

**FOREIGN SERVICE LABOR
RELATIONS BOARD
WASHINGTON, D.C.**

**U.S. DEPARTMENT OF
AGRICULTURE
FARM SERVICE AGENCY
FOREIGN AGRICULTURAL
SERVICE
(Agency)**

and

**AMERICAN FOREIGN SERVICE
ASSOCIATION
(Union)**

FS-AR-0004

DECISION

May 8, 1998

**Before the Board: Phyllis N. Segal,
Chair; Tia Schneider Denenberg and
Richard Bloch, Members.**

I. *Statement of the Case*

This matter is before the Foreign Service Labor Relations Board (FSLRB) on exceptions to a decision of the Foreign Service Grievance Board (Grievance Board), filed by the Agency under 22 U.S.C. § 4114(b) and 22 C.F.R. § 911.4. The Union filed an opposition to the Agency's exceptions.

The Grievance Board determined that the Agency failed to comply with the parties' collective bargaining agreement, when it departed from past practice without providing notice to the Union. For the following reasons, we conclude that the Agency has failed to establish that the award is deficient. Accordingly, we deny the exceptions.

II. *Background and Grievance Board's Decision*

The Union filed this grievance on behalf of foreign service officers employed pursuant to the Foreign Service Act of 1980, as amended. Determinations of overseas assignments for foreign service officers are controlled by 22 U.S.C. § 3982.¹

In 1995, the FAS Partnership Council--which is composed of representatives of the Agency, the Union, and the American Federation of State, County, and Municipal Employees (AFSCME)--discussed eligibility requirements for the Mansfield Fellowship program. The Council decided that the Mansfield Fellowship would be available to both foreign service and civil service employees. *Id.*

¹Section 3982(b), which is section 502 of the Foreign Service Act, provides in pertinent part that:

(b) . . . Positions designated as Foreign Service positions normally shall be filled by the assignment of members of the Service to those positions. Subject to that limitation--

(1) Foreign Service positions may be filled by the assignment for specified tours of duty of employees of the [State] Department and, under interagency agreements, employees of other agencies[.]

The dispute in this case arose after the Agency granted to a civil service employee a 3-year “follow-on” overseas posting in addition to a Mansfield Fellowship.² The Agency had originally issued a vacancy announcement stating that:

If a Foreign Service officer is selected [for the Mansfield Fellowship], at the conclusion of the work experience with the Japanese Government, the Foreign Service officer will move into the position of the Office of Agricultural Affairs, in Tokyo as Assistant Agricultural Attaché for three years. If a Civil Service candidate is selected at the conclusion of the work experience with the Japanese Government, he/she would return to FAS/Washington.

Decision at 5.

A civil service employee applied for, and was awarded the Mansfield Fellowship. Specifically, the civil service employee was granted 2 years of training in Japanese language and culture with the second year of training in Japan. The Fellowship committee recommended that, upon completion of the training, she begin a 3-year assignment in Japan. *Id.* at 5-6.

When the Union learned that the Fellowship committee had recommended that the civil service employee receive a posting in Japan after the fellowship

²The assignment at issue went to a civil service employee represented by AFSCME. AFSCME “advised the [Grievance] Board that [it] ‘[took] no position as to the merits of the . . . grievance[.]’” Decision at 4.

training, the Union filed a grievance with the Agency. The Union opposed the 3-year follow-on assignment because, the Union argued, the assignment breached section VI/6 of the Agency's collective bargaining agreement with the Union, by violating past practice.³ The Union also argued that the appointment violated 3 FAM § 147⁴ and 22 U.S.C. § 3982, both of which address the circumstances under which a civil service employee may receive assignments overseas. *Id.* at 7-8.

After the Agency ruled that the grievance was without merit, the Union filed a complaint with the Grievance Board, asserting that an “implementation dispute” existed.⁵ *Id.* at 1, 2-3. Initially,

³In order to change a past personnel practice, section VI/6 of the parties' collective bargaining agreement provides:

FAS shall transmit to [the] FAS/AFSA Vice-President or designated representative all proposed changes in personnel policy, procedure, or other matters affecting working conditions in the United States as well as overseas.

Decision at 2.

⁴In addition to citing this regulation as 3 FAM § 147, the Union occasionally cited it as 3 FAM § 2218, and indicated that the regulation was “formerly 3 FAM 140.” Union Brief to Board at 8. “FAM” is the Foreign Affairs Manual. Section 2218.3 replaced section 140 and its sub-section 147 on March 26, 1996. Hereinafter, unless a difference in the regulations makes an older reference relevant, references to this regulation will appear as 3 FAM § 2218.

⁵Under the terms of the Foreign Service Act, 22 U.S.C. § 4114(a), an “implementation dispute,” is “[a]ny dispute between the Department and the exclusive representative concerning the effect, interpretation, or a claim of breach of a collective

the Agency contested the Grievance Board's jurisdiction, arguing that this case does not concern an implementation dispute. *Id.* at 3-4.

The Grievance Board concluded that it had jurisdiction over the grievance because it involved an "implementation dispute" concerning "the alleged breach by [the Agency] of its obligation to notify" the Union of proposed changes in procedure under section VI/6 of the parties' agreement. *Id.* at 12. Consistent with the alleged breach, the Grievance Board stated that the "central issue" in the grievance was whether the Agency had "failed to conform to proper procedure in . . . making the assignment which . . . led to the grievance." *Id.*

The Grievance Board concluded that the Agency had violated section VI/6 of the parties' agreement by failing to provide the Union with notice of its intention to depart from its past practice of giving preference to foreign service officers for overseas assignments. In particular, the Grievance Board found that the Agency's decision to assign the civil service employee the follow-on assignment did not correspond to the vacancy announcements issued for the assignment. In addition, the Grievance Board found that the follow-on assignment "was never offered for bidding by civil service employees." *Id.* at 14. According to the Grievance Board, the Agency offered "no explanation" as to why it deviated from the vacancy announcements, *id.* at 13, and "[n]o

precedents . . . to make a case that the procedures followed in this assignment were normal practice." *Id.* at 14.

Additionally, the Grievance Board found that the Agency had failed to comply with 3 FAM § 147, the superseded regulation, which, unlike 3 FAM § 2218.3, identified grounds for "flexibility" in the assignment of civil service employees.

Based on the foregoing, the Grievance Board decided as follows:

Because the [collective bargaining agreement] obliges the [A]gency to notify [the Union] of proposed changes in its policies and procedures . . . and because the action by the [A]gency which resulted in this grievance amounted to such a change in procedure, we find for the grievant. The grievance is sustained.

Id. at 15. In fashioning a remedy for the Agency's violation of the parties' agreement, the Grievance Board noted the Agency's assertion that "the formal" follow-on assignment had not been made. *Id.* at 16. The Grievance Board found, in view of this fact, that:

it would be an equitable remedy . . . to require [the Agency] to reopen the bidding for the position in question and to conduct a selection process which corresponds to applicable regulations.

Id. at 16-17.

bargaining agreement[.]” 22 U.S.C. § 4114(a).
See also 22 C.F.R. § 911.2.

III. *Positions of the Parties*

A. *Agency*

The Agency seeks review on four grounds.

First, the Agency maintains that the Union's complaint is not ripe, as the civil service employee is now in Washington in the first year of the fellowship and has not yet received a foreign service assignment.

Second, the Agency contends that the Grievance Board decision is contrary to both 22 U.S.C. § 4105(a)(4)⁶ and 5 U.S.C. § 7106(a)(1)(B),⁷ which concern

⁶The Agency cites this as section 1005(a)(3) of the Foreign Service Labor-Management Relations Act. That section appears in the U.S. Code as 22 U.S.C. § 4105(a)(3), which was amended and renumbered in 1994 and now appears as 22 U.S.C. § 4105(a)(4). Pub. L. No. 103-236, 108 Stat. 417 (1994). 22 U.S.C. § 4105, which functions for the foreign service as 5 U.S.C. § 7106 does for the civil service, provides in pertinent part that:

(a) Subject to subsection (b) of this section, nothing in this subchapter shall affect the authority of any management official of the Department, in accordance with applicable law--

....

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

⁷As the cited section does not exist, we construe the Agency's argument that it intended to cite section 7106(a)(2)(B), which states in pertinent part:

(a) Subject to subsection (b) of this

management's right to determine personnel. Exceptions at 2. In particular, the Agency argues that, by requiring the Agency "to reopen the bidding for the position," the Grievance Board decision "vitiat[es] management's right to determine the personnel by which agency operations shall be conducted" (hereinafter "the right to determine personnel"). *Id.*

Third, the Agency maintains that the Grievance Board based its decision on two nonfacts. The first asserted nonfact is the Grievance Board's finding that the civil service employee received back-to-back appointments in the foreign service. *Id.* at 3. According to the Agency, the Mansfield Fellowship recipient is still employed in Washington, and has not yet been assigned to an overseas post. The second asserted nonfact is the Grievance Board's conclusion that the Agency violated past practice in its decision to grant an overseas position to a non-foreign service employee. The Agency asserts that it has no past practice involving awards of overseas assignments after fellowship training. *Id.*

section, nothing in this chapter shall affect the authority of any management official of any agency--

....

(2) in accordance with applicable laws--

....

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

Fourth, the Agency contends that the Grievance Board's decision is improper because it affects an employee who is not in the Union's bargaining unit. The Agency argues that the Board's order that the Agency reopen bidding for the fellowship means that the Board is "effectively requir[ing] FAS to rescind" the fellowship to the civil service employee recipient. *Id.* at 5.

B. *Union*

In response to the Agency's exception that the Union prematurely filed its grievance, the Union replies that because it is contesting the Agency's unnegotiated change in practice and not the actual placement of the non-foreign service officer in Japan, its grievance is timely. Opposition at 5-6.

In response to the second exception, the Union maintains that it is not contesting management's right to make assignments under 22 U.S.C. § 4105(a)(4). *Id.* at 2. The Union maintains that it does not oppose the selection of the civil service employee for the position, and it does not oppose the Agency's right to determine who is most qualified for the position. Rather, it challenges the Agency's failure to notify the Union of a change in past practice, as required in Section VI/6 (A) of the collective bargaining agreement.⁸

⁸The Union also cites 3 FAM § 2218.3 and its predecessor sections for the proposition that the Agency must first search for a qualified foreign service officer, before choosing a non-foreign service officer for a limited, non-career reappointment. However, the regulation provides only that "non-career appointments" may be made

The Union responds to the third exception by contending that the finding that the civil service employee will receive back-to-back overseas appointments is not clearly erroneous, since the civil service employee will receive a 3-year follow-on assignment to Japan after spending a year in Japan for training. *Id.* at 3. In addition, the Union views the Agency's grant of the 3-year follow-on assignment in Japan to a non-foreign service officer as a breach of 3 FAM § 2218.3. Although the Union states that the Agency has never incorporated 3 FAM § 2218.3 into its own regulations, the Union contends that the Agency had assented to the regulation through its past practice. *Id.* at 5.

With regard to the fourth exception, the Union disputes the Agency's allegation that the Grievance Board's order improperly affects an employee outside the Foreign Service bargaining unit. According to the Union, the effect would be improper only if the decision granted relief to employees who did not file a grievance. *Id.* at 8. The Union asserts that the decision grants relief to foreign service employees, who filed the grievance, not to the civil service employee, who will only experience an incidental effect from the decision.

when "the Director General of the Foreign Service . . . certif[ies] that there is a need for the applicant." The Union's interpretation of section 2218.3 accords with the wording of section 2218.3's predecessor, section 147, which the Grievance Board cites in its decision. The award of the Mansfield Fellowship to the civil service employee occurred after section 147 was superseded by section 2218.3 on March 26, 1996. *See, supra*, note 4. Thus, section 147 is not relevant to the analysis of this case.

IV. *Analysis and Conclusions*

A. *Standard of Review*

Under 22 U.S.C. § 4114, the FSLRB may hear appeals of a Grievance Board decision on the grounds that the Grievance Board decision is contrary to law, rule or regulation, or because the Grievance Board decision is deficient on grounds similar to those used by Federal courts in private sector labor cases.⁹ Congress has directed the Labor Relations Board decision to follow Federal Labor Relations Authority (Authority) precedent, except when the FSLRB finds special circumstances that require otherwise. 22 U.S.C. § 4107(b) and (c)(2)(F).

⁹Section 4114(b) provides in pertinent part:

(b) Review by Foreign Service Labor Relations Board

Either party to an appeal under subsection (a)(3) of this section may file with the [Foreign Service Labor Relations] Board an exception to the action of the Foreign Service Grievance Board in resolving the implementation dispute. If, upon review, the Board finds that the action is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the [Foreign Service Labor Relations] Board may take such action and make such recommendations concerning the Foreign Service Grievance Board action as it considers necessary, consistent with applicable laws, rules, and regulations.

No FSLRB precedent concerning Grievance Board appeals has been cited or is apparent, nor are any special circumstances asserted or apparent. Thus, pursuant to the requirement of 22 U.S.C. § 4107 that FSLRB precedent be consistent with Authority precedent, the following analysis relies on Authority precedent. The grounds for review of a Grievance Board decision provided in 22 U.S.C. § 4114(b) mirror the grounds for review provided in 5 U.S.C. § 7122 for arbitration awards. Thus, much of the analysis that follows relies on Authority precedent in arbitration appeals.

B. *The FSLRB does not Review Questions of Procedural Arbitrability.*

Authority case law holds that awards resolving questions of procedural arbitrability are subject to challenge only on grounds other than those that directly challenge an arbitrator's determination of procedural arbitrability itself. *U.S. Department of the Treasury, United States Mint, Philadelphia, Pennsylvania and Fraternal Order of Police, Lodge F1-PA*, 51 FLRA 1683, 1685 (1996). The Agency's exception challenges the Grievance Board's decision that this grievance was timely, which is a determination of procedural arbitrability. As such this exception is not reviewable by the FSLRB.

C. *The Grievance Board's Decision is not Contrary to Law.*

The Agency argues that the Grievance Board decision requiring the Agency to reopen bidding is contrary to law, because

it interferes with the Agency's right to determine personnel. The Authority provides that questions of law raised by an arbitrator's decision and the Agency's exception must be reviewed *de novo*. *National Treasury Employees Union, Chapter 24 and U.S. Department of the Treasury, Internal Revenue Service*, 50 FLRA 330, 332 (1995).

Management's right to determine personnel under 22 U.S.C. § 4105(a)(4) includes the discretion (1) to determine the particular employees to whom work will be assigned; (2) to establish the particular qualifications and skills needed to perform the work to be done; and (3) to exercise judgment in determining whether particular employees meet those qualifications. *See, e.g., American Federation of Government Employees, Council 147 and U.S. Department of Health and Human Services, Social Security Administration, Teleservice Center, Phoenix, Arizona*, 38 FLRA 110 (1990) (*SSA*) (Provision 1); *National Marine Fisheries Service, Northeast Region, National Oceanic and Atmospheric Administration, United States Department of Commerce, Gloucester, Massachusetts and International Organization of Masters, Mates and Pilots, AFL-CIO, Boston, Massachusetts*, 22 FLRA 443, 445 (1986) (*NOAA*); *National Treasury Employees Union and U.S. Customs Service*, 18 FLRA 780, 781 (1985) (*NTEU*). The exercise of the right is not subject to negotiation.

However, the procedures that management follows in making personnel

determinations are subject to negotiation. 22 U.S.C. § 4105(b)(2)¹⁰ and 5 U.S.C. § 7106(b)(2). Thus, for example, the procedure by which employees previously judged by management to be equally qualified will be selected to perform certain work is negotiable under section 7106(b)(2) of the Statute and, when negotiated by the parties, is enforceable in arbitration. *SSA; NOAA*, 22 FLRA at 445; *NTEU*, 18 FLRA at 781.

In *U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and National Treasury Employees Union, Chapter 201*, 53 FLRA 146 (1997) (*Engraving and Printing*), the Authority set forth the two-prong test by which it will assess arbitration awards "claimed to affect . . . management rights." *Id.* at 153.¹¹ Under Prong I, the

¹⁰Section 4105(b)(2) states:

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

....

(2) procedures which management officials of the Department will observe in exercising any function under this section[.]

¹¹The test results from the Supreme Court's decision in *IRS v. FLRA*, 494 U.S. 922 (1990), that, by its plain terms, management rights under section 7106(a) of the Statute are not subject to constraint except pursuant to the terms of section 7106 itself. In particular, the Court held that the portion of section 7106(a) providing that the rights set forth in that subsection are subject to "applicable laws" permits a union to require management to adhere to such, and only such, laws (which, according to the Court, encompass only laws outside the Statute). In *Engraving and Printing*, the Authority reasoned

Authority will determine whether an award enforces “an applicable law or a provision of the parties’ collective bargaining agreement on a section 7106(b) matter.” *Id.* Under Prong II, the Authority will uphold an award that reconstructs what management would have done, if management had followed such applicable law or contract provision. *Id.* at 154.

The Grievance Board’s decision satisfies Prong I. The Grievance Board concluded that the Agency had failed to comply with section VI/6 of the parties’ agreement, which requires notification to the Union of proposed changes in procedures. There is no contention that section VI/6 is not enforceable. In addition, as the section merely requires notification of proposed changes, on its face it appears procedural within the meaning of 22 U.S.C. § 4105(b)(2) and 5 U.S.C. § 7106(b)(2).

The Grievance Board’s decision also satisfies Prong II. As set forth above, the Grievance Board found that the Agency’s action in awarding the follow-on assignment constituted a change in procedure about which it failed to notify the Union under section VI/6. The Grievance Board’s decision requires only that the Agency readvertise the follow-on

that, as management rights are not only subject to “applicable laws” but also are “subject to subsection (b)” of section 7106, contract provisions negotiated under subsection (b)-- which includes the so-called “permissive” subjects of bargaining set forth in subsection (b)(1) as well as “procedures” and “appropriate arrangements” under subsection (b)(2) and (3)--also may be enforced in arbitration.

assignment and make a selection for it consistent with applicable regulations.¹² The decision neither precludes the Agency from selecting any particular applicant nor prevents the Agency from notifying the Union that it proposes to change prior procedures for making selections. Moreover, as the Agency asserted to the Grievance Board, the assignment has not yet been made. In these circumstances, the decision constitutes a reconstruction of what the Agency would have done if it had not violated the parties’ agreement.

D. The Grievance Board’s Decision is not Based on a Nonfact.

Under Authority case law, an excepting party asserting that an arbitration award is based on a nonfact must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator. *U.S. Department of the Air Force, Lowry Air Force Base, Denver Colorado and National Federation of Federal Employees, Local 1497*, 48 FLRA 589,

¹²In its discussion of the circumstances when a civil service employee may receive an overseas assignment, the Grievance Board cites the “applicable regulation” as 3 FAM § 147.2. Decision at 13-14. This superseded regulation contains requirements for the hiring of civil service employees, which do not appear in the current regulation, 3 FAM § 2218.3. The new regulation, like the collective bargaining agreement, requires only that the Agency provide the Union with notice of its intent to change its past practice. Because the Grievance Board did not specify a particular regulation with which the Agency must comply, the decision does not preclude the Agency from complying with the current regulation.

593 (1993). A party may not raise nonfact allegations concerning a matter that was disputed below. *U.S. Department of the Interior, Bureau of Mines, Pittsburgh Research Center and American Federation of Government Employees, Local 1916*, 53 FLRA 34, 40 (1997).

The Agency argues that the Grievance Board relied on two nonfacts: the finding that the civil service employee received a 3-year follow-on assignment; and the finding that the Agency failed to follow past practices.

With respect to the first asserted nonfact, the Grievance Board specifically stated that it “did not find it necessary to conclude that the two postings amount to back to back assignments.” Decision at 14. Nothing in the Grievance Board decision supports a conclusion that, contrary to this statement, it actually relied on a determination of whether the civil service employee received consecutive overseas assignments. As the Grievance Board did not find or rely on this fact, the Agency has not established that it is a nonfact rendering the decision deficient.

With respect to the second asserted nonfact--the determination of past practice--the question of past practice was clearly disputed below. See Agency Brief to Grievance Board at 6-7. As such, the Grievance Board’s finding concerning past practice does not constitute a nonfact.

E. *The Grievance Board did not Exceed its Authority.*

The Agency maintains that the Grievance Board’s decision exceeded the

Grievance Board’s authority because the decision affects a non-foreign service officer outside the bargaining unit, and because the Grievance Board “order effectively requires [the Agency] to rescind its stated intent to provide [the civil service employee] with a follow-on assignment in Japan after she completes her Mansfield Fellowship training.” Exceptions at 5.

Under Authority case law, an arbitrator exceeds his or her authority when, among other things, the arbitrator resolves an issue not submitted to arbitration or awards relief to persons who are not encompassed within the grievance. See *U.S. Department of Health and Human Services, Social Security Administration, Region VI, Dallas, Texas and American Federation of Government Employees, Local 1336*, 40 FLRA 644, 649 (1991). In the absence of a stipulation by the parties, arbitrators are accorded substantial deference in the formulation of the issues to be resolved in a grievance. For example, *U.S. Department of the Treasury, Internal Revenue Service, Ogden Service Center, Ogden, Utah and National Treasury Employees Union, Chapter 67*, 42 FLRA 1034, 1055 (1991); *U.S. Department of Transportation, Federal Aviation Administration, Chicago, Illinois and National Air Traffic Controllers Association*, 41 FLRA 1441, 1448 (1991) (*Federal Aviation Administration*). See also *International Association of Firefighters, Local 13 and Panama Canal Commission, General Services Bureau, Balboa, Republic of Panama*, 43 FLRA 1012, 1023-24 (1992).

We construe the Agency’s assertion that the decision affects a non-bargaining

unit member as relying on the “vitally affects” test, adopted by the Authority in *National Association of Government Employees, Local R1-144 and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 43 FLRA 1331 (1992). The test applies to determine the parameters of an agency’s bargaining obligations over union proposals affecting employees outside the union’s bargaining unit. See *United States Department of the Navy, Naval Aviation Depot, Cherry Point, North Carolina v. FLRA*, 952 F.2d 1434 (D.C. Cir. 1992). In *National Treasury Employees Union, Chapter 33 and U.S. Internal Revenue Service, Phoenix District*, 44 FLRA 252, 276 (1992) (*IRS Phoenix*), the Authority stated that the vitally affects test applies to “the scope of the duty to bargain under the Statute and not [to] the scope of permissible remedies[.]” In particular, the Authority stated it will not find a remedy deficient, if the remedy “is clearly designed to correct the harm suffered by the grievant[.]” *Id.* at 276. Thus, the Authority held that an arbitrator’s award did not exceed the arbitrator’s authority, even though the award affected non-unit employees.

Since the Grievance Board decision reconstructs what would have happened if the Agency had followed the collective bargaining agreement, *supra* at 7-8, the remedy directed by the Grievance Board clearly corrects the harm suffered by the grievant. Accordingly, consistent with *IRS Phoenix*, the fact that the remedy affects an employee outside the Union’s bargaining unit does not render the decision deficient.

In addition, the Agency has not shown that the Grievance Board exceeded its authority either by addressing an issue that was not before it or by awarding relief to employees who were not covered by the grievance or who were outside the bargaining unit. The issue before the Grievance Board was whether the Agency had violated the parties’ collective bargaining agreement. This is the issue the Grievance Board decided. The Agency has not shown that the Grievance Board decision grants relief to the non-bargaining-unit civil service employee.

V. *Decision*

The Agency’s exceptions are denied.

FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE
FARM SERVICE AGENCY
FOREIGN AGRICULTURAL SERVICE
(Agency)

and

AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)

FS-AR-0004

STATEMENT OF SERVICE

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

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WASHINGTON, D.C.

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