II. History

A. EARLY DEVELOPMENTS

Union representation of Federal employees is hardly a recent development. Federal unions trace their history to the early 1800's. However, it was not until the passage of the Lloyd-LaFollette Act in 1912[1] that union representation of Federal employees was recognized in law. That Act established the principles that postal employees have a right to join an organization of postal employees which is not affiliated with any outside organization imposing a duty to engage or assist in a strike against the Government, and that the right of such employees to petition Congress may not be interfered with or denied. By extension, it became the common law of Federal personnel practice that any Government employee had the right to join or not to join any organization which did not assert the right to strike against or advocate the overthrow of the Government. By 1961, about 33 percent of all Federal employees (primarily postal employees) belonged to employee organizations.

Despite these developemnts, the Federal Government had little in the way of formal policy concerning the relationship between Federal management and employee organizations. Lacking guidance, the various agencies of the Government proceeded on widely varying courses. Some had established extensive relations with labor organizations; most had done little; a number had done nothing. Circumstances clearly called for a Government-wide policy which acknowledged the legitimate role which labor organizations representing Federal employees should have in the formulation and implementation of Federal personnel policies and practices.

NOTE. Footnotes appear at the end.

B. THE FIRST EXECUTIVE ORDER

After his inauguration in 1961, President Kennedy appointed a Presidential Task Force of top level Government officials, with Secretary of Labor Arthur J. Goldberg, as Chairman, and Civil Service Commission Chairman John W. Macy, Jr., as Vice-Chairman, to review and advise him on employee-management relations in the Federal service. In establishing the Task Force, the President declared his belief that the "participation of federal employees in the formulation and implementation of employee policies and procedures affecting them contributes to the effective conduct of public business." The Task Force, following extensive public hearings and the consideration of the views of all interested parties, submitted its report and recommendations to the President in November 1961[2].

The Task Force concluded that labor organizations were capable of contributing to the more effective conduct of the public business by ensuring the positive participation of employees in the formulation and improvement of Federal personnel policies and practices. It believed that despite the obvious similarities in many respects between conditions of public and private employment, the equally obvious dissimilarities are such that it would be neither desirable, nor possible, to fashion a Federal system of employee-management relations directly modeled upon the system which had grown up in the private economy. However, it believed that certain of the ground rules which Congress had laid down for employee-management relations in the private sector should be carried over to the Federal service to ensure that the public interest and the interests of individual employees were protected. The Task Force emphasized that however desirous the management of an agency may be to respond to the wish of employees to negotiate collectively on matters of mutual interest, it remained true that many of the most important matters affecting Federal employees were determined by Congress, and were not subject to unfettered negotiation by officials of the executive branch. Finally, the Task Force expressed its conviction that there need be no conflict between its proposed system of employee-management relations and the Civil Service merit system, which remained the essential basis of personnel policy of the Federal Government.

Having acknowledged these fundamental principles, the Task Force made a number of significant proposals, among which were the following:

1. The Federal employee's right to organize.—Federal employees have the right to join bona fide employee organizations. This right encompasses the right to refrain from joining. Wherever any considerable number of employees have organized for the purpose of collective dealing, the attitude of the Government should be that of an affirmative willingness to enter such relations.

2. Forms of recognition.—Bona fide organizations of Federal employees, which are free of restrictions or practices denying membership because of race, color, creed or national origin, which are free of all corrupt influences, and which do not assert the right to strike

or advocate the overthrow of the Government of the United States, should be recognized by Government agencies.

Organizations of Federal employees should be granted recognition essentially according to the extent to which they represent employees in a particular unit or activity of a Government agency. This recognition may be informal, formal, or exclusive.

a. Informal recognition.—Informal recognition gives an organization the right to be heard on matters of interest to its members, but places an agency under no obligation to seek its views. Informal recognition will be granted to any organization, regardless of what status may have been extended to any other organization.

b. Formal recognition.—Formal recognition will be granted to any organization with 10 percent of the employees in a unit or activity of a Government agency, where no organization has been granted exclusive recognition. Formal recognition gives an organization the right to be consulted on matters of interest to its members.

c. Exclusive recognition.—Exclusive recognition will be granted to any organization chosen by a majority of the employees in an appropriate unit. Exclusive recognition gives an organization the right to enter collective negotiations with management officials with the object of reaching an agreement applicable to all employees of the unit. Such agreements must not conflict with existing Federal laws or regulations, or with agency regulations, or with Government-wide personnel policies, or with the authority of the Congress over various personnel matters.

3. The scope of consultations and negotiations with employee organizations.—Consultations or negotiations, according to the form of recognition granted, may concern matters in the area of working conditions and personnel policies, within the limits of applicable Federal laws and regulations, and consistent with merit system principles.

Accordingly, as an employee organization has been granted formal or exclusive recognition, it may consult with or negotiate with management officials on matters of concern to employees.

4. Procedures to be adopted in the event of impasses.—Impasses in negotiations between Government officials and employee organizations granted exclusive recognition should be solved by means other than arbitration. Methods for helping to bring about settlements should be devised and agreed to on an agency-by-agency basis.

5. Form of agreements.—Agreements between management officials and employee organizations granted exclusive recognition should be reduced to writing in an appropriate form. Decisions reached by management officials as a result of consultation with employee organizations granted formal recognition may also be communicated in writing to the organization concerned. Negotiations should be kept within reasonable time limits.

6. Services that may be provided for employee organizations.—Bulletin boards should be made available to employee organizations. Officially approved or requested consultations with employee organizations should take place on official time. An agency may require that negotiations with an employee organization granted exclusive recognition take place on employees' time. No internal business of an em-

ployee organization should be conducted on official time. If authorized by Congress, voluntary dues withholding may be granted to an employee organization, provided the cost is paid for by the organization.

7. Grievances.—Employee organizations should have a recognized role in grievance systems. Advisory arbitration may be provided by agreement between an agency and an employee organization granted exclusive recognition.

8. Union membership.—The union shop and the closed shop are inappropriate to the Federal service.

9. Technical services for the Federal employee-managment relations program.—Technical services required to implement the proposals contained in the report should be provided by the Civil Service Commission and the Department of Labor. Upon request, the Secretary of Labor shall choose a person or persons to make advisory determinations on appropriate units for exclusive recognition and to perform similar services. The Department of Labor and the Civil Service Commission jointly should prepare recommendations for standards of conduct for employee organizations and a code of fair labor practices for the Federal service.

There recommendations were accepted and were promulgated in January 1962 as Executive Order 10988.[3]

Pursuant to that Order, President Kennedy in 1963 prescribed Standards of Conduct for Employee Organizations and a Code of Fair Labor Practices in the Federal Service.[4] Following a 1963 Comptroller General ruling that existing statutes and a previously issued Executive order authorized Civil Service Commission to promulgate regulations permitting employees to approve allotments from their pay for the purpose of paying their union dues, the Commission issued such regulations.[5]

A review of the experience attained under E.O. 10988 was begun by a Presidential Review Committee on Employee-Management Relations in the Federal Service in 1967–68. The Committee completed a draft report which proposed a number of changes in the program but no action was taken on the draft report before the change of administrations in 1969.[6]

In 1969, the new President appointed an Interagency Study Committee to review and evaluate the program under the direction of the Chairman of the Civil Service Commission. Serving with him were the Secretary of Labor, the Secretary of Defense, the Postmaster General and the Director of the Bureau of the Budget.

The Study Committee considered, reexamined and, to a considerable extent, reaffirmed the findings and recommendations of the 1967–68 Presidential Review Committee.[7] It reported to the President that the policies of the 1962 Order had brought about more democratic management of the workforce and better employee-management communication; that negotiation and consultation had produced improvements in a number of personnel policies and working conditions; and that union representation of employees in exclusive bargaining units had expanded from 29 units covering 19,000 employees in 2 agencies to 2,305 exclusive units covering 1.4 million employees in 35 agencies (including the Post Office Department)—52 percent of

the total Federal workforce subject to the Order. They also reported that, with the great growth of union representation, significant changes were needed in program policies if the program were to continue on a constructive course. The size and scope of labor-management relations in 1969 produced conditions far different from those to which the policies of the 1962 Order were addressed. They recommended changes in the program to meet these different conditions. The proposals for change centered in six major areas:

A central authority to administer the program and make final decisions on policy questions and disputed matters.

Third-party processes for resolving disputes on unit and election questions, for investigation and resolution of complaints under the "Standards of Conduct for Employee Organizations" and "Code of Fair Labor Practices," and for assistance in resolving negotiation impasse problems and grievances.

Revision in the previously authorized multiple forms of recognition and improved criteria for appropriate units and consultation and negotiation rights.

Clarification and improvements in the status of supervisors.

An enlarged scope of negotiations and better rules for ensuring that management representatives do not arbitrarily or erroneously limit negotiations.

Union financial reporting and disclosure.

The Study Committee stated its belief that desirable changes could be made in these areas without serious disruption to the then-existing Federal labor-management relations program. These changes would be built upon the foundation of experience gained by unions and agencies under Executive Order 10988 and were intended to remove many of the existing causes of agency and union dissatisfaction. The changes recommended were intended solely to correct deficiencies in the existing program; change was not proposed for change's sake or in order to adopt some other model for Federal labor-management relations. Finally, the Study Committee noted that in proposing these adjustments, it had been mindful of the need to provide "an equitable balance of rights and responsibilities among the parties directly at interest—the employees, labor organizations, and agency management—and the need, above all, in public service to preserve the public interest as the paramount consideration."

The recommendations of the Study Committee were accepted and were promulgated in October 1969 as Executive Order 11491.[8]

C. EXECUTIVE ORDER 11491

Executive Order 11491 became effective on January 1, 1970, setting the stage for a new era in labor-management relations. While the new Order maintained the basic principles and objectives of labor-management relations in the Federal service underlying Executive Order 10988, a number of fundamental and far-reaching changes were made in the overall labor-management relations structure. Among the more significant changes made in the six major areas reflected in the proposals of the Study Committee were the following:

1. Central authority to administer the program—the Federal Labor Relations Council.—In order to reduce pressures on labor-manage-

ment relationships arising from the lack of authoritative central rulings and to strengthen parity between employee and agency representatives through third-party resolution of disputed matters, the Order established the Federal Labor Relations Council as the central authority to administer the program. Specifically, the Council was established to oversee the entire Federal service labor-management relations program; to make definitive interpretations and rulings on the provisions of the Order; to decide major policy issues; to entertain, at its discretion, appeals from decisions of the Assistant Secretary of Labor for Labor-Management Relations; to resolve appeals from negotiability decisions made by agency heads; to act upon exceptions to arbitration awards; and periodically to report to the President on the state of the program and to make recommendations for its improvement.

2. Third-party processes.—Several additional third-party processes were adopted to assist in the resolution of various labor-management disputes.

a. Assistant Secretary of Labor for Labor-Management Relations.—The Assistant Secretary of Labor for Labor-Management Relations was empowered to decide questions pertaining to appropriate units for the purpose of exclusive recognition and related issues; to supervise and certify the results of elections to determine employee choice regarding exclusive representation; to determine, under criteria established by the Council, the eligibility of labor organizations for national consultation rights with agencies; and to decide alleged unfair labor practice complaints and alleged violations of the standards of conduct for labor organizations. The farmers of the Order viewed the assignment of these responsibilities to the Assistant Secretary, with provision for a limited right of appeal to the Council, as a remedy for several serious deficiencies in program arrangements caused by the lack of third-party processes. Impartial action by an official who was independent of the parties, and who was assigned this responsibility by the President in these areas, was considered necessary for the fair and effective conduct of labor-management relations in the Federal service. Where questions arise involving the Department of Labor, the Order provided that the Assistant Secretary's responsibilities should be performed by a member of the Civil Service Commission, designated by the Chairman of the Commission.

b. Federal Mediation and Conciliation Service.—The success of limited experimental efforts by the Federal Mediation and Conciliation Service in providing mediation services to the Federal program in earlier years had demonstrated that its services should be expanded to include the same types of mediation assistance it offers in the private sector. Therefore, the Order authorized the Service to extend its services on a full and regular basis to parties in Federal program negotiations.

c. Federal Service Impasses Panel.—The Federal Service Impasses Panel was established as an agency within the Federal Labor Relations Council to provide additional assistance in negotiations when earnest efforts, including direct negotiations and resort to the services of the Federal Mediation and Conciliation Services, have been unavailing in bringing the parties to full agreement. The Panel was

authorized, in its discretion, to utilize the technique of factfinding with recommendations to form the basis for further negotiation and settlement by the parties, or to recommend other procedures for resolution of the impasse, or to settle the impasse by appropriate action.

d. Grievance arbitration.—The Order authorized the negotiation of grievance procedure, including binding arbitration, for the resolution of disputes between unions and agencies over the interpretation and application of agreements. It also authorized the negotiation of grievance procedures, including binding arbitration, for the resolution of employee grievances relating both to provisions of the agreements as well as to provisions of laws, regulations and agency policies, provided these procedures were consistent with requirements established by the Civil Service Commission. The framers of the Order noted that labor organizations understandably objected to an agency's unilateral right to reject an advisory arbitration award, as was possible under Executive Order 10988, and determined that arbitration awards should be accepted by the parties with a limited right to have exceptions to such awards considered by the Council.

3. Recognition and appropriate unit criteria.—The Order simplified the recognition accorded labor organizations by agencies to two forms—exclusive recognition and national rights. Formal and informal recognition and national consultation rights. Formal and informal recognition were abolished. Agencies were required to accord exclusive recognition to labor organizations selected, in secret ballot elections by a majority of employees voting in appropriate units. In addition, "effective dealings" and "efficiency of agency operations" were added as criteria to the existing "community of interest" criterion for the determination of whether a unit of employees was appropriate for the purpose of exclusive recognition. In recognition of the strong and steady surge in the organization of Federal employees and the dynamics of changed conditions in the program, these revisions had as their objectives reducing the extent of unit fragmentation, eliminating the overlapping of labor organizations in their relationships with agencies, and promoting more stable and effective labor-management relations.

Agencies were required to accord national consultation rights to labor organizations, qualifying under criteria established by the Council, as the representative of a substantial number of employees of the agency.

Pursuant to the instructions in the Report accompanying the Order, the Council, in February 1971, after considering the views of agencies and labor organizations, developed and issued eligibility criteria for the granting of national consultation rights. The criteria required that national consultation rights be accorded at the agency level or the level of an agencys primary national subdivision (defined as a first level organizational segment which has functions national in scope that are implemented in field activities) to a labor organization which so requests and which holds exclusive recognition for either a minimum of 10 percent or at least 5,000 of the employees involved.

4. Status of supervisors.—Experience under E.O. 10988 had raised serious questions about the status of supervisors in the labor-management relations program and their status was clarified in E.O. 11491.

In order to insure that supervisors would become fully integrated into management and, further, to insure that they would not in any way compromise the free choice by subordinate employees in the selection of their bargaining representatives, the new Order prohibited the recognition of bargaining units which included management officials or supervisors (with minor exceptions concerning the continued existance of certain separate supervisory units) and prohibited supervisors from representing or participating in the management of a union. The Order also adopted a definition of "supervisor" similar to that found in the private sector.

5. Negotiation of agreements.—Several significant changes were made concerning the negotiation of agreements:

a. Scope of negotiations.—The language defining the scope of negotiations was clarified expressly to permit negotiations on such matters as the assignment of employees to particular shifts, the assignment of overtime and the appropriate arrangements for employees adversely affected by the impact of realignment of workforces or technological change.

b. Negotiability dispute procedures.—Special procedures were established to resolve negotiability disputes. The Council was authorized to decide whether a proposal advanced in connection with negotiations is contrary to statute, regulations of appropriate authority outside the agency or the Order. The Council was also authorized to resolve disputes as to whether an agency's regulation, relied upon by that agency as a basis for a determination that a bargaining proposal is nonnegotiable, is itself contrary to statute, regulations of appropriate authority outside the agency or the Order.

c. Approval of agreements.—The requirement that a negotiated agreement must be approved by the agency head or his designated representative was retained. However, in order to prevent "second-guessing" on substantive issues, the scope of such review was limited to the agreement's conformity with laws, existing published agency policies and regulations, and regulations of appropriate authorities outside the agency.

d. Official time.—The Order provided that employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, reflecting the belief that an employee who negotiates an agreement on behalf of a labor organization is working for that organization.

6. Unfair labor practices and standards of conduct for labor organizations.—The previously established Code of Fair Labor Practices and Standards of Conduct for Labor Organizations were, with several significant changes, incorporated into the new Order. As to the changes in the Code of Fair Labor Practices, the obligations to consult, confer and negotiate which previously applied only to management were extended to labor organizations. In addition, the Order was changed to clarify the provision relating to proscribed strikes and picketing.

As to the changes in the Standards of Conduct for Labor Organizations, the Order required labor organizations having or seeking recognition to file financial and other reports, to provide for bonding of officials and organization employees, and to comply with trusteeship and election standards under regulations promulgated by the Assistant Secretary.

D. THE POSTAL REORGANIZATION ACT OF 1970

As a result of the Postal Reorganization Act of 1970, labor-management relations in the United States Postal Service became generally subject to the provisions of the National Labor Relations Act.[9] Consequently, postal employees were no longer subject to the provisions of the Order.

E. 1971 AMENDMENTS TO THE ORDER

The Federal Labor Relations Council initiated a general review and assessment of operations under E.O. 11491 after 1 year, in accordance with a directive by the President at the time the Order was signed. The Council held public hearings in October 1970, where several mmebers of Congress, top union officials, and key Government officials testified or submitted written remarks pertaining to experience under the Order and suggested improvements.

Following the hearings, the Council carefully considered the testimony elicited and conducted an intensive study of experience under the Order. Several issues emerged, and after due consideration, the Council concluded that revision of the Order was necessary.[10] The Council recommended certain changes to the President which he adopted in Executive Order 11616,[11] thereby amending Executive Order 11491. These amendments to the Order were signed on August 26, 1971, and became effective on November 24, 1971.

The major changes made by these amendments were in the areas of grievance procedures and arbitration; unfair labor practice procedures; official time; and dues withholding. In addition, the phrase "asserts the right to strike" was deleted from the prohibitions contained in the Order's definition of "labor organization." More specifically, the major changes were as follows:

1. Grievance procedures and arbitration.—As a result of this first review of the Order, the Council concluded that employees were faced with complicated choices in seeking relief, the role of the exclusive labor organization was diminished and distorted by permitting a rival organization to represent a grievant in disputes over the interpretation and application of the agreement negotiated by the exclusive representative, and the scope of negotiation for agencies and labor organizations was unnecessarily limited. In order to remedy those faults, the Order was amended to require that the negotiated agreement include a grievance procedure which would be the exclusive procedure available to the parties, and to provide that the scope of the negotiated grievance procedure and arbitration be restricted to grievances over the interpretation or application of the agreement. The provision permitting the Civil Service Commission to establish requirements for negotiated grievance procedures was deleted, leaving the parties free to negotiate the scope and coverage of the negotiated grievance procedure subject only to the constraints contained within the Order itself. By limiting the scope of the negotiated grievance procedure to grievances over the interpretation or application of the agreement, the Council believed that the confusion and anomalies in the then-existing arrangements would be reduced. Grievances over matters not covered in the agreement could be presented under any

procedure available for that purpose but not under the negotiated procedure, and matters for which statutory appeal procedures existed were excluded, as previously, from processing under the negotiated procedure. Consistent with the scope and coverage of the negotiated grievance procedure, arbitration under such procedures was limited to interpretation and application of the agreement, and the Order was amended to provide that arbitration could be invoked only by the agency or exclusive representative. By thus delineating the scope of negotiated grievance procedures, these revisions were intended to reduce the overlap and duplication of rights and remedies rooted in the confusing intermixture of individual employee rights established by law and regulation with the collective rights of employees established by negotiated agreements.

In order to provide for the resolution of disagreements that might arise between the parties to a negotiated agreement over whether a grievance is subject to the negotiated grievance procedure or whether a grievance under the procedure is subject to arbitration, the Assistant Secretary of Labor for Labor-Management Relations was authorized to resolve such questions of grievability and arbitrability.

2. Unfair labor practice procedures.—So as to ensure the development of a single body of unfair labor practice precedents and a single, uniform procedure for processing and resolving such complaints, the revised Order provided that the processing of unfair labor practice complaints be placed within the exclusive jurisdiction of the Assistant Secretary and the Council. Further, the amended Order eliminated the requirement that when the issue in certain unfair labor practice complaints was subject to a grievance procedure, that procedure would be the exclusive procedure for resolving the complaint. Instead, the aggrieved party was given the option of seeking redress under the grievance procedure or the unfair labor practice procedure. However, issues which can properly be raised under an appeals procedure may not be raised under the unfair labor practice complaint procedure.

During the 1971 general review, the Council received a proposal that a special procedure for expedited processing of alleged violations of section 19(b)(4) of the Order be established. The Council concluded that such an expedited procedure would be desirable. Following discussion and coordination with the Assistant Secretary, he revised his regulations to establish such a procedure.

3. Official time.—The prohibition on the use of official time by employees acting as union representatives in negotiations with agency management was modified to permit the parties to agree to a reasonable amount of official time for employees representing the union in negotiations. The amended Order permitted the parties to agree to arrangements that the agency will authorize official time for up to 40 hours or up to one-half of the time spent in negotiations during regular working hours for a reasonable number of employees, normally not to exceed the number of management representatives. The absolute prohibition on official time was eliminated in order to avoid delay in negotiations and undue hardship on employees who represent the union, but the amount of official time was expressly limited so as to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices.

4. Dues withholding.—The requirement that the costs of dues withholding be recovered from labor organizations was eliminated to make such service charges negotiable.

F. THE FOREIGN SERVICE AMENDMENT

In consideration of the unique conditions of Foreign Service employment, the Secretary of State requested that Foreign Service employees be excluded from coverage under E.O. 11491. The President agreed to the exclusion on the condition that a separate employee-management relations program be established for the Foreign Service that met the approval of the Federal Labor Relations Council. The Foreign Service agencies working closely with the employee organizations representing Foreign Service employees subsequently submitted to the Council a proposed Executive order which the Council recommended for adoption. On December 17, 1971, the President signed Executive Order 11636[12], exempting the Foreign Service from the coverage of E.O. 11491 as amended, and establishing a separate program for such personnel.

G. 1975 AMENDMENTS TO THE ORDER

The Federal labor-management relations program continued to evolve and develop to the extent that, in 1973, approximately 1,100,000 nonpostal employees, about half of the white-collar and nearly all of the eligible blue-collar Federal employees, or 56 percent of the nonpostal Federal workforce, were included in exclusive bargaining units. As of June 1974, negotiations were underway which were expected to raise from 86 to 94 percent the number of employees in exclusive units covered by agreements. Analysis of agreements indicated a considerable increase in the substantive content of their provisions; Federal employers and labor organizations were negotiating agreements within third-party intervention; and where third-party assistance was required in negotiation disputes, it resulted in informal settlements in most cases. Additionally, the machinery for resolution of disputes in such areas as representation, negotiability, grievances, arbitration, and unfair labor practices was established and operating smoothly and effectively. However, mindful of the continuous need to consider whether further adjustments in the Order were required so as to improve the program, the Council initiated a general review of the program in September 1973 in which it utilized procedures to ensure increased participation by interested parties. The Chairman of the Council, Robert E. Hampton, announced these procedures in a speech in Washington, D.C., before the Federal Bar Association National Conference on Labor Relations in the Federal Service.

As a first step, the Council invited all concerned to propose subject matter areas for the review. The Council received a substantial number of responses from unions, other employee organizations, private associations, executvie departments and agencies, and individuals. After careful examination of the issues proposed, the Council invited interested parties to submit detailed position papers on 11 areas selected for the central focus of the review. Thereafter, public hearings were held

at which representatives of selected agencies and labor organizations gave further testimony on their views. Many of the witnesses submitted additional written statements following the hearings to supplement their previous written and oral testimony.

Following the hearings, the Council intensively reviewed and analyzed the material it had received and, based on its findings, recommended changes in the Order.[13]

The President adopted the Council's recommendations and issued Executive Order 11838, [14] further amending Executive Order 11491, on February 6, 1975. These amendments became effective on May 7, 1975. Amendments or clarifications were made in several key areas, including: the impact of agency policies and regulations on the scope of negotiations; grievance and arbitration procedures; consolidation of existing bargaining units; supervisors; guards; approval of agreements; the resolution of negotiability disputes arising in unfair labor practice proceedings; the obligation to negotiate; and the investigation of unfair labor practice complaints.

1. Impact of agency policies and regulations on the scope of negotiations.—The 1975 amendments substantially enlarged the scope of negotiations. Previously, the scope of negotiations on personnel policies and practices and matters affecting working conditions had been limited by any internal agency regulation issued above the bargaining level, regardless of the degree of necessity for such regulation The Council determined that meaningful negotiations on personnel policies and practices and matters affecting working conditions had been unnecessarily constricted in a significant number of instances by higher level agency regulations not critical to effective agency management or the public interest. While the Council reaffirmed the conclusion of the 1969 Interagency Study Committee that agency regulatory authority must be retained, modifications in the role of internal agency regulations as a bar to negotiations were adopted, consistent with essential agency requirements, to implement, the purposes of the evolving and dynamic Federal labor-management relations program. E.O. 11838 limited the effect of internal agency regulations governing personnel policies and practices and matters affecting working conditions on the scope of negotiations. It provided that only regulations issued at agency headquarters or primary national subdivision levels and for which a compelling need exists, under criteria developed by the Council, may bar negotiations on a conflicting proposal submitted at the local level. As a result, internal agency regulations issued below the agency headquarters and primary national subdivision levels no longer serve as bars to negotiations. Further, as to those internal agency regulations issued at the agency headquarters or primary national subdivision levels, only those which meet the "compelling need" standard serve to bar negotiation on a conflicting proposal. However, even if a regulation does not meet the level of issuance or compelling need requirements, it nevertheless remains completely operative as a viable agency regulation, if otherwise valid, and continues to apply in a given exclusive bargaining unit except to the extent that the local agreement contains different provisions.

2. Grievance and arbitration procedures.—The Council reexamined the question of the nature and scope of negotiated grievance procedures

in the Federal service and concluded that the coverage and scope of the negotiated grievance procedure should be determined by the parties themselves, so long as it does not otherwise conflict with statute or the Order, and so long as it does not cover matters subject to statutory appeal procedures. This change was intended to give unions and agencies greater flexibility at the negotiating table to fashion negotiated grievance procedures suitable to their particular needs. While this change eliminated the requirement that the scope of the negotiated grievance procedure be limited to grievances over the interpretation and application of the agreement, parties may voluntarily do so. On the other hand, the change also permits them to include grievances over agency regulations within the discretion of agency management and pertaining to personnel policies and practices and matters affecting working conditions, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from negotiation by the Order or subject to statutory appeal procedures. Thus, with this change, the parties can agree to make their negotiated grievance procedure the exclusive procedure for resolving some or all employee grievances, thereby replacing the agency grievance procedure to the extent agreed upon by the parties.

The Order was also amended to ensure the development of a single body of precedent in decisions relating to the coverage of statutory appeal procedures by requiring that questions of whether a grievance is over a matter subject to statutory appeal procedures be resolved by the Assistant Secretary. Where disagreements on questions of whether a grievance is subject to the negotiated grievance procedure or whether a grievance is subject to arbitration do not involve the applicability of statutory appeal procedures, they may, by agreement of the parties, be submitted to arbitration, or, absent such agreement, may be referred to the Assistant Secretary for decision.

3. Consolidation of existing bargaining units.—The 1975 amendments sought to facilitate the consolidation of existing bargaining units, thereby reducing the extent of unit fragmentation that had developed over the 12 years of labor-management relations under Executive orders. Such consolidation would permit parties to arrive at new agreements broader in coverage and scope than the agreements which covered smaller, fragmented units. The amended Order now permits an agency and a labor organization to agree bilaterally to consolidate, without an election, those bargaining units represented by the labor organization within the agency. Affected employees are to be given notice of a proposed bilateral consolidation, with the right to petition the Assistant Secretary to hold an election on the issue of the proposed consolidation. A proposed consolidation of existing units is to be submitted to the Assistant Secretary to determine whether it conforms to the appropriate unit criteria contained in the Order. Where there is no bilateral agreement on the proposed consolidation, either party may petition the Assistant Secretary to hold an election on the consolidation issue. Election, certification, and agreement bars do not apply to the consolidation of existing units. These procedures apply only to situations where there is no question concerning the representation desires of employees who would be included within the proposed consolidation.

4. Supervisors.—The Council recognized that the function of evaluating employee performance is an important part of supervisory responsibility. However, it deemed exercise of this function alone to be insufficient to establish a person as a supervisor under the Order. Therefore, the Order was amended to delete the criterion of employee performance evaluation as a sole determinant of supervisory status from the definition of "supervisor." The Council also concluded that the implementation of agency systems for intramanagement communication and consultation with supervisors and associations of supervisors had reached the stage where they should be dealt with outside the Executive Order. The Council recognized that the Civil Service Commission would continue to provide guidance in this area to agencies through the Federal Personnel Manual.

5. Guards.—The amended Order eliminated the requirements that units for guards be separate from units of other employees and that newly established units of guards be represented by labor organizations which represent guards exclusively. The Council determined that the separate representation policy for guards encouraged fragmentation in units and rivalries among labor organizations. Further, in mixed units recognized prior to the establishment of the separate representation policy, guards had demonstrated no conflicts of interest in performing their duties and, so long as the existing prohibition on strikes by Federal employees is continued, such conflicts need not be anticipated.

6. Approval of agreements.—Council analysis of data on the agency approval process for negotiated agreements indicated that delays in the review of negotiated agreements by agency authorities had an unfavorable effect on the labor-management relations program and warranted remedial action. The Order was revised to provide that action must be taken by an agency head or his designated representative to approve or disapprove a negotiated agreement within 45 days from the date of its execution by the parties. Specifically, the failure of an agency to approve or disapprove a negotiated agreement within 45 days would result in the agreement going into effect automatically, subject to the condition that should a particular agreement provision subsequently be found violative of law, the Order, or regulation of appropriate authority outside the agency, it would be deemed void and unenforceable.

7. The resolution of negotiability disputes arising in unfair labor practice proceedings.—The Assistant Secretary was assigned express authority to resolve those negotiability issues which arise in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions, with the right to have such negotiability determinations reviewed on appeal by the Council. The Council, during the general review, had determined that unnecessary additional steps in the adjudicatory process would be required if such negotiability issues were brought to the Council for initial adjudication and that the purposes of the Order would be better served, on balance, by permitting the Assistant Secretary to resolve such issues in the first instance.

8. The obligation to negotiate.—The Council concluded that employee participation in the determination of midcontract changes in

personnel policies and practices and matters affecting working conditions is no less critical to their well-being and the efficient administration of Government than their participation during the relatively brief period of formal contract negotiations. However, the Council determined that no amendment of the Order was necessary since there is an obligation under existing provisions of the Order for an agency to provide the exclusive bargaining representative with adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement, unless the issues thus raised are controlled by existing contractual commitments or unless a clear and unmistakable waiver is present. The Council explained this existing obligation in the Report and Recommendations accompanying the 1975 amendments.

In addition, the Council cleared up the confusion which had developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate" with respect to relationships between agencies and labor organizations in the Order. The Council affirmed that:

> The parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way;
>
> "Consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under the Order; and
>
> The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

9. Investigation of unfair labor practice complaints.—In the Report and Recommendations accompanying the 1975 amendments, the Council recommended that the Assistant Secretary modify his procedures to permit members of his staff to conduct independent investigations of unfair labor practice cases as he deems necessary in order to determine whether there is a reasonable basis for the issuance of complaints. Such an independent investigation will facilitate the informal resolution of unfair labor practice issues and where such informal resolution is not possible, will facilitate the adjudicatory process because parties will have an investigatory file which has been developed independently by a professional investigator.

H. TENNESSEE VALLEY AUTHORITY AMENDMENT

At the request of the Tennessee Valley Authority and the labor organizations representing the employees of the TVA, the President further amended the Order by excluding the Tennessee Valley Authority from its coverage. This amendment was accomplished by the issuance of Executive Order 11901 on January 30, 1976.[15] It was issued to maintain the stability of the unique, bilaterally developed TVA labor-management relations program which was suited to the particular needs of TVA, TVA employees and the labor organizations representing those employees, and which predated, by better than two decades, the Federal labor-management relations program established by Executive order.

NOTES

PART I. INTRODUCTION

1. 3 C.F.R. 861 (Comp. 1966–70), 5 U.S.C. § 7301 (1970); *as amended* by Exec. Order No. 11616, 3 C.F.R. 605 (Comp. 1971–75); Exec. Order No. 11636, 3 C.F.R. 634 (Comp. 1971–75); Exec. Order No. 11838, 3 C.F.R. 957 (Comp. 1971–75); and Exec. Order No. 11901, 41 Fed. Reg. 4807 (1976). Exec. Order No. 11491, as amended by Exec. Order Nos. 11616, 11636, and 11838 can also be found in Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 7 (1975).

PART II. HISTORY

1. 37 Stat. 555, *as amended*, 5 U.S.C. §§ 7101–02 (1970).
2. President's Task Force on Employee-Management Relations in the Federal Service, *A Policy for Employee-Management Cooperation in the Federal Service* (1961).
3. 3 C.F.R. 521 (Comp. 1959–63).
4. Memorandum of May 21, 1963, 3 C.F.R. 848 (Comp. 1959–63).
5. 5 C.F.R. §§ 550.301–.309 (1964).
6. Draft Report of the President's Review Committee on Employee-Management Relations in the Federal Service, April 1968, in U.S. Department of Labor, *Fifty-sixth Annual Report* 33 (1969).
7. Interagency Study Committee on Federal Labor Relations, *Labor-Management Relations in the Federal Service* 31 (1969). The 1969 Report can also be found in Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 63 (1975).
8. 3 C.F.R. 861 (Comp. 1966–70), 5 U.S.C. § 7301 (1970).
9. 39 U.S.C. § 1209 (1970).
10. Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 27 (1971). The 1971 Report can also be found in Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 55 (1975).
11. 3 C.F.R. 605 (Comp. 1971–75).
12. 3 C.F.R. 634 (Comp. 1971–75).
13. Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 28 (1975).
14. 3 C.F.R. 957 (Comp. 1971–75). Exec. Order No. 11838 can also be found in Federal Labor Relations Council, *Labor-Management Relations in the Federal Service* 21 (1975).
15. 41 Fed. Reg. 4807 (1976).

PART III. COUNCIL ORGANIZATION, RULES AND REGULATIONS, AND RELATIONSHIPS WITH OTHER AGENCIES

1. 5 C.F.R. §§ 2400–2411 (1971).
2. 5 C.F.R. § 2410 (1972).
3. *See*, respectively, 5 C.F.R. §§ 2400–2412 (1973); 5 C.F.R. §§ 2400–2412 (1974); and 5 C.F.R. §§ 2400–2413 (1976).

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