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FEDERAL PERSONNEL AND
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We recently began a survey of reserved management rights as they applied to labor-management relations in the Federal service under Executive Order 11491. This work was suspended with the passage of the Civil Service Reform Act (CSRA) of 1978, which along with Reorganization Plan No. 2 created several new agencies including the Federal Labor Relations Authority (FLRA), and the Office of Personnel Management (OPM). The FLRA is responsible for interpreting and administering the CSRA as it relates to the labor-management relations program in the Federal service and the OPM is responsible for providing policy guidance, technical assistance, training, and information to agencies on labor-management relations. With these responsibilities, the FLRA and the OPM play important roles in the application and effectiveness of reserved management rights and collective bargaining in the Federal service. We believe our survey observations which follow will be useful as your agencies formulate policies and guidance, and become involved in negotiations and/or resolving disputes in the area of reserved management rights.

## Background

Federal policies governing the relationships between employee organizations and agency management in the executive branch were first established by Executive Order 10988 in 1962, revised by Executive Order 11491 in 1970, and given a statutory basis under the CSRA of 1978. The Federal labor-management relations program is intended primarily to promote the well-being of employees and the efficient administration of Government by establishing orderly and constructive means for employee organizations

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to deal with management officials. The underlying assumption of the program is that employee-management relations can be improved by providing employees an opportunity for greater participation in developing policies and procedures affecting their employment conditions while maintaining the public interest as the paramount consideration.

Since the program was established in 1962, the number of nonpostal Federal employees organized into bargaining units has increased from less than 25,000 to more than 1.2 million, or 60 percent of all nonpostal civilian employees. These employees are covered by about 2,500 collective bargaining agreements.

Labor relations has a vital relationship with the Government's management of its work force and a consequent impact on the cost and effectiveness of Government operations. Through negotiation and consultation, a broad range of personnel policies and working conditions have come under bilateral decisionmaking--work hours, overtime, rest periods, leave administration, safety and health practices, training and promotion policies, grievance and complaint handling, and many other matters of concern to employees and management. Pressure to expand these areas is certain to continue.

The right of management to make certain decisions and take action without employee approval is essential to the effective operation of the Federal Government and is reserved in the CSRA. Although the CSRA permits and encourages Federal employees to participate in determining certain conditions of their employment, it also reserves to management the right and authority to act unilaterally on certain other conditions of employment that are not therefore the subjects of collective bargaining.

Observations

Based on our review of the CSRA, Federal Labor Relations Council (FLRC) 1/ negotiability decisions under

1/As a result of Reorganization Plan No. 2, the FLRA replaced and assumed the functions of the FLRC.

Executive Order 11491 and discussions 1/ with union and management officials with experience at the bargaining table, it was not always clear which conditions of employment were negotiable and which were not. While the Act specifically identifies as reserved management rights and prohibits agencies from bargaining on areas such as: mission, budget, organization, number of employees or internal security; it permits (but does not require) agencies to negotiate over the methods, means, and technology of conducting agency operations. (Clearly a wide range of potentially negotiable issues.)

Under the Executive order program, agencies were prohibited from negotiating over methods and means by which an agency's operations are to be conducted. The CSRA, however, moved "method and means" from the prohibited category to the permissive category thereby providing that an agency can, but is not required, to negotiate in this area. The conference report in this matter stated:

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1/In identifying problems related to reserved management rights, we relied primarily on the opinions and observations of program participants, most of whom were agency and union officials at the activity level. In most instances, interviewees substantiated their views with factual examples of their own experiences in applying the Executive order's management rights provisions. Our survey included interviews with officials of four major labor organizations, four Federal agencies with varying union activity, the Civil Service Commission, the FLRC, and several State and local government officials responsible for public employee labor relations. Additionally we researched recent testimony before Congress and literature on public and private sector labor relations, and reviewed cases of the FLRC, which under the Executive order program determined the negotiability of subjects regarding reserved management rights. Our survey work was conducted in Washington, D.C.; Sacramento, California; and the San Francisco Bay Area during the latter part of 1978.

> "* * * the conference report fully preserves the right of management to refuse to bargain on 'method and means' and to terminate bargaining at any point on such matters even if it initially agrees to negotiations."

The conference report stated, however:

> "There may be instances where negotiations on a specific issue may be desirable. By inclusion of this language, however, it is not intended that agencies will discuss general policy questions determining how an agency does its work." (Emphasis added.)

Also related to this matter is the overall stated finding and purpose of Title VII of the CSRA, which stated that:

> "* * * labor organizations and collective bargaining in the civil service are in the public interest."

What impact the CSRA will have on management rights and the scope of bargaining is still unknown. In commenting on a draft of this letter, an OPM official with the Office of Labor-Management Relations, told us that while the FLRA, and perhaps the courts, would have the final say on the matter, he did not believe that the CSRA would result in expanding the scope of bargaining. This official felt that the CSRA was intended primarily to strengthen management's ability to manage while at the same time protecting the rights of employees to participate in personnel policy decisionmaking. Any erosion of management's rights would reduce management's tools needed to achieve more effective and efficient Government. This position was reemphasized by other agency management officials who were speakers at the Seventh Annual Symposium on Federal Labor-Management Relations, which was held in Washington, D.C., on March 15 and 16, 1979. During the symposium, the scope of bargaining received a great deal of discussion. Symposium participants were clearly divided as to their views on the impact the CSRA would have on the scope of bargaining. Management officials generally felt that the scope of bargaining would not appreciably expand and that

OPM would be taking a strong stand in an attempt to strengthen the role of management. On the other hand, union participants felt that the scope of bargaining would surely expand and that management's hard line approach to not expand scope was "short sighted" and not a good labor-management relations approach. In the middle, one senior FLRA official stated that the Congressional intent behind the scope of bargaining is not crystal clear and provides ample room for interpretation.

Our survey surfaced similar problems with interpreting what were management rights and in which areas unions could negotiate. At its simplest, we found that unions tended to want to broaden the scope of bargaining and therefore they defined management rights narrowly. Agency management, on the other hand, tended to try to reduce bargaining scope by broadly defining management rights. Based on our recent observations and discussions, these views and positions have not generally changed, nor does the CSRA resolve the problem. We believe these different views on management rights become detrimental to the bargaining process and good labor-management relations when negotiations concentrate on questions of legality and nonnegotiability, rather than on the merits of the proposals.

Under both the Executive order and the CSRA, determinations of a particular management right with respect to a particular set of circumstances is made by the individual agencies. An agency's determinations of nonnegotiability could be appealed by the union to the FLRC under the Executive order, or now to the FLRA under the CSRA. The CSRA specifies that existing laws, recognitions, agreements, and procedures under the Executive order will remain in effect until revised or revoked by the President, or unless superseded by different provisions, regulations, or decisions under the law. Prior decisions of the FLRC are to be carried forward until the FLRA, if necessary, issues changes.

We were told that FLRC's negotiability decisions provide some precedent and criteria for guiding labor and management in making tentative negotiability determinations at the bargaining table. We learned from a

review of FLRC cases, however, that negotiability determinations tended to be narrow in scope and that even slight differences in the work environment could lead to different negotiability decisions. As a result, previous decisions may offer little real guidance to either management or unions.

Officials at the FLRC stated that the scope of bargaining was actually much wider than generally understood by either management or the unions at the bargaining level. The Council had at times felt it necessary to formally admonish management and unions to reword proposals so that they would become negotiable, thereby allowing them to be discussed on their merits.

The difficulty of determining negotiability at the bargaining table surfaced during the course of our survey. The 10 union officials we interviewed complained that reserved management rights, coupled with the inability to negotiate wages and fringe benefits, mean that unions have little to negotiate about. One union negotiator termed reserved management rights "a loop-hole" management uses to narrow the scope of bargaining. One agency representative admitted he had in the past used reserved management rights provisions as an excuse for not bargaining.

In commenting on a draft of this letter, the Chief of the Negotiability Division, FLRA, agreed that existing FLRC cases may not provide clear and specific guidance in all cases. He did feel, however, that FLRC cases do provide some general guidance. He and the current Deputy Executive Director, FLRA, stated that the Authority is aware of this problem and that they would be sensitive to the extent they could, in providing greater guidance through the cases decided by the Authority.

## Conclusions

Reserved management rights are essential to the effective working of the Federal Government in the present collective bargaining structure. However, problems appear to exist in the application and understanding of these rights which may prevent effective labor relations in the Federal service. Since the CSRA continues the old structure of reserved management rights with only a few modifications, the impact, range, and significance of reserved management

rights as it relates to the scope of bargaining will be primarily determined and established by ~~your interpretations~~ and/or application of the new law's intent and provisions.

The CSRA places responsibility on the FLRA for providing leadership, guidance, and direction to collective bargaining in the Federal service as it relates to reserved management rights. The OPM also has broad authority to advise and guide agency management on issues such as reserved management rights and collective bargaining. Problems and misunderstandings which existed under the Executive order, as they pertain to reserved management rights, are likely to continue unless the FLRA and OPM take actions which will

--encourage collective bargaining in the Federal service and at the same time promote better relations and a more cooperative attitude between employees and management in addressing and resolving problems of mutual concern; and

--establish clear criteria or guidelines (through case law, policy, regulations, etc.) for determining negotiability over conditions of employment which are subject to reserved management rights.

In our opinion, there is a need for the FLRA and OPM to pay particular attention to the existence of these problems as they establish work priorities and begin to promulgate instructions and regulations pertaining to labor-management relations. In this regard, we would like to receive your comments on the matters discussed in this letter and would appreciate being informed of any action you may take regarding them.

We look forward to working with you and your staffs in the future. We extend to you good wishes on a most difficult challenge in guiding labor relations in the Federal service.

H. L. Krieger
Director