

FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 1812

and

U.S. DEPARTMENT OF STATE
U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT
U.S. INFORMATION AGENCY
and
FOREIGN AGRICULTURAL SERVICE

FS-NG-11

DECISION

December 12, 1989

Before Chairman McKee and Member Denenberg.

I. Statement of the Case

This case is before the Foreign Service Labor Relations Board (the Board) because of a negotiability appeal filed under the Foreign Service Act of 1980 (the Act), 22 U.S.C. §§ 3901 et seq. The case concerns the negotiability of one proposal relating to time limits for filing grievances.

Under the Act, grievances may be "filed with the Department within a period of 3 years after the occurrence or occurrences giving rise to the grievance or such shorter period as may be agreed to by the Department and the exclusive representative." 22 U.S.C. § 4134(a). During joint negotiations over the implementing regulations for the Foreign Service Grievance System, the American Federation of Government Employees (AFGE), Local 1812 (the Union) proposed that employees be permitted to file grievances concerning their personnel records "without regard to the 3 year time limit."

We find that unlike the proposal in American Foreign Service Association and United States Department of State, Agency for International Development, and United States Information Agency, Case No. FS-NG-10 (American Foreign Service Association), this proposal violates 22 U.S.C. § 4134(a). Therefore, it is outside the duty to bargain.

II. Procedural Matters

We deny the request of the Department of State (the Department or the Agency) to consolidate this case and American Foreign Service Association because we find that consolidation of the two cases would not effectuate the purposes of the Act. We grant the Agency's request that we consider its brief in American Foreign Service Association as its statement of position in this case.

The Agency contends that the petition for review is untimely under the Board's regulations. The Union contends that its negotiability appeal was timely filed. For the reasons set forth below, we conclude that the petition was timely filed.

On August 18, 1988, the Union requested a written allegation from the Agency concerning the negotiability of its proposal. In a letter dated August 30, 1988, the Agency acknowledged receipt on August 26 of the Union's request and stated that it did not understand the meaning of the proposal. The Agency requested written clarification. See Petition for Review, Attachment 2. The Union provided written clarification of its proposal in a letter to the Agency dated October 3, 1988, and mailed by regular mail. See Union's Response to Petition for Dismissal (Union's Response), Attachment 3.

By mid-November of 1988, the Union had not received an allegation of nonnegotiability from the Agency. On November 15, 1988, the Union resubmitted its October 3 letter clarifying the proposal and mailed the letter by certified mail. The Agency responded to the resubmitted clarification by letter dated November 28, 1988, declaring the Union's proposal nonnegotiable. See Statement of Position, Attachment 2. The Union had not received the Agency's allegation of nonnegotiability when it filed its petition for review with the Board on December 6, 1988. See Petition for Review.

Section 1424.3 of the Board's Regulations provides that the time limit for filing a negotiability appeal with the Board is 15 days from the date of the Department's

allegation of nonnegotiability which was requested in writing by the exclusive representative. That section also provides that review of a negotiability issue may be requested without a prior written allegation by the Department if a written allegation has not been served on the union within 10 days after the date of receipt by the Department bargaining representative of a written request for an allegation. 22 C.F.R. § 1424.3.

Section 1424.3 of the Board's Regulations is substantively identical to section 2424.3 of the Regulations of the Federal Labor Relations Authority (the Authority) concerning the filing of a petition for review. The Authority has held that if an agency fails to respond to a request for a negotiability allegation, a union may file a petition for review with the Authority without regard to the time limits set out in section 2424.3 of the Authority's Regulations. American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, 24 FLRA 512 (1986).

Under section 1007 of the Act (22 U.S.C. § 4107(b)), decisions of the Board must be consistent with decisions of the Authority unless the Board finds that special circumstances require otherwise. We find that there are no special circumstances in this case within the meaning of section 1007 of the Act--and none are alleged by the parties--which require a departure from the Authority's decisions interpreting section 2424.3 of its Regulations. Therefore, consistent with the decisions of the Authority, we find that where the Department fails to respond to a request for a negotiability allegation within 10 days after the date the Department's bargaining representative received the written request for an allegation, the union may file a petition for review with the Board without regard to the 15-day time limit set out in section 1424.3 of the Board's Rules and Regulations. See Department of the Navy, Naval Weapons Station, Concord, California, 24 FLRA at 514.

The Union had not received the Agency's allegation of nonnegotiability at the time that it filed the petition for review. Since the Agency's written allegation of nonnegotiability was not served on the Union within 10 days after August 26, 1988--the date the Department's bargaining representative received the Union's written request for an allegation--the Union could request review of its proposal without a prior written allegation by the Department. The Union could file its petition for review without regard to the 15-day time limit set out in section 1424.3. Therefore, the Union's appeal filed on December 6, 1988, is timely.

We reject the Agency's contention that the Union's appeal is barred by the doctrine of laches. "The doctrine of laches bars relief to those who delay the assertion of their claims for an unreasonable time." National Association for the Advancement of Colored People v. N.A.A.C.P. Legal Defense & Education Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985) (footnote omitted), cert. denied, 472 U.S. 1021 (1985). To establish laches, the Agency must demonstrate: (1) substantial delay by the Union in asserting its right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the Agency because of the Union's delay. See id. at 137. See also AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1545 (11th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

The Agency has failed to establish the essential elements to its defense of laches. The Agency has not demonstrated that filing the petition for review on December 6, 1988 caused a substantial or unreasonable delay. The Agency has not shown that the delay, which was the result of the Agency's failure to provide the Union with an allegation of nonnegotiability in a timely manner, was not excusable. Finally, the Agency has not established that its rights were prejudiced since the Agency could have expedited the appeal by providing the Union with an allegation of nonnegotiability earlier. Therefore, we conclude that the Agency's defense must fail. See Trustees of the Colorado Statewide Iron Workers (ERECTOR) Joint Apprenticeship and Training Trust Fund v. A & P Steel, Inc., 812 F.2d 1518, 1529 (10th Cir. 1987).

III. Background and Proposal

The Foreign Service grievance and personnel systems are described in our decision in American Foreign Service Association. We incorporate that discussion in this decision.

The proposal in this case would amend the provision in the current regulations (3 FAM 663.7) concerning the time limits for filing grievances. The current regulation reads:

- (a) A grievance under these regulations is forever barred unless it is presented within 3 years of (1) the date of the issuance of an employee efficiency report or other documents in the Official Performance Folder, and/or (2) the date of any other act or occurrence giving rise to the grievance. Additionally, grievances concerning an employee efficiency report or other documents in the Official Performance Folder may

be filed without regard to the 3 year time limits provided:

- (1) The material is specifically referenced by a selection board and relied upon by the agency in a retirement proceeding under section 608 of the Act; or
- (2) The material is otherwise adversely affecting the grievant and no more than 5 years have elapsed since the date of its issuance.
- (3) There shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence. . . .

The Union's proposal provides:

663.7 Amend to read:

(a) A grievance under these regulations, with the exception of a continuing violation, is forever barred unless it is presented within 3 years of (1) the date of the issuance of an employee efficiency report or other documents in the Official Performance Folder, and/or (2) the date of any other act or occurrence giving rise to the grievance. Grievances pertaining to records maintained by the Agency on an employee are a continuing violation and may be filed without regard to the 3 year time limit.

- (1) Delete present section.
- (2) Delete present section.
- (3) Move to 663.7 main text: "There shall be excluded . . . diligence."

IV. Positions of the Parties

A. Agency's Contentions

The Agency contends that the proposal is nonnegotiable for the reasons stated in its brief in American Foreign

Service Association. Agency's Statement at 5. In that case, the Department contended that the proposal, relating to the time limit for filing grievances concerning continuing violations, was nonnegotiable because it violated 22 U.S.C. § 4134(a). The Department argued that the effect of the proposal in American Foreign Service Association was to impermissibly negotiate an extension beyond the statutory time limitation by permitting the limitations period to begin at some point many years in the future with regard to acts or occurrences which have been completed at some point many years in the past. See American Foreign Service Association, slip op. at 6-7. The Department asserted that the proposal would permit an employee "to file a grievance at anytime without regard to the three year statute of limitations." Id. at 7 (emphasis in original).

In addition to relying on the plain wording of the law, the Department made several other arguments in support of its claim that the proposal violated 22 U.S.C. § 4134(a). The Department argued that the: (1) history of legislation on the grievance system and the legislative history of the 1980 Foreign Service Act and (2) subsequent negotiating history for the current grievance regulation bargaining agreement supported its position that the proposal was nonnegotiable. The Department also cited the decision of the Foreign Service Grievance Board (the Grievance Board) in No. G-012(7) (June 16, 1987) in support of its position. In that decision, the Grievance Board held that the time limit in 3 FAM 663.7 for filing a grievance concerning a performance-related record begins to run with the date of issuance of the record. See American Foreign Service Association, slip op. at 7.

B. Union's Contentions

The Union states that:

In essence, under the Union's proposal, documents in an employee's personnel file which adversely affect the employee are treated as a continuing condition which could be grieved without any time limitation. This would include material specifically referenced by a selection board and relied on by the agency in a retirement proceeding under section 608 of the Act.

The proposal retains the implicit continuing condition concept for documents in an Official Performance Folder, except that the five-year time limit for grievance filing purposes--where

the material is not specifically referenced by a selection Board and relied upon by the agency in a retirement proceeding--is omitted.

Union's Response, Attachment 3.

The Union does not make any additional arguments concerning the negotiability of its proposal.

V. Discussion

The issue before us is whether the Union's proposal is inconsistent with 22 U.S.C. § 4134(a). We find that the proposal is inconsistent with section 4134(a) and is, therefore, outside the duty to bargain.

The plain wording of the proposal provides that grievances concerning records maintained by the Agency may be filed without regard to a time limit. In its letter to the Agency clarifying the proposal, the Union states that it intends the proposal to provide that "documents in an employee's personnel file which adversely affect the employee are treated as a continuing condition which could be grieved without any time limitation." Union's Response, Attachment 3.

The Union does not explain how it interprets the term "adversely affect" in its proposal. Identical wording was included in the proposal in American Foreign Service Association. However, in American Foreign Service Association, the union stated that the term was intended to refer to a grievable adverse action taken by the agency against an employee. Id., slip op. at 10. There is no evidence that the Union in this case intends the term to have the same meaning that the union in American Foreign Service Association accorded the term--that is, an employee may grieve records only if the records are the basis for a grievable adverse action taken by the agency against the employee. Therefore, consistent with the plain wording of the proposal and the Union's statement of its intent, we interpret the proposal in this case as providing that grievances concerning records in an employee's personnel folder may be filed without regard to a time limit.

Section 4134(a) sets the time limit for filing grievances under the Foreign Service Grievance System. Section 4134(a) provides that "[a] grievance is forever barred unless it is filed with the Department within a

period of 3 years after the occurrence or occurrences giving rise to the grievance[.]”*/

The Union's proposal would make the 3-year time limit in section 4134(a) inapplicable to grievances concerning records in an employee's Official Personnel Folder, which the proposal describes as a "continuing violation." Section 4134(a) applies to a grievance concerning records in an employee's official personnel record. See, for example, 22 U.S.C. § 4131(a)(1)(E) (providing for a grievance concerning the existence of an "alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member"). See also American Foreign Service Association, slip op. at 6. By allowing a grievance concerning personnel records to be filed without regard to any time limit, the Union's proposal would permit an employee to file a grievance outside the statutory time limit in section 4134(a).

Because we find that the Union's proposal would permit a grievance concerning personnel records which falls outside the statutory time limit, we conclude that the proposal is contrary to 22 U.S.C. § 4134(a) and is outside the duty to bargain.

Our decision in American Foreign Service Association concerns a proposal which has a significant difference from the proposal in this case. The proposal in American Foreign Service Association allowed employees to contest personnel records to the extent that the records are used as a basis for grievable actions taken against them by the agency. We found that that proposal was not inconsistent with the time limitation in 22 U.S.C. § 4134(a) because it permitted employees to challenge the records that were relied on by the agency to take a grievable action against them only in connection with a grievance concerning the adverse action which was filed within the time period in section 4134(a).

The distinction between the proposal in this case and the proposal in American Foreign Service Association can

*/ For purposes of our discussion, our references to the 3-year time limit incorporate the proviso that "[t]here shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence." 22 U.S.C. § 4134(a).

best be illustrated by the following example: An employee wants to remove a record from his Official Personnel Folder which has been maintained in the personnel file for 15 years. A challenge to that record under 22 U.S.C. § 4131(a)(1)(E)--providing for a grievance concerning the existence of an "alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member"--is precluded because 22 U.S.C. § 4134(a) provides that a grievance under section 4131(a)(1)(E) must be filed within 3 years of the occurrence giving rise to the grievance. The "occurrence" giving rise to a grievance under section 4131(a)(1)(E) is the issuance of the record.

Under the proposal in American Foreign Service Association, the employee would be able to contest the record only if the Agency takes a grievable adverse action against the employee based on that record and the employee filed a grievance concerning the adverse action within 3 years, as required by section 4134(a). Under the proposal in the instant case, the employee could challenge the 15-year old record whenever he decided to file a grievance, without regard to any time limit and without regard to whether the Agency took a grievable adverse action against the employee based on the record.

Unlike the proposal in American Foreign Service Association, the Union's proposal in this case does not provide that employees may challenge records only in connection with a grievance which has been filed within the time period in section 4134(a). Rather, the proposal provides that employees may file grievances concerning records without regard to that statutory time limit, thereby allowing employees to file grievances which are precluded by section 4134(a).

VI. Order

The Union's petition for review is dismissed.

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**U.S. DEPARTMENT OF STATE
U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT
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U.S. INFORMATION AGENCY**

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FOREIGN AGRICULTURAL SERVICE

FS-NG-11

STATEMENT OF SERVICE

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

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DATED: December 12, 1989
WASHINGTON, D.C.

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