. 76A-99

Federal Aviation Administration,
Department of Transportation,
Alaska Region

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing the agency to repay salary withheld from the grievant and to restore annual leave taken from him after the agency discovered that it had incorrectly granted the grievant home leave in the course of his transfer from Puerto Rico to Alaska.

Based on the findings of the arbitrator and the entire record, it appears that this matter arose as a result of the Federal Aviation Administration's (FAA) decision to withhold 18 hours pay from the grievant's salary and to charge him with 104 hours of annual leave after it discovered that it had erroneously authorized the grievant 160 hours of home leave in the course of his transfer from Puerto Rico to Alaska. The grievant used 122 hours of the 160 hours authorized. Upon his arrival in Alaska, however, he was informed that "a mistake had been made in granting the leave for the applicable regulations did not authorize such leave" and that "he would have to repay the pay for the leave taken." It was decided that this would be accomplished by withholding 18 hours pay from his salary and deducting 104 hours of leave from his annual leave account. The grievant then grieved this decision and the matter was ultimately submitted to arbitration.

The arbitrator found that FAA had violated certain provisions of the parties' negotiated agreement, stating that "[w]hen travel orders were issued to the Grievant he was bound to follow them" and that leave (an integral part of the orders) was authorized in those orders, and that the agency had an obligation "properly to direct and inform the Grievant. The Administration did not do so" The arbitrator further stated that "[t]he Grievant was bound by what is contained in those orders; but similarly the [FAA] is bound by the travel orders, including the portion thereof granting leave." He concluded: "All personnel, employees of the Administration, whether in Anchorage or in the Southern Region, advised and directed the Grievant down a certain path, viz., that he was entitled to the leave requested. None deny this. They had the right and the duty

to advise and direct and they did so. Once the mistake, which resulted in the breach of the contract was discovered, the Administration then attempted to make the Grievant 'pay the Piper' for the Administration's mistake and breach of contract. This is not the law; and it is not fair." The arbitrator therefore sustained the grievance and directed FAA "to repay the 18 hours of salary to the Grievant" and "to restore to the Grievant the 104 hours of annual leave which it had taken from him."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulations.*7

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to its exception which alleges that the arbitrator's award directing the agency to repay 18 hours of salary to the grievant and to restore to the grievant 104 hours of annual leave which it had taken from him violates applicable law and appropriate regulations. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulation. The Comptroller General's decision in the matter, B-187396, July 28, 1977, is set forth in pertinent part below:

The sole issue before this Office, as stated by the FLRC, is whether the arbitrator's award violates applicable law and appropriate regulations dealing with entitlement to and the granting of home leave.

BACKGROUND

The pertinent facts and circumstances giving rise to the claim, as stated in a letter dated August 23, 1976, from the Department of Transportation to FLRC are:

*7 The agency requested and the Council granted a stay of the award pending determination of the appeal, pursuant to section 2411.47(f) of the Council's rules of procedure.

The facts involved in the arbitration were that Lamoyne J. DeLille (hereafter the grievant) was and is an Air Traffic Control Specialist presently employed by the Federal Aviation Administration at the Anchorage Air Route Traffic Control Center in Anchorage, Alaska. In May, 1975 the grievant requested a transfer to Anchorage where he had been previously employed from San Juan, Puerto Rico. This transfer was approved. Grievant requested 160 hours of biennial or home leave to be spent between his departure from San Juan and his arrival at Anchorage. This request was made of the FAA's Southern Region in Atlanta, Georgia which region has jurisdiction over San Juan. A telegram was sent by the Southern Region to the Alaska Region advising of grievant's request and asking for approval of the requested leave. Prior to receiving a response, grievant traveled to the headquarters of the Southern Region and was advised by the Chief of the Employment Branch that "because it is an overseas assignment" he was entitled to home leave. Because he did not receive formal orders from Alaska, the grievant then telephoned the Chief of the Elmendorf RAPCON, the new duty station of the grievant, and inquired of the whereabouts of his travel orders and whether the 160 hours of leave had been approved. He was informed by the Chief that his orders were forthcoming by teletype and the leave was approved. The leave was approved by teletype. Shortly thereafter, grievant's travel orders were issued and they included approval of the requested biennial leave.

The grievant used 122 of the 160 requested hours and reported to his new duty station. Upon his arrival, he was informed that a mistake had been made and the leave utilized could not be authorized. It was decided that grievant be charged 104 hours of annual leave and 18 hours of leave without pay to repay the 122 hours of leave used.

Mr. DeLille filed a grievance based upon the aforesaid decision of FAA, and the matter was submitted to arbitration. In his opinion the arbitrator concluded that FAA had violated Article 42, sections 2(a) and 2(b) of the collective bargaining agreement between FAA and PATCO. In sections 2(a) and 2(b), FAA reserved to itself the right to direct the work force and retained the right to hire, promote, transfer, and assign its employees. The arbitrator stated that FAA had the obligation to properly direct and inform the grievant and to issue travel orders to him which conformed to existing law and regulations. Inasmuch as the travel orders which were issued to Mr. DeLille stated, inter alia, "160 hours biennial leave enroute approved," the arbitrator concluded that FAA is bound by the travel orders, including the portion granting leave, particularly since employees of FAA in Anchorage and in the Southern Region advised and directed the grievant down a certain path, namely, that he was

entitled to the home leave requested. To remedy the violation the arbitrator directed FAA to repay the 18 hours of salary to the grievant and to restore the 104 hours of annual leave it had taken from him.

OPINION

1. Home Leave

The granting of home leave is governed by 5 U.S.C. § 6305 (1970) which provides, in pertinent part, as follows:

(a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months of that service without regard to other leave provided by this subchapter. Leave so granted--

(1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico;

(2) accumulates for future use without regard to the limitation in section 6304(b) of this title; and

(3) may not be made the basis for terminal leave or for a lump-sum payment.

The functions of the President under section 6305(a) have been delegated to the United States Civil Service Commission (CSC) by Executive Order 11228, June 14, 1965. Also, the heads of the several departments and agencies are empowered to grant leaves of absence, including home leave, as authorized by Executive Order 10471, July 17, 1953.

The implementing regulations pertaining to home leave promulgated by the CSC, as pertinent to this case and as found in 5 C.F.R. § 630.601, et seq., provide, in essence, that "home leave" means leave authorized by 5 U.S.C. § 6305(a) and earned by service abroad for use in the United States. "Service abroad" means service by an employee at a post of duty outside the United States. An agency may grant home leave only for use in the United States during an employee's period of service abroad or within a reasonable period after his return from service abroad when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States.

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The applicable definition of the term "United States," as stated in section 6301, title 5, United States Code, when used in a geographical sense, means "the several States and the District of Columbia."

Under the provisions of 5 U.S.C. § 6305, a Federal employee generally is entitled to home leave after serving a tour of duty overseas for the required period. The specific requirements laid down for the granting of home leave are that the employee must have completed a basic service period of 24 continuous months abroad and that it is contemplated that he will serve another tour of duty abroad. 52 Comp. Gen. 860 (1973); 35 id. 655 (1956); B-147031, February 5, 1962, and September 11, 1961.

In the case under consideration, Mr. DeLille had completed 24 months of continuous service in Puerto Rico which satisfied the initial statutory and regulatory requirement for entitlement to home leave. However, he failed to satisfy the second regulatory requirement for such entitlement. Since he transferred from Puerto Rico to Anchorage, Alaska, which is within the "United States" as defined in 5 U.S.C. § 6301, it clearly was not contemplated that Mr. DeLille would return to another assignment abroad as required by 5 C.F.R. § 630.606(c). With the admission of Alaska as a State of the United States, service in Alaska is no longer considered to be an overseas assignment. Federal Personnel Manual Supplement 990-2, subchapter S6-7a(2), explicitly states that "Home leave is to be provided only when employees are expected to return to overseas assignments." Accordingly, no statutory or regulatory authority existed for FAA to authorize home leave to Mr. DeLille.

As no authority existed for FAA officials to authorize home leave to the claimant, and since the Government is not bound by the unauthorized actions of its agents (54 Comp. Gen. 747, 749 (1975)), it is clear that the Government is not bound by the home leave provision of the travel orders. Hence, the award of the arbitrator cannot be upheld on the ground that the FAA was bound by its issuance of orders granting home leave.

2. Waiver Statute

The Waiver Statute, 5 U.S.C. § 5584, provides, in essence, that a claim of the United States against an employee arising out of an erroneous payment of pay or allowances may be waived, in whole or in part, by the Comptroller General of the United States or the head of the agency. [Emphasis in original.]

In promulgating standards for waiver of claims as authorized under 5 U.S.C. § 5584, the Comptroller General has provided in 4 C.F.R. § 91.2 as follows:

(c) "Pay" as it relates to an employee means salary, wages, pay, compensation, emoluments, and remuneration for services. It includes but is not limited to overtime pay; night, Sunday standby, irregular and hazardous duty differential; pay for Sunday and holiday work; payment for accumulated and accrued

leave; and severance pay. It does not include travel and transportation expenses and allowances, and relocation allowances payable under 5 U.S.C. 5724a.

The definition lists a number of items that are identified as pay and also states that the term "pay" "includes but is not limited to" the specific items listed, including "payment for accumulated and accrued leave."

After a careful review of the foregoing, we have concluded that the term "pay" appearing in section 5584, and the regulations issued pursuant thereto, includes home leave and, consequently, an erroneous grant of home leave is subject to consideration for waiver.

Prior to determining whether the home leave erroneously granted to Mr. DeLille may be waived under 5 U.S.C. § 5584 (1970), it is necessary to distinguish the erroneous grant of home leave herein involved from an erroneous grant of annual leave. In cases involving the erroneous crediting of annual leave, we have held that waiver of annual leave is appropriate when, as a result of a later adjustment to an employee's leave account, it is shown that the employee has taken leave in excess of that to which he was entitled, thereby creating a negative balance in his annual leave account. Otherwise, there is no overpayment which may be considered for waiver under the waiver statute since the error is susceptible to correction through reduction of the employee's positive leave balance. Matter of Franklin C. Appleby, B-183804, November 14, 1975; B-176020, August 4, 1972; and B-166848, June 3, 1969.

In the case before us, at the time Mr. DeLille was erroneously authorized the 160 hours of home leave (of which he used 122 hours), he had 104 hours in his annual leave account. Therefore, the question arises as to whether a different rule can be justified for home leave, permitting waiver of the indebtedness where home leave has been erroneously granted even if the employee has outstanding annual leave which could be used to offset all or a portion of the home leave owed.

We are of the opinion that home leave and annual leave are sufficiently different to justify allowing waiver of erroneous home leave even where there is outstanding annual leave which could be charged. Although annual leave and home leave both appear under chapter 63, subchapter I, of title 5, United States Code, 1970, they are separate leave systems authorized under different sections of the subchapter. Each has different requirements for accrual and accumulation. Also, the basic underlying purposes behind the granting of home leave and annual leave are different, and they may not be substituted for each other. Further, lump-sum payment for annual leave is permissible while home leave may not be the basis for

lump-sum payment or for terminal leave. See Part 630, title 5, Code of Federal Regulations. We believe that these basic differences between annual leave and home leave justify a different rule in the application of the waiver statute where, as here, home leave has been erroneously authorized.

Turning then to the facts of the case before us, overpayments of pay or allowances arising out of administrative errors may be waived by this Office if collection "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a) (1970). The regulations implementing this statutory provision state, in pertinent part at 4 C.F.R. § 91.5(c) (1974), as follows:

* * * Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. * * *

In view of the circumstances involved in this claim, it is clear that the grant of home leave to Mr. DeLille occurred through administrative error, and we find no indication of fraud, misrepresentation, fault or lack of good faith on the part of Mr. DeLille. Accordingly, we hereby waive the indebtedness created by the unauthorized grant of home leave and use thereof by Mr. DeLille.

Moreover, in further support of the legality of the arbitrator's award, 5 C.F.R. § 630.606(e)(1) provides that, where an employee is indebted for the home leave used by him when he fails to return to service abroad after the period of home leave, a refund of this indebtedness is not required when the employee, as in the case of Mr. DeLille, has completed not less than 6 month's service in an assignment in the United States following the period of home leave.

CONCLUSION

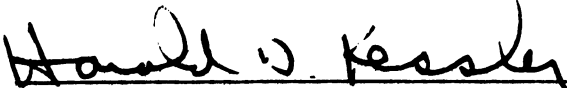
In summary, although we disagree with the reasoning used by the arbitrator, we find that the arbitrator's award is valid under applicable laws and regulations and may be implemented on the basis of this decision. Accordingly, Mr. DeLille is entitled to waiver of repayment of the 122 hours of home leave erroneously granted to him and used by him. Further, he is entitled to reimbursement of an amount equal to the 18 hours charged to him as leave without pay and deducted from his salary and to restoration to his annual leave account of the 104 hours of annual leave charged thereto.

Based upon the foregoing decision by the Comptroller General, we conclude that the arbitrator's award does not violate applicable law and appropriate regulations.

Conclusion

For the foregoing reasons, we find that the award directing FAA to repay 18 hours of salary to the grievant and to restore to the grievant the 104 hours of annual leave taken from him does not violate applicable law and appropriate regulation. Pursuant to section 2411.37(b) of the Council's rules of procedure, we therefore sustain the arbitrator's award and vacate the stay.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 17, 1977

National Treasury Employees Union and Internal Revenue Service. The dispute involved the negotiability under the Order of a union proposal which, in essence, would permit an employee to grieve a supervisor's determination of the level of complexity of a particular work assignment.

Council action (August 17, 1977). The Council held that the proposal was outside the bargaining obligation established by section 11(a) of the Order, and that the agency's determination that the proposal was nonnegotiable was therefore proper. Accordingly, pursuant to section 2411.28 of the Council's rules and regulations, the Council sustained the agency's determination.

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

National Treasury Employees Union

(Union)

and

FLRC No. 76A-132

Internal Revenue Service

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal reads as follows:

An employee who disagrees with the grade level assigned to a case may file a grievance pursuant to Article 32 of the Agreement.^{1/}
[Footnote added.]

Agency Determination

The agency head determined that the proposal is nonnegotiable because it conflicts with section 12(b)(5) of the Order or is excepted from the agency's obligation to bargain by section 11(b) of the Order.

Question Before the Council

Whether, under the facts and circumstances of this case, the proposal is nonnegotiable under the Order.

^{1/} Article 32 of the current multi-regional agreement between the parties sets forth procedures "for the disposition and processing of grievances which may arise from time to time as a result of the interpretation and/or application of the terms of this agreement." If no satisfactory resolution is reached in traversing the several steps of the grievance procedure, arbitration may be invoked.

Opinion

Conclusion: The proposal is outside the bargaining obligation established by section 11(a) of the Order. Therefore the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, must be sustained.^{2/}

Reasons: The proposal would permit an employee to grieve "the grade level assigned to a case." To understand the meaning of the quoted phrase--"the grade level assigned to a case"--a brief review of the circumstances which led to the proposal is necessary.

Among the employees represented by the union in Regional Offices of the IRS are Appellate Appeals Officers (formerly known as Appellate Conferees). These personnel hold administrative hearings concerning disputed income, excise, and gift tax liabilities.

The agency issued a Manual Supplement^{3/} in December 1975 announcing "procedures for testing guidelines to determine the grade levels of work assigned to Appellate Conferees in the Appellate Division." The ultimate objectives of the new guidelines were explained by the agency as follows:

[T]o establish a uniform system for assigning work units to Appellate Conferees; to provide a basis of workload determination for financial planning; to provide an improved basis for position classification; and to better utilize the conferee's time and abilities.

The guidelines were based on a belief that valid correlations could be drawn between the levels of complexity of cases assigned and the dollar value levels of the cases. The dollar value refers to the proposed deficiency, the proposed overassessment or the portion of a claim at issue.

The guide and guidelines therein were issued to test the validity of the correlations between the dollar value of cases (or "work units") and their difficulty. The guide established the following scale:

1 - Type I	\$1 - \$2,500	GS-12
2 - Type II	\$2,501 - \$100,000	GS-13
3 - Type III	\$100,001 or higher	GS-14

^{2/} In view of our decision herein, it is unnecessary to reach the question of whether the proposal conflicts with section 12(b)(5) of the Order or whether it is excepted from the agency's obligation to bargain by section 11(b) of the Order, as relied upon by the agency in its determination.

^{3/} Department of the Treasury, Internal Revenue Service Manual Supplement, MS 8(24) G-114. (Rev. 1) CR 13G-78 (Rev. 1) (Dec. 23, 1975).

While the grade level assigned to a case was to be based primarily on the dollar value of the tax liability in dispute, the guide did provide for adjustments by the supervisor in the grade level assigned to a case, where the complexity and scope of the case exceed or fall short of that reflected in dollar value alone. The guide provided that the work unit should be assigned to a conferee whose grade is commensurate with the grade level assigned to a case. Nevertheless, it was clearly indicated that the guide was not intended to supersede any existing Civil Service Commission classification standards and that position classification factors, such as supervision and guidance, could not be measured by the guide.

The test of the guidelines was conducted between July 1, 1975 and June 30, 1976. As a result of the test, the agency concluded that the initial case grading method using dollar criteria (with some minor modification of the original model) was a valid approach to the assignment of work. The agency therefore decided, among other things, to issue a permanent "case assignment guide" to be used on a continuing basis.

In subsequent negotiations concerning "the impact and implementation" of this decision (as well as others not relevant herein) the union offered the proposal in dispute in this case. In essence, the proposal would permit an employee to grieve the supervisor's determination of level of complexity of a particular work assignment.

Section 11(a) of the Order^{4/} establishes an obligation to bargain concerning personnel policies and practices and matters affecting working conditions so far as may be appropriate under various limitations, including provisions of the Order itself. Included within the obligation to bargain are negotiated grievance procedures under section 13(a) of the Order.^{5/} However, while section 13(a) of the Order affords the parties a great deal of discretion in negotiating the scope and coverage of their negotiated grievance procedure, the obligation to negotiate such scope and coverage extends only to matters that fall within section 11(a), i.e., personnel policies and practices and

^{4/} Section 11(a) of the Order provides, in pertinent part, as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order.

^{5/} Indeed, section 13(a) of the Order requires that the negotiated agreement for each exclusive bargaining unit must include a grievance procedure and provides that the coverage and scope of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order.

matters affecting working conditions. We are of the opinion that a supervisor's assessment of the level of complexity of a work assignment does not fall within the meaning of the phrase "personnel policies and practices and matters affecting working conditions" and hence does not fall within the obligation to bargain under section 11(a) of the Order.

The proposal in dispute, by its express terms and as explained by the union in its submissions to the Council, is concerned exclusively with permitting an employee to grieve over a supervisor's assessment as to the level of difficulty of a particular work assignment. Thus, in support of its proposal, the union asserted that "the language merely allows an employee to file a grievance when a disagreement occurs between an employee and a supervisor concerning the grade level to be assigned to a case." In a subsequent submission the union points out that:

[E]mployees would be provided with an effective means of bringing to light an erroneous application of the nationwide guide. Without the right to challenge, each supervisor may or may not properly apply the guide.

In essence, therefore, the proposal would permit an employee to grieve a supervisor's assessment as to the level of difficulty of work assignments within the agency simply to ensure that the supervisor's determination was proper, i.e., conformed with the guidelines.

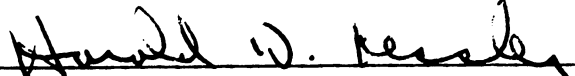
In our opinion, the proposal in dispute does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Rather, it relates solely to a management analysis and determination before particular work is assigned to a particular employee. Clearly, such a supervisor's assessment as to the level of difficulty of a work assignment does not, of itself, involve personnel policies or practices or matters affecting working conditions of bargaining unit employees.^{6/} Indeed, the union tacitly acknowledged the managerial nature of the supervisor's determination, stating:

The language merely allows the filing of a grievance, it does not mandate management action based upon a finding by an arbitrator. Further, NTEU has stated that its proposal is not intended to force the IRS to take any particular action based upon an arbitrator's finding that the guideline was improperly applied to a particular case by a particular supervisor.

^{6/} Cf. National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, California, FLRC No. 76A-111 (July 13, 1977), Report No. 131.

Accordingly, since the union's proposal does not involve personnel policies and practices or matters affecting working conditions and, hence, falls outside the required scope of bargaining under section 11(a) of the Order, we must hold that the agency is under no obligation to bargain over it.⁷⁷

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 17, 1977

7/ The impact of such assessments as to the level of difficulty of work assignments on personnel policies and practices and matters affecting working conditions within the bargaining unit would, of course, be a proper matter for negotiation under section 11(a) of the Order.

Community Services Administration, A/SLMR No. 749. This appeal arose from a decision of the Assistant Secretary holding that a grievance filed by the National Council of CSA Locals, American Federation of Government Employees, AFL-CIO (AFGE) was not on a matter subject to the parties' negotiated grievance procedure. The Council accepted AFGE's petition for review, concluding that a major policy issue was raised as to the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in the Crane case, FLRC No. 74A-19), under the circumstances of the present case.

Council action (August 17, 1977). The Council found that the Assistant Secretary's determination that the grievance in this case was not subject to the negotiated grievance procedure of the parties' agreement was inconsistent with the Council's intended interpretation and application of section 13(d) of the Order, as previously enunciated in its decision in Crane. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for reconsideration and decision consistent with the principles set forth by the Council in its decision.

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

Community Services Administration

and

National Council of CSA Locals,
AFGE, AFL-CIO

A/SLMR No. 749
FLRC No. 76A-149

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary holding that a grievance was not on a matter subject to the parties' negotiated grievance procedure. The grievance, which was filed by the National Council of CSA Locals, AFGE, AFL-CIO (AFGE), alleged that the Community Services Administration (agency) failed to abide by its collective bargaining agreement with AFGE in filling a vacant position which was outside the collective bargaining unit. The agency took the position that the matter was not grievable under the negotiated grievance procedure and filed an Application for Decision on Grievability or Arbitrability.

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: AFGE represents a nationwide unit composed of all of the agency's non-supervisory General Schedule and Wage Grade employees, including professionals. Employees engaged in personnel work are excluded from the unit. In January 1975, the agency issued a Merit Promotion Announcement for the position of Employee Development Specialist in the Personnel Office of the agency. There were six applicants for the position. A certificate was sent to the selecting official containing the names of two "in-house" applicants, one of whom was in the bargaining unit, and two applicants from outside the agency. An outside applicant was selected for the position. AFGE then filed a grievance under the parties' negotiated grievance procedure,^{1/} contending that the agency did not adhere to Amendment 11 of the agreement in filling the vacancy. As set

^{1/} According to the Assistant Secretary's decision, Article 16 of the agreement provides for a grievance procedure to resolve grievances over the "interpretation or application of this Agreement." Section 11 of Article 16 provides that if the union or the agency alleges nonadherence, improper interpretation, or failure to implement a provision of the agreement, the complaining party shall submit the complaint to the other party. This section further provides for meetings, and if the matter is not resolved, either party may refer the matter to arbitration.

forth in the Assistant Secretary's decision, Amendment 11 of the printed agreement states, in pertinent part:

The Parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible, with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system^{2/}
[Footnote added.]

AFGE alleged that the position was neither policymaking nor supervisory and must therefore be filled, pursuant to Amendment 11, with an in-house candidate. The agency's response was a final written rejection of the grievance which set forth its reasons for such rejection^{3/} and which notified AFGE of its intent to file an application with the Assistant Secretary as to whether the matter in dispute may properly be grieved under the parties' negotiated agreement. Shortly thereafter, the agency filed its Application for Decision on Grievability or Arbitrability with the Assistant Secretary.

The Assistant Secretary first resolved the issue raised by the agency's contention that the Order precludes a negotiated agreement from covering procedures for the filling of any vacancies outside the bargaining unit, and that, since the position involved herein was outside the unit, a dispute over the filling of that position was not grievable. The Assistant Secretary rejected this contention, concluding that while agencies are not obligated to bargain over proposals concerning the procedures for filling positions outside the bargaining unit, they may, at their option, bargain over such proposals. In support of this conclusion, he cited

^{2/} During the preliminary stages of the grievance procedure, and before the Assistant Secretary, AFGE sought the application of a different version of Amendment 11 which it claimed had been "agreed to by the parties at negotiations" The Assistant Secretary found that the language appearing in the printed agreement was binding upon the parties for the purposes of the instant grievability dispute, since the evidence failed to establish "beyond reasonable controversy" that such language was not consistent with the actual agreement or intention of the parties. The Assistant Secretary's finding in this regard is not at issue herein.

^{3/} The agency contended, in this regard, that the position in question was not in the bargaining unit, and, therefore, it had followed agency regulations and the FPM in filling the position; that under another article of the agreement, non-agency applicants could be considered where there were not three highly qualified in-house applicants; and, that since the position was outside the unit and because the agency could not apply different considerations to in-unit applicants and out-of-unit applicants, it would apply its own uniform standards, not those set forth in the agreement.

Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100. The Assistant Secretary went on to hold that "[i]n the instant case clearly the [agency] chose to bargain and reached an agreement with respect to a proposal which encompassed the filling of 'all vacancies in the competitive service above the entry level'" and "[t]herefore, unless the position in question is otherwise specifically precluded from coverage under Amendment 11, a question concerning the procedures for filling such position would be grievable despite the fact that the position was outside the bargaining unit." Finally, the Assistant Secretary found that since Amendment 11 excludes from coverage those positions defined as "policy" positions, and since the record established that the Employee Development Specialist position in question is involved in the formulation of agency-wide training policy, the position is specifically excluded from coverage under Amendment 11 as a "policy" position. Accordingly, the Assistant Secretary concluded that "the instant grievance over whether Amendment 11 was followed in filling the position in question is not grievable under the negotiated grievance procedure."

AFGE appealed the Assistant Secretary's decision to the Council. The Council accepted AFGE's petition for review, concluding that a major policy issue was raised as to the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63) under the circumstances of the present case. AFGE and the agency filed briefs with the Council as provided in section 2411.16 of the Council's rules (5 CFR 2411.16).

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case raised a major policy issue as to the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in Crane, supra) under the circumstances of the present case. That is, the issue presented in this case concerns the extent of the Assistant Secretary's responsibility under section 13(d) of the Order (as considered by the Council in Crane) in deciding questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, when such questions are referred to him for decision.

In Crane, a probationary employee grieved his termination under the provisions of a negotiated grievance procedure, claiming that such termination violated a provision of the agreement relating to "acceptable level of competence." The activity denied that the termination was grievable under the agreement, and the union then filed an application with the Assistant Secretary for a decision on grievability. Although a question was raised by the agency before the Assistant Secretary as to whether or not the grievance was on a matter for which a statutory appeal procedure exists,

the Assistant Secretary made no finding in that regard. Furthermore, the Assistant Secretary made no determination as to whether the grievance therein was on a matter subject to the negotiated grievance procedure, but, instead, ruled that this question "should be resolved through the negotiated grievance procedure." On appeal, the Council concluded that: (1) where an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question; (2) where a dispute is referred to him as to whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide such grievability dispute; and (3) in resolving the dispute referred to in (2), above, the Assistant Secretary must consider the relevant agreement provisions (including those provisions which describe the scope and coverage of the negotiated grievance procedure and any substantive provisions of the agreement which are being grieved) in light of related provisions of statute, the Order, and regulations, more particularly where special meaning is attached to words used in the relevant agreement provisions by such statute, regulation, or the Order and there is no indication that any other than the special meaning was intended by the parties. Accordingly, the Council set aside the Assistant Secretary's decision and remanded the case to him for reconsideration consistent with the foregoing principles.

The question before the Council is whether the Council's intended interpretation of section 13(d) of the Order as previously enunciated by the Council in Crane required the determination as to grievability made by the Assistant Secretary in the present case. For the reasons stated below, the Council is of the opinion that section 13(d) of the Order does not require the Assistant Secretary to interpret and apply such provision of the agreement, in the circumstances in the instant case, and, indeed, such action is inconsistent with section 13(d).

In the present case, a dispute was referred to the Assistant Secretary as to whether the agency's alleged failure to abide by its collective bargaining agreement with AFGE in filling a vacant position outside the collective bargaining unit was grievable under the negotiated grievance procedure contained in the agreement. Unlike Crane, no allegations were made herein that a statutory appeal procedure existed which would preclude the use of the negotiated grievance procedure. Furthermore, while the Assistant Secretary did make the required determination herein as to whether the grievance was on a matter subject to the negotiated grievance procedure,^{4/} he then proceeded to interpret and apply Amendment 11 of the

^{4/} In this regard, unlike Crane, there was also no allegation herein that the relevant agreement provisions contained words to which special meaning was attached by statute, regulation, or the Order. As the Council indicated in Crane, at some length, this was especially significant in that case since the negotiated provision which was alleged to have been violated dealt with a matter—"acceptable level of competence"—which was established specifically in statute and dealt with extensively in Civil Service Commission regulations and the Federal Personnel Manual.

parties' agreement concluding that the position of Employee Development Specialist was a "policy" position and therefore was excluded from coverage of that provision. On the basis of his interpretation and application of Amendment 11, the Assistant Secretary concluded that the grievance over whether Amendment 11 was followed in filling the position in question was not grievable under the negotiated grievance procedure.

In Crane, the Council stated, insofar as relevant herein, that in any dispute referred to the Assistant Secretary as to whether a grievance is on a matter subject to a negotiated grievance procedure:

[T]he Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13 and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. [Council decision at 4.]

This language in the Council's decision in Crane describes the Assistant Secretary's responsibilities under the Order in deciding whether a grievance is on a matter subject to a negotiated grievance procedure. In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such procedure as well as any specific exclusions contained therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector (or as an arbitrator or the Federal courts would in the private sector) whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure. The Assistant Secretary's consideration of "substantive provisions of the agreement being grieved" would be for the limited purpose of determining whether the grievance involves a claim which on its face is covered by the contract, i.e., involves a matter which arguably concerns the meaning or application of the substantive provision(s) being grieved and which the parties intended to be resolved under the negotiated grievance procedure.^{5/} The Council's statement in Crane that the Assistant Secretary must decide whether or not a dispute is subject to the negotiated grievance procedure, "just as an arbitrator would if the question were referred to him," while perhaps ambiguous, was not intended and should not be construed to mean that the

^{5/} In making this determination in circumstances such as those presented in Crane, i.e., where the substantive provision contains terms to which a special meaning is attached by statute, regulation or the Order, the Assistant Secretary must consider those legal provisions in resolving the grievability or arbitrability dispute. See n. 4, supra.

Assistant Secretary may interpret the substantive provisions of an agreement in resolving a grievability or arbitrability question as an arbitrator would in deciding the merits of a grievance. Instead, the Council's statement was intended to indicate that the Assistant Secretary must decide a question of grievability or arbitrability under a negotiated grievance procedure when such question is referred to him, just as an arbitrator would be required to decide the question of grievability or arbitrability where the parties bilaterally agree to refer such threshold issue to the arbitrator pursuant to section 13(d) of the Order.^{6/}

In applying these principles to the instant case, we find that the Assistant Secretary's determination that the grievance in this case was not subject to the negotiated grievance procedure is inconsistent with the

6/ The Council notes that the Assistant Secretary has previously recognized the foregoing distinction between the merits of a grievance and the grievability or arbitrability of a grievance under a negotiated agreement. See U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, Assistant Secretary Case No. 30-6026(GA), FLRC No. 76A-23 (July 8, 1976), Report No. 108. This description of the Assistant Secretary's responsibilities under section 13(d) is also in accord with the role of Federal courts in a suit under § 301 of the Labor-Management Relations Act (29 U.S.C. 185) to compel specific performance of an arbitration agreement. In such suits, judicial inquiry is narrowly restricted to the issues of whether the collective bargaining agreement between the parties contains an arbitration provision and to whether the labor dispute in question falls within its scope. Thus, in John Wiley and Sons v. Livingston, 376 U.S. 543 (1964), the Court stated:

"Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962). Accord, e.g., United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960).

As the Court likewise said in United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 568 (1960):

. . . It [the function of the court] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

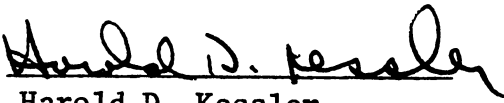
See also UAW v. General Electric Co., 474 F.2d 1172 (6th Cir. 1973) and Haig Berberian, Inc., v. Warehousemen, 535 F.2d 496 (9th Cir. 1976).

Council's intended interpretation and application of section 13(d) of the Order, as previously enunciated by the Council in Crane. In the present case, as the Assistant Secretary recognized, the parties were in a dispute as to whether the position of Employee Development Specialist was a "policy" position within the meaning of Amendment 11 of the negotiated agreement. The parties' negotiated grievance procedure encompassed grievances over the "interpretation or application of this Agreement." Since the question of whether the position of Employee Development Specialist was a "policy" position involved the interpretation and application of the agreement, the grievance was on a matter within the scope of the negotiated grievance procedure and, therefore, should have been referred to an arbitrator. The Assistant Secretary, by interpreting the substantive provisions of the agreement and deciding that the position of Employee Development Specialist was a "policy" position within the meaning of Amendment 11, in effect resolved the merits of the dispute, rather than considering Amendment 11 for the limited purpose of determining whether the grievance involved the interpretation or application of that substantive provision and thus, whether the grievance fell within the scope of the parties' negotiated grievance procedure.

Conclusion

For the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision in the instant case and remand the case to him for reconsideration and decision consistent with the principles enumerated above.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 17, 1977

U.S. Department of Commerce, U.S. Maritime Administration, A/SLMR No. 755. The Assistant Secretary, upon a complaint filed by the union (United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO), involving the revision of an agency regulation concerning certain personnel policies at the academy, found that the agency had not violated section 19(a)(1) and (6) of the Order, as alleged by the union in its complaint. The union appealed to the Council, alleging, in essence, that the decision of the Assistant Secretary raised major policy issues and appeared to be arbitrary and capricious.

Council action (August 17, 1977). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not raise any major policy issues and did not appear arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 17, 1977

Mr. Donald R. Paquette
Vice-Chairman, USMMA Chapter
United Federation of College Teachers
U.S. Merchant Marine Academy
Kings Point, New York 11024

Re: U.S. Department of Commerce,
U.S. Maritime Administration,
A/SLMR No. 755, FLRC No. 76A-152

Dear Mr. Paquette:

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

The case concerned an unfair labor practice complaint filed by the United Federation of College Teachers, U.S. Merchant Marine Academy Chapter, Local 1460, NYSUT, AFT/NEA, AFL-CIO (union), the exclusive representative of a unit comprised of the teaching faculty of the United States Merchant Marine Academy, Kings Point, New York (academy). The complaint, filed against the U.S. Department of Commerce, U.S. Maritime Administration (agency), alleged violations of section 19(a)(1) and (6) of the Order arising out of the revision of an agency regulation concerning certain personnel policies at the academy.

The Assistant Secretary indicated that the gravamen of the complaint was that, pursuant to the Council's decision in Merchant Marine,^{1/} the respondent agency was required to bargain in good faith with the union before issuing revised regulations which deal only with the personnel policies and practices and matters affecting the working conditions of employees at a single subordinate activity, namely, the academy. The Assistant Secretary concluded that Merchant Marine established the principle that a regulation dealing with the terms and conditions of employment at a single subordinate activity may not be interposed as a bar to a bargaining request made pursuant to section 11(a) of the Order by the exclusive representative of the employees at that subordinate activity. Then, relying on two of his published decisions in previous cases, the Assistant Secretary stated that the evidence in the case

1/ United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210, 216-217 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30].

established that the academy, which was not a respondent in the case, afforded exclusive recognition to the union, and found "that the Respondent agency could not be in violation of section 19(a)(6) of the Order based on its alleged failure to bargain in good faith with the Complainant prior to, or upon, the issuance of its revised regulations."

In determining whether the agency had violated section 19(a)(1) of the Order, the Assistant Secretary concluded that there was no evidence which would justify a finding that the agency had improperly interfered with an exclusive bargaining relationship. First, he noted that a regulation issued by the respondent agency which dealt only with the terms and conditions of employment of employees at a single subordinate activity, such as the academy, could not act as a bar to a legitimate bargaining request made by the union to the academy.^{2/} The Assistant Secretary further concluded that the union had made no request to bargain with the academy "regarding the implementation and/or effect of the proposed revised regulations on the terms and conditions of employment of the employees it represents." The Assistant Secretary found, on the basis of the facts, that there was no evidence that the agency's personnel officer deliberately misled the union concerning his separate roles on behalf of the agency and the academy or that the agency acted in any other way so as to improperly interfere with the bargaining obligations which the academy had vis-a-vis the union. The Assistant Secretary concluded that under all of these circumstances the agency's conduct was not in violation of the Order.

In your petition for review on behalf of the union, you allege that the Assistant Secretary "exceeded his authority when he limited the definition of the Order's section 11(a) reference to 'agency' to include only the agency's local activity." You further allege that the decision presents major policy issues as to: (1) Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) by such agency management in circumstances such as present in the instant case; (2) Whether the Assistant Secretary correctly applied the Council's decision in United

^{2/} It should be noted that, in its Merchant Marine decision (supra n. 1), the Council had concluded that "while higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations in the faculty unit at the Academy, higher level 'published policies and regulations' which deal only with terms and conditions of employment in that individual unit, such as the faculty salary plan and schedule in M.A.O. 181, do not properly limit the scope of negotiations on this subject matter--since unilateral prescription of these terms and conditions conflicts with the bargaining obligation of section 11(a). This is not to say that the Maritime Administrator's Order 181 is invalid. Rather, its publication does not, within the meaning of section 11(a), limit the agency's obligation to negotiate with the recognized union on the union's proposed changes in matters covered by that directive, subject of course to the Merchant Marine Act and legislative intent." [Emphasis in original.]

Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15]; (3) Whether the Assistant Secretary's "retroactive" application of and reliance upon a decision in another case—which decision was published subsequent to the filing of the unfair labor practice complaint in this case—was proper; and (4) Whether the granting of exclusive recognition by the agency's lower organizational level activity eliminates the higher levels from the bargaining relationship.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not raise any major policy issues, nor does it appear that his decision is arbitrary and capricious.

With respect to your allegation that the Assistant Secretary exceeded his authority, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Your allegation in this regard, and the first and fourth alleged major policy issues all concern the Assistant Secretary's conclusion that as the obligation to negotiate applies only in the context of the exclusive bargaining relationship, the agency, in the circumstances of the case, could not be in violation of section 19(a)(6). In the Council's view, in the circumstances of the case, noting particularly the Assistant Secretary's finding that the union made no request to bargain with the academy regarding the "implementation and/or effect of the proposed revised regulation," and without adopting the reasoning of the Assistant Secretary, such allegation does not raise a major policy issue warranting review.^{3/} As to the second alleged major policy issue concerning the Council's decision in Merchant Marine, in the Council's view, the Assistant Secretary's interpretation of that decision and its application to the facts of the case do not raise a major policy issue warranting review, again noting that the union did not request negotiation with the academy. Finally, as to the third alleged major policy issue, no issue

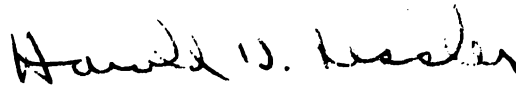
^{3/} Compare Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C., A/SLMR No. 608, FLRC No. 76A-37 (May 4, 1977), Report No. 125, wherein the Council concluded, in pertinent part, that when acts and conduct constitute a refusal to confer, consult, or negotiate as required by the Order, such acts and conduct may properly be found violative of section 19(a)(6) regardless of the organizational level of the member of agency management who committed the violative conduct. However, in the instant case, the agency was alleged to have changed an agency regulation concerning personnel policies at the academy. The Assistant Secretary's decision reflects that all that was at issue was the issuance of revisions in an agency regulation by higher level agency management, which dealt only with the terms and conditions of employment of employees at the academy and, hence, could not act as a bar to a legitimate bargaining request made by the union to the academy (see n. 2). Further, the union made no such request to bargain over the subject matter covered by the changes in the regulation, the effects of such changes or their implementation.

warranting review is raised by the Assistant Secretary's reliance upon his decisions published subsequent to the filing of the unfair labor practice complaint in this case, noting particularly that under section 6(a)(4) of the Order, the Assistant Secretary is authorized to decide unfair labor practice complaints and, in resolving the complaint in this case, relied upon his then established precedent.

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

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

M. J. McMorrow
Commerce

cc: A/SLMR
Labor

National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama and Marshall Engineers and Scientists Association Local 27, International Federation of Professional and Technical Engineers, AFL-CIO (Johnston, Arbitrator). This appeal arose from the arbitrator's award wherein he found that the agency's failure to promote the grievant as a repromotion eligible to a particular position was, in effect, contrary to the parties' collective bargaining agreement and directed that the grievant be offered promotion to the position. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated the Back Pay Act of 1966 and Civil Service Commission regulations (Report No. 122).

Council action (August 23, 1977). Since the Civil Service Commission is authorized to prescribe regulations to implement the Back Pay Act and to implement statutory provisions relating to selection and promotion in the Federal service, the Council, in accordance with established practice, sought from the Civil Service Commission an interpretation of the relevant statutes and implementing Commission regulations as they pertained to the arbitrator's award in this case. Based on the interpretation rendered by the Commission in response to the Council's request, the Council held that the arbitrator's award violated appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

National Aeronautics and Space Administration,
Marshall Space Flight Center, Huntsville,
Alabama

and

FLRC No. 76A-130

Marshall Engineers and Scientists Association
Local 27, International Federation of
Professional and Technical Engineers, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award wherein he found that the agency's failure to promote the grievant as a repromotion eligible to a particular position was, in effect, contrary to the parties' collective bargaining agreement and directed that the grievant be offered promotion to the position.

According to the arbitrator's award, before announcing the position at issue under merit promotion procedures, the Manpower Office of the Marshall Space Flight Center (the activity) sent a letter to the selecting official identifying repromotion eligibles, including the grievant. The selecting official subsequently informed the Manpower Office that none of the repromotion eligibles had been selected for the position. Thereafter, the position was formally announced to be filled by competitive procedures. Applications were received and each applicant was rated by a panel. The grievant, who had applied for the vacancy after it was announced, was rated as one of the three best qualified, and was specifically designated on the promotion certificate as a repromotion eligible. The selecting official, after personally interviewing the candidates, selected another employee for the position. The reasons for not selecting the grievant were noted on the promotion certificate and were reviewed by the Manpower Office, which deemed the reasons to be adequate.

The union filed a grievance resulting in the instant arbitration, contending that special consideration had not been given to the grievant as a repromotion eligible in accordance with the requirements of the negotiated agreement.

The Arbitrator's Award

The issues before the arbitrator as stipulated by the parties were:

Did [the grievant], a repromotion eligible, receive special consideration for repromotion in accordance with Articles 28 and 23.02 of the

bargaining contract^{1/} prior to issuance of [the job opportunity announcement] and prior to filling [the position] by competitive promotion procedures?

After the job was opened to competitive promotion procedures and [the grievant] was certified as one of the best-qualified candidates, was his nonselection in accordance with the bargaining contract?

If the answer to either of the above is no, what shall the remedy be? [Footnote added.]

The arbitrator first found that the selecting official had met the requirement that repromotion eligibles be given special consideration prior to announcement of the vacancy under competitive promotion procedures. However, he then determined that the failure to promote the grievant to the vacancy

^{1/} The arbitrator sets forth the relevant provisions of the cited Articles of the parties' negotiated agreement as follows:

ARTICLE 28 (REDUCTION IN FORCE)

.

Section 28.06. . . . An employee demoted in NASA without personal cause is entitled to special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means. Lists of employees demoted during reduction in force will be established by the EMPLOYER to avoid overlooking them when promotion opportunities occur.

Section 28.07. Employees eligible for repromotion will be given special consideration for promotion vacancies prior to announcement of such vacancies under the Merit Promotion Plan. A file of repromotion consideration memoranda will be maintained in the Labor Relations Office for UNION reference. In the event the vacancy is subsequently announced, repromotion eligibles will be notified by a copy of such announcement.

ARTICLE 23 (PROMOTIONS AND ASSIGNMENTS)

.

Section 23.02. The EMPLOYER agrees to implement the promotion plan in accordance with all applicable existing or future rules or regulations and directives issued by the Civil Service Commission and the Agency.

as a repromotion eligible after he was certified as one of the best qualified under competitive promotion procedures was arbitrary and capricious under the facts in this case since the selecting official's reasons for the nonselection were "not . . . persuasive." Accordingly, the arbitrator directed that the grievant be offered promotion to the position, effective as of the date upon which the selected employee's promotion became effective, and that the grievant be given ten days from the date of the award to accept the promotion. He further directed that, if the grievant accept the promotion, he be retroactively compensated at the rate of pay for the higher graded position.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award violates the Back Pay Act of 1966 and Civil Service Commission regulations.^{2/} The parties filed briefs.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review with respect to its exception which alleged that the arbitrator's award violates the Back Pay Act of 1966 (5 U.S.C. § 5596) and Civil Service Commission regulations. Since the Civil Service Commission is authorized to prescribe regulations to implement the Back Pay Act and to implement statutory provisions relating to selection and promotion in the Federal service, the Council, in accordance with established practice, sought from the Civil Service Commission an interpretation of the relevant statutes and implementing Commission regulations as they pertain to the arbitrator's award in this case. The Commission replied in pertinent part:

The grievant in this case, a repromotion eligible, alleges that he was not given special consideration in the filling of a supervisory electronics engineer position as required by the negotiated agreement. At issue is the extent of the agency's obligation to promote the

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

grievant after his certification to the selecting official as one of the best qualified candidates for the position. The union contends that the agency's failure to select the grievant at that point was a violation of the negotiated agreement and NASA's merit promotion plan because once a repromotion eligible has been certified as one of the best qualified candidates for a position, he must be selected unless there are persuasive reasons for not doing so. The agency, on the other hand, claims that the selecting official's obligation vis-a-vis the grievant was met by giving him special consideration prior to filling the job under competitive procedures, and after referral under competitive procedures, by documenting the reasons for his nonselection, and obtaining the concurrence of the personnel officer. The arbitrator, finding for the grievant, held that the selecting official's reasons for not selecting the grievant were "non-persuasive" and ordered the agency to offer the grievant promotion to the position at issue retroactive to the date it had been filled. He further ordered the agency to pay the grievant an appropriate amount of back pay if he accepted the promotion.

The arbitrator cited two provisions of Federal Personnel Manual Chapter 335 on page 2 of his award. The first provision, Requirement 1 of Subchapter 2, requires agencies to give non-competitive consideration to special consideration candidates (like the grievant) prior to filling vacancies under competitive procedures.

The second provision, section 4-3(c)(2) of chapter 335, describes what is meant by "special consideration." That section reads as follows:

- (2) Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade . . . for which he has demonstrated that he is well qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means If a selecting official considers an employee entitled to special consideration for repromotion under this paragraph but decides not to select him for promotion and then the employee is certified to the official as one of the best qualified under competitive promotion procedures for the same position, the official must state his reasons for the record if he does not then select the employee.

It is clear that the above cited provisions of the FPM strongly encourage the repromotion of "special consideration" candidates. They

do not, however, mandate that such repromotion occur.^{*/} Therefore, this chapter may not be the basis for an arbitrator's award that a particular person be promoted.

The arbitrator also relied upon an interpretation of the negotiated agreement and NASA's merit promotion plan in fashioning his award. Specifically, he determined that these documents require the selection of "special consideration" candidates who are certified to selecting officials as best qualified unless there are persuasive reasons (subject to evaluation under the grievance procedure) for not selecting them. The arbitrator evaluated the selecting official's reasons for not selecting the grievant, found them non-persuasive, and ordered the agency to offer the position at issue to the grievant. Pertinent here is FPM Chapter 335, Subchapter 2 (Requirement 6) which sets forth the management right to select or non-select. This right (derived from Rule 7.1 of the Civil Service Rules) means that management must retain the freedom to decide, without interference, which candidate it will select from among those referred for a given position under established procedures, or in fact, to make no selection at all. Whether or not the arbitrator's interpretation of the agreement and the merit promotion plan was correct, the parties could not have appropriately agreed to subject management's reasons for selecting one candidate over another to review by a third party because it would contravene management's right to make final selections for promotions. Hence, the arbitrator's interpretation of the parties' intentions is moot since the embodiment of such an intention in the negotiated agreement violates civil service rules and instructions.

The arbitrator awarded the grievant retroactive promotion with back pay. The only circumstance under which an agency may be required to promote a particular person and to accord that person back pay is when a finding has been made by an arbitrator or other competent authority that such person would have been promoted at a particular point in time but for an administrative error, a violation of a Commission or agency regulation or of a provision of a negotiated agreement. This principle has been set forth in a series of Comptroller General decisions dealing with retroactive promotion, all numbered B-180010, and issued on and subsequent to October 31, 1974. While

^{*/} In Kirk Army Hospital, FLRC No. 72A-18, the Council had occasion to cite FPM subchapter 4-3(c)(2), and commented that "With respect to the repromotion rights of such employees, the FPM plainly states that, even though they are entitled to 'special consideration', they are 'not guaranteed promotion.' In other words, a selection decision remains to be made by the selecting official." See also Commission opinions in Warren Air Force Base, FLRC No. 75A-127, and Tooele Army Depot, FLRC No. 75A-104.

the arbitrator in this case found that the grievant would have been selected but for the violation of the agency merit promotion plan and negotiated agreement, his finding was based on an interpretation of these documents that is violative of Civil Service Commission requirements and hence, unenforceable.

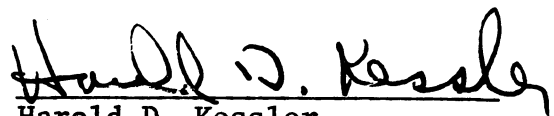
Therefore, based on the considerations discussed above, we find that implementation of the arbitrator's award in this case would violate Commission instructions and controlling Comptroller General decisions.

Based upon the foregoing interpretation by the Civil Service Commission, it is clear that the arbitrator's award in this case violates appropriate regulation and, therefore, must be set aside.

Conclusion

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

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 23, 1977

Labor-Management Services Administration, Department of Labor (Decision and Order of Vice Chairman of U.S. Civil Service Commission No. 34). The Vice Chairman dismissed the representation petition filed by the National Union of Compliance Officers, Independent (NUCO), which sought to sever all field office clerical employees of the agency's Labor-Management Services Administration from an existing bargaining unit represented by the American Federation of Government Employees, National Council of Field Labor Lodges and Local 12, AFL-CIO. NUCO appealed to the Council, contending that the Vice Chairman's decision was arbitrary and capricious and presented a major policy issue.

Council action* (August 23, 1977). The Council held that NUCO's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Vice Chairman did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of NUCO's appeal.

*/ The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1977

Mr. Joel D. Reed, President
National Union of Compliance Officers
2921 Teakwood Drive
Garland, Texas 75042

Re: Labor-Management Services Administration,
Department of Labor (Decision and Order
of Vice Chairman of U.S. Civil Service
Commission No. 34), FLRC No. 77A-43

Dear Mr. Reed:

The Council has carefully considered your petition for review of the decision of the Vice Chairman of the United States Civil Service Commission, and the joint opposition thereto filed by the American Federation of Government Employees, National Council of Field Labor Lodges and Local 12, AFL-CIO (AFGE), in the above-entitled case.

In this case, the National Union of Compliance Officers, Independent (NUCO) filed a representation petition (RO) seeking to sever all field office clerical employees of the Labor-Management Services Administration (LMSA), Department of Labor (the agency), from an existing bargaining unit represented by AFGE. The existing AFGE unit consists of all professional and nonprofessional field employees of the agency except nonclerical compliance personnel in LMSA field offices who are separately represented by NUCO.

The Vice Chairman adopted the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ) and ordered that NUCO's severance petition be dismissed. The ALJ concluded, in pertinent part, that under the Assistant Secretary's Naval Construction Battalion Center^{1/} criteria and "[c]onsidering the entire record in this matter [there were] no unusual circumstances that would justify establishment of a new bargaining unit as proposed in the request for severance." In the latter regard, it was found that a community of interest exists within AFGE's unit which is "stronger than, or at least as substantial as, would be found in the proposed unit" and that "the evidence offered to show inadequate representation is insufficient to warrant displacement of the incumbent union."

^{1/} The Assistant Secretary held in United States Naval Construction Battalion Center, A/SLMR No. 8 (Jan. 15, 1971), that absent "unusual circumstances," where the evidence shows that an established, effective, and fair collective bargaining relationship has existed, severance from an established more comprehensive unit will not be permitted. The Council specifically approved the Assistant Secretary's severance criteria in Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, 1 FLRC 375 [FLRC No. 72A-24 (May 22, 1973), Report No. 39].

In reaching this conclusion, the ALJ rejected a contention advanced by AFGE that NUCO's petition was barred by section 3(d) of the Order.^{2/} AFGE in effect had contended that since NUCO represents employees engaged in administering labor-management relations laws and the Order, NUCO could not represent the field office clerical employees because they comprise "other groups of employees" who do not administer such laws or the Order. The ALJ concluded, after reviewing the "legislative history" of section 3(d), that inasmuch as the type of conflict sought to be proscribed by section 3(d) was not presented in the circumstances of this case,^{3/} it was "not necessary to decide whether the LMSA clerical personnel in field offices are 'engaged in administering a labor-management relations law or this Order.'"

In your petition for review on behalf of NUCO, you contend that the Vice Chairman's decision in finding that NUCO's petition was not barred by section 3(d) and thereby, in effect, finding that NUCO might represent all agency employees, is arbitrary and capricious in that it fails to make a determination concerning the section 3(d) status of the LMSA field office clerical employees. You also contend that the Vice Chairman's decision presents a major policy issue with respect to whether the "LMSA clerical employees are 'engaged in administering' the Labor-Management Reporting and Disclosure Act and Executive Order 11491, as amended, and should be excluded (as are LMSA Compliance Officers) from membership in and representation by any affiliated labor union."

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Vice Chairman does not appear arbitrary and capricious or present any major policy issues.

2/ Section 3(d) of the Order states:

Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

3/ In this regard, the ALJ noted that the Federal labor-management relations program affecting the agency is administered by the Vice Chairman of the Civil Service Commission pursuant to section 6(e) of the Order which provides:

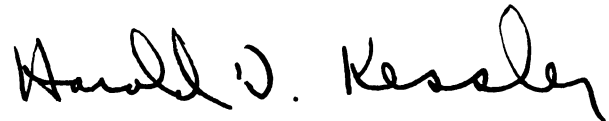
If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

With respect to your allegation that the Vice Chairman's decision is arbitrary and capricious, it does not appear that the Vice Chairman acted without reasonable justification in reaching the decision which was reached in the facts and circumstances of this case. Nor, in the Council's opinion, is a major policy issue presented by the Vice Chairman's decision adopting the findings, conclusions, and recommendations of the ALJ. In this regard, we note particularly the ALJ's finding that it was unnecessary in the circumstances of this case to decide the section 3(d) status of the LMSA field office clerical employees, in view of his rejection of AFGE's contention that NUCO's petition was barred by the provisions of section 3(d) of the Order and his subsequent application of the Assistant Secretary's Naval Construction Battalion Center criteria (which were specifically approved by the Council, supra n. 1) in dismissing NUCO's severance petition. Accordingly, without passing upon the specific reasoning of the ALJ as adopted by the Vice Chairman, no basis for Council review is presented.

Since the Vice Chairman's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied.

By the Council.^{4/}

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: Vice Chairman
CSC

B. S. Widom
Labor

J. R. Rosa
AFGE

^{4/} The Secretary of Labor did not participate in this decision.

National Federation of Federal Employees Local 273 and U.S. Army Field Artillery Center and Fort Sill (Williams, Arbitrator). The arbitrator concluded that the activity had properly followed the pertinent provisions of its regulations, which were incorporated by reference in the parties' agreement, in filling the position involved and therefore denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review based on an exception which alleged that the arbitrator's award did not draw its essence from the parties' agreement.

Council action (August 23, 1977). The Council held that the union's exception was not supported by the facts and circumstances described in the petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1977

Mr. John Helm, Staff Attorney
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20030

Re: National Federation of Federal Employees
Local 273 and U.S. Army Field Artillery
Center and Fort Sill (Williams, Arbitrator),
FLRC No. 77A-44

Dear Mr. Helm:

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

According to the arbitrator, the facts in this case were stipulated by the parties and indicate that this dispute arose as a result of the activity's failure to select a candidate for the position of Heavy Mobile Equipment Repairer Leader from a reconstituted referral roster of four best-qualified candidates. When the position was first advertised, the area of consideration was restricted to the Weapons Department of the U.S. Army Field Artillery School. Five candidates were listed as best qualified and referred to the selecting official. The tentative selection from that list of five candidates was grieved (in a previous grievance) by two nonselected candidates on the basis that the selected candidate was not qualified. After it was determined that the tentatively selected candidate was, in fact, not qualified, the Chief of Recruitment and Placement agreed to remove that candidate's name from consideration and to reconstitute the original roster to include the remaining four candidates. The activity subsequently concluded, however, that the reconstituted list contained only two candidates who were qualified and available for the position since one candidate had requested withdrawal from consideration during the initial interview and another had applied for disability retirement. The activity, therefore, decided to extend the area of consideration and ultimately selected a reduction-in-force priority placement candidate who was not among the four best-qualified candidates on the reconstituted referral roster for the position. The union filed a grievance alleging that the activity's failure to select a candidate from the reconstituted list of four eligibles constituted a failure "to give timely and appropriate consideration to employees for higher level position." The matter was ultimately submitted to arbitration.

Before the arbitrator, the union contended that the actions taken on the part of management were untimely and not in accordance with USAFACFS Regulation 690-8.^{1/} The activity contended that it had the prerogative of selecting persons from a roster of candidates and that no absolute duty was imposed upon it to select one of the candidates even though a roster might have more than two names listed on it. Further, it contended that in the instant case "the facts showed that only two candidates were on the roster, in which case . . . paragraph 18(c) of USAFACFS Regulation 690-8 specifically gave it the right to not select a candidate from the disputed roster."

The arbitrator, in an addendum to his decision and award,^{2/} found that, since the reconstituted list contained the names of only two "viable" candidates, the activity was not required to make a selection from it. He held, principally, that under USAFACFS Regulation 690-8 management retains the authority, but is not obligated, to make a selection from a referral roster whenever fewer than three candidates are listed. Therefore, the arbitrator concluded that the activity had properly followed the procedures in the filling of the Heavy Mobile Equipment Repairer Leader position and denied the grievance.

^{1/} The pertinent sections of USAFACFS Regulation 690-8 (which is incorporated by reference in the parties' negotiated agreement), as set forth by the arbitrator, are as follows:

Paragraph 15. . . .

[I]f the original area of consideration yields fewer than three highly qualified candidates, selection may be made from these candidates providing the candidate(s) are acceptable to the selecting official.

Paragraph 18. REFERRAL AND SELECTION

.

c. Only those candidates referred by the Civilian Personnel Division will be considered. If three or more candidates are referred, the selecting official will make a selection from the referral list unless he can furnish reasons relating to the candidates qualifications which, if known at the time of rating, would have precluded the rating of best qualified.

^{2/} In his original decision, the arbitrator had dismissed the grievance as being nonarbitrable because, among other things, it involved the interpretation of USAFACFS Regulation 690-8. Under the terms of the agreement Department of the Army regulations are excluded from coverage of the negotiated grievance procedure. Upon joint request of the parties that he reconsider his opinion, since the regulation was not a Department of the Army regulation but rather a locally promulgated regulation that he was not precluded from interpreting under the grievance procedure, the arbitrator issued an addendum to his decision.

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

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

In its exception the union contends that the arbitrator's award does not draw its essence from the collective bargaining agreement. In support of this exception the union asserts that the action by the Chief of Recruitment and Placement, removing the originally selected employee from the referral list and returning a reconstituted list containing the names of the four originally nonselected employees to the selecting official, was the result of an offer to the union to resolve the grievance about that selection. According to the union, the offer of resolution provided that the reconstituted referral and selection roster would be referred to the selecting official for selection, thereby binding the activity to make a selection from the reconstituted list and precluding the discretion normally vested in the selecting official. Therefore, the union asserts that the arbitrator erroneously applied the exception regarding the minimum number of individuals which must appear on a selection roster in order that selection be mandatory.

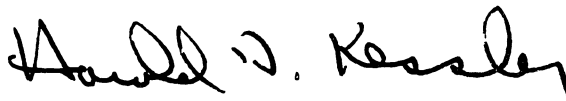
The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, the Council is of the opinion that the union's exception is not supported by the facts and circumstances described in the petition. In this regard, the union has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon his interpretation and application of the parties' collective bargaining agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or could not in any rational way be derived from the agreement; or evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123. It is noted, in this regard, that the union made the same argument, that the activity had to make a selection from the reconstituted list, before the arbitrator on the merits of the grievance and the arbitrator rejected it. Furthermore, the parties had incorporated USAFACFS Regulation 690-8

into Article XXV of their agreement^{3/}, and specifically stipulated that it was to be considered as a part of the negotiated agreement, and asked the arbitrator to interpret it. Thus, the union appears to be disagreeing with the arbitrator's interpretation and application of what was, in effect, part of the collective bargaining agreement and his reasoning in connection therewith. The Council has consistently held that the interpretation of contract provisions and, hence, resolution of the grievance, is a matter to be left to the arbitrator's judgment. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Therefore, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,



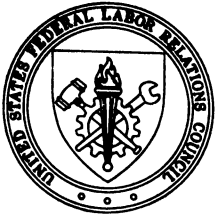
Harold D. Kessler
Acting Executive Director

cc: W. J. Schrader
Army

^{3/} In 1975, section 13(a) of the Order was amended to provide that the coverage of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. In the January 1975 report and recommendations on the amendment to the Order, the Council stated that this change would permit the parties "to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures." Labor-Management Relations in the Federal Service (1975), at 43.

Department of Treasury, Internal Revenue Service, Chicago District, Illinois, Assistant Secretary Case No. 50-13148(AR). The Assistant Secretary, upon an application for decision on grievability or arbitrability filed by the National Treasury Employees Union, found, in agreement with the Acting Regional Administrator (ARA), that the matter involved was arbitrable. Accordingly, the Assistant Secretary denied the activity's request for review seeking reversal of the ARA's report and findings on arbitrability. The agency appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (August 23, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 23, 1977

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: Department of Treasury, Internal
Revenue Service, Chicago District,
Illinois, Assistant Secretary Case
No. 50-13148(AR), FLRC No. 77A-55

Dear Mr. Simms:

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

In this case, as found by the Assistant Secretary, the National Treasury Employees Union (NTEU) filed a grievance with the Department of the Treasury, Internal Revenue Service, Chicago District, Illinois (activity) based upon the alleged improper working conditions of certain unit employees. The grievance was processed through all of the steps as indicated in the negotiated agreement, and was denied by the activity at the final step. NTEU then made a request for arbitration, which request was denied by the activity on the basis that NTEU had not provided the information necessary in order to properly "prosecute" the grievance under Article 35, Section 11 of the negotiated agreement.^{1/}

NTEU thereafter filed an Application for Decision on Grievability or Arbitrability with the Assistant Secretary who found, in agreement with the Acting Regional Administrator (ARA), that the matter was arbitrable. In so concluding, the Assistant Secretary stated:

In reaching his decision, the [ARA] found that the matter involved herein is arbitrable as the Multi-District Agreement of the parties does not define the meaning of "prosecuting" a grievance. After

^{1/} According to the Assistant Secretary, Article 35, Section 11 of the Multi-District Agreement states:

Failure on the part of the aggrieved or the Union to prosecute the grievance at any step of the procedure will have the effect of nullifying the grievance. Failure on the part of the Employer to meet any of the requirements of the procedure will permit the aggrieved or the Union to move to the next step.

consulting the dictionary with respect to the meaning of "prosecute," the [ARA] concluded that to meet its obligation to "prosecute" a grievance the Applicant need only to have followed the grievance procedure in a timely manner from one step to the next, which, in fact, it did.

The original application herein was timely filed While the Activity alleged procedural defects, particularly in the service of such application because it was not served until the amended application was filed, the evidence establishes that it was thereafter served with copies of the original and the amended application. Under these circumstances, I find that the Activity was not prejudiced by the timing of the service herein, which I find to be sufficient. I find also, for the reasons set forth by the [ARA], that the matter herein is subject to the negotiated grievance and arbitration procedures in the parties' negotiated agreement.

Accordingly, the Assistant Secretary denied review of the activity's request for review seeking reversal of the ARA's Report and Findings on Arbitrability.

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary did not properly apply the criteria set forth by the Council for resolving arbitrability disputes, and the findings of fact in the instant case are not supported by substantial evidence. You further allege that major policy issues are presented in that: (1) the Assistant Secretary's decision with regard to the procedural issue "is inconsistent with the clear language of his own regulations as well as his prior decisions interpreting these regulations"; and (2) the Assistant Secretary's decision on review of the ARA's arbitrability finding does not contain the required determination as to whether the ARA's finding is supported by substantial evidence.

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

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. More particularly, with regard to your assertion that the Assistant Secretary improperly applied the criteria set forth by the Council for resolving arbitrability disputes, your appeal fails to establish that the Assistant Secretary's decision is inconsistent with applicable Council precedent. Moreover, your further contention that the factual findings herein are unsupported by substantial evidence constitutes nothing more than disagreement with the Assistant Secretary's determination that the matter in dispute

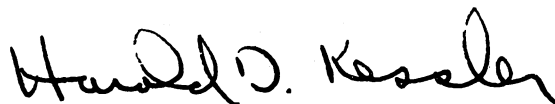
"is subject to the negotiated grievance and arbitration procedures in the parties' negotiated agreement," and therefore presents no basis for Council review.

Nor does the Assistant Secretary's decision that service upon the activity of the instant application as amended was sufficient under his regulations raise a major policy issue warranting Council review, as alleged, in the circumstances of this case. In this regard, your allegations as set forth above relate to the propriety of the Assistant Secretary's interpretation and application of his own regulations. As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.^{2/} In the instant case, the Assistant Secretary's decision as to the sufficiency of service was based upon the interpretation and application of his regulations, and your appeal fails to show that the Assistant Secretary's decision in this regard was inconsistent with the purposes of the Order in the circumstances of this case. Finally, no major policy issue is presented, as alleged, concerning the Assistant Secretary's failure to determine that the ARA's arbitrability finding was supported by substantial evidence, again noting that such allegation constitutes mere disagreement with the Assistant Secretary's finding that the matter in dispute was subject to the parties' negotiated grievance and arbitration procedures.

Since the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

W. Persina
NTEU

2/ NASA, John F. Kennedy Space Center, Florida, Assistant Secretary Case No. 42-3378(GA), FLRC No. 76A-135 (Mar. 22, 1977), Report No. 122, and cases cited therein.

National Treasury Employees Union, Washington, D.C., Assistant Secretary Case No. 50-13183(CO). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that further proceedings were unwarranted on the 19(b)(4) complaint filed by the activity (which alleged, in substance, that the actions of four activity employees in declining to use their personal vehicles constituted engaging in a prohibited work slowdown). Accordingly, the Assistant Secretary denied the activity's request for review seeking reversal of the RA's dismissal of the complaint. The agency appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (August 24, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear arbitrary and capricious and did not present any major policy issues warranting Council review. Accordingly, the Council denied the agency's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 24, 1977

Mr. Morris A. Simms
Director of Personnel
Department of the Treasury
Washington, D.C. 20220

Re: National Treasury Employees Union,
Washington, D.C., Assistant Secretary
Case No. 50-13183(CO), FLRC No. 77A-41

Dear Mr. Simms:

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

In this case, the Department of the Treasury, U.S. Customs Service, Chicago Region, Chicago, Illinois (the activity) filed a complaint against the National Treasury Employees Union (NTEU), NTEU Chapter 162 and NTEU Joint Council of Customs Chapters, Westmont, Illinois. The complaint alleged violations of section 19(b)(4) of the Order, alleging in substance that the actions of four activity employees in declining to use their personal vehicles constituted engaging in a prohibited work slowdown.

The Regional Administrator (RA) concluded, on the basis of all facts and circumstances in the case,^{1/} including all information supplied by the parties, that a reasonable basis for the complaint had not been established. The Assistant Secretary, in agreement with the RA, found that further proceedings were unwarranted inasmuch as a reasonable cause to believe that a violation occurred had not been established. Accordingly, the Assistant Secretary denied the activity's request for review seeking reversal of the RA's dismissal of the complaint.

^{1/} The RA reviewed the background concerning the use of privately owned vehicles by employees of the activity in the performance of their official duties and the impact of the refusal to use them in the circumstances presented herein. He reviewed the evidence presented concerning the availability of alternate means of transportation and noted, in particular, the absence of a showing that the employees had failed to carry out their work assignments given by their supervisors. He concluded that it was within the personal discretion of the employees involved to use or not to use their privately owned vehicles and that their decisions to refuse to use them here did not result in a slowdown.

In your petition for review on behalf of the agency, you assert that the decision of the Assistant Secretary is arbitrary and capricious in that: (1) he summarily dismissed the instant case which involves a novel and substantial question as to whether the facts alleged constituted a "slow-down" prohibited by section 19(b)(4); (2) he adopted the reasoning of the RA which was facially contrary to the regulations of the Assistant Secretary; (3) he dismissed the complaint without a hearing, permitting NTEU to continue engaging in conduct allegedly violative of section 19(b)(4); and (4) he ignored substantial issues of law and fact. You further contend that the decision of the Assistant Secretary presents major policy issues as to "[w]hether management and labor organizations operating under Executive Order 11491, as amended, are entitled to positive guidance by a decision on the merits of a formal allegation that certain conduct by [NTEU] was violative of section 19(b)(4)"; and "[w]hether, for section 19(b)(4) purposes, a long standing practice is a sufficient basis to support the obligation of employees to continue, in absence of proper notice usage of privately owned vehicles for official duty assignments, as opposed to a specific statutory, regulatory or similar formal requirement."

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

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that further proceedings were unwarranted in the circumstances of this case. Rather, your contentions appear to be essentially a disagreement with his determination pursuant to his regulations that the activity did not present sufficient evidence to establish "a reasonable cause to believe that a violation occurred." As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and your appeal fails to establish that the Assistant Secretary's application of his regulations in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes of the Order.

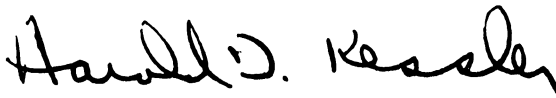
Similarly, no major policy issues are presented warranting Council review. Thus, as to both alleged major policy issues, rather than constituting policy questions in the circumstances of this case, they appear to be essentially a disagreement with the Assistant Secretary's conclusion that a reasonable cause to believe that a violation occurred had not been established, i.e., that the alleged facts did not warrant the issuance of a notice of hearing. Accordingly, without adopting the precise reasoning of the Assistant Secretary, the Council finds that no major policy issue is presented by his decision.^{2/}

^{2/} In so concluding, we make no finding as to whether or in what circumstances a concerted refusal (as opposed to a refusal by individual employees based on the exercise of their personal discretion) to use privately owned

Since the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

R. M. Tobias
NTEU

(Continued)

vehicles in the performance of their duties might constitute a slowdown. Rather, we decide only that his determination that "a reasonable cause to believe that a violation occurred [had] not been established," based upon the particular facts and circumstances of this case, raises no major policy issue.

The National Labor Relations Board Union (NLRBU) and the National Labor Relations Board (NLRB) (Sinicropi, Arbitrator). The arbitrator upheld the agency's determination that the grievant was not qualified for a particular position and denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review based on six exceptions, the first five of which alleged, respectively, that the arbitrator's award: violated the Order; violated appropriate regulation; was based on a nonfact and contained erroneous findings of fact; was "arbitrary, capricious and unreasonable"; and was contrary to "well-established applicable legal principles." In its sixth exception, the union alleged that the arbitrator exceeded his authority.

Council action (August 25, 1977). The Council held that the union's exceptions provided no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 25, 1977

Mr. David A. Nixon
c/o National Labor Relations Board
Seventeenth Regional Office
616 Two Gateway Center
Fourth at State
Kansas City, Kansas 66101

Re: The National Labor Relations Board Union (NLRBU) and
The National Labor Relations Board (NLRB) (Sinicropi,
Arbitrator), FLRC No. 77A-23

Dear Mr. Nixon:

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

According to the award, this case arose when the grievant, a nonsupervisory GS-14 attorney, filed a grievance over a 1975 agency appraisal which rated him unqualified for a supervisory GS-14 attorney position.^{1/} The matter was ultimately submitted to arbitration. Although the parties did not enter into a submission agreement, the arbitrator's unchallenged statement of the issue before him was whether "the appraisal itself and the procedure utilized to achieve the appraisal are 'fair, reasonable and objective;' or in the alternative, if either the appraisal or the procedure employed was 'capricious, arbitrary, discriminatory, disparate and unreasonable.'" The arbitrator ultimately concluded that certain portions of the disputed appraisal were unsupported by the evidence and ordered them removed from the grievant's file. As to the rest of the appraisal, however, the arbitrator found that it was "sufficient to justify the conclusion that the evaluation of the grievant was fair and reasonable; and the decision reached by Management that the Grievant is not well qualified for a supervisor position is not to be disturbed." The arbitrator thus upheld the agency's determination and denied the grievance.

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

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to

^{1/} The arbitrator refers to Article XV (Career Development) of the parties' negotiated agreement but does not set forth the specific provisions under which the grievance was brought.

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

In its first exception the union contends that the arbitrator's award violates the Order. In support, the union alleges that the appraisal at issue contains matter violative of the Order and hence that "Management here has in the Appraisal violated fundamental rights assured by the Order." Thus, the union's first exception states, as a ground for review, that the agency violated the Order. This does not assert a ground upon which the Council will grant a petition for review. Puget Sound Naval Shipyard and Bremerton Metal Trades Council AFL-CIO (Smith, Arbitrator), FLRC No. 76A-146 (June 7, 1977), Report No. 128; American Federation of Government Employees, Local 2498 and National Aeronautics and Space Administration, John F. Kennedy Space Center (Bode, Arbitrator), FLRC No. 76A-70 (May, 18, 1977), Report No. 126; and Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator), FLRC No. 75A-95 (Jan. 22, 1976), Report No. 96. Likewise, if the union's exception were read as contending that the award violates the Order because the arbitrator failed to find that the agency violated sections 19(a)(1) and (4) of the Order in rendering the disputed appraisal, the Council has previously held that a contention that an arbitrator has failed to decide, during the course of a grievance arbitration proceeding, whether an unfair labor practice has been committed under section 19 of the Order does not present a ground upon which the Council will accept a petition for review of an arbitration award. Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator), FLRC No. 75A-84 (Nov. 28, 1975), Report No. 92. Moreover, if the union's exception is read as contending that the arbitrator failed to find that the agency's conduct violated the parties' agreement,^{2/} it would appear that, in effect, the union is contending that the arbitrator reached an incorrect result in his interpretation of that agreement. In this regard, the Council has consistently held that the interpretation of provisions in a negotiated agreement is a matter to be left to the arbitrator's judgment; and for this reason the contention that the arbitrator misinterpreted the agreement does not state a ground upon which the Council will grant review of an arbitration award. E.g., American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Consequently, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

^{2/} It is noted that section 19(d) of the Order provides, in part:

Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section [Sec. 19. Unfair labor practices], but not under both procedures.

In its second exception, the union asserts that the arbitrator's award "violates and/or entails abuse of an appropriate regulation." In support of this assertion the union claims that the agency "flagrantly abused the Government's Regulations in utilizing [subchapter 5-2d(2) of chapter 335 of the Federal Personnel Manual^{3/}] as the basis for refusing to provide a copy of [another employee's] appraisal to the Arbitrator . . . for his in camera examination."^{4/}

The Council will grant a petition for review of an arbitrator's award on the ground that the award violates appropriate regulation, including the Federal Personnel Manual. In this instance, however, the union's exception clearly asserts that it was the agency which, by withholding from the arbitrator the requested appraisal, violated the regulation in question, rather than that the arbitrator's award violates appropriate regulation. As the Council has held, such an exception does not present a ground for review of an arbitrator's award. Puget Sound Naval Shipyard and Bremerton Metal Trades Council, AFL-CIO (Smith, Arbitrator), FLRC No. 76A-146 (June 7, 1977), Report No. 128; American Federation of Government Employees, Local 2498 and National Aeronautics and Space Administration, John F. Kennedy Space Center (Bode, Arbitrator), FLRC No. 76A-70 (May 18, 1977), Report No. 126. Accordingly, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

As its third exception, the union contends that the arbitrator's award is based upon nonfact. In support of this exception the union points to the arbitrator's apparently mistaken statement in his opinion that the coworker's appraisal referred to in the second exception, above, was introduced into

3/ Subchapter 5-2d(2) of FPM chapter 335 (Oct. 15, 1975) provides, in relevant part, as follows:

- (a) Employees may see the appraisals of other employees when dictated by their official responsibilities, for example, as members of a promotion board.
- (b) Otherwise, employees are not permitted to see an appraisal of another employee without the signed written consent of the subject of the record.

4/ The union similarly contends that the agency's action in withholding the appraisal from the arbitrator "entailed a clear abuse" of the Council's decision in National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, 2 FLRC 253 [FLRC No. 73A-53 (Oct. 31, 1974), Report No. 59]. As discussed above, a challenge, such as this, directed to the agency's actions rather than to the arbitrator's award does not state a ground for review under section 2411.32 of the Council's rules.

evidence when in fact it was not.^{5/} The union also refers to certain conclusions and findings of the arbitrator as "nonfacts" based upon the "proven facts of record."

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. . . ." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81. However, in this case the Council is of the opinion that the union's exception is not supported by the facts and circumstances described in the petition. Thus, while the arbitrator's statement that the coworker's appraisal was introduced into evidence appears to be "concededly erroneous,"^{6/} the union has not presented facts and circumstances to demonstrate that the central fact underlying the award is the arbitrator's erroneous statement concerning the coworker's appraisal and that such statement is in effect a gross mistake of fact but for which a different result would have been reached. As to the union's assertions that certain conclusions and findings of the arbitrator are "nonfacts," the essence of the union's assertions appears to be that the arbitrator's award contains erroneous findings of fact. But the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned by the Council. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Further, the Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Therefore, the union's third exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

The union's fourth exception alleges that the arbitrator's award is "arbitrary, capricious and unreasonable." In support of this exception the union in essence asserts that the arbitrator in several instances

^{5/} Although the agency refused to produce the coworker's appraisal at the hearing, the arbitrator, in subsequently drafting his opinion and award, appears to have assumed that the appraisal was received into evidence after all. The agency concedes that this assumption is incorrect. In passing, the Council notes that the record in this case exceeds 1,000 pages of transcript and includes, according to the arbitrator, 80 exhibits.

^{6/} See n. 5, supra.

reached conclusions unsupported by or contrary to record evidence. Thus, the union asserts that the arbitrator "utterly disregard[ed] and neglect[ed] to treat the undisputed, unchallenged testimony of [the grievant]," that his finding on one point "entails treating in isolation the barest fragment of the record in the face of more competent and probative evidence," that he failed "to perceive the probative value" of a certain affidavit, that other evidence credited by the arbitrator was "manifestly outweighed by . . . far more relevant testimony," and so forth.

In the Council's opinion, the union's contention that the arbitrator's award is arbitrary, capricious and unreasonable is, in substance, nothing more than mere disagreement with the weight given by the arbitrator to certain evidence and with the arbitrator's reasoning and conclusion in arriving at his award. The Council has previously held that arbitral determinations as to the credibility of witnesses and the weight to be given their testimony are not matters subject to Council review. Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), FLRC No. 75A-36 (Sept. 9, 1975), Report No. 82. And, as previously indicated, it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Accordingly, the union's fourth exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

The union's fifth exception alleges that the arbitrator's award is contrary to "well established, applicable legal principles." The union asserts, in this respect, that the arbitrator not only failed to accord any weight to an affidavit submitted in support of the grievant's position but also failed to credit statements in the same affidavit to the effect that the affiant (another coworker) had been wrongfully dissuaded by the agency from testifying in person at the hearing. Thus, the union asserts that the arbitrator "committed error in failing to draw an inference adverse to Management on what [the affiant] would have testified to had she been free of Management's coercive acts taken against her and in failing to credit in full the matters recited in [her] affidavit." The union moreover contends that the arbitrator erred in failing to find that "Management's coercion of [the affiant] improperly interfered with or was prejudicial to the Union's/Grievant's rights in the hearing." The union also asserts that the arbitrator erred in failing to "draw inferences adverse to management by reason of its failure to call [a certain other witness]." Again, the union's contentions in support of this exception that the arbitrator failed to draw certain inferences which the union felt warranted, go, not to the arbitrator's award, but instead constitute nothing more than mere disagreement with the arbitrator's reasoning and conclusion in arriving at the award. As previously indicated such contentions do not present a ground upon which the Council will grant a petition for review of an arbitration award. Federal Employees Metal Trades Council and Portsmouth Naval Shipyard, FLRC No. 76A-36, supra. As to the union's assertions that the

arbitrator should have found that the grievant was prejudiced by the agency's alleged coercion of his potential witness, and that the arbitrator should have given that witness' entire affidavit more weight than he did, such assertions go to the arbitrator's findings of fact and to the weight which he gave to the evidence. However, as previously indicated, such assertions provide no basis for Council review. Community Services Administration and American Federation of Government Employees, Local 2677, FLRC No. 75A-102, supra; Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor FLRC No. 75A-36, supra. Thus, the union's fifth exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

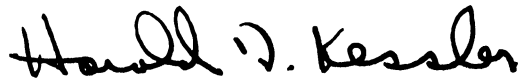
The union's sixth and final exception asserts that the arbitrator exceeded his authority. In support of this exception the union notes that, despite his finding that certain portions of the grievant's appraisal were unsupported and should be removed from the file, the arbitrator nonetheless upheld the agency's original determination that the grievant was unqualified for a GS-14 supervisory attorney position. The union thus concludes that "by declaring that the . . . abridged Appraisal requires that an adverse rating be given [the grievant]," the arbitrator "usurped a function that should . . . have devolved upon Management."

The Council will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. Thus, for example, the Council will grant a petition for review where it appears that the exception presents grounds that an arbitrator exceeded his authority by determining an issue not included in the question(s) submitted to arbitration, Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62; or by going beyond the scope of the submission agreement, Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101; or by violating a specific limitation or restriction on his authority which is contained in the negotiated agreement. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221 (Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123. In this case, however, the Council is of the opinion that the union's petition fails to describe facts and circumstances to support its exception that the arbitrator exceeded his authority. That is, the union does not present facts and circumstances to demonstrate that, in addressing the question before him of whether "the appraisal itself and the procedure utilized to achieve the appraisal are 'fair, reasonable and objective,'" the arbitrator exceeded his authority by answering that very question and finding that "the evaluation was fair and reasonable" Accordingly, the union's sixth exception provides no basis for acceptance of its petition for review under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: B. D. Rosenstein
NLRB

Social Security Administration and American Federation of Government Employees, Local 3231 (Lubow, Arbitrator). The arbitrator, in the first of a six-part award in the arbitration of a grievance related to a meeting between the grievant and management, determined that the Supreme Court's decision in NLRB v. Weingarten, 420 U.S. 251 (1975) and the Council's Statement on Major Policy Issue, FLRC No. 75P-2 (Dec. 2, 1976) are reconcilable with each other and are both applicable in the Federal sector. The agency filed an exception to that part of the arbitrator's award with the Council, (1) contending that the contested part violated the Order, and, (2) urging Council review thereof "to avoid any potential and future conflicts with stated Council policy."

Council action (August 25, 1977). As to (1), the Council held that the agency did not present sufficient facts and circumstances to support its exception. As to (2), which was, in effect, a request for an advisory opinion, the Council held that the issuance of such opinions is precluded by section 2411.53 of its rules of procedure. Accordingly, without passing upon or in any manner adopting any of the arbitrator's remarks or reasoning concerning the Order, FLRC No. 75P-2 or the application of the Court's Weingarten decision in the program, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 25, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
G-2608 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Social Security Administration and American
Federation of Government Employees, Local 3231
(Lubow, Arbitrator), FLRC No. 77A-35

Dear Mr. Becker:

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

According to the arbitrator, the activity, in order to reduce a backlog of cases, instituted a policy whereby one day a week was set aside as a "frozen day" for each organizational element. On the "frozen day" each employee was to do no new interviews but instead was to work on bringing his/her files up to date. The grievant in this matter, however, did not use her "frozen day" to take the required action on her backlog of cases because, according to the grievant, she misunderstood the purpose of the "frozen day." When the activity's assistant district manager became aware that the grievant had taken no action on her backlog cases, he called for a meeting with her.

Several days prior to the meeting, the grievant sent a memorandum to her district manager requesting union representation at the meeting. His response to the grievant noted that because the proposed discussion "is not adversary in nature nor is it a disciplinary action," he saw no need for representation at that time. The grievant attended the meeting without union representation. Following the meeting, a written summary of the meeting was prepared by management. The grievant received a copy of the summary and a copy of it was placed in her "local file."^{1/} Thereafter,

^{1/} According to the arbitrator, a "local file" is not used in upgrading and promotion matters.

the grievant initiated a grievance asking for the removal of the "unfair and inaccurate performance discussion . . ." and recognition by management in writing "that employees are entitled to representation. Reference: Article 30, Section 9; Article 2, Section 1 of the Agreement." The grievant stated that "had the true purpose of the meeting been known, the employee was entitled to and desired representation. . . . On this point, the employee is due an apology." The grievance was denied and the matter went to arbitration.

At the outset of his opinion, the arbitrator noted that the parties were seeking a resolution not only of the immediate dispute but also were seeking "guidelines for determining which occasions give rise to an employee's right to be represented in dealing with management, and which do not." In addition, he stated that the "question of advance notice to the employee of a meeting directed to be held by management is at issue."

In the "Discussion" section of his Opinion and Award the arbitrator reasoned that "the policy statement [FLRC No. 75P-2] of the [Federal] Labor Relations Council should be read in conjunction with Weingarten" and concluded that the "two are not mutually exclusive and can be reconciled with each other." The "Award" section of his Opinion and Award consisted of six parts. In the first part the arbitrator restated his view of the relationship between the Supreme Court's decision in NLRB v. Weingarten, 420 U.S. 251 (1975), and the Council's Statement On Major Policy Issue, FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116 as follows:

1. National Labor Relations Board v. J. Weingarten, Inc., (88 LRRM 2689, February, 1975), and Policy Statement Number 75P-2, December 2, 1976, of the [Federal] Labor Relations Council, are reconcilable to each other and both are applicable in the Federal sector.

In the next three parts of the "Award" section of his Opinion and Award he made the following resolution of the immediate dispute:

2. [The grievant's case] is distinguishable from Weingarten on the facts. The Charging Party in Weingarten faced an obvious likelihood of severe penalty. [The grievant] was promised no discipline.

3. The placing of the summary of the meeting in [grievant's] file was an act of discipline. It is ordered removed.

4. Management acted in good faith and no apology is necessary.

Finally, in the last two parts he provided the following answers as to when employees are generally entitled to representation and the nature of the advance notice required:

5. The current labor agreement contains no provision guaranteeing representation except in "audits."

6. In any case in which representation is appropriate and is requested, reasonable advance notice of the subject matter of the meeting shall be given to the employee and her representative so as to permit them sufficient time to prepare for the meeting.

The agency takes exception only to part 1 of the arbitrator's award and requests that the Council accept its petition for review of the award on the basis of the exception discussed below. The union filed an opposition.

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

In its exception to the award, the agency contends that part 1 of the award violates the Order in effect because it is contrary to the Council's Statement On Major Policy Issue in FLRC No. 75P-2.^{2/} The agency urges that part 1 of the arbitrator's award be reviewed "to avoid any potential and future conflicts with stated Council policy."

The Council will accept a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order. However, in this case, the Council is of the opinion that the agency has not presented sufficient

^{2/} The agency cites, without further explanation, the following portion of note 8 in 75P-2:

The decision of the U.S. Supreme Court in NLRB v. Weingarten . . . upholding the right of an employee to union representation at an investigative interview under section 7 of the Labor-Management Relations Act . . . clearly does not compel a contrary determination. Apart from other considerations, the literal provisions and stated purposes of the Order are dissimilar from those of the LMRA relied upon by the Court in its decision. Moreover, the Council, and not the NLRB, is the agency charged by the President under section 4(b) with the authority to "administer and interpret" the provisions of the Order, so the Council is without obligation to accord the special deference to the NLRB ruling in Weingarten which the Court stressed as a basis for its decision upon appeal in that case. FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116, at 5, n. 8.

facts and circumstances to support its exception that part 1 of the arbitrator's award violates the Order. In this regard, the agency, in essence, requests the Council to correct what it considers to be the arbitrator's erroneous view concerning a Council interpretation of the Order. Yet, the agency has not demonstrated how the arbitrator's asserted erroneous statement standing alone and without reference or application to a set of facts and circumstances violates the Order as, in effect, interpreted by the Council in 75P-2. The agency provides no facts and circumstances to show that part 1 of the award requires the agency to perform any affirmative act which is contrary to the Order, nor does it deny any rights guaranteed by the Order. See Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Kane, Arbitrator), FLRC No. 76A-31 (Oct. 22, 1976), Report No. 114. Furthermore, in seeking Council review of the award "to avoid any potential and future conflicts with stated Council policy," the agency is in effect seeking an advisory opinion. Under section 2411.53 of the Council's rules of procedure, the Council does not issue advisory opinions. See Veterans Administration Hospital Wilkes-Barre, Pennsylvania and American Federation of Government Employees, Local 1699 (Pollock, Arbitrator), FLRC No. 76A-129 (Apr. 7, 1977), Report No. 124; Community Services Administration and National Council of CSA Locals (American Federation of Government Employees) (Edgett, Arbitrator), FLRC No. 75A-48 (Aug. 15, 1975), Report No. 81. Therefore, the agency's exception provides no basis for acceptance of the agency's petition for review under section 2411.32 of the Council's rules.^{3/}

^{3/} In its petition for review, the agency also excepts to the award on the grounds that it violates applicable law and appropriate regulation. However, no specification is offered in support of these grounds; rather, it appears obvious from the petition in its entirety that the sole ground advanced for acceptance is that part 1 of the award violates the Order. Accordingly, because the agency has failed to describe facts and circumstances to support its exceptions that the award violates applicable law and appropriate regulation, these exceptions provide no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. The Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for the exceptions presented. E.g., Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.^{4/}

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: M. G. Blatch
AFGE

4/ The Council, in denying the petition for review of the award, does not pass upon and therefore in no manner adopts any of the arbitrator's remarks or reasoning concerning the Order, the Council's Statement on Major Policy Issue in FLRC No. 75P-2, or on the application of the Weingarten decision to the Federal labor-management relations program. In the Federal sector, as the Council concluded in 75P-2:

1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order.

National Union of Compliance Officers (Independent) and Labor-Management Services Administration, U.S. Department of Labor (Gamser, Arbitrator). The arbitrator concluded that in the circumstances of this case the agency had relinquished administrative control to a private contractor over the training course schedule involved. As his award, the arbitrator determined that certain employees who had been required by the activity to travel on Sunday to the training course were entitled to overtime pay or compensatory time off, and sustained the union's grievance. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award on the ground that the award violated applicable law and appropriate regulation.

Council action* (August 25, 1977). The Council held that the agency's petition lacked the necessary facts and circumstances to support its exception. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

*/ The Secretary of Labor did not participate in this decision.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 25, 1977

Mr. Barton S. Widom
Counsel for Labor Relations
U.S. Department of Labor
Washington, D.C. 20210

Re: National Union of Compliance Officers (Independent)
and Labor-Management Services Administration, U.S.
Department of Labor (Gamser, Arbitrator), FLRC
No. 77A-39

Dear Mr. Widom:

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

According to the arbitrator's award, the dispute in this matter arose when the Labor-Management Services Administration (the activity) directed its employees who were scheduled to attend a training course to travel on Sunday in order to be present for the first training session on Monday morning and refused to compensate certain of those employees for Sunday. The activity had contracted with a private contractor to provide training for its employees. The training commenced on Monday at 9:00 a.m. and concluded at different times on Friday afternoon. The activity issued a memorandum directing the employees to arrive at the training site on the Sunday evening prior to the start of the training sessions in order to be present at the beginning of the training at 9:00 a.m. the following morning. Employees in grades GS-9 and above who were exempt from the requirements of the Fair Labor Standards Act (FLSA) were required to travel on their own time, uncompensated, to the location of the training session. Nonexempt employees were compensated for such travel to the extent that such compensation was required by the terms of the Act. The union filed a grievance maintaining that the collective bargaining agreement was violated in that the employees who were exempt from the FLSA should have been compensated for the time spent in Sunday travel status or that travel should have been scheduled during normal working hours.^{1/} The matter was submitted to arbitration.

1/ In his award the arbitrator identified the relevant agreement provision in issue as Article XXX, Section 1 which he set forth as follows:

Consistent with PL90-206, the Activity shall, to the maximum extent practicable, schedule and arrange for all official travel for unit employees to occur within regular hours of work.

(Continued)

The parties submitted the following issue to the arbitrator:

Were employees required to travel on Sunday entitled to overtime pay or compensatory time off?

In the opinion accompanying his award the arbitrator referred to the provisions of 5 U.S.C. section 5542(b) (note 1, supra) and stated that "the question of whether the contracting agency could or could not control the travel time requirements of the event administratively is of crucial importance" to the resolution of the case. Referring then to the pertinent provisions of the Federal Personnel Manual for the definition of "could not be scheduled or controlled administratively"^{2/} and examples given therein regarding travel for training courses and, after examining the contract between the activity and the outside contractor, the arbitrator found that "contrary to an assumption of administrative control about which the FPM spoke, the actual terms of this contract [between the activity and the private contractor] indicate that the Government relinquished administrative control to the Contractor over the course schedule and hence [over] the time that these grievants had to travel in order to be in class on Monday morning when the Contractor determined that the course would begin."

(Continued)

The arbitrator stated that P.L. 90-206 refers to 5 U.S.C. section 5542, which reads in relevant part:

- a. For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided in this subchapter [5 U.S.C. Sections 5541-5549],
. . . .
- b. For the purposes of this subchapter (2) time spent in travel status away from the official duty station of an employee is not hours of employment unless (B) the travel . . . (iv) results from an event which could not be scheduled or controlled administratively.

2/ The arbitrator referred to FPM Supplement 990-2, Book 550, subchapter S-1, which provides in part as follows:

The phrase "could not be scheduled or controlled administratively" refers to the ability of an executive agency . . . to control the event which necessitates the employee's travel. The control is assumed to be the agency's whether the agency has sole control, or the control is achieved through a group of agencies acting in concert, such as a training program or conference . . . sponsored by one in the interest of all

In his conclusion, the arbitrator stated:

Having found that the Activity did not meet the burden of proving that the travel under consideration here could not have been accomplished "to the maximum extent practicable" within regular hours of work, and having further concluded that the course schedule and requisite travel time were not retained under the administrative control of the Activity, the undersigned must find that the employees required to travel on Sunday, under the circumstances indicated in this case, were entitled to overtime pay or compensatory time off by virtue of the obligations undertaken by the Activity in the collective bargaining agreement and the relevant statutory provisions of 5 U.S.C. 5542.

As his award the arbitrator sustained the grievance and stated that "the employees required to travel on Sunday were entitled to overtime pay or compensatory time off."

The agency requests that the Council accept its petition for review of the arbitrator's award on the ground that the award violates applicable law and appropriate regulation by its determination that certain employees required to travel to a training seminar on Sunday were entitled to overtime pay or compensatory time off.

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

In support of its exception that the arbitrator's award violates applicable law and appropriate regulation, the agency contends that the evidence establishes that the agency had administrative control over the scheduling of the course and that the arbitrator's reasoning, which found that the contract with the private training contractor resulted in a total relinquishment of Government control, is arbitrary and "flies in the face of Federal Personnel Manual and Comptroller General rulings which are precisely on the point."

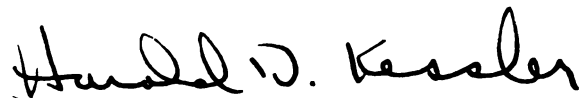
The Council will accept a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award violates applicable law or appropriate regulation. It is the Council's view, however, that in this case the agency's petition lacks the necessary facts and circumstances to support its exception. In this regard the Council notes that the arbitrator specifically examined the Federal Personnel Manual and applied its provisions and the illustrative cases therein, particularly the case concerning a training course conducted

by an institution for the benefit of the Government, to the matter before him. He concluded that, unlike the examples in the FPM, the agency in the instant case had relinquished administrative control to the private contractor over the course schedule and hence over the time the grievants had to travel. The agency's exception is directed to the arbitrator's finding, based upon his examination of the contract between the agency and the private contractor conducting the training course, that in the facts of this case the agency had given up administrative control. Thus, the agency, in substance, is disagreeing with the arbitrator's findings as to the facts. The Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned on appeal. E.g., Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), 2 FLRC 300 [FLRC No. 74A-49 (Dec. 20, 1974), Report No. 61]; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (Aug. 14, 1975), Report No. 81. Thus, the agency's exception does not present the necessary facts and circumstances to support a ground upon which the Council grants review under section 2411.32 of its rules of procedure.

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

By the Council.^{3/}

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: B. Stark
NUCO

^{3/} The Secretary of Labor did not participate in this decision.

National Federation of Federal Employees, Local 1745 and Veterans Administration Data Processing Center, Austin, Texas. The dispute involved a union proposal concerned exclusively with the designation of a union representative as a member on a Position Management Committee. The local parties agreed to the proposal, but the agency determined that it was nonnegotiable and therefore disapproved the proposal during review of the parties' agreement under section 15 of the Order. The union then filed the instant appeal with the Council and forwarded a copy of its petition for review to the agency by ordinary mail, rather than by certified or registered mail, or personal service, as required by section 2411.46(c) of the Council's rules of procedure, which copy of the appeal the agency failed to receive. The union subsequently sent another copy of the appeal to the agency, but again by ordinary mail; and, moreover, failed to serve the agency with the attachments to the appeal, as required by section 2411.25 of the Council's rules, although the attachments were documents previously submitted to or issued by the agency. The agency thereupon filed a statement of position with the Council, in which it (1) requested that the Council dismiss the union's appeal for failure to comply with the above-mentioned sections of the Council's rules; and (2), contended that the subject proposal was nonnegotiable.

Council action (August 26, 1977). As to (1), in the particular circumstances of this case, including the lack of prejudice to the agency and an apparent ambiguity in the Council's rules as to the consequences of a failure to comply with the procedural requirements involved, the Council denied the agency's request to dismiss the union's appeal. However, the Council stated that in like cases in the future and for the reasons indicated in its decision, the procedural requirements of the Council concerning service will be strictly enforced, and that continued noncompliance with those provisions of the rules will prompt the dismissal of such defective appeals. As to (2), the Council ruled that although the subject proposal was outside the bargaining obligation established by section 11(a) of the Order, since the local parties had agreed to the proposal, as permitted by the Order, the agency could not, after that agreement, change its position during the section 15 review process. Accordingly, the Council held that the agency's determination that the proposal was nonnegotiable was improper and, pursuant to section 2411.28 of its rules and regulations, set aside the determination.

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

National Federation of Federal
Employees, Local 1745
(Union)

and

FLRC No. 77A-1

Veterans Administration Data
Processing Center, Austin,
Texas
(Agency)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal reads as follows:

The Union shall have the right to designate a representative to serve as member on the Position Management Committee.

Agency Determination

The agency determined (pursuant to its authority under section 15 of the Order) that the subject proposal agreed to by the local parties violates section 12(b)(4) and (5) of the Order. Additionally, in its statement of position, the agency requested the Council to dismiss the union's petition for review, for willful failure of the union to comply with the Council's rules concerning the service of petitions.

Questions Before the Council

I. Whether the union's petition for review should be dismissed for failure to comply with the Council's requirements concerning the service of petitions, in sections 2411.25 and 2411.46(c) of the Council's rules.

II. If not, whether the proposal is nonnegotiable under the Order.

Opinion

Conclusion as to Question I: The union's petition, in the instant case, should not be dismissed for failure to comply with sections 2411.25 and 2411.46(c) of the Council's rules. In like cases in the future, however, these rules will be strictly enforced.

Reasons: As previously indicated, the agency requested the Council to dismiss the petition for review because the union failed to comply with the Council's rules concerning the service of petitions for review.^{1/}

According to the record in this case, when the union filed its appeal with the Council it forwarded a copy of its petition for review to the agency by ordinary mail, rather than by certified or registered mail, or personal service, as required by section 2411.46(c) of the Council's rules. The agency failed to receive this copy of the union's appeal, but, upon being advised that a petition for review had been filed,^{2/} requested the Council either to dismiss the appeal or to provide for proper service and for an extension of time to file the agency's statement of position. Before acting on the agency's request, the Council was advised that the union had sent another copy of its appeal to the agency, and the Council thereupon extended the time for the filing of the agency's statement of position.

In its statement of position, the agency asserts without contradiction by the union that the subsequent service of a copy of the appeal by the union was again made by ordinary mail, and that the union likewise failed to serve the agency with attachments to its appeal, as required by section 2411.25 of the Council's rules. While the agency does not claim prejudice by the union's conduct (the attachments to the appeal were

^{1/} Section 2411.25 of the Council's rules provides in pertinent part as follows:

A petition for review [of a negotiability determination] . . . shall contain the following:

.
(b) A copy of all pertinent material including the agency head's determination on the proposal, . . . and other relevant documentary material.

.
(d) A copy of the petition shall be served simultaneously on the other party.

Section 2411.46(c) of the Council's rules provides:

(c) Service shall be made by registered or certified mail or in person. A return post office receipt or other written receipt executed by the party or person served shall be proof of service.

^{2/} The Council, having failed to receive a statement of position from the agency within the time limits provided in the Council's rules, contacted the agency to determine whether such a document had been forwarded. The agency responded that no such document had been forwarded because it had not received a copy of the union's appeal. The Council so informed the union.

documents submitted to or issued by the agency), it contends that the union's appeal should be dismissed by reason of the union's failure to abide by the Council's rules.

In the particular circumstances of this case, including the lack of prejudice to the agency and an apparent ambiguity in the rules as to the consequences of a failure to comply with the procedural requirements here involved, we deny the agency's motion to dismiss the union's petition for review. However, in like cases in the future and for the reasons indicated below, the procedural requirements of the Council concerning service will be strictly enforced.

The procedural requirements here involved were adopted after careful consideration by the Council in amendments to its rules, issued on September 24, 1975 (40 FR 43880). They reflected revisions which were previously announced by the Council in its proposed rules published on May 16, 1975 (40 FR 21488). None of the interested persons (including the union in this case) came forward with any reason whatsoever as to why such procedural requirements should not be adopted, in comments submitted with respect to the proposed amendments.

The subject requirements were predicated upon extensive past experience of the Council, and their purpose is obvious: They were designed to avoid unwarranted delays in Council proceedings and uncertainties as to the accuracy of case records, which delays and uncertainties uniformly result from disputes over the service and content of case papers such as occurred in the present case. The union has advanced no persuasive reason for failing to adhere to these requirements and, in our opinion, such adherence is plainly mandated to ensure the fair and expeditious disposition of appeals by the Council under section 4(c) of the Order.

To repeat, while we deny the agency's request to dismiss the union appeal in the instant case, the procedural requirements of the Council concerning service will be strictly enforced in the future and continued noncompliance with these provisions of the rules will prompt the dismissal of such defective appeals.

Conclusion as to Question II: The proposal is outside the bargaining obligation established by section 11(a) of the Order. However, since the local parties agreed to the proposal, as permitted by the Order, the agency cannot, after that agreement, change its position during the section 15 review process. Accordingly, the agency's determination that the proposal is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules and regulations, is set aside.^{3/}

^{3/} Contrary to the agency's assertions, the proposal clearly does not infringe on the agency's retained rights under sections 12(b)(4) and (5) of the Order. As to 12(b)(4), the agency has failed to establish that the proposal violates this provision of the Order. (See Local Union No. 2219,

(Continued)

Reasons: Section 11(a) of the Order^{4/} establishes, within specified limits not here in dispute, an obligation to bargain concerning personnel policies and practices and matters affecting working conditions of bargaining unit employees. The Position Management Committee to which the disputed proposal relates is characterized in the record as a body, composed of management officials, established to assist the station Director. The committee assists the Director in carrying out his responsibility for work organization and the implementation of the position management program. It reviews all proposed changes in the organization from the standpoint of work design, occupational distribution, grade distribution, staffing requirements and costs to ensure that they are thoroughly justified. The committee reviews organizational work patterns to ascertain the necessity for any proposed position reclassification resulting from changes in duties. The committee reviews each vacant position and determines whether to eliminate it, assign all or part of the duties to other positions, modify it to permit performance at a lower grade, or fill it at the present level. It advises the budget committee on such matters as ceiling and organization structure. In performing its functions, problem areas are brought to the attention of the Director before corrective action is taken. (See attached APPENDIX.)

The proposal in dispute, by its express terms and as explained by the union in its submissions to the Council, is concerned exclusively with the designation of a union representative as a member on the Position Management Committee.

(Continued)

International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].) As to 12(b)(5), the agency would retain the right to determine the methods, means, and personnel by which its operations are to be conducted irrespective of whether a union representative was designated a member of such committee, and therefore the proposal is clearly consistent with section 12(b)(5) of the Order. Moreover, should an arbitrator render an award in connection with the proposal (which proposal, as already mentioned, has been agreed to by the local parties), such award must be consistent with the Order; and if the award is not so consistent with the Order, it would be subject to review and reversal by the Council under §§ 2411.31-2411.37 of the Council's rules (5 CFR 2411.31-2411.37).

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

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order.

In our opinion, the proposal in dispute is outside the agency's obligation to bargain; it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Clearly, union membership on the Position Management Committee (a management body established to review and make determinations as well as recommendations to the station Director concerning various proposed or potential management actions) does not, of itself, involve such personnel policies or practices or matters affecting working conditions of bargaining unit employees.^{5/} Furthermore, the activities of the Position Management Committee, itself, in reviewing and making determinations and/or submitting recommendations to the station Director for review and approval do not themselves involve personnel policies and practices, or matters affecting working conditions. Accordingly, since the union's proposal falls outside the scope of required bargaining under section 11(a) of the Order, we must hold that the proposal is not one on which the agency is obligated to negotiate.^{6/}

The case before us differs, however, in an important respect from previous cases involving proposals found to be outside the scope of required bargaining under section 11(a) of the Order in which the Council sustained the agency head determinations of nonnegotiability.^{7/} Here, as distinguished from the circumstances in the previous cases, the local parties agreed to the proposal in dispute and the agency disapproved the proposal only subsequently, during review of the agreement under section 15 of the Order. Section 15 provides, in part, "An agreement shall be approved . . . if it conforms to applicable laws, the Order, existing published agency policies and regulations . . . and regulations of other appropriate authorities." In this connection, the Council has expressly stated that matters which are outside the required scope of bargaining under section 11 (a) may be negotiated if management chooses to negotiate over them. In other words, while there is no requirement that matters outside the scope of 11(a) be negotiated, the Order does permit their negotiation so that an agreement which results from the negotiation of such matters does not, thereby fail to conform to the Order. Therefore, since the agency in the instant case, through its local bargaining representatives acting within the scope of their authority negotiated and reached agreement on a proposal not otherwise barred from the scope of negotiations by the Order or by published agency policies and regulations, the agency cannot, after that

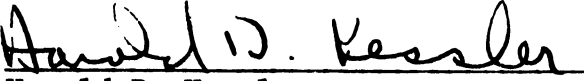
^{5/} Cf. National Treasury Employees Union and U.S. Customs Service, Region VII, Los Angeles, California, FLRC No. 76A-111 (July 13, 1977), Report No. 131, and cases cited therein.

^{6/} The impact on personnel policies and practices concerning bargaining unit members and on bargaining unit working conditions of a determination of the committee or a decision of the station Director, based on a committee recommendation, would, of course, be a proper matter for negotiation under section 11(a) of the Order.

^{7/} Supra n. 6.

fact, change its position during the section 15 review process. Such agreement conforms to the Order and under section 15 it must be approved.^{8/} Accordingly, we find that the agency head's determination that the union's proposal is nonnegotiable was improper and must be set aside.^{9/}

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 26, 1977

Attachment:

APPENDIX

8/ Cf. AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75. In that case the Council held that an agency may not disapprove, pursuant to section 15 review, a locally agreed-upon proposal concerning a matter excepted from the obligation to negotiate by section 11(b) of the Order.

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

APPENDIX

Veterans Administration CIRCULAR 00-76-40, ATTACHMENT A, provides:

FIELD FACILITY POSITION MANAGEMENT COMMITTEE/COORDINATOR

1. The facility director is responsible for work organization and position management. A position management committee may be established or coordinator appointed to assist in carrying out this responsibility.
2. The committee may be structured as follows:
 - a. Chairman: Assistant Director of field facility.
 - b. Members:
 - (1) Fiscal/Finance Officer.
 - (2) Personnel Officer.
 - (3) Other appropriate person designated by facility director.
 - c. Advisors:
 - (1) Management Analyst.
 - (2) Classification Specialist.
 - (3) Others as necessary and appropriate.
3. Committee responsibilities are in the following areas:
 - a. Organization Structure and Changes. The committee/coordinator should become familiar with the present organization and position structure of each element within the facility. The committee/coordinator will review all proposed changes in organization from the standpoint of work design, occupational distribution, grade distribution, staffing requirements, and costs. Each change must be thoroughly justified by the submitting organization as being more efficient and economical.
 - b. Position Reclassification. Before any position is reclassified because of a change in duties, the committee/coordinator will thoroughly review the organizational work pattern to ascertain the necessity for assigning responsibilities as high as the grade being proposed. All approved work assignments resulting in reclassifications must be shown to enhance the economy and efficiency of the organization affected. The origin of new duties being assigned to the position must be documented in the justification.
 - c. Position Control. The committee/coordinator will review each vacant position and make the appropriate determination to eliminate it, assign all or part of the duties to other positions, modify it to permit performance

at a lower grade, or fill it at the present level. This review must be made in conjunction with organizational information and the demonstrated continued need for the position.

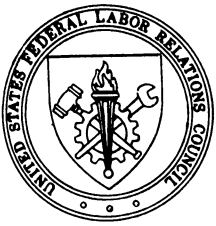
d. Budget. The committee/coordinator will advise the budget committee on matters dealing with ceiling, organization structure, and related matters.

4. The committee/coordinator will consult with and include line managers and supervisors in reviews. Problem areas will be brought to the attention of the Director before corrective action is taken.

5. The committee/coordinator must be alert to any labor-management implications involved in the reviews of organizations and positions. In facilities having exclusive recognition with labor organizations, any potential impact should be brought to the attention of the Director for appropriate action under the provisions of the station contract.

American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator). The arbitrator determined that the grievant was eligible and qualified for promotion at a particular time and that the activity violated the parties' agreement by delaying his promotion until a number of other trainees were eligible. As his award, the arbitrator sustained the union's grievance and directed that the grievant be promoted retroactively with backpay. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award, based on four exceptions: that the award was based on a nonfact; that the award did not draw its essence from the parties' agreement; that the award violated applicable law, appropriate regulation, and the Order; and that the arbitrator exceeded his authority. The agency also requested a stay of the award.

Council action (August 26, 1977). The Council held that the agency's exceptions were not supported by the facts and circumstances described in the petition. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 26, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
G-2608 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: American Federation of Government Employees,
Local 1760 and Northeastern Program Service
Center (Wolff, Arbitrator), FLRC No. 77A-31

Dear Mr. Becker:

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

According to the award, the grievant was hired by the Social Security Administration (the agency) in September 1974 under a temporary appointment as a GS-5 Claims Representative Trainee. After 3 weeks of pool training he was assigned to a branch office of the agency. (He did not receive the normal 12 weeks of training for Claims Representative Trainees because of the temporary nature of his appointment.) Eight months later, in May 1975, the grievant was transferred to the Northeastern Program Center of the Bureau of Retirement and Survivor's Insurance (the activity) where he was given a term appointment as a GS-5 Benefit Authorizer Trainee. He, along with 13 others hired in May 1975 for the same type of position, received 7 weeks of training in the area of Automatic Earnings Recomputation Operations (AERO). They did not receive the full range of 16 weeks of formal training for Benefit Authorizer Trainees because of the backlog of cases which the activity wanted to reduce. In September 1975 the grievant received a within-grade increase because he had performed at an acceptable level of competence at the GS-5 level for 1 year.

The dispute in this matter arose when the activity, in response to an inquiry from the grievant, notified him in December 1975 that he was ineligible for promotion from Term Benefit Authorizer Trainee, GS-5, to Term Benefit Authorizer Trainee, GS-7. The agency explained:

As a result of the temporary nature of Term appointments, a two phase training program was set up to make Term employees productive on the job as quickly as it was feasible. The first phase of the training all Term Benefit Authorizers received upon entering on duty enabled them to handle backlogs and certain one-time work projects. The remainder of the training needed to perform the full range of the job is targeted for the near future. Until such time as a Term

Benefit Authorizer receives the full range of training, he/she is ineligible for promotion to the next grade level in the career ladder, even though he/she may meet other Civil Service requirements for promotion.

Thereafter, the employee filed a grievance contending that the activity had violated the parties' negotiated agreement by refusing to promote him "because [he] was not given the training necessary to be eligible for career advancement." On June 6, 1976, the grievant along with the rest of his class of trainees, was promoted to the GS-7 level "without having received any additional documented training." The grievant pressed his grievance contending that he was entitled to the promotion as of October 12, 1975, in line with a claimed personnel policy giving an employee the advantage of receiving his within grade promotion and then, within the next pay period, his career ladder promotion, provided he is qualified for the promotion. The matter ultimately went to arbitration.

The arbitrator found, regarding the grievant's failure to complete "the full range of training," that the activity had not provided the appropriate training to the grievant and "if this is to be raised as a bar, then [the activity] is to bear responsibility therefor," since it would be in violation of the negotiated agreement between the parties.^{1/} The arbitrator further noted that the grievant and the other trainees had all received their promotions in June 1976 "even though they had not received . . . the further training" and that "the evidence . . . is uncontroverted that in September and October of 1975, [the grievant] had been doing the same work as in June 1976 when he was moved up to GS-7."

The arbitrator therefore determined that "on the record in this case, Grievant in October 1975 not only was eligible, but was also qualified to be moved up to the GS-7 level and . . . that there was not testimony or

^{1/} In his opinion the arbitrator cited and quoted two provisions from the negotiated agreement, as follows:

Article 16, Section b. The Bureau shall continue to provide equal opportunity in its promotion program for all qualified employees and will make promotions without discrimination for any nonmerit reason * * * .

Article 14, Section b. The parties agree to cooperate actively and positively in their efforts to carry out a plan of affirmative action to accomplish equal opportunity for all employees and to seek and achieve the highest potential and productivity in employment situations. The Bureau agrees to provide encouragement, assistance, and appropriate training opportunities so that all employees may utilize their abilities to the fullest extent.

satisfactory evidence introduced on behalf of Management to the contrary."^{2/}
The arbitrator also found on the basis of the record that the activity was not justified in delaying the grievant's promotion until the rest of the Trainees were eligible for promotion. In his view, "to permit this would, in effect, be denying Grievant the contractual 'equal opportunity' in the promotion program (Art. 14b)."^{3/}

As his award, the arbitrator sustained the grievance and held that the "Grievant should be promoted retroactively to October 12, 1975 and made whole for any loss of pay, allowances or differential to which he may be entitled by reason of such promotion, and the personnel action grieved shall be corrected to conform with this determination."

The agency takes exception to the award on the four grounds discussed below and requests a stay of the award. The union did not file an opposition.

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

The agency's first exception is that the award is based on a nonfact. In support of this exception, the agency contends that the arbitrator's award "rests on his conclusion that some kind of employment discrimination occurred . . . in violation of the negotiated agreement" and that such an award "could not be sustained unless some kind of 'discrimination' of the types referred to in [the agreement] were, in fact, found." [Emphasis by agency.]

^{2/} In so ruling, the arbitrator found, in agreement with management, that:

1. No Federal service employee is automatically entitled to a career ladder promotion upon the completion of one full year of service.
2. Promotion in a career ladder position is not guaranteed.
3. Being eligible and being qualified for a promotion are not synonymous because each in and of itself is a requirement for promotion.
4. An employee must be eligible (time in grade), qualified (experience and training), and must have performed successfully at current grade level and demonstrated readiness to assume duties at the next higher level in a career ladder position.

^{3/} Article 14, section b is set forth in n. 1, supra.

The Council will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 12, 1975), Report No. 81.

However, the Council is of the opinion that the agency's first exception is not supported by the facts and circumstances described in the petition. In this regard, the agency's petition for review does not present the necessary facts and circumstances to demonstrate that the central fact underlying this arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO, supra at 3 of the decision. Rather, the agency's contention that the award is based on a nonfact appears to constitute nothing more than disagreement with the arbitrator's interpretation of particular provisions of the parties' negotiated agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of a negotiated agreement is not a ground upon which the Council will grant review of an arbitration award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Thus, the agency's first exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its second exception the agency asserts that the award does not draw its essence from the labor-management agreement. In support of this exception, the agency contends that "the award does not represent a plausible interpretation of the provisions of this agreement." The Council will grant a petition for review of an arbitrator's award in cases where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement. NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79. However, it is the Council's view that the agency's second exception is not supported by the facts and circumstances described in the petition. In this regard, the agency has presented no facts and circumstances to demonstrate that the arbitrator's award, based upon his interpretation and application of the parties' collective bargaining agreement, is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or that the award could not in any rational way be derived from the agreement; or evidences a manifest disregard of the agreement; or on its face represents an implausible interpretation thereof. Department of the Air Force, Newark Air Force Station and American Federation of Government Employees, Local 2221

(Atwood, Arbitrator), FLRC No. 76A-116 (Mar. 31, 1977), Report No. 123. Rather, the agency's second exception constitutes nothing more than disagreement with the arbitrator's interpretation and application of the collective bargaining agreement and his reasoning in connection therewith. As previously stated, a challenge to an arbitrator's interpretation of a negotiated agreement is not a ground upon which the Council will grant review of an arbitration award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District, FLRC No. 76A-144, supra. Therefore, the agency's second exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

The agency's third exception is that the award violates applicable law, appropriate regulation, and the Order. More specifically, the agency contends that the award violates section 12(b)(2) of the Order because "[w]here, as here, a noncompetitive promotion is involved, it is . . . an inalterable right of an agency to decide when an employee is in fact qualified to warrant the exercise of management's discretion to effectuate a promotion."^{4/} The agency also contends that the award must be set aside since it "improperly requires retroactive promotion and backpay" citing regulations of the Civil Service Commission, decisions of the Comptroller General and the Back Pay Act of 1966. The Council will grant a petition for review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law, appropriate regulation, or the Order. In this case, however, the Council is of the opinion that the agency's petition does not present the necessary facts and circumstances to support any of the grounds stated in its exception.

^{4/} The agency also appears to contend that, in this same regard, the award violates law and Civil Service Regulations. However, the agency does not identify any specific law or regulation in support of this contention. (The agency does quote a portion of a subsection of the Federal Personnel Manual and states that the arbitrator had this subsection before him but offers no explanation as to how, if at all, the arbitrator's award may be contrary to this subsection.) The Council has consistently declined review of arbitration awards when the petition for review fails to set forth any support for the exceptions presented. Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82. Therefore, this contention provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

With regard to the agency's contention that the award violates section 12(b)(2) of the Order,^{5/} in the Council's opinion the agency has not, in the circumstances of this case, described facts and circumstances to support its exception. The Council notes, in this regard, that the arbitrator specifically found, in agreement with management's position, that a noncompetitive career ladder promotion is not guaranteed or automatic after a year of service and that an employee must be eligible and qualified for such promotion (see n. 2 supra). However, the Council also notes that the arbitrator further specifically found in this case that the grievant's failure to complete the full range of training was attributable to management and to use such lack of training as a bar to promotion was a violation of the agreement; that the grievant (as well as the 13 trainees hired in May 1975) were promoted by management to the GS-7 level in June 1976, "without having received any additional documented training"; that the "Grievant . . . in September and October of 1975 . . . had been doing the same work as in June 1976 when he was moved up to GS-7 [and] that he continued to do the same work right up to the time of his promotion"; that management had not presented evidence to support its claim that the employee was not qualified to move up to the GS-7 level; and that the activity had violated the agreement by delaying the grievant's promotion until the 13 other trainees were eligible for promotion. Therefore, the Council is of the opinion that the agency has not, in the circumstances of this case, presented facts and circumstances to support its exception that the award violates section 12(b)(2) of the Order, and this part of the agency's third exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

With regard to that part of the third exception in which the agency contends that the award "improperly requires retroactive promotion and backpay," the agency cites regulations of the Civil Service Commission, decisions of the Comptroller General and the Back Pay Act of 1966. In support of its contention, the agency states that the award violates "the general rule" prohibiting retroactive promotions;^{6/} that the type of "administrative or

5/ Section 12(b)(2) of the Order provides, in part:

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

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency

6/ According to the agency, the "general rule" prohibiting retroactive promotions is established in FPM Supplement 990-2, Book 531, Part S2-5b as follows:

(Continued)

clerical error" permitting an exception to the general rule has not occurred; and that the "nondiscretionary agency requirement" exception which would permit retroactive promotion and backpay is not present in this case.

The Council will grant review of an arbitrator's award where it appears based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation such as the Back Pay Act of 1966 and its implementing regulations. E.g., Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (Nov. 18, 1975), Report No. 91. However, in this case the Council is of the opinion that the agency's petition for review does not present facts and circumstances to support its exception that the arbitrator's award violates the Back Pay Act of 1966 and implementing regulations, including decisions of the Comptroller General. In this respect, the Council notes that the Comptroller General has held that in order for an arbitrator's award of backpay to be sustained under the Back Pay Act of 1966 and the implementing regulations thereto, the arbitrator must find that the agency violated the collective bargaining agreement, or find other improper agency action constituting an unjustified or unwarranted personnel action within the meaning of the Act, and that the arbitrator must further find that such improper agency action caused the aggrieved employee to suffer a withdrawal, reduction or denial of pay, allowances, or differentials -- that is, that the withdrawal, reduction or denial of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action. See Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126 at 5 of the Council's decision.

In the Council's opinion, the agency has not presented facts and circumstances in its petition to indicate that the award in this case is inconsistent with the Act, the decisions of the Comptroller General interpreting it or the regulations which implement the Act. The Council notes that the arbitrator specifically found that the activity had violated the parties' collective bargaining agreement by delaying the grievant's promotion until the 13 other trainees were eligible for promotion. Thus the arbitrator found in effect that but for the activity's delay in promoting the grievant in violation of the agreement, the grievant

(Continued)

A promotion cannot be made retroactively effective. It is effective only from the date administrative action is taken by the administrative officer vested with proper authority to take such action

The agency also cites Comptroller General Decision, B-183969, B-183985, July 2, 1975.

would have been promoted on October 12, 1975. The agency has not described sufficient facts and circumstances to show that the arbitrator's award is violative of the provisions of the Act and implementing regulations thereto or inconsistent with Comptroller General decisions interpreting them. That is, the agency fails to describe facts and circumstances to show that the arbitrator has failed either to make a determination that the grievant has undergone an unjustified or unwarranted personnel action or to make a determination that such action directly resulted in a withdrawal of pay, allowances, or differentials. The agency's argument that a nondiscretionary agency requirement to promote is not present in this case because there is "absolutely no provision in the agreement which can be in any way construed as binding the activity to process promotion actions in any manner or within any specified period of time" appears to constitute nothing more than disagreement with the arbitrator's interpretation of the negotiated agreement. As previously stated, a challenge to an arbitrator's interpretation of a negotiated agreement is not a ground upon which the Council will grant review of an arbitration award. American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District, FLRC No. 76A-144, supra. Accordingly, the agency's third exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its fourth exception the agency asserts that the arbitrator exceeded his authority by interpreting a statute, namely the Back Pay Act of 1966. The agency maintains that the interpretation of statutes was clearly not intended by the Council to be within the authority of arbitrators and that the Comptroller General of the United States and not the arbitrator is the authority on how the Back Pay Act can legally be applied.

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present the ground that the arbitrator exceeded his authority by determining an issue not included in the question(s) submitted to arbitration. Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101. However, in this case the Council is of the opinion that the agency's exception is not supported by the facts and circumstances described in the petition. In this regard the Council has previously held that there was no basis for acceptance of a petition for review in a case in which it was alleged that an arbitrator exceeded his authority when, in the course of resolving the grievance before him, he considered the meaning of laws and regulations. Automated Logistics Management Systems Agency and National Federation of Federal Employees, Local 1763 (Erbs, Arbitrator), FLRC No. 76A-69 (Nov. 5, 1976), Report No. 115. In that case the Council cited the January 1975 report and recommendations on the amendment to the Order, as follows:

In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by

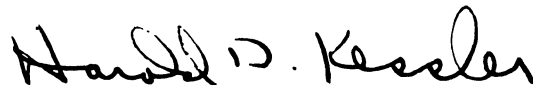
arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation Labor-Management Relations in the Federal Service (1975), at 44.

The Council notes that the arbitrator in the instant case interpreted and applied provisions of the negotiated agreement in making his award. In the course of resolving the grievance before him he specifically considered provisions of the Back Pay Act of 1966. As previously indicated, the agency presents no facts and circumstances to support a contention that the award violates the Back Pay Act or implementing regulations. Accordingly, the agency's fourth exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In summary, the agency's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay of the award is also denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: J. O'Leary
AFGE

U.S. Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO (National Border Patrol Council) (Shister, Arbitrator). The arbitrator determined, among other things, that the use by employees of Government vehicles to go home for lunch, as practiced in the circumstances here involved, was illegal and contractually prohibited. As his award, the arbitrator denied the union's grievance related to a supervisor's instructions restricting such activities by employees. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on two exceptions: that the underlying basis of the award was a nonfact; and that the arbitrator refused to hear evidence pertinent and material to the controversy before him.

Council action (August 26, 1977). The Council held that the union's petition did not describe facts and circumstances necessary to support its exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 26, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Immigration and Naturalization Service
and American Federation of Government Employees,
AFL-CIO (National Border Patrol Council)
(Shister, Arbitrator), FLRC No. 77A-51

Dear Mr. Mulholland:

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

According to the arbitrator's award,^{1/} the dispute in this matter arose when the Patrol Agent in charge of the Niagara Falls Border Patrol Station (the activity) issued verbal instructions directing that Border Patrol Agents working in and around the Niagara Falls area would no longer be able to eat meals at their homes on their assigned lunch break. Thereafter a grievance was filed wherein it was contended that these verbal instructions "arbitrarily and unilaterally changed a mutually beneficial past practice that has existed at the Niagara Falls [Station] for at least eight years and very probably a much greater time." According to the grievance letter, the activity order was:

. . . arbitrarily and discriminatorially selective, in that all personnel of the Buffalo Border who are usually mobile in the performance of their duties, . . . are allowed to regularly utilize Government vehicles for transportation to a place of their choosing, within the station area of operations, for lunch purposes. The majority of the personnel at the Niagara Falls Station, prior to March 31, 1976, have chosen to eat at home, which in many cases is as close or closer than a suitable restaurant.

The matter ultimately went to arbitration.

^{1/} The facts in this case are not separately stated by the arbitrator and are taken primarily from the grievance letter which the arbitrator sets forth in its entirety in his award.

The arbitrator set forth the issues in the case as follows:

(1) Is the grievance arbitrable? (2) If so, has there been a practice at the Niagara Falls Border Patrol Station . . . of border patrol agents . . . using government vehicles for traveling to their homes for lunch. (3) If so, was that practice legal? (4) If so, did the U.S. Immigration and Naturalization Service . . . have the right unilaterally to abrogate the practice?

In addressing each of these four issues, the arbitrator first determined that the matter was arbitrable. Secondly, he found that the evidence established a practice spanning a number of years under which the agents at the station frequently used a Government vehicle to go home for lunch with knowledge of the supervisory personnel and that the practice was abrogated by the agency at a meeting between the parties held on March 31, 1976. Third, after examining Article 4B of the parties' negotiated agreement,^{2/} section 638a(c) of title 31, United States Code,^{3/} and Chapter 2503.11 and .12 of the Agency Administrative Manual,^{4/} the arbitrator determined that

^{2/} According to the arbitrator, Article 4B of the negotiated agreement is identical to the language of section 12(a) of the Order.

^{3/} 31 U.S.C. § 638a is entitled "Restrictions on purchase, operation, use and maintenance of passenger motor vehicles and aircraft" and according to the arbitrator, provides in relevant part:

. . . no appropriation shall be expended . . . for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necessary and then only as to such latter cases when the same is approved by the head of the department concerned. Any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft, or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant. The limitations of this paragraph shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in section 101 of Title 5, ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.

^{4/} According to the arbitrator, this chapter of the Agency Administrative Manual is entitled "Use of Government-owned Motor Vehicles."

"the pattern of going home for lunch, as practiced here, is illegal . . ." [emphasis by arbitrator] and "that merely because the practice was permitted to continue does not endow it with the mantle of legality." The arbitrator also stated that "[t]he evidence clearly discloses that, given the locations of the homes of the agents and given the location where the agents make most of their arrests, they are most frequently not in the vicinity of their homes when going home for lunch . . . [b]ut entirely aside from that point, the crucial consideration here is that using a government vehicle to go home for lunch, as it has been practiced here, is illegal and contractually prohibited." [Emphasis by arbitrator.] Finally, since the arbitrator had found the past practice to be illegal, he stated that it was unnecessary to explore the question of whether the agency had the right to unilaterally abrogate the past practice. As his award, the arbitrator denied the grievance.

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

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

In its first exception, the union asserts that "the basis underlying the arbitrator's decision is a 'non-fact' and the parties cannot be fairly charged with the misapprehension of the arbitrator." In support of its exception, the union contends that "the record of the arbitration hearing shows that but for the gross error made in the award, the opposite result would have been reached, and that when the articulated basis for the award is contrasted against the evidence in the record, the 'non-fact' must be conceded and the award concluded to be in error." Thus the union asserts that, while the arbitrator stated that the agents are most frequently not in the vicinity of their homes when going home for lunch, "[t]he transcript of the hearing, and the fact of the matter, discloses that agents were more often than not, in closer proximity to their homes when going home for lunch than to restaurants and the Station itself." [Emphasis by union.]

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception presents the ground that "the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. . . ." [Emphasis added.] Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81.

However, in this case the Council is of the opinion that the union's petition for review does not describe sufficient facts and circumstances to support its exception. That is, the union has not presented the necessary facts and circumstances to demonstrate that the central fact underlying the award is the alleged erroneous finding by the arbitrator that the agents are most frequently not in the vicinity of their homes when going home for lunch and that such finding is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. In this regard, the Council notes that the arbitrator, in the opinion accompanying his award, after stating that the agents are most frequently not in the vicinity of their homes when going home for lunch, specifically goes on to add that "entirely aside from that point [emphasis added] the crucial consideration here is that using a government vehicle to go home for lunch, as it has been practiced here [emphasis by arbitrator], is illegal and contractually prohibited." Thus, the union's first exception does not present the necessary facts and circumstances to support a ground upon which the Council grants review under section 2411.32 of its rules of procedure.

In its second exception, the union asserts that "the arbitrator refused to hear (allow) pertinent and material evidence to the controversy before him in not permitting certain witnesses to testify as to their own personal impressions concerning the alleged violation of Article 6 of the labor agreement which provides for protection against reprisal." In support of this exception, the union contends that during the direct testimony of three particular witnesses, "the arbitrator repeatedly excluded their testimony relating to the coercive effect of the events described in the grievance" and cites to particular portions of the transcript of the arbitration hearing (submitted by the union as part of its petition for review) as evidence of the arbitrator's exclusion of this testimony.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that an arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair hearing. American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), FLRC No. 75A-105 (Jan. 30, 1976), Report No. 96; Community Services Administration and American Federation of Government Employees, (AFL-CIO), Local 2677 (Dorsey, Arbitrator), FLRC No. 75A-71 (Nov. 18, 1975), Report No. 92; Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (Aug. 15, 1975), Report No. 81. However, in the Council's view the union's petition does not describe the necessary facts and circumstances to support this exception. Without passing on the question of whether the reprisal issue was properly before the arbitrator,^{5/} the

^{5/} The agency, in its opposition brief to the union's petition for review, maintains that the issue of reprisal was not properly before the arbitrator for resolution.

Council is of the opinion that the portions of the transcript cited by the union do not present facts and circumstances to support the exception that the arbitrator refused to hear evidence pertinent and material to the controversy before him and hence denied the union a fair hearing. Thus, there is no indication in those portions of the transcript cited by the union that the arbitrator refused to hear testimony, or refused to accept evidence, or refused to permit a witness to testify at all. Instead, those specific portions of the transcript cited by the union reveal nothing more than an attempt by the arbitrator to control the conduct of the hearing by insuring that such testimony as was offered by witnesses was relevant to the resolution of the issues before him. Thus, as the Council has held, it is the arbitrator's responsibility to control the conduct of the hearing. Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), 1 FLRC 557 [FLRC No. 73A-20 (Sept. 17, 1973), Report No. 44]. The fact that the arbitrator conducted the hearing in a manner which one party finds objectionable does not support a contention that the arbitrator denied that party a fair hearing. Thus, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A. E. Ross
Justice

AFGE (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice. The dispute involved the negotiability of union proposals concerning (1) the filling of first-line supervisory positions; (2) a requirement that management take disciplinary action against agency officials in certain situations; (3) a requirement, based on alternative interpretations, that management either must fill all vacant positions in accordance with the proposal's conditions, or must post such vacancies as it decides to fill at the target or journeyman grades and fill the positions at those levels unless no qualified candidate applies; (4) the filling by bargaining unit employees of positions other than those with known promotion potential without resort to competitive procedures; (5) composition and use of selection lists; (6) area of consideration and preference for agency personnel over nonagency applicants for positions; (7) maximum duration of overseas assignments of employees; and (8) preparation of selection lists, and selection requirements.

Council action (August 31, 1977). As to (1), the Council held that the union's proposals were outside the agency's bargaining obligation under section 11(a) of the Order. With regard to (2), (4) and (7), the Council held that the proposals were violative of section 12(b)(2) of the Order. As to (3), which is susceptible to the respective interpretations indicated above, the Council held that the proposal was alternatively either excluded from bargaining by section 12(b)(2) of the Order, or excepted from the agency's obligation to bargain by section 11(b) of the Order. Concerning (5) and (8), based on an interpretation provided by the Civil Service Commission (CSC) in response to a request by the Council, the Council held that the proposals violated the Federal Personnel Manual (FPM). As to (6), the Council, based on an interpretation by the CSC, ruled that the portion of the union's proposal related to the area of consideration for agency positions did not violate the FPM; the Council further ruled that no compelling need existed for the provision of the agency's regulations asserted by the agency as a bar to negotiation on this part of the union's proposal. However, as to the second part of the union's proposal relating to preference for agency personnel over nonagency applicants for positions, the Council held it to be violative of section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the union's proposals here involved were nonnegotiable, with the exception of the determination regarding that part of the proposal numbered (6) above dealing with the subject of area of consideration, which determination the Council set aside.

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

AFGE (National Border Patrol
Council and National INS Council)

(Union)

and

FLRC No. 76A-68

Immigration and Naturalization
Service, U.S. Department of
Justice

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Proposals I - VI^{1/}

1-3.A.2. Potential Appraisal: An appraisal of experience to determine how well an employee will perform for [sic] higher level work. The potential appraisal should measure the type and quality of experience the candidate has in relationship to the position to be filled. Potential appraisals in this plan will only be used when bargaining unit employees are evaluated for possible promotion to a first-line supervisory position.

1-3.N. PROMOTION ELIGIBILITY SCORE FOR SUPERVISORY POSITIONS. The promotion eligibility score for supervisory positions is the score which results from the addition of the adjusted supervisory performance or supervisory potential score to the basic promotion eligibility score.

9-1.B. USE OF THE RATING OF SUPERVISORY PERFORMANCE OR POTENTIAL. The numerical score assigned to the rating given an employee for this supervisory performance or potential will be substituted for the employee's basic rating in determining his promotion eligibility score for first-line supervisory positions in the Officer Corps. The rating of supervisory performance or potential will also be factors [sic] to be considered in rating Nonofficer Corps candidates.

^{1/} For convenience of decision, these six proposals which involve essentially the same issues and contentions, are discussed as a group.

9-1.C. IDENTIFICATION OF FIRST-LINE SUPERVISORY POSITIONS. The regular vacancy announcements will clearly identify those positions which are first-line supervisory and for which the above first-line supervisory rating techniques will be used.

Appendices C-1 and C-2 and Instructions are rating guides for the Officer and Nonofficer Corps, respectively. Owing to their length, they are not set forth here. The salient point is that the guidance applies, inter alia, to supervisory potential appraisal and that the union wants the procedures to be employed in rating bargaining unit members.

Agency Determination

The agency determined principally that the proposals are outside the scope of the agency's bargaining obligation under section 11(a) of the Order and are therefore nonnegotiable.

Question Here Before the Council

Whether the proposals are outside the agency's bargaining obligation under section 11(a) of the Order.^{2/}

Opinion

Conclusion: The proposals are outside the bargaining obligation under section 11(a) of the Order. Hence, the agency's determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 11(a) of the Order^{3/} establishes an obligation to bargain with respect to personnel policies and practices and matters affecting

^{2/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposals.

^{3/} Section 11(a) provides in pertinent part:

Sec. 11. Negotiation of Agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set

(Continued)

working conditions of unit employees so far as may be appropriate under various enumerated authorities, including provisions of the Order itself. This obligation to negotiate does not encompass procedures, policies or practices relating to the filling of supervisory positions outside the bargaining unit, as held by the Council in its Texas ANG decision.^{4/}

In the Texas ANG case, the union's proposal would have required the agency to use the bargaining unit's negotiated merit promotion procedures in filling "threshold supervisory positions." The Council, finding that proposal to be outside the agency's obligation to bargain under section 11(a), stated:^{5/}

. . . under the Order, supervisors and, hence, supervisory positions are structurally and functionally a part of management. This status results in . . . their exclusion from any bargaining unit. . . . [T]he proposal solely relates to procedures for the filling of nonunit positions, which positions are concerned with management responsibilities and the performance of management functions. It clearly does not relate to the personnel policies and practices affecting the bargaining unit which are encompassed within the bargaining obligation under section 11(a).

Turning to the instant proposals, it is clear that they, like the proposal in Texas ANG, would establish procedures which management must use in filling "first-line supervisory positions." Here, more particularly, the proposals at issue relate to the rating procedures to be used in filling first-line supervisory positions outside the unit by promotion of employees and management's use of the resulting ratings in actually filling such nonunit positions. Hence, the instant proposals are in substance indistinguishable from the one which the Council held to be outside the agency's obligation to bargain in Texas ANG. Thus, for the reasons set forth in greater detail in Texas ANG, we find that the agency determination in the present case, that the proposals are outside its obligation to bargain under section 11(a) of the Order, must be sustained.

(Continued)

forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision . . . and this Order.

^{4/} Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100.

^{5/} Id., at 3-4 of Council decision.

Proposal VII

1-4.B.

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Any official found to have improperly discriminated on the basis of an employee's color, race, religion, national origin, politics, marital status, non-disqualifying physical handicap, sex, age, membership or non-membership in an employee organization, or on the basis of any other non-merit factor including personal favoritism or patronage, in the rating of an employee for promotion or in making a selection for promotion shall be subject to disciplinary action.

Agency Determination

The agency determined principally that the proposal is nonnegotiable because it violates section 12(b)(2) of the Order.

Question Here Before the Council

Whether the proposal is violative of the right to discipline employees reserved to management under section 12(b)(2).^{6/}

Opinion

Conclusion: The proposal is violative of management's reserved right under section 12(b)(2) of the Order to decide and act with respect to disciplining employees. Accordingly, the agency's determination as to the nonnegotiability of the proposal was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b) of the Order^{7/} sets forth rights reserved to management under any collective bargaining agreement. In this regard,

^{6/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

^{7/} Section 12 of the Order provides, in pertinent part:

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

(Continued)

the Council, in its VA Research Hospital decision, stated:^{8/}

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

In a subsequent decision, the Council further explicated the meaning of section 12(b)(2), as follows:^{9/}

. . . implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action.

Turning to the instant proposal, it would, as reflected by its language and the union's stated intent, require management to take disciplinary action in the circumstances outlined in the proposal. Consequently, (apart from any consideration of whether or not such disciplinary action would be warranted or desirable in particular circumstances) the well established principles adverted to above with respect to management's reserved rights under section 12(b)(2) are dispositive. That is, the instant proposal, by requiring the agency to take disciplinary action in certain situations, is an interference with the authority to decide whether to take such action against employees, reserved exclusively to management by the Order. Accordingly, we find the proposal is violative of section 12(b)(2) of the Order and therefore nonnegotiable.

(Continued)

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

.
(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and suspend, demote, discharge, or take other disciplinary action against employees;
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^{8/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31], at 230.

^{9/} National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61], at 297.

Proposal VIII

1-5.A.1. It is agreed that it is in the public interest to permit career development that will staff the service with the maximum number of highly qualified, experienced employees. Therefore, it is agreed that all vacancies will first be posted at the target or journeyman grade. In the event that insufficient highly qualified candidates (1) respond to the initial announcement, the service will fill the position by any means they [sic] deem appropriate.

Agency Determination

The agency determined principally that this proposal is nonnegotiable by reason of being excepted from the bargaining obligation under section 11(b) of the Order. It further determined that the proposal is nonnegotiable because it violates section 12(b)(2) and (5) of the Order, and the Federal Personnel Manual (FPM).

Question Here Before the Council

Whether the proposal is nonnegotiable under section 12(b)(2) of the Order; or, if not, whether it is nonnegotiable by reason of being excepted from the bargaining obligation under section 11(b) of the Order.^{10/}

Opinion

Conclusion: The proposal, which is susceptible to two interpretations (set forth below), either is violative of the authority to decide and act with respect to the placement and retention of employees in positions within the agency, reserved to management by section 12(b)(2) of the Order, or is nonnegotiable by reason of being excepted from the agency's bargaining obligation by section 11(b) of the Order. Hence, the agency's determination that this proposal is nonnegotiable was proper and, in accordance with section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: The proposal provides that ". . . all vacancies will first be posted at the target or journeyman grade" and that "[i]n the event that insufficient highly qualified candidates (1) respond to the initial announcement, the service will fill the position by any means" In the Council's view, this language would require either, (a) that management must fill all vacant positions in accordance with the proposal's

^{10/} In view of our decision herein it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

conditions, or (b) that management must fill, in accordance with such conditions, only those vacant positions which it determines should be filled.

The ambiguity in the language of the proposal giving rise to these alternative interpretations is not resolved in the record before the Council. However, under either interpretation, we must find the proposal nonnegotiable in the instant circumstances.

As to (a), if the proposal requires filling all vacancies, apart from any other considerations, it interferes with the decision and action authority expressly reserved to management officials under section 12(b)(2) of the Order with regard to placing and retaining employees in positions within the agency.^{11/} Therefore, under this interpretation, the proposal conflicts with section 12(b)(2) and is nonnegotiable.

Alternatively, as to (b), if the proposal does not require the filling of all vacancies and thus does not limit management's reserved authority to determine which vacancies it will fill, the proposal would not violate section 12(b)(2) of the Order. Even as so interpreted, however, it expressly would require management to post such vacancies as it decides to fill at the target or journeyman grade and to fill the positions at those levels unless no highly qualified candidate applies. Only if the latter condition were to occur could the agency recruit for and fill the vacancies at some other grade level. Thus, under this interpretation, the proposal would require the agency to bargain on a matter excepted from its obligation to bargain under section 11(b) of the Order,^{12/} i.e., a matter with respect to the staffing patterns of the agency—the "grades of positions or employees assigned to an organizational unit, work project or tour of duty" Consequently, under this interpretation the proposal would conflict with section 11(b).

In summary, we find the proposal to be either excluded from bargaining by section 12(b)(2) of the Order or excepted from the obligation to

^{11/} In pertinent part section 12(b)(2) (set forth more fully at n. 7, supra) provides that management officials retain the right to "hire, promote, transfer, assign and retain employees in positions within the agency," as well as the implicit authority (see n. 9, supra, and accompanying text) to decide not to take such action.

^{12/} Section 11(b) provides in pertinent part that "the obligation to meet and confer does not include matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty"

bargain under section 11(b)^{13/} and, accordingly, in the circumstances of this case, to be nonnegotiable.

Proposal IX

1-6.A.4. (a) Management will promote, reassign, or transfer bargaining unit employees in accordance with this plan. Positions other than those with known promotion potential may be filled, through any of the specified exemptions to the promotion plan (sec. 2-2), through the rotation (by reassignment of overseas employees of the Immigration and Naturalization Service, (Appendix A), or through the restoration of veterans of [sic] other employees who have restoration rights. Management may also reassign or demote employees upon the employee's request when the request for reassignment or demotion is made for compassionate (e.g. health) reasons (Appendix B). When positions are filled through any of these methods, vacancies will not be announced.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates management's rights to promote, transfer and reassign employees under section 12(b)(2) of the Order.

Question Here Before the Council

Whether the proposal conflicts with section 12(b)(2) of the Order.

Opinion

Conclusion: The proposal conflicts with management's reserved right to assign employees under section 12(b)(2) of the Order. Therefore, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: As previously discussed in connection with proposals VII and VIII, herein, under section 12(b)(2) of the Order management officials retain the right, in accordance with applicable laws and regulations, to hire, promote, transfer, assign and retain employees; and this reserved right may not be infringed by a negotiated agreement. The disputed proposal, however, would in effect limit management's decision and action authority, retained under section 12(b)(2), and is thereby nonnegotiable.

13/ Cf. NFFE Local 943 and Keesler Air Force Base, Mississippi, FLRC No. 74A-66 (Nov. 18, 1975), Report No. 89.

The proposal involved in the present case restricts, in the manner set forth in the proposal, management's right to promote, reassign or transfer bargaining unit employees to positions other than those with known promotion potential. The manner of effecting such personnel actions under the proposal fails to reflect management's prerogative, for example, to temporarily promote employees to fill vacancies without resort to competitive procedures.^{14/} Hence, in our view, the proposal improperly constricts management's right under section 12(b)(2) and is therefore violative of the Order.^{15/}

Accordingly, the proposal is nonnegotiable.

Proposal X

1-6.A.4.(b). When positions are not filled under the provisions of paragraph (a) above [see Proposal IX], the vacancy will be announced and a selection list will be prepared. The selection list will contain the names of the two employees rated "best qualified" for promotion, except for: Officer Corps positions, the names of the two "best qualified" employees who have requested reassignment, the names of all employees who have requested voluntary demotion, and the names of those outside candidates who are considered to be better qualified than internal candidates rated "best qualified." All candidates who appear on the selection list will be given simultaneous consideration by selecting officials, who should attempt to pick the best qualified person on the list to fill the vacancy.

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with provisions contained in subchapter 3 of the FPM, Chapter 335.

Question Here Before the Council

Whether the proposal conflicts with provisions of the FPM.

Opinion

Conclusion: The proposal conflicts with policies set forth in FPM chapter 335. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

^{14/} The right to promote is not dependent upon the duration of the action involved. Cf. Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157 [FLRC No. 73A-16 (July 31, 1974), Report No. 55] at 161.

^{15/} Id. at 162.

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including the FPM, that agency was requested, in accordance with Council practice, to interpret Commission directives as they pertain to the instant proposal. The Commission responded, in pertinent part, as follows:

We believe this proposal violates the provisions of subchapter 3 of Federal Personnel Manual Chapter 335. Paragraph 6 of subchapter 3 requires that selections be made from among the best qualified candidates as determined by comparative evaluation of all eligible candidates against one another. Requirement 4 of subchapter 2 also mandates a comparative evaluation of all candidates and not of candidates by category or source. Applied to the circumstances envisioned by the proposal, this means that if there were a large number of reassignment eligibles who were significantly superior to any of the promotion or demotion eligibles, then only the reassignment eligibles should be referred. The proposal, in contrast would require referral by source. In practice it would mean that candidates of lesser quality from one source might be referred while candidates of greater quality from another source were not.

Based on the foregoing interpretation of its own regulations by the Civil Service Commission, the Council finds that the instant proposal violates provisions of the FPM. Consequently, the proposal is nonnegotiable.

Proposal XI

8-1.B.4.(a). When the Service does an effective job of selecting and training its employees, it should have a pool of career employees with potential for career advancement for all positions covered by this plan. Therefore, the area of consideration will not be expanded to seek candidates outside the Service unless less than three eligible highly qualified employees bid for the position.

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

Agency Determination

The agency determined that the proposal is nonnegotiable because paragraph (a), insofar as it applies to positions at the GS-14 level and above, in effect, conflicts with the FPM and derivative agency regulations (DOJ Order 1335.1A, Section 8.a.(3)) for which a compelling need exists under section 11(a) of the Order; and paragraph (b) conflicts with the

FPM, derivative agency regulations for which a compelling need exists, and with section 12(b)(2) of the Order.

Questions Here Before the Council

1. Whether paragraph (a) conflicts with the FPM and, if not, whether a compelling need exists for the agency regulations asserted as a bar to negotiations on paragraph (a) of the proposal.
2. Whether paragraph (b) of the proposal conflicts with section 12(b)(2) of the Order.^{16/}

Opinion

Conclusion as to Question 1: Paragraph (a) of the proposal does not violate the FPM and no compelling need exists for the provision of the agency regulations in question to bar negotiations on paragraph (a). Accordingly, the agency determination that paragraph (a) is nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.^{17/}

Reasons: As to the asserted conflict with the FPM, in accordance with Council practice (as already indicated in connection with proposal X herein) the Civil Service Commission was requested to interpret its directives as they pertain to paragraph (a) of the instant proposal. The Commission responded in pertinent part that: "Part (a) of the proposal conforms to the provisions of subchapter 3 [of FPM chapter 335] on extending the area of consideration." Based on this interpretation of its own regulation by the Commission, the Council finds that paragraph (a) does not conflict with the FPM.

As to the contention that a compelling need exists for agency regulations to bar negotiations on paragraph (a) of the proposal, DOJ Order 1335.1A, as relied upon by the agency, provides:

8. CONTENTS OF PLANS.

a. Minimum Areas of Consideration:

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^{16/} In view of our decision herein, we find it unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

^{17/} This decision should not be construed as expressing or implying any opinion of the Council as to the merits of paragraph (a). We decide only that, in the circumstances presented, such proposal is properly subject to negotiation by the parties concerned under section 11(a) of the Order.

(3) GS-14 through GS-18. The minimum area of consideration established for GS-14 through GS-18 will be Department-wide unless the position is excepted by the Director of Personnel and Training. . . .

The agency asserts that a compelling need exists under section 11(a) of the Order^{18/} for this regulatory provision because, in essence, it:

(1) "promotes the public's interest" in assuring employment opportunities are open on a nondiscriminatory basis to applicants covered by equal employment opportunity legislation and implementing CSC regulations; (2) "promotes the public's interest" in allowing management to progressively expand the minimum area of consideration for higher graded positions to prevent "inbreeding"; (3) effectuates the "mandate" of the FPM; and (4) provides for equal treatment of agency employees outside the Immigration and Naturalization Service (INS).

As set forth below, in our opinion the agency has failed to establish that a compelling need exists within the meaning of section 11(a) of the Order and related illustrative criteria for determining compelling need contained in the Council's rules,^{19/} for the regulatory provision asserted by the agency to bar negotiations on the proposal.

^{18/} See n. 3, supra.

^{19/} 5 CFR Part 2413.

§ 2413.2 Illustrative criteria.

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

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

The agency's arguments, numbers (1) and (2) (i.e., that the regulation "promotes the public's interest") as well as (4) (i.e., that the regulation provides uniformity within the agency) obviously relate to section 2413.2(e) of the Council's illustrative criteria (note 19 supra). This section concerns establishing uniformity for a substantial segment of the employees in an agency or primary national subdivision "where this is essential to the effectuation of the public interest." [Emphasis added.]

The Council explained the intended meaning of the compelling need provisions of the Order and the illustrative criteria for determining compelling need in the consolidated National Guard cases, as follows:^{20/}

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

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

Thus, essentiality, as distinguished from merely helpfulness or desirability, is the key to the meaning of the criteria.

In the instant case, even assuming the "public interest" includes the matters referred to in agency arguments (1), (2) and (4), the agency fails to assert that the regulatory provision in question is "essential" to effectuating such public interest. That is, even if the regulatory provision promotes or provides for the effectuation of the public interest as the agency contends, merely "promoting" or "providing for" such interest

^{20/} National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 11-12.

could encompass being in effect only helpful or desirable as contrasted with critical or essential to the effectuation of that interest.

In any event, the record does not support a finding that the regulatory provision in question, establishing an agency-wide minimum area of consideration for certain positions, is in fact essential to effectuating the asserted public interest. More particularly, as to agency arguments (1), (2), and (4) (i.e., the need for the regulation to bar negotiations on paragraph (a) of the proposal in order to assure that employment opportunities are open on a nondiscriminatory basis, to prevent "inbreeding," and to provide for uniform employment opportunities for agency employees in and out of the INS), paragraph (a) of the proposal would not foreclose any person from seeking any employment opportunity in the bargaining unit. Paragraph (a) merely would require that the minimum area of consideration, i.e., the area of "intensive search for eligible candidates,"^{21/} would not be expanded if it yields three or more eligible, highly qualified candidates. Thus, the proposal is concerned only with limiting the area of such intensive search: It would not in any manner bar agency employees from outside the minimum area of consideration from applying for positions covered by the provision; and, likewise, would not limit management consideration of such applicants.^{22/}

Thus, while the agency regulation in question establishes uniformity for a substantial segment of the employees of the agency, the agency has not demonstrated that such uniformity is essential to the effectuation of the public interest. Accordingly, we find the agency has failed to support its determination that a compelling need exists for the regulation in question under section 2413.2(e) of the rules.

21/ FPM Chapter 335.3-3.a defines "area of consideration" as follows:

(1) Area of consideration means the area in which an agency makes an intensive search for eligible candidates during a specific promotion action. It must at least include the minimum area designated in the promotion plan.

(2) Minimum area of consideration means the area designated by the promotion plan in which the agency should reasonably expect to locate enough highly qualified candidates to fill vacancies in the positions covered by the plan. The agency must include this area in its initial search for candidates.

22/ In this regard FPM Chapter 335.3-3.d.(3) provides in part that:

An agency must allow employees outside the minimum area to submit voluntary applications for specific positions or types of positions. . . . The agency then considers for a vacancy all eligible employees outside the minimum area who have applied for the position in addition to those identified in the minimum area.

As to agency argument (3), that the regulation is necessary to effectuate a mandate of the FPM, it obviously relates to section 2413.2(d) of the illustrative criteria (note 19 supra) which concerns the essentially non-discretionary implementation of a mandate of outside authority. However, apart from other considerations, this agency argument is clearly unpersuasive in light of the Civil Service Commission's determination, previously set forth, that paragraph (a) of the union's proposal is consistent with the FPM provisions on extending the areas of consideration.^{23/} Therefore, we find the agency has not supported its determination that a compelling need exists for its regulation under section 2413.2(d) of the rules.

Accordingly, in summary, the agency has failed to support its determination that a compelling need exists under section 11(a) of the Order and part 2413 of the rules for its regulation to bar negotiations on paragraph (a) of the union's proposal.

Conclusion as to Question 2: Paragraph (b) of the proposal relating to preference for agency personnel over nonagency applicants conflicts with section 12(b)(2) of the Order. Accordingly, the agency determination that paragraph (b) is nonnegotiable was proper and, pursuant to section 2411.28 of the rules, is sustained.

Reasons: As already indicated, the agency determined that paragraph (b) of the disputed proposal conflicts with section 12(b)(2) of the Order. In this regard, the agency contends that the proposal would limit management's reserved rights under that section of the Order to hire, promote, transfer and assign employees. We agree with the agency's position.

Paragraph (b) of the disputed proposal would in effect establish "preference" for agency personnel over nonagency applicants for agency positions in the circumstances to which the proposal applies. The Council recently considered the negotiability of two proposals which similarly would have required management to give preference to individuals within particular categories specified in the proposals, in the Maritime Union case.^{24/} In finding those proposals to be violative of section 12(b)(2) of the Order, the Council stated (at 3):

Rather than calling for the "consideration" of certain criteria in selecting applicants for agency vacancies, the record indicates that

^{23/} We do not reach here the issue of whether the regulation is necessary to assure the maintenance of basic merit principles as the proposal would not prevent the agency from filling a bargaining unit position with an applicant from outside the minimum area of consideration.

^{24/} National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128. ("Hiring preference" for applicants with Coast Guard endorsements; "rehire preference" for those laid off after 90 days of satisfactory employment.)

the proposals would establish "preference" for the categories of job seekers described therein. That is, the proposals would establish a positive requirement that the categories of job seekers described therein be hired or rehired ahead of any other job seekers. Thus, the language of the proposals, through the use of the phrases "hiring preference" and "rehire preference" clearly would interfere, under the circumstances to which it applies, with management's authority to decide upon the selection of an individual once a decision had been made to fill a position through the hiring process. The proposals would deprive the selecting official of the required discretion inherent in making such a decision. [Footnote omitted.]

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

Proposal XII

5-3.A.6. Return from Overseas Tour. Employees selected for overseas positions under this or preceding [sic] plans shall be reassigned to the Continental United States after the completion of an overseas assignment that will not exceed three years.

Agency Determination

The agency determined that the proposal is nonnegotiable because it violates section 12(b)(2) and (5) of the Order and is excepted from the obligation to bargain by section 11(b).

Question Here Before the Council

Whether the proposal is nonnegotiable under section 12(b)(2) of the Order.^{25/}

^{25/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

Opinion

Conclusion: The proposal conflicts with management's reserved right to place and retain employees in positions within the agency under section 12(b)(2) of the Order. Thus, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: We have already discussed in detail the meaning and application of section 12(b)(2), in connection with Proposal VII. It is sufficient here to reiterate that section 12(b)(2) of the Order, reserves to management decision and action authority to hire, promote, transfer, assign, and retain employees in positions within the agency; and such authority may not be infringed by a negotiated agreement.

The instant proposal, however, would require, without exception, that an employee assigned to an overseas post be returned to the United States after a maximum tour of 3 years. Thus, the agency could not retain an employee in an overseas post beyond the 3-year limitation imposed by the proposal, notwithstanding exigencies such as, e.g., the need for an employee's special skills there, the unavailability of a fully qualified replacement, or any other circumstances which might cause the agency to decide to retain the employee at an overseas post beyond a 3-year period.

Consequently, the proposal imposes a limitation on the timing of management's action pursuant to its reserved decision and action authority under section 12(b)(2), which limitation in our view would so circumscribe as to deny that right. The authority reserved to management under section 12(b)(2) necessarily encompasses the timing of the decision and action involved.^{26/}

Accordingly, the proposal is violative of section 12(b)(2) of the Order,^{27/} and is nonnegotiable.

Proposal XIII

8-2. Preparation of Selection List. After the best qualified candidates for promotion for a specific vacancy have been identified, the personnel office will prepare a selection list which contains:

^{26/} NFFE Local 1555 and Tobacco Division, AMS, USDA, FLRC No. 74A-32 (Feb. 21, 1975), Report No. 64, at 3 of decision.

^{27/} Cf. Association of Academy Instructors, Inc., and Department of Transportation, Federal Aviation Administration, FAA Academy, Aeronautical Center, Oklahoma City, Oklahoma, FLRC No. 75A-85 (Apr. 12, 1976), Report No. 103.

- A. The name of the two highest ranking applicants for promotion who meet the requirements for the position and the names of the two top candidates who request demotion, if any.
- B. For Officer Corps Positions:
1. The name of the two senior candidates from among the top three candidates who requested reassignment. Seniority for this section is defined as the total accumulative time in the activity (occupation) in which the vacancy exists.
 2. In those instances where there is only one eligible candidate for promotion, the selection certificate may include the names of the top two candidates who apply for reassignment and the selection may be made from among them.
 3. In those instances where there are no eligible candidates for promotion, the selection certificate may include the names of the top three candidates who apply for reassignment and the selection may be made from among them.
- C. For Nonofficer Corps Positions: - The names of the three highest ranking candidates who have requested reassignment.
- D. For each additional vacancy, one name will be added to category (1), (2), and (3) above.
- E. In all cases, the selection must be from the top two candidates for promotion or the candidates for reassignment or for demotion.
- F. Ties will be broken when eligibles have identical promotion scores on the basis of time in grade and, if still tied, on the basis of total time in the Service.

Agency Determination

The agency determined that the proposal is nonnegotiable principally because it violates provisions contained in subchapter 3 of FPM chapter 335.

Question Here Before the Council

Whether the proposal conflicts with provisions of the FPM ^{28/}

^{28/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the proposal.

Opinion

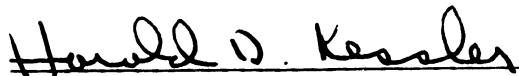
Conclusion: The proposal conflicts with FPM chapter 335. Accordingly, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Since the Civil Service Commission has primary responsibility for issuance and interpretation of its own directives, including the FPM, that agency was requested in accordance with Council practice for an interpretation of Commission directives as they pertain to the proposal in question. The Commission responded, in pertinent part, as follows:

Parts A, B, C, and D all violate FPM chapter 335 for the same reason as Proposal 1-6.A.4.(b) above [Proposal X, herein]; that is, they provide for referral by source or other category rather than by comparative evaluation of all candidates from all sources covered by the plan. Part E violates Chapter 335 if the intent is that management would be constrained to make a selection. Subchapter 3-7(c) states that selecting officers are not constrained to select someone from the promotion certificate, and requirement 6 of Subchapter 2 mandates that each plan provide for management's right to select or non-select. With regard to Part F, the FPM does not rule out the use of length of service or length of experience as a ranking factor, if after all appropriate evaluation factors measuring quality have been applied, there are identical ratings among candidates. However, this provision appears to apply to the competition among candidates from a given source, and as indicated above, Chapter 335 mandates a comparative evaluation of all candidates from all sources covered by the promotion plan with one another.

Based on the foregoing interpretation by the Civil Service Commission of its own directives, we find that the disputed proposal conflicts with provisions of the FPM. Accordingly, the agency's determination to that effect is sustained.

By the Council. 29/



Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

29/ The Secretary of Labor did not participate in the Council's consideration of this case insofar as it relates to Proposals X and XI.

American Federation of Government Employees, Local 1862 and Veterans Administration Hospital, Altoona, Pennsylvania. The dispute involved the negotiability under the Order of provisions in the local parties' agreement concerning (1) hours and tours of duty and (2) overtime, both of which the agency determined to be nonnegotiable and disapproved pursuant to section 15 of the Order because they conflicted with sections 11(b) and 12(b) of the Order and with published agency policies.

Council action (August 31, 1977). As to (1), the Council held that the agency had misinterpreted the disputed provision and thereby failed to establish the applicability of its published policies as a bar to negotiation on the provision under section 11(a) of the Order; and, further, that the provision was neither excepted from the agency's bargaining obligation under section 11(b) of the Order, nor violative of section 12(b). Accordingly, the Council found that the agency's determination that this provision was nonnegotiable was improper and, pursuant to section 2411.28 of the Council's rules, set aside the determination. As to (2), the Council held that while the provision was not excepted from the agency's obligation to bargain under section 11(b), nor violative of section 12(b) of the Order, it did conflict with published agency policies as interpreted by the agency. However, the Council held in abeyance its decision as to whether the disputed provision is thereby nonnegotiable, pending submissions by the parties as to the "compelling need" for such policies under section 11(a) of the Order.

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

American Federation of
Government Employees,
Local 1862

(Union)

and

FLRC No. 76A-128

Veterans Administration
Hospital, Altoona, Pennsylvania
(Activity)

DECISION ON NEGOTIABILITY ISSUES

Provision I

Article XVIII. Hours and Tours of Duty

(Does not apply to Physicians and Dentists where prohibited by
MP-5, Part II)

.

Section 4. When an employee desires to change his tour of duty to another established tour within his service and to a position at the same classification and grade level, he will submit his request in writing to the Service Chief. When an opening occurs, these requests will be reviewed. In the event more than one employee is interested, and the employees are generally equal in terms of qualifications, performance and dependability, the senior employee (SCD) will be given the assignment. Exception: Employees attending school normally will be given priority consideration over other candidates. Adequate proof of registration must be submitted to Management each class term.

Section 5. When a service has formally established regular days off for employees who do not work the basic work week, and such days become available, employees may request to be considered for these days off provided that the particular scheduling policy is to continue. The seniority provisions of section 4 above will apply.

Agency Determination

The agency (Veterans Administration) determined that the subject provision, which had been agreed to by the local parties but was disapproved by the agency during the review process under section 15 of the Order, is

nonnegotiable because it conflicts with published agency policies and sections 11(b) and 12(b) of the Order.^{1/}

Question Before the Council

The question is whether the disputed provision is barred from negotiation by reason of either published agency policies or section 11(b) or section 12(b) of the Order.

Opinion

Conclusion: The agency misinterpreted the disputed provision and thereby failed to establish the applicability of its published policies as a bar to negotiation. Likewise, the agency failed to demonstrate that the subject provision is violative of either section 11(b) or section 12(b) of the Order. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2411.28 of the Council's rules, is set aside.

Reasons: The agency construes the disputed provision as making "seniority rather than the professional obligation to the patient the primary consideration for assigning and scheduling" tours of duty and days off for professional nurses. As so interpreted, the provision, according to the agency, violates published agency policies,^{2/} and is thereby nonnegotiable

^{1/} In its determination and statement of position, the agency also challenged the timeliness of the union's negotiability referral and appeal relating to the provisions involved in the present case, because of alleged lack of "diligent prosecution." We cannot agree with the agency's position. While almost 17 months elapsed between the time when the local agreement was approved and when the union requested a negotiability determination, the agreement contained a savings clause attachment (reserving the union's right to pursue a negotiability appeal on these provisions and providing for reopening if the union wins such appeal), and the request for determination was submitted to the agency over 7 months before the termination date of the agreement. Nothing in section 11(c) of the Order or in the Council's rules expressly limits the time for seeking a negotiability determination (the union's appeal to the Council was timely filed after the determination was rendered), and nothing in the record indicates that such referral was rendered moot either by the terms of the agreement or by any related conduct of the parties. Accordingly, the agency's request that the appeal be dismissed for lack of diligence is denied. Cf. AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, 1 FLRC 607 [FLRC No. 73A-47 (Dec. 12, 1973), Report No. 46].

^{2/} The agency relies principally on Department of Medicine and Surgery (DM&S) Supplement to VA Manual MP-5, part II, chapter 7 (issued pursuant to authority in 38 U.S.C. § 4108 (Supp. V, 1975)), which states:

(Continued)

under section 11(a) of the Order.^{3/} The agency further claims that the provision is outside the agency's obligation to bargain on staffing patterns under section 11(b) of the Order,^{4/} and interferes with management's reserved rights under section 12(b)(2), (4), and (5) of the Order.^{5/} We find the agency's contentions to be without merit.

(Continued)

7.04 General Provisions.

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

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

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

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

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

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

5/ Section 12(b)(2), (4), and (5) provides:

[M]anagement officials of the agency retain the right, in accordance with applicable laws and regulations—

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(Continued)

As to the published agency policies, the agency has clearly misinterpreted the disputed provision to which the cited policies allegedly apply. Contrary to the agency's assertion, this provision would not make seniority the "primary consideration" for assigning and scheduling nurses' tours of duty and days off. Instead, as expressly stated in the provision, seniority would apply only if more than one employee is involved and if "the employees are generally equal in terms of qualifications, performance and dependability." Further, as the union emphasized in its appeal, concerning the intent of this provision, "[T]he use of seniority will be utilized only when, all things being equal; qualifications, performance and dependability among those employees who have submitted requests for these assignments, seniority will be the tie breaker."

Since the agency has plainly misconstrued the meaning of the disputed provision, we hold, consistent with established Council precedent, that the agency has failed to demonstrate the applicability of its published policies as a bar to negotiation on the subject provision under section 11 (a) of the Order.^{6/}

Turning to the agency's claims that the provision is nonnegotiable under sections 11(b) and 12(b)(2), (4), and (5) of the Order, the Council recently considered similar contentions by the same agency with regard to an analogous proposal in the VA Hospital, Providence, Rhode Island case.^{7/} For the reasons fully detailed by the Council in its decision in that case, we hold that the disputed provision herein is neither excepted from the agency's bargaining obligation under section 11(b) of the Order,^{8/} nor violative of section 12(b)(2), (4), or (5) of the Order.

(Continued)

.
(4) to maintain the efficiency of the Government operations entrusted to them;

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

6/ See, e.g., Laborers' International Union of North America, Local 1056 and Veterans Administration Hospital, Providence, Rhode Island, FLRC No. 75A-113 (Apr. 21, 1977), Report No. 124, at 2-3 of Council decision. In view of our determination that the agency has not established the applicability of its published policies to the disputed provision, we do not reach the question as to the "compelling need" for these policies.

7/ Id., at 3-6 of Council decision.

8/ Since the disputed provision falls outside the ambit of section 11(b), we do not reach the question as to whether the agency was foreclosed during the section 15 review process from determining such provision to be nonnegotiable. Cf. IAFF Local F-103 and U.S. Army Electronics Command, FLRC No. 76A-19 (Mar. 22, 1977), Report No. 122.

Provision II.

Article XXI. Over-time

(Excludes title 38 Physicians and Dentists)

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

- a. Rosters will be maintained by job categories and service computation dates.
- b. Those employees desiring to be included on the voluntary over-time roster will notify the Service Chief in writing.
- c. When it is determined that over-time will be required, the official assigning the over-time will begin by contacting the most senior (SCD) employees on the voluntary list, and will continue this procedure in descending order (SCD), until the over-time is assigned.
- d. In the event the voluntary procedure does not satisfy the over-time requirements, the official will then assign the over-time to the remaining non-volunteer employees beginning with the least senior (SCD) and continue in ascending order until the over-time requirement is satisfied.
- e. For purposes of this article, when an employee on the voluntary list is given the opportunity to work over-time and does not wish to do so, he will be considered to have worked the over-time for "equitable distribution purposes."

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

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

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

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

Agency Determination

The agency determined that this provision, which had been agreed to by the local parties but was disapproved by the agency during the review process under section 15 of the Order, is nonnegotiable because it conflicts with published agency policies and sections 11(b) and 12(b) of the Order.

Questions Before the Council

A. Whether the disputed provision conflicts with published agency policies, as interpreted by the agency, or is barred from negotiation by section 11(b) or section 12(b) of the Order.

B. If the provision conflicts with published agency policies, as interpreted by the agency, whether the "compelling need" requirements in section 11(a) are applicable to and are met by these published agency policies, so that negotiation is barred on the disputed provision.

Conclusion as to Question A: While the subject provision is negotiable under sections 11(b) and 12(b) of the Order, it conflicts with published agency policies as interpreted by the agency with respect to that provision.

Reasons: As with Provision I, the agency construes the disputed provision as making "seniority rather than the professional obligation to the patient the primary consideration for assigning and scheduling nurses' . . . overtime." Based on this interpretation, the agency determined the provision violates published agency policies^{9/} and is thereby nonnegotiable under section 11(a) of the Order. The agency similarly asserts that the provision is outside the agency's obligation to bargain under section 11(b) and violates management's rights under section 12(b)(2), (4), and (5) of the Order. We shall consider these contentions separately below.

Turning first, for convenience, to the agency's reliance on sections 11(b) and 12(b) of the Order, the disputed provision by its clear terms is concerned solely with the procedures and criteria for the assignment of individual employees to overtime work within their respective job categories. As the Council has previously indicated, such a provision is not excepted from an agency's obligation to bargain under section 11(b), nor violative of section 12(b)(2), (4), or (5), of the Order.^{10/} Accordingly, we reject the agency's claim that the disputed provision is nonnegotiable under section 11(b)^{11/} or 12(b) of the Order.

^{9/} See n. 2, supra.

^{10/} See, e.g., National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, FLRC No. 76A-28 (Apr. 7, 1977), Report No. 123, at 8-12 of Council decision.

^{11/} See n. 8, supra.

As to the agency's reliance on published agency policies, we agree, contrary to the union's position, with the agency's interpretation of the subject provision of the local parties' agreement, and we therefore uphold the agency's determination insofar as the agency finds that the provision violates its published policies. Under the express language of Provision II, unlike Provision I discussed supra, seniority would be a primary consideration in effecting the assignment of individual nurses to overtime work, as claimed by the agency. More particularly, the selection of individual nurses for overtime assignments under Provision II would be based principally upon the seniority of the nurse involved and, unlike the assignment of tours of duty and days off in Provision I, no consideration would be accorded such factors as equality in qualifications, performance and dependability. The agency's further interpretation of its own published policies as precluding such a provision is, of course, binding on the Council in a negotiability dispute, under section 11 (c)(3) of the Order.^{12/} Consequently, we find that the disputed provision violates the published agency policies cited by the agency.

There remains for consideration, then, the next question (Question B), namely, whether the "compelling need" provisions in section 11(a) are applicable to and are satisfied by the published agency policies, so that negotiation on the disputed provision is barred under section 11(a) of the Order.

Conclusion as to Question B: Under section 11(a) of the Order, as amended by E.O. 11838, published agency policies, as interpreted by the agency, may serve as a bar to negotiation on a proposal only if they satisfy the "compelling need" provisions of the amended Order.^{13/} While the union in its request for a negotiability determination in effect questioned the "compelling need" for the published agency policies here relied upon by the agency, the agency failed to address this question either in its negotiability determination or statement of position, assertedly because the "compelling need" provisions are inapplicable to the dispute. We find that the "compelling need" provisions of section 11(a) of the amended Order are applicable in the instant case. However, since the agency erroneously failed to address the critical question of "compelling need" and since the record is inadequate upon which to base a finding on the matter, the disposition of the negotiability dispute concerning Provision II is held in abeyance, pending timely submissions by the agency and the union with respect to the "compelling need" question.

^{12/} Section 11(c)(3) provides that: "An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final."

^{13/} The pertinent amendments to the Order became effective on Dec. 23, 1975, following the issuance of the Council's "compelling need" criteria (5 CFR part 2413), in conformity with the provisions of E.O. 11838 (Labor-Management Relations in the Federal Service (1975), at 24). The published agency policies must also satisfy the "level of issuance" provisions in section 11 (a), as amended, in order to serve as a bar to negotiations; however, these provisions are not in question in the present case.

Reasons: The local agreement was approved, with a savings clause attachment reserving the union's right to pursue a negotiability appeal on the disputed provision here involved, in March 1975,^{14/} before the effective date of the "compelling need" provisions in the present Order. However, the union's request for a negotiability determination was submitted to the agency in August 1976, after the effective date of these amendments, and, in its submission, the union requested an exception to any regulations relied upon by the agency in determining nonnegotiability, in conformity with rules adopted by the Council under the amended Order (5 CFR 2411.22 (b)).

As already indicated, the agency determined that Provision II violated published agency policies, as interpreted by the agency, which finding we have upheld; but the agency failed to address the "compelling need" for these regulations. Instead, the agency argued that the "compelling need" amendments are inapplicable to the dispute, because the local agreement and savings clause were entered into before the effective date of these amendments. We cannot agree with the agency's position.

The request for a negotiability determination was submitted to the agency under the amended Order, and the operative law, at that time, was clearly E.O. 11491, as presently amended. Therefore, as now provided in section 11 (a) of the Order, the published agency policies relied upon by the agency may serve as a bar to negotiation of the disputed provision only if they are policies "for which a compelling need exists under criteria established by the [Council] and which are issued at the agency headquarters level or at the level of a primary national subdivision."

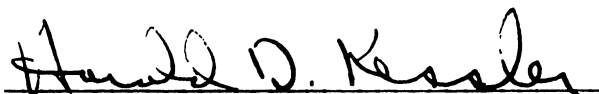
Accordingly, since the agency failed to address this critical question in its determination or statement of position, and since the present record is insufficient upon which to predicate a finding by the Council as to the "compelling need" for the cited published agency policies, we shall hold in abeyance the decision as to "compelling need" and as to the negotiability of Provision II, pending the submission by the agency of its position on "compelling need" and pending the response by the union to the agency's position. More specifically in this regard, the agency is granted 15 days from the date of the instant decision to file its statement of position as to the "compelling need" for the published agency policies found to have been violated by Provision II, along with a statement of service of such position on the union. Additionally, the union is granted 15 days from the date of such service by the agency to file any response thereto which it desires, together with a statement of service on the agency.^{15/}

^{14/} See n. 1, supra.

^{15/} Cf. Association of Civilian Technicians, Inc., and State of New York National Guard, 1 FLRC 513 [FLRC No. 72A-47 (Aug. 13, 1973), Report No. 43].

In summary, we find that Provision I (Sections 4 and 5 of Article XVIII of the local parties' agreement) is negotiable.^{16/} We further find that Provision II (Article XXI of the local parties' agreement) is violative of published agency policies; however, we shall hold in abeyance our decision as to whether the disputed provision is thereby nonnegotiable, pending submissions by the parties as to the "compelling need" for such policies under section 11(a) of the Order.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

16/ This decision should not be construed as expressing or implying any opinion of the Council as to the merits of Sections 4 and 5 of Article XVIII. We decide only that, in the circumstances presented, such provision was properly subject to negotiation by the parties concerned under section 11(a) of the Order.

National Treasury Employees Union and Internal Revenue Service. The dispute involved the negotiability of a union proposal which would permit an employee to grieve "the grade level assigned to a case" under management guidelines for supervisory assessment as to the level of difficulty of a particular work assignment.

Council action (August 31, 1977). The Council found that the facts and circumstances in the instant case were materially indistinguishable from those before it in FLRC No. 76A-132, Report No. 133. Based on its discussion and analysis in its decision in that case, the Council held that the union's proposal in the present case was outside the bargaining obligation established by section 11(a) of the Order, and that the agency's determination that the proposal was nonnegotiable was therefore proper. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination.

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

National Treasury Employees
Union

(Union)

and

FLRC No. 76A-157

Internal Revenue Service
(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

An employee who disagrees with the grade level assigned to a case may file a grievance pursuant to Article 35 of the Multi-District Agreement.^{1/} [Footnote added.]

Agency Determination

The agency determined that the proposal is nonnegotiable because it conflicts with section 12(b)(5) of the Order; is excepted from the agency's bargaining obligation by section 11(b) of the Order; or concerns matters outside the bargaining obligation established by section 11(a) of the Order.

Question Here Before the Council

The question is whether, under the facts and circumstances of this case, the proposal is nonnegotiable because it is outside the bargaining obligation established by section 11(a) of the Order.^{2/}

^{1/} Article 35 of the current multi-district agreement between the parties sets forth the procedures "for the disposition and processing of grievances which may arise from time to time as a result of the interpretation and/or application of the terms of this Agreement." Under the procedure, if no decision satisfactory to the grievant is rendered by the fourth step, binding arbitration may be invoked by the union.

^{2/} In view of our decision herein, it is unnecessary to consider the remaining agency contentions concerning the negotiability of the proposal.

Opinion

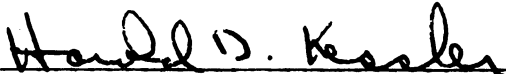
Conclusion: The proposal is outside the bargaining obligation established by section 11(a) of the Order. Therefore, the agency's determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, must be sustained.

Reasons: The facts and circumstances in the instant case are materially indistinguishable from those before the Council in National Treasury Employees Union and Internal Revenue Service, FLRC No. 76A-132 (Aug. 17, 1977), Report No. 133. In the cited case, as here, the disputed proposal would permit an employee to grieve "the grade level assigned to a case" under management guidelines for supervisory assessment as to the level of difficulty of a particular work assignment.

While the proposal in the instant case is concerned with work assignments made to Estate and Gift Tax Attorneys who are employed in District Offices of the activity, whereas FLRC No. 76A-132 was concerned with Appellate Appeals Officers in Regional Offices, and while the subject guidelines differ somewhat from each other, these differences are without controlling significance. The guidelines in both cases function to provide supervisors with a uniform method for assessing the level of difficulty of individual cases before assigning them to employees.

Accordingly, since the facts and circumstances herein are essentially identical to those before the Council in FLRC No. 76A-132, based on the discussion and analysis in that decision, we find that the union's proposal in the present case does not involve personnel policies and practices or matters affecting working conditions and, hence, falls outside the required scope of bargaining under section 11(a) of the Order. Therefore, the activity is under no obligation to bargain upon it.^{3/}

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

^{3/} As stated in FLRC No. 76A-132, the impact of such assessments of the level of difficulty of work assignments on personnel policies and practices and matters affecting working conditions within the bargaining unit would, of course, be a proper matter for bargaining under section 11(a) of the Order.

National Council of B.I.A. Educators, National Education Association and Department of the Interior, Bureau of Indian Affairs, Navajo Area Office.
The dispute involved the negotiability of union proposals related to (1) student-teacher ratio; (2) teacher aide-teacher ratio; (3) discipline of students; and (4) discipline of employees.

Council action (August 31, 1977). As to (1) and (2), the Council held that the union's proposals were excepted from the agency's obligation to bargain by section 11(b) of the Order. With regard to (3), the Council ruled that the proposal conflicted with section 12(b)(5) of the Order. Finally, as to (4), the Council held that the proposal violated section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination that the union's proposals were nonnegotiable.

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

National Council of B.I.A.
Educators, National Education
Association

(Union)

and

FLRC No. 77A-9

Department of the Interior,
Bureau of Indian Affairs,
Navajo Area Office

(Activity)

DECISION ON NEGOTIABILITY ISSUES

Proposals I-II^{1/}

Proposal I:

The teacher ratio of pupil to student [sic] in Navajo Area shall be no greater than one teacher per 12 students or in such cases where no student is bilingual the ratio shall be no greater than one teacher to 20 students.

Proposal II:

Each teacher entitled to an aide in Navajo Area will be given such service on a ratio of one aide per 17 students or major fraction thereof.

Agency Determination

The agency determined that the proposals are nonnegotiable because they restrict the agency's decisions concerning its staffing patterns and therefore are excepted from the obligation to bargain by section 11(b) of the Order. It further determined that the proposals interfere with management's reserved rights under section 12(b)(5) to determine the "means" and "personnel" by which agency operations will be conducted.

Question Here Before the Council

The question is whether the proposals are excepted from the agency's obligation to bargain by section 11(b) of the Order.^{2/}

^{1/} The proposals are considered together for convenience of decision since essentially the same issues and contentions are involved.

^{2/} In view of our decision that the proposals are essentially concerned with the agency's staffing patterns, the agency's additional contention with regard to section 12(b)(5) is inapposite and need not be further considered.

Opinion

Conclusion: The proposals concern matters with respect to the agency's staffing patterns and are excepted from the obligation to bargain by section 11(b) of the Order. Thus, the agency determination that the proposals are nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 11(b) of the Order provides in relevant part:

[T]he obligation to meet and confer does not include matters with respect to the . . . [agency's] organization . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty [Emphasis added.]

The Council frequently has noted that "the underscored provision of section 11(b) quoted above was intended to clarify the right of an agency to establish staffing patterns for its organization and for accomplishing its mission."^{3/} Consequently, in deciding cases under this provision of section 11(b), the Council has consistently held that a proposal is excepted from the agency's obligation to bargain by section 11(b) if, in the circumstances of a particular case, such proposal is integrally related to and consequently determinative of the staffing patterns of the agency, that is, the numbers, types and/or grades of positions or employees assigned to an organizational unit, work project or tour of duty.^{4/}

In the instant case, the disputed proposals I and II expressly concern the numbers of positions or employees assigned by agency management to organizational units, work projects or tours of duty. Each proposal would require a particular ratio to be observed by management in assigning, respectively, pupils to teachers and teacher aides to teachers. It is clear that such mandatory numerical criteria would automatically determine both the number of classroom teachers and the number of teacher aides which the agency would be required to assign to positions within the agency.^{5/}

Accordingly, we find that these two union proposals are integrally related to and consequently determinative of the numbers of positions or employees assigned to an organizational unit, work project or tour of duty, i.e., the agency's staffing patterns. Therefore, the proposals are excepted from the agency's obligation to bargain by section 11(b) of the Order.

^{3/} NAGE Local R12-183 and McClellan Air Force Base, California, FLRC No. 75A-81 (June 23, 1976), Report No. 107, at 2-3 of Council decision. See also Labor-Management Relations in the Federal Service (1975), at 70.

^{4/} See, e.g., NAGE Local R12-183 and McClellan Air Force Base, California, FLRC No. 75A-81 (June 23, 1976), Report No. 107, at 3 of Council decision.

^{5/} See AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, 2 FLRC 207, 211-12 [FLRC No. 73A-25 (Sept. 30, 1974), Report No. 57].

Proposal III

No student will be disciplined in Navajo Area without due process as accorded by Federal Law. Secondary students will be disciplined as recommended in the Students Guide Handbook for each disciplinary procedure or when secondary students are involved in discipline problems at elementary (K-12) installations the following policy should apply.

- Student's first offense -- Counseling by teacher making rule broken explicit.
- Student's second offense -- Teacher decision of proper punishment to fit the crime. Use of paddle included if witnessed by another professional educator. Parent informed if paddled.
- Student's third offense -- Teacher, counselor, student, parent conference.
- Decision after conference -- dismiss from school reinstate with considered provisions, probation, etc.

All teachers who resort to discipline by use of paddle will keep a record of events that led up to paddling — name of witness — date and counseling used prior to paddling.

Agency Determination

The agency determined that the proposal is nonnegotiable because it involves the methods by which school operations are to be conducted and hence violates section 12(b)(5) of the Order. It further determined that the proposal involves the "technology" of operating the school program and hence is excepted from the obligation to bargain under section 11(b).

Question Here Before the Council

The question is whether the proposal is nonnegotiable under section 12(b)(5) of the Order.^{6/}

Opinion

Conclusion: The proposal interferes with management's right to determine the methods by which agency operations are to be conducted and thus conflicts with section 12(b)(5) of the Order. Therefore, the agency determination that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

^{6/} In view of our decision herein, we find it unnecessary to consider the agency's remaining contention concerning the negotiability of the proposal.

Reasons: Section 12(b)(5) of the Order provides:

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

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

.
(5) to determine the methods . . . by which [agency] operations are to be conducted

The Council's Tidewater decision^{7/} sets forth the principles which are dispositive of the instant dispute. In that case the Council examined "the precise scope of the right reserved to management under section 12(b)(5)" and explained the meaning of the term "methods" as used in that section of the Order, as follows (at 436):

The term "methods," as used in the Order, means the procedures, processes, ways, techniques, modes, manners, and systems by which operations are to be conducted—in short, how operations are to be conducted.

Further, in the Tidewater decision, the Council emphasized that the rights reserved to management by section 12(b) of the Order, are mandatory.^{8/}

In the instant case, the proposal at issue is explicitly concerned with establishing procedures, processes, or techniques, i.e., the methods that will be used by agency personnel to discipline students. In other words, the proposal expressly would dictate how agency employees engaged in carrying out the agency's Indian school operations could administer discipline to students being taught in those schools. It is obvious that the system of student discipline is an integral component of this agency's overall plan or determination of how to conduct its operations in providing and managing the schools involved. Therefore, since the proposal would mandate specific methods of student discipline, it thereby interferes with management's reserved right under section 12(b)(5) of the Order to determine the

7/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

8/ Id. at 435-6, citing Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 232 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

methods by which the agency's Indian school operations are to be conducted. Accordingly, we find the union's proposal nonnegotiable.^{9/}

Proposal IV

Teachers who are asked to supervise more than one class at one time may decline that request without penalty, or adverse action, or reprisal from management.

Agency Determination

The agency determined the proposal to be nonnegotiable on the ground that it violates section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether the proposal violates section 12(b)(2) of the Order.

Opinion

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

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

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

.

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

.

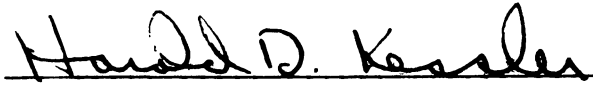
(2) to . . . suspend, demote, discharge, or take other disciplinary action against employees

^{9/} Our decision should not be construed, of course, as rendering nonnegotiable a proposal (not here involved) setting forth health and safety standards for unit employees. Cf. National Treasury Employees Union Chapter No. 1010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98, at 5 of Council decision and AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), 1 FLRC 71, 74 [FLRC No. 70A-10 (Apr. 15, 1971), Report No. 6].

The authority reserved to management under section 12(b)(2) to take the personnel actions enumerated therein is mandatory and may not be relinquished or diluted.^{10/} The union's proposal in dispute here, by its plain language, would negate the authority reserved to management by section 12(b)(2) to take disciplinary action against agency employees in a particular situation. That is, the proposal explicitly prohibits management's taking any disciplinary action against an employee who refuses to obey, for whatever reason, a direct management request to supervise more than one class at one time. Such a negation of management's right to take any suitable disciplinary action under the circumstances involved is plainly at odds with the mandatory nature of section 12(b)(2) of the Order and conflicts with that section's express reservation to management officials of authority to discipline agency employees.

Accordingly, we find that the union's proposal violates section 12(b)(2) of the Order and is nonnegotiable.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

10/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 232 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

National Treasury Employees Union and Internal Revenue Service. The dispute involved the negotiability of a union proposal related to "details" of employees to lower graded positions within the agency, and, subject to certain qualifications, would require that such details be confined by the agency to an "absolute minimum."

Council action (August 31, 1977). The Council held that the union's proposal was violative of section 12(b)(2) of the Order, and that the agency's determination that the proposal was nonnegotiable was therefore proper. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency's determination.

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

National Treasury Employees Union

(Union)

and

FLRC No. 77A-12

Internal Revenue Service

(Agency)

DECISION ON NEGOTIABILITY ISSUE

Proposal

The disputed proposal (Article 8, Section 2) reads as follows:

The detailing of personnel to lower graded positions is considered to be inconsistent with sound planning and management and will be kept to an absolute minimum. However, the Employer may use details under the following circumstances:

- A. When a temporary shortage of personnel exists;
- B. where an exceptional volume of work suddenly develops and seriously interrupts the work schedule;
- C. to fill temporarily the positions of employees on extended leave with or without pay; or
- D. other conditions of a special and temporary nature.

Agency Determination

The agency determined that the proposal is nonnegotiable by reason of sections 12(b)(1), (2), and (5) and 11(b) of the Order.

Question Here Before the Council

Whether the proposal is violative of section 12(b)(2) of the Order.^{1/}

^{1/} In view of our decision herein, it is unnecessary to consider the remaining contentions of the agency concerning the negotiability of the disputed proposal.

Opinion

Conclusion: The proposal conflicts with management's reserved right under section 12(b)(2) of the Order to assign employees in positions within the agency. Accordingly, the agency's determination as to the nonnegotiability of the proposal was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b)(2) of the Order reserves to management the right, among others, to "assign . . . employees in positions within the agency." As the Council has stated with respect to such right:^{2/}

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

The disputed proposal in the present case relates to "details" of employees to lower graded positions within the agency, and, subject to certain qualifications, would require that such details be confined by the agency to an "absolute minimum." The agency asserts in substance that the proposal violates its 12(b)(2) right to make "assignments" and is therefore nonnegotiable. We agree with the position of the agency.

The Council has previously ruled that details constitute "assignments" of employees to agency positions within the meaning of section 12(b)(2);^{3/} and, as already indicated, that the right of the agency to effect such assignments cannot be interfered with under the Order. Here, the union's proposal would plainly constrict management in the exercise of its right to make assignments of employees to agency positions since these assignments would be essentially prohibited if they exceed the "minimum" limitations established by the subject provision. Contrary to the

^{2/} Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, 230 [FLRC No. 71A-31 (Nov. 22, 1972), Report No. 31].

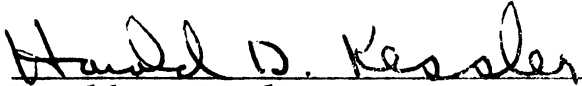
^{3/} See Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157 [FLRC No. 73A-16 (July 31, 1974), Report No. 55], in which the Council stated (at n. 5):

"Temporary assignments" or "details" are, in the context of section 12(b)(2) of the Order, the same personnel action, i.e., assignments. Nothing in the Order indicates that the reservation of authority by section 12(b)(2), except as may be provided by applicable laws or regulations, is in any way dependent upon the intended duration of the particular personnel action involved.

union's argument, such constriction is obviously not a mere procedure for handling details, but reflects a constraint on management's right to decide and act on assignments beyond the express limits set forth in the proposal.^{4/}

Accordingly, we find that the union's proposal is violative of section 12 (b)(2) of the Order and is thereby nonnegotiable.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

^{4/} Id. at 162. It is without controlling significance even if, as claimed by the union, the proposal mirrors a published agency policy on details (Policies of the Internal Revenue Service, Chapter 1800). See AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma, FLRC No. 76A-96 (July 13, 1977), Report No. 131, at 3 of Council decision. It is likewise not dispositive that the proposal may have been contained in prior agreements between the parties. See, e.g., National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, FLRC No. 76A-79 (June 21, 1977), Report No. 128, at n. 2 of Council decision. And while the union claims that the proposal, in effect, is largely hortatory, and therefore not constrictive of management's rights, such contention is unsupported by the express language of the proposal and is without merit. Cf. National Treasury Employees Union and Internal Revenue Service, FLRC No. 76A-132 (Aug. 17, 1977), Report No. 133.

Department of the Army, U.S. Army, Aberdeen Proving Ground, Maryland and International Association of Machinists and Aerospace Workers, AFL-CIO Lodge 2424 (Gottlieb, Arbitrator). This appeal arose from the arbitrator's award wherein he directed (a) that a certain employee temporarily cease to act as "Acting Section Chief" and (b) that the activity "arrange to consult" with the union on both the duties of the Acting Section Chief and the procedures for informing Section employees of the assignment of an Acting Chief. The Council accepted the agency's petition for review of the arbitrator's award, insofar as it related to the agency's exception which alleged that the award violated section 12(b)(2) of the Order; and granted the agency's request for a stay of the award (Report No. 126).

Council action (August 31, 1977). The Council held, in essence, that that part of the arbitrator's award which directed that the employee involved temporarily cease to act as Acting Section Chief violated section 12(b)(2) of the Order. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award by striking the portion thereof found violative of the Order. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

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

Department of the Army, U.S. Army,
Aberdeen Proving Ground, Maryland

and

FLRC No. 77A-27

International Association of Machinists
and Aerospace Workers, AFL-CIO, Lodge 2424

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award wherein the arbitrator directed (a) that a certain employee temporarily cease to act as "Acting Section Chief" and (b) that the activity "arrange to consult" with the union on both the duties of the Acting Section Chief and the procedures for informing Section employees of the assignment of an Acting Chief.

According to the award, the supervisor of the activity's Material Classification Section (Section) issued to Section employees a notice stating that, in his absence, the Section's working leader would "serve as Acting Chief" The union thereupon filed a grievance alleging, among other things, that the activity had violated Article XXXVII, Section 6, of the parties' negotiated agreement.^{1/}

1/ Article XXXVII, Section 6, is set forth by the arbitrator as follows:

Section 6. Unit employees shall be assigned to one immediate supervisor. This designated supervisor shall be responsible for approving leave, marking performance ratings, initiating disciplinary actions, and assigning and directing work. It is recognized by both parties that on occasions employees will be assigned on a temporary basis to other supervisors who will assign and direct work. In this connection, it is the purpose of this Section to establish a work situation whereby an employee will be advised of who his supervisor is at all times and will only be required to take direction and assignments from the designated supervisor. It is further recognized that on occasion the employee's immediate designated supervisor's supervisors may have to direct and assign the employee. In such cases, the employee will take such direction and will not be subject to discipline because he disregarded his immediate supervisor's direction.

The Arbitrator's Award

The arbitrator determined that the assignment of the Section's working leader to serve as Acting Chief "should only have taken place after consultation with the Union as intended by Articles III, IV, VI, and VII of the Negotiated Agreement."^{2/} He then sustained that part of the grievance

2/ The arbitrator sets forth only Article III, which he terms "specially pertinent." Article III provides as follows:

Section 1. Matters appropriate for consultation or negotiation between the parties are policies, programs and procedures related to working conditions which are within the discretion of the Employer. These matters include but are not limited to such matters as safety, training, labor management cooperation, employee services, methods of adjusting grievances and appeals, leave, promotion plans, demotion practices, pay practices, reduction-in-force practices, hours of work, and appropriate arrangements for employees affected by the impact of realignment of work forces or technological change.

Section 2. For purposes of this Agreement, consultation is defined as mutual discussion of policies, programs, and procedures related to working conditions of members of the Unit which are within the discretion of the Employer, in an effort to reach mutual understanding or agreements. It is further agreed that, except where compelling circumstances prevent, such consultation shall occur before decisions are reached.

Section 3. Either party desiring or having a requirement to consult with the other, shall give advance oral or written notice to the other party. Such notice shall include a statement of the subject matter to be discussed and the problem which generated the cause for discussion. Upon request by either party such meetings will take place without undue delay.

Section 4. It is recognized that certain matters involving working conditions have not been specifically covered in this Agreement, but this does not lessen the responsibility of either party to meet with the other for discussion and exchange of views in an effort to find mutually satisfactory solutions to matter not otherwise covered by this Agreement.

Section 5. The Employer agrees that any benefits, practice or understanding now in effect will not be changed during the life of this Agreement unless such change is agreed to by both parties except for those benefits, practices, and understandings that are contrary to any law, rule, regulation or published policy.

alleging that the activity had violated Article XXXVII, Section 6, and entered his award as follows:

II. That part of the Grievance alleging a violation by the Employer of Article XXXVII, Section 6 is upheld to the extent enumerated below:^{3/}

- A. [The working leader] shall temporarily cease to act as "Acting Chief." In the absence of the Section Chief . . . either [the Chief's] Supervisor or another full time Supervisor shall be designated.
- B. The Employer shall arrange to consult with the Union as to the specific duties and responsibilities of an "Acting Chief," and the procedure whereby Section employees will be informed whenever the Working Leader assumes the position of "Acting Chief."
- C. The Arbitrator shall retain jurisdiction for a period of ninety days following the receipt of this Award by the parties. If at the end of sixty days the consultation has not resulted in agreement, either party may request the assistance of the Arbitrator. If at the end of the ninety day period, and with the assistance of the Arbitrator, the parties have not reached agreement, the Employer may put into effect its delineation of the duties and responsibilities of "Acting Chief" and its proposal for informing employees of when the Working Leader (or any other designated employee) becomes "Acting Chief."

Agency's Appeal to the Council

The agency filed with the Council a petition for review of the arbitrator's award, excepting to the award on the ground, among others, that it violates section 12(b)(2) of the Order. Under section 2411.32 of the Council's rules of procedure, the Council accepted the agency's petition for review insofar as it related to the stated exception.^{4/} Only the union filed a brief.

Opinion

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

An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable

^{3/} Part I of the award, relating to other parts of the grievance before the arbitrator, is not at issue in this matter.

^{4/} The agency also requested, and the Council granted pursuant to section 2411.47(f) of its rules of procedure, a stay of the award pending determination of the appeal.

law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it alleged that the arbitrator's award violates section 12(b)(2) of the Order.^{5/} Part II(A) of the award directs that the Section's working leader "shall temporarily cease to act" as "Acting Section Chief." Thus, the arbitrator has, in effect, negated the activity's assignment of the Section's working leader to the position of Acting Chief of the Section. In this regard, it is well settled under Council precedent that section 12(b)(2) of the Order reserves to agency management the exclusive right to assign employees in positions within the agency.^{6/} This reservation of authority in section 12(b)(2) is in no way dependent upon the intended duration of the particular personnel action involved; thus it applies to short term assignments or details as well as to permanent assignments.^{7/} Accordingly, since rights reserved to agency management by section 12(b) may not be infringed by an arbitrator's award under a negotiated agreement,^{8/} we conclude that part II(A) of the award in this case, which negates the activity's assignment of the Section's working leader to the position of Acting Section Chief, must be set aside.

Parts B and C of the award apparently both stem from the arbitrator's finding that the assignment of the Section's working leader as Acting Chief "should only have taken place after consultation with the Union as intended by . . .

^{5/} Section 12(b)(2) provides, in relevant part, that management officials of the agency retain the right, in accordance with applicable laws and regulations, "to hire, promote, transfer, assign, and retain employees in positions within the agency"

^{6/} E.g., Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157 [FLRC No. 73A-16 (July 31, 1974), Report No. 55]; NFFE Local 1555 and Tobacco Division, AMS, USDA, FLRC No. 74A-32 (Feb. 21, 1975), Report No. 64.

^{7/} Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, 2 FLRC 157 [FLRC No. 73A-16 (July 31, 1974), Report No. 55], n. 5.

^{8/} Community Services Administration, CSA Region V and American Federation of Government Employees (AFL-CIO) for the National Council of OEO Locals, Local #2816 (Sembower, Arbitrator), FLRC No. 75A-120 (Apr. 7, 1977), Report No. 124; National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), 2 FLRC 293 [FLRC No. 73A-67 (Dec. 6, 1974), Report No. 61].

the Negotiated Agreement." Thus, part B directs the activity to "consult with the Union as to the specific duties and responsibilities of an 'Acting Chief'" while part C establishes certain procedures to assist the parties in carrying out their "consultation" until they reach either agreement or impasse (from which it appears that the arbitrator intends the parties to negotiate about the duties of the Acting Chief position).^{9/} In this regard, the Council has consistently held that matters concerning the duties of a given position -- i.e., the "job content" of that position -- fall "not within the ambit of section 12(b), but within the meaning of the phrases agency 'organization' and 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty' in section 11(b) of the Order. [Footnote omitted.]"^{10/} Unless an agency clearly has chosen to negotiate on matters covered by section 11(b), no such obligation can be inferred or required; except that the Council has held that an agency may choose to negotiate about a matter falling within section 11(b) even though it is under no obligation to do so.^{11/} Moreover, when included in a collective bargaining agreement, and when otherwise consistent with law, regulation, and the Order, negotiated provisions relating to the job content of positions may be enforced through arbitration.^{12/} Thus, in cases where, as in the present case, the parties negotiate a provision^{13/} which an arbitrator interprets to find that an agency has negotiated over such matters and requires the agency to meet certain negotiated obligations, the arbitrator's interpretation of the agreement is not subject to challenge before the Council.^{14/}

^{9/} The agency does not specifically address its contentions to part C of the arbitrator's award and it does not appear that the agency takes exception to part C other than insofar as it relates to the arbitrator's direction that the activity "consult with the Union" in part B of his award.

^{10/} IAFF Local F-103 and U.S. Army Electronics Command, FLRC No. 76A-19 (Mar. 22, 1977), Report No. 122 and cases cited therein. Section 11(b) of the Order provides in relevant part:

[T]he obligation to meet and confer does not include matters with respect to the [agency's] organization; . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty

^{11/} International Brotherhood of Electrical Workers, AFL-CIO, Local 640 and Parker-Davis Project Office, Bureau of Reclamation, United States Department of the Interior (Irwin, Arbitrator), FLRC No. 76A-44 (July 12, 1977), Report No. 130.

^{12/} Id. at 5 of the Council's decision.

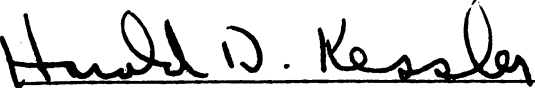
^{13/} See n. 2, supra.

^{14/} NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking part II(A) thereof. As so modified, the award is sustained and the stay of the award is vacated.

By the Council.


Harold D. Kessler
Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

Rocky Mountain Arsenal and American Federation of Government Employees, Local 2197 (Seligson, Arbitrator). The arbitrator upheld the union's grievance concerning a change in previously established environmental differential pay rates at the activity. As his award, the arbitrator directed that those employees whose pay differentials had been reduced were entitled to backpay and reinstatement of their previous rates until mutual agreement was reached between the parties as required by the applicable provision of their agreement. The agency appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on three exceptions, which alleged, respectively, that the award violated (1) appropriate regulation, namely the Federal Personnel Manual (FPM); (2) applicable law; and (3) section 12(a) of the Order, because of its alleged violation of the FPM and an agency regulation.

Council action (August 31, 1977). As to (1) and (2), the Council held that the agency's petition for review did not present facts and circumstances to support its exceptions. As to (3), the Council held that the agency's exception did not state a ground for review. Accordingly, the Council denied the agency's petition for review because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1977

Mr. W. J. Schrader, Chief
Labor & Employee Relations Division
Office of the Deputy Chief of Staff
for Personnel
Department of the Army
Washington, D.C. 20310

Re: Rocky Mountain Arsenal and American Federation of
Government Employees, Local No. 2197 (Seligson,
Arbitrator), FLRC No. 77A-53

Dear Mr. Schrader:

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

According to the award, this case arose when the union filed a grievance charging that the activity had violated the parties' agreement^{1/} by refusing to negotiate prior to reducing the established rate of environmental differential pay (EDP) previously being received by certain unit employees. Although offering to consult on the matter of EDP rates, the activity denied any obligation to negotiate and the grievance proceeded to arbitration.

Noting that "[t]he grievance involves changes in the payment of Environmental Differential Pay (EDP) at the [activity]," the arbitrator stated the issue before him as follows:

1. Were the actions taken by the Management in 1974 regarding environmental differential pay in violation of Article XXXV, Section 4 of the Agreement?
2. If the answer to the above is in the affirmative, what remedy, [if] any, is appropriate?

1/ The provision in dispute, Article XXXV, section 4 of the parties' agreement, is set forth by the arbitrator as follows:

It is further agreed and understood that any prior benefits and practices and [sic] affecting personnel practices and working conditions of members of the Unit which have been mutually acceptable to the parties and which is not specifically covered by this AGREEMENT shall not be changed unless mutually agreed to by the parties.

The arbitrator thus ruled during the hearing that "the evidence to be examined in order to arrive at a resolution of the issue" is:

We have to decide the main question; whether there was a violation of the agreement in the sense that Section 4, Article XXXV was complied with, and that's what we're proceeding on. Were there negotiations which led to a mutually acceptable agreement or were there not? Was there an attempt to arrive at a mutually acceptable agreement?

The arbitrator determined, in effect, that the previous EDP rates did in fact constitute "prior benefits . . . which have been mutually acceptable to the parties" under section 4 of Article XXXV of their agreement and were therefore not to be changed "unless mutually agreed to by the parties." The arbitrator found, however, that such change had taken place and had "resulted in some instances in reducing the previous benefits." The arbitrator further found that "no true negotiations took place during the process of revising [the EDP rates]" and that "[t]he burden for failure to negotiate falls primarily upon management." So finding, the arbitrator upheld the grievance. As his award he directed that those employees whose pay differentials had been reduced were "entitled to back pay and reinstatement of their previous rates until mutual agreement can be reached between management and Union as required by Article XXXV, Section 4."

The agency's petition before the Council takes exception to the arbitrator's award on the basis of the exceptions discussed below. The union did not file an opposition to the petition.

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

In its first exception, the agency contends that the arbitrator's award violates subchapter 8 of Federal Personnel Manual Supplement 532-1, which the agency asserts establishes "certain criteria which must be met before EDP may be authorized" and which further directs management officials "to evaluate work situations to determine whether these criteria are met." Thus, according to the agency, the reduction in EDP rates at the activity resulted from management's "performing the functions directed of it in subchapter S8-7g(2) [of FPM Supplement 532-1]"^{2/} -- that is, from conducting

^{2/} FPM Supplement 532-1, subchapter S8-7g(2) provides in pertinent part:

(2) Each installation or activity must evaluate its situations against the guidelines [for the payment of EDP] in appendix J to determine whether the local situation is covered by one or more of the defined categories.

a management survey in which it was determined that certain "work situations" at the activity did not meet the criteria for EDP set forth by the FPM. The agency asserts that the arbitrator's award permits the parties' agreement to supersede these FPM criteria by requiring "mutual agreement" prior to any revision of EDP rates.

The Council will grant a petition for review of an arbitrator's award when it appears, based upon facts and circumstances described in the petition, that the award violates appropriate regulation. In this case, however, the Council is of the opinion that the agency's petition does not contain a description of facts and circumstances to support its exception. That is, the agency has failed to demonstrate in what manner the arbitrator, in his award, has violated the FPM by interpreting the parties' negotiated agreement and concluding that the activity had agreed to reach "mutual agreement" with the union prior to reducing EDP rates. In this regard, the Council has previously noted that FPM Supplement 532-1, subchapter S8-7 leaves for local determination specific work situations for which an environmental differential is payable and that "FPM Supplement 532-1 provides for the collective bargaining process as one specific means of locally determining whether a particular disputed local work situation warrants payment of an environmental differential."^{3/} Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator), FLRC No. 76A-71 (Jan. 12, 1977), Report No. 121. Thus, since as previously indicated the arbitrator in this case has interpreted the parties' negotiated agreement as requiring negotiations over the payment of EDP, the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances to support its exception that the award violates the FPM.^{4/} Accordingly, the agency's

^{3/} FPM Supplement 532-1, subchapter S8-7g(3) provides as follows:

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above.

^{4/} In addition the agency asserts that the arbitrator's award violates certain agency regulations (Civilian Personnel Circular No. 3). Without passing on whether the cited agency regulation is an appropriate regulation within the meaning of section 2411.32 of the Council's rules (Cf. American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94), it is noted that the agency offers no specification in support of this assertion other than to state that the regulation has been issued "to implement the

(Continued)

first exception does not provide a basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception the agency contends that the award violates applicable law, specifically the Back Pay Act of 1966 (5 U.S.C. § 5596). In support of this exception the agency contends that the arbitrator's award of backpay does not meet the requirements for backpay under the Back Pay Act of 1966 since there is "no unauthorized or unwarranted personnel action" and "there is . . . no showing that 'but for' the alleged violation [of the agreement] different rates would be payable."

The Council will grant a petition for review of an arbitrator's award when it appears, based upon the facts and circumstances described in the petition, that the award violates the Back Pay Act of 1966. See, e.g., Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126. However, in this case the Council is of the opinion that the agency's petition for review does not present facts and circumstances to support its exception that the arbitrator's award violates the Back Pay Act of 1966. In this respect, the Council notes that the Comptroller General has held that in order for an arbitrator's award of backpay to be sustained under the Back Pay Act of 1966 and the implementing regulations thereto, the arbitrator must specifically find that the agency violated the collective bargaining agreement, or find other improper agency action constituting an unjustified or unwarranted personnel action within the meaning of the Act, and that the arbitrator must further specifically find that such improper agency action caused the aggrieved employee to suffer a withdrawal, reduction or denial of pay, allowances, or differentials -- that is, that the withdrawal, reduction or denial

(Continued)

Civil Service Commission regulations [FPM Supplement 532-1] on the payment of EDP." As previously indicated, the agency has not presented facts and circumstances to support its exception that the award in the case violates the FPM. Further, the Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for the exception presented. E.g., Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82.

The agency also asserts that the award violates Comptroller General decision B-179307, January 14, 1975. While the Council will accept a petition for review on the ground that an arbitrator's award violates applicable law and appropriate regulation as interpreted and applied in decisions of the Comptroller General of the United States, in this case the agency offers no support or basis for its assertion. As indicated, the Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for the exception presented.

of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action. See Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO, supra, at 5 of the Council's decision.

In the Council's opinion, the agency has not presented facts and circumstances in its petition to indicate that the award in this case is inconsistent with the Act, the decisions of the Comptroller General interpreting it, or the regulations which implement the Act. In this regard the Council notes that the arbitrator clearly found that the activity's refusal to negotiate with the union prior to reducing certain EDP rates was a violation of Article XXXV, section 4 of the parties' negotiated agreement. Thus the arbitrator found that under the negotiated agreement the activity was obligated to negotiate, and to reach "mutual agreement," with the union before changing the existing EDP rates and in effect that, but for the activity's violation of the agreement, employees would have continued to be paid at the existing EDP rates until "mutual agreement" as to the new rates could be reached. Thus the agency has failed to describe facts and circumstances to support its exception that the arbitrator's award is violative of the Back Pay Act of 1966.^{5/} Therefore, the agency's second exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

As its third exception the agency contends that the arbitrator's award violates section 12(a) of the Order because "[t]he administration of the

^{5/} In denying the agency's exception in this case, the Council notes that the arbitrator specifically found that the employees involved were previously receiving the higher rate of EDP and that the agency's reduction of a "prior benefit" without negotiation was a violation of the negotiated agreement. This situation is thus different from a situation in which an employee has not yet received a particular benefit and, although an arbitrator has found a violation of the negotiated agreement, it cannot be said with certainty that "but for" the violation the employee would definitely have received the benefit. (For example, an arbitrator determines that an employee was denied an opportunity for a promotion in violation of the negotiated agreement but a backpay award may not be implemented because it cannot be said with certainty that had the agreement not been violated the employee would have received the benefit of the promotion. Tooele Army Depot and American Federation of Government Employees, Local 2185, AFL-CIO (Lazar, Arbitrator), FLRC No. 76A-24 (May 18, 1977), Report No. 126.) Further, in denying the agency's exception the Council is aware of the Comptroller General's application of the "but for" test in response to the Council's request for a decision as to matters within his jurisdiction in Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (Mar. 3, 1976), Report No. 100. However, the Council notes that the circumstances of that case involved an agreement provision providing for "oral consultation and . . . the opportunity for an exchange of views" and did not involve, as in the instant case, an arbitrator's finding that the negotiated agreement required the parties to negotiate and reach "mutual agreement" on the issue.

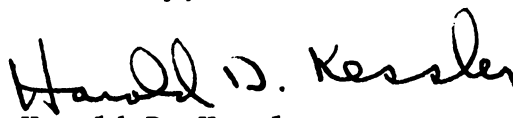
Agreement pertaining to the application of Article XXXV, Section 4, as it applies to the [activity] plan is, according to Section 12(a), E.O. 11491, as amended, governed by the provisions of FPM 532-1, Appendix J as well as CPC 3." Thus the agency appears to be contending that because, in its view, the arbitrator's award violates FPM Supplement 532-1 and the cited agency regulation it also violates section 12(a) of the Order.^{6/}

Apart from our previous determinations that the agency's petition describes no facts and circumstances to support its contention that the arbitrator's award violates appropriate regulation, the Council is of the opinion that the agency's third exception does not state a ground for review. Section 12(a) of the Order provides only that the administration of a negotiated agreement is subject to the legal and regulatory requirements cited in that section; it does not extend to the parties to such an agreement any rights or obligations independent of those requirements and therefore does not, in and of itself, provide a ground upon which the Council will grant a petition for review of an arbitrator's award.^{7/} We thus conclude that the agency's third exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

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

By the Council.

Sincerely,


Harold D. Kessler
Acting Executive Director

cc: K. T. Blaylock, AFGE

6/ Section 12(a) provides as follows:

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

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level[.]

7/ Cf. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96, n. 8.

United States Air Force, McClellan Air Force Base, California, A/SLMR
No. 830. The Assistant Secretary, upon a complaint filed by the American Federation of Government Employees, Local 1857, AFL-CIO, found that the interviews of three bargaining unit employees by the activity's counsel just prior to their appearance as witnesses for a grievant in an arbitration hearing constituted a formal discussion concerning a grievance within the meaning of section 10(e) of the Order, and that the activity violated section 19(a)(6) and (1) of the Order by failing to afford the union an opportunity to be represented at the subject interviews. The agency appealed to the Council, alleging that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (August 31, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1977

Major Nicholas J. Angelides
Litigation Division
Office of the Judge Advocate General
Headquarters, U.S. Air Force
Washington, D.C. 20314

Re: United States Air Force, McClellan
Air Force Base, California, A/SLMR
No. 830, FLRC No. 77A-56

Dear Major Angelides:

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

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, Local 1857, AFL-CIO (the union) filed an unfair labor practice complaint against the United States Air Force, McClellan Air Force Base (the activity). The amended complaint alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order in that its legal counsel questioned three bargaining unit employees just prior to their scheduled appearance as witnesses for a grievant in an arbitration hearing without giving prior notification to the union, the exclusive representative of certain employees, and according it an opportunity to be present at the interviews.

The Assistant Secretary found "that the interviews conducted by [the activity's] counsel . . . constituted a formal discussion concerning a grievance within the meaning of [s]ection 10(e) of the Order,^{1/} to which the [union] was entitled to be afforded the opportunity to be represented." [Footnote in original.] In so concluding, the Assistant Secretary found that the union, as the exclusive representative of the employees in the unit, had a legitimate interest in being represented at the interviews of the unit employees involved which were conducted in connection with

1/ Section 10(e) of the Order states, in pertinent part:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. . . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances

the processing of a pending grievance. In this regard, he stated that "clearly the information discussed could potentially have affected the disposition of the pending grievance." In the Assistant Secretary's view, in the circumstances of the case, including the fact that the witnesses interviewed were those of the grievant, the union's representational responsibility outweighed any impact its presence during the interviews might have had on the activity's preparation of its case for arbitration. Consequently, he found that the activity's failure to afford the union an opportunity to be represented at the subject interviews violated section 19(a)(6) of the Order, and that such failure had the concomitant effect of indicating to unit employees that the activity could bypass their exclusive representative and therefore also violated section 19(a)(1) of the Order.

In your petition for review on behalf of the activity, you allege that the Assistant Secretary's decision presents a major policy issue with respect to: (1) "whether a pre-hearing interview by the management counsel of unit members designated as witnesses for the grievant in an arbitration hearing constitutes a formal discussion of a grievance within the meaning of [s]ection 10(e) of Executive Order 11491, as amended"; and (2) whether the Assistant Secretary's decision contravenes Council precepts with respect to employer-employee communications, "and is not consistent with the private sector privilege of counsel of interrogating employees on the investigation of facts concerning issues to be litigated where this is necessary to the preparation of his defense for the pending hearing, and thereby fails to effectuate the purpose and policy of the Order."

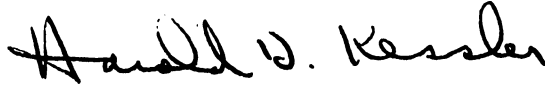
In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious. Thus, your allegation that the Assistant Secretary's decision presents a major policy issue as set forth above constitutes, in essence, nothing more than disagreement with his conclusion that the subject interviews "constituted a formal discussion concerning a grievance within the meaning of section 10(e) of the Order," and therefore provides no basis for Council review, noting particularly that the information discussed could potentially affect the disposition of a pending grievance. Further, your appeal fails to show that the Assistant Secretary's decision was inconsistent either with applicable precedent or the purposes and policies of the Order, as alleged, in the circumstances of the instant case, noting in this latter regard the absence of any evidence that the activity was unable to properly communicate with unit employees.^{2/}

^{2/} In so concluding, the Council does not construe the Assistant Secretary's decision herein as establishing a per se rule that any discussion with a prospective witness during the pendency of a grievance is a "formal" discussion within the meaning of section 10(e) of the Order. Rather, as

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

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

M. G. Blatch
AFGE

(Continued)

previously stated, we decide only that no major policy issue is presented by the Assistant Secretary's finding that the interviews conducted in the circumstances of this case "constituted a formal discussion concerning a grievance within the meaning of section 10(e) of the Order."

Naval Air Rework Facility, Cherry Point, North Carolina, A/SLMR No. 849. The Assistant Secretary, upon a complaint filed by Local Lodge 2297, International Association of Machinists and Aerospace Workers, AFL-CIO, ruled that the proper vehicle for a determination as to the grievability or arbitrability of the union's grievance here involved was under section 13(d) of the Order, and that by refusing to process the grievance and resort to arbitration the activity did not violate section 19(a)(1) and (6) of the Order, as alleged by the union. The union appealed to the Council, contending, in effect, that the Assistant Secretary's decision appeared arbitrary and capricious or presented a major policy issue.

Council action (August 31, 1977). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, it did not appear that the decision of the Assistant Secretary was arbitrary and capricious or that it presented a major policy issue. Accordingly, the Council denied review of the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1977

Mr. Hal Barrett, Jr.
Grand Lodge Representative
International Association of Machinists
and Aerospace Workers, AFL-CIO
3133 Braddock Street
Kettering, Ohio 45420

Re: Naval Air Rework Facility, Cherry
Point, North Carolina, A/SLMR
No. 849, FLRC No. 77A-64

Dear Mr. Barrett:

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

This case arose when the Naval Air Rework Facility, Cherry Point, North Carolina (the activity) took the position and so advised Local Lodge 2297, International Association of Machinists and Aerospace Workers (AFL-CIO) (the union), that management did not consider a grievance over unit work restrictions as appropriate for submission to arbitration or through the negotiated grievance procedure and that it considered the issue not negotiable under section 12(b) of the Order. The union thereafter filed an unfair labor practice complaint alleging, in essence, that the activity had violated section 19(a)(1) and (6) of the Order by its refusal to process the grievance and to pursue arbitration of the dispute between the parties.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge, who, relying on the Assistant Secretary's decision in U.S. Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2649(CA), FLRC No. 75A-82 (Nov. 18, 1975), Report No. 91, concluded, in pertinent part, that the proper vehicle for a determination as to the grievability or arbitrability of the union's grievance lies under section 13(d) of the Order,^{*/} and that by refusing to process the grievance

*/ Section 13(d) of the Order provides:

Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision.

(Continued)

and resort to arbitration the activity did not violate section 19(a)(1) and (6) of the Order. In so ruling, the Assistant Secretary stated that "it is clear that while [s]ection 13(d) permits the parties to a negotiated agreement to agree bilaterally to refer grievability or arbitrability questions to an arbitrator in lieu of the Assistant Secretary, it does not require bilateral agreement as a precondition to a party referring such matter to the Assistant Secretary for decision. See the Report and Recommendations of the Federal Labor Relations Council (1975)."

In your petition for review on behalf of the union, you allege, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or raises a major policy issue. In this regard, you assert that, "Unless the parties specifically agree in the Agreement to submit all threshold questions to the A/SLMR, neither party may unilaterally submit such a question to the A/SLMR if, as is true in the instant case, the Agreement makes the grievance procedure, including arbitration, the vehicle for resolving 'all matters concerning the interpretation or application of the Agreement.'" [Emphasis in original.] You further assert that the activity's refusal to resolve such threshold grievability or arbitrability questions through the negotiated grievance procedure herein constituted bad faith bargaining.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, it does not appear that the decision of the Assistant Secretary is arbitrary and capricious or presents a major policy issue. Thus, as the Council stated in denying review of the Assistant Secretary's decision in U.S. Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, supra: "As to the alleged major policy issue concerning the obligation of the activity to file for a grievability determination, in the Council's view, noting that the 1971 Report and Recommendations on the Amendment of Executive Order 11491 indicated that section 6(a)(5) is intended 'to provide for the resolution of disagreements that may arise between the parties as to whether a matter is grievable or arbitrable under the negotiated procedure,' no major policy issue warranting review is raised by the Assistant Secretary's determination that in the absence of bad faith, grievability and arbitrability questions, such as those involved in your case, are not matters to be resolved under section 19, but rather as grievability and arbitrability questions. See also U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., Assistant Secretary Case No. 22-3617 (CA), FLRC No. 73A-8 (July 23, 1973), Report No. 42."

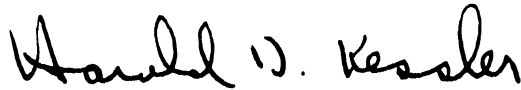
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Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,



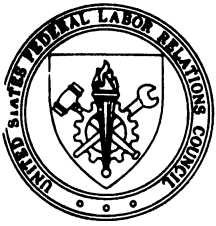
Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

M. Arkin
Navy

Immigration and Naturalization Service, U.S. Border Patrol, Assistant Secretary Case No. 22-06842(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis had not been established for the complaint filed by the American Federation of Government Employees, AFL-CIO (AFGE) (which complaint alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order through the issuance of a memorandum prohibiting the use of a pistol loading device); and that further proceedings were unwarranted. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the RA's dismissal of the complaint. AFGE appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and raised a major policy issue.

Council action (August 31, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Immigration and Naturalization Service,
U.S. Border Patrol, Assistant Secretary
Case No. 22-06842(CA), FLRC No. 77A-68

Dear Mr. Mulholland:

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

In this case, American Federation of Government Employees, AFL-CIO, (AFGE) filed an unfair labor practice complaint against the Immigration and Naturalization Service, U.S. Border Patrol (INS) alleging violations of section 19(a)(1) and (6) of the Order. The complaint alleged, in substance, that INS unilaterally changed the terms and conditions of employment, through the issuance of a memorandum prohibiting the use of "speed loaders"^{1/} by activity employees.

The Regional Administrator (RA), following an independent investigation of such allegations, concluded that a reasonable basis for the complaint had not been established. The Assistant Secretary, in agreement with the RA, found that further proceedings were unwarranted, stating:

[T]he evidence does not establish that [INS] condoned the use of "speed loaders" or that its . . . memorandum was inconsistent with [INS's] past policy on the subject. In this regard, see Section 203.6(e) of the Assistant Secretary's Regulations which provides that, "The complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint"

[Further] the investigation conducted by the Area Office in this matter was proper and sufficient

^{1/} According to the petition, a "speed loader" is a pistol loading device used to facilitate the rapid reloading of revolvers.

Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that "the independent investigation was not thorough enough to be dispositive as to whether or not there was a practice of using speedloaders," and that despite AFGE's request for a hearing to resolve factual disputes in this matter, none was held. You further allege that the Assistant Secretary's decision "raises a major policy issue in that it, in effect, allows the employer to issue, change, or, refuse to change an existing personnel practice by refusing to bargain when presented with a demand by the union." [Emphasis in original.] In this regard, relying in pertinent part on the statement of the Council concerning "the obligation to negotiate" contained in the Report and Recommendations of the Council on the Amendment of E.O. 11491,^{2/} you contend that "the obligation to bargain on the employer existed when the union demanded bargaining on a subject not covered by the parties' collective bargaining agreement whether or not a past practice was changed or not."^{3/}

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

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that further proceedings were unwarranted in the circumstances of this case. Rather, your contentions appear to be essentially a disagreement with his determination pursuant to Section 203.6(e) of his regulations, that "the evidence [did] not establish that [INS] condoned the use of 'speed loaders' or that its . . . memorandum was inconsistent with the [INS's] past policy on the subject." With respect to your further allegation that "the independent investigation was not thorough enough to be dispositive," nothing

^{2/} Labor-Management Relations in the Federal Service (1975), at 41-2.

^{3/} You also contend in your appeal that the Assistant Secretary "failed to reach the question of negotiability [of the use of "speed loaders"] raised by the employer." However, having determined that the evidence did not establish that the memorandum on speed loaders was inconsistent with the past policy on the subject, it does not appear that such a negotiability determination was necessary in order for the Assistant Secretary to resolve the unfair labor practice matter before him. Therefore, apart from other considerations, such contention provides no basis for Council review. See Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, FLRC No. 76A-87 (Dec. 20, 1976), Report No. 119.

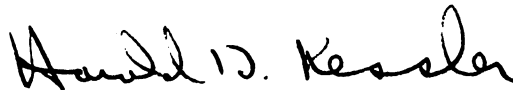
in your appeal indicates that any persuasive evidence was adduced which was not properly considered by the Assistant Secretary, nor does your appeal demonstrate that substantial factual issues exist requiring a hearing.

As to your alleged major policy issue, concerning "refus[al] to bargain when presented with a demand by [AFGE]," in the Council's view such contention does not provide a basis for review. In this regard, the obligation to negotiate spoken to by the Council in its Report and Recommendations on the Amendment of E.O. 11491 concerned the question as to whether the Order required, "that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement,"^{4/} not to the obligation to negotiate with respect to changes in established past practice proposed by the exclusive representative during the life of the agreement.^{5/} [Emphasis added.]

Since the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

A. E. Ross
Justice

4/ Labor-Management Relations in the Federal Service (1975), at 41.

5/ The Council also notes that the record submitted with the appeal contains no indication that such an issue was presented in the proceeding before the Assistant Secretary. Section 2411.51 of the Council's rules, Matters not previously presented; judicial notice, provides in pertinent part:

Consistent with the scope of review set forth in this part, the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary, an agency head, or an arbitrator.

National Federation of Federal Employees, Local 1641 and Veterans Administration Hospital, Spokane, Washington. The agency initially disapproved the disputed provision involved in this case, during its review of the local parties' agreement under section 15 of the Order. However, the agency later rescinded its disapproval of the subject provision and approved the agreement, including its disputed provision, as originally entered into by the local parties. The agency filed a motion to deny review with the Council, requesting that the Council dismiss the union's appeal, essentially on the grounds of mootness. The union responded to the agency's motion by requesting, among other things, that the Council proceed to resolve issues assertedly raised by the agency's initial determination of nonnegotiability.

Council action (August 31, 1977). The Council held that the agency's rescission of its disapproval of the disputed provision and its concurrent approval of the local parties' agreement, including this provision, rendered moot the dispute involved in the union's appeal. As to the union's request that the Council proceed to resolve negotiability issues assertedly raised by the agency's initial determination of nonnegotiability, the Council held that such an advisory opinion was prohibited under section 2411.53 of the Council's rules. Accordingly, the Council granted the agency's motion to deny review of the union's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

August 31, 1977

Mr. Robert J. Englehart
Staff Attorney
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: National Federation of Federal Employees,
Local 1641 and Veterans Administration Hospital,
Spokane, Washington, FLRC No. 77A-74

Dear Mr. Englehart:

The Council has carefully considered your petition for review of a negotiability dispute, the agency's opposition and motion for denial of review, and your submission in opposition to the agency's motion to deny review.

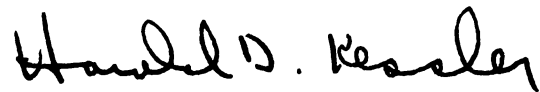
The record in this case indicates that the agency initially disapproved the disputed provision involved in your appeal, during its review of the local parties' agreement under section 15 of the Order. However, the agency later rescinded its disapproval of the subject provision and approved the agreement, including its disputed provision, as originally entered into by the local parties.

In the Council's opinion, the agency's rescission of its disapproval of the disputed provision and its concurrent approval of the local parties' agreement, including this provision, render moot the dispute involved in your appeal. See Federal Employees Metal Trades Council of Vallejo, California and Mare Island Naval Shipyard, FLRC No. 75A-97 (Dec. 24, 1975), Report No. 93; AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, 1 FLRC 607 [FLRC No. 73A-47 (Dec. 12, 1973), Report No. 46]. Contrary to the contention in your supplemental submission, nothing in the Council's rules renders untimely the agency's motion to dismiss your petition, essentially on the ground of mootness. Further, while you request that the Council proceed to resolve issues assertedly raised by the agency's initial determination of nonnegotiability, such an advisory opinion is prohibited under section 2411.53 of the Council's rules. Cf. Office of Economic Opportunity, Region IX, San Francisco, California and American Federation of Government Employees, Local 3009, Assistant Secretary Case No. 70-4236(AP), FLRC No. 74A-91 (May 6, 1975), Report No. 68.

Accordingly, for the foregoing reasons, the agency's motion to deny review is granted, and your petition is hereby dismissed.

By the Council.

Sincerely,

A handwritten signature in black ink that reads "Harold D. Kessler". The signature is written in a cursive style with a large, looped initial "H".

Harold D. Kessler
Acting Executive Director

cc: J. E. Adams
VA

American Federation of Government Employees, Local 3124 and Department of Transportation, U.S. Coast Guard Supply Center, Brooklyn, New York.

The dispute involved the negotiability under the Order of provisions in the local parties' agreement concerning (1) repromotion of employees demoted without personal cause and (2) contracting out, which the agency determined to be violative of section 12(b)(2) and 12(b)(5), respectively, during the section 15 review process. In its petition for review to the Council with regard to (1) the union explained the intent of the provision and the agency, responding in its statement of position, indicated that language could have been found which would express that intent without violating section 12(b)(2) of the Order.

Council action (September 16, 1977). As to (1), the Council determined that under the circumstances here involved, clarification of the subject provision was required so as to reflect more accurately the precise intent thereof; and that unless and until the agency head then determines that the provision, as so clarified, is nonnegotiable, the conditions for Council review, prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules, have not been met. Accordingly, the Council held that the union's petition for review as it pertained to this provision was prematurely filed and, without passing on the merits of the dispute, denied the union's appeal in that respect. As to (2), the Council found that the provision violated section 12(b)(5) of the Order. Accordingly, the Council held that the agency's determination that the provision was nonnegotiable was proper, and, pursuant to section 2411.28 of the Council's rules and regulations, sustained that determination.

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

American Federation of Government
Employees, Local 3124

and

FLRC No. 77A-25

Department of Transportation,
U.S. Coast Guard Supply
Center, Brooklyn, New York

DECISION ON NEGOTIABILITY ISSUES

Provision I

Any employee demoted without personal cause will be advised in writing of his entitlement to special consideration for promotion. If he is qualified for promotion in the future to a job of his previous grade, he will be repromoted without resort to competitive procedures unless restricted by law.

Agency Determination

The agency determined (during the review process under section 15 of the Order) that the second sentence of the provision, as presently framed, is nonnegotiable because it violates section 12(b)(2) of the Order.

Question Here Before the Council

The question is whether, under the facts and circumstances of this case, the appeal with respect to this provision meets the conditions for Council review prescribed in section 11(c)(4) of the Order and section 2411.22 of the Council's rules of procedure.^{1/}

Opinion

Conclusion: The petition for review of this provision was prematurely filed. Accordingly, without passing upon the merits of the negotiability dispute, the appeal as it pertains to this provision is denied.

Reasons: In its petition for Council review the union explained the intent of the disputed provision as follows:

The actual meaning of the clause [referring to the second sentence of the provision] is that a repromotion eligible may be repromoted without competitive procedures, as authorized in the Federal

^{1/} In view of our decision herein we find it unnecessary to consider the agency's contention as to the negotiability of the proposal.

Personnel Manual. . . . Taken in context the clause is a provision for an exception to competitive promotion procedures similar to such exception in the FPM. . . . The disputed clause may only be interpreted as allowing noncompetitive promotions, not requiring them.

Thereafter, responding in its statement of position to the Council, the agency indicated that "It is unfortunate that AFGE did not advance its definition of the intent of the language earlier because, with that definition, we are confident that words could have been found that would have expressed the intended meaning without violating section 12(b) of the Order."

Under these circumstances, the Council believes that clarification of the provision by the union is required, so as to reflect more accurately the precise intent of that provision. Unless and until the agency head then determines that the provision as so clarified is nonnegotiable,^{2/} the conditions for Council review, prescribed in section 11(c)(4) of the Order, and section 2411.22 of the Council's rules, have not been met.^{3/}

Provision II

The employer will make every effort to avoid contracting out work which will result in a reduction in force.

Agency Determination

The agency determined (during the review process under section 15 of the Order) that the provision is nonnegotiable because it violates section 12 (b)(5) of the Order.

Question Here Before the Council

The question is whether the provision is violative of section 12(b)(5) of the Order and, therefore, nonnegotiable.

2/ Of course, the provision as clarified must be considered in negotiations by the local parties as required by the Order. See AFGE Local 2151 and General Services Administration, Region 3, FLRC No. 75A-28 (Oct. 8, 1975), Report No. 86, at 2-4 of decision.

3/ National Federation of Federal Employees, Local No. 75, and Defense Contract Administration Services District, Cincinnati, Ohio, 1 FLRC 468 [FLRC No. 72A-51 (July 24, 1973), Report No. 42]; NFFE Local 997 and Ames Research Center, National Aeronautics and Space Administration, 1 FLRC 465 [FLRC No. 73A-12 (July 23, 1973), Report No. 42].

Opinion

Conclusion: The provision violates management's right to determine the "personnel" by which agency operations will be conducted under section 12 (b)(5) of the Order. Accordingly, the agency's determination that the provision is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.

Reasons: Section 12(b) of the Order provides in pertinent part:

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

.

(5) to determine the methods, means, and personnel by which [agency] operations are to be conducted;

The Council ruled in substance in its Tidewater decision that, under section 12(b)(5) of the Order, management officials retain the right, in accordance with applicable laws and regulations, to determine whether "Government personnel or contract personnel" will conduct agency operations; and that this reserved right may not be infringed by a negotiated agreement.^{4/} Thus, the Council held, in that case, that management's right to determine "who" will conduct agency operations would be violated by the union proposals there in dispute which the Council characterized as placing a limitation on management's discretion in making the judgment as to which personnel will be utilized to perform work normally performed by the unit.^{5/} In the present case, in our opinion, the disputed provision similarly would limit the agency's discretion and, hence, would constrain management in the exercise of its right to decide and act with respect to the contracting out of unit work. More particularly, the provision would establish, as a critical condition to management's exercising its right to contract out, the exertion by management of "every effort" to avoid such action, if a reduction-in-force would result. In other words, the disputed provision would deny management's right to contract out, unless the condition established in the provision were satisfied, i.e., unless the agency made "every effort" to avoid contracting out if a reduction-in-force would result.

Contrary to the union's contention, this provision obviously does not concern mere "procedures" to be observed by the agency in connection with contracting out. Rather, the limitation in the provision is substantive in nature and constrains the exercise, itself, of management's right to decide and act on the contracting out of unit work.^{6/}

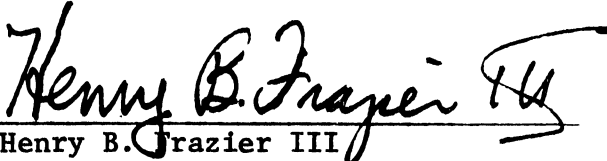
4/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 [FLRC No. 71A-56 (Mar. 9, 1971), Report No. 41], at 436-7.

5/ Id. at 437 and 441.

6/ Id. at 438-9.

Accordingly, for the reasons discussed at length in Tidewater, we find the disputed provision in the present case is nonnegotiable.

By the Council.


Henry B. Frazier III
Executive Director

Issued: September 16, 1977

Local 3369, American Federation of Government Employees, AFL-CIO and Social Security Administration, Department of Health, Education, and Welfare (Region II) (Sirefman, Arbitrator). The arbitrator determined in his award that although the grievant was eligible for promotion to GS-7 at the time in question, he did not meet the requirements for such promotion. Thus, the arbitrator concluded that the agency did not violate the relevant provisions of the parties' agreement by not promoting the grievant at that time, and therefore the arbitrator denied the union's grievance. The union appealed to the Council, requesting that the Council accept its petition for review of the arbitrator's award based on an exception which alleged that the arbitrator refused to hear pertinent and material evidence.

Council action (September 16, 1977). The Council held that the union's petition did not describe the necessary facts and circumstances to support its exception. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

September 16, 1977

Ms. Marjorie M. Rennie, President
Local 3369, American Federation of
Government Employees, AFL-CIO
Social Security Administration
1 Willoughby Street
Brooklyn, New York 11201

Re: Local 3369, American Federation of Government
Employees, AFL-CIO and Social Security Admini-
stration, Department of Health, Education, and
Welfare (Region II) (Sirefman, Arbitrator),
FLRC No. 77A-60

Dear Ms. Rennie:

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

According to the arbitrator's award, this matter involves the failure of the grievant to receive a career ladder promotion to GS-7. The grievant, a GS-5 employee with the Social Security Administration, became eligible for a career ladder promotion to GS-7 on October 6, 1975. When the grievant was not promoted as of the first pay period following eligibility, the union filed a grievance on his behalf that was ultimately submitted to arbitration.

The arbitrator stated the issue before him as follows:

Did grievant . . . meet the requirements for promotion to GS-7 from the first pay period following October, 1975? If so, what should the remedy be?

The arbitrator also stated that "[b]y agreement between the parties the time frame for purposes of this grievance runs through October 24, 1975."

In discussing the issue before him, the arbitrator observed that time-in-grade is a necessary but not a sufficient condition for promotion and

that the negotiated agreement requires a candidate for a career ladder promotion to meet all requirements of the next level of the career ladder. He also observed that the agency promotion plan requires that a candidate for promotion must successfully perform at his current level and demonstrate or indicate an ability to perform at the next higher grade. The arbitrator found that the uncontroverted testimony of four of the grievant's supervisors was that the grievant did not meet those requirements. The arbitrator further found that the testimony of these supervisors, uncontradicted by the grievant, made it clear that the grievant's difficulties were discussed with him and that efforts were made to improve his work. Accordingly, the arbitrator concluded that the "grievant's performance was insufficient . . . to support a promotion to GS-7, and that grievant was made aware of this by his supervisors." The arbitrator therefore made the following award:

Grievant . . . did not meet the requirements for promotion to GS-7 from the first pay period following October, 1975. The Social Security Administration did not violate Article 6, section 9, Article 6, section 17 and Article 36, Section 10(c) of the Agreement. The grievance is denied.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency filed an opposition.

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

The union petitions for review of the award "on the grounds that the [arbitrator] refused to hear pertinent and material evidence. Hence he denied the grievant a fair hearing." In support of its exception, the union contends that the arbitrator did not permit it to present evidence with respect to the grievant's termination on May 27, 1976, or "the history of [the grievant's] treatment at the hands of [the activity]." The union also maintains that "[t]here is absolutely no documentation in the SF7B extension file of the [grievant] indicating that he did not meet the criteria for promotion."

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair

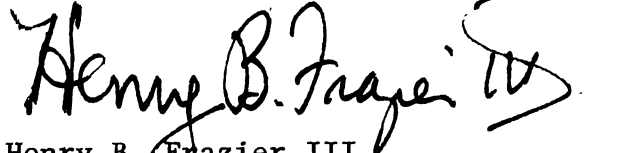
hearing. E.g., American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), FLRC No. 75A-105 (Jan. 30, 1976), Report No. 96. However, the Council is of the opinion that the union's petition does not describe the necessary facts and circumstances to support its exception. In the Council's view the union has not demonstrated how the assertedly proffered evidence with respect to the grievant's termination on May 27, 1976, is pertinent and material to the issue of whether in October 1975 the grievant met the requirements for a career ladder promotion to GS-7, especially in light of the arbitrator's statement that "[b]y agreement between the parties the time frame for purposes of this grievance runs through October 24, 1975." Similarly, the union does not describe facts and circumstances to demonstrate how the assertedly proffered evidence with respect to the "history of [the grievant's] treatment" is pertinent and material to the particular issue before the arbitrator. Thus, there is no indication apparent from the facts and circumstances described in the union's petition that this evidence assertedly proffered by the union and excluded by the arbitrator is pertinent or material to the controversy before the arbitrator concerning the grievant's failure to be promoted in October 1975, so as to deny a fair hearing on that grievance. Instead, exclusion of such evidence by the arbitrator would appear to only demonstrate an attempt by the arbitrator to control the conduct of the hearing so as to insure that proffered evidence was pertinent and relevant to the resolution of the particular grievance before him as limited by agreement of the parties. In this regard the Council held in Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), 1 FLRC 557 [FLRC No. 73A-20 (Sept. 17, 1973), Report No. 44], that it is the arbitrator's responsibility to control the conduct of the hearing. Assertions that the arbitrator conducted the hearing in a manner which one party finds objectionable does not support a contention that the arbitrator denied that party a fair hearing.

With respect to the union's assertion that there was no documentation of the grievant's failure to meet the criteria for promotion while there was in his file a personnel action stating the grievant was performing satisfactorily, the Council notes that this personnel action was specifically addressed by the arbitrator in the opinion accompanying his award. Thus, it appears that the union, in essence, is disagreeing with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by an arbitrator that is subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111; Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Thus, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: I. L. Becker
SSA

Social Security Administration, Headquarters, Bureaus and Offices in Baltimore, A/SLMR No. 851. The Assistant Secretary, upon a complaint filed by American Federation of Government Employees, Local 1923, AFL-CIO (AFGE) (which alleged, in pertinent part, that the activity's failure to initially give the employee 60-days notice in connection with denying his within-grade step increase, as required by the parties' agreement, violated section 19 of the Order), found that in view of the activity's immediate rectification of the conduct involved and thus the de minimis effect of such conduct, it would not effectuate the purposes and policies of the Order to find a violation in this case. Accordingly, the Assistant Secretary ordered that the complaint be dismissed. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and raised a major policy issue. AFGE also requested a stay of the Assistant Secretary's order.

Council action (October 20, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or raise any major policy issues. Accordingly, the Council denied AFGE's petition for review. The Council likewise denied AFGE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 20, 1977

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

Re: Social Security Administration, Head-
quarters, Bureaus and Offices in Baltimore,
A/SLMR No. 851, FLRC No. 77A-72

Dear Mr. Roth:

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

In this case, as found by the Assistant Secretary, the Social Security Administration, Headquarters, Bureaus and Offices in Baltimore (the activity) and American Federation of Government Employees, Local 1923, AFL-CIO (the union) were parties to a collective bargaining agreement which provided, in substance, that when a supervisor's evaluation of an employee leads to a conclusion that said employee's work is not of an acceptable level of competence, the supervisor will discuss the matter with the employee and provide a summary of the discussion in writing at least 60 days before the employee is eligible for a step increase. In a letter notifying an employee that his work was not of an acceptable level of competence and that his within-grade step increase was being denied, the activity noted that the employee had not been given the requisite notice. The activity further stated that the employee therefore would have 60 days from the negative determination to improve his work performance and that a new determination would then be made based on his performance "between now and then." After the additional 60 days expired, the employee was notified of the activity's new determination that the within-grade increase was denied on the basis that his work was below the acceptable level of competence. The union subsequently filed an unfair labor practice complaint which alleged, in pertinent part, that the activity's failure to give the employee the required notice as set forth in the parties' agreement violated section 19 of the Order.

The Assistant Secretary, in dismissing the complaint, stated that:

[T]he [activity's] failure to serve the prescribed 60 day notice could be construed as a patent unilateral change in terms and conditions of employment in the negotiated agreement and, as such,

could be considered violative conduct under the Order. However, in view of the [activity's] immediate rectification of such conduct and thus the de minimis effect of its conduct, I find that it would not effectuate the purposes and policies of the Executive Order to find a violation herein. Under these particular circumstances, I shall order that the subject complaint be dismissed. . . .^{1/}

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

Should the holding in Vandenberg, supra, a case involving an isolated and brief interruption of negotiations, be extended to apply to a single but deliberate and "patent" unilateral change by management in the terms and conditions of employment set forth in the negotiated agreement?

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

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. As to your allegation that the Assistant Secretary's decision presents a major policy issue as set forth above, such allegation constitutes nothing more than mere disagreement with the Assistant Secretary's conclusion that under the particular circumstances of this case, "it would not effectuate the purposes and policies of the Executive Order to find a violation herein." Accordingly, no major policy issue is presented warranting Council review.^{2/}

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

^{1/} In support of his finding, the Assistant Secretary cited Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77 (Aug. 8, 1975), Report No. 79.

^{2/} In so concluding, the Council does not pass upon or adopt the Assistant Secretary's reasoning or his rejection of the Administrative Law Judge's finding that, under the circumstances of this case, the activity's failure to serve the prescribed 60 day notice was not so flagrant a violation of the agreement as to constitute violative conduct under the Order. See generally Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118, at 8 of Council decision.

to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

I.L. Becker
SSA

Department of the Treasury, Internal Revenue Service, Chicago District, Illinois, Assistant Secretary Case No. 50-13155(CA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis had not been established for the section 19(a)(1) and (6) complaint filed by the National Treasury Employees Union related to the activity's discontinuation of the use of a particular evaluation checklist. Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint. The union appealed to the Council, alleging that the decision of the Assistant Secretary presented major policy issues.

Council action (October 20, 1977). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue, and the union neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 20, 1977

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

Re: Department of the Treasury, Internal Revenue Service, Chicago District, Illinois, Assistant Secretary Case No. 50-13155(CA), FLRC No. 77A-79

Dear Mr. Persina:

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

In this case, National Treasury Employees Union (the union) filed an unfair labor practice complaint against Department of the Treasury, Internal Revenue Service, Chicago District, Illinois (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order when it "declared not negotiable a request by [the union] to negotiate 'as to substance, impact and implementation' the abrogation of a check list of numerical factors type of evaluation format relating to certain employees of the Audit Division of the [activity]."

The Assistant Secretary, in agreement with the Regional Administrator (RA), found that a reasonable basis for the complaint had not been established. Thus, citing two of his previously published decisions, the Assistant Secretary found that since the alleged violations concerned differing and arguable interpretations of the parties' agreement and not a clear, unilateral breach of the parties' agreement by the activity, the remedy for such matters lay within the grievance-arbitration machinery of the negotiated agreement rather than through the unfair labor practice procedures. Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary "presents a major policy issue concerning (1) management's authority to unilaterally alter evaluation techniques, without prior negotiation with the exclusive representative; and (2) the appropriate avenue to pursue to obtain a remedy for such unilateral action." In support of these allegations, you assert that the RA and the Assistant

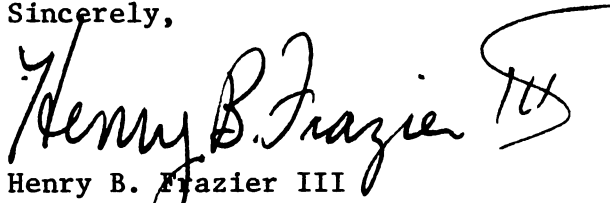
Secretary are incorrect in stating that the format for evaluations is governed by the parties' agreement, and that the discontinuation of the use of checklist factors constitutes a change in personnel practices on which management is obligated to negotiate.

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious. Thus, your allegations as set forth above constitute, in essence, nothing more than disagreement with the Assistant Secretary's determination that no reasonable basis for the complaint has been established in the circumstances of this case, and your allegations therefore present no basis for Council review.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

T.J. O'Rourke
IRS

Agency for International Development, Washington, D.C., Assistant Secretary Case No. 22-7349(AP). The Assistant Secretary, upon an Application for Decision on Grievability or Arbitrability filed by the agency, which the union (American Federation of Government Employees, Local 1534, AFL-CIO) contended was procedurally defective because no final rejection had been issued by the agency on the grievance involved, ruled that such final rejection was considered unnecessary under the particular circumstances of this case. The Assistant Secretary denied the agency's request for review seeking reversal of the Regional Administrator's Report and Findings on Grievability or Arbitrability; and the union appealed to the Council, alleging that the Assistant Secretary's decision was, in part, arbitrary and capricious and raised a major policy issue.

Council action (October 20, 1977). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or raise any major policy issue. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 20, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Agency for International Development,
Washington, D.C., Assistant Secretary
Case No. 22-7349(AP), FLRC No. 77A-84

Dear Mr. Mulholland:

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

In this case, as found by the Assistant Secretary, American Federation of Government Employees, Local 1534, AFL-CIO (the union) and the Agency for International Development (the agency) were parties to a collective bargaining agreement which contained a grievance procedure and an arbitration provision. The union filed a grievance under the negotiated procedure alleging that the agency had violated certain provisions of the agreement. The agency denied the grievance. The union requested a panel of arbitrators and the agency thereafter filed an Application for Decision on Grievability or Arbitrability. The union in its response to the application contended, in pertinent part, that the application was procedurally defective because no final rejection had been issued on the grievance. The Regional Administrator (RA) found that the grievance was arbitrable under the negotiated agreement.

The Assistant Secretary denied the agency's request for review seeking reversal of the RA's Report and Findings on Grievability or Arbitrability. In so ruling, the Assistant Secretary stated in pertinent part:

While normally a final written rejection of a grievance is required before an application will be considered timely filed, such a final rejection was considered unnecessary under the particular circumstances of the instant case, where the [u]nion invoked arbitration and the [a]gency responded by filing an application. In this regard, the [a]gency's action was considered to be tantamount to a final rejection of the grievance.

In your petition for review on behalf of the union (which you indicate "is limited solely to the Assistant Secretary's acceptance of the

employer's petition"), you allege that the portion of the Assistant Secretary's decision relating to the acceptance of the employer's petition is arbitrary and capricious and that his application of the Report on a Ruling No. 61 under the circumstances of this case presents a major policy issue.^{1/} In this regard you cite previous decisions of the Assistant Secretary finding an application procedurally defective where arbitration was not invoked and therefore no final written rejection of a request to proceed to arbitration by the activity had been sought or received. You contend that this raises the following question: If an agency's application for a decision on a question of arbitrability is "considered tantamount to a final rejection of the grievance" then why is not the union's application on a question of arbitrability--after having been refused by an agency to arbitrate--tantamount to demanding arbitration?

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

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. In this regard, your appeal fails to show any clear, unexplained inconsistency with the Assistant Secretary's previously published decisions. Nor does the Assistant Secretary's decision raise any major policy issues warranting Council review, as alleged, in the circumstances of this case. In this regard, your allegation as set forth above relates to the propriety of the Assistant Secretary's interpretation and application of his own regulations. As the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation. In the instant case, the Assistant Secretary's decision was based upon the interpretation and application of his regulations, specifically Section 205.2, and your appeal fails to show that

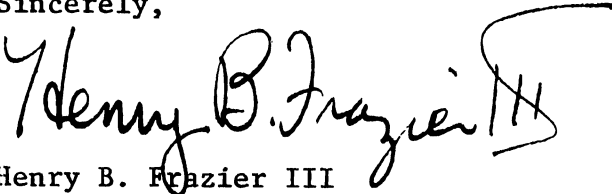
^{1/} Report on a Ruling of the Assistant Secretary of Labor No. 61 (Nov. 22, 1976), which was not cited by the Assistant Secretary in the decision in the instant case, provides, in pertinent part, that "[w]here one of the parties to an existing negotiated agreement has filed a grievance, all steps of the grievance procedure provided for in that agreement, including the invocation of arbitration where an arbitration provision exists, must be exhausted before the Assistant Secretary will consider an Application filed pursuant to Section 205.2(a) or (b) of the Regulations."

the Assistant Secretary's decision in the instant case was arbitrary and capricious or inconsistent with the purposes of the Order.^{2/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present any major policy issues, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. A. Boorady
AID

2/ U.S. Army Training Center, Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-4875(GA), FLRC No. 77A-19 (June 6, 1977), Report No. 127; General Services Administration, Region 9, San Francisco, California, Assistant Secretary Case No. 70-5123(GA), FLRC No. 77A-45 (June 21, 1977), Report No. 128; Department of the Interior, Geological Survey, Conservation Division, Gulf of Mexico, Metairie, Louisiana, Assistant Secretary Case No. 64-3170(GA), FLRC No. 77A-87 (Oct. 20, 1977), Report No. 138.

Department of the Interior, Geological Survey, Conservation Division, Gulf of Mexico, Metairie, Louisiana, Assistant Secretary Case No. 64-3170(GA). The Assistant Secretary, in agreement with the Regional Administrator (RA), found that the Application for Decision on Grievability or Arbitrability filed by Local 3457, American Federation of Government Employees, AFL-CIO (AFGE) was procedurally defective. Accordingly, the Assistant Secretary denied AFGE's request for review seeking reversal of the RA's dismissal of the Application. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious.

Council action (October 20, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision raised any major policy issues. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 20, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Department of the Interior, Geological Survey,
Conservation Division, Gulf of Mexico, Metairie,
Louisiana, Assistant Secretary Case No. 64-3170(GA),
FLRC No. 77A-87

Dear Mr. Mulholland:

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

In this case, as found by the Assistant Secretary, Local 3457, American Federation of Government Employees, AFL-CIO (the union) and the Department of the Interior, Geological Survey, Conservation Division, Gulf of Mexico, Metairie, Louisiana (the activity) were parties to a collective bargaining agreement which contained a grievance procedure and an arbitration provision. A grievance was filed concerning the activity's alleged refusal to pay Sunday differential pay to certain unit employees. The activity responded to the grievance by stating that inasmuch as the grievance concerned policies set forth in the Federal Personnel Manual, it was not on a matter subject to the negotiated grievance procedure. The union then filed an Application for Decision on Grievability or Arbitrability which was dismissed by the Regional Administrator (RA).

The Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the Application for Decision on Grievability or Arbitrability. In so ruling, the Assistant Secretary stated:

The evidence reveals that you filed the instant application . . . although arbitration was not invoked and, therefore, no final written rejection of a request to proceed to arbitration by the [a]ctivity had been sought or received.

Therefore, in agreement with the [RA], I find that the instant application is procedurally defective, as an application will not be processed by the Assistant Secretary until all the remedies contained in the parties' negotiated agreement have been exhausted. In this connection, see Report On A Ruling, Nos. 56 and 61

In your petition for review on behalf of the union, you allege that "the Assistant Secretary's decision is arbitrary and capricious in that it is inconsistent with his decisions in similar cases with the same facts." Specifically, you contend that the Assistant Secretary's decision in the instant case "does not comport with his stated policy in A Report on a Ruling, Nos. 56 and 61," arguing that the strict approach applied to a union application for a decision on grievability or arbitrability was not applied in another case to an agency application, which was considered tantamount to a final rejection of the grievance.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision raises any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the instant application was procedurally defective under his regulations in the circumstances of this case. More particularly, as to your assertion that the Assistant Secretary's decision herein is contrary to his prior decisions, your appeal fails to establish any clear, unexplained inconsistency with the Assistant Secretary's previously published decisions. Rather as the Council has previously stated, section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.^{1/} In the instant case, the Assistant Secretary's decision was based upon the interpretation and application of his regulations, specifically Section 205.2, and your appeal fails to show that the Assistant Secretary's decision in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes of the Order.^{2/}

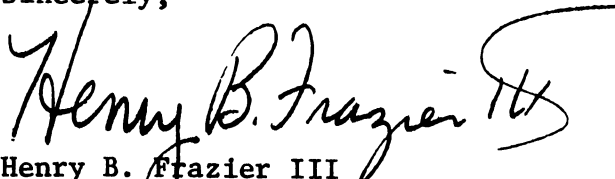
^{1/} See NASA, John F. Kennedy Space Center, Florida, Assistant Secretary Case No. 42-3378(GA), FLRC No. 76A-135 (Mar. 22, 1977), Report No. 122, and cases cited therein.

^{2/} U.S. Army Training Center, Fort Leonard Wood, Missouri, Assistant Secretary Case No. 62-4875(GA), FLRC No. 77A-19 (June 6, 1977), Report No. 127; General Services Administration, Region 9, San Francisco, California, Assistant Secretary Case No. 70-5123(GA), FLRC No. 77A-45 (June 21, 1977), Report No. 128.

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

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. Acuff
Interior

Veterans Administration Regional Office, Newark, New Jersey, Assistant Secretary Case No. 32-4340(RO). The American Federation of Government Employees, AFL-CIO (AFGE) filed a petition for review and a request for a stay of the Assistant Secretary's decision setting aside a rerun election and directing that a new election be conducted. Such election had not been conducted and no certification of the results of the election or certification of representative had issued, and no other final disposition of the entire case had been rendered by the Assistant Secretary.

Council action (October 21, 1977). Since a final decision had not been rendered by the Assistant Secretary on the entire proceeding before him, the Council, pursuant to section 2411.41 of its rules of procedure, denied review of AFGE's interlocutory appeal, without prejudice to the renewal of AFGE's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied AFGE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 21, 1977

Mr. James R. Rosa
Assistant General Counsel
for Litigation
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Veterans Administration Regional Office,
Newark, New Jersey, Assistant Secretary
Case No. 32-4340(RO), FLRC No. 77A-113

Dear Mr. Rosa:

This refers to your petition for review and request for a stay of the Assistant Secretary's decision of September 13, 1977, in the above-entitled case, which you filed with the Council on October 18, 1977.

In his subject action, from which you are appealing, the Assistant Secretary, among other things, set aside the rerun election that was held in this case on January 25, 1977, and directed that a new election be conducted. Such election has not been conducted and no certification of the results of the election or certification of representative has issued, and no other final disposition of the entire case has been rendered.

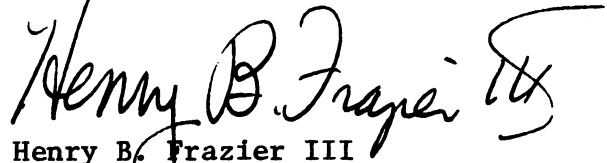
Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the election has issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice to the renewal of your contentions in a petition duly filed with the

Council after a final decision on the entire case by the Assistant Secretary. Likewise, your request for a stay is also denied.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. T. Green
VA

E. S. Colucci
NFFE

U.S. Army Materiel Readiness Command, Redstone Arsenal, Alabama, Assistant Secretary Case No. 40-7979(CA). The decision of the Assistant Secretary was dated September 1, 1977, and appeared to have been served on Local 1858, American Federation of Government Employees, AFL-CIO (AFGE) by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, AFGE's appeal was due in the office of the Council no later than the close of business on October 6, 1977. However, AFGE's appeal was not filed with the Council until October 20, 1977, or two weeks late; and no extension of time for filing was requested by AFGE or granted by the Council.

Council action (October 28, 1977). Since AFGE's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

October 28, 1977

Mr. William R. Murray, Staff Attorney
Local 1858, American Federation of
Government Employees, AFL-CIO
Building 7132
Redstone Arsenal, Alabama 35809

Re: U.S. Army Materiel Readiness Command,
Redstone Arsenal, Alabama, Assistant
Secretary Case No. 40-7979(CA), FLRC
No. 77A-116

Dear Mr. Murray:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case, filed with the Council on October 20, 1977. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated September 1, 1977, and appears to have been served on you by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure (5 C.F.R. §§ 2411.13(b) and 2411.45(a) and (c)), your appeal was due in the office of the Council no later than the close of business on October 6, 1977. However, as stated above, your appeal was not filed with the Council until October 20, 1977, or two weeks late, and no extension of time for filing was requested by you or granted by the Council.

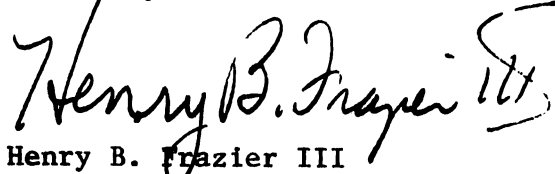
While it appears from your appeal that on September 15, 1977, you requested reconsideration by the Assistant Secretary of his subject decision, which request was denied by the Assistant Secretary on October 11, 1977, such request, as expressly provided in section 2411.45(d) of the Council's rules (5 C.F.R. § 2411.45(d)), did not operate to extend the time limits established in the Council's rules. Likewise, no persuasive reason is advanced in your appeal for granting a waiver of the Council's time limits, under section 2411.45(f) of the Council's rules (5 C.F.R. § 2411.45(f)). See, e.g., Department of the Interior,

U.S. Bureau of Reclamation, Mid-Pacific Regional Office, Assistant Secretary Case No. 70-5111(GA), FLRC No. 77A-33 (June 2, 1977), Report No. 127.

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

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

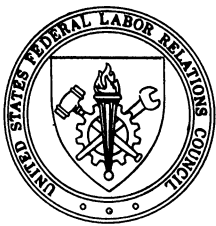
Enclosure

cc: A/SLMR
Labor

H. L. Trent
Army

United States Department of Defense, 3245th Air Base Group, United States Air Force, A/SLMR No. 904. The decision of the Assistant Secretary was dated September 21, 1977, and appeared (as confirmed by administrative advice) to have been served on Local 975, National Federation of Federal Employees (NFFE) by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, NFFE's appeal was due in the office of the Council no later than the close of business on October 26, 1977. However, NFFE's appeal was not filed with the Council until October 27, 1977; and no extension of time for filing was requested by NFFE or granted by the Council.

Council action (November 3, 1977). Since NFFE's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 3, 1977

Mr. William J. Smith, President
Local 975, National Federation
of Federal Employees
P.O. Box 216
Bedford, Massachusetts 01730

Re: United States Department of Defense, 3245th
Air Base Group, United States Air Force, A/SLMR
No. 904, FLRC No. 77A-119

Dear Mr. Smith:

This refers to your petition for review of the Assistant Secretary's decision and order amending certification in the above-entitled case, filed with the Council on October 27, 1977. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure (copy enclosed) and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated September 21, 1977, and appears (as confirmed by administrative advice) to have been served on you by mail on the same date. Therefore, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on October 26, 1977. However, as stated above, your appeal, which is dated October 25, 1977, was not filed with the Council until October 27, 1977; and no extension of time for filing was requested by you or granted by the Council.

While you state in your instant submission that you did not actually receive the subject decision of the Assistant Secretary until October 3, 1977, such asserted date of receipt is clearly not dispositive in this case. Section 2411.46(e) of the Council's rules expressly provides:

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

Consequently, the time limit prescribed under sections 2411.13(b) and 2411.45(b) and (c) of the Council's rules for the filing of your appeal (35 days) began to run from September 21, 1977, the date the decision of


the Assistant Secretary was mailed to and thereby "served" upon you. Thus, as already indicated, your appeal had to be received in the office of the Council before the close of business on October 26, 1977, to be considered timely.

Further, while you have not requested a waiver of the expired time limit for the filing of your appeal, as provided for in section 2411.45(f) of the Council's rules, your instant submission advances no persuasive reason for granting such a waiver. See, e.g., Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814, FLRC No. 77A-46 (June 30, 1977), Report No. 129.

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

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

Enclosure

cc: A/SLMR
Labor

M. Hill
NFFE Local 1384

N. Downes
NAGE Local R1-8

R. Rock
Air Force

American Federation of Government Employees, Local 2953, AFL-CIO and State of Nebraska National Guard. The union filed a petition for review of a negotiability issue arising out of the disapproval of a provision in the local parties' agreement by the National Guard Bureau (NGB) during review of the agreement under section 15 of the Order. However, subsequent to the filing of the appeal with the Council, the Department of Defense rescinded the NGB's disapproval of the subject provision and indicated that the agreement, including the disputed provision, as originally entered into by the parties, must be approved.

Council action (November 7, 1977). The Council held that the action by the agency subsequent to the filing of the union's appeal, rendered the dispute moot. Accordingly, the Council dismissed the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 7, 1977

Mr. Ronald D. King, Acting Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees,
Local 2953, AFL-CIO and State of Nebraska
National Guard, FLRC No. 77A-105

Dear Mr. King:

The Council has carefully considered your petition for review of a negotiability dispute filed on October 4, 1977, and the Department of Defense letter to you of October 20, 1977.

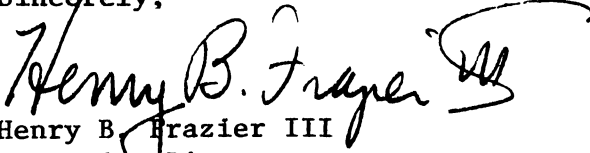
The record in this case indicates that the National Guard Bureau (NGB) initially disapproved the disputed provision involved in your appeal, during its review of the local parties' agreement under section 15 of the Order. However, the Department of Defense in its letter of October 20, 1977, rescinded the NGB's disapproval of the subject provision and indicated that the agreement, including the disputed provision, as originally entered into by the local parties must be approved.

In the Council's opinion, the agency's rescission of its disapproval of the disputed provision and its concurrent approval of the local parties' agreement, including this provision, render moot the dispute involved in your appeal. See Federal Employees Metal Trades Council of Vallejo, California and Mare Island Shipyard, FLRC No. 75A-97 (Dec. 24, 1975), Report No. 93; AFGE Local 1199 and Commander, 57th Combat Support Group (TAC), Nellis Air Force Base, Las Vegas, Nevada, 1 FLRC 607 [FLRC No. 73A-47 (Dec. 12, 1973), Report No. 46].

Accordingly, for the foregoing reason, your petition for review is hereby dismissed.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: W. C. Valdes
DOD

Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois, A/SLMR No. 832. The Assistant Secretary, upon a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1395, held, in agreement with the conclusion of the Administrative Law Judge, that the activity's refusal to negotiate ground rules for an agreement covering a particular unit (during the pendency of an AFGE-filed petition to consolidate a number of units, including the unit here involved) violated section 19(a)(1) and (6) of the Order. The agency appealed to the Council, alleging, in effect, that the decision of the Assistant Secretary presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (November 15, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present any major policy issues, and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 15, 1977

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
Room G-2608, West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Department of Health, Education, and Welfare,
Social Security Administration, Bureau of Field
Operations, Region V-A, Chicago, Illinois, A/SLMR
No. 832, FLRC No. 77A-62

Dear Mr. Becker:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the union, in the above-entitled case.

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, AFL-CIO, Local 1395 (the union) was the exclusive representative of three separate units of employees within the Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois (the activity). After filing a petition to consolidate these units, the union requested the activity to bargain on proposed ground rules for negotiating an agreement covering the activity's Cook County district office unit, one of the units included in the proposed consolidated unit. The activity refused to negotiate, contending in pertinent part that it was not obligated to negotiate with the union concerning the Cook County district office unit during the pendency of the consolidation petition. The union thereafter filed an unfair labor practice complaint alleging, as amended, that the activity's refusal to negotiate violated section 19(a)(1) and (6) of the Order.

The Assistant Secretary, in agreement with the conclusion of the Administrative Law Judge, held that the activity's refusal to negotiate ground rules for an agreement covering the Cook County district office unit violated section 19(a)(1) and (6) of the Order. In so concluding, the Assistant Secretary stated as to unit consolidation (UC) petitions:

[A] UC petition does not raise a question concerning representation in the units for which the consolidation is sought, and thus does not warrant a refusal to negotiate an agreement during the pendency of

that type of petition. In this regard, it was noted that Section IV of the Report and Recommendations of the Federal Labor Relations Council, (1975), which accompanied the issuance of Executive Order 11838, states that "[t]he procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation." . . . [I]t would not effectuate the purposes of the Order to deny an exclusive representative the right to negotiate an agreement in an individual unit during the pendency of a UC petition which includes that unit, absent the raising of a valid question concerning representation in that unit. [Footnote omitted.]

In your petition for review on behalf of the activity, you allege, in effect, that the decision of the Assistant Secretary presents major policy issues concerning "the obligation of an Agency/Activity to honor a request to enter into negotiations [for] a collective bargaining agreement concerning a . . . bargaining unit while, at the same time, there is a consolidation petition pending which includes [that] unit" Specifically, you allege that his decision raises the following major policy issues:

- A. Are the desired "laboratory conditions" for a consolidation election unduly affected by the initiation of bargaining for a collective bargaining agreement for a single, constituent unit?
- B. Does such bargaining create for an Agency/Activity the possibility of problems of contract administration which are unnecessary and unduly burdensome?
- C. Should expedited election procedures be established when such a bargaining request is made so as to better serve the interests of agency management and labor organizations?

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not present any major policy issues, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to the major policy issues which you allege are raised by the Assistant Secretary's decision, all relating to an agency's obligation to enter into negotiations concerning a bargaining unit during the pendency of a consolidation petition which includes that unit, in the Council's view such decision raises no major policy issues warranting review. In this regard, the Council notes particularly, as did the Assistant Secretary based upon Section IV of the Council's 1975 Report and Recommendations,^{1/}

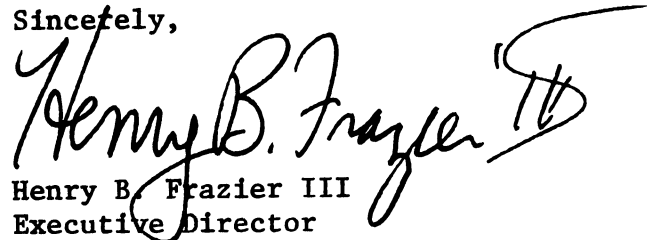
^{1/} Labor-Management Relations in the Federal Service (1975), at 34.

that a consolidation petition does not raise a question concerning representation. Moreover, the Council further notes that nothing in its Report and Recommendations suggests that the mutual duty to meet and confer is suspended while a consolidation petition is pending. Rather, as the Council's Report and Recommendations states: "In such circumstances, the labor organization should not be required to risk its existing certifications, because no question would have been raised concerning the desire of the employees to be represented by the exclusive representative."^{2/}
[Emphasis added.]

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

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in black ink and includes a stylized flourish at the end.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. A. Zaltman
AFGE

^{2/} Id. at 35.

Internal Revenue Service, Greensboro, North Carolina, A/SLMR No. 874. Ms. Hattie W. Angel appealed to the Council from the decision of the Assistant Secretary who, upon an Application for Decision on Grievability or Arbitrability filed by the National Treasury Employees Union, found that the matter involved was not subject to advisory arbitration under the parties' agreement. While the union (along with the activity) participated as a party in the proceedings before the Assistant Secretary, Ms. Angel was not named as a party, was not served as a party, and did not otherwise participate as a party in such proceedings.

Council action (November 16, 1977). The Council held that Ms. Angel was not a "party aggrieved" within the meaning of section 2411.13(a) of the Council's rules of procedure. Accordingly, apart from other considerations, the Council denied Ms. Angel's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 16, 1977

Ms. Hattie W. Angel
1090 Whispering Pines Drive
Kernersville, North Carolina 27284

Re: Internal Revenue Service, Greensboro, North
Carolina, A/SLMR No. 874, FLRC No. 77A-96

Dear Ms. Angel:

Receipt is acknowledged of your appeal from the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case.

In this case, as found by the Assistant Secretary, the Internal Revenue Service, Greensboro, North Carolina (the activity) notified you by letter that you were to be removed from employment by the activity, and informed you that an appeal of this adverse action could be filed with the United States Civil Service Commission within 15 days from the effective date of your removal. The National Treasury Employees Union (the union) thereafter notified the activity by letter that it was invoking advisory arbitration of the matter as provided by the negotiated agreement between the union and the activity. The activity rejected the request for arbitration as untimely under the terms of that agreement. The union then filed an Application for Decision on Grievability or Arbitrability, challenging the activity's determination that the request for arbitration had been untimely. The Assistant Secretary, in agreement with the Administrative Law Judge, found that the union's request to the activity for advisory arbitration pursuant to the negotiated advisory arbitration procedure was not timely submitted, and, therefore, the matter was not subject to advisory arbitration.

The union, as a party to the proceeding before the Assistant Secretary, has not filed a petition for review of the subject decision with the Council. However, you have filed the instant appeal, contending that you are a "party aggrieved" by the Assistant Secretary's decision within the meaning of section 2411.13 of the Council's rules.

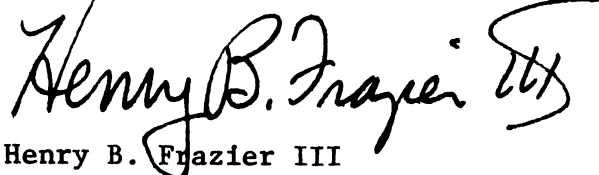
Section 2411.13(a) of the Council's rules provides that "[a]ny party aggrieved by a final decision of the Assistant Secretary may petition the Council for review." The term "party" is defined in section 2411.3(c) (1) of the Council's rules as follows:

- (c) "Party" means any person, employee, labor organization, or agency that participated as a party--
- (1) In a matter that was decided by the Assistant Secretary

In the instant case, based upon the record before the Council, it appears that while the union (along with the activity) participated as a party in the proceedings before the Assistant Secretary, you were not named as a party, were not served as a party, and did not otherwise participate as a party in such proceedings. Accordingly, you are not a "party aggrieved" within the meaning of section 2411.13(a) of the Council's rules^{*/} and, apart from other considerations, your appeal from the subject decision of the Assistant Secretary must therefore be denied.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. A. Remes
IRS

*/ It may also be noted that under section 13(b) of the Order, consistent with the practice in private sector labor-management relations, arbitration of grievances may be invoked only by the agency or the exclusive representative. Further, it may be noted that the Council has previously held that an individual grievant who does not participate as a "party" in the arbitration proceeding is not entitled to file a petition for review of the arbitration award before the Council. Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), 3 FLRC 421 [FLRC No. 75A-17 (June 26, 1975), Report No. 76].

Immigration and Naturalization Service, United States Department of Justice, Burlington, Vermont and National Border Patrol Council, American Federation of Government Employees, AFL-CIO (Zack, Arbitrator). This appeal arose from the arbitrator's award allowing the grievant to retain a sum of money which the activity sought to recover from the grievant as a premium pay overpayment. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law and appropriate regulation (Report No. 122).

Council action (November 30, 1977). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertained to the questions raised in the case. Based upon an interpretation rendered by the Commission in response to the Council's request, the Council, noting that consideration and determination of waiver of repayment of the sum of money in question was within the jurisdiction of the Comptroller General, held that the arbitrator's award, insofar as it allowed the grievant to retain the amount of money involved, was contrary to applicable law and appropriate regulation. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by setting aside that portion found violative of applicable law and appropriate regulation. As so modified, the Council sustained the award.

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

Immigration and Naturalization Service,
United States Department of Justice,
Burlington, Vermont

and

FLRC No. 76A-117

National Border Patrol Council,
American Federation of Government
Employees, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award allowing the grievant to retain the sum of \$984.51 which the activity sought to recover from the grievant as a premium pay overpayment.

Based on the findings of the arbitrator and the record before the Council, it appears that the grievant, a border patrol agent authorized to receive premium pay on an annual basis for performing administratively uncontrollable overtime, had reported for a number of years, for pay purposes, time spent on labor-management functions outside regular duty hours as administratively uncontrollable overtime. An audit of the grievant's time records for a certain period of time revealed that the grievant's practice of reporting time spent on labor-management functions as administratively uncontrollable overtime affected the amount of premium pay the grievant had received, resulting in an activity determination that the grievant had been overpaid in the amount of \$984.51. The activity sought repayment of this sum from the grievant.

The grievant initiated a grievance contending, among other things, that his superiors had approved over the years his use of administratively

uncontrollable overtime to perform certain labor-management functions and that this practice was consistent with Article 7, Section A of the parties' negotiated agreement.^{1/}

The Arbitrator's Award

The arbitrator determined that, because the grievant's superiors had approved his weekly time forms when they were submitted, it was unreasonable to require the grievant at a much later date to establish the legitimacy of forms previously approved. According to the arbitrator, the activity waived its right to contest those time forms of the grievant which had come under scrutiny. In view of the circumstances, the arbitrator found that "[t]he grievant must be held to have been in compliance with the terms of Article 7 of the parties' agreement." Consequently, the arbitrator decided that the grievant's claim to retain the \$984.51 had merit.

Agency's Appeal to the Council

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

1/ ARTICLE 7 - Use of Official Time provides in pertinent part:

A. Upon request and approval in advance by Management, a reasonable period of time in an on-duty status will be granted to accredited representatives of the Union for the purpose of carrying out the following Union functions:

- (1) Attending prearranged conferences with Management officials.
- (2) To be the personal representative of an employee who is presenting a complaint, grievance, or appeal from adverse action.
- (3) To carry out the Union rights and responsibilities as specified in Article 4, Section H.

In no case will internal Union business be conducted on official time.

2/ Pursuant to section 2411.47(f) of the Council's rules of procedure, the Council determined, based upon the facts and circumstances presented, that issuance of a stay was not warranted in this case and therefore denied the agency's request for a stay.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulation. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

The grievant in this case is employed as a border patrol agent for the Department of Justice, Immigration and Naturalization Service. As such, he may be entitled to receive premium pay on an annual basis for administratively uncontrollable overtime. During an agency review of the records on which the grievant's premium pay was based during the period from June 9, 1974 through August 30, 1975, it was discovered that the grievant had reported time spent on "labor relations functions" outside regular working hours as administratively uncontrollable overtime. This affected the amount of premium pay he received and the agency requested repayment of the amount (\$984.51) which was based on the grievant's recording of labor-management relations time as administratively uncontrollable overtime. The grievant contends that the recording of time spent on labor-management functions after regular duty hours as administratively uncontrollable overtime has been a past practice over a long period of years and had always been approved throughout the levels of the agency until the grievant was notified of the impending audit. The agency claims, on the other hand, that Civil Service Commission regulations (specifically sections 550.151-154) do not permit agencies to authorize administratively uncontrollable overtime for the purpose of permitting union representatives to engage in contract administration and other representational functions outside regular working hours.

The arbitrator did not rule on the propriety of the grievant's claim that he was entitled to \$984.51 which the agency later attempted to recover. Rather, the arbitrator ruled that because the grievant's supervisors had approved his claims for overtime compensation, the agency had, in effect, waived its right to challenge the claims at a much later date. He then determined that the grievant's claim for retention of the \$984.51 had merit.

Section 5545(c)(2) of title 5, U.S. Code, authorizes the payment of premium pay on an annual basis to employees occupying positions in which the hours of duty cannot be controlled administratively, and which require substantial amounts of irregular, unscheduled, overtime duty with the employees generally being responsible for recognizing circumstances which require them to remain on duty. The Commission's regulations which implement this section can be found in sections 550.151-550.154 of title 5, Code of Federal Regulations. Section 550.153(a) describes an example of a position in which the hours of duty cannot be controlled administratively -- the hours of duty of a criminal investigator are governed by what criminals do and when they do it. In such a situation, the hours of duty cannot be controlled by such devices as hiring additional personnel, rescheduling the hours of duty, or granting compensatory time off duty to offset overtime hours required. Subsection (c) of that section requires that an employee remain on duty because of compelling reasons inherently related to continuance of his duties of such a nature that failure to carry on would constitute negligence. Subsection (d)(2) further requires that in order to be entitled to receive premium pay on an annual basis, an employee must have no choice as to where he may perform the work. Situations in which an employee has the option of taking work home or doing it in the office, or doing it in continuation of his or her regular hours of duty or later in the evening do not constitute circumstances which "require the employee to remain on duty."

In order to meet the requirement for crediting time outside regular duty hours under the above provisions, such time must be involved in activities that are an inherent and integral part of the official duties of the position that constitutes the basis for the annual premium pay. Representational duties do not fall in this category. Rather than a deliberate determination by management that the detailed requirements outlined in section 550.153 of the Commission's regulations were met, it appears that the "authorization" for the grievant to charge labor relations functions as administratively uncontrollable overtime was ex post facto and a continuation of past practice. Hence, the payment of overtime compensation to the grievant based on the performance of duties incident to his presidency of the National Border Patrol Council is erroneous since those duties are not inherent in his position as a border patrol agent.

While there is no legal basis for authorizing overtime payment under the circumstances of this case, there are situations where it may be possible for an arbitrator to exercise the discretionary authority of an agency head and waive repayment of an erroneous payment of less than \$500.00 in accordance with the standards set forth by the Comptroller General in title 4, United States Code of Federal Regulations. In this regard, section 5584, title 5, United States Code, provides that a claim of the United States arising out of an erroneous payment of pay or allowances to an employee of an agency may be waived in whole or in part if collection of the erroneous

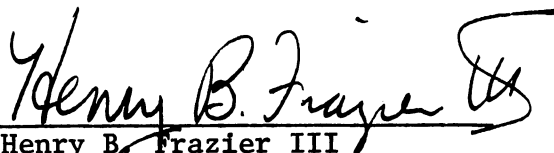
payment would be against equity and good conscience and not in the best interests of the United States. However, while an agency can waive repayment of claims for less than \$500.00, waiver of amounts in excess of \$500.00 must be granted by the Comptroller General. Therefore, in accordance with the above cited regulations set forth in title 4, CFR, the grievant may file a claim for waiver of repayment of the \$984.51 with the Comptroller General through the head of the agency.

Based upon the foregoing interpretation of the Civil Service Commission, it is clear that in the circumstances of this case the arbitrator's award, insofar as it allows the grievant to retain \$984.51 of premium pay, is contrary to applicable law and appropriate regulation and cannot stand.^{3/}

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby modify the arbitrator's award by setting aside that portion of the award which allows the grievant to retain \$984.51 of premium pay. As so modified, the award is sustained.

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 30, 1977

^{3/} As is also indicated in the Commission's response, in this case consideration and determination of waiver of repayment of the amount in question is within the jurisdiction of the Comptroller General of the United States.

Plum Island Animal Disease Center, Agricultural Research Service, U.S. Department of Agriculture and American Federation of Government Employees, Local 1940 (Levitt, Arbitrator). This appeal arose from the arbitrator's award wherein he determined that the activity violated the parties' agreement by denying two employees in the bargaining unit callback overtime when they were called in to work prior to the start of their regular shifts. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law and appropriate regulation (Report No. 122).

Council action (November 30, 1977). Because the case concerned issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violated applicable law and appropriate regulation. Based upon the decision of the Comptroller General rendered in response to the Council's request, the Council concluded that the arbitrator's award violated applicable laws and appropriate regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

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

Plum Island Animal Disease Center,
Agricultural Research Service, U.S.
Department of Agriculture

and

FLRC No. 76A-153

American Federation of Government
Employees, Local 1940

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award wherein he determined that the Plum Island Animal Disease Center (the activity) violated the parties' negotiated agreement by denying two employees in the bargaining unit callback overtime when they were called in to work prior to the start of their regular shifts.

According to the arbitrator's award, during one particular workweek, two maritime employees in the unit were each required to report for duty 45 minutes before their regular shift began. After working the extra 45 minutes and then continuing through their regular shifts, the employees were paid overtime for that extra 45-minute period. The union filed a grievance, resulting in the instant arbitration, contending that, under the labor agreement between the parties, the employees were entitled to payment of 2 hours callback overtime for the extra 45-minute period rather than payment for only the 45-minute period each actually worked.

The Arbitrator's Award

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

Did the employer violate Article XVIII, Section 3^{1/} of the negotiated agreement by denying unit employees . . . the minimum two hour call-back overtime when they were called in to work 45 minutes early. . . . [Footnote added.]

The arbitrator concluded that the employees involved in the case before him were entitled to the 2 hours minimum callback overtime. Accordingly, the arbitrator sustained the union's grievance.

Agency's Appeal to the Council

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

Opinion

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

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

1/ According to the award, Article XVIII, Section 3 provides:

Premium pay for vessel employees shall be as prescribed for wage grade employees in AM 402.2 except that night-time shift and Sunday differentials shall not be paid.

According to the award, Department of Agriculture, Agricultural Research Service Administrative Memorandum 402.2 (AM 402.2), in effect on the day the grievance arose, stated with respect to callback overtime for wage grade employees:

Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is considered at least 2 hours in duration for the purpose of overtime pay, whether or not work is performed.

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

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award violates law and regulation. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and appropriate regulation. The Comptroller General's decision in the matter, B-189163, October 11, 1977, is set forth below:

The record shows that employee Conway was called in 45 minutes early on October 7, 1974, to substitute for a sick employee. Employee Gibbs was called in 45 minutes early on October 9, 1974, for the same reason. Both employees were paid for 45 minutes of overtime. The grievance arose when the employees, through their union, Local 1940 of the American Federation of Government Employees, contended that they were entitled to 2 hours of call-back overtime under a negotiated agreement between the Department of Agriculture and the American Federation of Government Employees.

The "Statement of Issue" agreed upon by the parties and submitted to arbitration is as follows:

"Did the employer violate Article XVIII, Section 3 of the negotiated agreement by denying unit employees, Conway and Gibbs, the minimum two hour call-back overtime when they were called to work 45 minutes early on October 7th and 9th, 1974, respectively."

The arbitrator noted in his opinion that the provisions of Article XVIII, Section 3 are understood to mean the provisions of AM 402.2 regarding call-back overtime for wage grade employees. Article XVIII, Section 3 of the negotiated agreement states:

"Premium pay for vessel employees shall be as prescribed for wage grade employees in AM 402.2 except that nighttime, shift, and Sunday differentials shall not be paid."

Department of Agriculture, Agricultural Research Service Administrative Memorandum 402.2 (AM 402.2), in effect on the day the grievance arose, provides for call-back overtime for wage grade employees, as follows, at paragraph V, "Premium Pay for Wage Grade Employees," subparagraph B8d:

"Call-Back Overtime Work. Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is considered at least 2 hours in duration for the purpose of overtime pay, whether or not work is performed."

In reaching his decision in favor of employees Conway and Gibbs the arbitrator found that the quoted wording of AM 402.2 did not require the merger of overtime into a regular tour of duty when employees are

called in early. He based his conclusion on the fact that, prior to 1970, AM 402.2 had specifically stated that the 2-hour minimum did not apply if an employee's early reporting for duty merged with and continued into his regular tour of duty. In 1970 the merger provision was deleted from the wage grade employees agreement (but was retained in the Classification Act employees agreement). The arbitrator concluded that the deletion of the merger provision of AM 402.2 for wage grade employees was not a nullity and had some meaning. Hence, he determined that AM 402.2, as amended in 1970, did not require the merger of call-back overtime into the regular tour for wage grade employees who are requested to report to duty early. Thus, he found employees Conway and Gibbs were entitled to the 2-hour minimum for call-back overtime.

After careful examination of the record, applicable laws and regulations, and decisions of the Comptroller General we conclude that the holding of the arbitrator that early reporting overtime does not merge with a regular tour of duty for wage grade employees was incorrect. Although the Department of Agriculture changed the wording of AM 402.2 regarding call-back overtime for wage grade employees, that change had no legal effect because call-back overtime for wage grade employees is regulated by Federal Personnel Manual Supplement 532-1 at subchapter S8-4(b), section (8), which implements 5 U.S.C. § 5544 (Supp. V, 1975).

In our decision B-175452, May 1, 1972, we were asked to determine whether wage grade employees could be paid a minimum of 4 hours overtime for call-back work under a negotiated agreement between the Veterans Administration and the American Federation of Government Employees. In that decision we stated that the regulatory provisions of FPM Supplement 532-1, S8-4(b)(8) prescribing call-back overtime for wage grade employees parallel the statutory provision of 5 U.S.C. § 5542(b)(1) (1970) for General Schedule employees. We further stated that without the statutory authority of 5 U.S.C. § 5542(b)(1), which creates an exception to the general rule that overtime payments can be made only for the actual time duty is performed, a 2-hour minimum payment for call-back overtime could not be made. Accordingly, we held that said statute set the maximum time that an employee could be paid overtime in the absence of performance of duty. Additionally, we held that the regulatory provisions of FPM Supplement 532-1, S8-4(b)(8) must also be regarded as an exception to the general rule. Hence, we concluded that the proposal to pay a minimum of 4 hours overtime for call-back work was not authorized for either General Schedule or wage grade employees. See also B-177313, November 8, 1972.

In our decision 45 Comp. Gen. 53 (1965), we held that call-back overtime for General Schedule employees performed prior to and continuing into a regularly scheduled tour of duty merges with the regular tour. Hence, the 2-hour minimum for call-back overtime

authorized by 5 U.S.C. § 5542(b)(1) does not apply in such a situation. In light of B-175452, supra, this same rationale applies to call-back overtime authorized by FPM Supplement 532-1, section S8-4(b)(8) for wage grade employees. Thus, the Department of Agriculture was without authority to provide a 2-hour minimum call-back for wage grade employees who report to duty early. Accordingly, the arbitrator's interpretation of the Department's regulation to permit payment of a 2-hour minimum is incorrect.

Employees Conway and Gibbs contend that they are not covered by the provisions of 5 U.S.C. § 5544 and FPM Supplement 532-1, section S8-4(b) since they are vessel employees exempted by the provisions of 5 U.S.C. § 5348(a) (Supp. V, 1975). Nevertheless, the negotiated agreement incorporated certain overtime provisions of AM 402.2, including the call-back overtime provisions, and made them applicable to employees Conway and Gibbs. In reaching his decision the arbitrator found that employees Conway and Gibbs were covered by the call-back provisions of AM 402.2, as he based the award on his interpretation of the language of AM 402.2. The arbitrator did not find, as employees Conway and Gibbs contend, that the negotiated agreement incorporated the call-back overtime provisions of AM 402.2 only insofar as it did not conflict on its face with the prevailing practices of the maritime industry.

We express no opinion as to whether vessel employees, unlike wage grade employees, could, under 5 U.S.C. § 5348(a) be paid a 2-hour minimum for early reporting consistent with the prevailing practices of the maritime industry.

We conclude, therefore, that the arbitrator's award to employees Conway and Gibbs violates applicable laws and regulations and may not be implemented.

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

Conclusion

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

By the Council.


Henry B. Frazier III
Executive Director

Issued: November 30, 1977

New Jersey Department of Defense, New Jersey Air National Guard, 177th Fighter Interceptor Group, A/SLMR No. 835. The Assistant Secretary dismissed the section 19(a)(1) and (6) complaint filed by the American Federation of Government Employees, Local 3486, AFL-CIO (AFGE) related to a change in the minimum military reenlistment term for members of the New Jersey Air National Guard. AFGE appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue. AFGE also requested a stay of the Assistant Secretary's decision and order.

Council action (November 30, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied AFGE's petition for review. The Council likewise denied AFGE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 30, 1977

Ms. Maralyn G. Blatch, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: New Jersey Department of Defense, New Jersey
Air National Guard, 177th Fighter Interceptor
Group, A/SLMR No. 835, FLRC No. 77A-61

Dear Ms. Blatch:

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

In this case, the American Federation of Government Employees, Local 3486, AFL-CIO (the union) filed an unfair labor practice complaint against the New Jersey Department of Defense, New Jersey Air National Guard, 177th Fighter Interceptor Group (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(1) and (6) of the Order by its unilateral change in the minimum military reenlistment term for New Jersey Air National Guard members from one year to three years, which military enlistment is a mandatory condition of employment for civilian technicians of the National Guard.

The Assistant Secretary found that the activity was not obligated to provide the union an opportunity to meet and confer concerning the decision to change the minimum term for military reenlistments, since such decision was outside the scope of the bargaining requirements of the Order. The Assistant Secretary also found that, under the particular circumstances presented, the activity was likewise not obligated under the Order to afford the union an opportunity to meet and confer on the procedures to be utilized in effectuating the implementation of its decision and on the impact of its decision on adversely affected employees. In so finding, he noted that the record shows that military membership is, by statute, a prerequisite for civilian employment as a technician; that military membership in the Guard is a wholly separate enlistment contract which is mandated by statute and controlled by the regulations which implement that statute; and that the directive issued under the authority of the Chief of Staff, New Jersey Department of Defense, did not address terms and conditions of employment for civilian technicians, but, rather,

established a new policy for all military units of the Guard with respect to military reenlistment procedures. Hence, citing and relying upon the Council's decision in Association of Civilian Technicians, Inc., and State of New York National Guard, 1 FLRC 615a [FLRC No. 72A-47 (Dec. 27, 1973), Report No. 47], he concluded:

In my view, the change in military re-enlistment procedures did not change a working condition which was bargainable in any respect under the Order, but, rather, changed a precondition for civilian technician employment which is outside the purview of the Order and is solely governed by statute. Under these circumstances, I find that there were no procedures or impact over which the [activity] had an obligation to bargain. Accordingly, I shall order that the instant complaint be dismissed in its entirety. [Footnote omitted.]

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue insofar as it holds "that the impact and the procedures used to implement a nonnegotiable subject are per se nonnegotiable." In this regard, you assert that the "obligation to bargain over impact and procedures exists whether or not [a] matter is nonnegotiable," and that the Assistant Secretary has departed from precedent without offering a persuasive explanation by finding no such obligation in the instant case.

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

As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein. More particularly, with regard to your assertion that the Assistant Secretary's decision departs from prior decisions of the Assistant Secretary and the Council without persuasive explanation, your appeal fails to establish any clear, unexplained inconsistency with applicable precedent in the circumstances of this case. Nor is a major policy issue presented, as alleged, by the Assistant Secretary's finding that "there were no procedures or impact over which the [activity] had an obligation to bargain" in the circumstances of this case. In this regard we note particularly the Assistant Secretary's finding, citing the Council's decision in Association of Civilian Technicians, Inc., and State of New York National Guard, supra,^{1/}

^{1/} In New York National Guard, involving, inter alia, union bargaining proposals concerning technicians' discharge from the National Guard, the Council stated (at 3 of its decision, 1 FLRC 615(d)):

32 U.S.C. 709(b) makes military membership in the National Guard a prerequisite for civilian employment as a National Guard technician.

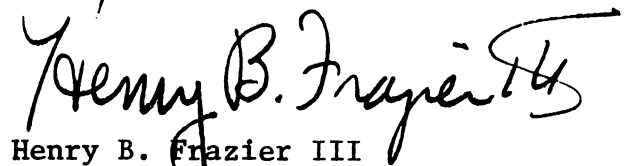
(Continued)

that "the change in military re-enlistment procedures did not change a working condition which was bargainable in any respect under the Order, but, rather, changed a precondition for civilian technician employment which is outside the purview of the Order and is solely governed by statute."^{2/}

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the standards for review as set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Col. J. G. Johnson
NJANG

(Continued)

In a sense, therefore, it could be considered a precondition for an employment relationship whose terms are subject to the Order. The precondition itself, however, is not covered by the Order, but is a wholly separate enlistment contract which is mandated by statute and controlled by the regulations which implement that statute. The enlistment contract is for military service which entails numerous obligations and responsibilities attendant upon and required to be fulfilled by all members of the National Guard, regardless of the nature of their civilian employment.

^{2/} In so concluding, the Council does not construe the Assistant Secretary's decision as holding that "the impact and the procedures used to implement a nonnegotiable subject are per se nonnegotiable," as the union contends. Rather, we interpret the Assistant Secretary's decision as restricted to the circumstances of the instant case, involving a change in a precondition of employment which is totally outside the purview of the Order and is solely governed by statute, as distinguished from a change in personnel policies and practices and matters affecting working conditions under the Order.

Federal Aviation Administration, St. Louis Air Traffic Control Tower and Professional Air Traffic Controllers Organization (Moore, Arbitrator). The arbitrator denied the grievance concerning the activity's calling in an employee other than the grievant for overtime work on the particular occasion involved. The union filed a petition for review of the arbitration award with the Council, contending that the award was internally inconsistent and, therefore, arbitrary and capricious.

Council action (November 30, 1977). The Council held that the union's exception provided no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

November 30, 1977

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

Re: Federal Aviation Administration, St. Louis Air Traffic Control Tower and Professional Air Traffic Controllers Organization (Moore, Arbitrator), FLRC No. 77A-95

Dear Mr. Peer:

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

According to the arbitrator's award, the dispute in this matter arose when the grievant alleged that he, rather than another employee, should have been called in for certain overtime work and filed a grievance seeking reimbursement at the overtime rate of pay for the overtime that was denied him.

The arbitrator stated that the St. Louis Air Traffic Control Tower (the activity), in order to facilitate compliance with the provisions of Article 40, Section 2 of the parties' negotiated agreement, */ adopted a formula to be followed in determining who among activity employees should be called in for available overtime. The grievance arose out of the undisputed fact that, on one particular occasion, an error was made and the formula was not followed, resulting in the grievant's not being called in for overtime work.

The basic issue, according to the arbitrator, was whether he might grant the remedy requested, that is, reimbursement at the appropriate overtime rate. The arbitrator found that in order for him to make a backpay award in this matter, it must be proved that the pertinent

*/ According to the award, Article 40, Section 2 provides as follows:

Whenever overtime work is to be performed, it shall be made available to qualified employees on an equitable basis.

agreement provision was violated, not the formula unilaterally adopted by the facility. The arbitrator then stated that, while "the evidence established that the formula unilaterally adopted by the facility . . . to comply with the requirement in the Agreement that 'overtime work . . . be made available to qualified employees on an equitable basis,' was on one occasion not complied with[,] [a]n 'equitable basis' of distributing overtime does not require that a formula adopted by the facility be applied with total accuracy on a day to day basis." The arbitrator concluded that there was no authority for him to substitute the formula for the requirement in the agreement and no evidence that the distribution of overtime was inequitable. Therefore he denied the grievance.

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

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

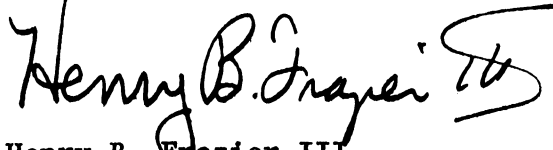
In its petition the union contends that the award is internally inconsistent and, therefore, arbitrary and capricious. In support of this exception the union argues that no "reasoned decision" can logically start with the given premise that an error was made and the formula not followed and end up with the conclusion that no award of pay is in order "because there was no evidence the distribution was inequitable."

In the Council's opinion, the union's contention that the award is "internally inconsistent" is, in essence, nothing more than mere disagreement with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that it is the award rather than the conclusion or specific reasoning employed by the arbitrator that is subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Moreover, it would appear that the union is disagreeing with the arbitrator's interpretation and application of the provisions of Article 40, Section 2 of the negotiated agreement in the resolution of the grievance. Council precedent is clear that the interpretation of provisions in a negotiated agreement is a matter to be left to the arbitrator's judgment. E.g., American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: R. J. Alfultis
Transportation

Department of the Air Force, 2750th Air Base Wing, Wright-Patterson Air Force Base, Assistant Secretary Case No. 53-09517(CA). The Assistant Secretary denied the request for review of Local 1138, American Federation of Government Employees, AFL-CIO (AFGE), seeking reversal of the partial dismissal by the Regional Administrator (RA) of AFGE's unfair labor practice complaint; returned the case to the RA; and directed the RA, absent settlement, to issue a notice of hearing on the remaining allegations in the subject complaint. AFGE filed a petition for review of the Assistant Secretary's decision with the Council, and requested a stay of the notice of hearing issued by the RA pursuant to that decision.

Council action (December 12, 1977). Since a final decision on the entire unfair labor practice complaint had not been rendered by the Assistant Secretary, the Council, pursuant to section 2411.41 of its rules of procedure, denied review of AFGE's interlocutory appeal, without prejudice to the renewal of AFGE's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied AFGE's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 12, 1977

Mr. Henry A. Webb, President
Local 1138, American Federation
of Government Employees, AFL-CIO
408 West Main Street, Suite 203
Fairborn, Ohio 45324

Re: Department of the Air Force, 2750th Air Base
Wing, Wright-Patterson Air Force Base,
Assistant Secretary Case No. 53-09517(CA),
FLRC No. 77A-137

Dear Mr. Webb:

This refers to your petition for review of the Assistant Secretary's decision of October 20, 1977, and to your request for a stay of the notice of hearing issued on October 31, 1977, by the Regional Administrator pursuant to that decision, which you filed with the Council in the above-entitled case on November 22, 1977.

In his decision, the Assistant Secretary denied your request for review seeking reversal of the partial dismissal by the Regional Administrator (RA) of the union's unfair labor practice complaint (insofar as the complaint alleged a violation of section 19(a)(2) of the Order); returned the case to the RA; and directed the RA, absent settlement, to issue a notice of hearing on the remaining allegations in the subject complaint. As stated above, the RA issued such a notice of hearing on October 31, 1977.

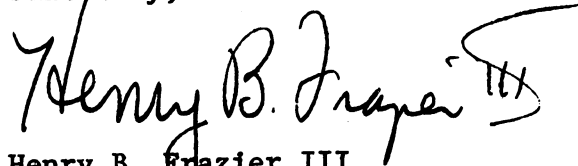
Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a decision on the entire unfair labor practice complaint has issued, or after other final disposition has been made of the entire matter by the Assistant Secretary.

Since a final decision on the entire unfair labor practice complaint has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice to the renewal of your contentions

in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. Likewise, your request for a stay is also denied.

For the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

F. Hustad
Air Force

J. R. Rosa
AFGE

American Federation of Government Employees Local 3285 and Veterans Administration Hospital, Omaha, Nebraska. The union filed a petition for review of a negotiability issue arising from an agency head determination that a particular union proposal was nonnegotiable. However, subsequent to the filing of the appeal, the agency, in a submission to the Council, withdrew its objections to the subject proposal and requested that the union's petition be dismissed for mootness.

Council action (December 15, 1977). The Council held that the action by the agency subsequent to the filing of the union's appeal in effect rescinded its initial determination of nonnegotiability concerning the disputed proposal and rendered moot the dispute involved in the appeal. Accordingly, the Council granted the agency's request and dismissed the union's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 15, 1977

Mr. Ronald D. King, Acting Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees
Local 3285 and Veterans Administration Hospital,
Omaha, Nebraska, FLRC No. 77A-120

Dear Mr. King:

The Council has carefully considered your petition for review of a negotiability dispute filed with the Council on October 27, 1977, your supplemental submission filed on December 1, 1977, and the agency's letter to the Council of December 5, 1977, filed on December 12, 1977, in the above-entitled case.

The record in this case indicates that the agency head initially determined that the disputed proposal involved in your appeal was nonnegotiable. However, in its letter of December 5, 1977, the agency withdrew its objections to the subject proposal, and requested that the instant petition for review be dismissed for mootness.

In the Council's opinion, the agency's action of December 5, 1977, in effect rescinded its initial determination of nonnegotiability of the disputed proposal and rendered moot the dispute involved in your appeal. Cf. National Federation of Federal Employees, Local 1641 and Veterans Administration Hospital, Spokane, Washington, FLRC No. 77A-74 (Aug. 31, 1977), Report No. 137.

Accordingly, the agency's request of December 5, 1977, is granted and your petition for review is hereby dismissed.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: S. L. Shochet
VA

Department of the Army, Headquarters, 24th Infantry Division and Fort Stewart, Fort Stewart, Georgia, Assistant Secretary Case No. 40-7912(AC). Upon appeal from the decision of the Assistant Secretary by Local 1922, American Federation of Government Employees, AFL-CIO (AFGE), the Council advised AFGE that its appeal failed to comply with cited requirements of the Council's rules of procedure, and provided AFGE with time to effect such compliance. However, AFGE made no submission in compliance with those requirements within the time limit provided.

Council action (December 15, 1977). The Council dismissed AFGE's appeal for failure to comply with the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 15, 1977

Mr. Arthur Ross, President
Local 1922, American Federation
of Government Employees, AFL-CIO
Fort Stewart, Georgia 31313

Re: Department of the Army, Headquarters, 24th
Infantry Division and Fort Stewart, Fort Stewart,
Georgia, Assistant Secretary Case No. 40-7912(AC),
FLRC No. 77A-128

Dear Mr. Ross:

By Council letter of November 22, 1977, you were advised that preliminary examination of your petition for review of the decision of the Assistant Secretary in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included: 2411.14(c), 2411.42, 2411.44 and 2411.46(c) and (d).

You were also advised in the Council's letter:

Further processing of your appeal is contingent upon your compliance with the above-designated provisions of the Council's rules. Accordingly, you are hereby granted until the close of business on December 12, 1977, to take action and to file additional materials with the Council in compliance with the above provisions, along with a statement of service of your additional submission as provided in section 2411.46(d) of the rules.

Failure to do so within the time limit prescribed will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR H. Golden K. T. Blaylock
Labor Army AFGE

International Association of Machinists and Aerospace Workers and Naval Air Rework Facility, Norfolk, Virginia (Ables, Arbitrator). This appeal arose from the arbitrator's award directing that the grievant be compensated as temporary foreman for a period of 120 days. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated appropriate regulation, namely, the regulations of the U.S. Civil Service Commission (Report No. 123).

Council action (December 20, 1977). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertained to the questions raised in the case. Based on the Commission's response to the Council's request, the Council held that the arbitrator's award was, in the circumstances under consideration in the case, contrary to regulations of the Commission. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award providing compensation to the grievant.

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

International Association of
Machinists and Aerospace Workers

and

FLRC No. 77A-11

Naval Air Rework Facility,
Norfolk, Virginia

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing that the grievant be compensated as temporary foreman for a period of 120 days.

Based on the findings of the arbitrator and the record before the Council, it appears that the grievant's supervisor, an aircraft electrician foreman, was ill and was expected to be absent from work indefinitely. The grievant was assigned his supervisor's duties as temporary foreman. Because a provision of the parties' negotiated agreement required that employees receiving temporary assignments to foreman positions expected to last for 10 work days or more receive temporary promotions, the Naval Air Rework Facility (the activity) initiated action to promote the grievant temporarily to the absent supervisor's position. In the course of processing the proposed temporary promotion, the personnel office determined that the grievant did not meet the Civil Service Commission's qualification standards for the higher level position. The grievant served on detail June 2 - 25, 1976, in the absent supervisor's position.

A grievance was initiated by the International Association of Machinists and Aerospace Workers (the union) asserting that the activity, in denying the grievant a temporary promotion to the supervisor's position, had violated Article XVIII, Section 3(c) and Section 4b of the parties' negotiated agreement.^{1/} To correct the asserted contract violation, the

^{1/} Article XVIII, Section 3 provides in pertinent part:

At any time a foreman is absent from the Facility for one (1) hour or more the Employer will do one of the following . . . (c) temporarily promote a unit employee to the position.

Article XVIII, Section 4b provides:

When it is known in advance of an assignment or during the assignment that the requirement will be for a period of ten work days, or

(Continued)

union requested that the grievant be compensated for the time he spent in the higher level position and that he be allowed to complete the remainder of the higher level assignment as specified in the negotiated agreement.

The Arbitrator's Award

The arbitrator resolved the dispute in favor of the grievant and sustained the grievance, providing compensation for the grievant "as though he had been promoted to the job of temporary foreman for the full period of 120 days." In so concluding the arbitrator determined that the grievant was entitled to the temporary promotion because he was qualified for the higher level position. According to the arbitrator, there was no dispute that the grievant satisfied the negotiated criteria for assignment to the higher level position and therefore was qualified under the agreement. Additionally, the arbitrator stressed that there was testimony by one of the grievant's superiors that the grievant was fully qualified for the higher level position. As for management's contention that the grievant did not meet the qualification standards established by the Civil Service Commission, the arbitrator concluded:

Keeping in mind . . . the specific agreement by the parties as to what constitutes qualifications for the job in issue and most importantly the judgment of the people in charge that this particular employee was qualified for the job under consideration, it cannot be found in this dispute that the institutional standards set for it by the Civil Service Commission unattached to real, practical problems in labor management relations should determine the outcome of this dispute. Rather, substance should control. That substance is that [the grievant] was qualified to act as a temporary foreman as an aircraft electrician and should have been promoted in accordance with the recommendations of the senior supervisor who know[s] what the job requires.

Agency's Appeal to the Council

The agency filed a petition for review with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review^{2/} insofar as it related to the agency's

(Continued)

more, including holidays, a temporary promotion will be made. Assignments to temporary foreman or leader will start when the requirement occurs and will be for the duration of the requirement but not to exceed a total of 120 days.

NOTE: Non-competitive promotions, including details to a higher level position cannot exceed a total of 120 days during the 12 months preceding the ending of the assignment.

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

exception which alleged that the award violates appropriate regulation, namely the regulations of the U.S. Civil Service Commission.^{3/} The agency thereafter supplemented its memorandum in support of its petition for review. The union did not file a brief.

Opinion

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

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

As previously stated, the Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates appropriate regulation, namely the regulations of the U.S. Civil Service Commission. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

The grievant in this case, an electronics mechanic, was assigned to perform the duties of his supervisor, an aircraft electrician foreman, for a period in excess of ten work days. Article XVIII, Section 4 of the negotiated agreement requires that an employee assigned to perform the duties of a higher level position must receive a temporary promotion. After the branch chief submitted the necessary documentation to propose temporary promotion of the grievant as required by the agreement, it was determined by the personnel office that the grievant did not meet the Civil Service Commission qualification standards for promotion to the higher level position. After the request for promotion was returned to the branch chief with the notation that the grievant was not qualified for promotion, the grievant was detailed to the higher grade position until he was returned to his position twenty three days after his assignment as acting supervisor. Thereupon, the grievance was filed which requested as corrective action for the alleged contract violation, that the grievant be paid the higher rate of pay for the 120 days that he would have served as acting supervisor if the provisions of the contract had been followed. The

^{3/} In its acceptance letter, the Council requested that the parties, should they wish to submit briefs, explain whether the grievant met the Civil Service Commission qualification standards for temporary promotion to the position involved and why. The Council also requested that the parties address the question of whether or not the arbitrator's award violates the Back Pay Act of 1966, 5 U.S.C. § 5596, and regulations issued thereunder.

arbitrator found for the grievant and ordered that the grievant be paid the difference between the wage he received in his regular job as electronics mechanic and that of temporary foreman for a period of 120 days beginning June 2, 1976.

A decision as to the consistency of the arbitrator's award in this case with Civil Service Commission regulations must be based on a determination as to whether or not the grievant was qualified for the job of aircraft electrician foreman. Federal Personnel Manual Bulletin No. 300-40, entitled GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs (B-183086) and dated May 25, 1977, clarifies that while an employee who is detailed to work outside his or her regular position does not have to meet placement requirements for that position, when an employee is promoted, whether temporarily or permanently, statutory and Commission requirements which govern promotions are to be applied. In that regard, Requirement 2 of Subchapter 2, FPM Chapter 335 requires in pertinent part: "Each plan shall provide that no person may be promoted who fails to meet the minimum qualifications standards prescribed by the U.S. Civil Service Commission, or other standards which agencies have authority to prescribe" Furthermore, Section 3-5 of that same chapter requires that the minimum qualification standards used for promotion shall be the standards prescribed by the Commission.

The question of the authority of an arbitrator to address a qualifications issue properly before him was addressed in the advisory opinion the Commission furnished to the Council in FLRC Case No. 74A-99 (Defense General Supply Center and AFGE Local 2047) [Report No. 104]. We advised the following:

Under authority provided by 5 USC 3301, 5105 and Civil Service Rule II, the Commission issues qualifications standards which are binding on the agencies and which are applied by the agencies in making qualifications determinations in individual cases. While the Commission retains the authority to overrule an agency's determination, an employee does not have a right to appeal an agency's determination to the Commission under statute or current appellate procedures. Therefore, provided a qualifications issue were otherwise properly before the arbitrator, we would know of no bar to his rendering a decision on it. His decision would, of course, have to be consistent with the controlling qualifications standards of the Commission in order to be legally implementable.

The file you provided contains insufficient information on the grievant's experience and training for us to make a positive determination as to whether or not he met the Commission's qualifications standards for promotion to the aircraft electrician foreman position. However, the file indicates that the agency's assertion before the

arbitrator that the grievant did not meet the qualifications standards was not disputed by the union. Furthermore, the arbitrator determined that the standards set forth in the agreement should determine the outcome of the dispute before him rather than Commission qualifications standards which he determined should be applied as guidelines in this case.

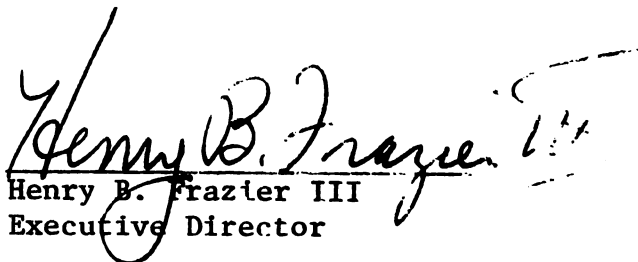
You mentioned in your request for an advisory opinion that you requested that the parties to the appeal before you explain whether, in their opinion, the grievant met the Civil Service Commission qualification standards for promotion to the position involved herein and why. The union did not submit any statement to refute the agency's position that the grievant did not meet the qualification standards for promotion. Therefore, based on the agency's presentation, we must conclude that the grievant was not qualified for the position at issue. Because it is well established that a Federal employee can be compensated only for the position to which he has been officially assigned and because the grievant in this case cannot properly be awarded a retroactive temporary promotion to the position in question, there is no basis for the arbitrator's award of back pay in this case.

Based upon the foregoing interpretation of the Civil Service Commission, the arbitrator's award is, in the circumstances under consideration in this case, contrary to regulations of the Civil Service Commission and cannot be sustained.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we hereby set aside the arbitrator's award which provides "[g]rievance sustained as to compensation as temporary foreman for period in dispute."

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 20, 1977

Portsmouth Naval Shipyard and Federal Employees Metal Trades Council (Blum, Arbitrator). The arbitrator held that in the particular work situations involved, high work environmental differential pay was warranted under the Federal Personnel Manual (FPM), and that the activity violated the parties' agreement by terminating such payments. Accordingly, the arbitrator awarded the grievants retroactive backpay for the environmental differential to which he determined they were entitled. The agency filed exceptions to the arbitrator's award with the Council contending (1) that the award violated the FPM; (2) that the arbitrator exceeded his authority; and (3) that the arbitrator failed to administer the parties' agreement in accordance with section 12(a) of the Order. The agency also requested a stay of the award.

Council action (December 20, 1977). As to (1) and (2), the Council held that the agency's petition failed to present the necessary facts and circumstances to support its exceptions. As to (3), the Council held that the agency's exception did not state a ground upon which the Council grants review of an arbitration award. Accordingly, the Council denied the agency's petition for review because it failed to meet the requirements set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Mr. Terry Haycock, Acting Director
Labor & Employee Relations Division
Office of Civilian Personnel
Department of the Navy
Washington, D.C. 20390

Re: Portsmouth Naval Shipyard and Federal Employees
Metal Trades Council (Blum, Arbitrator), FLRC
No. 77A-66

Dear Mr. Haycock:

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

According to the arbitrator's award, this case involves the activity's termination of payment of a high work environmental differential for specified work situations to certain categories of employees. In reviewing the background of the grievance submitted to him, the arbitrator pointed out that an earlier grievance filed in 1973 had also concerned the termination by the activity of an environmental pay differential for high work. To resolve the earlier grievance a series of discussions was held between management and union officials. As a result of those discussions, the parties entered into a written settlement of that grievance. They agreed to reinstate a high work environmental pay differential for specific categories of employees for work situations specified in the settlement agreement and in a supplemental list of work areas issued by the activity. This reinstated environmental differential was paid pursuant to the aforementioned 1973 grievance settlement agreement and its supplemental list until November 1975. At that time, as the result of a memorandum issued by a shop superintendent of the activity, these payments were in effect terminated. This led to the filing of the grievance in the present case that was ultimately submitted to arbitration.

The arbitrator stated the issues before him to be whether the activity "violate[d] the contract by ceasing to honor a certain settlement of a prior grievance between the parties by terminating" the payment of a high work environmental differential to certain employees and whether "under the contract between the parties," those employees were "wrongfully denied" such environmental pay differential in work areas specified in the supplemental list developed by management.

With respect to the issue concerning the prior grievance settlement, the arbitrator referred to various provisions of the negotiated agreement in

effect at the time of that prior grievance and the grievance procedure of the current agreement and concluded that the settlement of the earlier grievance became a pay practice under the current negotiated agreement and that, as provided in that agreement, any change in the practice was required to be executed in writing and ratified by the parties. Since the evidence "clearly indicate[d]" to the arbitrator that this pay practice was violated by the activity "when it unilaterally and wrongfully stopped valid payments for high work differential," the arbitrator held in his award that the activity had "violated the contract by ceasing to honor a certain settlement of a prior grievance between the parties by terminating" this high work environmental pay differential for certain employees.

With respect to the issue of whether "under the contract" the grieving employees were "wrongfully denied" a high work environmental pay differential, the arbitrator observed that the negotiated agreement provides for payment of environmental differentials "to the extent permitted and prescribed by applicable regulations." Thus, he acknowledged Appendix J of FPM Supplement 532-1 as solely dispositive of the grievance--in particular Part I.2.a. and 2.b.^{1/} In the arbitrator's view, height alone determined the payment of a high work environmental differential pursuant to subparagraph 2.a., whereas in subparagraph 2.b. certain other specified

^{1/} FPM Supplement 532-1, Appendix J, entitled "Schedule of Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature," pertinently provides:

PART I. PAYMENT FOR ACTUAL EXPOSURE

.

2. High Work.

- a. Working on any structure at least 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit;
- b. Working at a lesser height:
 - (1) If the footing is unsure or the structure is unstable; or
 - (2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, [or] a similar support []); or
 - (3) If adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors render working at such height(s) hazardous.

conditions in conjunction with lesser heights determined payment. In the opinion of the arbitrator, the parties were aware of these high work environmental pay differentials of Appendix J when they settled the earlier grievance and when they negotiated their current agreement, and it was their reasonable judgment until November 1975 that height and other subparagraph 2.b. conditions were reasonably involved in the specified work situations so as to warrant the payment of that environmental differential. In addition, from an on-site inspection and by a preponderance of the testimony, the arbitrator, himself, determined that in all the specified work situations, lesser heights than 100 feet and one or more of subparagraph 2.b. conditions existed, thereby warranting the payment of a high work environmental differential. Accordingly, the arbitrator held in his award that "[u]nder the contract between the parties," certain categories of employees had been "wrongfully denied" a high work environmental pay differential. Since the payment of this environmental differential was warranted by Appendix J and terminated in violation of the negotiated agreement, as a remedy the arbitrator granted the grievants an award of backpay for the high work environmental pay differential due them retroactive to November 1975.

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

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

In its first exception to the award, the agency contends that the award violates FPM Supplement 532-1. In support of this exception, the agency principally asserts that payment of a high work environmental differential is only justified if a substantial height is involved. Arguing that this basic FPM criterion of height has been disregarded by the arbitrator, the agency maintains that implementation of the award would violate the Federal Personnel Manual.

The Council will grant a petition for review of an arbitrator's award when it appears, based upon the facts and circumstances described in the petition, that the award violates appropriate regulation, such as the Federal Personnel Manual. In this case, however, the Council is of the opinion that the agency's petition does not contain a description of facts and circumstances to support its exception. That is, the agency has failed to demonstrate in what manner the arbitrator's determination, in the work situations presented to him, that a high work environmental differential was warranted and therefore was wrongfully denied the grieving employees, is violative of FPM Supplement 532-1. In this regard the Council has previously noted in Headquarters, Sacramento Air

Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator), FLRC No. 76A-71 (Jan. 12, 1977), Report No. 121, wherein the Council denied review of an arbitrator's award in which the arbitrator found that a local disputed work situation warranted payment of an environmental differential, that the Federal Personnel Manual^{2/} leaves to local determination the specific work situations for which an environmental differential will be paid and that

FPM Supplement 532-1 provides for the collective bargaining process as one specific means of locally determining whether a particular disputed local work situation warrants payment of an environmental differential. Id. at 4 of the Council's decision.

In the instant case the parties provided in their negotiated agreement for payment of environmental differentials "to the extent permitted and prescribed by applicable regulations" and submitted to the arbitrator the question of whether under this agreement a high work environmental pay differential was warranted and therefore was being wrongfully denied the grieving employees. Referring to the provisions of FPM Supplement 532-1, Appendix J, and noting that the provisions therein were "determinative of the grievance," the arbitrator determined that in all the specified local work situations lesser heights than 100 feet and one or more of the subparagraph 2.b. conditions^{3/} existed, thereby warranting payment of a high work environmental differential under the Federal Personnel Manual. The arbitrator accordingly awarded backpay for the environmental differential pay denied the employees. Thus, since, as indicated in Headquarters, Sacramento Air Logistics Center, the Commission has delegated to local determination the specific work situations for which an environmental differential will be payable and has "consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases,"^{4/} in the

2/ FPM Supplement 532-1, subchapter S8-7g(3) provides as follows:

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above.

3/ See note 1, supra.

4/ Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857 (Staudohar, Arbitrator), FLRC No. 76A-71 (Jan. 12, 1977), Report No. 121 at 5, n.6 of the Council's decision. In that case the Council also noted the decision of the Comptroller General B-180010.03,

(Continued)

Council's view the agency's petition fails to present the necessary facts and circumstances in support of its exception that this award violates the Federal Personnel Manual. Accordingly, the agency's first exception does not provide a basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

In its second exception the agency contends that the arbitrator exceeded his authority under the negotiated agreement. In support of this exception, however, the agency merely asserts that the arbitrator exceeded his authority when he granted an award in contravention of Civil Service Commission regulations. Although the Council will grant a petition for review of an arbitrator's award when it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority, the Council is of the opinion that the agency's petition fails to present the necessary facts and circumstances in support of its exception that the arbitrator exceeded his authority. The agency is apparently contending that because the award assertedly violates FPM Supplement 532-1, the arbitrator exceeded his authority under the negotiated agreement. Thus, the essence of the agency's second exception is the same as its first exception and, as previously indicated, such an exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules of procedure.

In its third exception to the award, the agency contends that the arbitrator failed to administer the agreement in accordance with the provisions of section 12(a) of the Order. In support of this exception, the agency asserts that the arbitrator failed to administer the agreement in accordance with the provisions of section 12(a) of the Order when he granted an award in contravention of Civil Service Commission regulation. Thus, the agency is apparently contending that because the award assertedly violates FPM Supplement 532-1, it also violates section 12(a) of the Order.^{5/}

(Continued)

October 7, 1976 [56 Comp. Gen. 8 (1976)], in a case involving determinations by two arbitrators that payments of an environmental differential were warranted, that since the FPM delegates authority to determine local coverage to each agency and expressly permits the collective bargaining process to be used to determine coverage under appropriate Appendix J categories, the arbitrators were authorized to decide that the local working conditions were covered by specific categories of Appendix J.

^{5/} Section 12(a) provides as follows:

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

(Continued)

Apart from our previous determination that the agency's petition fails to describe facts and circumstances to support its contention that the arbitrator's award violates the Federal Personnel Manual, the Council held in Rocky Mountain Arsenal and American Federation of Government Employees, Local No. 2197 (Seligson, Arbitrator), FLRC No. 77A-53 (Aug. 31, 1977), Report No. 137, that an exception to an award asserting that the award violates section 12(a) of the Order does not state a ground upon which the Council grants review of an arbitration award. As explained in Rocky Mountain Arsenal,

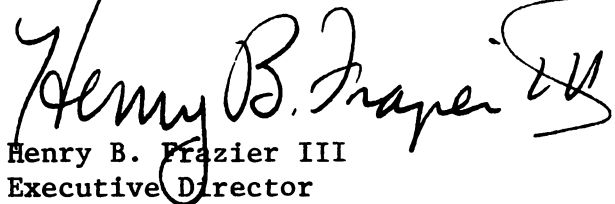
[s]ection 12(a) of the Order provides only that the administration of a negotiated agreement is subject to the legal and regulatory requirements cited in that section; it does not extend to the parties to such an agreement any rights or obligations independent of those requirements and therefore does not, in and of itself, provide a ground upon which the Council will grant a petition for review of an arbitrator's award. [Footnote omitted.] Id. at 6 of the Council's decision.

Therefore, the agency's third exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the agency's petition for review has been denied because it fails to meet the requirements set forth in section 2411.32 of the Council's rules of procedure. The agency's request for a stay of the award is also denied.

By the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: J. F. Meese
IAM

(Continued)

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level[.]

American Federation of Government Employees, Local 3006 and Idaho National Guard. The dispute involved the negotiability under the Order of a union proposal related to an Idaho National Guard Educational Encouragement Fund Program established by Idaho State law.

Council action (December 20, 1977). The Council found that the union's proposal concerned a subject which was not a working condition arising under or controlled by the Order. Accordingly, the Council held that the proposal was outside the obligation to bargain under section 11(a) of the Order and was therefore nonnegotiable.

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

American Federation of Government
Employees, Local 3006

(Union)

and

FLRC No. 77A-70

Idaho National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Technicians will be allowed to further their education through the "Idaho National Guard Educational Encouragement Fund Program," currently available to National Guard Personnel.

Agency Determination

The agency, head determined that the proposal conflicts with "applicable laws" (Idaho State Code §46-314 "Educational encouragement fund") and is therefore nonnegotiable under section 11(a) of the Order.

Question Here Before the Council

The question is whether the proposal concerns a matter within the bargaining obligation established by section 11(a) of the Order.

Opinion

Conclusion: The proposal is outside the obligation to bargain established by section 11(a) of the Order.^{1/} Accordingly, the agency's determination

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

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

that the proposal is nonnegotiable was proper and, pursuant to section 2411.28 of the Council's rules and regulations, is sustained.^{2/}

Reasons: The union represents a bargaining unit of employees who are National Guard technicians. Such technicians must, as a condition of their civilian employment under the National Guard Technician Act of 1968,^{3/} be members of the National Guard in a military capacity.

The union's proposal relates to an Idaho National Guard Educational Encouragement Fund Program established in 1974 by Idaho State law. In this regard, the Idaho State Code provides as follows:

46-314. Educational encouragement fund.--The Idaho national guard educational encouragement fund is hereby established in the state treasury. The adjutant general may authorize the payment of not more than fifty per cent (50%) of student registration fees for each semester for each member of the active Idaho national guard who attends an institution of higher education in Idaho, a vocational education school, or a junior college organized under the provisions of chapter 21, title 33, Idaho Code, from the Idaho national guard educational encouragement fund. To be eligible to receive benefits from the fund, an individual must be a member in good standing of the active Idaho national guard at the beginning of and throughout the entire semester for which benefits are received.

This Idaho law is concerned with providing a benefit for "member[s] in good standing of the active Idaho national guard" In other words, it establishes a program which does not in any manner relate to civilian technicians of the National Guard qua technicians but, rather, is a program for which the sole criterion of eligibility is the status of military membership in the Idaho National Guard.

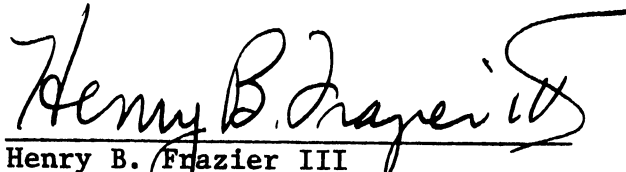
Although, as already mentioned, National Guard technicians are required by law to maintain military status in the National Guard as a condition of their civilian technician employment relationship (which relationship is, of course, subject to the Order), the military service relationship itself is not covered by the Order, but is totally mandated by statute. Consequently, since the union's proposal concerns a matter in connection with the military status of all members of the Idaho National Guard, whether or not they are also civilian technicians, it concerns a subject which is not

^{2/} In view of our decision herein, we find it unnecessary to consider the agency's specific contentions with respect to the negotiability of the proposal.

^{3/} 32 U.S.C. § 709 (1970). See generally National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120; letter denying request for reconsideration (May 18, 1977), Report No. 125.

a working condition arising under or controlled by the Order. Accordingly, it is outside the obligation to bargain under section 11(a) of the Order^{4/} and, in the circumstances of this case, is nonnegotiable.^{5/}

By the Council.


Henry B. Frazier III
Executive Director

Issued: December 20, 1977

4/ See Association of Civilian Technicians, Inc., and State of New York National Guard, 1 FLRC 615a, 615d [FLRC No. 72A-47 (Aug. 13, 1973), Report No. 47].

5/ This decision should not be construed as rendering an opinion of the Council as to whether technicians have a right under the Idaho law to participate in the educational encouragement program.

American Federation of Government Employees, Local 1760 and Department of Health, Education, and Welfare, Social Security Administration, Northeastern Program Center (Wolf, Arbitrator). Following issuance of his award, the arbitrator denied the union's request to reopen the hearing to consider newly discovered evidence. The union appealed to the Council, requesting that the Council accept its petition for review based on three exceptions, contending (1) in effect that the arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied the union a fair hearing; (2) that the arbitrator's post-award refusal to consider the union's submission of newly discovered evidence violated appropriate regulation; and (3) that such refusal violated applicable law.

Council action (December 20, 1977). As to (1) and (3), the Council held that the union's petition did not describe the necessary facts and circumstances to support its exceptions. As to (2), the Council determined that the union's petition did not state what appropriate regulation the award allegedly violated and did not otherwise provide contentions in support of this exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Mr. James R. Rosa
Assistant General Counsel
for Litigation
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees,
Local 1760 and Department of Health, Education,
and Welfare, Social Security Administration,
Northeastern Program Center (Wolf, Arbitrator),
FLRC No. 77A-78

Dear Mr. Rosa:

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

According to the arbitrator, the issue before him was "the proposed disciplinary suspension of [the grievant] for five days." According to the arbitrator, the facts in the specifications supporting the charges were disputed by the union. The arbitrator stated that "the principle issue is therefore one of credibility."

In the opinion accompanying the award the arbitrator analyzed the testimony and evidence before him and resolved the question of credibility in favor of the activity. He therefore sustained the charges against the grievant and issued the following award:

The charges against [the grievant] are sustained. The proposed penalty of five days disciplinary suspension was proper.

Following the issuance of the arbitrator's opinion and award, the union requested the arbitrator to reopen the hearing to consider newly discovered evidence, which request the activity opposed. The evidence consisted of a report of an interview by an Employee Appeals Examiner of the Department of Health, Education, and Welfare with an activity witness at the arbitration hearing, made in connection with an appraisal grievance filed by the grievant. The arbitrator declined to reopen the hearing to consider the evidence stating that, in the absence of mutual consent, under the doctrine of functus officio, he had no power to reopen the case.

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

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

In its first exception, the union contends that the arbitrator's post award refusal to consider the union's submission of newly discovered evidence violated the Order. In support of this exception, the union contends that the arbitrator's refusal to consider newly discovered evidence which, on its face, is both pertinent and material to the grievant's position, violates the due process requirements of the Order. The union asserts, in this regard, that since it has a due process right to have the arbitrator consider newly discovered evidence, the Council should be guided by the procedures of Federal courts for handling prof-fers of newly discovered evidence, particularly Rule 60 of the Federal Rules of Civil Procedure.^{1/} The union's first exception, on its face, alleges that the award violates the Order. Nevertheless, when the substance of this exception and its supporting contentions is considered, the union is, in effect contending that the arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied the union a fair hearing.

The Council has previously stated that it will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that during the course of the arbitration hearing the arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a

^{1/} It appears that the union is referring to Rule 60(b) of the Federal Rules of Civil Procedure which provides, in pertinent part:

Rule 60. RELIEF FROM JUDGEMENT OR ORDER

.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
. . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)

party a fair hearing. E.g., American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), FLRC No. 75A-105 (Jan. 30, 1976), Report No. 96. However, in this case, involving an allegation regarding the arbitrator's post award refusal to consider certain evidence, the Council is of the opinion that the union's petition does not describe the necessary facts and circumstances to support its exception that the arbitrator refused to hear evidence pertinent and material to the controversy before him. Thus, it has been held in the private sector that a post award assertion that there is newly discovered pertinent evidence usually is not sufficient grounds for a court to vacate an award. Bridgeport Rolling Mills Company v. Brown, 314 F.2d 885 (2d Cir. 1963).^{2/} In that case the court stated:

[T]he parties, having agreed to an arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator. 314 F.2d 885, 886.

Therefore, the union's exception provides no basis for acceptance of the petition under section 2411.32 of the Council's rules.^{3/}

In its second exception, the union contends that the arbitrator's refusal to consider the union's submission of newly discovered evidence violated appropriate regulations. The Council will accept an appeal of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition for review, that the award violates appropriate regulations. In this case, however, the union's petition does not state what appropriate regulation the award allegedly violates nor otherwise provide contentions in support of this exception. The Council will not accept an arbitrator's award for review where there appears in the petition no support for the stated exception to the award. E.g., Department of the Air Force, 4392D Aerospace Support Group (SAC) and National Federation of Federal Employees (NFFE), Local 1001 (Vandenberg Air Force Base, California) (Pollard, Arbitrator), FLRC No. 77A-24 (May 4, 1977), Report No. 125. Therefore this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

The union's third exception is that the arbitrator's refusal to consider the union's submission of newly discovered evidence violated applicable law. In support of this exception the union asserts that since the

^{2/} See also, O. Fairweather, Practice and Procedure in Labor Arbitration 328 and 363 (BNA 1973).

^{3/} As to the union's assertions regarding Rule 60(b) of the Federal Rules of Civil Procedure, it has been held that "neither Rule 60(b) nor any judicially constructed parallel thereto was meant to be applied to final arbitration awards . . ." Washington Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971).

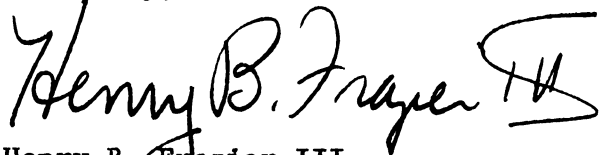
arbitrator's failure to consider newly discovered evidence would deny the grievant due process under the Order, the withholding of 5 days of the grievant's salary violated his statutory entitlement to pay.

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates applicable law. In this case, however, the Council is of the opinion that the union's petition does not contain a description of facts and circumstances to support this exception. In support of this exception, the union is, in effect, reiterating its first exception to the award, which, as previously indicated, does not provide a basis for acceptance under the Council's rules. Therefore, the union's third exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,

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

Henry B. Frazier III
Executive Director

cc: I. L. Becker
SSA

Aerospace Guidance and Metrology Center, Newark Air Force Station, Ohio and American Federation of Government Employees, Local 2221 (Gross, Arbitrator). The arbitrator found that the grievance was not timely filed under the terms of the parties' agreement and therefore denied it. The union filed an exception to the arbitrator's award with the Council, in effect contending that the award violated certain regulations. The union also requested a stay of the award.

Council action (December 20, 1977). The Council held that the union's petition did not describe facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council also denied the union's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Ms. Mary K. Smith
Vice President, Local 2221
American Federation of Government
Employees, AFL-CIO
395 Woods Avenue
Newark, Ohio 43055

Re: Aerospace Guidance and Metrology Center, Newark Air
Force Station, Ohio and American Federation of
Government Employees, Local 2221 (Gross, Arbitrator)
FLRC No. 77A-80

Dear Ms. Smith:

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

According to the arbitrator's award, the dispute in this matter arose when the grievant was denied a promotion. Ultimately a grievance was filed under the parties' negotiated agreement and the matter submitted to arbitration. Before the arbitrator, the activity argued that the grievance had not been timely filed in accordance with the provisions of the negotiated agreement. The union, on the other hand, argued that the written grievance finally filed "was timely and within the spirit of the negotiated agreement."

The arbitrator stated that the initial issue for consideration was the question of arbitrability. In making his findings regarding arbitrability the arbitrator referred to Article 18, Section D of the negotiated agreement.^{1/} The arbitrator found that the activity's evidence was persuasive that "the manifestation of intent of the contract was that a grievant

^{1/} According to the arbitrator, Article 18, Section D of the parties' negotiated agreement provides, in pertinent part:

(2) Initial presentation or notification of the supervisor of an employee's grievance must be within 15 days of the act or occurrence or 15 days after the employee becomes aware of the act or occurrence that gave rise to the grievance.

Also, according to the arbitrator:

Said paragraph further requires that the grievance must be prepared and submitted to the immediate supervisor or the manager who took the action being grieved.

should file within 15 days of the act or occurrence to the individual's immediate supervisor." Furthermore, the arbitrator determined that the principal element in the disposition of this arbitrability issue "in accordance with the contract between the parties is when, in fact, the grievant did become aware that she was not being promoted pursuant to her request."

The arbitrator's findings and conclusions were as follows:

In this instant case, and without evidence to the contrary, the Arbitrator finds that the grievant was, in fact, completely aware that she had been denied promotion as early as April, 1975 and the evidence is also strong that she was, in fact, aware of her denial as early as February, 1975. There has not been sufficient evidence to attack the credibility of the Air Force witnesses and the grievant upon cross-examination did admit that she did meet with the supervisor sometime after February concerning the reasons for her non-selection.

Therefore, without sufficient persuasive evidence to the contrary the Arbitrator finds that the grievance was not effectively filed until after August 30, 1975 and that the grievant, in fact, was aware of the Air Force actions in April, 1975 and, therefore, the grievant has not met the procedural requirements of Article 18, Section D, and this case is not arbitrable due to timeliness. Furthermore, the Arbitrator finds that the Air Force has procedurally established throughout its case, and contended throughout the grievance procedure that said grievance was not arbitrable and thus has not waived any such claim.

The arbitrator made the following award:

I find the grievance was not timely filed under the terms of Article 18, Section D of the Agreement between the Parties . . . and, therefore, order the grievance of [the grievant] be denied.

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

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

The union takes exception to the arbitrator's award on the basis that "the arbitrator, by his own 'dictum' did not understand the issues nor the appellate channels he was citing as avenues for seeking redress, nor does

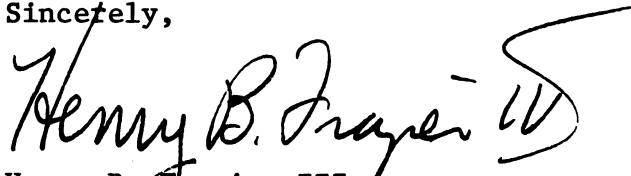
he understand the contractual considerations negotiated by the parties and he has definitely not appraised himself of the regulatory provisions of the Federal Personnel Management System nor the Air Force Regulations AFR 40 series and AFR 12-30 (FOI) and AFR 123." While not entirely clear, the union's exception may be read as contending that the arbitrator's award violates certain regulations.

The Council will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates appropriate regulation. However, in this case the Council is of the opinion that the union's petition for review does not describe facts and circumstances to support its exception. In this regard the union does not show in what manner the arbitrator's determination, that the grievance was not timely filed within the time limits established in the parties' negotiated agreement and therefore that it was not arbitrable, is violative of either the Federal Personnel Manual or the cited Air Force regulations.^{2/} Instead, the essence of the union's exception appears to be a disagreement with the arbitrator's interpretation of the relevant contract provision and the specific reasoning behind his award. However, the Council has consistently held that a challenge to an arbitrator's interpretation of a negotiated agreement is not a ground upon which the Council will grant review of an arbitration award. E.g., American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144 (June 7, 1977), Report No. 128. Furthermore, the Council has also consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge. E.g., Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36 (Aug. 31, 1976), Report No. 111. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the Council's rules.

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

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: R. T. McLean
Air Force

^{2/} The Council does not pass upon the question of whether or not the cited Air Force regulations are "appropriate regulations" within the meaning of section 2411.32 of the Council's rules.

National Weather Service, A/SLMR No. 847. The Assistant Secretary dismissed the section 19(a)(1) and (6) complaint filed by the National Association of Government Employees (NAGE), related to the issuance of a merit promotion evaluation guide by the National Weather Service. NAGE appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (December 20, 1977). The Council held that NAGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied NAGE's appeal.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Mr. Robert J. Canavan
Chief Counsel
National Association of
Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Re: National Weather Service, A/SLMR
No. 847, FLRC No. 77A-82

Dear Mr. Canavan:

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

In this case, the National Association of Government Employees (the union) filed an unfair labor practice complaint against the National Weather Service (NWS) alleging violations of section 19(a)(1) and (6) of the Order. The complaint alleged, in essence, that NWS unilaterally promulgated a Merit Promotion Evaluation Guide despite the demand of the union, as the exclusive representative of multiple units of employees of the activity, that the contents of the Evaluation Guide were subject to negotiation; and that thereafter the activity refused to discuss proposals of the union relating to "an objective Merit Promotion Evaluation Procedure" during collective bargaining negotiations and took the position that there was no duty to negotiate the subject matter.

The Assistant Secretary found that the NWS was an organizational entity below the agency or primary national subdivision level which contains subordinate organizational elements in which exclusive bargaining units exist, and that the NWS issued the Guide concerning merit promotion evaluations at a time just prior to the commencement of negotiations with the union involving several bargaining units for which the union is the exclusive representative. The Assistant Secretary then concluded:

In my view, an organizational entity, such as the [NWS] herein, has the authority to issue a policy such as that involved in the instant case having uniform application to all of its subordinate organizational components, including those in which there are exclusive bargaining units, so long as the issuance of such policy does not preclude bargaining on negotiable matters at the level of exclusive recognition. In the instant case, the evidence establishes that the [NWS] did not preclude bargaining on the Guide at its subordinate component levels. In fact, . . . the subordinate activities of the [NWS] met and conferred with the [union] concerning the subject matter encompassed by the Guide, and the [union] subsequently agreed to

accept the [NWS'] evaluation plan with regard to merit promotions. Under these particular circumstances, I shall dismiss the complaint herein in its entirety. [Footnote omitted.]

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious, contending, in essence, that his findings that the activity did not preclude bargaining on the Guide at its subordinate component levels during the multi-unit bargaining and that the union had agreed to accept the Guide were contrary to the evidence in the record. You further allege that the Assistant Secretary's decision presents a major policy issue as to "what is an agency's obligation to bargain with a union representing approximately three-quarters of its employees before implementing a major policy manual on merit promotion on the very eve of multi-unit negotiations with that union."

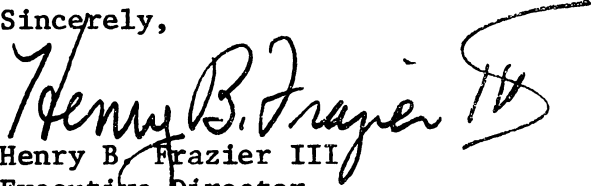
In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision in the circumstances of this case. Rather, your assertion that his decision was contrary to the evidence constitutes, in essence, nothing more than disagreement with the Assistant Secretary's factual determinations that the subordinate components of the activity met and conferred with the union concerning the subject matter encompassed by the Guide and the union subsequently agreed to accept the plan. Therefore, your assertion provides no basis for Council review. Nor is a major policy issue presented, as alleged, concerning an agency's obligation to bargain with a union before issuing a merit promotion guide, noting particularly the Assistant Secretary's finding that NWS' issuance of the Guide did not preclude bargaining on negotiable matters encompassed by the Guide at the level of exclusive recognition in the particular circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

P. J. Travers
NOAA

Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, Assistant Secretary Case No. 40-7581(CA). The Assistant Secretary denied the request for review of Local 987, American Federation of Government Employees, AFL-CIO (AFGE), seeking reversal of the dismissal by the Regional Administrator (RA) of AFGE's section 19(a)(1) and (6) complaint concerning the activity's penalty system for drivers involved in traffic accidents on activity premises. AFGE appealed to the Council alleging that "the [RA] and the Assistant Secretary failed to properly consider the threshold question of negotiability when making their decisions;" and, further, that the policy at issue is subject to the negotiation requirements in section 11(a) of the Order and "[e]ven if this subject was protected by 11(b) and 12(b) of the Order, the [activity] must still bargain over the impact and implementation procedures."

Council action (December 20, 1977). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, AFGE neither alleged, nor did it appear, that the Assistant Secretary's decision was either arbitrary and capricious or presented a major policy issue. Accordingly, the Council denied AFGE's petition for review.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Warner Robins Air Logistics Center, Robins
Air Force Base, Georgia, Assistant Secretary
Case No. 40-7581(CA), FLRC No. 77A-83

Dear Mr. Mulholland:

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

In this case, American Federation of Government Employees, Local 987, AFL-CIO (the union) filed an unfair labor practice complaint against Warner Robins Air Logistics Center, Robins Air Force Base, Georgia (the activity). The complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by establishing a penalty system for drivers responsible for traffic accidents on activity premises without prior consultation with the union, the exclusive representative of certain activity employees.

The Assistant Secretary, citing his prior decision in Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 805 (Mar. 1, 1977), found that:

Under all of the circumstances . . . the evidence is insufficient to establish a reasonable basis for the instant complaint. In this connection . . . although a unilateral change was alleged by the Union, the evidence fails to establish that the subject policy complained of effected any real change in employee terms and conditions of employment.

Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the RA's dismissal of the complaint.

In your petition for review on behalf of AFGE, you allege that "the [RA] and the Assistant Secretary failed to properly consider the threshold question of negotiability when making their decisions." In this regard you contend that "the Assistant Secretary has attempted to establish criteria other than that mandated by the Order by deciding that the

union's collective bargaining rights were not abridged by the [activity] Commander when he unilaterally published [the] policy" You further contend that the policy at issue is subject to the negotiations requirements in section 11(a) of the Order and "[e]ven if this subject was protected by 11(b) and 12(b) of the Order, the [activity] must still bargain over the impact and implementation procedures."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, you do not allege, nor does it appear, that the Assistant Secretary's decision is either arbitrary and capricious or presents a major policy issue. Thus, as to your contentions concerning the absence of a negotiability determination and the negotiability of the matter at issue, in view of the Assistant Secretary's finding that "the evidence fails to establish that the subject policy complained of effected any real change in employee terms and conditions of employment," it does not appear that such a negotiability determination was necessary in order for the Assistant Secretary to resolve the unfair labor practice matter before him. Therefore, such allegation provides no basis for Council review. See Immigration and Naturalization Service, U.S. Border Patrol, Assistant Secretary Case No. 22-06842(CA), FLRC No. 77A-68 (Aug. 31, 1977), Report No. 137, and Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, FLRC No. 76A-87 (Dec. 20, 1976), Report No. 119. Nor is any basis for Council review presented by your related contention that the Assistant Secretary has attempted to establish criteria inconsistent with the Order herein, again noting the Assistant Secretary's finding that the evidence failed to establish any real change in employee terms and conditions of employment in the circumstances of this case.

Since you neither allege, nor does it appear, that the Assistant Secretary's decision is arbitrary and capricious or raises a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,


Henry B. Frazier I/1
Executive Director

cc: A/SLMR
Labor

R. T. McLean
Air Force

Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, A/SLMR No. 867. The Assistant Secretary dismissed the section 19(b)(4) complaint filed by the Department of the Navy, Norfolk Naval Shipyard, related to the picketing of the activity by the union. The agency appealed to the Council, contending that the decision of the Assistant Secretary presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (December 20, 1977). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not raise any major policy issues warranting review, and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 20, 1977

Mr. Stuart M. Foss
Labor-Management Relations Specialist
Office of the Assistant Secretary of Defense
(Manpower, Reserve Affairs and Logistics)
Department of Defense
Washington, D.C. 20301

Re: Tidewater Virginia Federal Employees Metal
Trades Council, AFL-CIO, A/SLMR No. 867,
FLRC No. 77A-93

Dear Mr. Foss:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the union, in the above-entitled case.

In this case, the Department of the Navy, Norfolk Naval Shipyard (the activity) filed an unfair labor practice complaint alleging that the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (MTC) violated section 19(b)(4) of the Order by improperly sponsoring and directing picketing of the activity at the activity's access gates. As found by the Assistant Secretary, MTC peacefully picketed the activity at eight access gates from approximately 3:30 p.m. to 4:30 p.m. on November 8, 1976, and at four access gates for about an hour the following morning, to inform its members of the problems it was having with negotiations for a new collective bargaining agreement. The pickets, varying in number from 2 to 18 at each gate, carried signs related to the existing labor-management dispute. The picketing was peaceful and caused no interference with deliveries to, or the operation of, the activity.

The Assistant Secretary, in agreement with the Administrative Law Judge (ALJ), found that the foregoing picketing by MTC did not violate section 19(b)(4) of the Order. In so concluding, the Assistant Secretary stated:

Under the particular circumstances of the instant case and in accordance with the guidelines set forth in the Council's Statement On Major Policy Issue, FLRC No. 76P-4 [Jan. 5, 1977, Report No. 117], I find that [MTC's] informational picketing falls within the Council's definition of "permissible picketing" under [s]ection 19(b)(4) of the Order. Thus, the evidence establishes that the number of pickets was not excessive; the picketing was for the purpose of informing [MTC's] members of its labor-management dispute with the [activity]; the conduct of the pickets was peaceful; and

the picketing was limited to relatively short periods on each day it occurred and did not interfere with the operation of the [activity] or deliveries. Nor do I find in the record sufficient evidence to support a finding that the picketing reasonably threatened to interfere with the operation of the [activity] or deliveries. Further, I find that the evidence fails to establish that the [activity's] functions are so crucial and sensitive that picketing would per se be so injurious and disruptive as to justify an absolute ban against all labor-management dispute picketing at the Norfolk Naval Shipyard.

Accordingly, the Assistant Secretary ordered that the activity's complaint be dismissed in its entirety.

In your petition for review filed on behalf of the activity, you contend that the decision of the Assistant Secretary presents the following major policy issues:

1. "[I]s a naval shipyard which performs unique and discrete functions in connection with the national defense, a 'critical' and 'sensitive' activity within the meaning of the Council's policy guidelines and the opinion of Judge Gesell in the National Treasury Employees Union^{1/} case . . . so a[s] to justify an absolute ban on all picketing of its premises in a labor-management dispute?"

[Footnote added.]

2. "[D]oes peaceful picketing of an agency by a labor organization in connection with a labor-management dispute, which, inter alia, is directed solely at the agency employees represented by that union qua employees, qualify as permissible 'informational' picketing under well-settled labor law principles, and hence, comprise prohibited conduct within the meaning of Section 19(b)(4) of the Order[?]"

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not raise any major policy issues warranting review, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to the first alleged major policy issue, your assertion that the activity herein is so "crucial" and "sensitive" as to justify an absolute ban on all picketing of its premises constitutes essentially nothing more than a disagreement with the Assistant Secretary's finding that "the evidence fails to establish that the [activity's] functions are so crucial and sensitive . . . as to justify an absolute ban against all labor-management dispute picketing at the [activity]." The Assistant

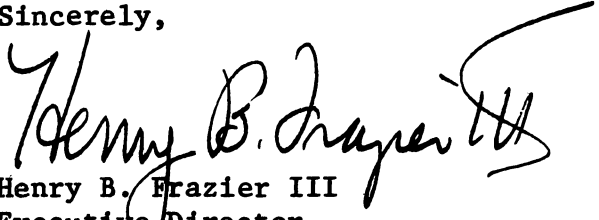
^{1/} National Treasury Employees Union v. Fasser, et al., 428 F. Supp. 295 (D.D.C. 1976).

Secretary's finding in this regard presents no basis for Council review. Nor is a major policy issue presented, as alleged, as to whether the subject picketing qualified as "permissible 'informational' picketing under well-settled labor law principles," noting particularly the Assistant Secretary's finding, pursuant to the guidelines previously enunciated by the Council, that the picketing herein did not actually interfere or reasonably threaten to interfere with the activity's operation in the particular circumstances of this case.^{2/}

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

By the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. F. Haley II
MTC

2/ In so concluding, the Council wishes to re-emphasize that under the guidelines set forth in its Statement on Major Policy Issue, FLRC No.76P-4, supra, and applied by the Assistant Secretary herein, a determination as to whether particular picketing is permissible does not turn upon whether it is "informational" in nature. Moreover, as the court stated in National Treasury Employees Union v. Fasser, et al., supra, 428 F. Supp. at 298-299:

Executive Order 11491 can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency.

.
[A] dividing line between . . . permissible and nonpermissible types of picketing [cannot] be drawn . . . by the use of such vague terms as "informational" or "non-informational" picketing. [Emphasis added.]

International Association of Machinists and Aerospace Workers and Tooele Army Depot (Lunt, Arbitrator). Upon the filing of a petition for review of the arbitrator's award by the activity, the Council advised the activity that its appeal failed to comply with cited requirements of the Council's rules of procedure, and provided the activity with time to effect such compliance. However, the activity made no submission in compliance with those requirements within the time limits provided.

Council action (December 29, 1977). The Council dismissed the activity's appeal for failure to comply with the Council's rules of procedure.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

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

December 29, 1977

Colonel Peter G. Burbules
Tooele Army Depot
Tooele, Utah 84074

Re: International Association of Machinists and Aerospace
Workers and Tooele Army Depot (Lunt, Arbitrator),
FLRC No. 77A-143

Dear Colonel Burbules:

By Council letter of December 6, 1977, you were advised that preliminary examination of your petition for review of the arbitration award in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included: 2411.33(d), 2411.42, 2411.44 and 2411.46(a), (c) and (d).

You were also advised in the Council's letter:

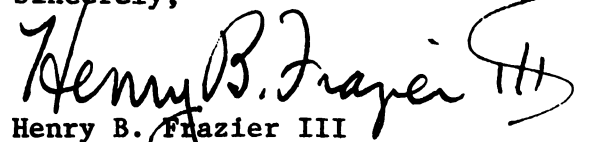
Further processing of your appeal is contingent upon your compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on December 27, 1977, to take necessary action and file additional materials in compliance with the above provision(s). Moreover, you must serve a copy of the required additional submission on the other parties including all representatives of other parties who entered appearances in the subject proceeding before the Assistant Secretary, the agency head, or the arbitrator, as the case may be, in accordance with section 2411.46(a) of the rules; and you must include a statement of such service with your additional submission to the Council.

Failure to comply with the above requirements will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,


Henry B. Frazier III
Executive Director

cc: E. A. St. Claire W. J. Shrader
IAM&AW Army

INTERPRETATIONS AND POLICY STATEMENTS

January 1, 1977 through December 31, 1977

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules (5 CFR 2410.3), the Council provided the attached major policy statement on the implementation of the Court decision in National Treasury Employees Union v. Paul J. Fasser, Jr., et al., Civil Action No. 76-408 (D.D.C. 1976), appeal from which was withdrawn by the Government effective on January 4, 1977.

For the reasons and in the manner fully detailed in its statement, the Council determined, consistent with the decision of the Court, to accomplish the delineation of picketing which is permissible or nonpermissible under section 19(b)(4) of the Order on a case-by-case basis, utilizing the adjudicatory procedures established in sections 4(c)(1) and 6 of the Order. This policy will apply in all pending and future cases involving complaints that a labor organization unlawfully picketed an agency in a labor-management dispute, as proscribed by section 19(b)(4) of the Order.

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

FLRC No. 76P-4

STATEMENT ON MAJOR POLICY ISSUE

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules of procedure (5 CFR 2410.3), the Council provides this major policy statement on the implementation of the decision rendered by the District Court in National Treasury Employees Union v. Paul J. Fasser, Jr., et al., Civil Action No. 76-408 (D.D.C. 1976), appeal from which was withdrawn by the Government effective on January 4, 1977.

In the subject case, the Court vacated the decision and order of the Assistant Secretary in A/SLMR No. 536, sustained by the Council in FLRC No. 75A-96 (Mar. 3, 1976), Report No. 97, in which the union was held to have violated section 19(b)(4) of the Order by its picketing of several Internal Revenue Service facilities in the course of a labor-management dispute with that agency.

While the Court determined that the application of section 19(b)(4) to the precise fact situation in the subject case contravened the First Amendment, the Court denied the union's request that the picketing ban in section 19(b)(4) be declared unconstitutional. Instead, the Court ruled, in the latter regard, that the Order "can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency." Further, the Court, after expressing the need for more facts and the application at least initially of expert judgment on the problem, suggested that the Council—either through rulemaking or otherwise—develop facts as to the precise Government interest to be protected and as to possible differentiations between types of picketing, based on such matters as the sensitivity of the particular governmental function involved, the location of the picketed facility, the number of pickets, and the purpose of the picketing.

Consistent with the decision of the Court, the Council has decided to accomplish the delineation of picketing which is permissible or nonpermissible under section 19(b)(4) on a case-by-case basis, utilizing the adjudicatory procedures established in sections 4(c)(1) and 6 of the Order. Clearly only when picketing of an agency by a labor organization in a labor-management dispute actually interferes or reasonably threatens to interfere with the operation of the affected Government agency will that picketing be found nonpermissible under section 19(b)(4). If picketing of an agency by a labor organization in a labor-management dispute does not actually interfere or reasonably threaten to interfere with the operation of the affected Government agency that picketing will be found permissible under section 19(b)(4). The Council has concluded that it is less

practicable to delineate through rulemaking the myriad circumstances in which such nonpermissible or permissible picketing might occur. Moreover, the development of facts as to the precise Government interest to be protected in given circumstances and as to possible differentiations between types of picketing can best be accomplished on a case-by-case basis through the adjudicatory procedures established under the Order. These procedures include provision for the presentation of arguments by amici curiae under section 2411.49 of the Council's rules.

More particularly as to the adjudicatory procedures, upon a complaint filed by an agency alleging that a labor organization unlawfully picketed the agency in a labor-management dispute, in violation of section 19(b)(4), the Assistant Secretary shall continue to process such complaint in accordance with the expedited procedures set forth in section 203.7(b) (29 CFR 203.7(b)) and related provisions of the Assistant Secretary's Rules and Regulations (including the procedure for the issuance of an order providing for cessation of the picketing pending disposition of the complaint). In such cases, the Assistant Secretary shall determine whether the picketing involved in the particular case interfered with or reasonably threatened to interfere with the operation of the affected Government agency and thereby violated section 19(b)(4) of the Order. In this connection, the Assistant Secretary shall fully develop in the record and carefully consider the precise Government interest sought to be protected and such matters as the sensitivity of the governmental function involved, the situs of the picketed operation, the number of pickets, the purpose of the picketing, the conduct of the pickets, and any other facts relevant to the exact nature of the picketing and the Government organization concerned. Based upon these detailed findings in each case, the Assistant Secretary shall render his decision as to whether the picketing was permissible or nonpermissible under section 19(b)(4) of the Order.

Thereafter, upon a petition for review of the decision of the Assistant Secretary duly filed by a party to the case and upon acceptance of that petition for review by the Council under part 2411, subpart B of the Council's rules of procedure (5 CFR 2411.11 et. seq.), the Council will carefully review the decision of the Assistant Secretary. As appropriate, the Council will carefully analyze the Assistant Secretary's determination and the required supporting findings by the Assistant Secretary referred to hereinabove relating to whether, under the particular circumstances of the case, the picketing interfered with or reasonably threatened to interfere with the operation of the Government agency involved, in violation of section 19(b)(4) of the Order. Requests of interested agencies, unions or other persons to submit their views on these matters, as amici curiae, will be entertained by the Council in accordance with section 2411.49 of the Council's rules (5 CFR 2411.49). Founded on this analysis, and in conformity with section 2411.18(b) of the Council's rules (5 CFR 2411.18(b)), the Council will issue its decision sustaining, modifying or setting aside the Assistant Secretary's ruling that the picketing at issue was permissible or nonpermissible under section 19(b)(4) of the Order.

In this manner, on a case-by-case basis and demonstrated by the facts in each case, the Council will effect the specific delineation of picketing

which is permissible or nonpermissible under section 19(b)(4) of the Order, as suggested by the Court in the National Treasury Employees Union decision. The decision of the Council rendered in each case will, of course, serve as a precedent which will be binding on the disposition of any like situation which may subsequently be presented.

The foregoing practice and considerations will apply in all pending and future cases involving complaints that a labor organization unlawfully picketed an agency in a labor-management dispute, as proscribed by section 19(b)(4) of the Order.

By the Council.



Henry B. Frazier III
Executive Director

Issued: January 5, 1977

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules of procedure (5 CFR 2410.3), in response to a request by the National Association of Government Employees, the Council determined that a major policy issue existed as to: When the Council finds in a negotiability appeal filed under section 11(c) of the Order that no compelling need exists for an agency regulation or the regulation of a primary national subdivision, would such regulation, in the same or similar circumstances, serve to bar negotiation on the same or similar proposals presented by labor organizations holding exclusive recognition within that agency or primary national subdivision?

Council action (August 17, 1977). The Council determined, for reasons fully detailed in its statement, that where it finds no compelling need for a regulation to bar negotiation on a conflicting proposal, such regulation would not, in the same or similar circumstances, serve to bar negotiation on the same or similar proposal within the same agency or the same primary national subdivision. In other words a Council determination as to the lack of compelling need for an agency regulation would be binding with respect to the same or similar proposals in the same or similar circumstances within the same agency or the same primary national subdivision; and the agency is foreclosed from relying on the disputed regulation as a bar to negotiation under these conditions.

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

FLRC No. 77P-1

STATEMENT ON MAJOR POLICY ISSUE

Pursuant to section 4(b) of Executive Order 11491, as amended, and section 2410.3 of the Council's rules and regulations (5 CFR 2410.3), the Council has considered a request from the National Vice President/ National President Designee of the National Association of Government Employees for a Statement on Major Policy Issue. The Council determined that the request raises an issue which has general applicability to the Federal labor-management relations program in assuring the effectuation of the purposes of the Order and consequently warrants the issuance of a Statement on Major Policy Issue.

The Major Policy Issue on which the Council has determined a Statement should be issued is:

When the Council finds in a negotiability appeal filed under section 11(c) of the Order that no compelling need exists for an agency regulation or the regulation of a primary national subdivision, would such regulation, in the same or similar circumstances, serve to bar negotiation on the same or similar proposals presented by labor organizations holding exclusive recognition within that agency or primary national subdivision?

Section 11(a) of E.O. 11491 was amended by E.O. 11838 to provide that only those internal agency regulations which are issued at the agency headquarters level or at the level of a primary national subdivision and for which a compelling need exists, under criteria established by the Council, may bar negotiations with respect to a conflicting proposal.^{1/} Section 11(c) was also amended to authorize the Council to resolve disputes concerning an agency head's determination, in connection with negotiations, that an agency's regulations meet the compelling need standard.

^{1/} Section 11(a) of the Order as amended provides in relevant part, as follows:

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

In its Report and Recommendations which led to adoption by the President of the compelling need provisions, the Council stated that:^{2/}

. . . disputes as to whether an agency regulation, as interpreted by the agency head, meets the standard of "compelling need" should be resolved by the Council on a case-by-case basis in negotiability appeals filed under section 11(c) of the Order. (A decision by the Council as to the "compelling need" for a regulation in one agency or one primary national subdivision of an agency would not, of course, be dispositive as to the "compelling need" for the same or similar regulation in another agency or another primary national subdivision in the same agency.) [Emphasis added.]

It is apparent from this language of the Report that where the Council finds no compelling need for a regulation to bar negotiation on a conflicting proposal, such regulation would not, in the same or similar circumstances, serve to bar negotiation on the same or similar proposal within the same agency or the same primary national subdivision. In other words a Council determination as to the lack of compelling need for an agency regulation would be binding with respect to the same or similar proposals in the same or similar circumstances within the same agency or the same primary national subdivision; and the agency is foreclosed from relying on the disputed regulation as a bar to negotiation under these conditions.^{3/}

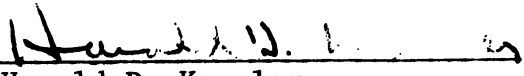
Any contrary conclusion as to the precedential effect of a Council determination would be inconsistent with the clear intent of the Order. Further, any such conclusion would be inconsistent with the purposes of the Order since it would prompt the useless relitigation of issues thereby seriously impeding the conduct of meaningful negotiations by the parties as contemplated by the Order.

^{2/} Labor-Management Relations in the Federal Service (1975), at 38.

^{3/} Clearly if any of these critical conditions (i.e., the proposal, circumstances or organization) involved are different, the Council's earlier determination would not be dispositive. See National Association of Government Employees, Local No. R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (Jan. 19, 1977), Report No. 120, at 18-19. Likewise, if the Council found a compelling need existed for an agency regulation in one case, that determination would be binding with respect to the same or similar proposals in the same or similar circumstances within the same agency or the same primary national subdivision, but such determination would not be dispositive in other negotiations where any of the critical conditions (i.e., the proposal, circumstances or organization) are different.

Accordingly, as set forth above, we hold that if no compelling need is found to exist for a regulation to bar negotiation on any conflicting proposal, such regulation would not, in the same or similar circumstances, serve to bar negotiation on the same or similar proposal within the same agency or the same primary national subdivision.

By the Council.


Harold D. Kessler
Acting Executive Director

Issued: August 17, 1977

Pursuant to section 4(b) of the Order and section 2410.3(a) of the Council's rules of procedure (5 CFR 2410.3(a)), the Council determined to provide an interpretation of the Order with respect to the issue: The applicability of the provisions in section 7(c) of the Order which in effect preclude an election "in any unit or subdivision thereof within 12 months after a prior election with respect to such a unit," to a consolidation proceeding under section 10 of the Order. More specifically, the issue is the applicability of the election bar provisions in section 7(c) to a situation wherein the union seeks to include in the proposed consolidated unit a group of employees who at that time are unrepresented and who within the preceding 12 months had rejected union representation.

Council action (August 31, 1977). The Council determined, for reasons fully detailed in its interpretation, that the election bar provisions in section 7(c) of the Order do not prevent a labor organization from seeking to include such unrepresented employees in a proposed consolidated unit. That is, where the union seeks to include in the proposed consolidated unit such previously unrepresented employees, they may be included provided they are first given an opportunity to vote on the question of whether they want to be represented by the union in the proposed consolidated unit. If they vote to be represented by the petitioning union in the proposed consolidated unit their ballots will then be counted along with those of other employees who vote in the consolidation election. However, if such unrepresented employees vote against representation by the union in the proposed consolidated unit, or, if consolidation is rejected by employees in a consolidation election, the previously unrepresented employees will remain unrepresented.

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

FLRC No. 77P-2

INTERPRETATION OF THE ORDER

To assure the effectuation of the purposes of the Order, the Council has determined, pursuant to section 4(b) of the Order and section 2410.3(a) of the rules of procedure (5 CFR 2410.3(a)), to provide an Interpretation of the Order with respect to the following issue: The applicability of the provisions in section 7(c) of the Order which in effect preclude an election "in any unit or subdivision thereof within 12 months after a prior election with respect to such a unit," to a consolidation proceeding under section 10 of the Order. More specifically, the issue is the applicability of the election bar provisions in section 7(c) to a situation wherein the union seeks to include in the proposed consolidated unit a group of employees who at that time are unrepresented and who within the preceding 12 months had rejected union representation.

It is the Council's determination that the election bar provisions in section 7(c) of the Order do not prevent a labor organization from seeking to include such unrepresented employees in a proposed consolidated unit. That is, where the union seeks to include in the proposed consolidated unit such previously unrepresented employees, having obtained an adequate showing of interest among such employees, they may be included provided they are first given an opportunity to vote on the question of whether they want to be represented by the union in the proposed consolidated unit. If they vote to be represented by the petitioning union in the proposed consolidated unit their ballots will then be counted along with those of other employees who vote in the consolidation election.^{1/} However, if such unrepresented employees vote against representation by the union in the proposed consolidated unit, or, if consolidation is rejected by employees in a consolidation election, the previously unrepresented employees will remain unrepresented.

Pursuant to the operation of section 7(c) of the Order,^{2/} as a general rule only one valid election may be held in any unit or any subdivision

^{1/} Of course, where the agency and the labor organization agree bilaterally to consolidate without an election, the previously unrepresented employees who voted to be represented by the union in the proposed consolidated unit would be included therein.

^{2/} Section 7(c) provides:

When recognition of a labor organization has been accorded, the recognition continues as long as the organization continues to meet the requirements of this Order applicable to that recognition, except that this section does not require an election to determine whether an organization should become, or continue to be recognized as, exclusive representative of the employees in any unit or subdivision thereof within 12 months after a prior valid election with respect to such unit.

of that unit in a 12-month period to determine whether any labor organization should become the exclusive representative of employees. This is commonly referred to as the "election bar" rule.^{3/}

In 1975 section 10 of the Order was amended to facilitate the consolidation of bargaining units, thereby reducing fragmentation in the bargaining unit structure and achieving more comprehensive bargaining units. The Council recognized that in the creation of more comprehensive units, a labor organization might seek a consolidated unit which included employees in its existing units together with employees who were currently unrepresented. The Council further recognized that in seeking the inclusion of such previously unrepresented employees in the proposed consolidated unit a conflict might arise with the requirement of section 7(c) of the Order. With respect to this possible conflict the Council stated in the Report and Recommendations on the Amendment of Executive Order 11491:^{4/}

The processing of petitions for exclusive recognition by the Assistant Secretary is affected by certain "bars to elections," either specifically provided for in the Order or fashioned by the Assistant Secretary in his regulations or case decisions. More particularly, a petition is untimely if filed within 12 months of a valid election . . . , commonly referred to as an "election bar"

. . . [W]e feel that parties should be free to consolidate units bilaterally notwithstanding when a valid election might have been held That is, "election bar," . . . rules should not apply to the parties when they seek bilaterally to consolidate existing units.

When a labor organization or agency seeks to consolidate units by petitioning the Assistant Secretary to hold an election to determine whether the employees wish to be represented in the proposed unit or in their existing units, it should also be able to do so notwithstanding election bars

The procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation. Where a labor organization seeks a unit which includes its existing units together with employees who are currently unrepresented, the unrepresented employees should have the option of being represented in the consolidated unit, remaining unrepresented, or, if they constitute a separate appropriate unit, being represented in that unit by any intervening labor organization. . . .

^{3/} Labor-Management Relations in the Federal Service (1975), at 67.

^{4/} Id. at 36-37.

In observing that parties should be free to consolidate units and include in the proposed consolidated unit currently unrepresented employees notwithstanding election bars, the Council implicitly recognized that the section 7(c) election bar went only to the holding of an election in "any unit or any subdivision of that unit." As a proposed consolidated unit in which the union seeks to include the unrepresented employees would be a unit larger than that in which the previous election was conducted, section 7(c) is not applicable to a consolidation proceeding under section 10 of the Order. That is, where a union seeks to include in the proposed consolidated unit such previously unrepresented employees, they may be included, provided they are first given an opportunity to vote on the question of whether they want to be represented by the union in the proposed consolidated unit.

While section 7(c) is not applicable to the holding of an election in a unit larger than that in which the previous election was conducted, it does bar a union representation election in the same unit or any subdivision of that unit in which an election has been conducted in the preceding 12-month period. Accordingly, such a unit of employees could not vote on separate representation during that period. Therefore, if such unrepresented employees vote against representation by the union in the proposed consolidated unit, or, if consolidation is rejected by employees in a consolidation election, the previously unrepresented employees will remain unrepresented.

By the Council.



Harold D. Kessler
Acting Executive Director

Issued: August 31, 1977

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January 1, 1977 through December 31, 1977

SUBJECT MATTER INDEX*

January 1, 1977 through December 31, 1977

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