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| Plumbers Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada<br><br>Petitioner,<br><br>and<br><br>Office of the Architect of the Capitol,<br><br>Employing Office | ) | Case Nos. 02-LMR-03<br>02-LMR-05 |
| International Brotherhood of Electrical Workers, Local 26<br><br>Petitioner,<br><br>and<br><br>Office of the Architect of the Capitol,<br><br>Employing Office | ) | Case Nos. 02-LMR-04<br>02-LMR-06<br><br>Date: October 7, 2002 |

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

CONSOLIDATED DECISION OF THE BOARD OF DIRECTORS
ON NEGOTIABILITY ISSUES

## I. Introduction

The petitions for review in each of these four cases[1] come 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"), 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). Upon careful consideration of the entire record, including the parties' contentions, [2] the Board has determined, for reasons set forth below, that the Unions' proposals contain non-negotiable elements.

## II Statement of the Cases

The Employing Office's ("the Architect") Construction Management Division utilizes members of the Plumbers' and Electrical Workers' bargaining units to perform construction work at the Capitol Hill Campus. The Architect, Plumbers Union and Electrical Workers Union are negotiating their initial collective bargaining agreement and this consolidated negotiability dispute arose in that context. The underlying Union proposals (*02-LMR- 03*, *02-LMR-04*) would require the Architect, on behalf of each individual bargaining unit employee, to make pre-tax fringe benefit contributions into the Unions' employee benefit trust funds (e.g., health & life

[1] The two proposals advanced by the two petitioning labor organizations address identical matters at the same employing office. Because the parties have presented corresponding arguments in support of their positions and the cases are so intertwined, we have consolidated the petitions for consideration.

[2] The petitioning Unions filed timely petitions for review, and reply briefs to the Employing Office's statements of position. However, on September 16, 2002, the Employing Office, without leave of the Board, filed written submissions in response to the Unions' reply briefs, dated July 17 and 30, 2002, respectively. The Unions, on September 30, 2002, filed motions objecting to those submissions and asked "For Leave to File Response to 'Reply' by Architect of the Capitol". The Board views the Employing Office's submissions to be unauthorized and will not consider them. See *Section 2424.8* of the Board's Labor-Management Relations Regulations. *See 142 Cong. Rec. H10369-6 (09/12/1996).* Accordingly, the Board shall not consider the Unions' responses to the Employing Office's excluded submissions.

insurance, retirement, training, savings). When the Architect declared those proposals to be non-negotiable the Unions made interim implementation proposals, ostensibly to maintain the bargaining unit employees' pay *status quo ante* until the Board decided the underlying negotiability disputes. The Architect also declared those proposals to be non-negotiable and the Unions duly filed petitions for review with the Board (*02-LMR-05, 02 LMR-06*).

Earlier in the bargaining process the Board decided the parties' negotiability dispute arising from the Unions' proposals for holiday premium pay.[3] The Board determined that while the Architect exercised his discretion, under *5 U.S.C. § 5349*, to adopt Labor Department wage determinations under the Davis-Bacon Act, that "Davis-Bacon is not a straitjacket that precludes any bargaining over holiday premium pay" nor does it foreclose these parties "from negotiating other components of pay independent of Davis-Bacon". *See Case No. 01-LMR-01*, at page 16. These Board decisions recognized, as a general matter, the negotiability of pay and fringe benefit issues between the Architect and the Plumbers and Electrical Workers Unions. The Board specifically held, in this regard, as follows:

> Pay is a quintessential condition of employment that is subject to bargaining under the FSLMRS, as the Supreme Court has so affirmed in *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990). However, a pay proposal will be found nonnegotiable if it falls within one of the above statutory exceptions [ i.e., matters that concern conditions of employment, but are inconsistent with law or regulation, *See 5 U.S.C. § 7117(a)*], which is often found to be the case because the subject of pay and benefits is so widely settled by federal law [footnote omitted]. If a pay proposal involves a matter for which a governing statute leaves *no* discretion to an employing agency, the matter is deemed "specifically provided for by Federal statute" and therefore is excepted from bargaining. *BEP*, 50 FLRA at 682. Similarly, if a governing statute vests an employing agency with *sole* and *exclusive* discretion over a matter, a proposal that subjects the exercise of that discretion to collective bargaining would e "inconsistent with law." [citation omitted]. Where a proposal implicates a pay-specific statute or regulation, a careful examination of the structure, purpose and operation of the statute or regulation in question is typically required.
>
> *See Case No. 01-LMR-01, at pp., 10-11.*

Accordingly, it is the Board's task to determine whether the Unions' proposals are consistent with law or regulation, including reserved management rights under the FSLMRS and the Architect's specific statutory employment prerogatives.

## III. Statutory Genesis for the Unions' Proposals

The Unions and the Architect all contend that *Section 133 of the Legislative Branch Fiscal Year 2002 Appropriations Act, (Public Law 107-68)* ("Section 133") is of controlling significance to the resolution of these cases. Each party submits that *Section 133* supports its

[3] *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*, Case No. 01-LMR-01 (Dec. 3, 2001); and *International Brotherhood of Electrical Workers, Local 26 and Office of the Architect of the Capitol*, 01-LMR-02 (Dec. 3, 2001), available at http://www.compliance.gov.

respective position. Therefore, it will be useful to incorporate that statutory provision into this decision.

> SEC. 133. (a) LIMITATION- (1) Except as provided in paragraph (2), none of the funds provided by this Act or any other Act may be used by the Architect of the Capitol after the expiration of the 90-day period which begins on the date of the enactment of this Act to employ any individual as a temporary employee within a category of temporary employment which does not provide employees with the same eligibility for life insurance, health insurance, retirement, and other benefits which is provided to temporary employees who are hired for a period exceeding 1 year in length.
>
> (2) Paragraph (1) shall not apply with respect to any of the following individuals:
>
> (A) An individual who is employed under the Architect of the Capitol Summer Employment Program.
>
> (B) An individual who is hired for a total of 120 days or less during any 5-year period (excluding any days in which the individual is employed under the Architect of the Capitol Summer Employment Program).
>
> (C) An individual employed by the Architect of the Capitol as a temporary employee as of the date of the enactment of this Act who exercises in writing, not later than 90 days after such date, an option offered by the Architect to remain under the pay system (including benefits) provided for the individual as of such date.
>
> (D) An individual who becomes employed by the Architect of the Capitol after the date of enactment of this Act who exercises in writing, prior to the individual's employment, an option offered by the Architect to receive pay and benefits under an alternative system which does not provide the benefits described in paragraph (1), except that under such an option the Architect shall be required to provide the individual with the benefits described in paragraph (1) as soon as the individual's period of service as a temporary employee exceeds 1 year in length.
>
> (3) Nothing in this subsection may be construed to require the Architect of the Capitol to provide duplicative benefits for any employee.
>
> (b) ALLOTMENT AND ASSIGNMENT OF PAY- (1) Section 5525 of title 5, United States Code, is amended by adding at the end the following new sentence: "For purposes of this section, the term 'agency' includes the Office of the Architect of the Capitol.
>
> (2) The amendment made by paragraph (1) shall apply with respect to pay periods beginning on or after the date of the enactment of this Act.

## IV. Proposals in Dispute

### A. Underlying Proposals[4]

The Unions' proposals are essentially identical. Each Union premised its proposal upon the *Section 133* requirement to provide covered employees with the same eligibility for life insurance, health insurance, retirement, and other benefits that are provided to temporary

[4] The Architect determined the proposal to be non-negotiable as conflicting with its special statutory prerogatives, and its management rights under the FSLMRS. It also objected on grounds described below.

employees who are hired for a period exceeding one year in length. The elements of those proposals determined to be non-negotiable by the Architect are identified below:

> Bargaining unit employees who become employed[5] by the Employer after November 2001, and whose period of service as a temporary employee does not exceed one year in length are eligible for the same life insurance, health insurance, retirement, and other benefits that are provided to temporary employees of the Employer who are hired for a period exceeding one year of length.
>
> Bargaining unit employees hereby exercise the option[6] to receive the alternative benefits below instead of the federal benefits described above.
>
> Commencing on certain dates the Architect agrees to pay identified rates for each hour worked by bargaining unit employees to specified employee benefit Union trust funds.[7]
>
> Pursuant to the *Internal Revenue Code* the Architect shall not treat its contributions to the Union employee benefit trust funds as employee income subject to contributions or taxes under federal income tax withholding, Social Security Insurance, or Unemployment Compensation Insurance.[8]

B. Interim Implementation of Section 133 Proposals

Again, the Unions' proposals are essentially identical. The elements of those proposals determined non-negotiable by the Architect are identified below:

> Pending the Board's decision on the underlying negotiability dispute, bargaining unit employees hired on or before November 12, 2001, shall continue to be paid

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[5] The Architect declared this language to be inconsistent with Section 133(a)(2) because it would allow employees hired for less than 120 days to be eligible for the federal benefits.

[6] The Architect determined that this provision violated *Section 133* as being inconsistent with the requirement that only individual employees may exercise the option to receive either federal benefits or *alternative benefits* offered by the Architect. The Architect asserts that *Section 133* does not afford an exception for collectively bargained agreements.

[7] The Architect declared that it lacks legal authority to deduct monies from an employee's wages without the employee executing a voluntary allotment for a specified purpose.

[8] The Architect concluded that it lacks authority under federal law, including that governing pretax benefits, to reduce an employee's taxable income, absent specific statutory authorization.

the Washington, D.C. Metropolitan Area prevailing wage rate (including fringe benefit component).

The Unions elect, on behalf of bargaining unit employees hired after November 12, 2001, to receive the prevailing wage rate for a period not to exceed one year. After completing one year of service those employees shall be eligible to participate in the Federal Employee Retirement System, Federal life insurance, medical insurance and other benefits afforded employees of the Architect hired for a period exceeding one year of length, subject to standard employee deductions for the costs of the benefits.[9]

## V. Positions of the Parties, Analysis and Conclusions

### A. Underlying Proposals[10]

**1. Architect's authority to make direct fringe benefit payments to the Unions' Trust Funds**

Architect's Position

The Architect submits that it lacks authority to make direct payments to union trust funds and asserts that end may only be accomplished through voluntary individual employee signed allotments and assignments of pay. The Architect relies upon two Comptroller General decisions specifically addressed to the Architect.

Unions' Position

The Unions contend that voluntary employee allotments are not relevant to their proposals, which instead contemplate direct Architect payments to union trust funds and not deductions from individual employee wages. The Unions assert that the cited

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[9] The Architect declared this proposal to be non-negotiable for the reason stated in footnote 6, *supra.* In addition, the Architect determined that the proposal to permit subsequently hired employees, after a year of employment, to receive both prevailing wages (including fringe benefit component) and eligibility for federal fringe benefits, would violate *Section 133(3)*, which states: "[n]othing in this subsection may be construed to require the Architect of the Capitol to provide duplicative benefits for any employee".

[10] The Architect submits that the Unions' proposal conflicts with *Section 133(a)(2) of the Fiscal Year 2002 Legislative Branch Appropriations Act* because it would afford Federal fringe benefit eligibility to temporary employees hired for fewer than 120 days. While the Architect is correct in its characterization of the proposal, that provision is not in play because the Unions' proposal seeks to elect on behalf of the entire bargaining units that they not receive Federal fringe benefit eligibility.

Comptroller General decisions do not address the legality of the Architect making employer contribution to fringe benefit funds.

ANALYSIS AND CONCLUSION

The Comptroller General is charged under *31 U.S.C. § 3529* with issuing binding decisions to disbursing or certifying officials and heads of agencies on matters involving the expenditure of appropriated funds, in such situations such as this.

In 1977, the Comptroller General was requested to decide, *inter alia*, whether the Architect had authority to make fringe benefit contributions for its temporary construction craft employees directly into employee benefit trust funds administered by their labor organizations. The Comptroller General concluded that the Architect lacked legal authority to make such direct payments to the union trust funds, under 31 U.S.C. § 492(A)(1970), because Congress had not extended that authority to the Architect. The Comptroller General also noted that the Architect could not make such payments through individual employee allotments or assignments because the allotment statute (5 U.S.C. § 5525) did not at that time encompass the Architect. The Comptroller General concluded "we are unable to advise the Architect to make fringe benefit contributions directly to the trust funds.
*Matter of: Architect of the Capitol Contributions to Employee Benefit Trust Funds on Behalf of Temporary Employees*, October 13, 1977, Unpublished, 1977 WL 12008 (Comp. Gen.), B-189,533.

In 2001, in connection with the enactment of *Section 133 of the Legislative Fiscal Year 2002 Appropriations Act*, the Architect sought the Comptroller General's determination of its legal authority to make direct payments to union trust funds on behalf of its temporary employees. The Comptroller General, acknowledging that *Section 133* brought the Architect under the coverage of the employee allotment statute, nevertheless concluded that the Architect could only make such payments to union trust funds on behalf of temporary employees who individually elected to make allotments and assignments from their pay to the trust funds.
*Comptroller General Decision B-289496,* 12/21/2001.

The Comptroller General exercised his statutory authority in determining that the Architect lacked legal authority to make direct payments to union trust funds absent individual employee authorizing assignments or allotments. The Comptroller General's decisions establish that the direct payment provision of the Unions' proposal conflicts with *Section 133* and *31 U.S.C. § 492(A)(1970).* Inasmuch as these binding decisions preclude the Architect's disbursing officers from making payments directly into the Unions' trust funds, we find that portion of the proposal to be non-negotiable.

**2. Unions' proposal for the unions to elect, on behalf of bargaining unit employees,**

**that they receive alternative benefits provided by the Architect in lieu of Federal fringe benefits**

Architect's Position

The Architect contends that the Unions may not elect on behalf of bargaining unit employees whether, as individuals, they wish to select an alternative compensation system [i.e., continue to be paid as prevailing rate employees] or, instead, whether they wish to receive eligibility for federal fringe benefits. The Architect maintains that those decisions require individual elections under *Section 133(a)(2)(c) of the Legislative Fiscal Year 2002 Appropriations Act.*

Unions' Position

The Unions argue that *Section 133* is silent on whether individual employees must make an election and that the details of an election are irrelevant to the Congressional policy, articulated by *Section 133*, that the Architect provide its temporary employees with eligibility for fringe benefits. The Unions, citing statutory and case law authority for its entitlement to act on behalf of bargaining unit employees, state that attempts of the Architect to deal individually with those employees on the election of benefits issue would subvert its role of exclusive bargaining representative. The Unions assert that nothing in *Section 133* suggests that Congress intended to *overrule* those basic notions of collective bargaining, and they suggest that *Section 133's* individual election provision solely relates to unrepresented employees.

ANALYSIS AND CONCLUSION

*Section 133(a)(2)(C) & (D)* essentially exempts from the Architect's obligation to provide temporary employees with federal fringe benefits:

> [for current employees] An individual . . . who exercises in writing . . . an option offered by the Architect to remain under the pay system (including benefits) provided for as of the date of the enactment of this Act.
>
> [for subsequently hired employees] An individual who becomes employed by the Architect after the date of the enactment of this Act who exercises in writing, prior to the individual's employment, an option offered by the Architect to receive pay and benefits under an alternative system which does not provide the benefits described in paragraph (1), except that under such an option the Architect shall be required to provide the individual with the benefits described in paragraph (1) as soon as the individual's period of service as a temporary employee exceeds 1 year in length.

In our view, the clear import of this statutory benefits election language affords individual employees the opportunity to make a timely written election. The particularized nature of this election is further emphasized by *Section 133 (b)*, which introduced to the Architect authority to permit its employees to make voluntary allotments and assignments of their pay. Such does not contemplate an exclusive bargaining representative making that election on behalf of the individual bargaining unit members.

While, as the Unions contend, employing offices must negotiate with their employees through their exclusive bargaining representatives, this requirement hinges upon whether a matter constitutes for the employer a discretionary condition of employment. In addition to *Section 133,* there are Federal Sector statutes and government-wide regulations that permit individual employees, not their exclusive bargaining representatives, to select their fringe benefits. e.g., Federal Employee Health Care Insurance (5 U.S.C. § 8905); and Federal Employee Group Life Insurance (5 U.S.C. § 8702). Federal employers, like the Architect, are not free to negotiate over a union proposal, for example, which would permit a union to select for bargaining unit employees the choices reserved to individual employees under 5 U.S.C. §§ 8702 and 8905. Yet, the sense of the Unions' arguments in this matter would imply that collective bargaining agents could negotiate such elections.

The cases cited by the Unions in support of their position are inapposite. Those cases involve federal non-appropriated fund entities not governed by specific government fringe benefit legislation and normal federal fiscal limitations. Consequently, any such bargaining unit fringe benefit entitlement would be the product of collective bargaining. *See United States Dep't of the Navy, Navy Exch.,* 37 FLRA. 320 (1990); *United States Dep't of the Air Force, Air Logistics Ctr.,* 36 FLRA. 984 (1990); *United States Dep't of Defense, Army and Air Force Exch. Service,* 38 FLRA. 282 (1990); *Department of the Navy,* 25 FLRA. 832 (1987); *Dep't of the Air Force, Maxwell Air Force Base*, 24 FLRA. 475 (1986); *Dep't of the Air Force, Eglin Air Force Base*, 24 FLRA. 377 (1986).

If the subject matter of a proposal is already specifically covered by statute it is non-negotiable. *5 U.S.C. § 7103(a)(14)(c). Maritime Metal Trades Council and Panama Canal Comm'n,* 17 FLRA 890 (1985). A matter is specifically provided for within the meaning of *5 U.S.C. § 7103(a)(14)* only to the extent that the governing statute leaves no discretion to the agency. *Department of Justice, INS, and AFGE National Border Patrol Council,* 55 FLRA 892, 897 (1999); *International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135, et al. And U.S. Dep't of Treasury, Bureau of Printing and Engraving,* 50 FLRA 677, 681-85 (1995).

*Section 133* does not afford the Architect the discretion, as contemplated by the Unions' proposals, to deny bargaining unit employees their statutory right, as individuals, to elect their choice of compensation program. Accordingly, we find that portion of the Unions' proposal to be non-negotiable.

**3. Architect's Authority to make pretax payments to the Union Trust Funds**

Architect's Position

The Architect relies upon the Comptroller General's December 21, 2001, decision informing the Architect that it could not treat such contributions as pretax contributions without specific authorization in statute or regulation. The Architect notes that the resolution of this issue is presently before the United States Office of Personnel Management ('OPM"), which is the authority in this area.

Unions' Position

The Unions submit that the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("IRC") permit employers to make pretax contributions to union fringe benefit funds in accordance with collective bargaining agreements. The Unions support their position with references to ERISA and IRC provisions, implementing regulations, and a Revenue Ruling.

ANALYSIS AND CONCLUSION

The Architect requested the Comptroller General's decision regarding the Architect's authority to make the proposed pretax contributions. The Comptroller General concluded: "With respect to your authority to make any particular fringe benefit allotment before deducting FICA and federal income taxes, you should consult with the Internal Revenue Service". The Comptroller General essentially determined that the Architect could not treat such contributions on a pretax basis without pre-approval by the appropriate authority. *Comptroller General Decision B-289496 (December 21, 2001).*

The Architect's letter, dated February 7, 2002 raised this question with the Internal Revenue Service. IRS responded, by letter dated April 22, 2002. IRS indicated that OPM had jurisdiction over the question and referred the Architect's letter to OPM for decision. According to the record, OPM has not responded as of this time.

In essence, the Architect's position is that it lacks authority to agree that its proposed contributions to the Unions' trust funds would be on a pretax basis. The Comptroller General's constraining decision, and the IRS Commissioner's response letter, confirm the

Architect's view that it lacks the independent authority that the Unions' proposals contemplate. This issue presents the situation where another agency (apparently OPM) has control over the working condition that the Unions are seeking to negotiate about.

This proposal goes beyond requiring the Architect to negotiate over making recommendations to another agency possessing actual control over the subject working conditions. *See Library of Congress v. FLRA,* 699 F.2d 1280 (D.C. Cir. 1983). Accordingly, we find that this portion of the proposal does not concern a negotiable working condition because the adoption of the proposal would be outside the scope of the Architect's authority.

**4. Whether the Unions' proposal conflicts with the special statutory authority of the Architect in Employment matters?**

Architect's Position

The Architect relies upon its employment authority derived from various statutory provisions in the late 19th and early 20th Centuries *(40 U.S.C. §§ 167, 174(c) & 175).* The Architect contends that his foregoing statutory authorities vest him with sole and exclusive authority in the appointment and direction of Architect of the Capitol employees, subject to the control of the Speaker of the House, Senate Committee on Rules and Administration (on matters of general policy), and regulation by the House Office Building Commission. The Architect submits that its statutory prerogatives were not diminished by the relevant pay setting legislation or by enactment of the Congressional Accountability Act. The Architect concludes that it is within its sole and exclusive authority to decide how to implement the appointment and employment-related provisions of *Section 133 of the Legislative Fiscal Year 2002 Appropriations Act* and that the Unions' proposals are non-negotiable for infringing upon that authority.

Unions' Position

The Unions assert that *40 U.S.C. §§ 167, 174(c) & 175* parallel for the Architect those management rights also applied to the Congressional Accountability Act by the Federal Service Labor Management Relations Statute. However, none of these provisions is preclusive or specifically provide for the setting of wages and/or wage-related benefits of the Architect's employees. The Unions, citing the Board's decisions involving these same parties (01-LMR-01, 01-LMR-02, *supra*), submit that wages for bargaining unit employees must be set in accordance with 5 U.S.C § 5349(a), irrespective of how the Architect appoints or classifies its employees. The Unions conclude that the statutes relied upon by the Architect do not meet the standards set down by FLRA case law for determining whether an agency has "sole and exclusive" authority over a personnel

matter.

ANALYSIS AND CONCLUSION

For a matter to be non-negotiable as falling within the exclusive authority of the agency head, the authorizing statute must refer to the unfettered agency head discretion, for example, by excluding or limiting the application of other laws. *See Department of Veterans Affairs, Veterans Canteen Service, Lexington and NAGE Local R5*, 44 FLRA 162 (1992); *Department of Treasury, Office of Thrift Supervision*, 47 FLRA 884 (1993), aff'd 46 F.3d 73 (D.C. Cir. 1995); and *Colorado Nurses Association v. Federal Labor Relations Authority, et al.,* 851 F.2d 1486 (D.C. Cir. 1988).

The Architect's referenced statutory authorities do not establish that Congress afforded it unfettered discretion in the employment area. Instead, our review of those statutes, as in *Veterans Canteen Service, supra*, discloses an intent to imbue the Architect with described personnel- management authority as is appropriate to an agency head. Therefore, those statutes cannot reasonably be construed to abrogate the Architect's bargaining obligations under the FSLMRS, as applied by *Section 220 of the Congressional Accountability Act*.

**5. Whether the Unions' proposals conflict with the Architect's Management Rights under *5 U.S.C. § 7106*?**

Architect's Position

The Architect contends that the Unions' proposal impermissibly implicates certain management rights under *5 U.S.C. §7106(a), i.e.,* right to hire and retain employees and to determine the personnel by whom agency operations will be conducted; and *5 U.S.C. § 7106(b)(1)*, essentially management's right to establish its organizational staffing patterns. The Architect cites cases insulating management's prerogative against proposals to negotiate over whether to appoint and utilize temporary employees or to convert employees from one employment status to another. The Architect argues that the Unions' proposal would create a new category of employment with its own system of benefits and require the Architect to convert employees to that system and compensate them accordingly. The Architect also views the proposal as requiring it to negotiate with the unions as a precondition to exercising its right to hire and retain employees.

Unions' Position

Under FLRA case law the Architect has the burden of establishing that a proposal is inconsistent with law, rule or regulation. The proposal does not implicate any of the management rights that the Architect invokes. Nothing in the proposal places any limitation on the Architect's ability to hire or retain employees as the Architect is entitled

to do under *5 U.S.C. § 7106(a)(2)*. Moreover, the proposal does not involve the determination of "types" of employment within the sense of *5 U.S.C. § 7106(b)(1)*, nor does it concern staffing patterns or the allocation of employees. Rather, the proposal simply provides that the employees, however allocated or characterized by the Architect, will be paid the prevailing rate in accordance with *5 U.S.C. § 5349*.

ANALYSIS AND CONCLUSION

An agency must provide record evidence in support of its non-negotiability determinations. *AFGE, Nat'l Border Patrol Council and Department of Justice, INS, U.S. Border Patrol, Western Region,* 39 FLRA 675 (1991).

The Unions' proposal does not require the Architect to allocate between short-term, long-term temporary or any other tenure status in its workforce. The proposal solely relates to the compensation of employees whom the Architect has appointed to temporary status. Accordingly, the proposal is not foreclosed by *5 U.S.C. § 7106(b)(1)*, which relates to the "numbers, types, and grades of employees or positions assigned to any organizational subdivision". *NAGE Local RF-184 and VAMC Lexington, KY.,* 55 FLRA 549, 552 (1999).

The proposal does not impinge upon the Architect's management rights under *5 U.S.C. §* 7106(a) *to hire* and retain employees and to determine the personnel by whom agency operations will be conducted. The proposal does not in any manner constrain the Architect as to what categories or types of employees it may hire or retain to utilize to perform its operations. *International Federation of Professiona*l *Technical Engineers Local 49 and U.S. Department of the Army, Army Corps of Engineers, South Pacific Division, San Francisco,* 52 FLRA 813 (1996). Again, the proposal relates solely to compensation of those bargaining unit employees whom the Architect, in its discretion, appoints or has appointed as temporary employees. Nor does the proposal create a new category of employment, as the Architect contends; it instead addresses the compensation of the existing category of temporary employees.

Based upon the foregoing, we conclude that the proposal does not violate the Architect's management rights under *5 U.S.C. §7106*.

B. Interim Implementation of Section 133 Proposal

We conclude, under the rationale discussed above, that the Unions' *interim implementation* proposal conflicts with *Section 133 of the Fiscal Year 2002 Legislative Appropriations Act* inasmuch as it would deny individual employees their statutory right to elect in writing whether (1) they wished to be provided eligibility for federal fringe benefits, or (2) that instead they be compensated under an alternative system established by the Architect. However, as also explicated above, the Architect's additional non-

negotiability bases (conflict with reserved management rights and the Architect's statutory employment authorities) lack merit.

C. Conclusion[11]

We have determined that each of the Unions' proposals contains non-negotiable elements. The Unions did not seek to sever parts of their proposals to permit the Board of Directors to decide whether negotiable portions of the proposal could stand separately. *Local 32, AFGE v. FLRA,* 774 F.2d 498 (D.C. Cir. 1985); *NFFE Local 1332 and Department of Army, Army Material Command*, 47 FLRA 1357 (1993); and *5 C.F.R. § 2424.22(c)(2000).*

## *VI.* ORDER

The Unions' petitions for review are dismissed.

[11] In view of our dispositive non-negotiability determinations, we deem it unnecessary to decide the Architect's allegations that the Unions' proposals conflict with Section 133(a)(3) that "[N]othing in this subsection may be construed to require the Architect of the Capitol to provide duplicative benefits for any employee". We deem the state of the record at this juncture as precluding us from exercising an informed judgment on this issue. Our reading of the statute does not disclose a clear Congressional intent regarding the permissibility of the Architect granting its employees any duplicative benefits or even how the term duplicative should be interpreted. It is unclear whether Section 133(a)(3) should be construed as an absolute bar to the Architect's provision of duplicative benefits to its employees, or, in the alternative, Section 133(a)(3) should be construed to afford the Architect authority to agree, as a matter of collective bargaining, to provide its employees with duplicative benefits. We also note that Section 133(a)(3) speaks in terms of providing benefits, while Section 133(a)(1) speaks in terms of providing eligibility for benefits. Without further information and comment, it is difficult to determine whether Section 133(a)(3) was meant to allow the Architect to deny eligibility if an employee is covered under another plan, or to only allow the Architect to coordinate benefits with other plans. However, as noted above, we need not reach these difficult issues today. Accordingly, we take no position in this decision on the Architect's instant allegation.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Consolidated Decision of the Board of Directors on Negotiability Issues were delivered by facsimile mail and by first class mail by the undersigned on this 7th day of October, 2002, upon the following:

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