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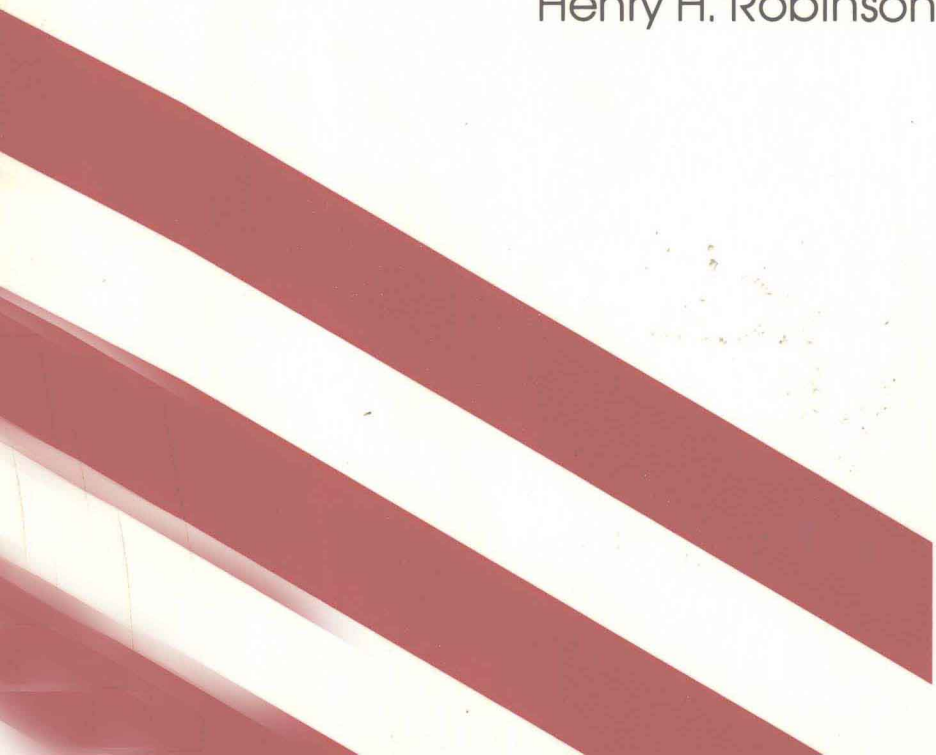

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To Jenny, who put up with me while writing this and who showed love and understanding,

and

To Kurt Hanslowe, who helped me gain admission to study industrial and labor relations after the deadline had long passed.

Foreword

The issue of what should be considered negotiable between unions representing federal employees and federal agencies and departments came up during the task force discussions that led to Executive Order 10,988 of 1962. This was the original order calling for labor-management cooperation and a limited form of collective bargaining in the federal goverment. Secretary of Labor Arthur Goldberg had been named chairman of the task force by President John F. Kennedy. In one of the early task force discussions Goldberg commented that he did not think there was any necessity to specify in detail areas of negotiability in the federal government. Reflecting on his experience as general counsel for the Steelworkers, Goldberg noted that the original contract between the Steel Workers Organizing Committee and U.S. Steel had been typewritten double-space and still had covered only one side of one piece of paper. He contrasted this original agreement with the Steelworkers' 1960 contract, by then printed in two volumes of small print. Secretary Goldberg concluded that general experience in private industry had been that the scope of subjects considered appropriate for negotiation evolved gradually. He anticipated that the same evolution would take place in the federal government.

The letter from Secretary of Labor Goldberg to President Kennedy transmitting the task force report, dated November 30, 1961, reiterated some of this same lack of specificity regarding what was to be considered negotiable in the federal goverment: "We are not proposing the establishment of uniform government-wide practices. The great variations among the many agencies of the government require that each be enabled to devise its own particular practices, in cooperation with its own employees."

Executive Order 10,988 itself contained two sections generally referred to as the "management prerogatives" clause of the executive order. The first was section 6(b), which listed certain "areas of discretion and policy" to which "the obligation to meet, confer, and to try to negotiate agreements with unions granted exclusive recognition shall not be construed to extend." The second was section 7, which

listed certain other areas in which management officials retained the right to perform their assigned function, "in accordance with applicable laws and regulations." Controversy over the intent of these two sections arose almost immediately after the promulgation of the order. Federal unions argued that the wording of both sections expressed a clear intent that agencies should exercise individual discretion whether to invoke their privilege of declining to negotiate on matters falling within the scope of either section or to waive that privilege. From the point of view of the Civil Service Commission, however, as reflected in the guidelines it promulgated soon after the order became effective, these two sections of the order set up an absolute negotiability bar. In its view, agency management was prohibited from bargaining on any matter that could be identified as falling within the purview of either section.

These differences were sharply delineated very soon after Executive Order 10,988 was promulgated. As a result, commentators quickly concluded that collective bargaining in the federal service would essentially come to little or naught. For example, as early as May of 1964, B. V. H. Schneider concluded that probably no more than 20 percent of the subject matter areas contained in the average private sector collective bargaining agreement could be negotiated over in federal bargaining relationships. Echoing this point of view, during the meeting of the Industrial Relations Research Association in the spring of 1966, representatives of federal unions and federal management and I agreed that federal collective bargaining by that time probably encompassed no more than a quarter of the subject matter areas commonly considered mandatory or permissive subjects for bargaining in the private sector. We unanimously concluded at that time that the chief hope for change in federal employment relationships lay not so much in collective bargaining per se but in the potentialities inherent in grievance procedures culminating in binding neutral arbitration.

The present volume is the first systematic analysis of federal negotiatiability issues and is particularly enlightening in terms of those gloomy prognoses of the early and middle 1960s. It summarizes all collective bargaining proposals that have been declared to be negotiable or nonnegotiable in the federal sector and the reasons why. It covers all negotiability opinions rendered by the Federal Labor Relations Council and its successor, the recently created Federal Labor Relations Authority. The authority, established under Title

VII of the Civil Service Reform Act of 1978, is the neutral body that now has the task, among others, of deciding controverted negotiability issues in the federal service.

Nothing of similar comprehensiveness has before been attempted. The scope of federal labor relations and negotiations is expanding, but systematic study of it has been neglected. More issues regarding the appropriateness of negotiations on performance standards and other areas related to worker productivity have been filed before the new authority in the last year than were filed before the council in the previous decade. One cannot predict with any certainty the outcome of these current issues, but there is no doubt that the authority will soon be issuing many significant negotiability precedents. As a consequence, it is the hope of the American Arbitration Association and the New York State School of Industrial and Labor Relations at Cornell University to keep this volume current by periodic updating. Some of the author's ideas have already been confirmed, others reversed, by recent authority decisions. Hence this book and its intended updatings should be an essential reference tool for all concerned with federal bargaining.

It is no secret that negotiability controversies have been one of the major stumbling blocks to effective collective bargaining in the federal sector. The present volume itself reflects some of this controversy. It represents the personal views of one of the participants in the process. In some respects, it is a partisan book, and from time to time the reader may find himself or herself in disagreement with the author's forecasts or reasoning. But negotiability in the federal sector is a highly debated subject, and this provocative book addresses many of the issues under discussion. It is with this in mind that the AAA and the ILR School present this work.

This study assumes that the Federal Labor Relations Authority may from time to time apply reasoning similar to that used by its predecessor agency, the Federal Labor Relations Council, when it considers contemporary negotiability issues. The author cites cases where the authority has already done so. On the other hand, there are those who believe that subjects declared nonnegotiable under earlier executive orders will always be reexamined de novo by the authority when it decides negotiability issues brought before it. They believe that the authority will take a fresh look at these issues, particularly those concerning management rights, and that this was the intent of Congress when it enacted Title VII of the Civil Service Reform Act.

My own view on this issue is that both the author and those who might criticize his point of view are correct. The Federal Labor Relations Authority has already looked back at earlier council decisions and has quoted them approvingly. On the other hand, the authority has also begun to establish new precedents. For example, the authority and its general counsel have recently, and for the first time, cited with approval private sector bargaining precedents of the National Labor Relations Board. It thus seems fair to conclude that private sector precedents will inexorably creep into negotiability determinations in the federal sector, just as they have in the public sector in several states. In short, the new Federal Labor Relations Authority is finally looking ahead toward the very evolution and growth of negotiability issues and the scope of bargaining anticipated by Secretary of Labor Arthur Goldberg twenty years ago.

Charles M. Rehmus
July 1980

A Note on the Citations

When citing a case decision of the Federal Labor Relations Council, only the decision's docket number is provided in the footnote. This method has been chosen to avoid the complications in citations caused by changes in the council's mode of publishing decisions. The docket number is the basic information that is required to locate a copy of the decision. As a convenience, at the end of the book the reader will find an appendix relating the docket number to both the report and the bound volume in which the decision was published. The first column lists in numerical order the docket number of every negotiability decision rendered by the Federal Labor Relations Council. In the second column is the report number in which the decision may be found, and in the third column is the bound volume and page citation for the case.—H. H. R.

Contents

1.
A Short History of Current Legislation

In January 1962 President John F. Kennedy issued Executive Order 10,988, setting forth policies governing the respective rights and obligations of federal employees, employee organizations, and agency management in pursuing the objective of effective employee-management cooperation in the executive branch of the federal service. While Executive Order 10,988 produced substantial accomplishments, shortcomings also emerged. One of these was an overly constricted scope of bargaining, and a presidential study committee called for "an enlarged scope of negotiation and better rules of insuring that it is not arbitrarily or erroneously limited by management representatives."[1] On October 29, 1969, President Richard Nixon issued Executive Order 11,491, which became effective on January 1, 1970, the same day on which Executive Order 10,988 was revoked.[2] Executive Order 11,491 extended the scope of negotiation and clarified it by providing for negotiation of appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. Also, it established the Federal Labor Relations Council (FLRC),[3] consisting of the chairman of the Civil Service Commission (CSC), the secretary of labor, and the dirctor of the Office of Management and Budget.[4] One of the council's duties was to issue rulings on petitions requesting negotiability determinations.[5]

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1. "Study Committee Report and Recommendations, August 1969, which led to the Issuance of Executive Order 11,491," in *Labor-Management Relations in the Federal Service* (Washington, D.C.: GPO, 1975), p. 65.
2. Executive Order 11,491 § 26.
3. Executive Order 11,491 § 4(a).
4. The chairperson of the CSC was already vested with the inherently conflicting duties of advising agency management on how to act in personnel matters and reviewing agency management's personnel actions. Encumbering the director of the CSC with the additional FLRC review of agency management's acts in personnel matters served to add inherent conflict within the various duties of the director of the CSC.
5. Executive Order 11,491 § 4(c)(2).

Commencing in 1970 the Federal Labor Relations Council launched a review of Executive Order 11,491.[6] This review led to issuance on August 26, 1971, of Executive Order 11,616, amending Executive Order 11,491. Executive Order 11,616 primarily ushered in changes in the provisions of Executive Order 11,491 concerning the negotiated grievance procedure, the unfair labor practice procedure, availability of official time to union negotiators, and dues withholding. On December 17, 1971, Executive Order 11,491 was amended a second time, this time by Executive Order 11,636, which established a separate program for employees of the Foreign Service.

On February 6, 1975, President Gerald Ford issued Executive Order 11,838, which once again amended Executive Order 11,491 and affected negotiability law in two respects. First, before issuance of Executive Order 11,838, bargaining proposals conflicting with an agency regulation were nonnegotiable. Agencies had taken advantage of this situation and issued many regulations that served to restrict excessively the scope of bargaining. Executive Order 11,838 changed this by providing that, when a union proposal conflicted with a regulation issued by agency management, the proposal was negotiable unless a compelling need existed for the regulation and the regulation had been issued at agency headquarters level or at the level of a primary national subdivision.[7] Second, before Executive Order 11,838, if an unfair labor practice complaint alleging a unilateral change centered upon a negotiability dispute over whether the agency was obliged to negotiate the change, the union was required, before filing the complaint, to obtain a negotiability determination from the Federal Labor Relations Council. The negotiability procedure would lag for one to two years, and finally, after the council had issued a determination, the statute of limitation for seeking unfair labor practice recourse as to the unilaterally implemented change would have expired, thus leaving the union without remedy, or else, if the unfair labor practice had been held in abeyance, another year would lapse before a decision would be issued. Executive Order 11,838 sought to remedy this problem by authorizing the assistant secretary,[8] when

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6. "Report and Recommendations on the Amendment of Executive Order 11,491" (June 1971), in *Labor-Management Relations in the Federal Service* (Washington, D. C.: GPO, 1975), p. 28.

7. Executive Order 11,491 *as amended*, § 11(a).

8. The assistant secretary of labor for labor-management relations was required, by section 6 of Executive Order 11,491, as amended, to render unit determinations, to

faced with the circumstance of an unfair labor practice alleging a unilaterally implemented change that could not be resolved without first resolving a negotiability dispute, to make a negotiability determination.[9]

During 1977 and before President Carter launched an effort pursuant to his campaign pledge to reform civil service, federal sector unions attempted to gain congressional enactment of a federal sector collective bargaining law. Several different union-backed bills were introduced before the Civil Service Subcommittee of the House Post Office and Civil Service Committee and elaborate hearings were held during the spring.[10]

On May 27, 1977, while these bills were pending before the Civil Service Subcommittee, the Carter administration commissioned the Federal Personnel Management Project to study the civil service system and to issue a report containing findings and recommended legislative proposals and options.[11] At this time the Carter administration had not yet formulated its position on proposed labor legislation. In an effort to gain enactment of a union-sponsored bill, the federal sector unions united in support of a single bill, but by the end of 1977 the bill remained unreported and locked in the subcommittee.[12]

By January 1978 the Federal Personnel Project had submitted its so-called Ink Report, named after Dwight Ink, executive director of the project. The Ink Report recommended, among other things, a centralized federal labor relations authority and a scope of bargaining similar in many respects to that which existed under Executive Order 11,491, as amended.[13] Thereafter, on March 2, 1978, the president presented his civil service reorganization proposals to Congress and to the nation in a televised address.[14] At this point, the federal sector unions were split in their support for the administration's plan. The largest of the federal unions, the American Federation of Government Employees, endorsed the general outlines of the president's package but with the qualification that specific amendments would have to be

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supervise elections and certify their results, to make decisions on applications for national consultation rights, to decide unfair labor practice complaints, and to render grievability-arbitrability determinations. *See* section 6 of Executive Order 11,491.

9. Executive Order 11,491 *as amended*, § 11(d).
10. 705 GERR 3,29; 706 GERR 3; 707 GERR 9; 708 GERR 6.
11. 711 GERR 3.
12. 741 GERR 7.
13. 744 GERR 8.
14. 749 GERR 7.

made.[15] Other federal sector unions opposed the entire package and lobbied to defeat it.[16]

During the spring months of April and May civil service reform appeared to have stalled.[17] But by July, however, the prospect of passage of civil service reform improved. Several unions that had originally opposed the president's package recognized that a reform bill was becoming inevitable and shifted their efforts from total opposition to working to modify the administration's proposals. The civil service reform plan moved through the House Government Operations Committee, and by August the plan was moving through the Senate Governmental Affairs Committee.[18] On August 24, the Senate approved its version of S.2640,[19] and shortly afterward, the House passed its version.[20] The two versions were then considered by the House-Senate Conference Committee during September. As to the labor relations title of the reform bill, the conferees adopted the House version but with nine exceptions.[21] The conference issued its report with recommendation that the reported bill received approval from both houses. Both houses approved the conference report on S.2640, and on October 13, 1978, the bill, titled the Civil Service Reform Act of 1978, was signed into law.[22]

The Civil Service Reform Act of 1978 (CSRA of 1978) is composed of nine titles and amends Title 5, United States Code (Public Law 95-454, 92 Stat. 1192). Title VII of the CSRA of 1978 is headed "Federal Service Labor-Management Relations" and is essentially the law governing collective bargaining in the federal sector.[23]

As compared to Executive Order 11,491, as amended, the most striking organizational change wrought by Title VII of the CSRA of 1978 was that the Federal Labor Relations Council and the assistant secretary of labor became defunct in federal sector collective bargaining and were replaced by a new, independent agency named the

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15. 749 GERR 9; 751 GERR 9; 791 GERR 5-6.
16. *Ibid.*
17. 757 GERR 6-7 and 34-35; 759 GERR 6 and 38.
18. 760 GERR 7; 761 GERR 6; 769 GERR 6; 771 GERR 9; 772 GERR 7.
19. 774 GERR 8.
20. 777 GERR 3.
21. *See* 779 GERR 6.
22. 781 GERR 7, 27, and 73.
23. Title VII of the Civil Service Reform Act of 1978 amends Title 5, United States Code, by adding to subpart F an amended chapter 7.

Federal Labor Relations Authority.[24] The staff of the Federal Labor Relations Authority (FLRA) is composed in substantial part of staff from the Federal Labor Relations Council and from the offices of the assistant secretary.[25] Unlike the Federal Labor Relations Council and the assistant secretary, which had no prosecutorial authority, the Federal Labor Relations authority is vested with authority to prosecute unfair labor practices.[26] Also, one of the authority's additional duties is to render negotiability determinations.[27]

While negotiability decisions issued under Executive Order 11,491, as amended, are not binding upon the FLRA, many of them and their analyses may serve to help predict what will and will not be declared negotiable under Title VII of the CSRA of 1978. Also, by applying an analysis of the CSRA's statutory language in combination with its legislative history, it is possible to predict how the FLRA negotiability decisions will compare and contrast with negotiability decisions that were rendered under the executive order. Several facts support these propositions. First, under the executive order negotiations with respect to many matters had to occur within the context of a preexisting legal framework created by statutes and governmentwide rules and regulations. For example, statutes and CSC regulations governed many facets of sick, annual, and administrative leave. Bargaining proposals could not conflict with the relevant statutes and regulations. Virtually all of this legal framework continues to exist under the CSRA, and bargaining proposals still may not

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24. 5 U.S.C. § 7104.

25. The FLRA has nine regional offices and several satellite offices. A substantial part of the working field staff was initially composed of employees who were formerly employed in the regional and area offices of the Labor-Management Services Administration and who were offered and accepted the opportunity to transfer to the employment of the FLRA. The FLRA has now hired many employees who have had NLRB experience. On the national level, many of the FLRA officials have had experience under the executive order. Henry Frazier III, former executive director of the Federal Labor Relations Council, has been named, along with Ronald Haughton and Leon Applewhaite, to the Federal Labor Relations Authority. Steve Gordon, chief of the Office of Administrative Law Judges, which conducted hearings under Executive Order 11,491, as amended, has become the FLRA's general counsel. Samuel Chaitovitz, an administrative law judge before the CSRA, was named the FLRA's executive director. Influential decision makers under the executive order, such as Jesse Reuben and Jerome Hardiman, are in similarly high positions within the FLRA. Virtually all of the FLRA's administrative law judges had experience under the executive order.

26. 5 U.S.C. § 7105.

27. 5 U.S.C. §§ 7105(a)(2)(D) and (E).

conflict with relevant statutes and regulations. For example, the statutes and regulations governing leave remain unaffected. It logically follows that many of the FLRC negotiability determinations applying statutes and regulations to bargaining proposals may be applied to help chart the path that negotiability law will probably take under the CSRA. It is true that the CSRA has changed some of the legal framework within which bargaining must transpire. For example, the statutes and regulations governing discipline for both conduct and performance related reasons have been altered. All these changes in the legal framework, however, may be pinpointed, and careful analysis can ascertain what will be their effect upon negotiability under the CSRA.

Second, under Executive Order 11,491, as amended, the duty to bargain extended to personnel policies and practices and matters affecting working conditions. A rule of legal construction is that like language is usually to be accorded like legal construction. Under the CSRA of 1978, the duty to bargain extends to personnel policies and practices and matters affecting working conditions. It follows that decisions as to what comes within the scope of the duty to bargain under the CSRA should be similar to decisions on the scope of the duty to bargain under the executive order. This is not to suggest that there will be no differences, but to the extent that differences will eventuate, they may be predicted by reviewing the CSRA's legislative history and by examining the CSRA's language, which lists certain matters not within the scope of the duty to bargain.

Third, the executive order contained management rights language that served to prohibit bargaining about the substance of certain subject matters and other management rights language that vested an agency with the discretion to negotiate or not to negotiate the substance of certain other subject matters. Likewise, the CSRA of 1978 contains management rights language that serves to prohibit bargaining about the substance of certain subject matters and other management rights language that vests an agency with the discretion to negotiate or not to negotiate the substance of certain other subject matters. There are several differences between the management rights language of the CSRA and that of the executive order. These differences are readily recognizable, and careful analysis can predict any corresponding differences that will result in negotiability law. But most of the management rights language in the CSRA is identical to the language that was contained in the executive order. Since like language is