

### **Bargaining on Nonappropriated Fund Issues**

#### **Purpose**

The purpose of this guide is to provide a summary of various negotiability decisions by the Federal Labor Relations Authority (FLRA) and negotiation impasse decisions by the Federal Service Impasses Panel (FSIP or Panel) applicable to negotiations in the Nonappropriated Fund (NAF) arena. While many of these decisions include proposals on other matters, we have intentionally limited this guide to only those proposals that concern issues unique to the NAF community. Our discussion on FSIP decisions is further limited to concern only those proposals on NAF unique issues that the FSIP actually ordered union and management to adopt new contract language.

This guide is as comprehensive as we can make it and we intend to update it as significant new decisions and rulings are made that impact on NAF bargaining. However, you may have questions that are not clearly addressed by the cases described in this guide. If so, please call Field Advisory Services Labor Relations and we will assist you with your specific question or problem. As always, any negotiations or impasse issues should also be coordinated with your respective Component's NAF headquarters.

#### **Background**

Under 5 USC Chapter 7117(a)(1), if a matter is specifically provided for by law or government-wide rule or regulation, any proposal that conflicts with such law or government-wide rule or regulation would be considered nonnegotiable. However, NAF personnel matters are, for the most part, provided for by agency regulations, such as DOD 1401.1-M, not law or government-wide rules or regulations. There are exceptions, such as laws and government-wide regulations covering NAF blue collar pay, EEO, safety, workers' compensation, labor relations, and health benefits. For those matters covered by agency regulations, these regulations generally do not bar negotiations on NAF issues unless a compelling need exists for the agency regulation. Under 5 USC 7117(a)(2), a matter may be outside the duty to bargain if it conflicts with an agency regulation for which a compelling need exists.

Under 5 CFR 2424.50, compelling need exists when the rule or regulation (a) is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirement of an effective and efficient government; (b) is necessary to ensure the maintenance of the basic merit principles; and/or (c) implements a mandate to the agency or primary national subdivision under law or outside authority, which implementation is essentially nondiscretionary in nature. These criteria establish standards that are very difficult to meet.

While not necessarily included in this guide, we would like to make you aware of case law that concerns employees in other pay systems not established by statute. Wages and benefits for employees in such agencies including, but not limited to, the Department of Defense Domestic Dependents' Elementary and Secondary Schools or the Bureau of Engraving and Printing are not specifically provided for by statute. Therefore, you are not limited to the decisions provided in this guide. Negotiability and impasse decisions for other agencies may provide you additional information to assist you in responding to union proposals on wages and benefits. However, for the purpose of this guide, we are emphasizing decisions involving NAF organizations.

## **NEGOTIABILITY DECISIONS**

### **SUPREME COURT**

There is one significant Supreme Court decision that supports most of the FLRA decisions in this guide. In Fort Stewart Schools v. FLRA, 110 S.Ct. 2043 (1990), the Supreme Court found that proposals concerning pay and fringe benefits are negotiable conditions of employment in circumstances where pay and fringe benefits are not specifically provided for by statute.

### **EXCUSED ABSENCES / HOLIDAYS**

In SEIU, Local 556 and Fort Shafter, 26 FLRA No. 47 (1987), the FLRA ruled a proposal negotiable which provided that excused absence be granted to regularly scheduled intermittent employees for purposes of jury duty, military duty or during periods of shutdown. The proposal concerned a condition of employment and the agency failed to demonstrate a compelling need for its regulation (proposal 6). As part of a consolidated appeal, the Ninth Circuit Court of Appeals remanded the case to the FLRA to revisit the issue of compelling need for the agency regulation. See Navy Exchange, Pearl Harbor and

FLRA, 841 F.2d 1128 (9th Cir. 1988). On remand, the FLRA reaffirmed its previous decision in 26 FLRA No. 47. See SEIU, Local 556 and Fort Shafter, 37 FLRA No. 21 (1990) (proposal 4).

In another decision, a proposal was found negotiable which mandated the holidays that will be observed, including the employee's birthday. The Authority found that negotiation of proposals relating to pay and benefits are negotiable if 1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and 2) the proposals are not otherwise inconsistent with law, government-wide rule or regulation; and 3) the agency failed to demonstrate compelling need for its regulation. See SEIU, Local 556 and Fort Shafter, 29 FLRA No. 124 (1987) (proposal 2). This decision was affirmed on appeal to the 9th Circuit Court of Appeals. See Fort Shafter and FLRA, 914 F.2d 1291 (9th Cir. 1990).

## **FOOD SERVICES**

In AFGE, Local 2670 and AAFES, 10 FLRA No. 19 (1982), the FLRA ruled proposals negotiable, which increased the value of free meals provided to NAF employees. The Authority found that the proposals did not interfere with the agency's right to determine its budget as the proposals did not prescribe a particular program or operation to be included in the agency's budget and did not prescribe a particular amount to be allocated in the budget. The agency failed to demonstrate that the proposals would result in a significant and unavoidable increase in costs and failed to demonstrate that the increased costs would not be offset by compensating benefits. Finally, the agency failed to demonstrate a compelling need for its regulation (proposals 1 and 2).

## **INSURANCE**

The Department of Defense Nonappropriated Fund Health Benefits Program (HBP) was implemented January 1, 2000. The DoD NAF HBP complies with Section 349 of the National Defense Authorization Act for Fiscal Year 1995, Public Law 103-337, October 5, 1994. This law requires that DoD provide a uniform health benefits program for DoD NAF employees. Consistent with the statutory mandate for uniformity, NAF employers have no authority to offer any other health benefits plans, provisions, or policy other than as provided by the DoD NAF HBP. With this in mind, most NAF health insurance provisions are now non-discretionary. If you receive any proposals related to health insurance benefits, contact the FAS Labor Relations Team for a negotiability determination.

## **LEAVE**

In SEIU, Local 556 and Fort Shafter, 26 FLRA No. 47 (1987), the FLRA found five proposals to be negotiable, as they concerned a condition of employment and the agency failed to demonstrate a compelling need for its regulation. Two proposals provided that regularly scheduled intermittent employees would accrue sick leave at the rate of five percent of the total basic workweek (proposals 1 and 2). Two more proposals required allowing regularly scheduled intermittent employees to earn annual leave depending on the employee's length of service (proposals 3 and 4). And, a final proposal allowed regularly scheduled intermittent male employees to request annual leave and/or leave without pay for paternity reasons (proposal 5).

As part of a consolidated appeal, the Ninth Circuit Court of Appeals remanded 26 FLRA No. 47 to the FLRA to revisit the issue of compelling need for the agency regulation. See, Navy Exchange, Pearl Harbor and FLRA, 841 F.2d 1128 (9th Cir. 1988). On remand, the FLRA reaffirmed its previous decision. See, SEIU, Local 556 and Marine Corps Exchange, Kaneohe Bay/Fort Shafter, 37 FLRA No. 21 (1990).

In another decision, the FLRA determined that proposals are negotiable which provide court leave and funeral leave to employees. The proposals concerned employees' conditions of employment and the agency failed to demonstrate a compelling need for its regulation. See AFGE, Local 1786 and Marine Corps Exchange, Henderson Hall, 26 FLRA No. 54 (1987) (proposals 3, 4 and 5).

The FLRA ruled a proposal as negotiable which provided that when employees change grades for whatever reason, their total hours of accrued annual leave will not be changed. The Authority found the proposal concerned a condition of employment and the agency failed to demonstrate a compelling need for its regulation. See NAGE, Local R7-23 and Scott Air Force Base, 26 FLRA No. 106 (1987) (proposal 1).

A proposal was negotiable which established the maximum amount of accumulated vacation leave that may be carried over from one leave year to the next. The proposal concerned a condition of employment and the agency failed to demonstrate a compelling need for its regulation. See AFGE, Local 2317 and Marine Corps, Albany, 29 FLRA No. 126 (1987) (proposal 4).

Finally, the FLRA determined a proposal negotiable that required the agency to reimburse employees for any loss of funds incurred as a result of the cancellation of leave by the agency. The proposal concerned a condition of employment and was not

inconsistent with law, rule or regulation. To the extent that such funds required by the proposal need not be derived from appropriated funds, the proposal was negotiable. See NAGE, Local R4-26 and Langley Air Force Base, 40 FLRA No. 15 (1991) (proposal 1).

## **MILITARY CHILD CARE ACT**

A proposal was partially negotiable and partially nonnegotiable which required the employer to provide free childcare services for unit employees' children when the employees were in a duty status. To the extent that the proposal concerned free childcare services for children at centers that did not provide services for members of the Armed Forces, the proposal was negotiable. However, to the extent that the proposal required free childcare services at centers that did provide services to members of the Armed Forces, it was inconsistent with the Military Child Care Act of 1989 and outside the duty to bargain. See NAGE, Local R4-26 and Langley Air Force Base, 40 FLRA No. 15 (1991) (proposal 4).

A proposal was negotiable which provided that conversion of current childcare employees to positions in the new childcare grade system be based solely on performance and experience. The proposal was consistent with the Military Child Care Act of 1989. The agency argued that the proposal also interfered with management's right to make selections for appointment under 5 USC 7106(a)(2)(C). However, the Authority noted that there was insufficient evidence in the record to determine whether the proposal interfered with the agency's right to make selections for appointment. See NAGE, Local R4-6 and Fort Eustis, 42 FLRA No. 46 (1991) (proposal 1).

Another proposal in 42 FLRA No. 46 was ruled negotiable which provided that employees would be converted to the new childcare system without competition. The proposal was consistent with the Military Child Care Act of 1989. The agency argued that the proposal also interfered with management's right to make selections for appointment under 5 USC 7106(a)(2)(C). However, the Authority noted there was insufficient evidence in the record to determine whether the proposal interferes with the agency's right to make selections for appointment (proposal 6).

In 42 FLRA No.46, the union also proposed that child development center employees would receive a fifty percent discount on the fee normally charged the employee for child care services when the services are provided by the center during the employees' duty hours. The proposal conflicted with the Military Child Care Act of 1989 as the proposal concerned a childcare center that provided services for members of the Armed Forces (proposal 8).

Finally, the FLRA ruled negotiable in 42 FLRA No. 46 a proposal that required specific step increases within a pay band based on an employee's annual performance rating. The proposal was consistent with the childcare pay schedule of the Military Child Care Act of 1989 and did not interfere with the agency's right to determine its budget (proposal 13).

## **PART-TIME EMPLOYEES**

A proposal was negotiable which required that part-time employees be utilized only when it was not practical or prudent to use full-time employees. The FLRA found that the proposal established a general, nonquantitative contractual requirement by which management's use of part-time employees could be evaluated in a grievance filed by a full-time employee who believed he or she had been adversely affected by the agency action. See AFGE, Local 987 and Air Force, AFLC, 8 FLRA No. 116 (1982) (proposal 1). This decision was overturned on appeal to the Eleventh Circuit Court of Appeals. The Court ruled that the union proposal was determinative of numbers of employees assigned to an organizational unit and, thus not bargainable. See Air Force, AFLC and FLRA, 727 F.2d 1502 (11th Cir. 1984).

## **PROBATIONARY EMPLOYEES**

A proposal was partially nonnegotiable and partially negotiable. Specifically, the proposal allowed probationary employees to grieve terminations. Since the probationary period, including summary termination, constitutes an essential element of the agency's right to hire under 5 USC 7106(a)(2)(A), the proposal was nonnegotiable. The proposal also allowed intermittent employees to grieve terminations. Since the agency failed to establish that intermittent employees served probationary periods, this part of the proposal was negotiable. See SEIU, Local 556 and Marine Corps Exchange, Kaneohe Bay, 26 FLRA No. 95 (1987).

In SEIU, Local 556 and Fort Shafter, 29 FLRA No. 124 (1987), a proposal was nonnegotiable which provided that the probationary period for regular full-time and regular part-time employees 1) would not apply to employees who served at least six months in an intermittent position prior to their conversion to regular full-time or part-time; and 2) would be offset by the amount of time actually served by an intermittent who served fewer than six months. The proposal conflicted with an agency regulation that had a compelling need. Specifically, the agency regulation had a compelling need because the probationary period

is an essential part of the hiring process and necessary for an effective and efficient service (proposal 4).

A proposal was nonnegotiable which required the agency to give probationary employees counseling and written guidance concerning their performance deficiencies in order to bring their performance to an acceptable level. The proposal would eliminate the agency's ability to exercise its right to summarily terminate probationary employees by requiring the agency to provide procedural protections prior to completion of the probationary period. The proposal excessively interfered with management's right to hire employees under 5 USC 7106(a)(2)(A) as the hiring process for probationary employees is not complete until management has decided whether to retain such employees on a permanent basis. The right to summarily terminate a probationary employee constitutes an element of management's right to hire. See AFGE, Local 1625 and Oceana Naval Air Station, 31 FLRA No 117 (1988) (proposal 2).

#### **REDUCTION IN FORCE / BUSINESS-BASED ACTIONS / TERMINATIONS**

A proposal was nonnegotiable which attempted to provide NAF employees with an option to contest performance based separations for cause through either the agency's internal regulatory appeals procedure or through the negotiated grievance procedure, which covered such matters. Since the agency's internal regulatory appeals procedure is not established by law, challenges to performance based separations for cause of NAF employees are required by 5 USC 7121(a)(1) to be processed exclusively through the negotiated grievance procedure which covered such matters. See AFGE, Local 1799 and Aberdeen Proving Ground, 22 FLRA No. 62 (1986) (proposal 1).

The FLRA ruled negotiable a proposal requiring reduction in force principles be applied whenever an employee was scheduled for separation or downgrade through no fault of his/her own. Contrary to the agency's arguments, the proposal did not conflict with the agency's right to assign and layoff employees. In addition, the agency failed to demonstrate a compelling need for the agency regulation. See NAGE, Local R7-23 and Scott Air Force Base, 26 FLRA No. 106 (1987) (proposal 2).

Proposals are nonnegotiable which established criteria for determining the order by which nonappropriated fund employees would be retained in those positions not eliminated in a reduction in force or business-based action. The proposals interfered with the agency's right to layoff employees under 5 USC 7106(a)(2)(A). See SEIU, Local 556 and Fort Shafter, 29 FLRA No. 124 (proposals 5, 6 and 7).

A proposal was negotiable which allowed intermittent and temporary nonappropriated fund employees to contest terminations for cause through the negotiated grievance procedure. NAGE, Local R5-82 and Navy Exchange, Naval Air Station, 43 FLRA No. 2 (1991) (proposal 6).

## **SHOPPING PRIVILEGES**

A proposal was negotiable that provided shopping privileges at the base exchange for all nonappropriated fund employees. The proposal 1) concerned a condition of employment; 2) did not interfere with the agency's right to determine its mission under 5 USC 7106(a)(1); and 3) the agency failed to demonstrate a compelling need for its regulation. SEIU, Local 556 and Marine Corps Air Station, Kaneohe Bay, 49 FLRA No. 114 (1994). For a related negotiability case, see NAGE, Local R1-100 and Navy Branch Exchange Store, U.S. Naval Submarine Base, Groton, 46 FLRA No. 48 (1992). For a related unfair labor practice case on shopping privileges, see Eielson Air Force Base and AFGE, Local 1836, 23 FLRA No. 83 (1986).

In determining whether exchange privileges are a matter related to employees' conditions of employment, the Authority considers the circumstances of each case and determines whether factors exist that establish a connection between access to a base exchange and employees' work situations. With this in mind, shopping privileges may not be considered a condition of employment in all instances. If you receive similar proposals, contact the FAS Labor Relations Team for assistance.

## **TOURS-OF-DUTY**

A proposal was partially negotiable and partially nonnegotiable which precluded management from changing employees' tours of duty to work on holidays to avoid payment of overtime. To the extent the proposal applied to employees who are subject to 5 CFR 610.121 (i.e., Crafts and Trades) (see 5 CFR 610.101 and 5 USC 5342(a)(2)(B)), the proposal was nonnegotiable for being inconsistent with a government-wide regulation. To the extent the proposal applied to employees who are not subject to 5 CFR 610.121, the proposal was negotiable as an appropriate arrangement under 5 USC 7106(b)(3). See, NAGE, Local R14-52 and Red River Army Depot, 44 FLRA No. 61 (1992) (proposal 2).

## WAGES

Consistent with the Supreme Court decision in Fort Stewart Schools v. FLRA, 110 S.Ct. 2043 (1990), the FLRA determines proposals concerning wages to be negotiable conditions of employment in circumstances where such wages are not specifically provided for by statute.

A proposal was negotiable which limited the amount of tip offset for tipped employees who earned more than thirty dollars per month to be not more than ten percent of the minimum wage. The proposal was consistent with the Fair Labor Standards Act as the agency was left with the discretion to determine the tip offset percentage. Contrary to the agency's position, the FLRA did not find the provision inconsistent with the prevailing rate statute. See, AFGE, Local 987 and Air Force, AFLC, 8 FLRA No. 116 (1982) (proposal 2).

A proposal was nonnegotiable that mandated that the commission rate paid to AAFES mechanics not be reduced from sixty percent to forty percent, but remain at sixty percent. The Authority found that the prevailing rate statute established mechanics' wages. See AFGE and AAFES, 32 FLRA No. 86 (1988). The Authority overturned this decision in a later case. Specifically, the Authority determined, to the extent that AFGE and AAFES extends to all aspects of pay setting for prevailing rate employees, this decision was erroneous and the Authority will no longer follow this decision. (See later discussion concerning 50 FLRA No. 87)

In another decision, a proposal was negotiable which required that all employees receive a six percent wage increase every year for the next three years. The proposal: 1) involved a condition of employment; 2) did not interfere with the agency's right to determine its budget; and 3) was not barred from bargaining by an agency regulation that had a compelling need. See, NAGE, Local R4-26 and Langley Air Force Base, 40 FLRA No. 15 (1991) (proposal 3). However, to the extent that the proposal would affect employees covered under the Prevailing Rate Systems Act of 1972, the proposal conflicted with this statute and was nonnegotiable. As it related to prevailing rate employees, the Authority overturned this decision in a later case. Specifically, the Authority determined, to the extent that its decision in NAGE, Local R4-26 and Langley Air Force Base extends to all aspects of pay-setting for prevailing rate employees, this decision was erroneous and the Authority will no longer follow this decision. (See later discussion concerning 50 FLRA No. 87.)

In 40 FLRA No.15, the FLRA ruled a proposal nonnegotiable that mandated the agency charge its patrons a twenty percent surcharge on prices for services rendered at special functions. The proposal mandated that the surcharge be divided among the employees who perform work at these special functions. The proposal did not concern a condition of employment. Therefore, it was outside the duty to bargain. There was no direct connection between the prices the agency charges for its services and the work situation or employment relationship of the bargaining unit (proposal 5).

While the FLRA had ruled that all aspects of prevailing rate employees' wages were established by statute, and that, therefore, proposals to establish wages for prevailing rate employees were nonnegotiable, the FLRA backed away from this position in 1995. In its decision in IAM Lodge 2135 LIUNA, Locals 2, 24, 32 and Treasury, Bureau of Engraving, 50 FLRA No. 87 (1995), on remand from the D.C. Circuit Court of Appeals [see, Treasury, Bureau of Engraving and FLRA, 995 F.2d 301 (D.C. Cir. 1993)], the Authority concluded that, to the extent that the Authority's decisions in AAFES and Langley, *supra*, hold that all matters pertaining to wage rates for prevailing rate employees under 5 USC 5343 were specifically provided for by Federal statute, they were erroneous.

While the Authority noted in 50 FLRA No. 87 that some aspects of wage setting under 5343 may be specifically provided for by that statute, the Authority declined to say which aspect of wage setting is specifically provided for by statute. However, to the extent that AAFES and Langley, extend to all aspects of pay setting, the Authority decided that would no longer follow those decisions or others based on the same rationale. This suggests that some aspects of wage setting under 5343 may still be specifically provided by statute. However, there has been no decision on this matter since this case.

## **FEDERAL SERVICE IMPASSES PANEL DECISIONS**

In one case, the Union proposed that the agency maintain the practice of allowing NAF employees, who are on duty at the club, to eat any leftover food, free of charge, after the serving lines close. The agency proposed that employees be permitted to consume, free of charge, food that has been determined by management to be non-recyclable. In addition, the agency proposed that employees would be charged the raw food cost of food determined by management to be recyclable. The Panel ordered that management withdraw its proposal and continue the practice as proposed by the union. The Panel noted that the agency failed to support its proposal to change the practice and relatively few employees were affected. NAGE, Local R7-23 and Scott Air Force Base, 83 FSIP 30 (1983).

In another case, the union proposed that employees be offered an alternative opportunity to enroll in a Health Maintenance Organization (HMO), which the parties have agreed to be acceptable. The agency proposed that the Union initiate any solicitation for bids for an HMO to be presented through appropriate Air Force channels for approval. If approved, it would be made available to eligible employees. The agency noted that it was prohibited by agency regulation from soliciting bids for an HMO. The Panel adopted the union's proposal, as amended, to provide that only "eligible" employees are offered the HMO benefit. AFGE, Local 1857 and McClellan Air Force Base, 87 FSIP 39 (1988). The Panel declined to assert jurisdiction on other proposals that the agency asserted were nonnegotiable.<sup>1</sup>

In another decision by the Panel, the union proposed specific pay rates for Administrative Support (AS) contrary to the agency's policy of treating AS employees as prevailing rate employees by limiting wage increases to the same percentages awarded to General Schedule employees. The union's proposal amounted to a nineteen to twenty percent pay increase. The agency proposed that the status quo be maintained. The agency noted that the union has not demonstrated a need to change the existing policy and the union's proposal is not affordable. The Panel found that the union has demonstrated a need to change the agency policy due to the pay gap with comparable employees in the local area. However, the Panel found the union's proposed pay increase to be extreme and ordered the agency to increase pay rates by ten percent and maintain that rate through the life of the parties' collective bargaining agreement. AFGE, Local 2600 and Navy, Resale and Services Support Office, 91 FSIP 182 (1992).

In one case, the union proposed that the agency pay seventy percent of the costs of the employees' health insurance premiums. The agency proposed that the status quo of paying fifty percent be maintained. The Panel ordered the agency to pay sixty percent of

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<sup>1</sup> The Department of Defense Nonappropriated Fund Health Benefits Program (HBP) was implemented January 1, 2000. The DoD NAF HBP complies with Section 349 of the National Defense Authorization Act for Fiscal Year 1995, Public Law 103-337, October 5, 1994. This law requires DoD provide a uniform health benefits program for DoD NAF employees. Consistent with the statutory mandate for uniformity, NAF employers have no authority to offer any other health benefits plans, provisions, or policy other than as provided by the DoD NAF HBP. With this in mind, most NAF health insurance provisions are now non-discretionary. If you receive any proposals related to health insurance benefits, contact the FAS Labor Relations Team for a negotiability determination.

the employees' health insurance premiums. The Panel was not persuaded that a ten-percentage point increase in the agency's contribution would have an adverse impact on the agency's mission. NAGE, Local R4-6, SEIU and Fort Eustis, 91 FSIP 200 (1992).

The agency proposed that "bump-and-retreat" rights be eliminated from current reduction in force (RIF) / business-based action procedures. The agency asserted that this would eliminate the disruptive effect that current RIF procedures have on the organization. The union proposed that "current reduction in force procedures" be maintained, including the "bump-and-retreat" rights. The Panel adopted the union's proposal, as it was not persuaded that the agency demonstrated a need to eliminate "bump-and-retreat" rights for NAF employees. The Panel concluded the existing system protected the job security of senior employees. AFGE, Local 1858 and Redstone Arsenal Support Activity, 93 FSIP 37 (1993).

In another decision of the Panel, the union proposed mandatory minimum performance awards and annual bonuses be paid depending on length of service. The agency proposed that the decision to grant awards and the amounts to be provided be discretionary on management's part. The agency argued that the union's proposal was too costly. The Panel adopted a compromise provision of mandatory performance awards limited to employees who are rated outstanding and excellent, at lower percentages than the union's proposal, but higher than the expired agreement. The union was ordered to withdraw its proposal concerning annual bonuses. The union also proposed that the probationary period for all NAF employees be six months. The agency proposed that the probationary period for all regular employees be one year with credit applied from flexible service when the flexible appointment is converted to a regular appointment with no changes in duties and with no break in service. The Panel adopted the agency's proposal, as it would provide the Employer a better opportunity to evaluate a newly hired employee. NAGE, Local R5-160 and Fort Bragg, 96 FSIP 19 (1996).

In another Panel decision, the union proposed that employees receive mandatory annual performance awards in lump sum amounts that are based on a percentage of their salaries. The proposal called for percentages to vary depending on the actual rating received by the employee. The agency proposed that employees receive mandatory performance awards only if the agency met the higher-level command goal for net profit. Otherwise, if the goal were not met, then performance awards would be at the election of the agency. In arguing against the union proposal, the agency noted that nonappropriated fund instrumentalities are business operations that must generate funding to cover every expense and retain budgetary flexibility. Consequently, the Employer must be able to keep awards expenditures within its available budget resources. The Panel adopted a

compromise provision calling for mandatory performance awards for employees who receive ratings of very good or outstanding within the ranges prescribed by the union. The requirement for awards should, however, be subject to budgetary constraints and allow distinctions among employees based on the portion of the year they have been employed. The Panel also ordered wording, for the sake of clarity, identifying the basis for computing award amounts, i.e., base pay. The Panel noted that accommodation should be made for the Employer's need to meet fiscal contingencies. If the union believes that asserted budgetary constraints do not legitimately support Employer failure to provide awards within the specified ranges, it has recourse to third party review through the negotiated grievance procedure. NAGE, SEIU, Local R4-26 vs. USAF, Langley AFB, 98 FSIP 146 (1998).

## **CONCLUSION**

This guide only provides summaries. Before you rely on any of these cases to support a negotiability or impasses dispute at your activity, we urge you to review the entire decision to ensure that the case supports your position.

If you have any questions concerning this guide or any other NAF labor relations matter, please contact the Labor Team at (703) 696-6301, Team 3, or DSN 426-6301, Team 3. As always, any negotiations or impasse issues should also be coordinated with your respective Component NAF headquarters.

## **REFERENCES:**

- 5 USC Chapter 71, The Federal Service Labor-Management Relations Statute
- 5 CFR Part 2424, Expedited Review of Negotiability Issues
- 5 CFR Part 2470, Federal Service Impasses Panel
- DOD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (NOTE: NAF personnel policy will be moved, in phases from DoD 1401.1-M to Civilian Personnel Manual (CPM) Chapter 1400. Sections of DoD 1401.1-M will be canceled as they are updated and re-issued in CPM Chapter 1400. This phased approach will continue until DoD 1401.1-M is canceled in its entirety, having been fully replaced by CPM Chapter 1400. At the time of this Reference Guide's revision, CPM Subchapter 1408, "NAF Insurance and Annuities," is being readied for publication. A July 16, 1999, ASD(FMP) policy memorandum, subject "Implementation of Nonappropriated Fund Uniform Health Benefits Program," establishes the uniform benefit structure and provides a transitional premium sharing formula for calendar years 2000 – 2002.)