



September 16, 2003

Ms. Theresa Foster  
Acting Director, Division of Human Resources  
Policy and Programs  
5600 Fishers Lane  
Room 9-89  
Rockville, MD 20857

Re: National Grievance on PEP Changes

Dear Ms. Foster:

I am writing to you regarding earlier correspondence between a representative of FDA and NTEU's National Negotiator, Barbara Sheehy. NTEU and FDA disagree as to certain changes to employees' Performance Evaluation Plans (PEP) that the agency has unilaterally implemented. Pursuant to Article 45, Section 8.D of the FDA-NTEU collective bargaining agreement, NTEU alleges that the FDA has committed the following violations:

- 1) The agency has violated Article 30, Section 5.B of the FDA-NTEU collective bargaining agreement by failing to notify NTEU of the proposed changes;
- 2) The agency has committed an unfair labor practice by refusing to bargain with NTEU over these changes; and
- 3) The agency has violated 5 U.S.C. § 4302(b)(1).

The aforesaid violations are based on the following allegations. In August 2003, NTEU learned that beginning in or around July 2003, the agency started requiring employees to sign an addendum to their PEPs that incorporates the ten Department-wide Management Objectives. Those objectives enumerate several politically driven measures, including a commitment to complete public-private or direct conversion competition on not less than 15 percent of the full-time equivalent employees listed on the approved FAIR Act inventories. Additionally, FDA Centers have changed employees' PEPs to include a provision that the "employee is familiar with and effectively supports the requirements of the supervisor's performance contract as it applies to his/her specific responsibilities."

Article 30, Section 5.B of the FDA-NTEU collective bargaining agreement provides that the agency will notify NTEU and bargain (if requested and appropriate) over substantial changes in a performance plan that adversely impacts an employee. The requirement that employees endorse *ten* new objectives (each of which has *multiple* components) constitutes a substantial

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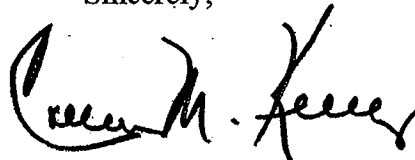
change in employees' performance plans. In addition, a requirement that employees "effectively support" their supervisor's performance is a substantial change. The agency never notified NTEU of these changes. By letter dated August 27, 2003, NTEU requested bargaining, which the agency refused on August 29, 2003. Accordingly, NTEU alleges a violation of Article 30, Section 5.B of the contract because of the agency's failure to notify and subsequently bargain.

On August 27, 2003, after learning about these changes from employees, NTEU requested a briefing and bargaining over the changes. By letter dated August 29, 2003, the agency indicated that it would not. It is an unfair labor practice for an agency to "refuse to consult or negotiate in good faith with a labor organization." 5 U.S.C. § 7116(a)(5). The agency has committed an unfair labor practice in failing to negotiate with the union regarding these changes.

Finally, 5 U.S.C. § 4302(b)(1) provides that performance standards must, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. The standard must therefore be sufficiently precise and specific as to invoke a general consensus as to its meaning and content and provide a benchmark toward which the employee may aim his/her performance. The new PEP addendum violates federal law. NTEU alleges that the agency has violated § 4302(b)(1).

By way of remedy, NTEU hereby demands that the agency restore the *status quo* with regards to employee PEPs and that the agency brief NTEU as to the proposed changes and bargain in accordance with law, rule, regulation, and applicable contract provisions. Please direct all future correspondence related to this matter to Barbara Sheehy, National Negotiator. Ms. Sheehy can be reached by telephone at 202.572.5500, ext. 7087, or via e-mail at [bsheehy@nteu.org](mailto:bsheehy@nteu.org).

Sincerely,



Colleen M. Kelley  
National President



**Office of Human Resources and Management Services**  
Office of Management and Systems

Food and Drug Administration

October 15, 2003

Ms. Colleen Kelley  
National President  
The National Treasury Employees Union  
1750 H Street, NW  
Washington, DC 20006-

Dear Ms. Kelley:

This is in further response to the National Treasury Employees Union's (NTEU) September 16 grievance, filed pursuant to Article 45, Section 8 D of the Food and Drug Administration (FDA)/NTEU Collective Bargaining Agreement (CBA).

Your grievance alleges that the FDA violated Article 30, Section 5 B of the CBA by failing to notify NTEU of proposed changes in employee performance plans; committed an unfair labor practice by refusing to bargain with NTEU over changes to performance plans; and violated 5 U.S.C. § 4302(b)(1) by imposing standards that lack sufficient precision and specificity.

After careful consideration, I must conclude that the facts do not support your grievance. I will begin with a brief review of the relevant provisions of the CBA and law that govern this matter. Article 30 of the FDA/NTEU CBA covers the matter of performance management, including performance appraisal, in great detail. Among other things, Article 30, Section 5 B provides for the FDA to notify NTEU and engage in negotiations only when changing a performance plan in a way that "... adversely impacts on an employee(s)." Section 6 of Article 30 provides that performance measures used in FDA performance plans shall be, to the extent possible, objective, explicit, observable or measurable, and attainable. Thus, Article 30, Section 6 restates the requirement of 5 U.S.C. § 4302 that agency performance appraisal systems, "... to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system."

Your grievance pertains to the action taken by the FDA to "cascade" the requirements of the performance contracts of senior leaders to rank and file employees. In other words, the grievance pertains to the agency's efforts to hold individual employees accountable for taking effective action, within their areas of responsibility, to accomplish the organizational objectives of the agency. The specific action taken by the FDA in this regard was to direct that the following statement be added as an "as evidenced by" statement to the appropriate performance measure in each employee's performance plan: "(E)mployee is familiar with and effectively supports the requirements of the supervisor's performance contract as it applies to his/her specific responsibilities."

With regard to your first allegation, I conclude that the FDA's action in this matter was fully consistent with Article 30 of the CBA. I particularly note that Section 2 of Article 30

specifically identifies improvement of employee and organizational performance as an objective of the performance management system. Further, the FDA's action is fully consistent with past practice within the agency. The FDA guidance on performance management, which is located on the FDA's OHRMS website and which has been used in conjunction with the CBA since before the agreement became effective in 1999, expressly calls for considering organizational goals and objectives when establishing performance plans. Thus, contrary to the allegation in your grievance, the requirement that employees effectively support their supervisors' performance (i.e., organizational goals) is a longstanding practice and does not constitute a change, much less a substantial one. Finally and most importantly, by almost any reasonable definition of the term, the addition to the performance plans at issue here resulted in no "adverse impact" on bargaining unit employees.<sup>1</sup> Rather, the added language was merely designed to ensure that employees' performance objectives were linked to relevant organizational objectives. I also note that the implementation instructions to managers in connection with this matter specified that only those objectives that were relevant to the work of each employee should be considered in the performance management process. In these circumstances, the action in question did not involve an obligation to notify NTEU and negotiate upon request pursuant to Article 30, Section 5B of the CBA.

Similarly, I conclude that the FDA's action in this matter did not constitute an unfair labor practice in violation of 5 U.S.C. § 7116(a)(5). The Federal Labor Relations Authority has held that, where a matter is "covered" by a collective bargaining agreement, there is no obligation to negotiate about that matter during the life of the agreement. *Social Security Administration and AFGE, National Council of Social Security Administration Filed Office Locals, Council 220*, 47 FLRA 1004 (1993). Since the change to performance plans at issue here was clearly "covered by" Article 30 and, since, as explained above, the FDA's action was consistent with Article 30, there was no duty to negotiate with NTEU concerning the matter.

Finally, I find no merit to NTEU's allegation that the change to performance plans at issue somehow violated 5 U.S.C. § 4302(b)(1). Section 4302(b)(1) requires that agency performance appraisal systems, among other things, ". . . to the maximum extent feasible, permit accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system." Contrary to the allegation contained in your grievance, the FDA did not require that employees sign an addendum to their performance plans that incorporates the ten Department-wide Management Objectives.<sup>2</sup> Rather,

<sup>1</sup> While the CBA contains no definition of adverse impact, the Merriam-Webster Dictionary defines adverse as "opposed to one's interests" or "causing harm." We maintain that a change such as that at issue here clearly does not rise to that level. Rather we believe that an example of what the CBA means by adverse impact can be found in the opinion of Arbitrator Ira Jaffe in his 2002 award involving the Bureau of Engraving and Printing, Western Currency Facility, Fort Worth, Texas and the Graphic Communications International Union, Local 4B, at 103 LRP 2489. In that case, Arbitrator Jaffe found that the changes to performance plans made by the agency had the *de facto* effect of significantly increasing productivity standards. Such a decision is clearly adverse, while a change such as that at issue here, which merely provides employees with more information regarding how to direct their efforts in performing currently assigned functions, is not.

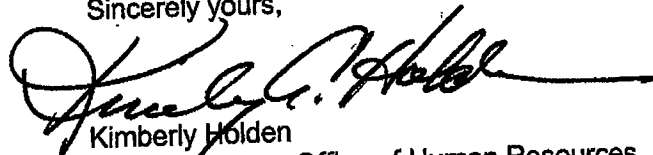
<sup>2</sup> Center and Office Directors were asked to certify that, as appropriate, employees' performance plans reflected Department of Health and Human Services (DHHS) strategic and program and management goals. They were instructed to do this by comparing employee performance plans with the performance contracts of the employees' immediate supervisors (on the assumption that the performance contracts reflected the DHHS goals).

employees were asked to acknowledge the receipt of the standard sentence modifying their performance plans quoted above (i.e., the sentence indicating that the employee is familiar with and effectively supports the requirements of the supervisor's performance contract as it applies to his/her specific responsibilities). This sentence, supplemented with information about their supervisors' performance contracts is quite sufficient to enable employees to understand its meaning and content and to provide a benchmark toward which they may aim their performance. Further, such an implementation of Article 30 is consistent with precedents interpreting § 4302 to permit agencies to "flesh out" performance standards with additional information. See, for example, *Wilson v. Dept. of HHS*, 770 f.2d 1048 (Fed. Cir., 1985); *Schuman v. Dept. of the Treasury*, 84 FMSR 5868 (1984). In view of this conclusion, I find that there is no violation of 5 U.S.C. § 4302.

While I find no merit to your grievance concerning this matter, the FDA remains ready to discuss NTEU's concerns about the change in question. In particular, we are sensitive to the concern that appears implicit in your grievance that the FDA is subjecting employees to a political litmus test. Nothing could be farther from the truth. We have not required employees and have no intention of requiring them to signify agreement with the Administration's public policy agenda. Rather, what we have done is to communicate with employees about the specific actions required of them in the course of performing official duties that support the FDA's organizational objectives and, through those objectives, the administration's public policy goals. That distinction is critical and we are open to discussing any ideas NTEU may have for communicating it to bargaining unit employees.

Pursuant to Article 46 of the CBA, if you are not satisfied with this decision, you may appeal it to arbitration within 30 days of receipt.

Sincerely yours,



Kimberly Holden  
Interim Director, Office of Human Resources  
and Management Services