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

AMERICAN FOREIGN SERVICE ASSOCIATION AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1812

Unions

and

Case Nos. FS-NG-1
FS-NG-2[1]/

UNITED STATES DEPARTMENT OF STATE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

These cases come before the Foreign Service Labor Relations Board (the Board) pursuant to § 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the Act). The issues presented are the negotiability of six Union proposals: Whether they are within the duty to bargain or are excluded therefrom because they are inconsistent with law.

UNION PROPOSALS

6(c)

Any uniform personnel policy or procedure proposed will meet and be negotiated in accordance with the following standards:

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1/ The separate appeals of the Unions, herein, contain the same issues and were consolidated for convenience of decision.

(c) Will not create uniformity where conditions of employment in each foreign affairs agency have been historically different for good cause, or where the agencies cannot clearly and convincingly demonstrate a current need for uniformity.

6(d) and (e)

Any uniform personnel policy or procedure proposed will meet and be negotiated in accordance with the following standards:

(d) Adoption of such a policy will not create a negative impact on the professional careers of the members of a bargaining unit e.g. in areas of promotion opportunities and precepts, assignments, professional training Agency career flows, selection out procedures or access to an Agency's Senior Foreign Service.

(e) It will not result in any negative impact on the structure of the relationship between an Agency and its Exclusive Representative.

6(f)

Any uniform personnel policy or procedure proposed will meet and be negotiated in accordance with the following standards:

(f) It will be consistent with all collective bargaining agreements between any of the parties per Sections 1013(a), (c) and Section 1015(a)(5) and (a)(8) of the Act.

6(g)

Any uniform personnel policy or procedure proposed will meet and be negotiated in accordance with the following standards:

(g) Will be consistent with that Agency's exercise of control or management over the physical or environmental conditions of employment.

7

Variety of Procedures

(a) Purpose.

The parties to this agreement agree that the "amicable settlement of disputes between workers and their employers involving conditions of employment" (Section 1001(c) of the Act) is the goal of collective bargaining between and among the parties.

The parties agree that the joint negotiating sessions in which every foreign affairs agency and its exclusive representative (if any) participates are not necessary for the realization of either a uniform personnel policy or "maximum compatability" (sic) between foreign affairs agencies. They recognize that "facilitation and encouragement" of agreement may be best achieved through parallel tract or separate negotiations between an Agency and its Exclusive Representative.

(b) Right and duty to bargain between Agency and its Exclusive Representative.

The foreign affairs agencies recognize that because of the Exclusive Representative's rights and duties under Section 1013 of the Act, the Exclusive Representative may seek to conduct or separately conduct negotiations on conditions of employment with the management of the bargaining unit for which it holds exclusive representation rights. The parties recognize that at any time, in order to "facilitate" the reaching of agreement on a condition of employment any party may withdraw from joint negotiations and negotiate separately with its appropriate Exclusive Representative or Agency.

The Exclusive Representatives recognize that in the case of parallel track or separate negotiations for reaching a uniform personnel policy or procedure, the foreign affairs agencies have the right to consult with each other according to Sections 203(a) and Section 204 of the Act and to participate in the negotiations per section 1013(e)(5) of the Act.

The parties recognize that their obligation to meet and collectively bargain does not compel either party to agree to a proposal or require the making of a concession.

## OPINION

For the reasons stated below, after careful consideration of the parties' arguments submitted pursuant to the Board's Rules and Regulations,2/ it is the Board's decision that proposals 6(c), 6(d), 6(e) and 7 are inconsistent with law and are excluded from the duty to bargain. Accordingly, pursuant to section 1424.10(b) of the Board's Rules and Regulations (22 CFR 1424.10(b) (1981)), IT IS ORDERED that the petitions for review of these proposals be, and they hereby are, dismissed. Proposals 6(f) and 6(g), in contrast, are consistent with law and are within the duty to bargain. Accordingly, IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning these proposals. In deciding that these proposals are within the duty to bargain, the Board makes no judgment as to their merits.

Section 1005(a)(5) of the Act, principally relied upon by the Agency, provides as follows:

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

2/ The Board's rules of procedure do not provide for submissions in a negotiability case beyond the union petition, the agency statement of position, and the union response. Further, the rules provide that the agency statement should set forth in full its position on any matter relevant to the petition which it wishes the Board to consider in reaching a decision. Therefore, it is the policy of the Board, as reflected in section 1424.8 of the rules, not to consider submissions in negotiability cases other than those prescribed unless additional information either is requested by the Board or the Board, in its discretion, grants permission to file.

No additional information beyond that contained in the above-referenced submissions is deemed necessary in the instant case. Accordingly, in reaching its decision, the Board did not consider the Agency's supplemental memorandum or the submission of the International Communications Agency, filed over the Unions' objections.

Additionally, as the positions of the parties are adequately reflected in the record before the Board, the Union request for oral argument is hereby denied.

> (5) to determine the need for uniform personnel policies and procedures between or among the agencies to which this chapter applies . . . .

The Act itself indicates that the substantive authority reserved to management under section 1005(a)(5) was not intended to mean only what the plain language states and nothing more: the authority to decide that uniformity is necessary. On the contrary, in section 1013(e)(5), Congress provided management with the means for assuring that such uniformity as management determined to be needed could, in fact, be attained through collective bargaining. That is, section 1013(e)(5) establishes as a part of the parties' duty to negotiate in good faith an obligation to "negotiate jointly with respect to conditions of employment applicable to employees in more than one of the agencies authorized to utilize the Foreign Service personnel system, as determined by the heads of such agencies . . . ." [Emphasis supplied.]

Hence, the meaning of sections 1005(a)(5) and 1013(e)(5) read in combination is that management's right to determine the need for uniform personnel policies and procedures, which under the duty to bargain cannot unilaterally be prescribed, includes the right to take effective action--joint negotiations--to effectuate such determination.3/

The Act also indicates, however, that this right of management is subject to the duty to bargain over implementing procedures and appropriate arrangements regarding adverse impact pursuant to section 1005(b)(2) and (3), principally relied upon by the Unions, which provides as follows:

. . . . . .

> (b) Nothing in [section 1005] shall preculde 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; or

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3/ This conclusion is further supported by reference to the legislative history of section 1005(a)(5). In this connection, the committee reports on both the House and Senate bills characterize the management right in question as being "to require uniform personnel policies and procedures . . . ." [Emphasis added.] See H.R. Rep. No. 96-992, Part 1 96th Cong., 2d Sess. 86 (1980); and S. Rep. No. 96-913, 96th Cong; 2d Sess. 83(1980).

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

The Act and its relevant legislative history clearly indicate that a proposed procedure under section 1005(b)(2) is negotiable unless it would prevent the agency from "acting at all," within the meaning of the legislative history of title VII of the Civil Service Reform Act of 1978 (5 U.S.C. §§ 7101-7135) (CSRA).4/ Under the latter, as interpreted and applied by the Federal Labor Relations Authority (FLRA), a proposed procedure which is consistent with applicable law and regulation, including the right of management "ultimately to act," is not excluded from the duty to bargain simply because it might unreasonably delay management action pursuant to such right.5/

Turning now to the disputed proposals, proposal 6(c) would establish certain criteria--the absence of historical nonuniformity for good cause and the presence of a clear and convincing demonstration of a need for uniformity--which management must meet in determining a need for uniformity under section 1005(a)(5) of the Act. These criteria would be determinative of management's decisions in the circumstances to which they apply and, thereby, would preclude management's deciding there is a need for, and negotiating to achieve, uniformity. Thus, the proposal does not concern matters which can be deemed procedures leading up to the exercise of management's function under section 1005(a)(5), as claimed by the Unions. Rather, since adoption of the proposal would prevent management from acting at all to make effective decisions regarding a need for uniformity in conflict with the contractual criteria, the proposal is inconsistent with section 1005(a)(5) and is outside the duty to bargain.

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4/ In this connection, the House-Senate conference regarding the Foreign Service Act of 1980 stated that:

> [W]ith respect to negotiated procedures the [House and Senate] bills are consistent and reflect the conference report to accompany the Civil Service Reform Act of 1978 (S. Rept. 95-1271, p. 158), which stated that the standard for determining whether a proposal is nonnegotiable is whether it 'prevent[s] the agency from acting at all. . . .' H.R. Rep. No. 96-1432, 96th Cong., 2d Sess. 117 (1980).

5/ American Federation of Government Employees, AFL-CIO, Local 1999, and Army-Air Force Exchange Service, Dix-McGuire Exchange, Ft. Dix, New Jersey, 2 FLRA 152 (1979), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981).

Proposals 6(d) and 6(e), likewise, would prevent management's acting at all to exercise its statutory right. More particularly, while they literally would not prevent management from deciding that there is a "need" for uniform policies and procedures between or among the agencies involved, they would prescribe criteria which, in the circumstances to which they apply, would preclude management's ultimately taking effective action to implement its decision. Thus, management could not take such action when uniform policies and procedures would "create a negative impact on the professional careers of the members of a bargaining unit;" or "result in any negative impact on the structure of the relationship between an Agency and its Exclusive Representative."

Of course, the Act, itself, contemplates that employees may in some cases suffer "negative impact" as a result of the exercise of management rights. In this regard, it explicitly provides for the negotiation of "appropriate arrangements for such adversely affected employees.6/ Clearly, however, such appropriate arrangements, any more than implementing procedures, as already discussed, were not intended to prevent management's acting at all to exercise its rights under the Act. The application by the FLRA of the parallel "appropriate arrangements" provision contained in title VII of the CSRA (5 U.S.C. § 7106(b)(3)) is illustrative. For example, see National Association of Air Traffic Specialists and Department of Transportation, F.A.A., 6 FLRA No. 106 (1981), wherein the Authority held that a proposal which required the agency to "make every reasonable effort" to insure that work normally assigned to bargaining unit members is performed by properly qualified employees in the unit concerned appropriate arrangements and was negotiable as it would not prevent the agency's exercise of its statutory right to assign work. Rather, the proposed requirement established a general, nonquantitative contractual standard by which the agency's exercise of its reserved authority to assign work could be evaluated in a subsequent grievance and arbitration proceeding.

Consequently, in the instant case, the disputed proposals do not constitute appropriate arrangements because they would avoid potential adverse effects by contractually barring management from exercising its right. To find otherwise would, essentially, read out of the Act the rights therein reserved to management officials. Accordingly, these proposals are not negotiable.

Proposal 6(f), in contrast to the proposals previously discussed, would delay but would not prevent the ultimate effectuation by management of uniform policies and procedures which it has determined to be necessary pursuant to its reserved right. That is, the proposed

6/ Section 1005(b)(3), supra p. 6.

procedure would in effect delay implementation of such policies and procedures with respect to employees covered by a pre-existing collective bargaining agreement with which the policies and procedures are inconsistent.7/ As stated previously, Congress intended that a procedure which, if adopted, would merely delay effective exercise of a management right under the Act would not be deemed outside the duty to bargain. Rather, such a proposal which does not prevent the agency from acting at all, as here, is negotiable.

The Agency's claim that the proposal "does not limit itself to bargaining agreements with unexpired fixed durations," does not require a different result. First, the record does not establish the existence of "non-fixed term" agreements. Moreover, the Agency has not shown that if such agreements exist they would prevent management from acting at all to exercise its right. On the other hand, as the Unions suggest, the Act itself provides various ways for the Agency to proceed consistent with its rights. In the first place, the Agency can seek to negotiate the conditions it finds necessary to protect itself, e.g., fixed terms for existing contracts. Furthermore, it need not agree to the disputed proposal but can present its bargaining impasse to the Foreign Service Impasse Disputes Panel (FSIDP) pursuant to section 1010. If the culmination of FSIDP proceedings is a directive adverse to the Agency, the Agency can refuse to comply with such directive. Thereupon, if the Unions wanted to obtain enforcement of the directive, they would file an unfair labor practice charge with the Board against the Agency, alleging violation of, e.g., section 1015(a)(6) and (a)(8) of the Act. The Board's decision in this unfair labor practice proceeding would then be judicially reviewable under section 1009 of the Act.

With respect to proposal 6(g), the Agency, similarly, has not shown how the proposal would prevent it from acting at all in the exercise of its right. The Unions state, without contradiction, that this proposal is intended to insure that uniform personnel policies or procedures which may be adopted will reflect which of the agencies involved is actually in control of shared physical space. The objective is to allow grievances accurately to be directed against the responsible agency in the event of a claimed safety or health violation concerning such physical space. This reasonable interpretation of the proposal is consistent with the plain language of the proposal and is adopted by the Board for purposes of this decision. So interpreted, the proposal would not prevent management action. Rather, it is concerned only with an appropriate arrangement for employees adversely affected by the exercise of a management right--facilitation of the

7/ In this connection, it is noted that section 1015(a)(7) of the Act provides that, with certain exceptions not here pertinent, it shall be an unfair labor practice to enforce any rule or regulation in conflict with an applicable, pre-existing collective bargaining agreement.

post-management action grievance process--and is negotiable pursuant to section 1005(b)(3).

Turning, finally, to proposal 7, on its face it would, as the Agency claims, allow the Unions to refuse to engage in, or to withdraw from, joint negotiations and to insist upon separate negotiations. Thus, the proposal clearly is inconsistent with the duty to negotiate in good faith under section 1013(e)(5) of the Act which includes, as previously quoted, the obligation to negotiate jointly, as determined by management.8/ Consequently, this proposal is not negotiable.9/

Issued, Washington, D.C., January 11, 1982.

Ronald W. Haughton, Chairman

Arnold Ordman Member

Arnold Zack Member

FOREIGN SERVICE LABOR RELATIONS BOARD

8/ Supra, p. 5.

9/ The various claims of the Unions that the proposal is consistent with practice under Executive Order 11636 which, previous to the Act, governed conduct of labor relations in the Foreign Service, or with practice under the National Labor Relations Act (NLRA) which applies in the private sector are not dispositive. In the first place, such practices, the statutory provisions involved, and the instant proposal are distinguishable. In any event, practices and precedents under the Order and the NLRA are not binding on the Board.

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CERTIFICATE OF SERVICE

Copies of the Decision and Order of Negotiability Issues of the Foreign Service Labor Relations Board in the subject proceeding have this day been mailed to the parties listed below:

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