AFSCME COUNCIL 26, AFL-CIO__

_____Petitioner,
_____Labor Organization

_____ Case No. 04-LMR-02
_____Date: December 23, 2004
_____v.

OFFICE OF THE ARCHITECT
OF THE CAPITOL

Order Denying Request for Reconsideration

_____On August 9, 2004, the Architect of the Capitol filed this Request for Reconsideration of our Decision and Order on Negotiability Issues, dated July 23, 2004, pursuant to Office of Compliance Rule of Procedure §8.02. Petitioner, AFSCME Council 26, filed an Objection to Reconsideration on August 24, 2004.

The Board of Directors has reviewed this matter pursuant to the requirements of 5 U.S.C. 7105(a)(2)(E) and 5 U.S.C. 7117, as adopted by §220(c) of the Congressional Accountability Act of 1995 (2 U.S.C. 1351(c)).

The Architect's Request for Reconsideration alleges that the Board "misapprehended the nature of the brief notification telephone calls which the AOC employs to notify its employees of certain work assignments." In support of its request for reconsideration, the Architect incorrectly focuses solely on **U.S. Department of Health and Human Services, Social Security Administration and AFGE Local 1923**, 37 FLRA 1469 (1990).

The Architect's motion does not meet the criteria for reconsideration. In our Decision we did not misapprehend the length and nature of the telephone calls at issue in AFSCME's request for negotiation. The length and nature of the telephone calls is not dispositive of the issue of whether the proposal is negotiable.

Both the Architect and AFSCME narrowly focused their debate on HHS. While HHS is helpful, it does not address the issue of negotiability. HHS addressed exceptions filed from an Arbitrator's award that denied overtime and differential pay for employees who were required to respond to telephone calls outside of their normal tour of duty. The FLRA disagreed with the Arbitrator and found that responding to telephone calls outside the normal tour of duty qualified as compensable "hours of work" under 5 U.S.C. §5542 and 5 C.F.R. §550.112(a)(2).

This case is one where we were called upon to determine if the AFSCME proposal is negotiable. We found that it was. The FLRA has determined that a proposal to pay employees required to carry and respond to electronic "beepers" during non-duty days is negotiable. **American Federation of Government Employees, Council of Marine Corps Locals C-240 and U.S. Department of the navy, U.S. Marine Corps**, 39 F.L.R.A. 773, 782 (2/22/91); affd **U.S. Department of Navy, U.S. Marine Corps and Federal Labor Relations Authority**, 962 F. 2d 1066, 1068 (D.C. Cir. 1992). The Authority found it significant that the proposal did not require the Agency to pay employees "merely for carrying and responding to beepers". Instead, the proposal focused on those circumstances where the Agency "requires" the use of a beeper. Id., at 779. The Authority noted that the proposal does not interfere with the Agency's rights to direct employees or assign work pursuant to 5 U.S.C. 7106(a)(2)(A) and (B) since the Agency retains the right to designate which employees are required to carry and respond to the beepers. Id., at 780.

The proposal submitted by AFSCME here has unmistakable parallels to that proffered in Marine Corps. The AFSCME proposal is that:

> 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.

Whether the employer calls and leaves a message on the home answering machine requiring the employee to call in (as suggested by the first sentence) or the employee is required to call in at a preset time (as suggested by the second sentence), the outcome is the same under the Marine Corps analysis. The proposal stipulates that employees "required" to "call in for instructions" or upon receipt of "notification" will be paid fifteen (15) minutes of overtime. As in Marine Corps, the proposal does not interfere with the Architect's right to assign work, discipline, or direct employees. Even with the language of the current proposal, the Architect would retain the right to determine which employees are "required" to call for instructions, when they must call, etc. Therefore, the proposal is negotiable.

We make no determination regarding the merits of the parties' concerns and interests. These are, however, matters that should be addressed and resolved at the negotiating table. In the event the parties reach impasse, assistance may be sought pursuant to Section 220 of the CAA which applies the impasse procedures of 5 U.S.C. §7119.

The Board denies the Architect's Request for Reconsideration.

December 23, 2004 **By: BOARD OF DIRECTORS**
OF THE OFFICE OF COMPLIANCE

I hereby certify that on this 23rd day December 2004 I served a copy of the Order of the Board of Directors to the following parties in the following manner:

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