OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

AFSCME Council 26, AFL-CIO ,	)	
	)	
Petitioner,	)	
Labor Organization	)	
v.	)	**Case No. 04-LMR-02**
	)	**Date: July 23 , 2004**
OFFICE OF THE ARCHITECT	)	
OF THE CAPITOL	)	
	)	
Respondent,	)	
Employing Office	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION AND ORDER OF THE BOARD OF DIRECTORS ON NEGOTIABILITY ISSUES

I. Introduction

The petition for review comes before the Board of Directors of the Office of Compliance ("the Board") pursuant to § 7105(a)(2)(E) of the Federal Service Labor Management Relations Statute ("FSLMRS"), as applied by § 220©)(1) of the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1351©)(1). Upon careful consideration of the parties' filings, the Board has determined, for the reasons set forth below, that two of the contested proposals are non-negotiable and one proposal is negotiable. Accordingly, we sustain in part and dismiss in part the Union's petition for review of negotiability determinations.

AFSMCE Council 26 is the exclusive bargaining representative for a unit of employees, including gardeners and grounds crews, at the employing office's Botanical Gardens. AFSCME's disputed proposals relate to emergency situations, such as ice and snow, when the employing office calls employees back to work outside of their normal working hours.

II. Disputed Assignment of Work Proposals

3. The work performed in all position descriptions, except Grounds Team, shall be amended to remove “During inclement weather, removes snow and ice from sidewalks and steps. Applies salt, sand and melting agents to clear area and provide safe conditions.” Replacement language shall be, “This employee shall not be expected to remove snow and ice from sidewalks.”

4. The position description of all except Grounds Team shall include “Shall not be required to work outdoors during or as a result of adverse weather emergency.”

III. Positions of the Parties

A. Employing Office

The employing office explained to the union its intent not to utilize gardeners to perform ice and snow removal duties. However, there may be emergencies requiring that non-Grounds Crew personnel, such as the gardeners, be assigned to that duty. The union’s proposal impermissibly would preclude the employing office from making such assignments in violation of the employing office’s statutory right to assign work under the Federal Labor Management Relations Act.

B. Union

The union opposed the employing office’s original proposal that broader categories of unit personnel be subject to emergency ice and snow removal duties. Subsequently, the employing office conducted a briefing for the union acknowledging that certain groups of employees no longer would be required to remove ice and snow from outside the buildings. However, when the Union submitted a bargaining proposal formalizing that position the employing office declared it to be non-negotiable.

IV. Analysis and Conclusions

It is plain that the letter and intent of the union proposals are to preclude the employing office from assigning snow and ice removal duties to any category of bargaining unit employee other than Grounds Crew personnel.

Section 220 of the Congressional Accountability Act applies the Management Rights provision of the Federal Labor-Management Relations Statute, *5 U.S.C. §7106,* which provides in pertinent part:

> **§7106. Management Rights**
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-
>
> * * * *
>
> (A) to hire, **assign**, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees ; [emphasis supplied].
>
> (B) to **assign work**, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; [emphasis supplied].
>
> * * * *
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating -
>
> * * * *
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

A proposal to subject to collective bargaining an employing office's decision to add duties to employees' position descriptions infringes upon management's right to assign work pursuant to *5 U.S.C. §7106(a)&(b). U.S. Department of Veterans Affairs, Medical Center, Providence, Rhode Island and Laborers' International Union of North America, Local 1056*, 37 FLRA 566 (1990). *See also*, *NAGE, SEIU, AFL-CIO and State of Connecticut Adjutant General Office,* 27 FLRA 801 (1987). This is in contrast to the negotiability of proposals for an agency to bargain over the impact and implementation of its decision to assign such additional duties to

employees. *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)(Proposal II), enforced as to other matters sub nom. AFGE v. FLRA,* 455 U.S. 945 (1982).

The disputed union proposals would only serve to restrict the employing office's ability to assign work while they do not express any purpose or intent to address the impact and implementation of the employing office's *fait accompli* decision to make such assignments. The proposals, therefore, do not fall under any of the aforementioned qualifications to management's reserved right to assign work to its employees. Accordingly, the employing office's non-negotiability determination is sustained.[1]

V. Disputed Compensation Proposals

8. Employees not working at the time of notification shall receive fifteen (15) minutes overtime upon receipt of the notification. Designated essential personnel shall be paid overtime each time they are required to call in for instructions during non-working hours in excess of forty (40) hours in one week.

10. Employees required to report to duty immediately upon receipt of notification shall be paid overtime from the time of notification.

VI. Positions of the Parties

A. Employing Office

The controlling statute, *5 U.S.C.* **§***5542(b)* treats travel time to and from work, with narrow exceptions not applicable hereto, as being non-compensable. The Federal Labor Relations Authority has so held. Moreover, responding to employer telephonic calls at home is compensable only if an employee is performing work at home. Notification to report to work because of an adverse weather emergency does not constitute the performance of work and does

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[1] This holding is without prejudice to the union reformulating its proposal to one over impact and implementation ("I & I") of the employing office's decision to assign work. For an example of where a proposal for the specification of added duties in position descriptions was found to be negotiable, and not an abridgement of management's reserved right to assign work, 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)*. If bargaining results and the employing office alleges that a subsequent union proposal is nonnegotiable, then the union may file a negotiability appeal regarding that proposal. *National Treasury Employees Union Chapter 207 and Federal Deposit Insurance Corporation*, 58 FLRA No. 99, 2003 FLRA LEXIS 36 (2003).

not qualify for overtime pay.

B. Union

"In the event an employee is called to report to work immediately, interrupting his/her time, the employee should be compensated accordingly."

VII. Analysis and Conclusions

Section 220 of the Congressional Accountability Act applies *5 U.S.C. §7117(a)(1)* of the FLMRS , which qualifies the duty to bargain in good faith, *inter alia*, to the extent not inconsistent with any Federal law. The Pay Administration and Premium pay provisions of Title V of the U.S. Code apply to the Office of the Capitol, the Botanical Gardens and their employees pursuant to *5 U.S.C. §5541(1)(E-F), (2)©)*.

______The Title V provision for hours of work (*5 U.S.C. §5542(a))* does not authorize compensation for employees traveling within the boundaries of their official duty station unless they are performing functions required by, or conferring benefits on, the employer, which distinguish the travel from commuting. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, Local 1923,* 37 FLRA 1469 (1990); *Louis Mossbaauer v. U.S.A.* 541 F.2d 823 (9th Cir. 1976); *Bobo v. United States*, 37 Fed. Cl. 690 (Ct. Cl. 1997).

Accordingly, the Union proposal to compensate employees for travel time to work conflicts with *5 U.S.C. §5542(a)* and, therefore, is not subject to the obligation to negotiate.

The record is silent on whether any of the affected bargaining unit employees are covered by the compensation scheme imposed by the Fair Labor Standards Act (FLSA). Assuming, *arguendo*, that the FLSA governs any of the bargaining unit members, their travel time to work in the situation posited by the Union's proposal would still be non-compensable under controlling regulations promulgated by the United States Office of Personnel Management. *American Federation of Government Employees, Local 987 and U.S. Department of the Air Force, Robins Air Force Base, Georgia*, 37 FLRA 197 (1990).

The parties did not present clarification or argument on the Union's proposal that off-duty employees be awarded 15 minutes overtime pay upon receipt of notification to report to work and that designated essential personnel be paid each time they are required to call in for instructions during non-working hours in excess of forty (40) hours in one week. However, the Federal Labor Relations Authority has determined to be negotiable a proposal that employees be compensated for responding to telephone calls at their homes concerning official business after a normal tour of duty. *Department of Health and Human Service,* 37 FLRA; 1469, *supra*. Thus, we find, upon the record before us, the proposal to be negotiable.

VIII. ORDER

The Architect shall, upon request, or as otherwise agreed to by the parties, bargain on the proposal concerning compensating employees for official telephonic contacts as per Union proposal no. 8, supra. [2] In respect to all other disputed proposals herein, the petition for review is dismissed.

IT IS SO ORDERED.

Issued, at Washington, D.C., July 23, 2004

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[2] In finding the proposal to be negotiable, we make no judgment as to its merits.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 23, 2004, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

First-Class Mail Postage-Prepaid
& Facsimile Mail
AFSCME Council 26
Mr. J.L. Power, Council Representative
Capital Area Council of Federal Employees
729 15th Street, N.W. 7th Floor
Washington, D.C. 20005

First-Class Mail Postage-Prepaid
& Facsimile Mail

Office of Architect of the Capitol
Margaret P. Cox, Esquire
Tanisha Cole, Esquire
Ford House Building, Room H2-265A
2nd and D Streets, S.W.
Washington, D.C. 20514
Washington, D.C. 20515

____
Kisha L. Harley
Office of Compliance

July 23, 2004

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Re: *AFSCME Council 26, AFL-CIO v. Office of the Architect of the Capitol,* Case No. 04-LMR-02

Dear Parties:

Enclosed is the Decision and Order of the Board of Directors, entered July 23, 2004, in the above styled matter.

Sincerely,

William W. Thompson II
Executive Director