

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

AMERICAN FOREIGN SERVICE  
ASSOCIATION

Union

and

Case No. FS-NG-3

UNITED STATES DEPARTMENT  
OF STATE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

This case comes before the Foreign Service Labor Relations Board (the Board) pursuant to section 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the Act). The issue presented is whether the underscored portion of the following Union proposal is within the duty to bargain or is excluded therefrom because it is inconsistent with law (5 U.S.C. § 5545(c)(1)):

A member receiving additional pay on an annual basis as described herein for regularly scheduled standby duty may not receive premium pay for regularly scheduled overtime work, or night, Sunday and Holiday pay. However, the member may be paid additional premium pay for irregular or unscheduled overtime duty in excess of the member's regularly scheduled weekly tour, including but not limited to call-back duty. See 3 FAM 232.1.c and 232.2 regarding regularly scheduled overtime.

Opinion

It is the Board's decision that the Union's proposal is inconsistent with law (5 U.S.C. § 5545(c)(1)) and, therefore, 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) (1982)), IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

From the record, it is clear that some bargaining unit employees are assigned to work regularly scheduled, longer than ordinary tours of duty; and that the portions of such tours of duty which exceed the ordinary forty-hour week include substantial periods of duty in a standby status. As compensation for these longer than ordinary periods of duty, the employees involved receive premium pay on an annual basis, pursuant to 5 U.S.C. § 5545(c)(1), up to an additional 25 percent of their basic rate of pay. The intent and effect of the Union's proposal would be to compensate those employees at the applicable hourly overtime rate for actual work performed during the portions of the regular weekly tour of duty which exceed forty hours, in addition to premium pay on an annual basis for standing by.<sup>1/</sup> The Agency alleges that the proposal is inconsistent with 5 U.S.C. § 5545(c)(1) and, therefore, not within the duty to bargain.

Section 5545(c)(1) of title 5, U.S. Code, provides as follows:

§ 5545. Night, standby, irregular, and hazardous duty differential

(c) The head of an agency, with the approval of the Office of Personnel Management may provide that--

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour.

The Union contends that premium pay on an annual basis under this section is compensation only for an employee's availability in a standby status and not for the actual performance of work. This argument, however, reflects a misapprehension of that statute. Section 5545(c)(1) provides that annual premium pay is compensation for the entire period of longer than ordinary, regularly scheduled duty. As explained by the modifying clause "a substantial part of which consists of remaining in a standby status rather than performing work," it is clear that section 5545(c)(1) compensates an employee for all job tasks

<sup>1/</sup> Union's Brief at 1, 3-4.

performed during that period of duty, including actual work as well as standing by. Moreover, the plain language of the statute provides that such annual premium pay is exclusive compensation for the period involved, i.e., for the regularly scheduled tour of duty. Thus, contrary to the Union's argument, so long as work is performed within the regularly scheduled tour of duty (including the part devoted to standing by), the fact that the work occurs irregularly provides no legal basis for additional compensation under the "except" clause in section 5545(c)(1).<sup>2/</sup> Based upon the foregoing, the Board concludes that when an employee is paid annual premium pay under section 5545(c)(1), no additional form of premium pay would be authorized under law for the regular tour of duty, whether spent actually working or merely standing by. Since the Union's proposal, if implemented, would require the Agency to pay such additional premium compensation, it is inconsistent with the exclusivity requirements of section 5545(c)(1) and, therefore, outside the duty to bargain.

This conclusion is supported by the legislative history of section 5545(c)(1), which was originally enacted by section 208 of P.L. 83-763 (1954). The Conference Report<sup>3/</sup> thereto states:

Subsection (a) of section 208 of the conference substitute adds a new title IV to the Federal Employees Pay Act of 1945, as amended.

Paragraph (1) of section 401(a) of the new title IV authorizes agency heads to allow additional annual pay at rates up to 25 percent of base-pay rates, in lieu of all overtime, night, and holiday pay, for employees who are required, by reason of the duties of their positions, to remain at or within the confines of their stations during longer than ordinary periods of duty but who spend a substantial part of their time on duty in a standby status rather than actually performing work.

Thus, it is clear that Congress intended annual premium pay to compensate employees in lieu of any other premium pay for periods "of time on duty," a substantial portion of which consists of standing by and the other portion, implicitly, of performing actual work.

<sup>2/</sup> Although the Union intends that under its proposal "the clock would stop running on payment of standby" during work periods (U. Br. at 3), under section 5545(c)(1), such a result would not be possible because annual premium pay in fact compensates employees for actual work performed within the regularly scheduled tour.

<sup>3/</sup> Conf. Rep. No. 2665, 83rd Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. and Ad. News 3870.

Judicial and administrative opinions similarly support the Board's conclusion. In Bean v. United States, 175 F. Supp. 166 (Ct. Cl. 1959), certain employees sued to recover additional annual premium pay when their tour of duty was increased from 60 to 72 hours. Construing the intent of Congress in enacting what is now section 5545(c)(1), the court stated:

Its intention was to simplify the computation of the pay of employees required to remain in a standby status and to work overtime at night and on holidays. For all such work a certain percentage of their basic compensation was to be paid. No longer would it be necessary to keep an account of overtime and holiday and nighttime work; no longer would there be uncertainty about their right to compensation for time spent in a standby status. This was the purpose of the Act.

175 F. Supp. at 168. Finally, in International Association of Fire Fighters, AFL-CIO, Local F-37 and Naval Training Center, Great Lakes, Illinois, 9 FLRA No. 89 (1982), the Federal Labor Relations Authority determined that "[t]here is no provision or authorization for additional compensation in connection with the regularly scheduled weekly tour of duty . . . for employees who already are receiving annual premium pay pursuant to section 5545(c)(1)."<sup>4/</sup> In the absence of "special circumstances" in the present case which would require a contrary or different conclusion, the Board's decision herein must be consistent with the Authority's decision in Naval Training Center.<sup>5/</sup> The Union has not come forward with any such circumstances and none are apparent from the record.

<sup>4/</sup> Accord, Comptroller General Decision B-178613 (July 6, 1973) (there is "no authority for allowance of additional compensation in a situation such as here where an employee during his regularly scheduled tour of duty is required to perform certain duty which is regarded more in the nature of work than the normal standby duty"). See also Comptroller General Decision B-200639 (April 15, 1981) (employee who received annual premium pay pursuant to section 5545(c)(1) held "ineligible for any other overtime or premium pay except for irregular, unscheduled overtime duty performed during his off-duty shifts" (emphasis added)).

<sup>5/</sup> Regarding the precedential value of decisions rendered by the Authority, section 1007 of the Act provides:

Sec. 1007. Functions of the Board.

. . . . .

(Continued)

In reaching its decision herein, the Board addresses only the issue of whether the Union's proposal, to in effect modify the manner of compensating employees who are being paid premium pay under 5 U.S.C. § 5545(c)(1), is inconsistent with that statutory provision. It does not address, of course, any question relating to whether such employees are in fact presently being properly compensated pursuant to the intent of that provision of law. Thus, the decision would not detract from the right of any individual who believes that he or she has been deprived of appropriate compensation under the laws and regulations governing the administration of premium pay from pursuing any of the various actions which are available to resolve such claims.

Issued, Washington, D.C., May 3, 1983

  
Barbara J. Mahone, Chairperson

  
Arnold Ordman, Member

  
Arnold Zack, Member

FOREIGN SERVICE LABOR RELATIONS BOARD

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(Continued)

(b) Decisions of the Board under this chapter shall be consistent with decisions rendered by the Authority under chapter 71 of title 5, United States Code, other than in cases in which the Board finds that special circumstances require otherwise. Decisions of the Board under this chapter shall not be construed as precedent by the Authority, or any court or other authority, for any decision under chapter 71 of title 5, United States Code.

See also S. Rep. No. 96-913, 96th Cong., 2d Sess. 83 (1980); H.R. Rep. No. 96-992, Part 1, 96th Cong., 2d Sess. 87 (1980); H.R. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 31, 102 (1980).

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CERTIFICATE OF SERVICE

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

Certified Mail

Ms. Susan Z. Holik  
General Counsel  
American Foreign Service  
Association  
2101 E Street, NW.  
Washington, D.C. 20037

Mr. Robert S. Sherman  
Chief Labor-Management Negotiator  
Office of Employee Relations  
U.S. Department of State  
Room 1822, New State  
Washington, D.C. 20520