OFFICE OF COMPLIANCE
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Washington, D.C. 20540-1999

International Brotherhood of Electrical Workers, Local 26, Petitioner, and Office of the Architect of the Capitol, Employing Office	Case No. 01-LMR-02

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

DECISION OF THE BOARD OF DIRECTORS

I. Statement of the Case

This case requires that we examine the negotiability of two proposals to provide premium pay for work on holidays and on Sundays, respectively. The matter is before the Board pursuant to §7105(a)(2)(E) of the Federal Service Labor Management Relations Statute ("FSLMRS"), 5 U.S.C. §7105(a)(2)(E), as applied by §220(c)(1) of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1351(c)(1).

The petitioner International Brotherhood of Electrical Workers, Local 26 ("IBEW Local 26" or "Union") is the certified representative of a unit of electricians employed in the Construction Management Division of the Office of the Architect of the Capitol

("Employing Office" or "AOC"). These employees are employed on an "as-needed" basis for various construction projects undertaken by the Employing Office. The parties are negotiating for an initial collective bargaining agreement that will cover terms and conditions of employment, including pay.

The Union has submitted a proposal that would require covered employees who work on holidays to be paid not less than two times the straight-time rate for all time worked. Under a separate proposal, the employees who undertake a tour of duty including worktime on a Sunday would receive in addition to their basic rate of pay a premium of 25% of the basic hourly rate, or a greater rate if provided by applicable law. The Employing Office contends that these proposals are nonnegotiable.

As framed by the arguments of AOC, this case raises the identical legal issues that are presented in *Plumbers Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Office of the Architect of the Capitol* (*"Plumbers Local 5"*), 01-LRM-01, also decided this day. In that case, the negotiability of a holiday premium pay proposal offered by Plumbers Local 5 is disputed. The AOC advanced essentially the same arguments there that it presented here. The Board has ruled today in *Plumbers Local 5* that the grounds asserted by AOC for nonnegotiability are not well founded. For the same reasons articulated in that decision, we likewise conclude here that the premium pay proposals of IBEW Local 26 are negotiable.

II. Proposals In Dispute

"Article XV (Holidays)
"If Employees are needed to work on a federal holiday prescribed by current or future law or a special holiday designated by the President of the United States,

the Employer will first seek qualified volunteers. . . . *An Employee who works on a holiday shall be paid at a rate not less than two (2) times the straight-time rate for all hours work.*

"Article XII (Wages)
"Section 3. Any Employee whose regular work schedule includes an (8) hour period of work a part of which is on Sunday is entitled to pay for all hours worked during each period at his basic rate of pay *plus a premium of 25% of his basic hour wage rate, or a greater rate if provided by law*."

The italicized portions are in dispute.

III. Positions of the Parties

A. Employing Office

The Employing Office argues that the premium pay proposals would create an inconsistency with Federal law and hence are nonnegotiable under §7117(a) of the FSLMRS, 5 U.S.C. §7117(a), as applied by §220(c)(1) of the CAA, 2 U.S.C. §1351(c)(1). It rests this argument on three statutory grounds. The Employing Office argues that the electricians are paid at prevailing wage rates established pursuant to the Davis-Bacon Act, 40 U.S.C. §276a et seq., and to the Prevailing Rate Systems Act (PRSA), 5 U.S.C. §5349(c), and that such statutes do not authorize the payment of premium pay. Secondly, AOC argues that the unit employees, as "prevailing rate employees," are not entitled to holiday pay by virtue of a definitional exclusion in the premium pay statute that allows certain Federal employees to earn a wage premium for working on Sundays and holidays. See 5 U.S.C. §5541(2)(C)(xi).[1] Payment of a holiday premium to the electricians would supposedly be "inconsistent" with this exclusion. A third "inconsistency" would be created, according to the AOC, citing 31 U.S.C. §3101(a),

[1] The exclusion, in the form of a definition for purposes of the subchapter on premium pay, reads in pertinent part: "'employee' . . . does not include . . . an employee whose pay is fixed and adjusted from

were it to agree to expend appropriated funds for holiday premium pay. Under this section, "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." The AOC contends that the exclusion of prevailing wage employees under 5 U.S.C. §5541(a)(2)(C)(xi) removes holiday premium pay as a lawful object for which the Employing Office would be allowed to spend appropriated money.

Finally, the AOC insists that because the pay for the electricians here is established through the prevailing wage rate determinations by the Department of Labor under the Davis-Bacon Act,[2] the Employing Office is left with no discretion or control in the setting of such compensation. According to AOC, under case law interpreting FSLMRS, matters beyond the control and discretion of an employing agency are outside the duty to bargain.

B. Union

IBEW Local 26 counters that its premium pay proposals are in no way inconsistent with law so as to bar negotiations under 5 U.S.C. §7117(a), as applied by the CAA. The arguments advanced by the Union closely parallel those that were urged by the petitioning union in *Plumbers Local 5*, and therefore need only be summarized here: First, neither the Davis-Bacon Act nor the PRSA limits the authority and discretion of the AOC to negotiate holiday premium pay. Second, the holiday premium proposals are not inconsistent with the definitional provision in 5 U.S.C. §5541(2)(C)(xi) that excludes

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time to time in accordance with prevailing rates under subchapter IV of chapter 53 of this title [5 U.S.C. §§5341-49] . . . ."

[2] See 40 U.S.C. §276a.

"prevailing rate employees" from the Premium Pay chapter of the United States Code. 5 U.S.C. §5541 et seq. Third, the proposals are not inconsistent with the limitation in 31 U.S.C. §3101(a) that appropriations may only be expended for an authorized object. Finally, the Union argues that, by having discretion to negotiate wage benefits of its prevailing rate employees, the Employing Office must negotiate over proposals to provide holiday and Sunday premium pay.

IV. Analysis and Conclusions

As indicated above, we believe that the rationale of *Plumbers Local 5* fully supports a finding that the proposals here are negotiable. To summarize, we believe that the holiday premium proposals here, like the one in *Plumbers Local 5*, involve bargainable conditions of employment under §7114(a)(4) and §7102 of the FSLMRS, as applied by the CAA, and within the contours established by 5 U.S.C. §5349 of the PRSA governing the Office of the Architect of the Capitol. See *U.S. Department of Treasury, Bureau of Engraving and Printing and International Association of Machinists, Lodge 2135*, 50 FLRA 677 (1995), *enf'd*, 88 F.3d 1279 (D.C. Cir. 1996)(Table), 1996 WL 311465 (unpublished opinion); *AFGE, AFL-CIO, Local 1897, and Department of the Air Force, Eglin Air Force Base* (*"Eglin AFB"*), 24 FLRA 377 (1986). While wage determinations made by the Labor Department under the Davis-Bacon Act may serve as a basis on which the prevailing rate of basic pay is calculated, that Act does not limit the authority and discretion of the AOC under the FSLMRS, as applied by the CAA, and under the 5 USC §5349(a) to negotiate holiday premium pay. Therefore, Davis-Bacon is not a law with which holiday premium pay would create an inconsistency. Similarly, the

definitional exclusion in 5 U.S.C. §5541(2)(C)(xi) is not a prohibition on prevailing rate employees receiving holiday pay and therefore creates no inconsistency with law. Lastly, the limitation contained in 31 U.S.C. §3101 that restricts the expenditure of funds beyond an approved object does not restrict payments for holiday premium pay, which would otherwise be authorized as an element of salaries in the appropriations act that funds the AOC.

The AOC, in this case, urged that *United Power Trades Organization and U.S. Army Corps of Engineers, North Pacific Division* (*"North Pacific Division"*), 30 FLRA 639 (1987), supports its position that the Davis-Bacon Act provides the exclusive authority and procedures for pay matters, even though compensation for AOC's trades and craft employees are governed by 5 U.S.C. §5349(a) of the Prevailing Rate Systems Act. However, that case is readily distinguishable.

In *North Pacific Division*, the wages of certain bargaining unit employees of the Corps of Engineers were governed by 5 U.S.C. §5343 of the PRSA, pursuant to which the Department of Defense Wage Fixing Authority (DOD WFA) was vested with responsibility for making prevailing rate determinations. However, the Supplemental Appropriations Act of 1982, P.L. 97-257, 96 Stat. 832, circumscribed DOD WFA's authority by mandating that wages for the affected Engineering Corps employees be fixed in accordance with wages paid to employees of the Departments of Interior and Energy who perform similar work in the same geographic area. In implementing this legislative directive, DOD WFA issued a wage determination that eliminated the shift differential premium that had previously been allowed under pre-1982 wage determinations. When the union sought to negotiate the restoration of the shift

differential and the addition of other wage premiums, FLRA held that the proposals were nonnegotiable as inconsistent with the Supplemental Appropriations Act.

The AOC argues that the Davis-Bacon Act here supersedes the PRSA in the same manner that the 1982 Supplemental Appropriations Act did in *North Pacific Division*, and because the wage determinations by the Labor Department do not include premium pay, wage proposals for such premiums are nonnegotiable. As the Union correctly observes, under 5 U.S.C. §5349(a), the AOC is the pay-fixing authority here and there is nothing in the Davis-Bacon Act that displaces or modifies that statutory authority. Davis-Bacon in no sense supplants the PRSA.

As we concluded in *Plumbers Local 5*, decided today, simply because the parties have opted to rely upon Davis-Bacon wage determinations of the Labor Department to fix basic rates of pay, it does not follow that AOC is ousted from negotiating further elements of the pay package under 5 U.S.C. §5349(a). The situation here stands in stark contrast to *North Pacific Division*, where Congress clearly intended through the 1982 Supplemental Appropriations Act to redefine the standard by which DOD WFA calculated the wages of the Corps of Engineering employees.

V. Order

The Employing Office shall, upon request, or as otherwise agreed to by the parties, bargain on the proposals concerning holiday premium pay.[3]

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