II. ARBITRATION IN THE FEDERAL GOVERNMENT: WHAT HAPPENED TO THE "MAGNA CARTA"?

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Arbitration presently plays such a narrow role in the federal labor relations program that the question of "How to Avoid the Arbitrator" is a nontopic in the federal sector.[1] Indeed, it is such a nontopic that I was hard pressed to find a text for this paper in the scriptures, Shakespeare, or Alice in Wonderland. Since this is a tale of unrequited love and perhaps because country music is very much an "in" art-form in Washington these days, however, I turned to that medium for inspiration. I am indebted to Don Meredith, one-time Dallas quarterback and now full-time professional good-ol'-country-boy, for a number of country-music lyrics—any one of which might suffice to describe the heartbreak, if not disenchantment, which awaits a wooer of arbitration in the federal sector. Instead of picking one of them, I decided to use several and to sprinkle them throughout the paper as appropriate—or more often, I fear, inappropriate; some of them may appear to be non sequiturs, but in my own baroque mind they are relevant as comment. In any event, their interjection from time to time will break up the remorseless logic and ideal symmetry of the paper.

Arbitration is now a fixture in most federal collective bargaining agreements,[2] and the number of "binding" arbitration decisions has steadily increased over the years.[3] Nevertheless, the sphere within which the arbitrator functions under the present federal grievance and arbitration systems is so confined and the systems are so hedged in by procedural and substantive limitations that most of this audience would not recognize the beast if they saw him, much less worry about how to avoid him.

The burden of this paper is to examine the present crazy-quilt structure for resolving disputes between the Government and its employees and to highlight the need for policy decisions by the executive and/or legislative branches: first, to simplify the laws, regula-

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[1] The subject of this paper relates to the executive branch's classified or white-collar employees only and does not purport to cover blue-collar employees.

[2] The Civil Service Commission's Office of Labor Management Relations reports that as of December 1975, 86 percent of the negotiated agreements under Executive Order 11491, as amended, provided for arbitration, and 88 percent of these, or 75 percent of the total, provided for binding arbitration. Federal Labor Relations Council, Information Announcement, July 2, 1976, p. 3.

[3] In 1970, there were 67 arbitration decisions, of which only 13 were binding. In 1975, the total number of decisions rose to 214, of which 197 were binding. *Ibid.*

tions, and practices governing the resolution of such disputes; second, to reduce, if not eliminate, the present fragmentation of decision-making; and third, to devise some mechanism for independent, impartial determination of such matters.

As will appear, the Government employee unions are generally unhappy with the design and functioning of the entire federal labor relations structure and have been seeking legislation for the past decade to broaden the scope of collective bargaining and provide an independent, impartial decision-making body, similar to the NLRB in the private sector but with authority also to handle negotiating impasses and, perhaps, appeals of arbitration decisions. Government managers reply that the present structure is a good one and should be permitted to evolve gradually without the intervention of Congress, except in limited areas where ancient statutory procedures may have outlived their usefulness.

(If I were a Government employee, I know what my reaction to management's appeal for more "evolution" would be. It would echo the words of the lovelorn heroine of one of the Meredith lyrics: to wit, "He broke my heart at Walgreens and I cried all the way to Sears.")

The state of federal labor-management relations, as a whole,[4] is beyond the ambit of this paper. Nevertheless, in order to understand the limitations upon the use of arbitration in the federal sector, it will be necessary to sketch in some detail concerning the overall scheme of labor relations in the Federal Government today.

Consider, then, the present situation: Congress has occupied much of the field in which traditional collective bargaining takes place. Salary scales, hours of work, overtime pay rates, and rules for the payment of overtime (as distinct from compensatory time), holidays, vacations, pensions, and insurance plans are all established by statute or, as in the case of salaries under the Federal Pay Comparability Act of 1970, by a statutorily established mechanism. In addition, Congress has established statutory standards for the protection of a great number of other employee rights, for example, those dealing with the merit system and nondiscrimination. For the enforcement of these rights, it has prescribed statutory appeals procedures in a variety of forums. Depending upon the nature of his claim, the employee seeking to enforce these statutory rights may find himself before the Federal Employees Appeals Authority, the Appeals Review Board, the Performance Review Board, an ad-

[4] See, generally, Murray B. Nesbitt, Labor Relations in the Federal Government Service (Washington: BNA Books, 1976).

ministrative law judge, the Civil Service Commission or one of its bureaus, such as the Bureau of Personnel Investigations or the Bureau of Retirement, Insurance, and Occupational Health. Even the titles are enough to boggle the mind.

The Civil Service Commission identifies 23 areas of action or decision taken by an agency or by the CSC itself which are covered by statutory appeals procedures. Included are such matters as adverse actions (discharges and suspensions of more than 30 days), job classifications, and reductions in force—areas which in other sectors are routinely subject to the grievance and arbitration procedure.[5] Many of these statutory appeals procedures do not even pro-

[5] The "actions or decisions" involved are listed by the CSC as follows (after each action or decision in the list, a notation in parentheses indicates whether or not a hearing is provided):

(1) Adverse action (discharge and other disciplinary action involving suspension of more than 30 days) (hearing) 5 C.F.R. Sections 752.203, 754.105, 5 U.S.C. 7701, E.O. 11491;

(2) Classification and job grading (no hearing) 5 C.F.R. Sections 511.603-612, 532.702-703, 5 U.S.C. Sections 5112, 5346;

(3) Discrimination (hearing) 5 C.F.R. Section 713.221, P.L. 93-259, P.L. 92-261, Section 717;

(4) Level-of-competence decisions (no hearing) 5 C.F.R. Section 531.407, 5 U.S.C. Section 5335;

(5) Performance-rating appeals (hearing) 5 C.F.R. Section 430.401, 5 U.S.C. Section 4305;

(6) Removal of hearing examiner (hearing) 5 C.F.R. Section 930.221, 5 U.S.C. Section 7521;

(7) Restoration after military duty (no hearing) 5 C.F.R. Section 353.701, 62 Stat. G14, 50 U.S.C. App. 459;

(8) Retirement (a) disability (hearing) 5 C.F.R. Section 831.2105, (b) Hiss Act (hearing) 5 C.F.R. Section 831.111, (c) other (no hearing) 5 C.F.R. Section 831.107, 5 U.S.C. Section 8347;

(9) Adverse action for political activity (hearing) 5 C.F.R. Sections 733.201, 204, 5 U.S.C. Sections 7321-7325;

(10) Adverse suitability rating (no hearing) 5 C.F.R. Sections 731.302(b), 754.105, 5 U.S.C. Sections 3301, 3302, 7301;

(11) Denial of life-insurance coverage (no hearing) 5 C.F.R. Section 870.205, 5 U.S.C. Section 8716(a);

(12) Denial of reemployment or reinstatement rights (no hearing) 5 C.F.R. Sections 352.209, 352.313(a), 352.508, 330.202, 5 U.S.C. Sections 3101 Note, 3301, 3584, 1302, 3302, 75 Stat. 449 Section 625, 22 U.S.C. 2385;

(13) Determination of exempt/nonexempt (regulations not yet final), P.L. 93-259;

(14) Employment practice (hearing) 5 C.F.R. Section 300.104, 5 U.S.C. Sections 3301, 3302, 7151, 7154;

(15) Examination ratings (no hearing), *ibid.*;

(16) Health benefits (no hearing) 5 C.F.R. Sections 890.103, 891.105, 5 U.S.C. Sections 8913(a), 8902(j);

(17) Reemployment/reinstatement eligibility (no hearing) 5 C.F.R. Sections 732.401, 731.401, 5 U.S.C. Sections 3301, 3302, 7301, 7312;

(18) Reduction in force (hearing for preference eligibles only) 5 C.F.R. Section 351.901, 5 U.S.C. Sections 1302, 3502;

(19) Restoration after military service (temporary or indefinite employees) (no hearing) 5 C.F.R. Section 353.801;

(20) Salary-retention decision (no hearing) 5 C.F.R. Section 531.517, 5 U.S.C. Section 5338;

(21) Separation of probationers (no hearing) 5 C.F.R. Sections 315.806(b), (c), 5 U.S.C. Sections 1302, 3301, 3302;

(22) Suspension—30 days or less (no hearing) 5 C.F.R. Section 752.304, 5 U.S.C. Sections 1302, 3301, 3302, 7701;

(23) Mandatory reinstatement for injury on job (no hearing) 5 U.S.C. Section 8121.

vide a hearing for the employee appealing the action or decision in question.

(Confronted by this suffocating "due process," one can again envision the federal employee's reaction. In the folk wisdom of the lyrics preserved for us by the prophet Meredith: "I feel better all over more than anywhere else.")

What remains after the broad areas covered by statute have been removed forms the substance of collective bargaining in the federal sector. Within this already tightly circumscribed sphere, Government managers and unions for the past 15 years have tried to carry out so-called collective bargaining. The 15-year-old has matured, but is still very much in the throes of puberty.

Now a brief history: The federal labor-management relations program was inaugurated with President John F. Kennedy's issuance of Executive Order 10988 [6] in January 1962. The policies and procedures governing labor-management relations in the areas not preempted by statute have been set ever since by a succession of Executive Orders. The Kennedy Order guaranteed federal employees the right to join a union and engage in collective bargaining; established requirements for union recognition and for determining appropriate units; provided for various forms of union recognition; and defined the scope of bargaining.

When it was announced, the Kennedy Order was widely hailed as a Magna Carta for public employees. Given the uncertain impact of collective bargaining upon entrenched civil-service-merit-system policies and procedures and the lingering shadows cast by the doctrines of sovereignty, separation of powers, and limited delegation of powers, the New Frontiersmen may have been justified in feeling they had struck the greatest blow for employee rights since Van Buren pleased the Locofocos by proclaiming the 10-hour day. But the profile looks less courageous when one discovers that management retained the last word in resolving all disputes under the Kennedy Order. Disputes could go to advisory arbitration only—assuming the unions could get even that much through negotiations. But the final decision in all disputes rested with the agency head.

(Hear, here, Meredith, once again: "I had a good woman . . . but she married Lawrence.")

In 1967 and 1968, the Johnson Administration conducted an extensive study of the experience under E.O. 10988 but took no action. Building upon the Johnson Committee study and a study of its

[6] 3 C.F.R. 521 (Comp. 1959-1963), 5 U.S.C. Section 631 (1964).

own, the Nixon Administration did introduce substantial reforms when it displaced 10988 with Executive Order 11491 [7] in 1969 and subsequently amended 11491 in 1971.[8] Among other things, Executive Order 11491, as amended, did the following:

- transferred final decision-making authority from agency heads to three newly established decision-making bodies in an effort to centralize the determination of disputes formerly decided by individual agency heads. The three new bodies are:

  (a) the Federal Labor Relations Council (FLRC) which administers the Executive Order, advises agencies on conduct of labor relations, and reviews arbitrators' awards and rulings of the Assistant Secretary of Labor;

  (b) the Federal Service Impasses Panel (FSIP) which is empowered to assist in resolving negotiation impasses through mediation, fact-finding, post-fact-finding recommendations, and decisions and orders; and

  (c) the Assistant Secretary of Labor for Labor-Management Relations who is authorized to determine certain issues formerly decided by agency heads (such as representation and appropriate unit issues and unfair labor practices).
- gave to the Federal Mediation and Conciliation Service a role in mediating negotiation disputes;
- made it permissible to include in collective bargaining agreements a provision authorizing union representatives to spend on "official time" as much as 40 hours or 50 percent of the total time involved in negotiations; and
- permitted the parties to negotiate a provision for binding arbitration of contract disputes.

The next and final amendment to the Executive Order came in February 1975 when President Gerald Ford issued Executive Order 11838, further liberalizing the rules by limiting the agencies' previously existing authority to restrict the scope of negotiations through agency regulations; permitting some expansion of the grievance and arbitration procedure; setting time limits on an agency head's approval of collective bargaining agreements; and permitting either party to bring unfair labor practice charges to break negotiating impasses.

Notwithstanding these liberalizing moves, the Executive Order still contains a management rights provision which private managers can only envy. Under Section 12(b), management officials re-

[7] 3 C.F.R. 861 (Comp. 1969-1970), 5 U.S.C. Section 7301 (1970).
[8] Executive Order 11616, 3 C.F.R. 204 (Comp. 1971).

tain the usual rights to direct, hire, promote, transfer, assign, suspend, demote, or discharge employees and to remove employees from duties because of lack of work or other legitimate reasons, plus the further right "to maintain the efficiency of the government operations entrusted to them"; "to determine the methods, means, and personnel by which such operations are to be conducted"; and "to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency." The catch-22 here is that none of these rights is limited by the usual management rights proviso stating that management, in the exercise of its rights, shall not violate rights granted to the employees elsewhere in the agreement.

No attempt was made by any of the Executive Orders to delve into any of the areas in which Congress had acted, nor did either Democratic or Republican administrations seek legislative changes. Thus, the unions' fundamental complaint concerning the confined limits of the program has continued unabated. Even within the limits of the program constructed by the executive branch, moreover, the successive Orders demonstrated something less than an enthusiastic commitment to independent, third-party resolution of disputes arising under the Orders. At the apex of the decision-making structure under the Order sits the Federal Labor Relations Council, composed of three top-level members of management (the chairman of the Civil Service Commission, the Secretary of Labor, and the director of the Office of Management and Budget). Just below the Council sits the Assistant Secretary of Labor for Labor-Management Relations, another high-level manager. Labor's view of this arrangement was summed up by Vincent L. Connery, national president of the National Treasury Employees' Union, in his testimony before the House Post Office and Civil Service Committee three years ago. Connery stated: "If this is third-party machinery or objective third-party adjudication in any sense of the word, we would prefer being left to the mercy of Mao's Red Guard."[9]

Insofar as the functioning of the grievance and arbitration procedure is concerned, the Executive Order today still places certain barriers in the way of union participation in the grievance procedure, and effective use of the process may be delayed or frustrated by a number of constraints, some of them built into the Order and some extraneous to it.

First, under the Executive Order, an employee need not be repre-

[9] U.S. House of Representatives, Subcommittee on Manpower and Civil Service of Committee on Post Office and Civil Service, Hearings on Federal Service Labor-Management Legislation, June 12, 1974, 93d Cong., 2d Sess., p. 299.

sented by the union and may process his own grievance or select a nonunion representative to present his case. Specifically, the Order provides:" . . . any employee or group of employees in the union may present such grievances to the agency and have them adjusted, *without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given the opportunity to be present at the adjustment"* (emphasis added).[10] An employee may not take his grievance to arbitration without the union's intervention, however, because the Order provides that arbitration may be invoked only by the agency or the exclusive representative.[11]

Second, during the processing of a complaint through the grievance and arbitration procedure, an obstructionist management may indefinitely delay the process simply by raising objections to the grievability or arbitrability of the grievance. Unless *both* parties agree to refer grievability or arbitrability issues to an arbitrator, such questions are to be referred for decision to the Assistant Secretary of Labor. In cases claimed to be covered by an existing statutory appeals procedure, the parties have no choice; they *must* submit the matter to the Assistant Secretary for a preliminary determination of the statutory appeals claim.[12] Nor is this the end of the matter. Decisions by the Assistant Secretary on these issues are, in turn, subject to further review by the FLRC.[13]

The potential for delay thus built into the system needs no special elaboration. However, it is noteworthy that a survey conducted by the American Federation of Government Employees in late 1973 indicates that litigating grievability and arbitrability questions before the Assistant Secretary consumes an average of six months' time. AFGE estimated that appeals of such questions to the FLRC would consume an additional ten months, bringing to a total of one year and four months the time needed merely to determine whether a case may be processed at all.[14]

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[10] Executive Order 11491, as amended, Section 13(a).

[11] *Id.*, Section 13(b).

[12] *Id.*, Section 13(d).

[13] See, e.g., *Department of the Navy, Naval Ammunition Depot, Crane, Indiana,* A/SLMR Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (February 7, 1975), in which the Council reversed the Assistant Secretary's decision sustaining the grievability/arbitrability of a dispute involving termination of a probationary employee. The Council directed the Assistant Secretary to consider the provisions of the collective bargaining agreement in the light of related statutes, regulations, and Executive Order 11491, as amended (including statutory appeals procedures where such procedures are claimed to bar consideration of the dispute in the grievance and arbitration procedure), and base his holding on the grievability/arbitrability issue on an interpretation of the relevant statutes, etc., as well as of the agreement.

[14] See 8 AFGE Washington Letter No. 36 (October 12, 1973), at 5, cited in *Comments and*

(For the embattled or embittered federal employee, Meredith, again, has a lyric which fits: "If you want to keep the beer *real* cold, put it next to my ex-wife's *heart.*")

Third, assuming these preliminary barriers are surmounted and the case goes to "final and binding" arbitration, either party may still take exceptions to the arbitrator's decision and appeal the decision to the Federal Labor Relations Council.[15] Under the present policies and practices of the Council, this avenue is not apt to lead to wholesale reversals of arbitration decisions, because the Council has made clear that it will review arbitrators' decisions only under certain narrowly defined conditions[16] akin to those applied by the courts in reviewing arbitration decisions in the private sector.[17] The fact remains, however, that arbitrators' decisions are subject to final review by a group of managers.

(Arbitrators confronted by this indignity may take solace from another Meredith lyric: "My pride is not hard to swallow . . . once I chew it long enough.")

Fourth, the lack of an independent agency at the top of the decision-making structure is compounded by the lack of effective judicial review of the Council's decisions with respect not only to appeals from arbitration decisions but to all other areas of labor-management relations under the Council's jurisdiction. The courts have made it clear that enforcement of employee rights under presidential Executive Orders dealing with labor-management rights is a matter to be policed by the executive branch and not by the judiciary. The courts have viewed the Executive Orders as statements of policy to guide the federal agencies in the conduct of their labor-

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Recommendations of the AFL-CIO on Areas for Review of the Federal Labor-Management Program Pursuant to Executive Order 11491, U.S. House of Representatives, Subcommittee on Manpower and Civil Service of Committee on Post Office and Civil Service, Hearings on Federal Service Labor-Management Legislation, June 5, 1974, 93d Cong., 2d Sess., p. 227.

[15] E.O. 11491, as amended, Section 13(b).

[16] Although reversals are comparatively rare, appeals by both agencies and unions are not. And the Council still does reverse on occasion: e.g., *National Council of OEO Locals, AFGE and Office of Economic Opportunity,* FLRC Case No. 73A-67, holding an arbitrator's award contrary to Section 12(b)(2) of E.O. 11491, as amended, because it required filling a position which management had determined to leave vacant. As the Council explained, "management's reserved rights under Section 12(b) of the Order may not be infringed by an arbitrator's award under a negotiated grievance procedure." FLRC, Information Announcement, July 2, 1976, p. 9.

[17] Section 2411.37(a) of the Council's rules, 5 C.F.R. 2411.37(a), provides: "An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations." For a summary of the arbitration awards appealed to the Council from 1970 through 1975 under each of the quoted grounds and of the Council's disposition of the appeals, see Federal Labor Relations Council, Information Announcement, July 2, 1976, pp. 4-13.

management relations programs. The courts will intervene when denials of constitutional rights are at issue.[18] Lacking this, the employee or his union is directed to look to the President to resolve complaints concerning alleged agency violations of the policies laid down by Executive Order. As the U.S. Court of Appeals for the District of Columbia put it in the lead case of *Manhattan-Bronx Postal Union* v. *Gronouski*:[19] "Congress has given the District Court many functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees."[20]

Fifth, although the courts will not intervene in the administration of the Executive Order, the Comptroller General is all too willing to do so. Our moderator, John Kagel, remarked upon the Comptroller General's heavy-handed interference with arbitration decisions involving monetary awards in a piece he wrote for the *Oregon Law Review* five years ago.[21] The Comptroller General's involvement stems, of course, from his status as guardian of the federal purse.[22] It is a role which cries to be filled by men who won't take yes for an answer. Under federal law, individual disbursing officers who make payments not authorized by law may be held personally liable for the amounts improperly disbursed.[23] One can imagine what a chilling effect this has upon the average bureaucrat who is asked to disburse questionable monies.

When in doubt about his authority to make a particular payment, the disbursing officer may, before making the disbursement, request a decision from the Comptroller General as to the legality of the proposed payment.[24] Not surprisingly, this provision of the law has been seized upon by the agencies as a means of challenging and frequently reversing adverse arbitration decisions involving monetary awards. At the time Kagel wrote, the ploy was a highly effective one. The Comptroller General had embraced his role with considerable enthusiasm, interpreting not only the pay statutes within his presumed jurisdiction, but the Executive Orders and collective bargaining agreements as well. Kagel summed up the situation by saying: "An appeal to the Comptroller General, in view of the attitude shown to date with respect to arbitration, is apparently a depend-

[18] See, e.g., *National Association of Government Employees* v. *White*, 418 F.2d 1126, 71 LRRM 2209 (1969).

[19] 350 F.2d 451, 59 LRRM 2898 (D.C. Cir. 1965), *cert. den.*, 382 U.S. 978, 61 LRRM 2147 (1966).

[20] *Id.*, at 457.

[21] Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding?* 51 Ore. L. R. 134 (1971).

[22] 31 U.S.C. Section 41 (1970).

[23] 31 U.S.C. Sections 82a-1, 82a-2b, 506, 508, 510-511, 514, 516 (1970).

[24] *Id.*, Section 74 (1970).

able method to overturn virtually all arbitration decisions where monetary relief is granted."[25] He concluded that, since the Comptroller General is an independent creation of Congress, the situation would have to be remedied by statute.

In the years since Kagel wrote, the Comptroller General's role in federal labor-management relations has continued to grow,[26] although he has modified his previous, negative stand regarding arbitral back-pay awards in favor of a more permissive view under which laws and regulations are increasingly interpreted to allow compliance with arbitration awards involving monetary relief.[27] Despite this new, more permissive outlook, the Comptroller General has not retired completely from the field of arbitral review.[28] However, in recent years his more spectacular excursions have been in other areas of labor-management relations, such as the amount of "official time" permitted to union representatives to engage in grievance processing or other employee-representation work.[29]

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[25] Kagel, *supra* note 21, at 148.

[26] A year ago, the editors of BNA's Government Employee Relations Reports listed "The Expanding Influence of the General Accounting Office in the Federal Labor Relations Program" as one of the top ten developments of 1975. 638 GERR A-14 (January 5, 1976). The editors observed that the Comptroller General's place in the firmament had become so prominent that it had become necessary to coordinate his function with that of the FLRC. Toward this end, the FLRC has advised the parties to file exceptions to arbitrators' awards promptly with the FLRC so that it may secure the Comptroller General's advice on whether the awards may be complied with. FLRC No. 74A-46.

[27] See Dec. B-180010, 54 Comp. Gen. 312 (October 31, 1974), holding binding arbitration award, if otherwise proper, must be given same weight as any other exercise of administrative discretion by head of agency, prior decisions to the contrary modified; Dec. B-181069, 54 Comp. Gen. 403 (November 20, 1974), 589 GERR A-16, upholding arbitrator's authority to interpret agency's regulations which are incorporated in a collective bargaining agreement by reference; Dec. B-180010, 54 Comp. Gen. 760 (March 19, 1975), 601 GERR A-1, E-1, sustaining the Assistant Secretary of Labor's authority to direct agencies to make employees "whole" in unfair-labor-practice cases involving unjustified or unwarranted personnel actions; and 54 Comp. Gen. 927, 613 GERR A-4, E-1, upholding arbitrator's right to award back pay for management acts of omission as well as commission.

[28] A recent example is a decision issued in October overturning an arbitrator's award of overtime pay to 54 employees at the Navy's Mare Island Shipyard, on the ground that the facts did not satisfy the Comptroller General's "but for" test (i.e., the record didn't persuade the Comptroller General that overtime would have been paid the employees "but for" the shipyard's failure to do what the arbitrator held it was obligated to do, namely, to consult the union before making a schedule change). 55 Comp. Gen. 629 (October 7, 1976).

[29] In Dec. Comp. Gen. B-180010.03 (February 23, 1976), the Comptroller General held that, in the absence of specific legislative authorization, no union representative may spend more than 160 hours per year on such work while on "official time." Not content with merely deciding the case before him, the Comptroller General further directed all agencies and unions to bring their collective bargaining agreements into compliance with the 160-hour ruling.

Those unions which had successfully bargained for a more liberal "official time" rule than the Comptroller General's 160-hour rule were predictably outraged at the notion that the Comptroller General could and would try to alter the terms of their collective bargaining agreements. They charged, furthermore, that the 160-hour figure was a purely arbitrary one, for which there was no foundation in the record before the Comptroller General. After several months of heated controversy, the Civil Service Commission salvaged the situation by issuing a letter which substituted a broad rule of reason for the flat 160-hour rule. FPM letter 711-120,

What can be done to correct some of these skewed arrangements? To achieve any major revision in the overall collective bargaining structure would clearly necessitate action involving both the executive and the legislative branches. On the other hand, certain not inconsequential changes could be mandated by the President, alone, through amendment to Executive Order 11491. In between these two poles is an area in which combined executive and legislative action could remedy the more egregious flaws in the present system of dispute resolution without waiting for Congress and the President to come to grips with the broader problems involved in overhauling the entire collective bargaining system.

Until the Carter Administration makes clear its view of the merits of establishing a statutory system of collective bargaining for federal employees, it may be doubted that Congress will enact legislation providing the kind of fundamental overhaul sought by the unions, although I am informed the House Committee on Post Office and Civil Service will hold hearings on the matter later this month. Even if the Carter Administration comes out strongly for a statutory system of the type envisioned by the unions, Congress may well balk at giving up many of its prerogatives. The labor-supported bills would permit bargaining on pay, fringe benefits, and most of the other bread-and-butter issues which are the stuff of bargaining in private industry but which in the federal sector have traditionally been regulated by statute, as least as to the classified, white-collar employees. The bills which have been proposed would also grant the agency shop or some comparable form of union security, and at least one bill would grant an attenuated right to strike.

Obviously, these provisions raise fundamental questions concerning, among other things, the interplay between collective bargaining and the civil service merit system[30] and the effect of collective bargaining upon the political process and upon the separation of powers among the three branches of Government.[31] Many of the questions involved will not be new to anyone familiar with the evolution of collective bargaining laws at the state and local level in the United States and at the national and provincial levels in Canada,

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issued October 14, 1976. The Comptroller General thereupon backed away from his 160-hour ruling, saying it was no longer necessary. 676 GERR A-5.

[30] See, e.g., Nesbitt, *supra* note 4, at 145-148; Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. Chi. L. Rev. 826 (1971); *Impact of Collective Bargaining on Personnel Administration in Government*, 30 Arb. J. 199 (1975).

[31] See, e.g., Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974), and Project, *Collective Bargaining and Politics in Public Employment*, 19 UCLA L. Rev. 887, 1010-51 (1972).

some or all of which are frequently cited as models to which our Federal Government should look for answers. As noted at the outset, however, the design and functioning of the entire federal labor-relations structure is beyond the scope of this paper. The broad policy issues to be confronted in establishing a statutory system of collective bargaining are mentioned here to highlight the fact that neither the executive nor the legislative branch has yet seriously addressed these issues in an effort to arrive at a statutory scheme. The Kennedy, Johnson, Nixon, and Ford Administrations have opted to maintain the status quo not only as to the substance of matters covered by statute, but as to the procedures for enforcing employee rights under such statutes, even in cases where the law permits a degree of administrative judgment in applying its terms. For its part, Congress has conducted hearings on the subject, but no bill has gotten out of committee or seems likely to in the near future.

Given the apparent unlikelihood of prompt action on an overall statutory system, the chances of eliminating the unfair or unduly restrictive elements of the Government's present grievance and arbitration procedures would seem to lie with one of the two lesser alternatives mentioned earlier—i.e., either unilateral executive action or combined executive and legislative action tailored to deal only with the correction of some of the worst flaws in the present system.

The single, most glaring defect in the dispute-resolution structure under Executive Order 11491 is the lack of independent, impartial decision-making bodies at the top. No sound reason appears for continuing to vest in three top-level federal managers the decision-making authority presently exercised by the Federal Labor Relations Council or for vesting in the Assistant Secretary of Labor, a subcabinet-level federal manager, the authority he presently exercises over unfair labor practices, representation and appropriate-unit questions, grievability and arbitrability issues, etc.

This is one flaw in the structure which might be corrected by the executive branch, alone. That it is possible for the President to create an independent, third-party body of decision-makers in this field, without special legislative authority, is indicated by the manner in which the third member of the present triumvirate, the Federal Services Impasses Panel, is manned. To fill the positions on the FSIP, the President went outside the executive establishment and appointed a group of outstanding arbitrators and lawyers with backgrounds in public-sector impasse resolution.[32] Without any

[32] There are other examples. The Foreign Service Grievance Board, now a statutorily based body for the determination of grievances brought by officers and employees of the foreign

change whatever in the substantive matrix of federal collective bargaining, the substitution of independent, third-party decision-makers for the present top managers could remove the appearance of management bias which stigmatizes the present program.

The executive branch would appear to have authority, also, to remedy certain of the other above-noted constraints upon the present grievance and arbitration system, without recourse to legislation. These include providing for greater participation by the exclusive representative in the grievance procedure, eliminating the Executive Order provision under which grievability and arbitrability issues and claims that a grievance subject matter is covered by a statutory appeals procedure may or must be referred to the Assistant Secretary of Labor for decision, and eliminating the provision for appeal of arbitrators' decisions to the FLRC.

Other changes aimed at broadening the scope of grievance and arbitration procedures in the federal sector would require legislative action, but are relatively uncontroversial and could be enacted rapidly—if management and labor could agree, in the interests of taking a half a loaf now, to treat them separately from the broader issues involved in establishing a comprehensive statutory system of collective bargaining. These include at least two basic items on which the Nixon Administration indicated it was willing to support a legislative change:[33] to wit, clear statutory authorization for arbitrators to provide "make whole" relief in the form of back-pay remedies (thereby taking the Comptroller General out of the china shop), and legislative authorization to the parties to negotiate binding arbitration of adverse actions. Civil Service Commission Chairman Hampton further implied during his testimony before the House Subcommittee on Manpower and Civil Service that the Administration would not object to legislation authorizing judicial review of arbitration decisions or other "third party" decisions affecting individual rights under the Executive Order,[34] thereby overcoming the courts' refusal under the *Manhattan-Bronx* doctrine to review such decisions.

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service (P.L. 94-141, Part J, 22 U.S.C. 1037) was originally established by the unilateral action of the Secretary of State. See 3 F.A.M. 660. The membership of the original "interim" board was drawn, in part, from active officers and employees of the foreign service agencies and, in part, from independent arbitrators and private citizens who were appointed and paid as part-time consultants. The statutory board is composed of arbitrators and retired foreign service officers, appointed by agreement of the agencies and the employee organizations with exclusive representation status and paid as part-time "members."

[33] See testimony of Civil Service Commission Chairman Robert E. Hampton at 17-18, 188, and 202 ff., before the House Subcommittee on Manpower and Civil Service, *supra* note 9.

[34] *Id.*, at 189 and 202.

Beyond these items on which there appears to be a consensus favorable to legislated change lie many of the other items mentioned at the outset which are routinely handled in negotiated grievance and arbitration procedures elsewhere, but which are presently excluded from the federal grievance and arbitration machinery because they are subject to statutory appeals procedures. One suspects that many of the statutory appeals procedures continue in existence because they are the beneficiaries of decades of Moynihan-style "benign neglect" rather than because the procedures themselves have demonstrated vitality in adjusting to changed conditions.

To be sure, some of the subjects covered by such procedures may arguably be deemed to require special expertise. But many of them involve subjects which have been dealt with through the grievance and arbitration procedure in other sectors for years. In this category belong agency or Civil Service Commission actions or decisions dealing with job classifications, performance ratings, restoration after military duty, denial of life-insurance coverage or health benefits, denial of reemployment or reinstatement rights, and reinstatement after injury on the job. Action by Congress to make agency or Civil Service Commission actions or decisions in these areas subject to challenge through negotiated grievance and arbitration procedures could do much to vitalize the rights of federal employees to bring their complaints concerning management's personnel procedures and practices before independent, third-party decision-makers.

I recognize that adoption of the suggested changes will not bring the millenium to federal labor-management relations, for it represents the kind of piecemeal change which the Government unions are unlikely to embrace enthusiastically, since it would remove many of the demonstrably one-sided features and narrow constraints built into the present program, features which lend substance and force to the unions' push for a statutory collective bargaining system. Federal managers may welcome a piecemeal approach, but will presumably continue to opt for creeping evolution by Executive Order, at least until a different signal is received from the Carter Administration. Nevertheless, it is submitted that the suggested changes should not be held hostage to the idea that one day the President and the Congress may adopt a comprehensive collective bargaining program. The federal sector's grievance and arbitration procedures today are so limited in scope that they cannot but lack credibility among the employees. Adoption of the suggested changes could lend a measure of respectability to a program which now lacks it in too many respects.

(In conclusion, I leave you with a choice of two further country lyrics, either one of which might express a federal employee's response to all of this:

"Life is like a book, and let me tell you Janet, I've read every page," or (and this is, perhaps, my favorite)

"Don't come home a-drinkin' with lovin' on your mind.")