

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

Case No. FS-PS-1

INTERPRETATION AND GUIDANCE

Pursuant to section 1429.4 of the Board's Rules and Regulations,^{1/} the Foreign Service Impasse Disputes Panel (Panel) requested the Board to issue a ruling with respect to major policy issues which arose in the context of an impasse proceeding before the Panel (Case No. 82 FSIDP 3).^{2/} The parties to the impasse proceeding are the United States Information Agency (Agency) and American Federation of Government Employees, Local 1812 (Union).

As stated by the Panel, the issues are as follows:

1. Do sections 405 and 602 of the Foreign Service Act of 1980 (the Act) permit negotiations concerning the composition of selection boards established to make recommendations concerning performance pay, or are such negotiations inconsistent with section 1005 of the Act?
2. Does section 405 of the Act vest in the agency head the sole right to determine not only the total amount of performance pay available for distribution but also the timing of the determination and the apportionment among the classes of the Senior Foreign Service?

1/ Section 1429.4 of the Board's Rules and Regulations provides:

§ 1429.4 Referral of policy questions to the Board.

Notwithstanding the procedures set forth in this subchapter, the General Counsel, the Assistant Secretary, or the Panel may refer for review and decision or general ruling by the Board any case involving a major policy issue that arises in a proceeding before any of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Board shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

2/ This request does not involve an unfair labor practice proceeding under Part 1423 of the Board's Rules and Regulations, a negotiability issue under Part 1424 of the Board's Rules and Regulations, or an advisory opinion under section 1429.10 of the Board's Rules and Regulations.

3. Does section 405 of the Act which provides that the agency head "shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602" permit the agency head to be bound by such recommendations?

With its request, the Panel forwarded to the Board its entire record in Case No. 82 FSIDP 3 which contains statements from the parties before the Panel, as well as from the American Foreign Service Association and the Department of State. The Union filed a response to the State Department's submission. These statements have been carefully considered by the Board so that the Board's interpretation of the Act which follows specifically relates to the record which was developed before the Panel; such additional guidance as is included is confined to the context of the bargaining proposals at impasse.

Issue 1

For the reasons which follow, it is concluded that sections 405^{3/}

3/ Section 405 of the Act provides:

Sec. 405. Performance Pay.--(a) Members of the Senior Foreign Service who are serving--

(1) under career or career candidate appointments, or
(2) under limited appointments with reemployment rights under section 310 as career appointees in the Senior Executive Service, shall be eligible to compete for performance pay in accordance with this section. Performance pay shall be paid in a lump sum and shall be in addition to the basic salary prescribed under section 402 and any other award. The fact that a member of the Senior Foreign Service competing for performance pay would, as a result of the payment of such performance pay, receive compensation exceeding the compensation of any other member of the Service shall not preclude the award or its payment.

(b) Awards of performance pay shall take into account the criteria established by the Office of Personnel Management for performance awards under section 5384 of title 5, United States Code, and rank awards under section 4507 of title 5, United States Code. Awards of performance pay under this section shall be subject to the following limitations:

(1) Not more than 50 percent of the members of the Senior Foreign Service may receive performance pay in any fiscal year.

(2) Except as provided in paragraph (3), performance pay for a member of the Senior Foreign Service may not exceed 20 percent of the annual rate of basic salary for that member.

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and 602^{4/} of the Act permit negotiations concerning the composition of the selection boards established to make recommendations concerning awards of performance pay.

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(3) Not more than 6 percent of the members of the Senior Foreign Service may receive performance pay in any fiscal year in an amount which exceeds the percentage limitation specified in paragraph (2). Payments under this paragraph to a member of the Senior Foreign Service may not exceed \$10,000 in any fiscal year, except that payments of up to \$20,000 in any fiscal year may be made under this paragraph to up to 1 percent of the members of the Senior Foreign Service.

(4) The total amount of basic salary plus performance pay received in any fiscal year by any member of the Senior Foreign Service may not exceed the salary payable for level I of the Executive Schedule under section 5312 of title 5, United States Code, as in effect at the end of that fiscal year.

(c) The Secretary shall determine the amount of performance pay available under subsection (b)(2) each year for distribution among the members of the Senior Foreign Service and shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602.

(d) The President may grant awards of performance pay under subsection (b)(3) on the basis of annual recommendations by the Secretary of State of members of the Senior Foreign Service who are nominated by their agencies as having performed especially meritorious or distinguished service. Recommendations by the Secretary of State under this subsection shall be made on the basis of recommendations by special interagency selection boards established by the Secretary of State for the purpose of reviewing and evaluating the nominations of agencies.

4/ Section 602 of the Act provides:

Sec. 602. Selection Boards.--(a) The Secretary shall establish selection boards to evaluate the performance of members of the Senior Foreign Service and members of the Service assigned to a salary class in the Foreign Service Schedule. Selection boards shall, in accordance with precepts prescribed by the Secretary, rank the members of a salary class on the basis of relative performance and may make recommendations for--

- (1) promotions in accordance with section 601;
- (2) awards of performance pay under section 405(c);
- (3) denials of within-class step increases under section 406(a);

(continued)

Section 405 of the Act, which provides generally for performance pay, states in subsection (c) that the agency head^{5/} shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602. Section 602(a) provides that the agency head shall establish the selection boards; subsection (b) requires that the boards include public members and a substantial number of women and members of minority groups. Thus, section 602 commits the establishment and composition of the selection boards to the discretion of the agency head subject only to the specific requirements of subsection 602(b).

As to such discretion, under the Federal Service Labor-Management Relations Statute (the C.S. Statute) the Federal Labor Relations Authority (FLRA) has consistently held that to the extent an agency has discretion with respect to a matter affecting the conditions of employment of its employees, which discretion is not required to be exercised solely and exclusively by officials of the agency, that matter is within the duty to bargain consistent with applicable law and regulations. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 759-60 (1980).^{6/} In this regard, sections 405 and 602 of the Act do not, on their face, prescribe that the discretion to establish selection boards is to be exercised solely and exclusively by the Secretary; the exercise of that discretion through negotiations over the composition of the boards, therefore, would not be inconsistent with the language of these sections.

Furthermore, the foregoing interpretation finds support in the legislative history of the Act. Specifically, H.R. Rep. No. 96-992,

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(4) offer or renewal of limited career extensions under section 607(b); and

(5) such other actions as the Secretary may prescribe by regulation.

(b) All selection boards established under this section shall include public members. The Secretary shall assure that a substantial number of women and members of minority groups are appointed to each selection board established under this section.

^{5/} While sections 405 and 602, on their face, refer to the "Secretary," section 102(a)(10) provides that the term, "Secretary," means the head of the agency when referring to the exercise of functions under the Act by an agency authorized to utilize the Foreign Service personnel system.

^{6/} Under section 1007(b) of the Act, decisions of the Board must be consistent with decisions of the Authority except when the Board finds that special circumstances require otherwise.

Part 2, 96th Cong., 2d Sess. (1980), discusses at page 101 the relationship of the management rights section to the selection boards established in chapter 6:

Chapter 6 of the bill generally prescribes the promotion process for the Foreign Service, including the composition of selection boards (section 602(b)), the development of precepts for use by selection boards (section 603(b)), the basis for selection board review (section 603(a)), and the responsibility of the Secretary to make promotions in accordance with selection board rankings (section 605(a)) except in certain special circumstances (section 605(b)). Except for those matters specifically reserved to management under section 1005(a), all aspects of the promotion process are negotiable.

Thus, the Report of House Post Office and Civil Service Committee states that, except for matters specifically reserved to management under section 1005(a)--i.e., the right "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" for certain limited reasons--the composition of the selection boards is negotiable. That Report accurately states the position of the drafter of the labor-management relations provisions of the Act. Statement of Rep. Schroeder, 126 Cong. Rec. H8658 (daily ed. Sept. 8, 1980). Thus it is concluded that Congress did not intend to grant the head of the Agency sole and exclusive discretion to determine the composition of the selection boards; rather, Congress intended such discretion to be subject to collective bargaining.

In this connection, the position taken by the Department of State during a joint hearing of subcommittees of the House Committees on Foreign Affairs and Post Office and Civil Service, is not inconsistent with this conclusion. Pages 906-07 of H.R. Rep. No. 96-992, Part 2, indicate that in response to a question by the House Subcommittees on how board members are chosen, the Department of State replied:

The composition and the work of the selection boards would not change significantly under the proposed legislation. However, the selection boards may be charged with some additional duties such as making recommendations for the award of performance pay to members of the new senior Foreign Service.

Moreover, testifying before the House Subcommittees, the Under Secretary of State for Management stated, with respect to selection boards, that:

Career members of the boards are designated based on their records of excellent performance and both management and labor must agree on their membership.^{7/}

7/ The Foreign Service Act: Hearings on H.R. 4674 Before the Subcommittee on International Operations of the House Committee on Foreign Affairs and the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess. 45 (1979) (statement of Hon. Ben H. Read).

Further, in this connection, it must be noted that the State Department had negotiated with the unions prior to the passage of the Act, "The Agreement for the Establishment and Composition of Selection Boards," which governed the composition of the boards at the time the quoted testimony was given. Thus, in that context, by stating that recommendations concerning awards of performance pay would constitute an additional duty of those boards and that management and labor must agree on their membership, the Department, in effect, represented to the House subcommittees that the composition of the selection boards would, for performance pay purposes, be subject to negotiation.

Based upon the foregoing, it is concluded that, under sections 405 and 602 of the Act, the discretion to determine the composition of the selection boards is not sole and exclusive and is subject to negotiation.

Finally, consideration of the management rights section of the Act does not change this conclusion. The Agency had argued before the Panel that negotiation over the composition of the boards in question would interfere with its rights to assign individuals in the Service, to assign work, and to determine the numbers, types, and classes of employees assigned to a work project, in a manner inconsistent with section 1005(a)(2), (3), and (b)(1) of the Act.^{8/} Specifically, the Agency claimed that subjecting the performance pay selection boards to the general "Selection Boards Agreement" would be inconsistent with:

- its right to assign individuals by precluding the Agency from assigning work to certain persons not in the bargaining unit;
- its right to assign work by requiring specific work to be performed by bargaining unit employees; and
- its right to elect to negotiate in section 1005(b)(1) by prescribing the number, types, and classes of employees on a work project (i.e., the selection boards).

8/ Section 1005(a)(2), (3), and (b)(1) of the Act provides:

Sec. 1005. Management Rights.--(a) Subject to subsection (b), nothing in this chapter shall affect the authority of any management official of the Department, in accordance with applicable law--

(2) to hire, assign, direct, lay off, and retain individuals in the Service or in the 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);

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With respect to employee participation on certain boards or committees, under the C.S. Statute, the FLRA has distinguished between a proposal which merely defined the perimeters of employee participation (e.g., that the union shall be represented on a wage survey committee), which was held to be within the duty to bargain, and a proposal which permitted the union to actually select members of a committee, which was held to be inconsistent with the right to assign work. Compare American Federation of Government Employees, Local 1786 and Marine Corps Development and Education Command, Quantico, Virginia, 2 FLRA 422 (1980) with Association of Civilian Technicians, Inc., Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, 7 FLRA No. 52 (1981).

Consequently, it is clear that the question of whether negotiations with respect to the composition of selection boards would be inconsistent with section 1005 of the Act cannot be answered in the abstract, but only in the context of a specific proposal. In this regard, the Board is informed from the record before the Panel that the Union seeks to negotiate a proposal which generally would require that at least 50 percent of the members of the selection boards consist of career Foreign Service employees.^{9/} Under that type of proposal, the Agency would be able to assign any particular Foreign Service employee to a given board. Thus, with respect to the specific proposal in the record before the Panel, it is concluded that such proposal would not interfere with management's right under section 1005(a)(2) to assign individuals in the

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(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--

(1) at the election of the Department, on the numbers, types and classes of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]

^{9/} As set forth in Attachment B to the Agency's statement of November 30, 1981, the proposal in question provides:

1. That the composition of any Board making recommendations for performance pay, including Presidential awards, be subject to the conditions outlined in The Agreement for the Establishment and Composition of Selection Boards, with the exception that retired career officers may serve on the career ministers board.

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Service (see American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 4 FLRA No. 52 (1980)) or its right under section 1005(a)(3) to assign work (ACT, Pennsylvania State Council, supra). Further, the proposal does not specify which numbers, types, or classes of Foreign Service employees should be assigned to a selection board. Accordingly, it also must be concluded that negotiations on such a proposal would not be limited to being held only at the election of the Agency under section 1005(b)(1) of the Act.

Issue 2

For the reasons which follow, it is concluded that section 405 of the Act does not vest in the head of the Agency the sole right to determine the apportionment of performance pay among classes of the Senior Foreign Service or to set the timing of that determination.

Only subsection (c) of section 405 concerns the determination of the amount of performance pay available for distribution. On its face, section 405(c) merely states that the Secretary shall determine the total amount of performance pay available for distribution among the members of the Senior Foreign Service (SFS). Hence, contrary to the Agency's argument, the Act does not on its face specifically either permit or prohibit the apportionment of such distribution among SFS classes or speak to the timing of such a determination. The only express limitations placed upon the distribution of performance pay are those set forth in section 405(b), concerning the maximum amount and number of SFS members to whom performance pay can be distributed. Thus, within those limitations, under section 405 the determination of the apportionment of available performance pay and the timing of such determination is within the Secretary's discretion. Since the Act is silent with respect to these matters, it does not commit decisions concerning them to the sole and exclusive discretion of the Secretary. Thus, as set forth in regard to Issue 1, supra, such matters would be subject to the bargaining obligation, to the extent otherwise consistent with applicable law and regulations.

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The record indicates that in 1975, the Agency negotiated with the American Foreign Service Association an "Agreement for the Establishment and Composition of Selection Boards" (Selection Board Agreement). That agreement generally requires that career Foreign Service employees comprise no less than 50 percent of the several selection boards organized to consider employees for promotion. Union Statement of December 15, 1981, Attachment A. Thus, the Union's proposal would require that at least 50 percent of the members of the selection boards consist of career Foreign Service employees, with the exception that retired career officers may serve on the career ministers board.

This conclusion is consistent with the legislative history of section 405(c), which indicates that "the determination of the total amount which shall be made available in any one year is a budgetary determination left with the individual heads of the agencies" H.R. Rep. No. 96-992, Part 1 at 40, H.R. Rep. No. 96-992, Part 2 at 60; Sen. Rep. No. 96-913, 96th Cong., 2d Sess. 40 (1980). Thus, while the legislative history expressly supports a finding that the total amount to be made available is committed to the sole and exclusive discretion of the agency head, it provides no basis for finding, further, that any apportionment of the total amount could not be subject to negotiations.

In this regard, the Agency claimed before the Panel that the determinations which are the subject of the Union's proposal are matters specifically provided for by statute, arguing generally that section 405 "contemplates" Service-wide, rather than class-wide, competition. Noting that section 405 speaks in terms of "members of the Foreign Service," the Agency further contended that a selection board for each class could not take cognizance of and implement the Service-wide limitations set forth in section 405(b).

The Agency's argument that the Act "contemplates" Service-wide competition is not persuasive. The language of section 405, which states that "members of the . . . Service . . . shall be eligible to compete for performance pay . . . ," simply does not address the groupings within which the members shall compete. Rather, the fact that, under section 602, separate selection boards evaluate and "rank the members of a salary class on the basis of relative performance and may make recommendations for . . . awards of performance pay under section 405(c)" reasonably can be taken to indicate that Congress, to the contrary, contemplated class-wide competition. In any event, neither the language of the Act nor its legislative history provides dispositive support for the Agency's contention that Congress intended to provide only for Service-wide competition for performance pay.

The Agency further has not demonstrated that a negotiated apportionment necessarily would result in the distribution of performance pay in a manner inconsistent with law, i.e., the limitations of section 405(b), previously mentioned. Moreover, in this connection, the Agency has not adverted to any language in the Act to support a claim that the apportionment of awards in a manner consistent with law is within the sole and exclusive discretion of management. Rather, the language, quoted from the Committee Reports, supra, suggests to the contrary.

Finally, the "timing" of a determination as to the amount available for distribution is not shown to be other than a procedural matter; it appears to be a safeguard designed to protect the integrity of the

performance pay system by preventing the Agency's determination of the total amount of performance pay available from being influenced by the recommendations of the selection boards. See H.R. Rep. No. 96-992, Part 2 at 16, 18. Even assuming that the total amount available for distribution is a matter reserved by the Act to the sole and exclusive discretion of the agency head, the timing of such a decision is not integral to and determinative of such amount. As a consequence, timing properly may be negotiated to the extent it would otherwise be consistent with applicable law and regulations. See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 152 (1979), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 50 U.S.L.W. 3669 (Feb. 23, 1982); American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 8 FLRA No. 75 at 10-11 (1982).

Finally, the Board is informed by the record before the Panel that the Union seeks to negotiate a proposal that, before any of the selection boards meet, the Director will determine the total amount of performance pay to be awarded for each class of officers and that those amounts will be stated and placed in sealed envelopes to be opened after the selection boards have made their recommendations.^{10/} Based upon the foregoing interpretation of the relevant statutory provisions, section 405 of the Act would not prohibit negotiations over such a proposal.

Issue 3

For the reasons which follow, it is concluded that section 405 of the Act permits the Agency head to be bound by the performance pay recommendations of the selection boards established under section 602 of the Act.

10/ As set forth in Attachment B to the Agency's statement of November 30, 1981, the proposal in question provides:

7. That the total amount of agency performance pay to be awarded for each class of officers be determined by the Director and that these amounts be stated and placed in an envelope signed by management and AFGE and placed in a safe in the Board of the Foreign Service before any [selection] boards meet, in accordance with the procedures indicated in subsection (4) of the Foreign Service Promotion Safeguards Agreement.

Section 405(c) provides that the Secretary "shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602." There is no indication either in the Act or the relevant legislative history that Congress intended that the discretion thus granted to the Secretary be sole and exclusive. Rather, the legislative history suggests, as the Union argued before the Panel, that selection board recommendations are binding on the agency head:

The rankings of selection boards serve different purposes. For promotions and career extensions the rankings of a selection board are binding on the Secretary. The agency head recommends promotions to the President in the rank order which the selection board specifies. Names of individuals can only be removed for exceptional reasons.

Awards of performance pay to members of the Senior Foreign Service are similarly based on the rankings of selection boards. Denials of step increases must also be in accordance with selection board rankings. The initial determinations of who should be selected out for sub-standard performance are also based on the rankings.

On the other hand, decisions about granting multiple step increases, and other personnel actions may be made by an agency head using selection board rankings in merely an advisory manner.

H.R. Rep. No. 96-992, Part 2 at 28.

To respond to the issue raised by the Panel it is not necessary to find a Congressional intent that the agency head would be bound by selection board recommendations, and the Board expressly does not so find; it is only necessary to find that the agency head's discretion to award performance pay to an individual was not intended to be sole and exclusive and, therefore, could be exercised through negotiations.

In this connection, the Agency states that, in section 405(c), "Congress intended to leave the Director free to exercise his discretion in apportioning performance pay among those recommended by selection boards, taking into account the criteria established by OPM" (Agency Rebuttal Brief of March 12, 1982). The Agency does not, however, establish, nor does it otherwise appear, that the Director's discretion is sole and

exclusive. Thus, as discussed in Issue 1, supra, to the extent otherwise consistent with applicable law and regulations, the Agency head could exercise his discretion, provided in section 405(c), through negotiations and agree to make awards in accordance with selection board recommendations.

The Board is informed by the record before the Panel that the Union seeks to negotiate a proposal which would establish that the recommendations for performance pay made by the selection boards would be binding upon the Director of the Agency.^{11/} Based upon the foregoing interpretation of the Act, section 405 of the Act permits negotiations over such a proposal.^{12/}

Issued, Washington, D.C., June 4, 1982.


Ronald W. Haughton, Chairman


Arnold Ordman, Member


Arnold Zack, Member

FOREIGN SERVICE LABOR RELATIONS BOARD

11/ As set forth in Attachment B to the Agency's statement of November 30, 1981, the proposal in question provides:

5. That the recommendations for performance pay, including Presidential awards, made by the selections boards be binding upon the Director of the Agency.

12/ The Board notes that the Agency contended generally before the Panel that a monetary award in the form of performance pay is a motivating tool within management's technology for assigning work and directing employees to achieve higher levels of excellence and productivity. Section 1005, however, does not explicitly reserve to management a right to make such awards and, further, the Agency has not persuasively demonstrated a legal or logical connection between awards of performance pay and the reserved rights to assign work and direct employees. Accordingly, the Board cannot conclude upon the record before it at this time that those management rights would prohibit the Secretary from agreeing to be bound by the recommendations of the selection boards.

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