BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

American Foreign Service Association Complainant	Record of Proceedings FSGB Case No. 2015-006
And	August 2, 2016
Department of State	**DECISION**

For the Foreign Service Grievance Board:

Presiding Member:	William Persina
Board Members:	Jeanne L. Schulz
	William B. Nance
Special Assistant	Katherine D. Kaetzer-Hodson
Representative for the Complainant:	Sharon Papp, AFSA General Counsel
Representative for the Department:	Kathryn Nutt Skipper Attorney Adviser, HR/G
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

Held – The Board held that the Complainant in this implementation dispute, the American Foreign Service Association (AFSA), failed to establish by preponderant evidence that the U.S. State Department (Department) had breached the parties' negotiated 2014 Procedural Precepts (Precepts) concerning Meritorious Service Increases (MSIs) when the Department awarded fewer MSIs in 2014 than AFSA alleged were required to be awarded under the Precepts. The Board therefore denied AFSA's complaint.

Summary – AFSA argues that it has been the parties' past practice over a period of many years that the Department would award MSIs to all employees rated eligible, but not reached for, promotion by Selection Boards up to a maximum of 10% of the employees in a competition group, and that this practice should be followed under the 2014 Precepts. It also argues that, contrary to the Department's claims, language in the 2014 MSI Precepts supports this conclusion. AFSA further asserts that rulings favorable to it in this Board's decision in an earlier case, FSGB Case No. 2014-028 (September 3, 2015), are determinative in this case. That case involved an implementation dispute concerning the 2013 Procedural Precepts.

The Department argues that under the Precepts, it has the discretion to award MSIs in any number under the 10% limit. It also asserts that it made clear to AFSA during negotiations on the Precepts that it had a unilateral management right to determine, based on budgetary considerations, the number of MSIs to be awarded. The Department further argues that AFSA has not established that the parties' past practice regarding the number of MSIs to be awarded binds it in this case.

This Board first found that the disputed Precepts language is ambiguous as to how the number of MSIs below 10% is to be determined. After reviewing the parties' 2014 Precepts bargaining history, it then held that the parties agreed that the Department had the discretion to award MSIs to fewer than 10% of the employees in a competition group recommended for MSIs. The Board's decision centered on the fact that the Department made clear to AFSA during negotiations that the Department had a unilateral management right to decide on the number of MSIs to be awarded in 2014, based on budget considerations under 22 U.S.C. § 4105(a)(1). It therefore told AFSA it would not bargain on AFSA's proposal. The Board held that if AFSA wanted to dispute this allegation of non-negotiability, it should have filed a negotiability appeal with the Foreign Service Labor Relations Board (FSLRB) under 22 CFR §§ 1424.1 *et seq.* The FSLRB by statute has exclusive jurisdiction to address such disputes. As AFSA did not file such an appeal, the Board concluded that it must be considered to have agreed to the Department's interpretation of the Precepts. To hold otherwise would allow for an unlawful result: giving binding effect to a negotiated agreement provision whose legality has been questioned, without an authoritative ruling on the legality issue from the only forum charged by law with making such rulings. The Board further held that its rulings in FSGB Case No. 2014-028, concerning past practice and the import of the language in earlier Precepts, among other things, were not determinative in this case because the Department had not in the earlier case declared during negotiations, as it did in this case, that the number of MSIs to be awarded was not negotiable.

DECISION

I. THE COMPLAINT

The American Foreign Service Association (AFSA) filed an implementation dispute with the U.S. Department of State (Department) alleging that the Department had breached the 2014 Selection Board Procedural Precepts that the parties had negotiated concerning Meritorious Service Increases (MSIs). Specifically, AFSA alleged that the Department failed to award MSIs to all employees recommended by Selection Boards for MSIs up to the maximum number provided for in the Precepts. The Department rejected the dispute, and AFSA filed its complaint on the matter with this Board. It requests that the Department be declared to have violated the Precepts, retroactive payment of all 2014 MSIs with interest, and attorney fees.

II. BACKGROUND

Section 1014 of the Foreign Service Act, as amended (FSA), 22 U.S.C. § 4114, establishes procedures for resolving cases in which AFSA and the Department have a dispute about the "effect, interpretation, or a claim of breach of a collective bargaining agreement." Among other things, this statutory provision states that such implementation disputes will be resolved through procedures negotiated by the Department and AFSA. The Department and AFSA negotiated such procedures in 3 FAM 4470. The statute also provides for a complainant to this Board if the parties cannot bilaterally resolve their dispute. The present case arises under these provisions.

For many years prior to 2014, the Department and AFSA negotiated annually on the content of Procedural Precepts for Selection Boards (SBs). This collective bargaining engaged in by the parties was conducted pursuant to the mandate of Section 1004 of the FSA, as

amended, 22 U.S.C. § 4104, which grants Department employees the right to "engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." The terms of such a negotiated agreement are binding on the parties until they agree to change them.

As we found in a previous case, involving the 2013 SB Precepts on MSIs,[1] one of the provisions that the parties typically agreed to for inclusion in the annual Precepts prior to 2013 dealt with the award of MSIs to employees who were not promoted, but whose performance was of sufficient quality that an MSI was deemed appropriate. For example, in the 2012 Precepts, it was stated that the Department's Bureau of Human Resources "will implement all MSIs and cash payments in lieu thereof as of the effective date of the promotions," in accordance with rank order lists prepared by the SBs. For approximately 30 years prior to 2013, promotions were granted or MSIs paid to whatever number of employees the SBs recommended, up to a percentage limitation specified in the Precepts of a competitive class.

In early 2014 AFSA and the Department met to begin negotiations for the Precepts to govern that year's SBs. In March 2014 the parties exchanged proposals for revising the Precepts used in past years. These proposals were largely aimed at revising the format used in previous years' Precepts, including the section dealing with MSIs, to improve their readability. These negotiations continued through early May 2014.

At a May 21, 2014, bargaining session, however, the Department submitted a proposal concerning the MSI section of the Precepts that substantially altered the direction of the negotiations on MSIs. The Department proposed in relevant part that the 2014 SBs "will not

[1] *See* FSGB Case No. 2014-028 (September 3, 2015). The Foreign Service Labor Relations Board denied exceptions filed by the Department to our decision in that case in FSLRB Case No. FS-AR-0006 (April 20, 2016).

confer" MSIs. Rather, the various Department "Bureaus will award MSIs." Further, the Department proposed to cap the maximum number of MSIs that could be awarded for the year at 2.5% [2] of the annual pool of eligible Foreign Service personnel. This was a considerable reduction in the number of employees who would be eligible to receive MSIs, compared to past years.

By letter dated May 23, 2014 AFSA said that it was "very concerned" about the Department's proposal. For one thing, it said it was "an 11th hour proposal" that was untimely introduced into the bargaining process. AFSA next noted that MSIs had been part of the SB process since the inception of the FSA in 1980. Finally, AFSA cautioned the Department that it should not unilaterally implement its proposal until either AFSA agreed to it or the Foreign Service Labor Relations Board (FSLRB) or the Foreign Service Impasse Disputes Panel (FSIDP) resolved any issues arising from the parties' negotiations that may be submitted to either of those agencies.[3]

By letter dated May 28, 2014, the Department replied to the AFSA letter. The Department said that it recognized that its MSI proposal "came late in the process," and did not accord with the parties' "Framework Agreement," that in part called for AFSA to have 15 days to consider proposals. As a result, the Department said that for 2014 it would agree to allocate MSIs by way of the SBs.

[2] The Department clarifies that 2.5% of the Foreign Service population is roughly equivalent to 5% of eligible promotion competition pools; and 5% of the Foreign Service population is roughly equivalent to 10% of the promotion competition pools. Department motion to Dismiss, dated March 16, 2015, at 4.

[3] The FSLRB is charged by the FSA with, among other things, determining whether a bargaining proposal is negotiable, that is, whether or not it is contrary to law or regulation. 22 U.S.C. § 4107. The FSIDP is charged under the FSA with resolving bargaining impasses that may arise in the parties' negotiations. 22 U.S.C. § 4110.

However, the Department further said that the decision to reduce MSI allocations to 2.5% of the Foreign Service population was “not a proposal.” It comported, the Department stated, with the Precepts language from previous years, which said that "[n]o more than ten percent of members in a competition group” would receive MSIs. The Department also asserted that “it is Management's right to make a policy determination in light of budgetary needs and fiscal constraints.” The Department concluded that it was “prepared to implement the 2014 Procedural Precepts based on all the agreements reached in the May 21 negotiation session.” But if AFSA did not agree to this proposal by May 30, 2014, the Department would “commence the 2014 Selection Boards utilizing the 2013 Procedural Precepts.”

AFSA responded by e-mail dated May 30, 2014. It said, among other things, that using the 2013 Precept MSI language was not appropriate because that Precept provision contained language that was unique, based on the government-wide budget sequestration that was in effect at the time. The sequestration was no longer in effect in 2014, so, AFSA said that language was no longer relevant. AFSA did say that it was “prepared to agree to 2014 procedural precepts as negotiated . . . with the inclusion of the uncontested 2012 MSI language.” AFSA concluded by saying that it would “like to reach an agreement” and was prepared to sign a Memorandum of Agreement adopting the 2014 SB Precepts, including the MSI language used in 2012. It expressed “concern[]” about the functioning of the 2014 SBs, which were scheduled to start meeting the following week, in the absence of the Precepts.

The Department responded to AFSA by e-mail dated June 2, 2014. It said it was “pleased to adhere to the terms of this agreement including the 2012 language governing conferral of MSIs.” A copy of the Precepts agreement was attached, signed by Steven Polson,

the Department's Chief Labor-Management Negotiator. AFSA signed the agreement the next day. The MSI provision of the Precepts provided in relevant part as follows:

> 3. Meritorious Service Increases (MSIs)
>
> The rank order lists from Senior Threshold Boards and Intermediate Boards will be used in conferral of within-grade MSIs. Employees rank-ordered by those Boards but not promoted because of limited promotion opportunities will be deemed qualified for MSIs up to the appropriate levels and their names will be submitted in accordance with their rank order to the DG for approval of the MSI's conferral. Such approval is subject to the same guidelines for approval and enactment as recommendations for promotion. These include provisions for the removal of a name from the rank order list under the same circumstances for removal of those reached for promotion as set forth in 3 FAM 2320.
>
> MSIs are awarded for the quality of cumulative and competitive performance. No more than ten percent of members in a competition group shall receive MSIs. A statement noting an MSI will be placed in each member's performance folder in the Official Personnel File (OPF).
>
> * * * * * * * * *
>
> Note: The Bureau of Human Resources will implement all MSIs and cash payments in lieu thereof as of the effective date of the promotions.

On July 23, 2014, after having provided an advance copy to AFSA, the Department issued an ALDAC (14 State 89828) titled, "Update On MSIs and QSIs."[4] Among other things, this ALDAC said that the Department in 2014 was "still operat[ing] under intense fiscal pressures," and as a result, the Department said the number of MSIs "will drop from what have been historical levels." The Department cited the need for "fiscal prudence" in the monetary awards program. After receiving its advance copy of the ALDAC but prior to its issuance, AFSA sent an e-mail to the Department advising that it considered a unilateral reduction of the number of MSIs by the Department to be a breach of the negotiated agreement. AFSA said that

[4] "QSI" stands for "Quality Step Increase" and is, for Civil Service employees, the equivalent of an MSI for Foreign Service employees.

the language of the Precept and past practice mandate that the Department grant MSIs to all employees the SBs recommend for the awards up to 10% of each competition group.

The Department issued an ALDAC (14 State 119094) on October 3, 2014, listing the names of employees receiving promotions, MSIs, and bidding privileges. The number of employees receiving MSIs was limited to 5% of the employees in each competition group whom SBs recommended for promotion but who were not reached. Employees recommended for promotion but not reached and not receiving an MSI received bidding privileges.[5]

On December 3, 2014, AFSA filed its implementation dispute with the Department, alleging that the Department violated the 2014 Precepts relating to MSIs when it failed to award MSIs to all of the employees the 2014 Selection Boards had ranked and recommended for MSIs up to the negotiated 10% limit. The Department denied the implementation dispute on January 20, 2015. On February 27, 2015, AFSA filed with the Board the instant complaint of the Department's denial. By Order dated July 7, 2015, the Board denied the Department's motion to dismiss the complaint, which was based on the claim that AFSA untimely filed its implementation dispute with the Department.

III. POSITIONS OF THE PARTIES

A. The Complainant

AFSA argues that it has been the parties' consistent past practice since enactment of the FSA to award MSIs to all of the employees ranked by SBs for MSIs or ranked but not reached for promotion up to the percentage cap specified in the precepts. AFSA points out that the Precepts have consistently included a clause committing the Department's Bureau of Human Resources to implement "all," not some, of the MSIs on the effective date of promotions.

[5] Bidding privileges give Foreign Service employees who are bidding on onward assignments the right to bid on positions at a grade higher than their own with status equal to those already promoted to the higher grade.

Accordingly, AFSA claims, this longstanding past practice of the Department requires it in this case to pay MSIs to all of the employees recommended but not reached for promotion, up to the cap. In 2014, the cap was 10% of the competition pool. Therefore, the Department's unilateral reduction of the number of MSIs to 5% violates the Precepts.

AFSA rejects the arguments the Department relied on in denying AFSA's implementation dispute. First, it argues that the Department erroneously claims that the SBs do not have the authority to recommend or confer MSIs. In support of its position AFSA points to language in various issuances by the Department over a period of years that establish that SBs have been authorized to recommend the conferral of MSIs.

AFSA next rejects the Department's claim that the Precepts' provision that employees ranked but not reached for promotion by the Selection Boards "will be deemed qualified for MSIs up to the appropriate levels" does not guarantee that such employees will receive an MSI. AFSA notes that the Precepts state that these employees' names "will be submitted in accordance with the rank order to the DG [Director General] for approval of the MSI's conferral," and that the DG's approval is limited to "the same guidelines for approval and enactment as recommendations for promotion. These include provisions for removal of a name from the rank order list under the same circumstances for removal of those reached for promotion as set forth in 3 FAM 2320." Thus, AFSA argues, the plain language of the Precepts allows for SB recommendations for MSIs not to be followed only in the very limited circumstances set out in 3 FAM 2320.

Third, AFSA asserts that the Department is mistaken when it says that the "no more than ten percent" language of the Precepts is intended to allow the Department to make a unilateral determination as to whether a lower percentage of employees should receive MSIs. AFSA

argues in this connection that the consistent past practice of the Department for the past 30 years has been to award MSIs to all of the employees ranked but not reached by the SBs up to the cap specified in the precepts. The only exceptions to this practice have been when the Precepts for a particular year explicitly recognized the Department's authority to issue fewer MSIs than the maximum allowed in the Precepts.

AFSA next points to the language in the 2014 Precepts that requires the Department's Bureau of Human Resources to "implement all MSIs and cash payments in lieu thereof as of the effective date of the promotions." It argues that this language "eliminate[s] all Department discretion, sans vetting," in regards to the implementation of SB recommendations for promotion and MSIs. It also argues that this Board's rulings in its earlier decision in FSGB Case No. 2014-028 (September 3, 2015), involving the MSI Precepts for 2013, are dispositive of' the issues in this case. There, according to AFSA, the Board found that, consistent with the parties' bargaining history and past practice, the 2013 Precepts mandated that MSIs be awarded to all employees recommended for them by the SBs, up to 10% of the competitive class.

Based on the foregoing, AFSA claims that it has established that the provisions of the 2012 Precepts required the Department to implement the 2012 SB's MSI recommendations. Thus, since the parties agreed to use the exact 2012 Precepts MSI language in the 2014 Precepts, the same result must be adopted for the 2014 Precepts. AFSA contends that the bargaining history of the 2014 Precepts supports this conclusion.

B. The Respondent

The Department first looks to the language of the 2014 MSI Precepts and asserts that the language does not mandate that it award a specific number or percentage of MSIs based on the SBs' rank order lists. The "no more than ten percent" language, it claims, is "a band or range; it

is not an agreed upon specific number." Thus, it claims, the agreed-upon language in the 2014 Precepts does not require the Department to confer MSIs on 10% of each of the promotion competition pools. Rather, it claims, the Precepts only bind the Department to use the rank-order lists generated by SBs in deciding which employees will receive MSIs.

The Department next argues that SBs recommend and rank-order employees only for promotion, not for MSIs. There are no such procedures in the 2014 Precepts, and no 2014 SB identified or recommended any employee for an MSI.

Further, the Department points out that it made it clear to AFSA during negotiations that it rejected any suggestion that MSIs would be paid up to the full 10% cap mentioned in the Precept. Its bargaining representatives told their AFSA counterparts that its statement of intent regarding reducing the percentage of MSIs it would award over previous years was “not a proposal.” Rather, it was consistent with the language of the Precepts. Having heard the Department’s clear statement of its position on this issue, the Department asserts, AFSA cannot now advance a contrary view of the meaning of the 2014 MSI Precepts.

The Department next argues that the language relied on by AFSA, that the Bureau of Human Resources “will implement all MSIs and cash payments in lieu thereof as of the effective date of the promotions,” does not mandate the Department to grant MSIs to an absolute number (10%) of the competition pools. Rather, it only addresses the timing of the implementation of any MSIs the Department confers.

The Department also asserts that AFSA has failed to establish a past practice that could bind it to awarding MSIs up to the 10% limit. It claims that AFSA has first not shown a consistent practice on this issue over a period of time, and second has not shown express or implied consent by the Department to that practice. The Department goes on to argue that even

if it could be said there was an established past practice, it was specifically disavowed during the negotiations for the 2014 Precepts.

IV. DISCUSSION AND FINDINGS

Under the Board's regulations governing implementation disputes, such cases "shall be handled by the Board in accordance with the procedures set forth" in the provisions of the rules governing grievance cases. Thus, as the complainant in this case, AFSA has the burden of establishing, by a preponderance of the evidence, that its complaint is meritorious. 22 CFR § 905.1(a).[6]

An implementation dispute such as the present case calls on the Board to interpret and apply the provisions of a collective bargaining agreement that the parties have entered into. Our role is therefore to determine and carry out the mutual intent of the parties in agreeing to the contract language at issue in the case. Elkouri & Elkouri, How Arbitration Works, (7th ed. 2012) at 9-2. If the language in the negotiated agreement is clear and unambiguous, we are required to apply the language as written, without recourse to other sources to determine the parties' intent. However, if the language is ambiguous, then we consult other sources to assist us in determining the parties' intent. Agreement language is generally considered to be ambiguous if "plausible contentions may be made for conflicting interpretations" of the agreement language at issue. *Armstrong Rubber Co.*, 17 LA 741, 744 (Gorder, Arb. 1952). Sources to be consulted in deciding the meaning of the disputed language, in addition to the language itself, are bargaining history, past practice, the agreement taken as a whole, as well as reason and equity. Elkouri, *supra*, at 9-21 – 9-52.

[6] The Department sought leave to file a sur-reply to AFSA's rebuttal, and AFSA opposed the request. In the interest of providing the Board with a complete statement of the parties' positions in this case, and in the absence of any apparent prejudice to AFSA, we accepted for filing both the Department's sur-reply and AFSA's response to it.

As mentioned above, this Board had occasion to consider and apply the language of the 2013 MSI Precepts in FSGB Case No. 2014-028. The language in the 2013 Precepts is virtually identical to that in the 2014 Precepts save in one important respect: the 2013 MSI Precepts contained language in its Note section that is not contained in the 2014 Precepts. This 2013 Note language addressed matters specific to the issue of how the budget sequestration that Executive branch agencies were operating under in 2013 would impact the granting of MSIs that year. Our decision in FSGB Case No. 2014-028 centered largely on interpreting and applying this 2013 Note language. Accordingly, our decision in FSGB Case No. 2014-028 is of limited controlling authority in the present case, as the 2014 MSI Precepts do not contain the disputed Note language at issue in that case.

Nonetheless, there were certain issues we addressed in FSGB Case No. 2014-028 that are relevant to the present case. First, we held in FSGB Case No. 2014-028 that the same Precepts language in dispute in the present case was ambiguous, a ruling we reaffirm in this case. Further, contrary to the Department's contention, we held that Congress did not intend in Section 406(b) of the Foreign Service Act, as amended (FSA), 22 U.S.C. § 3966(b), to confer sole and exclusive discretion on the Department to decide whether to award all the MSIs recommended by the SBs.[7] Rather, the discretion conferred on the Department concerning MSI awards was to be exercised

[7]The Department states in its Response to AFSA's Supplemental Submission in this case that this Board in FSGB Case No. 2014-028 "may have misunderstood," based on alleged misrepresentations of AFSA, and that Selection Boards do not recommend MSIs. The Department asserts that SBs only make recommendations for promotion, not for MSIs. We find this claim to be puzzling. The Department itself, in its Announcement No. 2014_05_076 (May 13, 2014), said, "The 2013 Selection Boards recommended the conferral" of several hundred MSIs. Further, in Department Announcement No. 2013_09_158 (September 27, 2013), the Department stated that "based on the findings of the 2013 [SBs]," employees in FS grades "have been identified to receive" MSIs. These Department announcements clearly indicate to us that SBs do in fact make MSI recommendations. That is, all employees recommended by SBs for promotion, but not in fact promoted due to a limited number of job openings, are considered to be recommended for MSIs. We also note that the FSLRB rejected the Department's exception based on this claim in its appeal of our ruling in FSGB Case No. 2014-028. FSLRB Case No. FS-AR-0006 (April 20, 2016) at p. 10.

by way of the collective bargaining process. That holding remains applicable in the present case as well.

Further, we found that the 2013 MSI Precepts did not establish that the parties intended to confer sole and exclusive discretion in the Department to determine the number of MSIs to be awarded under the 10% cap set out in the Precepts. We indicated that the language of the 2013 MSI Precepts "strongly suggests" that the parties agreed that MSIs would be paid to all employees that SBs recommended for MSIs, up to the 10% maximum set out in the Precepts. We looked to, among other things, the Precepts provisions stating that "[n]o more than ten percent of members in a competitive group shall receive MSIs;" and the fact that the Precepts specified that the names of those employees the SBs recommended for MSIs would be forwarded to the Director General (DG) "for approval of the MSI's conferral." The Precepts established that the only grounds for the DG to disapprove an MSI for a recommended employee were the same limited grounds for disapproving a recommended promotion, such as "issues of loyalty, security, misconduct," etc.

We also looked to the parties' past practice concerning awarding MSIs, and found that it supported AFSA's claim that the Department had consistently over the years awarded MSIs to all employees recommended by SBs for MSIs up to the 10% limit. Finally, we rejected the Department's claim that it had a management right under Section 1005 of the FSA, 22 U.S.C. § 4105(a), to determine its budget, and that preventing it from refusing to pay any MSIs in 2013 interfered with its ability to exercise that right.

The parties offer various arguments about the applicability of these rulings in FSGB Case No. 2014-028 to the present case. However, certain events occurring during the course of the parties' collective bargaining negotiations on the 2014 MSI Precepts, which events did not occur

during the bargaining on the 2013 Precepts, lead us to reach a different result than we did as to the 2013 Precepts.

Specifically, the record of this case reflects that after several months of bargaining the Department's chief negotiator, Steven J. Polson, at a bargaining session on May 21, 2014, informed AFSA representatives that the Department was proposing to de-link MSIs from the SB process and transfer the responsibility for awarding MSIs to the various bureaus in the Department. The Department also informed AFSA that the number of MSIs in 2014 would be capped at 2.5% of the annual pool of eligible FS personnel.

AFSA, however, objected to the Department's de-linking proposal, asserting that it came too late in the bargaining process and was contrary to negotiated ground rules for bargaining. As a result, Mr. Polson sent a letter to AFSA State Vice President Matthew Asada dated May 28, 2014. In this letter Mr. Polson said that in light of AFSA's objections to the de-linking proposal, the Department would continue to use the SB rankings as the basis for granting MSIs, and would look to pursue the de-linking proposal with AFSA in the future. Mr. Polson indicated that for the 2014 SBs the Department would agree to use the 2013 MSI Precept language. However, Mr. Polson's letter made clear that the Department intended to adhere to the 2.5% cap on the number of MSIs to be issued pursuant to the 2013 language, and that this was "not a proposal." Polson said that the 2.5% cap "comports with the 2013 Precepts language," which set the 10% limit for MSIs. Further, he said that "it is Management's right to make a policy determination in light of budgetary needs and fiscal constraints."

Mr. Asada, in an e-mail dated May 30, 2014, said that AFSA confirmed that as the parties further discussed the MSI issue "long-term," the SBs would "continue to confer MSIs as per past practice." Further, he said that due to the budget sequestration situation that was in effect in

2013, and the special language that the parties agreed to in addressing that situation in the 2013 Precepts, it would be inappropriate to use the 2013 language. He went on to say that AFSA was "prepared to agree to 2014 procedural precepts as negotiated . . . with the inclusion of the uncontested 2012 MSI language."

Mr. Polson responded to the Asada e-mail with an e-mail of his own dated June 2, 2014. In it Polson said that "[w]e are pleased to adhere to the terms of the agreement including the 2012 language governing conferral of MSIs." Further, he signed a copy of the agreement using the 2012 Precepts language and attached it to the e-mail. AFSA signed the agreement the next day. The Department's Director General approved the agreement on June 4, 2014.

We find that Mr. Polson's May 28, 2014, letter to Mr. Asada constitutes a declaration of non-negotiability as to AFSA's proposal that MSIs must be awarded to all employees recommended by SBs for an MSI up to a maximum of 10% of the members in a competition group. In this regard, the Polson letter clearly states that the Department's intention to restrict the number of MSIs to 2.5% of the Foreign Service population was "not a [bargaining] proposal," but was rather an exercise of the Department's "Management[] right to make a policy determination in light of budgetary needs and fiscal constraints." In other words, the Department was stating that its duty to bargain in good faith did not extend to AFSA's proposal because the proposal was inconsistent with law, in particular Section 1005(a)(1) of the FSA, 22 U.S.C. § 4105(a)(1).[8]

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[8] Section 4105(a)(1) states in relevant part:

> (a) . . . nothing in this subchapter [which deals with labor-management relations and the duty to bargain in good faith in the Foreign Service] shall affect the authority of any management official of the Department, in accordance with applicable law –
>
> (1) to determine the . . . budget . . . of the Department.

Section 1007(a)(3) of the FSA, 22 U.S.C. § 4107(a)(3), assigns sole responsibility for resolving such negotiability disputes to the FSLRB.[9] The FSLRB has issued regulations governing its disposition of these disputes. 22 CFR §§ 1424.1 *et seq.* Pursuant to these regulations, an exclusive representative, like AFSA, has 15 days from the date of the Department's declaration of non-negotiability to file a petition with the FSLRB for review of the Department's declaration. 22 CFR § 1424.3. The FSLRB will then issue a decision ruling on whether or not the disputed bargaining proposal is within the duty to bargain. If it finds that the proposal is negotiable as consistent with law, the FSLRB will issue an order that the Department bargain on the proposal. 22 CFR § 1424.10. If the FSLRB finds the proposal is inconsistent with law, it will dismiss the petition.

In the present case AFSA did not avail itself of this opportunity to challenge the Department's declaration of non-negotiability. Rather, it agreed to the language used in the 2012 MSI Precepts as a result of the bargaining history set out above. It appears that AFSA was of the view that by agreeing to the 2012 Precepts language, it was also incorporating the parties' practices and understandings of past years that accompanied that Precepts language. We find this supposition on AFSA's part, in the face of the Department's very clear statement that it now viewed AFSA's understanding of the 2012 Precepts language to violate the Department's management right to determine its budget, as mistaken. In short, the legal terrain for negotiations on the 2014 MSI Precepts changed dramatically over what it had been in past years with the May 28 Polson letter.

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[9] Section 4107(a)(3) states in relevant part:

(a) General Provisions

The Board shall –

* * * * * *

(3) resolve issues relating to the duty to bargain in good faith.

In our view it was incumbent on AFSA, if it wanted to be able to negotiate on the 2012 Precepts language as it intended the language to operate in the 2014 Precepts, to file a negotiability petition with the FSLRB.[10] It is only the FSLRB that can rule on negotiability issues like the one the Department raised in this case, not this Grievance Board. In this connection, as the FSLRB has recognized,[11] Section 1007(b) of the FSA, 22 U.S.C. § 4107(b), requires that FSLRB decisions must be consistent with decisions of the Federal Labor Relations Authority (FLRA), which governs executive branch labor-management relations in the Civil Service. The FLRA has held that only it, and not arbitrators (which is the role the Grievance Board fulfills in implementation disputes), can resolve negotiability disputes that arise during collective bargaining. *See U.S. Dep't of Veterans Affairs, Medical Ctr., Marion, Ill. and American Fed'n of Gov't Employees, Local 1020*, 50 FLRA 105 at n.3 (January 25, 1995); *Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base and American Fed'n of Gov't Employees, Council of Locals No. 214*, 18 FLRA 710 (June 21, 1985). We see no compelling reason to decline to apply that ruling under the FSA.

We recognize that in our decision in FSGB Case No. 2014-028, involving the 2013 MSI Precepts, we did address the merits of the Department's assertion that construing the 2013 MSI Precepts to mandate awarding MSIs violated the Department's right to determine its budget under 22 U.S.C. § 4105(a)(1). We held that the Department had not established on the record of that case that its statutory budget right had been interfered with. However, the Department there

[10] Under Section 1424.5 of the FSLRB's rules, 22 CFR § 1424.5, AFSA may also have had the option to raise the negotiability dispute in an unfair labor practice proceeding before the FSLRB. Further, AFSA had the option of revising its proposal language to address the Department's management right concerns and, in the event that a bargaining impasse was reached on a revised proposal, submitting the matter to the Foreign Service Impasse Disputes Panel under 22 U.S.C. § 4110.

[11] *See American Fed'n of Gov't Employees, Local 1812 and U.S. Information Agency*, FSLRB Case No. FS-AR-2 (July 19, 1988) at 3.

first raised the claim to us in responding to AFSA's complaint regarding the Department's denial of its implementation dispute, after negotiations had been completed and the Precepts were in effect as a binding collective bargaining agreement. The FLRA has ruled that an arbitrator properly rules on the lawfulness of the agreement provision at issue in that situation because bargaining has been completed and a negotiability dispute therefore cannot be brought before the FLRA. *U.S. Environmental Protection Agency and American Fed'n of Gov't Employees Council*, *238*, 65 FLRA 113 (September 29, 2010). In the present case, by contrast, the Department raised its management rights claim during negotiations before agreement was reached, so the negotiability dispute could have been raised to the FSLRB.

When the Department made its non-negotiability allegation in the May 28 Polson letter, its practical effect was to end the bargaining process at that point on the part of the MSI Precepts concerning the number of MSIs to be awarded up to the 10% maximum, and only subsequent actions by the parties to resolve this negotiability issue could revive the process as to the number of MSIs to be awarded. AFSA had a choice: it could either petition for FSLRB review of that determination; or it could agree to the Department's statement of intent as to what the Precepts language meant, that is, that the Department had sole and exclusive discretion pursuant to its management right to decide how many MSIs would be awarded up to the stated limit in the Precept.

As AFSA did not pursue the former, we must conclude the latter. That is, AFSA chose to revive the bargaining process as to the part of the Precept concerning the number of MSIs to be awarded by agreeing to the Department's view of how the number of MSIs to be awarded for the year would be determined, thus taking the issue of the legality of AFSA's interpretation of the Precepts language off the table. For us to conclude otherwise would allow for an unlawful result,

namely, that a bargaining proposal challenged by the Department during the negotiations as contrary to law would be included in the Precepts, without having the legality issue authoritatively resolved. As a matter of public policy, this is not a result we can countenance. *See* Elkouri, *supra*, at 9-44 to 9-45 (when two interpretations of agreement language are possible, one making the agreement valid and the other making it unlawful, the former will be chosen). Our conclusion on this point is further supported by the fact that AFSA showed itself during bargaining to be well aware of the availability of the FSLRB negotiability appeal process, as it referenced this process in its May 23, 2014, letter responding to the Department's May 21 proposal. This fact demonstrates to us that AFSA made a conscious decision not to pursue a negotiability appeal with the FSLRB.

In sum, we interpret the 2014 MSI Precepts as granting the Department sole and exclusive discretion to decide how many MSIs would be awarded for 2014, up to the stated limit in the Precept. It therefore did not breach its contractual obligations under the 2014 Precepts when it decided to award MSIs to less than the 10% maximum number of awards referenced in the Precept.

It may be said that there is an apparent incongruity in our reaching this result. On the one hand, the language in the 2014 MSI Precepts is virtually identical to the 2012 Precepts and the portion of the 2013 Precepts other than their language specially aimed at the 2013 budget sequestration situation. In FSGB Case No. 2014-028 we said at pages 16-17 that this language, which we found to be ambiguous, "strongly suggests" that MSIs will be awarded to all those recommended by the SBs up to the 10% maximum. Yet in the present case, on this same language, we reach a different result.

This seeming incongruity is a product of the vagueness and ambiguity created by the language the parties have chosen to deal with the issue of how many MSIs will be awarded each year, up to the 10% maximum. The MSI Precepts language is clear on one thing: that the maximum number of MSIs to be awarded each year will be "no more than ten percent of members in a competition group." The Precepts are silent, however, as to how the specific number of awards below the maximum is to be determined. They do not expressly say (although as we have previously said, they do "strongly suggest") that it will be all employees recommended by SBs up to the 10% maximum, as AFSA claims; nor do they expressly say that the Department has the sole and exclusive discretion to decide how many MSIs below the maximum will be awarded, as the Department contends. Accordingly, it is our view that the express language of the Precepts can accommodate either interpretation, depending on factors outside of the plain language itself.

We have already explained how the factors associated with the 2014 negotiations, in particular the Department's declaration of non-negotiability, lead us to adopt the Department's view of how the Precepts would work in 2014. Our adoption of AFSA's view of the language in FSGB Case No. 2014-028 was premised largely on the practice of the parties over a number of years under the same language, or language very close to the 2013 Precepts language. However, the Department in the present case clearly and unequivocally stated that it was no longer willing to be bound by that past practice in 2014. As we noted in our decision in FSGB Case No. 2014-028, in order for a past practice to be held to establish a binding condition of employment it must, among other things, be accepted by both parties. While the record in FSGB Case No. 2014-028 showed that the Department did not dispute the applicability of the past practice in that

case, it has certainly done so here. Accordingly, we find that the past practice we relied on in FSGB Case No. 2014-028 does not govern in the present case.

We do not believe that the Department, in Mr. Polson's June 2 e-mail to Mr. Asada, agreed to rescind its May 28 declaration of non-negotiability and revert to the past practice we found to have been in effect prior to 2014, that is, to grant MSIs to all qualified employees up to the 10% maximum. To review the relevant bargaining history, Mr. Polson specified in his May 28 letter that the Department had the unilateral management right to set the number of MSI recipients below the 10% limit, and that the 2014 SBs would use the 2013 Precepts language to govern MSIs for 2014.

Mr. Asada responded to the Polson letter in a May 30 e-mail. Among other things, he said that: 1) AFSA acknowledged that "as we further discuss this item [apparently the Precepts provision on MSIs] long-term the selection boards will continue to confer MSIs as per past practice"; and 2) in light of the fact that the 2013 Precepts contained language unique to the budget sequestration of 2013, AFSA was "prepared to agree to 2014 procedural precepts as negotiated (Note one comment in attached) with the inclusion of the uncontested 2012 MSI language."[12] On June 2 Mr. Polson replied by e-mail to the May 30 Asada e-mail, saying "[w]e are pleased to adhere to the terms of this agreement including the 2012 language governing conferral of MSIs."

Based on this record we conclude that the only thing the Department agreed to in its June 2 e-mail was to use the 2012 Precepts language, which was identical in all respects to the 2013 Precepts language on MSIs except for the added language in the Note section that was engendered by the 2013 budget sequester. It said nothing about rescinding its management right

[12] The comment noted concerned the Precepts provision entitled "Low Ranking and Referral to a Performance Standards Board (PSB)," a matter not at issue in this case.

determination, nor did it express any agreement to revert to AFSA's asserted past practice of granting MSIs to all qualified employees up to the 10% maximum.

Mr. Asada's reference in his May 30 e-mail to the 2014 SBs (as opposed to the bureaus per the Department's earlier proposal) conferring MSIs "as per past practice" does not change our conclusion. That reference to past practice is most reasonably read as applying only to the SBs versus the bureaus as the organizational entity to recommend MSIs, and not to the past practice of how many MSIs will be awarded. Indeed, the Asada e-mail's reference to past practice is in a one-sentence paragraph devoted only to the agreement to continue using SBs, and not the bureaus, as the recommending authorities for MSIs in 2014. Finally, the Asada e-mail says nothing about counter-proposing to the Department that it rescind its non-negotiability determination and revert to the past practice that AFSA had argued governed determining how many MSIs would be awarded each year.

In short, we find that this bargaining history is far too thin a reed to support the conclusion that the Department, by agreeing to AFSA's suggestion to use the 2012 as opposed to the 2013 Precepts language, was agreeing to rescind in its entirety its previous position as set out in the Polson letter of May 28.

Further, we find that the Department made it known to AFSA that it no longer intended to be bound by any past practice concerning awarding MSIs that existed prior to 2014. The FLRA has long held that agency management may not unilaterally terminate a past practice without first notifying the union of its intent to change, and giving it an opportunity to bargain on the matter. *E.g., Scott Air Force Base and NAGE*, 5 FLRA 9 (1981); and *NTEU Chap. 83 and IRS*, 64 FLRA 723 (2010). We find that the Department satisfied these conditions for

terminating the past practice we previously recognized concerning how many MSIs would be awarded each year.

The Department certainly notified AFSA in the context of ongoing negotiations that it did not intend to follow a practice that failed to accord it the unilateral discretion to determine the number of MSIs to be awarded up to the 10% maximum. Further, AFSA had the opportunity to bargain on the Department's newly declared position. To be sure, the Department made clear that its declared intent to exercise its alleged management right by awarding less than the maximum number of MSIs established in the Precepts was "not a proposal." However, AFSA could have revised its proposal to the Department in an attempt to accommodate the Department's management right concern. Had it done so, the Department would have been required to respond to the revised proposal. Also, as we detailed above, AFSA had the option of going to the FSLRB to obtain review of the Department's management right claim. Had the FSLRB agreed with AFSA that the Department's position was without merit, AFSA would have been able to return to the bargaining table to negotiate further on the matter.

In light of these facts, we find that the Department in the May 28 Polson letter departed from its past practice concerning the number of MSIs to be awarded each year in a manner consistent with the requirements established by the FLRA. The fact that AFSA chose not to avail itself of the avenues available to it in responding to the Department's bargaining position does not alter our holding on this point.

Finally, we note that the record of this case reflects that both AFSA and the Department were concerned about whether they would be able to conclude their negotiations on the MSI Precepts in time for their use by the 2014 SBs. The SBs were scheduled to begin their meetings

later in June 2014. The parties therefore were understandably eager to conclude their negotiations quickly.

This consideration does not, however, change our view of the case. It is commonplace in federal sector collective bargaining that a negotiability dispute as to a particular proposal remains pending after the parties have completed their bargaining on other proposals whose negotiability is not challenged. The parties execute their agreement containing the other agreed-to proposals and await a decision from the appropriate forum on the negotiability of the challenged proposal. If the challenged proposal is found to be a lawful bargaining subject, the parties bargain on the proposal and the results are incorporated into the existing agreement, usually with retroactive effect if appropriate. This practice seems adequate to allow for AFSA to have filed a negotiability appeal with the FSLRB while still protecting the interests of bargaining unit employees.

V. DECISION

AFSA has failed to establish by preponderant evidence that its complaint should be sustained. We therefore dismiss the complaint.

For the Foreign Service Grievance Board:

William E. Persina
Presiding Member

Jeanne L. Schulz
Member

William B. Nance
Member