[v11 p01]
11:0001(01)NG
The decision of the Authority follows:

15 FLRA NO. 1

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 1708

Union

and

MILITARY OCEAN TERMINAL,
SUNNY POINT, SOUTHPORT,
NORTH CAROLINA

Agency

Case No. 0-NG-580

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor - Management Relations Statute (the Statute) and presents issues relating to the negotiability of three Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

There shall be no secret studies bearing on performance standards. All studies conducted by the employer will be conducted on average workers under normal working conditions. The Union shall be allowed to have an observer present in the development or revision of all measures of performance and studies. All information derived from such work studies will be provided to the union within five (5) days of completion of the study. The Union shall have the right to conduct independent time studies during duty hours in addition to receiving all documents and data used in developing performance standards. [v11 p 3]

The first two sentences of Union Proposal 1 herein are identical to the provisions of Union Proposal 4 in

American Federation of Government Employees, AFL - CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981). In FDIC, the Authority found that those provisions did not prevent the Agency from establishing particular performance standards pursuant to its rights under section 7106(a)(2)(A) and (B) of the Statute to direct employees and assign work. For the reasons set forth in FDIC, the Authority finds that the Agency's contention that the first two sentences of Union Proposal 1 interfere with its rights to direct employees and assign work through the establishment of performance standards must be set aside.

Nor can the Agency's additional argument that these particular provisions interfere with its right to determine methods and means of performing work be sustained. While the Agency asserts that assessment of the quality and quantity of work performed by its employees is an integral and essential part of its mission, which it describes as the movement of freight for the military services, it has not shown how negotiation of the procedures used to develop performance standards would directly interfere with its ability to determine the methods or means of moving freight for the military services. Rather, it has merely shown an incidental and indirect relationship to the performance of its work. Clearly, the record does not establish that the subject studies constitute an instrument used for the accomplishing or the furthering of the performance of the work of the Agency. Cf. National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 255 (1979) (the name plates worn by Customs officers constitute an instrument used to accomplish that aspect of the work of a Customs officer which involves contact with the public). For the foregoing reasons the Authority finds that the first two sentences of the proposal are within the duty to bargain.

The Union has not explained what is contemplated by the third sentence of the proposal. The Agency contends that this sentence would require Union involvement in internal management deliberations regarding the determination of performance standards. This interpretation is compatible with the terms of the proposal taken on its face and therefore is adopted for purposes of this decision. In this regard the proposal appears, among other things, to create a requirement that the Union be allowed to be present at management proceedings relating to the development and revision of performance standards.

The establishment of performance standards is an exercise of management's rights under section 7106(a)(2)(A) and (B) of the Statute to direct its employees and assign work. National Treasury Employees

[v11 p 4] Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), enf'd sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982). Inasmuch as the third sentence of the proposal would require the Union's involvement in managerial deliberations and discussions which are part of the decision-making process directly relating to the exercise of management rights, it is to the same effect as Union Proposal 3 discussed in National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) enf'd sub nom. National Federation of Federal Employees v. FLRA, 681 F.2d 886 (D.C. Cir. 1982). For the reasons expressed in Homestead Air Force Base, the Authority finds that the third sentence of the proposal would directly interfere with management's rights under section 7106(a) of the Statute and is, therefore, not within the duty to bargain.

The fourth sentence of the proposal is substantially identical to Union Proposal 5 addressed in FDIC (cited earlier herein). For the reasons stated in FDIC, and contrary to the Agency contentions that it would interfere with its rights to assign employees, assign work and determine the methods and means of performing work, the Authority finds that the fourth sentence is within the duty to bargain.

Union Proposal 2

Production studies or goals shall not be translated into performance standards (e.g., work units per person) unless the following conditions are fully satisfied:

(1) The work performed is repetitive and capable of being done uniformly by all workers in the unit being measured.

(2) Job content is constant throughout the appraisal period.

(3) The method of operation, service and work unit produced is capable of being objectively, reliably, and accurately measured.

(4) The work units measured are equivalent.

The Union does not explain what is specifically meant by the proposal, arguing only that it is intended to establish a mutually acceptable procedure to be employed by the Agency in establishing and administering its performance appraisal system. However, the proposal, by its plain language, would prevent the Agency from establishing performance standards based on production goals unless [v11 p5] the conditions described in the proposal exist. Thus, the Union seeks to negotiate the substance of performance standards by proposing limitations on the inclusion of certain matters in performance standards. In this regard the proposal is to the same effect as those addressed in National Federation of Federal Employees and U.S. Army Armament Research and Development Command, Dover, New Jersey, 8 FLRA No. 88 (1982). In that case the Authority, relying on American Federation of Government Employees, AFL - CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980) (Union Proposal 4), found those proposals which restricted management in its establishment of performance standards outside the duty to bargain since they infringed upon management's discretion to direct employees and to assign work under section 7106(a) of the Statute. 1 Thus, for the reasons set forth in Office of Personnel Management, the Authority finds in agreement with the Agency that Union Proposal 2 is outside the duty to bargain because it directly interferes with the Agency's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. 2

Union Proposal 3

Unacceptable Performance. If remedial actions for unacceptable performance as defined in 5 USC 4303 is (sic) necessary, that action shall be progressively applied as follows:

a. Providing training.

b. Reassigned to another appropriate position at the same grade level, and at the same commuting area.

c. Demotion.

d. Termination. [v11 p6]

The proposal on its face would prescribe specific actions to be taken against an employee if the Agency determines that action is warranted based on unacceptable performance. The proposal would further establish that as a prerequisite to taking more serious action, such as demotion and termination, actions of lesser gravity, such as training and lateral reassignment, must occur. The actions involved entail the exercise of various rights reserved to management pursuant to section 7106(a) of the Statute. In this

connection, proposals which would contractually obligate an agency to provide, or assign employees to, training are outside the duty to bargain because the assignment of training constitutes an assignment of work within the meaning of section 7106(a)(2)(B). See American Federation of Government Employees, AFL - CIO, Local 3004 and Department of the Air Force, Otis Air Force Base, Massachusetts, 9 FLRA No. 87 (1982) and cases cited therein. Proposals which would require that employees be reassigned from their current positions conflict with management's right under section 7106(a)(2) to assign employees. See American Federation of Government Employees, Local 1760 and Department of Health and Human Services, Social Security Administration, Northeast Program Center, 9 FLRA No. 142 (1982) (Union Proposal 1); National Federation of Federal Employees, Local 1624 and Air Force Contract Management Division, Hagerstown, Maryland, 3 FLRA 142 (1980). Proposals which would directly interfere with management's ability to demote and terminate employees conflict with management's rights under section 7106(a)(1) to reduce in grade and remove employees. See Social Security Administration, Northeast Program Service Center.

Thus, the effect of the proposal would be to condition the exercise of specified management rights on the prior exercise of others. The proposal therefore is materially to the same effect as Union Proposal 1 discussed in Social Security Administration, Northeast Program Service Center which the Authority found to conflict with section 7106(a)(2)(A) of the Statute. In this regard, contrary to the Union's argument that this proposal is procedural in nature, the Authority finds that this proposal like Union Proposal 1 in Social Security Administration, Northeast Program Service Center, instead concerns the substantive exercise of management's rights. Cf. American Federation of State, County and Municipal Employees, AFL - CIO, Local 2910 and Library of Congress, 11 FLRA No. 109 (1983) (Union Proposal 5) (a proposal which provided that employees faced with adverse action based on unsatisfactory performance "be given a reasonable opportunity to improve their performance before being subject to adverse action," rather than requiring, as would the proposal herein, that management exercise particular management rights as a preliminary to exercising [v11 p7] others, would only require a delay in the exercise of a given management right and, thus, did not conflict with that management right). For the reasons expressed in Social Security Administration, Northeast Program Service Center the Authority finds that Union Proposal 3 is outside the duty to bargain. 3

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Union Proposal 2, 3 and the third sentence of Union Proposal 1 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on the remaining portions of Union Proposal 1. 4

Issued, Washington, D.C., June 6, 1984

Barbara J. Mahone, Chairman

Ronald W. Haughton, Member

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[v11 p8]

FOOTNOTES

Footnote 1 Cf. Office of Personnel Management (Union Proposal 5) wherein the Authority found that a proposal which merely established a general, nonquantitative requirement by which the application of performance standards could be evaluated was within the duty to bargain.

Footnote 2 In view of this decision it is unnecessary to address the Agency's other arguments as to the negotiability of the proposal.

Footnote 3 In view of this decision, it is unnecessary to address the Agency's other arguments as to the negotiability of the proposal.

Footnote 4 In deciding that these portions of Union Proposal 1 are within the duty to bargain, the Authority makes no judgment as to their merits.