Collective Bargaining in the Federal Service: The Permissible Scope of Negotiations under Executive Order 11,491

Alexander J. Zimmer

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol25/iss1/14

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
COLLECTIVE BARGAINING IN THE FEDERAL SERVICE: THE PERMISSIBLE SCOPE OF NEGOTIATIONS UNDER EXECUTIVE ORDER 11,491

Focusing on the decisions of the Federal Labor Relations Council, the author outlines the parameters of collective bargaining in the federal service under Executive Order 11,491. The resolution of disputes over the negotiability of union proposals is discussed within the context of the Order, and the role of the Civil Service Commission in the Council's decision-making process is given special attention. In addition, the author describes, and offers an alternative to, the limiting effect on the scope of negotiations of agency-wide regulations under the current Order.

I. Introduction

The present federal labor-management relations program has evolved from a series of executive orders that were designed to accommodate the interests of both labor and management within the context of the public service. The Lloyd-LaFollette Act of 1912 established the right of federal employees to become members of labor organizations, yet the government did not formally take up the challenge of developing a uniform labor relations policy until the promulgation of Executive Order 10,988 in 1962 by President Kennedy. Although heralded as the watershed in the long history


3. 37 Stat. 555 (1912), as amended, 5 U.S.C. §§ 7101-02 (1970): "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any member thereof, or to furnish information to either House of Congress, or to any Committee thereof shall not be denied or interfered with." The Act did not, however, establish the right of unions to bargain collectively with governmental agencies.


5. During the 50 years following the passage of the Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 5 U.S.C. §§ 7101-02 (1970), little attention
of attempts to establish a formal program of labor relations in the federal service, the Kennedy Order placed definite constraints on the obligations of a government agency to negotiate, the most obvious limit being the exclusion of wages and salaries as bargainable items.

In spite of the limited scope of negotiations, there is little doubt that the Kennedy Order made significant strides toward providing employees an opportunity for participation in the development of policies and procedures that affected conditions of employment.

was directed toward the development of a uniform labor-management program in the federal service. See generally Hampton, Federal Labor-Management Relations: A Program in Evolution, 21 CATH. U.L. REV. 493, 494 (1972). As a result, federal employee unionism under the Act was manifested in the form of lobbying in Congress for legislation on both bread-and-butter issues and conditions of employment. Id. at 504. In the period following World War II, however, proposals for legislation to establish a uniform federal labor relations program were a source of major political controversy. Three such legislative attempts were initiated unsuccessfully in the 1950's. See Mathews, Federal Labor Relations: A Program in Transition, 21 CATH. U.L. REV. 512, 516 & n.21 (1972).

Nevertheless, toward the end of the 1960 presidential campaign, then-Senator John F. Kennedy predicted that proposals for a formal federal labor relations program would receive more sympathetic treatment from a Democratic administration. D. WALLER & D. SEARS, LABOR RELATIONS AND SOCIAL PROBLEMS, UNIT FOUR, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 29 (1971). In 1961, President Kennedy fulfilled his own prediction by creating a special task force to investigate the need for and the desirability of a formal program for labor-management relations in the federal service. Id. The Task Force found: (1) there was no uniform labor relations policy in the federal service; (2) unions could contribute to the efficiency and effectiveness of governmental operations; (3) one-third of all government workers were already organized into unions; (4) there did not need to be any conflict between collective bargaining and the merit system; and (5) dissimilarities between the private and public sectors made a direct transfer of private sector techniques and policies to the federal service impossible. REPORT OF THE PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE (1961). On the basis of the findings of the Task Force, President Kennedy promulgated Exec. Order No. 10,988, 3 C.F.R. 521 (1963).


7. In addition, the permissible scope of negotiations did not extend to the mission of the particular agency involved, to the budget, to the organization and assignment of personnel, or to work technology under the Kennedy Order. Exec. Order No. 10,988, § 6(h), 3 C.F.R. 521, 524 (1963). Moreover, every agreement between a local agency "activity" (a term denoting specific operating unit of an agency, such as a particular Veteran's Administration hospital or Naval shipyard) and a union required approval by the head of the agency involved, though the Order itself contained no standards for such approval. Id.

8. The 1969 REPORT, supra note 2, Introduction stated: [Executive Order 10,988] noted that employee-management relations
SCOPE OF NEGOTIATIONS

The President's Study Commission Report and Recommendations issued in August 1969 announced that negotiations had led to improvements in a number of areas: the scheduling of hours of work, overtime, rest periods, and leave; safety and industrial health practices; training and promotion policies; grievance handling; and "many other matters of significance to employees and management."9

Despite these improvements, the 1969 Report noted a need for changes in the area of the permissible scope of negotiations.10 The Report (1) recognized management's tendency to interpret the Order in the federal service should be improved by providing employees an opportunity for greater participation in developing policies and procedures affecting the conditions of their employment, while preserving the public interest as the paramount consideration....

We find that the 1962 Order produced some excellent results, beneficial to both agencies and employees. This has been acknowledged by practically all concerned.

9. Id.
10. Certain limitations upon the scope of negotiations had been given an overly broad interpretation in many cases, restricting the number of negotiable items. For example, the right of an agency to assign personnel had been viewed as precluding negotiations over procedures that management employed in assigning work shifts and overtime. 1969 REPORT, supra note 2, § E1. The true intention of such reserved management right, however, had been to reserve an agency's unilateral right to establish staffing patterns for its organization and for the accomplishment of its work. Accordingly, the 1969 Report recommended that an expanded explanation of an agency's reserve right to assign personnel be adopted and suggested the following language, which was incorporated into Executive Order 11,491: "[T]he number of employees and the number, types and grades of positions, or employees assigned to an organizational unit, work project or tour of duty [shall be excluded from the scope of negotiations]. . . ." Id.

Labor organizations also complained that agencies had unduly restricted the range of negotiable matters through their regulatory power. Id. § E2. The 1969 Report concurred. Instead of recommending a formal change in the language of the Order, however, the Report merely announced a policy of discouraging overly prescriptive regulations, which could hinder negotiations. Id.

In other areas the 1969 Report did propose changes in the language of the Kennedy Order. While recommending the retention of the requirement that the agency head approve all negotiated agreements, the 1969 Report suggested the addition of limiting language in the Order, as a guide to such "approval decisions," so as to prevent the arbitrary rejection of agreements negotiated at the activity level. The recommended addition was that "approval or disapproval should be based solely upon the agreement's conformity with laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and with the regulations of other appropriate authorities." Id. § E4. As an additional clarification of the permissible scope of negotiations, the Report stated that arrangements for employees adversely affected by the realignment of work forces or technological change should also be negotiable. Id. § E1.
as favoring a narrow scope of negotiations, (2) recognized the need to clarify the permissible scope of negotiations, and (3) selected as a method of clarification more specific language in an expanded "statutory" treatment of the scope of negotiations. In response to the 1969 Report, President Nixon issued Executive Order 11,491 on October 24, 1969, which also imposed significant limitations on the scope of negotiations. The delineation of these limitations is the first object of this Note. In evaluating the present scope of negotiations in the federal service, attention will be focused on negotiability questions that have arisen in response to union proposals involving working conditions, agency regulations, work and scheduling assignments, work preservation, and merit promotions.

While lines that designate the general boundaries of the scope of negotiations may be drawn, they are of practical significance only if they provide a meaningful guide to the persons involved in the negotiation process itself. It is clear that management negotiators will seek to narrow the scope of negotiations, while union negotiators will seek to expand it. Since well over 50 percent of all federal workers are represented by exclusive bargaining units, the effect of the delay and animosity that may be produced by the conflicting aims of labor and management can hardly be underestimated. If collective bargaining is to be effective and efficient, the Order governing the negotiation process must furnish guidelines which will minimize such conflicts. Accordingly, the second object of this Note is to evaluate the current Order as the primary source of guidance with respect to the scope of negotiations for those who actually sit at the bargaining table.

II. DEFINING THE PERMISSIBLE SCOPE OF NEGOTIATIONS IN THE FEDERAL SERVICE

Sections 11(a), 11(b), and 12(b) of Executive Order 11,491 define the permissible scope of negotiations. Section 11(a) establishes the general obligation of management and labor to bargain

13. Since 1961, growth in union organization within the federal service has been dramatic. In 1973, 56 percent of the total nonpostal federal work force (more than one million employees) were represented by union locals—an increase of 44 percent, more than 800,000 employers over 1964. GOV'T EMP. REL. REP. No. 544, at D-9-10 (March 4, 1974).
with respect to personnel policies and practices and matters affecting working conditions.\textsuperscript{15} The obligation is mandatory, so long as bargaining is consistent with "applicable laws and regulations," including the general personnel policies contained in the \textit{Federal Personnel Manual}, published agency regulations, and existing labor-management agreements negotiated at higher levels in the agency.\textsuperscript{16} Section 11 (b) specifically excludes from the scope of negotiations the mission of the agency, the budget and organization, the numbers, types and grades of positions or employees assigned to an organizational unit, work project, or tour of duty, and the technology employed in performing work.\textsuperscript{17} In addition, section 12(b) of the Order provides that management shall retain the following nonnegotiable rights:

(1) to direct employees of the agency;\textsuperscript{18}

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;\textsuperscript{19}

(3) to relieve employees from duty because of lack of work or for other legitimate reasons;\textsuperscript{20}

15. \textit{Id.} at 268.

Sec. 11. \textit{Negotiation of agreements.} (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the \textit{Federal Personnel Manual}, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder, determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

16. \textit{Id.}

17. \textit{Id.} § 11:

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

18. \textit{Id.} at 269, § 12(b)(1).

19. \textit{Id.} § 12(b)(2).

20. \textit{Id.} § 12(b)(3).
(4) to maintain the efficiency of the Government operations entrusted to them;\textsuperscript{21}

(5) to determine the methods, means, and personnel by which such operations are to be conducted;\textsuperscript{22} and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.\textsuperscript{23}

Executive Order 11,491\textsuperscript{24} is clearly based on the findings and recommendations of the 1969 Report. The limits of negotiations are set forth by the delineation of specific nonnegotiable areas and by a comprehensive list of reserved management rights which are incorporated into every agreement.\textsuperscript{25} The emphasis on the exceptions to the obligation to bargain reveals something of the nature of the Order itself, for it provides management an arsenal of language with which to limit negotiations. Thus, there is a question whether the Order contains an implied structural bias favoring a narrow scope of negotiations.

The broad language used to limit negotiations raises the additional question whether such language provides significant guidance to negotiators. The language of the Order can best be evaluated and analyzed by viewing past interpretations of the Order in the context of specific negotiability questions which have arisen during the collective bargaining process. To resolve conflicts in interpretation, the Order establishes the Federal Labor Relations Council as the final arbiter of such negotiability questions\textsuperscript{26} and makes the Council

\begin{itemize}
  \item \textsuperscript{21} Id. § 12(b)(4).
  \item \textsuperscript{22} Id. § 12(b)(5).
  \item \textsuperscript{23} Id. § 12(b)(6).
  \item \textsuperscript{24} Exec. Order No. 11,491 was amended in 1971 by Exec. Order No. 11,616, 3 C.F.R. 262 (1973). The amendments are significant with respect to the scope of negotiations in only one regard: Section 20 of the Exec. Order No. 11,491 was changed so that parties are now permitted to negotiate within limits on the issue of the use of official time by employee representatives in negotiating an agreement. Exec. Order No. 11,616, § 1, 3 C.F.R. 262 (1973).
  \item \textsuperscript{25} Exec. Order No. 11,491, § 12(b), 3 C.F.R. 269 (1973), 5 U.S.C. § 7301 (1971). See also text accompanying notes 18-23 supra.
  \item \textsuperscript{26} Exec. Order No. 11,491, § 4(a), 3 C.F.R. 262, 264 (1973), 5 U.S.C. § 7301 (1971), established the Federal Labor Relations Council [hereinafter referred to as the Council], which consists of the chairman of the Civil Service Commission, who acts as chairman of the Council, the Secretary of Labor, and the Director of the Office of Management and Budget. Section 4(c)(2) empowers the Council to consider appeals. Section 11(c) outlines the appeals procedure and provides:
    \begin{itemize}
      \item \textsuperscript{c} If, in connection with negotiations, an issue develops as to
the ultimate authority on the scope of the obligation to bargain. Accordingly, the Council's interpretations clarify the meaning of the Order and serve to define the limits of negotiations. Many of the Council's decisions illustrate possible management bias in the Order and highlight the issues that produce the greatest degree of uncertainty in determining the permissible scope of negotiations.

A. Matters Affecting Working Conditions

In an early case, AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector, the Council was called upon to interpret the meaning of the phrase "matter[s] affecting working conditions" as used in section 11(a) of the Order. The agency argued that the union proposal, which required negotiations over health and safety standards in connection with the maintenance of roads used in border surveillance, violated the prohibition in section 11(b) against negotiating the technology for performing work. The Council found that the proposal was intended merely to reduce the chance of injury and disease. As such, the subject of the proposal was a "matter affecting working conditions" and hence was negotiable, subject to the additional qualifications set out in sections 11(a), 11(b), and 12(b) of the Order. The Council specifically held that proposals setting safety standards were negotiable, so long as such proposals did not attempt to make negotiable

whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when—

(i) It disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency or this Order.

28. Id.
29. Id.
30. Id. at 21:7008. For text of sections 11(a), 11(b), and 12(b), see notes 15, 17 supra and text accompanying notes 18-23 supra.
how the standards would be achieved. As a result, the Council's ruling left the union with a voice in determining an important aspect of the work environment, health and safety standards, and, at the same time, recognized the unilateral right of the agency to determine how such standards would be implemented.

B. The Limitation of Applicable Regulations

Since published agency regulations and policies, including the policies set forth in the Civil Service Commission's Federal Personnel Manual, supercede and limit both the obligation to bargain and the content of negotiated agreements, differences in the interpretation of such regulations and policies are inevitable. Such conflicts in interpretation may involve the regulations or policies of an agency that

31. American Fed'n of Gov't Employees Local 2595 and Immigration and Nationalization Serv., U.S. Border Patrol, Yuma Sector, Gov'T. EMP. REL. REP. 21:7007 (1971). In addition, the Council rejected management's contention that the proposal infringed management's reserved rights under § 12(b)(1), (4), and (5) to direct employees, maintain the efficiency of operation and determine methods, means, and personnel by which the activity's operations are to be conducted.


On the other hand, the fact that similar proposals had been negotiated by other agencies has been given no weight in the resolution of negotiability disputes. International Ass'n of Machinists and Aerospace Workers and U.S. Kirk Army Hosp., Gov'T EMP. REL. REP. 21:7005, 21:7006 (1971).


34. Id. § 12(a).
is not an actual party to the negotiations. This situation may arise where a union claims that an agency regulation violates existing Civil Service Commission policies as expressed in the Federal Personnel Manual. On the other hand, the negotiating agency may argue that a union proposal violates the agency's own regulations. In both situations the question whether a union proposal violates a policy or regulation is finally determined by the head of the agency that issued it. The validity of the policy or regulation may also be subject to dispute. Where the validity of a regulation is in issue, the initial resolution of the controversy is performed by the head of the agency involved in the negotiations. A labor union, however, may appeal the agency head's decision on the validity of a regulation or policy to the Council.

Where the controversy has involved an alleged conflict between agency regulations and Civil Service Commission regulations, the Council has declined to render its own interpretation of the latter and has relied, instead, on the advisory opinions of the Commission. Such a practice has been justified on the theory that the Civil Service Commission has the primary responsibility for interpreting its own regulations. Thus, when a union urged that an agency regulation that required a greater number of actual work hours to qualify firefighters for premium pay than were required by the Federal Personnel Manual was invalid as conflicting with Civil Service Commission regulations, the Council referred the question to the Commission. In rejecting the union's contention, the Council adopted the opinion of the Commission that the regulations involved established minimum standards only, which could be modified upward by agency regulations.

35. See, e.g., note 42 infra and accompanying text.
38. Notes 58-63 infra and accompanying text.
43. Id.
In another case, National Association of Federal Employees Local 779 and Department of Air Force, Sheppard Air Base, the Air Training Command, pursuant to a Department of Air Force regulation on merit promotions, issued a regulation prescribing a comprehensive merit promotion plan applicable to activities throughout the Command. The Command's regulation prohibited modifications of the plan by subordinate activities. In accordance with this prohibition, a subsequent union proposal concerning merit promotions at Sheppard Air Base was held nonnegotiable by the agency head. On appeal to the Council, the union contended that since the regulation precluded activity-level negotiations on merit promotion plans, it violated Civil Service Commission requirements. In accordance with its usual practice, the Council asked the Commission to interpret the applicable portion of the Federal Personnel Manual, Chapter 335. In response, the Commission noted that Chapter 335 instructed agencies on the negotiation of merit promotion plans. Nevertheless, since its regulations did not directly address the issue whether negotiations at the activity level could be prohibited by a higher authority, the Commission found that the Air Training Command regulation did not violate Civil Service Regulations. The Council adopted the Commission's findings. Under Sheppard, then, a regulation promulgated at an intermediate level in an agency, such as the Air Training Command, will be valid with respect to Civil Service Commission Regulations, unless it conflicts with specific Civil Service Commission requirements. This reasoning applies with equal force to regulations promulgated at the highest level of an agency. In this respect agencies are given great leeway in promulgating regulations, even when such regulations have a significant constricting effect on the scope of negotiations.

45. Dep't of Air Force Reg. 40-335.
48. Id. The Civil Service Regulation was in the Federal Personnel Manual chapter 335, subchapter 5.
50. Id. at 21:7049-50.
51. Id.
52. See Local 2424, Int'l Ass'n of Machinists and Aerospace Workers and Aberdeen Proving Grounds, Gov't Emp. Rel. Rep. 21:7081 (1973), where the Council deferred to the Civil Service Commission on the definition of "brief period," as used in the Federal Personnel Manual chapter 300, §§ 8-3(b), 8-4e, to define the period of a work assignment that involves a temporary promotion.
The mechanical adoption of the Civil Service Commission's advisory opinions may be viewed simply as evidencing the Council's respect for the authority of the Commission. This is so because the Order in no way diminishes the authority of the Commission to set personnel policy for the Executive Branch. Moreover, if the Council were to render its own interpretation of Civil Service Commission regulations, confusion over the meaning of such regulations could result. The Council might adopt an interpretation for the purposes of a negotiability question that would conflict with the interpretation given the regulation by the Civil Service Commission in another context. Sheppard could have presented this very situation. Had the Air Training Command sought the Commission's advice before it promulgated its merit promotion regulation, the Commission presumably would have approved the regulation. The Council, on the other hand, could have ruled that the Air Training Command regulation contravened Civil Service Commission policy as set out in the Federal Personnel Manual. Such a conclusion by the Council would have been reasonable, since Chapter 335 of the Manual permits, at a minimum, limited negotiations regarding merit promotion proposals, so that a regulation precluding all negotiations over such proposals could violate the spirit of the chapter.

Although the Order provides that "an agency head's determination of the agency's regulations with respect to a proposal is final," the practice of giving the Civil Service Commission's advisory opinions binding force diminishes the role of the Council as the final arbiter of negotiability disputes. Admittedly, the Council is faced with a Hobson's choice: If it relies solely on the Commission's interpretations, the Council diminishes its own authority; if it renders its own interpretations, the Council risks confusion over the meaning of Civil Service Regulations. In adopting the former alternative the Council, in effect, cedes jurisdiction over disputes concerning the effect of Civil Service Commission regulations to the Commission itself. Moreover, since the union's right to contest the validity of regulations

The Commission found that the Department of Army's rule that a temporary promotion was not permissible in an assignment of less than 60 days was not in conflict with "brief period" as used in the Federal Personnel Manual. Id. at 7082.


55. Text accompanying notes 52-53 supra.
extends only to the regulations of the negotiating agency, the propriety of Civil Service regulations is not subject to review in negotiability appeals. Given the pervasive application of Civil Service regulations, the Order, as interpreted by the Council, provides the Civil Service Commission with extraordinary power to limit the scope of negotiations. Consequently, the ability of the Council to speak with authority on the permissible scope of negotiations is significantly circumscribed. Indeed, the Civil Service Commission's interpretations have placed within the agencies the power to limit negotiations through regulations of general application. Such regulations tend to block negotiations at the local level.

On the other hand, the Council has held that the scope of negotiations is not limited by agency regulations dealing only with conditions of employment in an individual activity. In United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, a union proposal would have been negotiable but for a Department of Commerce regulation. However, since it was directed specifically at the Academy's faculty, the Council refused to consider the regulation as limiting the scope of negotiations. The Council specifically held that only those regulations and policies "issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency, or at least to employees of more than one subordinate activity," were permitted to limit the scope of negotiations. To interpret the Order otherwise, the Council reasoned, would permit ad hoc limitations on the scope of negotiations and make a mockery of the bargaining obligation.

The validity of agency-wide regulations presents a more difficult question. Section 11(b) of the Order requires that in prescribing regulations relating to working conditions and personnel practices and policies, an agency shall have due regard for the obligation to bargain imposed by section 11(a). It would seem that the validity of agency regulations could be determined by viewing the regulation...
against the areas in which bargaining is required by the Order. The language of the Order, however, precludes the use of such a technique, since section 11(a) prohibits bargaining over agency regulations, and since the Order does not set out any reserved employee rights that, like the designated management rights, may not be infringed. Thus, from the union's point of view, the Order contains a catch-22 that protects the validity of agency regulations. In formulating its regulations the agency is to be mindful of its obligation to bargain, but the obligation to bargain does not extend to the regulations so promulgated. As a result, when a union proposal would be negotiable but for an agency-wide regulation, and the validity of such regulation is in dispute, the question is not strictly whether the regulation is overly proscriptive. Rather, the Council has determined that the real question is whether the regulation involved is valid on its own merits. The test to be applied is the same one employed in dealing with agency regulations directed at a single activity. If it was issued to achieve some degree of uniformity and equality in administration of matters common to all employees, the regulation will not be held to improperly restrict negotiations. Thus, the Council has held that a regulation precluding activity-level negotiations over merit promotion proposals was a proper restriction on the scope of negotiations, since the regulation applied uniformly throughout the issuer's command.

It is apparent that the narrowing impact of such regulations on the scope of negotiations is considerable. In fact, the Council has noted that the practice of issuing explicit regulations on matters relating to personnel practices and working conditions reduces the scope of bargaining and is therefore of doubtful wisdom. Nevertheless, under the language of the present order, the Council is bound to apply the Merchant Marine test in determining the validity of agency-wide regulations. It appears, then, that the Order will be inter-

64. See note 59 supra and accompanying text.
66. Id.
67. Id. at 21:7049.
68. See note 60 supra and accompanying text.
69. Accord, Seattle Center Controller's Union and FAA, Gov't Emp. Rel. Rep. 21:7057 (1973), where the Council held an FAA regulation issued to strengthen administrative and technical supervision of air traffic control per-
preted to give the widest possible latitude to the formulation and application of agency and Civil Service Commission regulations, regardless of the effect on the scope of negotiations.

C. Work Assignments and Scheduling

The 1969 Report's recommendations relating to the assignment of personnel were incorporated in Executive Order 11,491 in the hope of clarifying the negotiability of proposals. The Order provides that "the obligation to meet and confer does not include matters with respect to . . . numbers, types and grades of positions . . . assigned to [a] . . . tour of duty." Nevertheless, the determination of an agency's power to assign personnel to projects and shifts has continued to be a source of conflict at the bargaining table. In resolving such conflicts, however, the Council has refrained from adopting an expansive interpretation of the language of the Order, thus avoiding a construction that could lead to a further narrowing of the permissible scope of negotiations.

The Council has modified its earlier hard-line stance on the negotiability of work assignment proposals. Its earlier approach, which seemed to portend a narrow scope of negotiations in the area of work assignments, was expressed in AFGE Local 194 and Plum Island Animal Disease Laboratory. There the Council held: "[T]he specific right of an agency to determine the 'numbers, types and grades of positions or employees' assigned to a shift or tour of duty, as provided in section 11(b), obviously subsumes the agency's right to fix or change the number and duration of those shifts or tours." Subsequently, however, the Council rendered a decision that substantially eased the narrowing effect on the scope of negotiations of the...
**SCOPE OF NEGOTIATIONS**

Plum Island holding. In *Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center*\(^75\) the Council held that a union proposal to establish a basic Monday-through-Friday workweek at a 24-hour-a-day, seven-day-a-week activity was negotiable.\(^76\) *Plum Island* was distinguished on the ground that the number and duration of the tours of duty at the activity in that case were "integrally related" to the numbers and types of workers assigned to those tours. Taken together, the duration and composition of the tours of duty comprised an essential part of Plum Island's staffing patterns (the number and types of workers assigned to accomplish the agency's work), a subject which is expressly nonnegotiable under section 11(b) of the Order.\(^77\) The Council did not find that the union's basic workweek proposal in *U.S. Naval Supply Center* similarly affected the staffing patterns of the activity, since there was no indication that the proposal in question was "integrally related in any manner to the numbers and types of employees involved."\(^78\)

On the basis of these opinions, a basic workweek proposal is negotiable unless the agency can show that there is an integral relationship between the work assignment proposal and the activity's staffing patterns—the numbers, types, or grades of positions to be assigned at specific times during the workweek. Thus, the modification of the broad limitation on bargaining implicit in the *Plum Island* decision makes it clear that the burden is on an agency to show that a work assignment proposal conflicts with the agency's right to establish staffing patterns. Such a rule is consistent with the *1969 Report*’s goal of permitting a wider range of negotiations in the area of policies and practices relating to work assignments.\(^79\)

Proposals affecting shift scheduling and overtime are also related to questions involving the assignment of personnel. The point of inquiry with respect to such proposals is the retained management right "to maintain the efficiency of government operations entrusted to


\(^{76}\) The Council held that, since the proposal was not "integrally related" to the agency's staffing patterns, it was negotiable as a matter affecting working conditions. *Id.*

\(^{77}\) *Id.* at 21:7034.

\(^{78}\) *Id.* See also *Federal Employees Metal Trades Council of Charleston, AFL-CIO* and *Charleston Naval Shipyard, Gov't Emp. Rel. Rep.* 21:7105, 21:7106 (1973), in which the Council ruled, in part, that a union proposal involving the number of employees assigned to a non-Monday-through-Friday workweek was nonnegotiable, since it was "integrally related" to staffing patterns. *Federal Employees Metal Trades Council of Charleston, AFL-CIO* and *Charleston Naval Shipyard, Gov't Emp. Rel. Rep.* 21:7103, 7104 (1973).

In *Local 2219, IBEW and Department of Army, Corps of Engineers, Little Rock District*, the union's proposal would have prevented the rescheduling of swing shifts at a 24-hour-a-day activity to avoid the payment of overtime to swing men. The agency argued that the proposal, which required the payment of overtime in certain situations regardless of whether the employee had worked his full 40-hour week, violated the reserved management right to maintain the efficiency of the government operations entrusted to it. The agency reasoned that the proposals would circumscribe its efforts in reducing premium pay costs, thereby impairing its ability to maintain efficiency and economy in agency operations. The Council rejected the agency's position, however, and held that increased costs were not necessarily incompatible with the efficient operation of government activities. In fact, the Council found that there was a real probability that the union's proposals might increase efficiency because of their favorable impact on employee morale.

In addition to the improvement in employee morale, the Council noted other potential benefits from the union's proposal, such as increased productivity, employee responsiveness to direction, reduced turnovers, fewer grievances, and contributions by employees of money-saving ideas.

Thus, the Council has recognized the importance of overtime arrangements to employees as a matter affecting working conditions and has held that overtime proposals are not invariably related to an agency's staffing patterns. As a result, *U.S. Naval Supply Center* permits negotiations over such proposals unless the agency dem-

---

82. The proposal provided that a swing man would be paid overtime should he be rescheduled to work on a holiday or weekend. *Id.*
83. *Id.* at 21:7024.
84. One of the primary purposes of the union proposal was to eliminate, or at least soften, the demoralizing effect of last-minute shift changes and the resulting uncertainty as to when workers would have days off to be with their families. *Id.* at 21:7024.
86. *Cf.* Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, *Gov't Emp. Rel. Rep.* 21:7107, 21:7108 (1973), where the Council held that the union's proposal was concerned solely with overtime and therefore was not integrally related to staffing patterns. The proposal provided that duties of unit employees were not to be assigned to non-unit employees solely for the purpose of avoiding the payment of overtime to unit members. *Id.* at 21:7107.
onstrates that they are integrally related to its staffing patterns. Moreover, under Little Rock, overtime proposals will not be held to violate management's right to maintain efficiency in operations unless the agency can demonstrate that increased costs or reduced effectiveness in operations are "inescapable and significant" and "are not offset by compensating benefits."\(^8\)

While Little Rock and U.S. Naval Supply Center permit negotiations with respect to overtime and basic workweek proposals, a different result obtains on the question of job content. The Civil Service Commission has advised that its job descriptions are not all-inclusive of the duties involved and do not prohibit the assignment of any duties or responsibilities to an employee by an agency.\(^8\)\(^8\) Under the rationale developed in Plum Island and U.S. Naval Supply Center, the negotiability of job content proposals seems to depend upon the relationship of the proposal to the nonnegotiable area of agency organization and staffing patterns, because the content of individual jobs is necessarily related to the numbers, types, and grades of positions the agency employs. In International Association of Firefighters, Local F-111 and Griffiss Air Force Base,\(^8\)\(^8\) the Council defined the term "organization" as the structure or systematic grouping of work and determined that the worker's individual position is the lowest building block in that structure.\(^9\)\(^0\) Moreover, since it is apparent that job content relates to the duties that will be performed by the individual positions involved, it follows that job-content proposals must have a substantial effect on the numbers and types of positions to be assigned to any given work project. In fact, the Council ruled that the assignment of duties to individual positions is the critical first step in determining the staffing patterns of an agency.\(^9\)\(^1\)


\(^8\)8. See International Ass'n of Firefighters, Local F-111 and Griffiss Air Base, Gov't Emp. Rel. Rep. 21:7059 (1973), in which the Civil Service Commission, in reply to a request for an interpretation of one of its own directives stated: "In relation to the entire standard [the typical work examples] are only illustrative of the distinctions drawn in the statement of characteristics of the class and body of applicable knowledge at the time the standards were prepared. They are not intended to be either complete or exclusive." Id. at 21:7060.


\(^9\)0. Id. at 21:7061.

ingly, the Council in *Griffiss* held that the exception from the bargain-
ing obligation of matters pertaining to the organization of an agency precluded negotiations over the content of the individual job. Such a result was justified in view of the significant role that the assignment of duties to the individual position plays in the determination of agency staffing patterns.

In sum, the Order, as interpreted by the Council, opens a significant area of negotiations with respect to work-assignment and work-scheduling proposals. The Council's treatment of management's right to maintain the efficiency of operations\(^9\) demonstrates an awareness of the importance of considering the human element in negotiability questions.\(^9\) Such an awareness is indicated by the admonition that the impact of a proposal on agency efficiency must be measured by balancing the projected increased costs against the potential increases in production resulting from the proposal's favorable impact on employee morale.\(^9\) Indeed, the heavy burden of proof required of an agency to demonstrate the nonnegotiability of an overtime proposal\(^9\) further emphasizes the Council's position that the initial dollar outlay is not the proper yardstick by which to judge the impact of a proposal on government efficiency. Moreover, the Council's refusal to interpret broadly the limitations of section 11(b) strengthens the bargaining obligation that section 11(a) mandates. Nevertheless, the boundary of negotiations appears to be fixed at the point where a work-assignment proposal arguably interferes with management's substantive right to control the essential organization of its work.\(^9\)

**D. Work-Preservation Proposals**

A federal agency may "contract out" work assignments to private

---

92. *Id.* See also Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Gov't Emp. Rel. Rep. 21:7151 (1973). Nevertheless, if the Order does not prevent the assignment of unrelated duties to one position, *quaere* the future effect on maintaining the rigid criteria for promotion in the Federal Service. One can forcefully argue that as individual positions become more and more diversified in the scope of their duties, performance will be correspondingly more difficult to evaluate.


94. *Id.* at 21:7024.

95. Notes 84-85 *supra* and accompanying text.

96. Note 87 *supra* and accompanying text.

97. Notes 89-91 *supra* and accompanying text.
industry to provide for the organization of its work. The contracting-out alternative is a well-entrenched practice in the federal government and is of great concern to unions representing federal employees. Union concern stems from a natural desire to preserve the work and therefore the jobs of unit members. Consequently, a union will seek to control this practice so that the working capacity of a unit is exhausted before the agency looks elsewhere for sources of labor.

Such an attempt to control the assignment of work to non-unit government employees was made by the union in *Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center*. One of the union proposals sought to require that "work regularly and historically assigned to and performed by bargaining unit employees covered by [the] agreement [would] not be assigned to military personnel or Public Works Center employees excluded from the bargaining unit." It was found that such a proposal necessarily determined the type of personnel or which employees would conduct the particular agency operation involved. Accordingly, the Council held that the proposal violated management's right to determine the "total body of persons" by which its operations were to be conducted under section 12(b)(5) of the Order.

100. While federal employees would not lose their jobs because of "contracting out," the practice has the effect of reducing the number of employees required to perform an activity's functions, thereby reducing the number of potential unit members.
102. *Id. at 21:7093.*


A second proposal was also advanced by the union. The proposal provided in part:

Section 1. It is understood by the parties hereto that decisions regarding contracting work out of the unit and transfer of work within
Though the Council analyzed the issues in *Naval Public Works Center* under the reserved-management-rights section 12(b)(5), the disputes over such work preservation clauses could have been resolved under section 11(b) of the Order.104 The union's first proposal defined the initial source of labor available for the performance of work as the members of the bargaining unit. As a result, the proposal determined the numbers and type of personnel the activity could employ in assigning work. Since the numbers and types of personnel constitute an activity's staffing patterns, the proposal violated the section 11(b)105 prohibition against negotiating over staffing patterns. The use of section 11(b) to evaluate the negotiability of such proposals has the advantage of discouraging management negotiators from relying on the stern language of the reserved management right in section 12(b)(5). Management rights provisions such as section 12(b)(5) create barriers behind which management can refuse to negotiate. In view of its tendency to narrow the scope of negotiations,106 it is not surprising that management will resort to such provisions whenever possible.107 Thus, the mere presence of and reliance upon such management rights provisions has been criticized as generating unnecessary negotiability disputes which hinder the collective-bargaining process.108

In light of the great weight the Council placed on the Office of Management and Budget directive109 encouraging contracting out

the Public Works Center are areas of discretion of the employer. However, it will be the policy of the Employer that work normally performed in the unit will not be contracted out or assigned to employees not in the bargaining unit, unless such work is beyond the capacity or capability of unit employees to perform or if economic situations or technological change dictate that such work be performed outside the unit. In this regard the Employer agrees to consult with the union concerning any work situation changes affecting employees in the unit.


104. See note 17 *supra*.
105. Notes 77-79 *supra* and accompanying text.
106. Note 12 *supra* and accompanying text.
108. *Id*.
109. See note 98 *supra*. The directive states a general policy of relying upon the private enterprise system to supply the government's needs except
work by agencies, the availability of section 11(b) as an alternative
guide takes on greater significance. This is so because the Council’s
mode of analysis gave the Office of Management and Budget (here-
inafter OMB) the power to influence the scope of negotiations sub-
stantially. While it held that the contracting-out proposal was non-
negotiable because it violated management’s section 12(b)(5) right
to determine the personnel by which activity operations were to be
conducted, the Council went on to say that the proposal would have
proscribed management action based on the OMB directive.\textsuperscript{110} Al-
though the Council disclaimed the binding effect of the OMB direct-
ive with respect to negotiations,\textsuperscript{111} it conceded that such directives,
as a statement of governmental policy, were a major considera-
tion in construing the scope of an agency’s right under section
12(b)(5).\textsuperscript{112} Thus, the Council’s analysis seems to permit the OMB
through its directives to limit the scope of negotiations by serving as
authority for determining the substance of management’s right under
section 12(b)(5).\textsuperscript{113} Such a result was clearly not intended by the
Order,\textsuperscript{114} and it seriously undermines the independence and authority
of the Council to guide the development of the federal labor relations
program. If the analysis of such proposals were conducted under
section 11(b), however, the issue of OMB directives as defining
management rights would be avoided and the integrity of the Council
maintained. Indeed, since management’s section 11(b) right to de-
termine staffing patterns appears to be coextensive with its section


\textsuperscript{111} \textit{Id.} See United Fed’n of College Teachers, Local 1460 and U.S. Merchant Marine Academy, \textit{Gov’t Emp. Rel. Rep.} 21:7019 (1972), where the council expressly held that Office of Management and Budget direc-
tives were not to be viewed as limitations on the scope of negotiations.


\textsuperscript{113} \textit{See} Local 174, AFL-CIO and Supships, USN, 11th Naval Dist., \textit{Gov’t Emp. Rel. Rep.} 21:7099 (1973). In both cases, the Council found a union “contracting out” proposal violative of § 12(b)(3) on the basis of the discus-
sion in \textit{Naval Public Works Center}.

\textsuperscript{114} The directives of the OMB should not be given the same treatment as Civil Service Regulations, since it is nowhere suggested in the Order that the OMB has the authority, directly or indirectly, to limit the scope of nego-
E. Merit-Promotion Proposals

Special union interests in methods of promotion may conflict with the merit concept, which is the cornerstone of the Civil Service System.\(^\text{115}\) This conflict may arise through the interjection of the union’s special interests into the objective standards that characterize a merit system of employee promotion and retention. For example, a seniority proposal could inject a non-merit criterion into the promotion process. Consequently, section 12(b)(2) of the Order expressly reserves management’s right to promote employees. Nevertheless, the Council has been faced with questions on the negotiability of union proposals for employee input into the merit promotion process.\(^\text{116}\)

In dealing with such proposals the Council has carefully distinguished between the substantive and procedural aspects of the merit promotion system.\(^\text{117}\) In *Veteran’s Administration Independent Service Employees Union and Veteran’s Administration Research Hospital*,\(^\text{118}\) the union proposed that the union steward be allowed to obtain the reasons for the selection of an employee to be promoted and to appeal such selection to a higher agency official, whose decision on the promotion was to be final.\(^\text{119}\) The proposal was held negotiable under section 12(b)(2).\(^\text{120}\) The Council noted that while section 12(b)(2) prohibits union interference with the authority of management to decide and act on promotions, “there is no implication that . . . [such] authority [was] intended to bar negotiations of procedures which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.”\(^\text{121}\) Thus, a union proposal will be negotiable if it does not require management


\(^{117}\) See *V.A. Research Hospital, Gov’t Emp. Rel. Rep.* 21:7029 (1972).

\(^{118}\) *Id.*

\(^{119}\) *Id.*

\(^{120}\) *Id.*

SCOPE OF NEGOTIATIONS

1974]

215
to negotiate or to secure union consent on a promotion selection, (the
substantive aspect of management's right to promote) and does not
unreasonably delay the promotion process.\textsuperscript{122}

In spite of section 12(b)(2) the Order appears to open a rela-
tively wide path for employee participation and input into the proce-
dures of selecting individuals for promotion. However, a proposal
that passes the Council's substance-procedure test of section
12(b)(2) may still be nonnegotiable if it conflicts with applicable
regulations, such as Civil Service regulations, or any other section of
the Order.\textsuperscript{123} Nevertheless, in giving the labor organization a voice
in the promotion process, the Council's interpretation of section
12(b)(2) certainly makes the role of the exclusive representative
more meaningful.\textsuperscript{124} Because of the Order's structural emphasis of
reserved management rights,\textsuperscript{125} the Council's interpretation of section
12(b)(2) takes on additional significance. Although the promotion
system may be considered a matter affecting working conditions,
management's reserved right to promote outs across the bargaining
obligation. Accordingly, the Council could easily have held all union
proposals concerning merit promotions to be nonnegotiable. There-
fore, in finding that certain merit promotion proposals are negotiable,
the Council clearly views the Order as intending to provide broad
scope of negotiations.

\textsuperscript{122} Id. at 21:7030.

\textsuperscript{123} See Federal Employees Metal Trades Council of Charleston and
proposal giving the union access to standards used in the formulation of merit
promotion procedures was held nonnegotiable on the ground that it violated
the Civil Service Commission's \textit{Federal Personnel Manual} chapter 337, sub-
chapter 3-3, regarding merit promotion procedures, which required that all em-
ployees have equal opportunity for promotion.

\textsuperscript{124} The Council's attention to making the role of the exclusive representa-
tive meaningful is also reflected in negotiability decisions regarding grievance
procedures. Thus, in American Fed'n of Gov't Employees Local 1668 and
Elmendorf Air Force Base, Gov't Emp. Rel. Rep. 21:7071 (1973), the
Council ruled that proposals over grievance procedures were negotiable, subject
only to the limitations in the Order. The Council reasoned that since the ex-
clusive representative was responsible for processing grievances on unilaterally
determined working conditions, to permit the agency to establish the grievance
procedure itself would diminish the role of the exclusive representative. \textit{Id.}
at 7073. \textit{Accord}, International Ass'n of Machinists and Aerospace Workers,
Local 830 and U.S. Naval Ordnance Station, Gov't Emp. Rel. Rep. 21:7077
(1973). \textit{See also} International Ass'n of Machinists and Aerospace Workers

\textsuperscript{125} Notes 18-23 \textit{supra} and accompanying text.
III. Conclusion

The history of the federal labor relations program indicates that the right of employee organizations to bargain collectively with the government through its agencies is firmly established. The broad obligation to bargain contained in section 11(a) of Executive Order 11,491 evidences the sincerity with which the government views its commitment to the development of a fair and sensible collective bargaining system in the federal service. Nevertheless, the Order contains broad limitations on the scope of negotiations which account, in part, for the rather significant number of negotiability disputes which have arisen.126

In the main, the Council has demonstrated its unwillingness to allow the Order to become a shield behind which management may hide to avoid its bargaining obligation. The decisions permitting negotiations in the areas of working conditions, work assignments and overtime, and merit promotions have done much to reform the structural bias in favor of management implicit in the Order's emphasis of the limitations on the scope of bargaining. Moreover, it appears that a broad picture of the permissible scope of negotiations in the federal service is beginning to take shape. In establishing the boundaries, the Council has applied the Order to preclude negotiations over union proposals that arguably interfere with those aspects of an agency's action necessary for the accomplishment of its mission. Thus, negotiations over proposals affecting an agency's staffing patterns, the essential ordering of an agency's work force, are nonnegotiable. Negotiations over the agency's substantive right to promote are similarly prohibited. The practice of having the Civil Service Commission determine whether a union proposal violates its regulations, however, appears to diminish the Council's authority in defining the permissible scope of negotiations. Moreover, by raising the potential power of the Office of Management and Budget to limit the scope of negotiations by issuing directives relating to an agency's right to determine the methods, means, and personnel by which its operations are to be conducted under section 12(b)(5), the Council has detracted from its generally laudable effort to define the scope of negotiations.

The emerging picture of the permissible scope of negotiations in the federal service is clouded, however, by the Order's treatment of agency-wide regulations. As the Order is presently written, such reg-

ulations provide a vehicle for the unilateral elimination from the bargaining table of items that would otherwise be negotiable.\footnote{127} Since the cornerstone of the Federal Labor-Management Relations Program is the implementation of bilateral machinery, such as collective bargaining, as a method of problem resolution,\footnote{128} such a power raises doubt concerning the efficacy of the Order itself. If management may unilaterally control the scope of negotiations by the issuance of an agency-wide regulation, the bargaining obligation becomes so malleable as to be meaningless. Clearly, the impact of such regulations is a problem that cannot be ignored.

A. *A Proposal*

As it is presently written, Executive Order 11,491 confers broad power upon an agency to limit the scope of negotiations by issuing agency-wide regulations. Accordingly, the Order should be modified so that the scope of the bargaining obligation may not be changed by unilateral management action. There are two ways in which a modification could be achieved within the general framework of the Order. One would be simply to provide that agency regulations do not preclude negotiations over otherwise negotiable proposals. Such a provision, however, would cut deeply into the right of agencies to promulgate regulations since it places the Order in a position that absolutely preempts any agency regulation. Moreover, such a change would run counter to the position of the 1969 Report that an agency's authority to promulgate regulations must be retained.\footnote{129} An alternative would be to permit an agency-wide regulation to limit the scope of negotiations only if the agency could demonstrate that the regulation was essential to implementation of the agency's rights under one of the other legitimate exceptions to the bargaining obligation. For example, agency-wide regulations affecting the procedural aspects of merit promotions would be negotiable, whereas agency-wide regulations affecting substantive aspects of merit promotions would not be. Additionally, it would be open to the Council to place a high burden of proof on the agency if it

\footnote{127. See notes 62-69 supra and accompanying text.}
\footnote{128. Ingrassia, *The Maturing Federal Labor Management Relationship*, CIVIL SERVICE J., Apr.-June 1972, at 6, 8. Mr. Ingrassia is director of labor management relations for the Civil Service Commission.}
found the danger of undue restrictions on the scope of negotiations to be great. ¹³⁰ The latter approach is clearly preferable, since the scope of negotiations would not then be subject to restrictions imposed by completely uncontrolled management action, as is now the case.

This proposed modification would be consistent with the position of the 1969 Report.¹³¹ Under Merchant Marine, regulations directed at a specific activity do not pose a bar to negotiations.¹³² The Order, then, does not require that every agency regulation operate as a limit on the scope of negotiations, notwithstanding that it is possible for a union to obtain an exemption from such regulations.¹³³ Thus, the restriction on the scope of negotiations posed by agency regulations need not be given broad effect, a result which is consistent with the 1969 Report's emphasis on avoiding the inhibiting effect of agency regulations on negotiations. In fact, the Council's decision in Sheppard Air Base,¹³⁴ which rendered a union proposal nonnegotiable because of a regulation, was compelled not so much by the spirit of the Order as by its structure.¹³⁵ Thus, the proposed change would obviate the uncontrolled restrictive effect of agency regulations on the scope of negotiations by imposing restraints on that restriction, and would simultaneously preserve the same degree of deference for the authority of agencies to promulgate regulations contained in Merchant Marine.

ALEXANDER J. ZIMMER

¹³⁵ Id., at 7048.