

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

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1812, AFL-CIO

Union

and

Case No. FS-NG-5

U.S. INFORMATION AGENCY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

This case comes before the Foreign Service Labor Relations 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 the negotiability of the following five proposals regarding within-class pay adjustments for members of the Senior Foreign Service:

Union Proposals 1-5

1. Adjustment of the basic levels of pay shall be done by recommendation of the selection board and shall be implemented by the Director effective the first pay period following completion of the boards unless there is a pending investigation or proceedings of an officer recommended involving loyalty, security, misconduct or malfeasance and whose inclusion would not be in the public interest. If and when the matter is resolved favorably for the officer, the increase will be effectuated.
2. If an officer is recommended for and falls within the range of the annual promotion opportunities for his class as well as for a salary adjustment, she/he will be given the promotion and the increase appropriate to such promotion.
3. Any officer who is deferred or not given the pay increase as indicated above, will be provided an

explanation in writing at the time of the exclusion and the exclusive representative shall also be informed in accordance with the procedures of the Promotion Safeguard Agreement.

4. The selection boards will review only those materials allowed them by the precepts, but shall be urged to recommend officers for increases to the next ES level within the officer's class if the officer is being recommended for promotion or considered highly competitive with his peers.

5. Any decreasing of pay rate to a lower pay rate shall be accompanied by a statement of justification by a selection board citing the specific reason for the decrease in pay. Such statement shall be transmitted to the rated officer but will not become part of the officer's Performance File.

Opinion

In response to the Union's appeal, the Agency raises two issues.^{1/} It contends, as a procedural matter, that the petition for review was untimely filed and, therefore, should be dismissed. It also alleges, substantively, that the disputed proposals are nonnegotiable "as a matter of law."

^{1/} Section 1424.6 of the Board's Rules and Regulations set forth at 22 CFR 1424.6 (1983) provides in this regard as follows:

(a) Within thirty (30) days after the date of receipt by the Secretary of a copy of the petition for review of a negotiability issue the Department shall file a statement--

(1) Withdrawing the allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained; or

(2) Setting forth in full its position on any matters relevant to the petition which it wishes the Board to consider in reaching its decision, including a full and detailed statement of its reasons supporting the allegation. The statement shall cite the section of any law, rule or regulation relied upon as a basis for the allegation.

As to the procedural question, the timeliness of the Union's petition for review, section 1424.3 of the Board's Rules and Regulations provides that the time limit for filing an appeal is within "fifteen (15) days from the Department's allegation, which was requested in writing by the exclusive representative . . ." (emphasis added). Based on the record in this case, on April 12, 1983, the Agency alleged that the "subject of pay level adjustments for members of the Senior Foreign Service" is not negotiable "as a matter of law." Based further upon the record, however, including statements and explanations by the Union which are not contradicted by the Agency, the April 12 allegation was not in response to specific Union proposals and was not requested by the Union. The Union did not elect to appeal that unrequested allegation. Subsequently, on April 20, 1983, the Union submitted specific bargaining proposals to the Agency and requested an allegation of nonnegotiability with respect to them, as referenced in the above-quoted provision of the Board's Rules and Regulations. The Agency's allegation in response to this request was made on May 2, 1983, and the Union filed its petition for review on May 4, 1983.

The Federal Labor Relations Authority has held, under a substantively identical regulation governing the timeliness of negotiability petitions under the Federal Labor-Management Relations Statute, that a union may choose to timely appeal from an unrequested allegation of nonnegotiability but is not required to do so. Moreover, failure to appeal from an unrequested allegation does not prejudice a union's right to subsequently request an agency to serve it with a written allegation that the matter proposed is outside the duty to bargain, from which it could timely appeal. See International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA No. 39 (1982).

Section 1007 of the Act requires decisions of the Board to be consistent with decisions of the Authority unless "special circumstances require otherwise."^{2/} There do not appear to be any

^{2/} Section 1007 of the Act provides:

Sec. 1007. Functions of the Board

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(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

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"special circumstances" in the present case which would require a conclusion by the Board herein which is inconsistent with the Authority's decision in Bureau of Engraving and Printing. Hence, since the petition for review was filed by the Union only two days after the Agency's allegation which the Union had requested, the petition clearly is timely under section 1424.3 of the Board's Rules. Accordingly, the Agency's motion to dismiss the petition for review is denied.

Turning now to the Agency's substantive claim that the Union's proposals are not negotiable "as a matter of law," the Agency has not cited any law or regulation with which it claims the proposals are inconsistent; nor has it otherwise supported its allegation. Section 1424.6 of the Board's Rules and Regulations previously set forth herein at footnote 1 obligates an agency to "cite the section of any law, rule, or regulation relied upon as a basis for the allegation" of nonnegotiability and to make "a full and detailed statement of its reasons supporting the allegation." The Agency in this case has not met this obligation. In National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886, 891 (D.C. Cir. 1982) the United States Court of Appeals for the District of Columbia Circuit stated that "while the Authority plainly is not foreclosed from making an independent inquiry into the law as relevant to each agency's exercise of management rights the parties should not expect the Authority, sua sponte, to locate, analyze and apply all arguably pertinent regulations from the myriad of federal regulations . . ." to a case before it. This principle is apposite in the present case, where the Agency has not met the minimum requirements of the Board's Rules and Regulations, i.e., section 1424.6, by initially coming forward with citations to the law or regulations with which it believes the proposals are inconsistent. For such reason, the Agency has not supported its claim that the proposals are outside the duty to bargain.

ORDER

Based upon the foregoing, the Agency has failed to demonstrate that the Union's proposals are inconsistent with applicable laws or

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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.

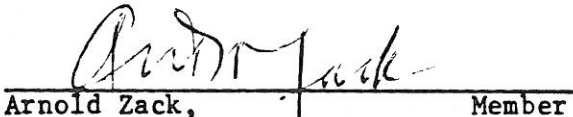
See also S. Rep. No. 96-913, 96th Cong., 2d Sess. 83 (1980); H.R. Rep. No. 96-992, Part 1, 96th Cong., 2d Sess. 87 (1980); H.R. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 31, 102 (1980).

regulations. Accordingly, pursuant to section 1424.10(b) of the Board's Rules and Regulations (22 CFR 1424.10(b) (1983)), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on Union Proposals 1 through 5.

Issued, Washington, D.C., December 1, 1983


Barbara J. Mahone, Chairperson


Arnold Ordman, Member


Arnold Zack, Member

FOREIGN SERVICE LABOR RELATIONS BOARD