Report and Recommendations on the Amendment of Executive Order 11491

INTRODUCTION

When President Nixon signed Executive Order 11491, *Labor-Management Relations in the Federal Service,* on October 29, 1969, he directed that a review and assessment of operations under the Order be made after one year. This is the Council's assessment and report of review.

The review was initiated with public hearings held in October 1970. Federal employees, representatives of labor organizations and other associations, department and agency officials, and other interested groups and individuals were invited to present views on their experience under the Order and their suggestions for its improvement. Sixty-five persons, including several Members of Congress, top union officials, and key Government officials testified at the hearings or submitted written remarks for the record. An opportunity was provided for all interested parties to present their views regarding Executive Order 11491.

While most of the testimony was addressed to proposals for change, it was clear throughout

adding "professional" to the types of lawful associations, not qualified as labor organizations, with which an agency may have limited dealings not inconsistent with the rights of recognized labor organizations.

(2) *Section 2(e)(2) should be revised by deleting the provision which precludes recognition of an organization that "asserts the right to strike."*

In some instances, agencies may be overly fearful of violating the rights of recognized labor organizations and unnecessarily refrain from proper dealings with professional associations on purely professional matters. To maintain such communications and to avoid further misunderstandings, we recommend that "professional" be explicitly included among the types of associations listed in section 7(d)(3) with which an agency may have limited dealings not inconsistent with the rights of recognized labor organizations.

The provision of section 2(e)(2) of the Order which precludes the recognition of an organization that "asserts the right to strike against the Government of the United States or

the proceedings, that, in general, the Order has greatly enhanced the climate for collective bargaining in the Federal service.

Some proposals made at the hearings related to administration of the Order or to adjustments which could be made within existing authority; the Council has initiated necessary action in these areas, such as expedited processing of unfair labor practice complaints in certain situations. Other proposals were determined to be outside the scope of the current review or not appropriate for consideration at this time in view of the limited experience under Executive Order 11491.

The Council conducted an intensive study and held 18 executive sessions to discuss major policy issues directly related to the Order. There were several of these issues on which, after due consideration, the Council concluded that revision of the Order is necessary at this time. Our recommendations on these matters are discussed below. A number of other issues studied in depth, which the Council determined did not warrant action during this review, are listed in the final section of the report.

A. REPRESENTATION

(1) *Section 7(d)(3) should be amended by* any agency thereof" parallels portions of section 7311 of title 5 of the United States Code. Subsequent to the issuance of the Order, a Federal District Court decided that this portion of the Code violated the First Amendment. Testimony at the Council's hearing raised questions as to the effect of the Court's decision on section 2(e)(2) of the Order. After careful review and consideration of this issue, the Council recommends that "assert the right to strike" be deleted from section 2(e)(2). This does not alter the basic prohibition against strikes in the Federal Government.

B. GRIEVANCE PROCEDURES AND ARBITRATION

Section 13 should be revised to provide that—

(1) *the negotiated agreement for an exclusive unit must include a grievance procedure. That procedure will be the exclusive procedure available to the parties and the employees in the unit for differences over the interpretation and application of the agreement, except that an employee or group of employees may present such a grievance to the agency and have it adjusted without the intervention of the exclusive representative under certain conditions which are set forth below.*

(2) *an employee's grievance on a matter not covered in the agreement may be presented under any procedure available for the purpose, but not under the negotiated procedure.*

(3) *the requirement that the negotiated procedure must conform to CSC regulations should be eliminated; however, matters for which statutory appeals procedures exist should continue to be excluded from negotiated grievance procedures.*

(4) *Section 7(d)(1) and section 13 should be revised so as to specify who may represent an employee when presenting a grievance under the negotiated procedure.*

(5) *Section 14 should be changed to provide that the negotiated procedure may include arbitration, limited to interpretation or application of the agreement, which may be invoked only by the agency or the exclusive representative.*

(6) *Section 6 should be amended to authorize the Assistant Secretary to resolve disagreements between the parties on questions whether a grievance is subject to the negotiated grievance procedure, or whether a grievance under the procedure is subject to arbitration.*

As the above six items indicate, a number of including arbitration, for consideration of "employee grievances" and of "disputes over the interpretation and application of agreements." Under the Order and Civil Service Commission regulations, "employee grievances" may be filed only by an employee or group of employees. Such grievances may relate to matters involving application of law, regulation, or agency policy as well as to the provisions of the labor agreement. The Order and regulations reserve to the employee rights to choose his own representative (which may be a rival union), to disapprove the use of arbitration, and, unless otherwise provided in the labor agreement, to choose the unilaterally established agency grievance procedure rather than the negotiated procedure for processing the grievance. In contrast, union-initiated "disputes," including arbitration, are limited to the interpretation or application of the labor agreement. Where negotiated procedures include arbitration, the Order provides that the costs of the arbitrator shall be shared equally by the parties.

Under these conditions employees are faced with complicated choices in seeking relief, the role of the exclusive union is diminished and distorted by permitting a rival union to represent a

issues were raised concerning the nature and scope of grievance procedures and arbitration. In view of the importance of this matter, the Council made an intensive review of this whole subject. We conclude that substantial changes in present arrangements are warranted. The root of the persistent dissatisfaction with grievance and arbitration procedures in the Federal program appears to be the confusing intermixture of individual employee rights established by law and regulation with the collective rights of employees established by negotiated agreement. This intermixture has resulted in overlap and duplication of rights and remedies, and in requirements with respect to negotiated grievance procedures which are less in some respects and greater in others than are suitable for effective grievance handling in a labor relations system.

Following a thorough examination of the issue, the Council concluded that there should be no change in the existing requirement that matters on which employees have appeal rights established by law should not be included in negotiated grievance procedures.

Turning to matters not subject to appeal procedures, the Order presently authorizes the exclusive representative to negotiate procedures, grievant with respect to the interpretation and application of the agreement negotiated by the exclusive representative, and the scope of negotiations for agencies and unions is unnecessarily limited.

In order to remedy these faults, we recommend that the Order be amended to provide for negotiated grievance procedures and arbitration involving only the interpretation or application of the negotiated agreement and not involving matters outside the agreement, including matters for which statutory appeals procedures exist. This should be the only procedure for consideration of grievances over the interpretation or application of the provisions of the agreement. The nature and scope of the procedure, including cost-sharing arrangements for arbitration, should be negotiated by the parties. The negotiated grievance procedure and arbitration should not be subject to Commission regulations. An employee or group of employees in the unit, or the exclusive union, should be permitted to file a grievance under the procedure, but only with representation by the exclusive union or a representative approved by the union. If an employee or group of employees wishes to present grievances on matters arising under the agreement without the in-

tervention of the exclusive representative, they should be permitted to present such grievances to agency management and have them adjusted so long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative is given opportunity to be present at the time of adjustment. Arbitration of a grievance should not require the approval of the employee or employees involved. Any grievance by an employee on a matter other than the interpretation or application of an existing agreement may be presented under any procedure available for the purpose, but not under the negotiated procedure.

By thus delineating the scope of the negotiated grievance procedure, the confusion and anomalies in present arrangements can effectively be eliminated. In addition, an incentive will be created for unions to negotiate substantive agreements within the full scope of negotiations authorized by the Order. The exclusive representative will be clothed with full authority and responsibility for grievance processing on the bilaterally determined conditions of employment. Artificial distinctions between "employee grievances" and union "disputes" will be eliminated, *should not be construed as unfair labor practice decisions under the Order nor as precedents for such decisions. When a grievance includes an alleged unfair labor practice, it should be optional with the aggrieved party whether he will seek redress under the grievance procedure or the unfair labor practice procedure; however, he may not use both procedures, either simultaneously or sequentially. The existing requirement that when an issue can be raised under an established appeals procedure, that procedure is the exclusive procedure for resolving the issue is not affected by this recommendation.*

Section 19(d) presently requires that complaints under sections 19(a)(1), (2) and (4), i.e. alleged management unfair labor practices against employees, be processed under established grievance or appeals procedures, where applicable, while other unfair labor practice complaints are resolved under machinery established by the Order. This requirement inhibits the development of a single body of unfair labor practice precedents and a single, uniform procedure for processing and resolving unfair labor practice complaints under the Order, since such complaints are today processed under grievance, ap-

and only the term "grievance" will be used.

This recommended revision of policy will require that all negotiated agreements provide a grievance procedure. Accordingly, the policy should be made applicable to all new agreements entered into after the effective date of the Order's revision and to all agreements renewed or extended after that date. Further, to provide for the resolution of disagreements that may arise between the parties as to whether a matter is grievable or arbitrable under the negotiated procedure, we recommend that such questions be referred to the Assistant Secretary of Labor for Labor-Management Relations. Provision of machinery under the Order for resolving such disagreements is appropriate in order to insure consistent application of the recommended revisions with respect to negotiated grievance procedures.

C. UNFAIR LABOR PRACTICES

Section 19(d) should be revised to place the processing of unfair labor practice complaints within the exclusive jurisdiction of the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council. Decisions under grievance or appeals procedures peals, and unfair labor practice procedures. The decision as to whether an unfair labor practice has been committed should not be made under grievance and appeals systems which are not under the control of the Assistant Secretary, nor should decisions under grievance and appeals systems have precedential effect in the area of unfair labor practices. Therefore, we recommend that all unfair labor practice complaints be processed and decided only under the procedures provided by the Assistant Secretary and the Council.

Further under section 19(d) when an alleged unfair labor practice is subject to an agency grievance procedure, agency management is the final judge of its own conduct. We believe there should be an opportunity to seek third-party adjudication of any issue involving an alleged unfair labor practice. To provide this opportunity we recommend elimination of the requirement that when the issue in certain unfair labor practice complaints is subject to a grievance procedure, that procedure is the exclusive procedure for resolving the complaint. We propose, instead, that when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made op-

tional with the aggrieved party whether to seek redress under the grievance procedure or under the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure.

The existing rule that issues which can properly be raised under established appeals procedures may not be raised under unfair labor practice complaint procedures should be retained. Employees currently have the opportunity to seek third-party review of agency action under appeals procedures established by statute.

D. OFFICIAL TIME

Section 20 should be modified to eliminate the prohibition of official time for employees when engaged as labor organization representatives in negotiations with agency management. The parties may negotiate on the issue within specified limits.

The present Order provides that employees who represent a labor organization shall not be on official time when negotiating an agreement with agency management. This policy has been among the most controversial of the provisions

In order to promote flexibility in the negotiation of agreements for the use of official time, we recommend that the limitations established by the Order on negotiations of such official time be in alternative forms, either: (1) a maximum of 40 hours; or (2) a maximum of one-half the total time spent in negotiations during regular working hours. These limitations refer to the amount of official time during normal working hours of the activity which may be authorized each employee representative in connection with the negotiation of an agreement, from preliminary meetings on ground rules, if any, through all aspects of negotiations, including mediation and impasse resolution processes when needed. Overtime, premium pay, or travel expenditures are not authorized. The number of union representatives on official time during such negotiations normally should not exceed the number of management representatives.

E. DUES WITHHOLDING

Section 21 should be revised to eliminate the requirement that the costs of dues deductions must be charged to the labor organization. This matter should be left to negotiation by the parties.

in Executive Order 11491.

The Council's review indicated that the present policy has had some unfavorable effects on the negotiation process; for example, difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation. The policy has also had some beneficial effects: better advance planning and preparation for negotiation meetings, and more efficient use of meeting time.

Upon consideration of all factors, we have concluded that the program will benefit by modifying present policy so as to permit the negotiating parties, when circumstances warrant, to agree to a reasonable amount of official time for employees who represent the union in negotiations during regular working hours. This change will enlarge the scope of negotiations and promote responsible collective bargaining. However, we believe it is essential that the amount of such official time authorized, while adequate to avoid undue hardship or delay in negotiations, should be expressly limited so as to maintain a reasonable policy with respect to union self-support and an incentive to economical and business-like bargaining practices.

We believe that the uniform requirement that the costs of making dues deductions must be recovered is no longer desirable. In our opinion, removal of this requirement will improve the collective bargaining process by enlarging the scope of negotiable matters. The question of a service charge for payroll deductions is a meaningful economic item suitable for bargaining between the parties in the same way as other matters governing the labor-management relationship. If the agency agrees to no service charge or a reduced charge below actual costs of the dues withholding service, presumably it would be done on the basis that offsetting benefits of commensurate value will be obtained from the labor agreement. Accordingly, the Council recommends that the Order be revised to delete the present requirement that the costs of making dues deductions be recovered from labor organizations.

F. POLICY GUIDANCE AND REVIEW OF AGENCY PROGRAMS

Section 25 should be revised to provide that the Civil Service Commission in conjunction with

the Office of Management and Budget shall establish and maintain a program of policy guidance to agencies on Federal labor-management relations and periodically review the implementation of these policies.

Reorganization Plan No. 2 of 1970 established the Office of Management and Budget with responsibilities in the area of executive management. These include policy guidance and review of the management of labor relations in the Federal departments and agencies. The Office of Management and Budget works closely with the Civil Service Commission in carrying out these functions. These arrangements for policy guidance and review within the executive branch should be reflected in the Order.

We recommend that the Order be revised to provide that the Civil Service Commission in conjunction with the Office of Management and Budget shall establish and maintain a program of policy guidance to agencies in the labor relations area and periodically review the implementation of these policies. The Civil Service Commission should continue its day-to-day review of program operations and the provision of technical advice, information and training assistance to agencies.

These issues are listed below:

1. Relax restrictions against the inclusion of supervisors in units of exclusive recognition and supervisors holding union office.
2. Provide a separate Executive order covering agency relationships with professional organizations.
3. Authorize professional organizations rights similar to those provided for associations of supervisors.
4. Establish a policy concerning the severance of professional employees for decertification purposes.
5. Modify the requirement of a secret ballot election in all cases as a prerequisite for exclusive recognition.
6. Further restrict agency regulatory authority as it affects the scope of negotiations.
7. Redefine the scope of negotiation with respect to assignment of personnel.
8. Include job classification within the scope of negotiation and grievance procedures.
9. Authorize voluntary arbitration of negotiation impasses without reference to the Federal Service Impasses Panel.
10. Process negotiability issues as refusals to bargain under unfair labor practice pro-

G. OTHER MATTERS CONSIDERED

There were a number of policy issues raised by interested parties which, after careful study and consideration, the Council determined were not appropriate for action as part of this review, either because the Executive order appeared to be working effectively in the particular area, experience was insufficient to establish any sound basis for change, or the change proposed would conflict with existing statutory requirements.

cedures.

11. Establish independent office for prosecution of unfair labor practice complaints.
12. Require use of arbitration in agency adverse action appeal systems.
13. Prescribe uniform policy regarding official time for employees representing labor organizations in third-party proceedings.
14. Authorize dues withholding without regard to recognition or on the basis of national consultation rights.