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

AMERICAN FOREIGN SERVICE
ASSOCIATION

Union

and

Case No. FS-NG-4

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 § 1007(a)(3) of the Foreign Service Act of 1980 (22 U.S.C. §§ 3901-4173) (the F.S. 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 (31 U.S.C. § 242):

> Section 662c. "Grievance" means any act, omission, or condition subject to the control of a foreign affairs agency which is alleged to deprive a member of the Service, who is a citizen of the United States, of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including, but not limited to:
>
> . . . . . .
>
> (8) <u>Dissatisfaction with settlement of a claim under the Military and Civilian Employees Claims Act.</u>

<u>Opinion</u>

It is the Board's decision that the Union's proposal is inconsistent with law (31 U.S.C. § 242) 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.

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. §§ 240-43 (the Claims Act) authorizes the head of an agency to settle employees' claims for damage to or loss of personal property incident to their Government service. The Claims Act specifies the conditions under which claims may be allowed, sets time limitations on when claims may be presented and, at 31 U.S.C. § 242, provides:

> Notwithstanding any other provision of law, the settlement of a claim under sections 240 to 243 of this title is final and conclusive.

The Agency argues that any grievance to review a settlement reached pursuant to the Claims Act would be contrary to the quoted provision of 31 U.S.C. § 242 and, therefore, outside the duty to bargain.

The Union's proposal would make administrative settlements pursuant to the Claims Act subject to the statutory grievance procedure established by chapter 11 of the Foreign Service Act of 1980.[1/] As a consequence, it would make the grievance procedure in effect a continuation of the Claims Act settlement process through which dissatisfaction with the settlement could be grieved and the settlement itself subjected to review.

While the Union correctly asserts that the Foreign Service grievance procedure is intended to be broad in scope[2/] and that Claims Act settlements are not expressly excluded therefrom,[3/] actions taken

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1/ See Union Reply Brief at 1, 6.

2/ See S. Rep. No. 96-913, 96th Cong., 2d Sess. 89 (1980); H.R. Rep. No. 96-992, Part 1, 96th Cong., 2d Sess. 92 (1980); H.R. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 32, 106-07 (1980).

3/ Section 1101(b), which excludes certain matters from the scope of the grievance procedure, provides as follows:

Sec. 1101. Definition of Grievance.

. . . . . .

(Continued)

under the grievance procedure must, nevertheless, be consistent with law. See sections 1107(d) and 1110 of the F.S. Act.4/ It follows, then, that if the filing of any grievance concerning a particular matter would be contrary to law, such matter is, by virtue of that fact, excluded from the scope of the grievance procedure. See American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA No. 14 (1981) (Union Proposal 4), affirmed sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority, 691 F.2d 565 (D.C. Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3574 (U.S. Jan. 7, 1983) (No. 82-1144).

As noted above, the language of the Claims Act that, "notwithstanding any other provision of law, the settlement of a claim under [the Claims Act] is final and conclusive," precludes further review of an administrative claims settlement. This provision has been held to bar even judicial review. Macomber v. United States, 335 F. Supp. 197

(Continued)

> (b) For purposes of this chapter, the term "grievance" does not include--
>
> (1) an individual assignment of a member under chapter 5, other than an assignment alleged to be contrary to law or regulation;
>
> (2) the judgment of a selection board established under section 602, a tenure board established under section 306(b), or any other equivalent body established by laws or regulations which similarly evaluates the performance of members of the Service on a comparative basis;
>
> (3) the expiration of a limited appointment, the termination of a limited appointment under section 611, or the denial of a limited career extension or of a renewal of a limited career extension under section 607(b); or
>
> (4) any complaint or appeal where a specific statutory hearing procedure exists, except as provided in section 1109(b).

4/ Section 1107(d) provides that the agency head shall implement the recommendation of the Foreign Service Grievance Board concerning a grievance except, inter alia, to the extent that implementation of the recommendation would be contrary to law. Section 1110 provides for judicial review of any final action of the agency head or the Grievance Board concerning a grievance. The standard of judicial review expressly incorporated into section 1110 "without limitation or exception" requires a reviewing court to set aside the administrative action if it is "not in accordance with law." 5 U.S.C. § 706.

(1971).5/ Since the Union's proposal would allow an administrative settlement under the Claims Act to be reviewed under the grievance procedure established by the F.S. Act, it would negate the finality of settlements required by 31 U.S.C. § 242 and render them inconclusive. Because the Union's proposal would only authorize grievances which would, ab initio, be contrary to law, i.e., 31 U.S.C. § 242, the proposal is outside the duty to bargain.

In reaching this conclusion, it is noted that the Federal Labor Relations Authority's decision in American Federation of Government Employees, AFL-CIO, Local 3669 and Veterans Administration Medical Center, Minneapolis, Minnesota, 3 FLRA 311 (1980), reversed sub nom. Veterans Administration Medical Center, Minneapolis, Minnesota v. Federal Labor Relations Authority, ____ F.2d ____ (8th Cir. 1983), relied upon by the Union, is distinguishable. In that case, the Authority held negotiable a proposed dispute resolution procedure, finding that it provided an alternative procedure and therefore did not conflict with existing administrative procedures. The instant proposal, however, would not provide an alternative means of resolving the underlying dispute but, instead, would subject the administrative settlement pursuant to the Claims Act to grievance review, in direct conflict with 31 U.S.C. § 242.

Based upon the foregoing, the Board concludes that the Union's proposal is contrary to law and not within the duty to bargain.

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

Barbara J. Mahone, Chairperson

Arnold Ordman, Member

Arnold Zack, Member

FOREIGN SERVICE LABOR RELATIONS BOARD

5/ The decision of the court in Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978), cited by the Union, is inapposite. In that case, the court considered the conclusiveness of claims decided under another statute, the Military Claims Act, 10 U.S.C. § 2731 et seq., which has a markedly different legislative history from that of the Claims Act. Compare the discussion at 446 F. Supp. 77-78 with S. Rep. No. 1423, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. and Ad. News 3407, 3408, 3414-15.

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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 to the parties listed:

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