

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

**AMERICAN FOREIGN SERVICE ASSOCIATION
(Union/AFSA)**

and

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union/AFGE)**

and

**U.S. DEPARTMENT OF STATE (Agency)^{1/}, AND
AGENCY FOR INTERNATIONAL DEVELOPMENT (AID),
AND THE U.S. INFORMATION AGENCY (USIA)**

**FS-NG-12
FS-NG-13
FS-NG-14**

DECISION AND ORDER ON NEGOTIABILITY ISSUES

April 12, 1991

Before Chairman McKee and Members Denenberg and Greenbaum.

I. Statement of the Cases

These cases are before the Foreign Service Labor Relations Board (the Board) because of negotiability petitions filed by AFSA and AFGE under section 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the Act). The petitions contain a total of 10 proposals--5 each submitted by AFSA and AFGE. The text of the proposals, numbered sequentially by the Board, appears in the Appendix to this decision.

^{1/} Unless otherwise indicated, the term "Agency" in this decision will refer only to the U.S. Department of State.

The Agency filed a motion requesting that the Board consolidate the cases for decision. In support of its motion, the Agency states that the proposals, which grew out of joint negotiations conducted by the parties, raise the same matters, and contain identical language. The Unions did not oppose the Agency's motion. Under these circumstances, the Board finds that it will effectuate the purposes and policies of the Act to consolidate the cases for decision. Accordingly, the Agency's motion is granted.

For the reasons set forth in our decision, we find that Proposals 2, 3, 4, 7, 8 and 10 are negotiable. Proposals 1, 5, 6 and 9 are nonnegotiable.

II. Background

AFSA is the exclusive representative for foreign service employees of the Agency and AID. AFGE is the exclusive representative for foreign service employees of the USIA. The proposals in dispute grew out of joint negotiations conducted among the parties in response to proposed Agency changes to the Foreign Affairs Manual, Volume 3, Chapter 760, (3 FAM 760), pertaining to Disciplinary Action and Separation for Cause. The five proposals submitted by AFSA for Board review are essentially identical to the five proposals submitted by AFGE for review.

As indicated in the Appendix, Proposals 1, 2, 3 and 5 are contained in the petition for review filed by AFSA in Case No. FS-NG-12. The corresponding proposals submitted by AFGE in Case No. FS-NG-13 are numbered Proposals 6, 7, 8 and 9. Proposal 4, submitted by AFSA in an amended petition to FS-NG-12, corresponds with Proposal 10, submitted by AFGE in Case No. FS-NG-14.2/

2/ Although the Board's Regulations do not specifically authorize the filing of amended petitions for review, we find that the amended petition is properly before us. As explained by AFSA, Proposal 4 was initially at impasse before the Foreign Service Impasse Disputes Panel. However, before the Panel, the Agency declared the proposal nonnegotiable. AFSA sought and received from the Agency a declaration of nonnegotiability whereupon AFSA filed the amended petition for review. The Agency has not objected to (Footnote continued on next page)

III. Preliminary Matters

A. Timeliness of the Union's Responses

The Agency filed two separate statements of position with the Board--one pertaining to FS-NG-12 and FS-NG-13 (hereinafter Statement of Position I), and one pertaining to the amended petition in FS-NG-12 and FS-NG-14 (hereinafter Statement of Position II). The Agency alleges that the Unions' separate responses to Statement of Position I were untimely filed and should not be considered by the Board. The undisputed evidence is that Statement of Position I was filed with the Board on June 27, 1990, and that pursuant to 22 C.F.R. § 1424.7, the Unions' reply briefs were due to be filed with the Board by July 12, 1990. However, briefs were not filed until July 13, 1990.

On July 20, 1990, in separate orders issued by the Board, the Unions were ordered to show cause why their responses should be considered by the Board. They were advised that under 22 C.F.R. § 1424.7, the time limit for filing a response to an agency's statement of position is 15 days from the date of its receipt. As the Agency's statement of position in this case was hand-delivered to each Union on June 27, 1990, the Unions' responses had to be received by the Board no later than July 12, 1990, in order to be considered timely. Both responses were filed in the Board's Docket Room on July 13, 1990.

Both Unions filed submissions with the Board. They acknowledged that their reply briefs were due on July 12, 1990 and that each brief was not filed until July 13, 1990. The Unions explained that they were operating under the assumption that the Agency's statements of position would be filed on June 28, 1990--which corresponds to 30 days from the date each petition for review was filed--and that the responses, therefore, would be due on July 13. The Unions indicated that a copy of Statement of Position I was received in each Union office

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the filing of the amended petition. Under these circumstances, and noting that the amended petition would have been timely filed under section 1424.3(a) of our Regulations had it been filed as a separate petition for review, we accept and consider the amended petition in FS-NG-12.

on June 27, although the attorney responsible for each case did not actually receive the document until June 28. In the case of AFSA, the reason for non-receipt on June 27 was a new employee who failed to disseminate incoming mail on the day received. In the case of AFGE, the reason for non-receipt was the absence of the attorney from the office on June 27. Both Unions argue that they have presented what they have termed a "reasonable excuse" for the delay in filing and, further, that the Agency has not been prejudiced by the 1-day delay in the filing of the responses.

Section 1429.23 of the Board's Regulations permits the Board to waive any expired time limit "in extraordinary circumstances." In our view, regardless of whether the Unions have given "reasonable excuses," they have not presented "extraordinary circumstances" justifying a waiver of the expired time limit.

The reasons proffered by the Unions for the late filing--namely, the incorrect assumption as to the date on which the Agency's statement of position would be filed, and the non-receipt by the attorneys handling the case until the day after Statement of Position I was received--do not present the type of circumstances warranting a waiver of an expired time limit. Accord National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982), in which the court found that the Federal Labor Relations Authority (the Authority) acted properly in refusing to consider a union response to an agency statement of position that was filed 4 days late. In commenting on the Congressional purpose of expediting the resolution of negotiability disputes, the court stated that "[i]f Congress' purpose is to be achieved, the statutory time limits for filing union appeals, agency statements, and union responses must be strictly observed." Id. at 890. Compare U.S. Department of Housing and Urban Development and American Federation of Government Employees, Local 476, AFL-CIO, 32 FLRA 1261 (1988) (the waiver of an expired time limit for filing a request for reconsideration is justified where the reasons for the union representative's absence and failure to receive an Authority decision--a family medical matter--were such as to establish extraordinary circumstances).

Consequently, the Board can not consider the Unions' responses to Agency Statement of Position I. However, it will consider the separately filed responses to Agency's

Statement of Position II. Those responses were timely filed in accordance with the Board's Regulations.

B. Applicability of Decisions Under the Federal Service Labor-Management Relations Statute

Section 1007 of the Act (22 U.S.C. § 4107(b)) provides that decisions of the Board must be consistent with decisions of the Authority issued under the Federal Service Labor-Management Relations Statute (the Statute), 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 applicable Authority decisions. See, for example, American Foreign Service Association and United States Department of State, FS-NG-9 (1990), slip op. at 4.

IV. Proposals 1 and 6

Proposal 1

Section 762(d)--Grounds for Action

Management has proposed that "[a]n employee's breach of security regulations or the loss of a security clearance" be added to the grounds for disciplinary action. AFSA proposes deletion of this language.

Proposal 6

762(d): Grounds for Action -- Union proposal to delete provision that action be taken for employee's breach of security regulation or loss of her/his security clearance.

A. Agency's Position

The Unions' proposals were made in response to the Agency's proposal to add to the list of grounds for disciplinary action appearing in 3 FAM 762, an employee's breach of security regulations and the loss of a security clearance. The Agency claims that the proposals would prohibit management from exercising its rights under section 1005(a) of the Act to take disciplinary action or to separate an employee for violating security regulations, or

following revocation of an employee's security clearance.^{3/} According to the Agency, maintenance of an appropriate security clearance is a requirement for employment. Absent a security clearance, an employee either must be reassigned to a position that does not require clearance or be separated for failing to maintain a condition for continued employment. As further explained by the Agency, the Unions' stated intent is "to have management's decision subject to outside, third party review." Statement of Position I at 4. The Agency argues that subjecting management's determination concerning security clearances to arbitral review would violate 5 U.S.C. Chapter 75, the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. ___, 108 S.Ct. 818 (1988), and a decision involving the Foreign Service Grievance Board in USIA v. Krc, 905 F.2d 389 (D.C. Cir. 1990), in which the U.S. Court of Appeals for the D.C. Circuit held that the Grievance Board does not have authority to review a security clearance determination. The Agency also states that the Unions "do not want the loss of an employment requirement to serve as the sole basis for disciplinary action or separation for cause. Instead, the unions want the misconduct or improper action which formed the basis for security clearance determination to be the material basis for separate disciplinary action." Statement of Position I at 4.

The Agency also argues that the proposals do not constitute procedures within the meaning of section 1005(b)(2) of the Act because they would directly interfere with the exercise of the right to discipline by precluding management from taking disciplinary or separation action against employees. Finally, the Agency argues that the proposals do not constitute appropriate arrangements within the meaning of section 1005(b)(3) of the Act. The Agency states that the Unions failed to describe in what manner the proposals constitute appropriate arrangements. Instead, according to the Agency, the proposals would excessively interfere with management's right to discipline by "totally prohibit[ing] the taking of action where an employee violates security regulations or fails to maintain an employment condition." Id. at 9 (emphasis in original).

^{3/} Pertinent statutory provisions involved in this case are set forth in the Appendix.

B. Analysis and Conclusions

We find that the proposals violate management's right to discipline under section 1005(a)(2) of the Act and, therefore, are outside the duty to bargain. Additionally, we agree with the Agency that the proposals do not constitute procedures or appropriate arrangements under sections 1005(b)(2) and (3) of the Act.

As indicated, the Agency proposed to add to the grounds for disciplinary action set forth in 3 FAM 762, an employee's breach of security regulations or loss of security clearance. The proposals, on the other hand, seek to preclude those matters as a basis for disciplinary action. The Unions' timely filed petitions for review are devoid of any statement of intent or explication as to the meaning of the proposals. Consequently, the Board must confine its analysis to the express language. We find that the plain wording of the proposals would prevent management from taking disciplinary action against an employee following that employee's breach of security regulations or loss of security clearance. By placing such prohibitions on the right to discipline, the proposals directly interfere with the right to discipline and are outside the duty to bargain. See, for example, American Federation of Government Employees, Local 987 and U.S. Department of the Air Force, Robins Air Force Base, Georgia, 37 FLRA 197, 206 (1990) (Robins Air Force Base), pet. for review filed sub nom. United States Department of the Air Force v. FLRA, No. 90-1530 (D.C. Cir. Nov. 13, 1990), in which the Authority found that a proposal which would have insulated employees from discipline for tardiness directly interfered with the right to discipline and was outside the duty to bargain because it would have prevented the Agency from taking disciplinary action under prescribed conditions. See also National Federation of Federal Employees, Local 2050 and Environmental Protection Agency, 36 FLRA 618, 625 (1990), discussing the imposition of substantive restrictions on the exercise of other management rights.

A proposal which directly interferes with a management right does not constitute a negotiable procedure under section 1005(b)(2). American Foreign Service Association and United States Department of State, FS-NG-8, slip op. at 7 (1987) (Department of State). Consequently, as the proposals here directly interfere with management's right to discipline, we find that they do not constitute negotiable procedures under section 1005(b)(2).

We also find that the proposals do not constitute appropriate arrangements under section 1005(b)(3) of the Act. Previously, the Board has utilized the "excessive interference" test, set forth by the Authority in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986) (Kansas Army National Guard), for determining whether a matter proposed to be bargained is an appropriate arrangement for employees adversely affected by the exercise of a management right under the Act. Department of State, slip op. at 8. A union must first demonstrate that its proposal is intended to be an "arrangement." Once that requirement is satisfied, the excessive interference test must be applied to determine whether the proposal is "appropriate" for bargaining. This test involves weighing the competing practical needs of employees and management in the light of various factors, in order to determine whether, on balance, the impact of the proposal on management's rights is excessive when compared with the benefits afforded employees.

In our view, the Unions have not demonstrated that the proposals were designed to be arrangements. The petitions for review contained no evidence or arguments which would establish that the proposals were intended as arrangements. Any arguments raised in the reply briefs can not be considered since the briefs were not timely filed. The parties bear the burden of creating a record on which the Board can make a negotiability determination. A party failing to sustain its burden acts at its peril. See Robins Air Force Base, 37 FLRA at 203. Here, as noted, the Unions have not created a record sufficiently adequate to allow the Board to assess whether the proposals were intended to be arrangements.

Accordingly, we find at this time that Proposals 1 and 6 are outside the duty to bargain.^{4/}

^{4/} In view of our conclusion that the proposals are nonnegotiable, we need not address the Agency's additional arguments based on its characterization of the Unions' intent of the proposals. However, with regard to the Agency's arguments concerning third-party review of security clearance determinations, the parties may wish to refer to (Footnote continued on next page)

IV. Proposals 2 and 7 5/

Proposal 2

Section 763.2-6C

[C]urtailment of assignments shall be subject to disciplinary and grievance procedures.

Proposal 7

763.2-6c: Investigating and Reporting of Facts --
A Curtailment that is motivated by allegations of misconduct, criminal activity, or actions which have serious negative security implications shall be considered an adverse action, subject to the grievance process. . . .

A. Agency's Position

As explained by the Agency, most assignments are overseas tours of duty lasting anywhere from 2 to 4 years. Curtailment arises when management prematurely terminates an employee's assignment. There are a number of reasons for curtailments--such as a medical emergency, an urgent need for the employee's skills in another position, or loss of confidence in the employee by the Chief of the Mission. When curtailments occur, the employee involved is generally reassigned to a position in the continental United States. The Agency states that "curtailments are taken under the agencies' assignment process, and that there are no adverse consequences or effects for the employee in terms of a loss of basic pay, status or rank which emanate from the curtailment." Statement of Position I at 12.

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the Authority's decision in United States Information Agency and American Federation of Government Employees, Local 1812, 32 FLRA 739, 745-46 (1988), for guidance as to the appropriate parameters of third-party review of revocation of security clearances.

5/ The text of each proposal was taken from the petitions for review. While the wording of the respective proposals is not identical, the parties have treated them as such. Therefore, our disposition of the proposals assumes that the proposals are identical.

The Agency claims that the proposals violate 22 U.S.C. § 4131(b)(1), which excepts assignments from the definition of grievance, and management's rights to assign and maintain internal security practices. The Agency also states that the proposals would require use of the Agency's disciplinary procedures in various instances, rather than the procedural requirements set forth in a separate Agency regulation, enumerated section 766, and submitted to the Board as Agency Exhibit 7.

More particularly with regard to the exercise of the right to assign, the Agency argues that under the proposals, a decision to curtail an assignment would be subject to the Agency's grievance procedure which, by its terms, would allow the employee "prescriptive relief" namely, retention in a duty and pay status until the merits of the grievance were resolved by the Grievance Board. The Agency contends that the proposals would thereby subject the substantive decision to reassign an employee to review and reversal by the Grievance Board.

The Agency also claims that the proposals would interfere with management's right to maintain internal security by imposing "an uninhibited restriction of procedures . . ." when management decides to use "the necessary action of curtailment to safeguard government security and foreign policy interests[.]" Statement of Position I at 15. As with the right to assign, the Agency argues that the proposals would impermissibly subject management's substantive security decisions to arbitral review.

Additionally, the Agency asserts that the proposals are neither procedures under section 1005(b)(2) nor appropriate arrangements under section 1005(b)(3). With regard to procedures, the Agency argues that the proposals excessively interfere with the right to assign by eliminating management's discretion and effectively preventing it from assigning employees and, instead, giving that discretion to the Grievance Board. With regard to section 1005(b)(3), the Agency claims that the proposals are analogous to a proposal concerning voluntary repatriation that was found nonnegotiable in Department of State, FS-NG-8. It further argues that there are no adverse impacts from the decision to curtail an employee.

B. Analysis and Conclusions

The proposals do not violate 22 U.S.C. § 4131(b)(1) or management's rights to assign or determine internal security

practices. Consequently, the proposals are within the duty to bargain.

1. The Proposals Do Not Violate 22 U.S.C. § 4131(b)(1)

We reject the Agency's contention that the proposals violate section 4131(b)(1) by subjecting to the Agency's grievance procedure a matter that is excluded from the statutory definition of grievance.

22 U.S.C. § 4131(b)(1) provides as follows:

(b) For purposes of this subchapter, the term "grievance" does not include--

(1) an individual assignment of a member under Subchapter V of this chapter, other than an assignment alleged to be contrary to law or regulation[.]

Assuming, for purposes of this decision, that curtailment involves the assignment of an employee, § 4131(b)(1), by its terms, does not exclude all assignments from the definition of grievance. Rather, assignments that are alleged to be contrary to law or regulation clearly fall within the statutory definition of grievance.

Previously, the Board has noted that the scope of the grievance procedure covering foreign service employees is intended to be broad. See American Foreign Service Association and United States Department of State, FS-NG-4 (1983), slip op. at 2. Although the proposals here do not specifically limit application of the grievance procedure to curtailments that are alleged to be contrary to law or regulation, nothing in the provisions would require that curtailments not alleged to be contrary to law or regulation be processed through the Agency's grievance procedure, and we are unwilling to read such a requirement into the proposals.

The Agency's grievance procedure, set forth in 3 FAM 660, contains a parallel provision which mirrors the statutory definition of grievance. In our view, the proposals would simply incorporate into the Agency's grievance procedure curtailments that are alleged to be "contrary to law or regulation[.]" as provided in 22 U.S.C. § 4131(b)(1) and 3 FAM 660.

Consequently, in view of the broad scope of the grievance procedure and the inclusion of certain assignment actions within the statutory definition of grievance, we find that Proposals 2 and 7 do not conflict with the cited law.

2. The Proposals Do Not Violate the Right to Determine Internal Security Practices

As previously noted, the Agency argues that when it decides to "use the necessary action of curtailment to safeguard government security and foreign policy interests, the union's [proposals] would impose an uninhibited restriction of procedures that would excessively interfere with the exercise of our security right." Statement of Position I at 15-16. The Agency claims that subjecting management's substantive decisions to "arbitral review and substantiation" constitutes a further violation. Id. at 16.

An agency's right to determine its internal security practices has been held by the Authority, under a provision of the Statute that is analogous to section 1005(a)(1) of the Act, to include the right to determine policies and take actions which are part of its management's plan to secure or safeguard its personnel, its physical property, and its operations. See, for example, National Federation of Federal Employees, Local 2050 and Environmental Protection Agency, 36 FLRA 618, 625 (1990). Additionally, in determining whether a particular plan or policy falls within the scope of the right to determine internal security practices, an agency must show that there is a reasonable link between the plan or policy and the security of its operations. American Federation of Government Employees, Local 987 and U.S. Department of the Air Force, Robins Air Force Base, Georgia, 37 FLRA 197, 200 (1990).

Here, the Agency has not identified in what manner the proposals would affect its ability to secure or safeguard its personnel, physical property, or operations. It has merely referenced some unspecified "uninhibited restriction of procedures" that would be imposed by the proposals in contravention of the Agency's right to maintain its internal security practices. If the Agency's reference to the "prescriptive relief" provisions of 3 FAM 660 were intended to constitute the "uninhibited restriction of procedures," we would nonetheless find no inconsistency between the use of these procedures and management's right to determine its internal security practices.

The prescriptive relief provisions referenced by the Agency, 3 FAM 664, require that the Agency suspend its action in matters such as suspensions, separations and terminations, on request of the affected employee, following the filing of a grievance and during the pendency of the grievance processing.^{6/} Excluded from suspension of the Agency's actions are grievances that are not integral to the proposed action. Where management suspends action, the employee's suspension remains in effect until 15 days after completion of the agency grievance procedures to permit the employee to file a grievance with the Grievance Board. 3 FAM 666.3, referenced by the Agency, also provides for the suspension of agency action until the Grievance Board has ruled on the grievance.

The Agency argues that under these regulations, an employee "would have to be kept in his/her assignment or some sort of duty and pay status until the merits of the grievance are resolved by the [Grievance Board]." Statement of Position I at 13. Any assertion that use of such prescriptive relief violates management's right to determine its internal security must fail for the simple reason that management retains the authority to curtail an employee's assignment. The very provision relied on by the Agency, 3 FAM 666.3, contains the following crucial language:

Notwithstanding such suspension of action, the head of agency concerned or a chief of mission or principal officer may exclude the grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the grievant is assigned.

Based on this language, it is clear that the Agency can exclude an employee from official premises or from the performance of duties, in effect curtailing that employee's assignment, when it is determined by the Agency that exclusion of the employee is essential to the functioning of the particular location to which the employee is assigned.

Additionally, 3 FAM 666.5, authorizes the Grievance Board to direct management to take corrective action for

^{6/} The text of the pertinent provisions of 3 FAM 660 appears in the Appendix.

grievances found to be meritorious. However, where the Grievance Board's "remedial action . . . relates directly to . . . assignment of the grievant," the Grievance Board's remedial authority consists of recommendations only, which management may implement or reject. Significant is the fact that rejection of the Grievance Board's recommendation is contingent on management's determination that "implementation of the recommendation would be contrary to law, or would adversely affect the foreign policy or national security of the United States." In our view, the language of the Agency's own regulations must be viewed as authorizing management to curtail an employee's assignment under the circumstances specified in the Agency's regulations.

The Agency's assertion that the proposals would require it to follow disciplinary procedures rather than "the procedural requirements of section 766 . . ." also does not support a finding that the proposals violate the right to determine internal security practices. Statement of Position I at 13. The provisions of "section 766," attached as an Agency exhibit, relate to "Suspensions" and "Separation for Cause." Since the Agency states that "curtailments are taken under the agencies' assignment process[,]" section 766 has no applicability to the matters here in dispute. Statement of Position I at 12.

In finding that the proposals do not violate management's right to determine its internal security practices, we recognize that matters of internal security are of grave importance and, this is particularly so for employees who are representing the United States in foreign assignments. The proposals here, however, would not prevent the Agency from determining its internal security practices inasmuch as management retains the authority to curtail an employee's assignment in accordance with the provisions of 3 FAM 666.3 and 3 FAM 666.5.

It is noteworthy, too, that the Agency's objections are to the use of its own regulations to challenge curtailment actions. Yet, an examination of those regulations indicates that other types of actions, such as separations or suspensions, are subject to processing through the Agency's grievance procedure. With regard to such actions, the regulations provide that the Agency may be required to suspend the separation or termination during the pendency of the grievance processing and, further, that the Agency may be required to take corrective action when grievances are found to be meritorious by the Grievance Board. The proposals here do no more than permit

curtailments to be subject to the same procedural processes that are available for other agency actions, such as separations and suspensions, while at the same time preserving management's ability to curtail under the conditions described above.

3. The Proposals Do Not Violate the Right to Assign

Contrary to the Agency's argument, we find that the proposals do not violate the right to assign. Although the Agency did not specify which right the proposals are alleged to violate--namely, the right to assign individuals under section 1005(a)(2) of the Act, or the right to assign work under section 1005(a)(3) of the Act, it is apparent from the Agency's arguments that the right referred to is the right to assign individuals.

The Agency's sole argument in support of its contention is that the proposals would subject management's substantive decision to reassign an employee to review and reversal by the Grievance Board. We find that such assertion provides no basis for finding the proposals to be outside the duty to bargain. As noted above, in our discussion of various provisions contained in the Agency regulation pertaining to its grievance system, the authority of the Grievance Board to order management to take corrective action in grievances involving an assignment of a grievant is circumscribed by the language of the regulation itself. 3 FAM 666.5(d), which is set forth in the Appendix, states that a Grievance Board recommendation on a meritorious grievance relating to assignment is subject to rejection by the Agency. Consequently, even if the Grievance Board were to review a curtailment action and recommend that it be reversed, such recommendation would be subject to rejection by the Agency if, in the Agency's view, the recommendation would be contrary to law, or would adversely affect the foreign policy or national security of the United States. Under these circumstances, we cannot agree that the proposals interfere with the exercise of management's right to assign individuals.

Consequently, we find that the proposals do not violate law or management's rights, as alleged by the Agency. In view of our finding that the proposals do not violate management's rights, we need not address the Agency's arguments concerning sections 1005(b)(2) and (3) of the Act. In sum, Proposals 2 and 7 are within the duty to bargain.

VI. Proposal 3 and 8 7/

Proposal 3

Section 766. _____ --Indefinite Suspension

Where there is a reasonable basis to believe an employee has committed a crime having a nexus to the efficiency of the Service, the employee may be placed on administrative leave.

Proposal 8

766. _____: Indefinite Suspension -- Where there is a reasonable basis to believe an employee has committed a crime having a nexus to the efficiency of the Service, the employee may be placed on administrative leave.

A. Agency's Position

The Agency claims that the intent of the proposals, as indicated by the Unions in bargaining sessions, is to require management to put an employee on administrative leave, which is a non-duty, pay status. The Agency states that "[b]ut for the unions unequivocal statement of intent for the disputed sentence, management would not have declared the proposal nonnegotiable." Statement of Position I at 19. Based on the Unions' stated intent, the Agency argues that the proposals interfere with management's right to assign employees under section 1005(a) by preventing it from assigning an employee to another

7/ Proposals 3 and 8, as well as 4 and 10 discussed infra, relate to the following management proposed change in indefinite suspension:

Where there is a reasonable basis to believe that an employee has committed a crime having a nexus with the efficiency of the service, the employee may be placed on indefinite suspension (non-duty, non-pay status). Reasonable basis for indefinite suspension shall include indictment, criminal information, or similar process, or such sufficient evidentiary grounds as established by the federal courts and/or the [Merit Systems Protection Board] in indefinite suspension cases.

position or from approving or disapproving the placement of the employee in an appropriate leave category. In support of its position, the Agency cites the Authority's decisions in National Federation of Federal Employees, Local 15 and U.S. Army Armament Munitions and Chemical Command, Rock Island Arsenal, Illinois, 19 FLRA 48 (1985).

B. Analysis and Conclusions

The proposal does not violate the right to assign individuals under section 1005(a) of the Act, as alleged.

The Unions' proposals were submitted in response to the Agency's proposal, set forth in n.7, to place an employee believed to have committed a crime having a nexus to the efficiency of the Service on indefinite suspension. The Unions proposed instead that the employee be placed on administrative leave. As claimed by the Agency, the Unions' proposals would require the Agency to place employees in a non-duty, pay status. We disagree.

Where there is an inconsistency between the language of a proposal and its stated intent, we will not base a negotiability determination on the union's intent. Instead, we will base our negotiability determination on the language of the proposal. See, for example, International Federation of Professional and Technical Engineers, Local 4 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 35 FLRA 31, 35 (1990). Here, the proposals state only that an employee may be placed on administrative leave when there is a reasonable basis to believe that the employee has committed a crime having a nexus to the efficiency of the Service. There is no requirement that the Agency utilize the process of administrative leave in any or all instances, and we will not read into the proposals such a requirement. Rather, we find that the Agency may choose not to place an employee on administrative leave and, instead, may utilize any other appropriate procedure or none.

The Agency's reliance on Rock Island Arsenal is misplaced. In that case, the clear language of union proposal 1 would have required the agency to grant leave without pay to an employee who met certain specified criteria. The proposal was held to violate management's right to assign work by eliminating the discretion inherent in that management right. By contrast, the proposals here do not eliminate management's discretion. The proposals simply provide an option which management can choose to use or not, as it deems appropriate.

As noted, the Agency indicated in its statement of position that it would not have declared the proposals nonnegotiable but for the Unions' stated intent. As we have based our decision on the plain language of the proposals, and not the intent ascribed by the Agency, it appears that the Agency would have no further objection to the proposals. In fact, the Agency has made no other arguments contesting the negotiability of the proposals and none is otherwise apparent to us. Consequently, Proposals 3 and 8 are within the duty to bargain.

VII. Proposals 4 and 10

Proposal 4

An employee may not be indefinitely suspended without pay unless the employee has been convicted of, and a sentence of imprisonment has been imposed for, a job-related crime.

Proposal 10

766._____: Grounds for Indefinite Suspension. An employee may not be indefinitely suspended without pay unless the employee has been convicted of, and a sentence of imprisonment imposed for, a job-related crime.

A. Agency's Position

The Agency argues that the proposals directly interfere with management's rights to determine internal security practices and to discipline, and that the proposals do not promote an effective and efficient Government.

The Agency claims that the intent of the proposals is to make conviction of a job-related crime with a sentence of imprisonment the sole basis on which to impose an indefinite suspension. In such manner, the Agency states that the proposals are "nothing more than the minimum standard required by Congress" Statement of Position II at 3. It rejects the notion that Congress intended to limit the use of indefinite suspension to the situation set forth in the proposals. The Agency also argues that the proposals "seek[] to restrict Management's authority to indefinitely suspend an employee to a basis much narrower than that recognized and accepted by the MSPB and Federal courts." Id. at 6. In this regard, the Agency notes that

although foreign service employees are exempt from 5 U.S.C. § 7513(b)(1), under regulations issued by the Office of Personnel Management (OPM), an agency can suspend an employee indefinitely in a variety of circumstances, not limited to the situation identified in the proposals. The Agency adds that the MSPB has also upheld indefinite suspensions as a proper exercise of management's authority to discipline.

With regard to its assertion that the proposals interfere with management's right to determine internal security practices, the Agency argues that management "must be able to protect its facilities, equipment, personnel and national security interests from compromise or further risk where an employee faces an indictment or the filing of a criminal information." Id. at 5. The Agency adds that if the sole basis for an indefinite suspension was as set forth in the proposals, "[m]anagement would have to await the conclusion of either a plea agreement or . . . trial proceedings and the imposition of an imprisonment sentence[,] " before an indefinite suspension could be imposed. Id. at 5-6. According to the Agency, such a result would "clearly eviscerate Management's statutory right to establish practices to maintain internal security[,] " and the resultant delay "would certainly be inimical to the public interest" Id. at 6.

With regard to the assertion that the proposals violate the right to discipline, the Agency argues that they would prevent management from exercising its authority to suspend indefinitely employees in circumstances not defined in the proposals, such as when an employee has been indicted or when an employee is charged with a "criminal information filing." Id. at 7. The Agency asserts that by attempting to establish the criteria on which discipline can be based, the proposals violate the right to discipline.

Finally, the Agency argues that the proposals constitute neither procedures nor appropriate arrangements under sections 1005(b)(2) and 1005(b)(3). As to section 1005(b)(2), the Agency claims that the Unions have not demonstrated in what manner the proposals constitute procedures. The Agency argues likewise with respect to the applicability of section 1005(b)(3) and, further, that the proposals would excessively interfere with management's right to discipline by "totally prohibit[ing] the taking of action unless an employee has been convicted of, and a sentence of imprisonment imposed." Id. at 10 (emphasis in original).

B. Unions' Positions

1. AFSA Position

AFSA claims that the effect of its proposal is to amend grievance regulations so that they comply with applicable law. In response to the Agency's arguments, AFSA contends that its proposal does not impermissibly interfere with management's rights to determine internal security practices and to discipline. Rather, AFSA claims that the proposal is designed to be an appropriate arrangement for employees adversely affected by management's exercise of the right to discipline and also constitutes a negotiable procedure under the Act.

AFSA argues that unlike OPM regulations which allow for indefinite suspensions under various conditions, Congress did not extend this same authority to foreign service agencies. Instead, Congress provided foreign service employees with special protections against the adverse impact of an indefinite suspension. AFSA points to section 1106(8) of the Act which provides for prescriptive relief while a separation action is pending.^{9/} AFSA further indicates that its proposal is consistent with 22 U.S.C. § 4010(a)(3), which establishes the grounds for indefinite suspensions without pay. According to AFSA, an employee may be placed in a non-duty, non-pay status where there is reasonable cause to believe that the employee has committed a crime which is subject to a sentence of imprisonment. It points out that the standard of "reasonable cause" is defined in section 586(c) of P.L. 101-167, codified at 22 U.S.C. § 4010, as "a member of the Service having been convicted of, and sentence of imprisonment having been imposed for, a job-related crime." AFSA claims that its proposal is, therefore, within the scope of the Act.

With regard to its assertion that the proposal is a negotiable procedure, AFSA argues that the proposal would not prevent management from establishing security procedures and disciplining employees. AFSA indicates that where management seeks to take action against an employee in

^{9/} Sections 610 and 1106(8) of the Act, codified at 22 U.S.C. §§ 4010 and 4136, were amended by Pub. L. 101-167, section 586 (1989), which is set forth in full in the Appendix. 22 U.S.C. §§ 4010(a)(3) and 4136(8), as amended, are set forth in the Appendix also.

circumstances other than those set forth in the proposal, there are options available to management other than placing an employee on indefinite suspension. By way of example, AFSA suggests that management can curtail an employee's assignment and place the employee in a different assignment, or in a non-duty pay status.

As to the assertion that the proposal is an appropriate arrangement, AFSA first points out that the nature and extent of the impact of an indefinite suspension are such that an affected employee suffers an immediate loss of grade, pay, and attendant benefits and is in "a state of limbo" during which the employee has not been terminated and yet is not in a pay status. AFSA Statement of Position at 7.

Second, AFSA notes that the circumstances giving rise to the adverse effects of the suspension are not within the employee's control. To the extent that there are no limits on the length of time an employee may be placed on indefinite suspension, AFSA asserts that its proposal is a reasonable constraint on the exercise of management's rights.

Third, considering the nature and extent of the proposal on management's ability to act pursuant to its statutory rights, AFSA maintains that the proposal would not totally prohibit management from taking action. Rather, and as previously argued, it contends that there are options available to management which would permit it to maintain its internal security. AFSA further suggests that any constraints thereby placed on management, such as a delay in management's use of indefinite suspensions, are reasonable.

Finally, in addressing whether the negative impact on management's rights is disproportionate to the benefits to be derived from the proposed arrangement, AFSA argues that the impact of an indefinite suspension on employees, who typically serve abroad, is to disrupt not only their professional lives, but also their personal lives and those of their families as well. Also, with regard to the Agency's claim that the foreign service system should follow the civil service system's use of indefinite suspension, AFSA argues that the systems are noticeably different and that there are more serious consequences flowing from indefinite suspensions for foreign service employees than for civil service employees.

2. AFGE's Position

AFGE contends that its proposal does not interfere with management's rights to discipline or to maintain internal security because the proposal "merely provides for the same rights to which foreign service employees are entitled under the Act." AFGE Response at 4.

As explained by AFGE, Section 1106(8) of the Act, 22 U.S.C. § 4136, provides that agencies are to suspend all actions concerning involuntary separation against a grievant pending a ruling on the grievance by the Grievance Board, with one exception. That exception, contained in a 1989 amendment to the Act, applies when an employee is convicted, and a sentence of imprisonment imposed, for a job-related crime. AFGE argues that the change to the regulation the Agency now seeks to make, to provide for indefinite suspension when there is reasonable cause to believe that an employee has committed a crime, would broaden the exception provided for by law and would deprive foreign service officers of their statutory right to prescriptive relief. AFGE claims that its proposal, in contrast, is consistent with existing law and is thus negotiable.

AFGE also asserts that the proposal is a negotiable procedure insofar as it would postpone an agency's action to take an employee off pay status only until the employee is convicted of a crime. In other words, AFGE claims, the proposal would merely affect the time frame within which management could place an employee in non-pay status. AFGE argues that when this proposal is read in conjunction with its Proposal 8, management clearly would maintain control over discipline and internal security. Moreover, AFGE notes that the Act itself, in Section 1106(8), provides an additional basis on which the Agency can remove an employee from a duty status.

Finally, AFGE argues that the proposal constitutes an appropriate arrangement "because it would limit the drastic action of suspension without pay to those instances where it is clearly warranted as a punishment." AFGE Response at 9-10. AFGE further avers that the proposal does not excessively interfere with management's right to discipline because it does not limit: (1) management's control over the investigative process; (2) the criteria to be used in deciding whether to invoke discipline, revoke a security clearance or retain an employee on duty status; or (3) whether and how to discipline an employee. Instead,

AFGE asserts that the proposal "preserves employees' statutory right to remain in pay status pending a final decision by the Foreign Service Grievance Board." Id. at 10.

C. Analysis and Conclusions

The Unions argue that their proposals are consistent with law and are designed to amend the Agency's grievance regulations to comply with the Foreign Service Act as it was amended by Pub. L. 101-167, section 586 (hereinafter the 1989 amendment).

22 U.S.C. § 4010(a)(3), as amended, pertains to the authority of the Agency to effect separations for cause. In relevant part, the section provides:

[w]here there is reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed, and there is a nexus to the efficiency of the Service, the Secretary, or his designee, may suspend such member without pay pending final resolution of the underlying matter, subject to reinstatement with back pay if cause for separation is not established in a hearing before the Board.

22 U.S.C. § 4136(8), as amended, relates to Grievance Board procedures and provides:

If the Board determines that the Department is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the Board has ruled upon the grievance. Notwithstanding such suspension of action, the head of the agency concerned or a chief of mission or principal officer may exclude the grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the grievant is assigned. Notwithstanding the first sentence of this paragraph, the Board's authority to suspend such action shall not extend to instances where the Secretary, or his designee, has determined that there is reasonable cause to believe that a grievant has committed a job-related crime for which a sentence of imprisonment

may be imposed and has taken action to suspend the grievant without pay pending a final resolution of the underlying matter.

We find, consistent with the Unions' stated intent, that the proposals are designed to restate the 1989 amendment to the Act and incorporate it into the Agency's grievance regulation. The 1989 amendment, which appears in both 22 U.S.C. § 4010(a)(3) and § 4136(8), authorizes the Agency to suspend an employee without pay when there is reasonable cause to believe that the employee has committed a job-related crime for which a sentence of imprisonment may be imposed. The 1989 amendment also defined such reasonable cause. It provided that reasonable cause, within the meaning of 22 U.S.C. §§ 4010 and 4136, "shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for, a job-related crime." 22 U.S.C.A. §§ 4010 note and 4316 note (1990).

There is no basis on which to conclude that the proposals are designed to affect, or would affect, any Agency authority other than that defined in 22 U.S.C. §§ 4010(a)(3) and 4136(8). Accordingly, as the proposals are consistent with and constitute a restatement of the statutory definition of that authority, the proposals are consistent with law. Put simply, we construe the proposals as having one effect: incorporation of existing statutory provisions into the Agency's grievance procedure. As such, the proposals are negotiable. Moreover, as the proposals merely restate existing statutory provisions, it is unnecessary to address, and we do not address, the parties' differing interpretations of those statutory provisions.

VIII. Proposals 5 and 9 10/

Proposal 5

Section 766.____.h(i)--Indefinite Suspension

Investigations conducted pursuant to 3 FAM 760 shall not exceed 90 days and that the period of employee suspension would likewise be limited to 90 days.

10/ The text of AFGE's proposals was taken from both its petition for review and its prior request to the Agency for a written allegation of nonnegotiability.

Proposal 9

766.____h(i): Indefinite Suspension -- Union proposal that investigations and indefinite suspensions related to disciplinary action and separation for cause be limited to a ninety-day period.

A. Agency's Position

According to the Agency, the intent of the proposals is to require management to complete its investigation of an incident that leads to indefinite suspension within 90 days or, if not completed within 90 days, to terminate the indefinite suspension. The Agency argues that the proposals directly interfere with management's right to discipline by restricting the length of an investigation and the period of non-duty/non-pay status.

B. Analysis and Conclusions

We find that the proposals would violate management's right to discipline.

By their express language, the proposals essentially provide two things--that Agency investigations not exceed 90 days, and that the length of a suspension not exceed 90 days. With regard to the duration of an investigation, we find that the proposals would impermissibly affect management's ability to discipline. The right to discipline includes the right to conduct investigations to determine whether discipline is justified. See American Federation of Government Employees, Local 1164 and U.S. Department of Health and Human Services, Social Security Administration, Lynn, Massachusetts, 35 FLRA 1193, 1199 (1990). By limiting to 90 days the period of time in which the Agency can conduct its investigation, the proposals would prevent management from taking disciplinary action when it is unable to complete its investigation within the period prescribed by the proposals, which is relatively brief given the possible complexity of world-wide investigations.

The second part of the proposals, limiting the length of a suspension, also conflicts with the right to discipline. The plain language of the proposals would limit suspensions to a period of 90 days. By confining to such a brief time period the exercise of management's right to discipline, the proposals directly interfere with that right.

For the reasons set forth above, we find that these proposals conflict with management's right to discipline, although the parties remain free to negotiate time limits which do not unduly restrict management's rights to investigate and to discipline employees. In reaching this conclusion, we note that our decision is based on the arguments set forth in the petitions for review and the Agency's statement of position. Any statements of intent, claims by the Unions that the proposals were intended to constitute negotiable procedures or appropriate arrangements, or any other arguments in response to the Agency's contentions, which were contained in the Unions' untimely submissions, have not been considered by the Board.

In sum, based on the evidence before us, we find that Proposals 5 and 9 are outside the duty to bargain.

IX. Order

The Agency must, upon request, or as otherwise agreed to by the parties, bargain over Proposals 2, 3, 4, 7, 8 and 10.¹¹/ The petitions for review as to Proposals 1, 5, 6 and 9 are dismissed.

¹¹/ In finding these proposals negotiable, we make no judgment as to their merits.

APPENDIX

The following proposals were submitted by AFSA in connection with Case No. FS-NG-12:

Proposal 1

Section 762(d)--Grounds for Action

Management has proposed that "[a]n employee's breach of security regulations or the loss of a security clearance" be added to the grounds for disciplinary action. AFSA proposes deletion of this language.

Proposal 2

Section 763.2-6C

[C]urtailment of assignments shall be subject to disciplinary and grievance procedures.

Proposal 3

Section 766.____--Indefinite Suspension

Where there is a reasonable basis to believe an employee has committed a crime having a nexus to the efficiency of the Service, the employee may be placed on administrative leave.

Proposal 4

An employee may not be indefinitely suspended without pay unless the employee has been convicted of, and a sentence of imprisonment has been imposed for, a job-related crime.

Proposal 5

Section 766.____.h(i)--Indefinite Suspension

Investigations conducted pursuant to 3 FAM 760 shall not exceed 90 days and that the period of employee suspension would likewise be limited to 90 days.

The following proposals were submitted by AFGE in Case No. FS-NG-13:

Proposal 6

762(d): Grounds for Action -- Union proposal to delete provision that action be taken for employee's breach of security regulation or loss of her/his security clearance.

Proposal 7

763.2-6c: Investigating and Reporting of Facts -- A Curtailment that is motivated by allegations of misconduct, criminal activity, or actions which have serious negative security implications shall be considered an adverse action, subject to the grievance process. . . .

Proposal 8

766.____: Indefinite Suspension -- Where there is a reasonable basis to believe an employee has committed a crime having a nexus to the efficiency of the Service, the employee may be placed on administrative leave.

Proposal 9

766.____h(i): Indefinite Suspension -- Union proposal that investigations and indefinite suspensions related to disciplinary action and separation for cause be limited to a ninety-day period.

The following proposal was submitted by AFGE in Case No. FS-NG-14.

Proposal 10

766.____: Grounds for Indefinite Suspension. An employee may not be indefinitely suspended without pay unless the employee has been convicted of, and a sentence of imprisonment imposed for, a job related crime.

Pub. L. 101-167 (Foreign Operations, Export Financing and Related Programs Appropriations Act of 1990), section 586 (1989) provides:

(a) Section 1106(8) of the Foreign Service Act of 1980 is amended by inserting at the end thereof the following sentence: "Notwithstanding the first sentence of this paragraph, the Board's authority to suspend such action shall not extend to instances where the Secretary, or his designee, has determined that there is reasonable cause to believe that a grievant has committed a job-related crime for which a sentence of imprisonment may be imposed and has taken action to suspend the grievant without pay pending a final resolution of the underlying matter."

(b) Section 610(a) of the Foreign Service Act of 1980 is amended by inserting the following new paragraphs:

(3) Notwithstanding the hearing required by this section, or procedures under any other provision of law, where there is reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed, and there is a nexus to the efficiency of the Service, the Secretary, or his designee, may suspend such member without pay pending final resolution of the underlying matter, subject to reinstatement with back pay if cause for separation is not established in a hearing before the Board.

. . . .

(c) For purposes of the amendments made by subsections (1) and (b) of this section, reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for, a job-related crime.

Provisions in the Foreign Service Act, as amended:

[22 U.S.C. § 4010]

Section 610. SEPARATION FOR CAUSE.--(a)
Authorization of Secretary; hearing prior to
separation; waiver of hearing

. . . .

(3) Notwithstanding the hearing required by this section, or procedures under any other provision of law, where there is reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed, and there is a nexus to the efficiency of the Service, the Secretary, or his designee, may suspend such member without pay pending final resolution of the underlying matter, subject to reinstatement with back pay if cause for separation is not established in a hearing before the Board.

[22 U.S.C. § 4105]

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

(1) to determine the mission, budget, organization and internal security practices of the Department, and the number of individuals in the Service or in the Department;

(2) to hire, assign, direct, lay off, and retain individuals in the Service or in Department, to suspend, remove, or take other disciplinary action against such individuals, and to determine the number of members of the Service to be promoted and to remove the name of or delay the promotion of any member in accordance with regulations prescribed under section 605(b);

(3) 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;

. . . .

(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; or

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

[22 U.S.C. § 4136]

Section 1106. BOARD PROCEDURES.--The Board may adopt regulations concerning its organization and procedures. Such regulations shall include provision for the following:

. . . .

(8) If the Board determines that the Department is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the Board has ruled upon the grievance.

Notwithstanding such suspension of action, the head of the agency concerned or a chief of mission or principal officer may exclude the grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the grievant is assigned. Notwithstanding the first sentence of this paragraph, the Board's authority to suspend such action shall not extend to instances where the Secretary, or his designee, has determined that there is reasonable cause to believe that a grievant has committed a job-related crime for which a sentence of imprisonment may be imposed and has taken action to suspend the grievant without pay pending a final resolution of the underlying matter.

3 FAM 660 provides, in pertinent part, as follows:

664 AGENCY PROCEDURES

664.1 Initial Consideration

. . . .

b. During the pendency of agency procedures under this section and upon request of the grievant, the agency shall suspend its action in the following instances:

. . . .

(2) Suspensions, separations, terminations.

. . . .

c. The agency shall suspend the actions unless the grievance is not integral to the proposed action.

d. The agency shall suspend its proposed action until completion of agency procedures and for a period thereafter of 15 days to permit the grievant to file a grievance with the Board, and to request further interim relief.

Part 666 PRESENTATION OF GRIEVANCES TO THE BOARD

. . . .

666.3 Prescription of Interim Relief

a. If the Board determines that the agency is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the agency shall suspend such action until the Board has ruled upon the grievance. Notwithstanding such suspension of action, the head of agency concerned or chief of mission or principal officer may exclude the grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the grievant is assigned.

666.5 Decisions

. . . .

b. If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the agency:

. . . .

(3) To retain in service a member whose separation would be in consequence of the matter by which the member is aggrieved.

(4) To reinstate the grievant, and to grant the grievant backpay, where it is clearly established that the separation or suspension without pay of the employee was unjustified or unwarranted under 5 U.S.C. 5596(b)(1).

. . . .

d. If the Board finds that the grievance is meritorious and that remedial action should be taken that relates directly to promotion or assignment of the grievant, or if the Board finds that the evidence before it warrants disciplinary action against any employee of an agency or member of the Service, it shall make an appropriate recommendation to the head of the agency. The head of the agency shall make a written decision within 30 days from receipt of the recommendation. The head of the agency shall implement the recommendation of the Board except to the extent that in a decision made within that 30-day period, the head of the agency rejects the recommendation in whole or in part on the basis of a determination that implementation of the recommendation would be contrary to law, or would adversely affect the foreign policy or national security of the United States.

If the head of the agency rejects the recommendation in whole or in part, the decision shall specify the reasons for such action. Pending the decision of the head of the agency, there shall be no ex parte communication concerning the grievance between the agency head and any person involved in the grievance proceedings. The head of the agency shall, however, have access to the entire record of the proceedings of the Board.

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

**AMERICAN FOREIGN SERVICE ASSOCIATION
(Union/AFSA)**

and

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union/AFGE)**

and

**U.S. DEPARTMENT OF STATE (Agency) AND
AGENCY FOR INTERNATIONAL DEVELOPMENT (AID)
AND THE U.S. INFORMATION AGENCY (USIA)**

**FS-NG-12
FS-NG-13
FS-NG-14**

STATEMENT OF SERVICE

I hereby certify that copies of the Decision and Order 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: April 12, 1991
WASHINGTON, D.C.

Deborah D. Johnson
Deborah D. Johnson
Legal Technician