



U.S. Department of Energy
Washington, D.C.

GUIDE

DOE G 3710.1

1-12-95

SUBJECT: DEPARTMENT OF ENERGY LABOR-MANAGEMENT RELATIONS

1. **PURPOSE.** This Guide is published by the Department of Energy, Employee/Labor Management Relations Policy Branch, Personnel Policy, Programs, and Assistance Division, for distribution to personnel and labor relations specialists to better enable them to carry out their roles. Decisions of the non-DOE Federal labor relations program authorities given in this Guide will be placed in the DOE Directives System when such decisions result in the establishment of new policies or procedures. The interpretations of the decisions provided in this Guide are the best available at this time. Future interpretations will be issued in supplemental Labor-Management Relations Advisories which should be interfaced according to subject matter.
2. **APPLICABILITY.** This Guide is applicable to all Department of Energy employees.
3. **EXEMPTIONS.** The information in this Guide does not apply to any organization, under 5 United States Code 7103(b)(1), having as a primary function intelligence, counterintelligence, investigative or national security work. (See Executive Order 12171.)
4. **COMMENTS AND ASSISTANCE.** Questions or comments should be addressed to the Department of Energy, Employee/Labor Management Relations Policy Branch, Personnel Policy, Programs, and Assistance Division, Washington, D.C. 20585 or by telephoning (202) 586-1749.
5. **REFERENCES.**
 - a. Title 5 United States Code, Chapter 71 (which is part of Public Law 95-454, The Civil Service Reform Act), and 5 United States Code, Section 5596(b).
 - b. The following provisions of 5 Code of Federal Regulations (CFR):
 - (1) Chapter II (Part 1200), Merit Systems Protection Board (MSPB);

Distribution:
All Departmental Elements

Initiated By:
Office of Personnel

- (2) Chapter VIII (Part 1800), Office of Special Counsel;
- (3) Chapter XIV (Part 2411), Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel (FSIP).
- c. 29 Code of Federal Regulations, Chapter XII (Part 1400), Federal Mediation and Conciliation Service (FMCS).
- d. 29 Code of Federal Regulations, Chapter XIV (Part 1600), Equal Employment Opportunity Commission (EEOC).
- e. Applicable approved negotiated agreement with an exclusive representative.
- f. Legislation - Congressional legislation can impact on labor-management programs. For example, annual budget legislation in the past has, on occasion, contained pay cap language which limited the scope of bargaining for employees authorized to negotiate wages under 5 United States Code, Chapter 71. Information on specific legislative provisions that impact on labor-management relations will be reported to operating units in advisory notices from Department of Energy Headquarters.
- g. Executive Order 12871 - Establishes the requirements for labor-management partnership councils and directs the parties to bargain on the numbers, types and grades of employees in bargaining unit positions in an organizational subdivision, and on the technology, methods, and means of performing work.
- h. The Department's matrix of human resource management authorities which will contain specific delegations of authority for labor relations duties and responsibilities.

BY ORDER OF THE SECRETARY OF ENERGY:



ARCHER L. DURHAM
Assistant Secretary for
Human Resources and Administration

TABLE OF CONTENTS

CHAPTER I - REPRESENTATION ELECTIONS

1.	Organizing Phase	I-1
a.	Union Organizing Activities	I-1
b.	Equal Access	I-1
c.	Maintaining Conditions of Employment	I-2
d.	Management Neutrality	I-2
2.	Representation Petitions	I-3
a.	Timeliness	I-3
b.	Showing of Interest	I-3
c.	Intervenor Petitions	I-4
3.	Appropriateness of the Bargaining Unit	I-4
a.	Community of Interest	I-4
b.	Notice	I-5
4.	Elections	I-5
a.	Eligibility List	I-5
b.	Election Observers	I-5
c.	Election Conduct	I-6

CHAPTER II - GENERAL PROVISIONS

1.	Employee Rights	II-1
2.	Union Rights	II-1
3.	Dues Allotments	II-2
4.	Official Time	II-3
5.	Bargaining Unit Status	II-4
6.	Unfair Labor Practice Charges	II-4

CHAPTER III - NEGOTIATION

1.	Bargaining Obligations	III-1
a.	Full Term Contract Negotiations	III-1
b.	Mid-term Negotiations	III-1
2.	Scope of Bargaining	III-2
a.	Management Rights Defined	III-2
b.	Bargaining obligations on the Exercise of Management Rights	III-3
c.	7106(b)(1) Bargaining Subjects	III-3
d.	Subjects Prohibited From Bargaining in Addition to Management Rights ...	III-4
3.	Bargaining Styles	III-5
a.	Traditional Bargaining	III-5

	b.	Interest Based Bargaining	III-6
	c.	Summary	III-6
4.		Content of Agreement	III-6
	a.	Elements Required by Statute	III-6
	b.	Recommended Elements	III-7
5.		Dispute Resolution	III-8
	a.	Impasses	III-8
	b.	Negotiability Disputes	III-8
6.		Contract Approval	III-8

CHAPTER IV - CONTRACT ADMINISTRATION

1.		Supervisors Training	IV-1
2.		Grievances and Arbitrations	IV-1
	a.	Grievances	IV-1
	b.	Union Right to Information to Process Grievances	IV-1
	c.	Arbitration	IV-2
3.		Labor Relations and Equal Employment Opportunity Programs	IV-3
	a.	Choice of Procedures.	IV-3
	b.	Implementing a Discrimination Complaint Decision	IV-3
	c.	Affirmative Action Plans	IV-4

CHAPTER V - PARTNERSHIP

1.		Executive Order 12871	V-1
	a.	Preamble to Executive Order 12871	V-1
	b.	Agency Requirements	V-1
2.		Partnership Councils and Committees	V-2
	a.	Forming a Partnership Council or Committee	V-2
	b.	Decision Process (Predecisional Involvement, Consensus, Good Government Standard)	V-3
3.		Alternative Dispute Resolution Training	V-5
	a.	General	V-5
	b.	Training	V-5
4.		Negotiation of 7106(b)(1) Subjects	V-6
5.		Evaluation of Progress and Improvements in Organizational Performance	V-6

CHAPTER I

REPRESENTATION ELECTIONS

1. Organizing Phase.

- a. Union Organizing Activities. Title 5 United States Code, Section 7102, guarantees an employee's right to form, join, or assist a labor organization. Management may not interfere with these rights. However, efforts to form, join, or assist a labor organization do not convey any additional rights upon the participants until a sufficient showing of interest has been submitted to the Federal Labor Relations Authority (FLRA).
 - (1) Requests for names of employees or other information will be treated as requests for information from the general public, not as union information requests submitted under 7114(b)(4).
 - (2) Requests from non-employee organizers for access to employees or facilities will be treated as requests from the general public.
 - (3) Organizing activities by Federal employees must be conducted during their non-work times, i.e., before and after work and during breaks and lunches.
 - (4) Activities such as literature distribution or informational picketing conducted outside government facilities will be allowed if such activities conform to local law; however, no organizing activities will be allowed to disrupt agency mission or Federal employee's duties. Employee discipline and/or unfair labor practice charges are alternatives for dealing with any activities which disrupt Government operations.
- b. Equal Access.
 - (1) A labor organization challenging an incumbent exclusive representative pursuant to a validly filed election petition, as determined by the Federal Labor Relations Authority, is entitled to be accorded a status equivalent to the exclusive representatives for matters related to access to facilities and employees. Equivalent status does not convey the right to attend formal meetings.

Equivalent status will remain in effect until final disposition of the representation process, including resolution of any challenges to the election.

- (2) As soon as the Federal Labor Relations Authority has accorded a challenging labor organization equivalent status, responsible field office/Headquarters labor relations staff will notify each labor organization, in writing, of the specific services or facilities each may use during the representation campaign. These services or facilities may include:

- (a) Use of public areas for distributing literature during non-duty time.
- (b) Use of employee bulletin boards (other than use of boards already negotiated by the exclusive representative).

- c. Maintaining Conditions of Employment. Conditions of employment must remain unchanged, to the maximum extent possible, during a representation campaign. This includes adhering to the terms of negotiated agreements with recognized unions. This rule preserves the equivalent status of the challenging labor organization with that of the exclusive representative.

- d. Management Neutrality.

- (1) Department of Energy supervisors and managers are discouraged from expressing personal views about labor organizations. Supervisors and managers must remain officially neutral during representation campaigns. Official views may be expressed for the following purposes:
- (a) Publicize an election and encourage bargaining unit employees to vote.
 - (b) Correct the record regarding any false or misleading statement made by any person about Department of Energy.
 - (c) Inform employees of the Federal Government policy regarding labor-management relations.

- (2) Supervisors and managers may not:
 - (a) Survey employees as to their union sympathies.
 - (b) Promise employees benefits for voting against the union or for voting for one union over another.
 - (c) Interrogate employees about union activities.
 - (d) Threaten employees with adverse consequences if they vote for the union.
 - (3) Before any representation campaign begins, the Field Office/Headquarters labor relations staff will notify and brief managers and supervisors of their rights and obligations during the campaign.
- 2. Representation Petitions. Title 5 Code of Federal Regulations, Part 2422 describes procedural requirements for the representation election process. The formal process begins when a labor organization, seeking to become the exclusive representative of an agency's employees, files a representation petition with the Federal Labor Relations Authority.
 - a. Timeliness.
 - (1) A representation petition cannot be considered timely if there has been an election for bargaining unit representation within the last twelve months.
 - (2) If a collective bargaining agreement is in effect it will serve as a bar to an election during its duration up to 3 years. This is referred to as a "contract bar." A representation petition may be timely filed only during a window period between 105 and 60 days prior to the expiration of the contract, or at any time after expiration of the contract during which a new agreement has not been put into effect (see 5 United States Code 7111).
 - b. Showing of Interest. The representation petition filed with the Federal Labor Relations Authority must be accompanied by signatures of 30% of the employees a bargaining unit deemed appropriate by the union. Failing agreement by the agency on the appropriateness of the bargaining unit, it may be determined after a

hearing with the Federal Labor Relations Authority (see Chapter 3). Upon determination of the appropriate bargaining unit, the Field Office/Headquarters will be required to furnish to the Federal Labor Relations Authority a listing of all employees in the bargaining unit, in order for the Federal Labor Relations Authority to determine whether the 30% showing of interest has been met. Under Federal Labor Relations Authority regulations, management will not be given access to the names or signatures. If the Field Office/Headquarters labor relations staff believe that there is not a sufficient showing of interest, the Department Labor/Employee Relations, Policy Branch should be contacted for advice and assistance on how to proceed.

- c. Intervenor Petitions. Once a question concerning representation has been raised by a labor organization submitting a 30% showing of interest in order to obtain an election, one or more additional unions may become parties to the election and have their names placed on the ballot by submitting a 10% showing of interest to the Federal Labor Relations Authority.

3. Appropriateness of the Bargaining Unit.

- a. Community of Interest. The bargaining unit described in the representation petition must ensure a clear and identifiable community of interest among the employees covered, and it must promote effective dealings between the exclusive representative and management and the efficiency of agency operations. If management does not agree with the appropriateness of the bargaining unit petitioned for, it may request a hearing before the Federal Labor Relations Authority. In assessing the appropriateness of the bargaining unit the following should be considered:
 - (1) Do the employees share common working conditions?
 - (2) At what level are personnel policies established and are they applied consistently throughout the petitioned for unit?
 - (3) If the unit petitioned for contains both professional and non-professional employees, a separate election may be held for the professionals to elect inclusion or exclusion from the bargaining unit.
 - (4) Is there common supervision/management of the unit petitioned for?

(5) Would the unit petitioned for exclude from representation certain groups or locations otherwise appropriate for representation?

- b. Notice. After receipt of a representation petition the Federal Labor Relations Authority will direct the posting of a Notice to Employees of the proposed bargaining unit and election. If the petition is deficient in any element, e.g., showing of interest, contract bar, timeliness, inappropriate bargaining unit, a response shall be filed with the Federal Labor Relations Authority challenging the validity of the petition within 10 days of the posting of the proposed election notice.

4. Elections.

- a. Eligibility List. A list of employees eligible to vote in the election must be prepared by the agency subject to concurrence by the union(s) and the Federal Labor Relations Authority. It will reflect current employees, at the time of the election, in the bargaining unit. The inclusion of names which the agency does not agree belong in the bargaining unit can be handled as challenged ballots when the individuals vote. Their status can be determined after the election if their votes would affect the outcome.
- b. Election Observers. The Federal Labor Relations Authority will conduct the election at the worksite(s). Management and the union(s) may each have an observer. The observer for management must not be a supervisor or manager, and therefore is usually a confidential employee who is not included in the bargaining unit. The observer's responsibilities are to observe the general conduct of the election, report inappropriate election conduct by any party, and ascertain employee identity and bargaining unit status by comparing their names to the eligibility list. The observer should be instructed by management to challenge the ballot of any employee whose name does not appear on the eligibility list. The challenge must be verbally stated to the Federal Labor Relations Authority agent prior to the ballot being placed in the ballot box, preferably as soon as the employee identifies himself, in order that the Federal Labor Relations Authority can identify the ballot and seal it for later determination. The observer should also be instructed to challenge the ballot of any employee on the list who management believes is not properly on the list.

- c. Election Conduct. Shortly before and during the election balloting, management officials, supervisors, and union officials should remain away from the location of the balloting in order to avoid any appearance of coercion of employee voters. Campaigning must not be conducted during the election. Employees should not be polled before or after the election about their votes. Ballots are secret.

CHAPTER II

GENERAL PROVISIONS

1. **Employee Rights.** Under 5 United States Code, chapter 71, employees have the protected right to form, join, or assist any labor organization, or to refrain from any such activity. This right includes the right:
 - a. to act as a representative of a labor organization and while in that capacity the right to present the labor organization's views to the heads of agencies and other executive branch officials, Congress or other authorities (Section 7102),
 - b. have their representatives engage in collective bargaining with management (Section 7102),
 - c. have management deduct union dues from their pay (Section 7115),
 - d. be represented by a representative of their choosing in grievances or appeal actions (Section 7114(a)(5)(A)).
2. **Union Rights.** A labor organization recognized as the exclusive representative of employees has the right to:
 - a. act exclusively for and negotiate collective bargaining agreements covering such employees (Section 7114(a)(1), see Part III, Negotiations).
 - b. be represented at any formal meeting between the agency and a bargaining unit employee(s) where the meeting subject concerns any grievance, personnel policy or practice or general condition of employment (Section 7114(a)(2), see Advisory on FORMAL DISCUSSIONS Attachment).
 - c. be present at any agency examination of an employee if the employee reasonably believes that the examination may result in disciplinary action and the employee requests that the exclusive representative be present (Section 7114(a)(2)(B), see Advisories on WEINGARTEN MEETINGS).

NOTE: Annually, on 10-1, unless otherwise provided for in negotiated agreements, DOE Field Offices/Headquarters will post the announcement in Attachment 1-1 to inform employees of these rights.

- d. request and be provided data (Section 7114(b)(4)):
 - (1) which is normally maintained,
 - (2) which is reasonably available,
 - (3) which is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and
 - (4) which does not constitute advice, counsel, or training provided for management officials or supervisors relating to collective bargaining (see Advisories on INFORMATION REQUESTS Attachment).

3. Dues Allotments.

- a. Under the provisions of 5 United States Code 7115, an agency shall, upon request of an exclusively recognized labor organization, deduct the organization's dues from the pay of bargaining unit employees who submit a voluntary allotment on Standard Form (SF) 1187, "Request for Payroll Deductions for Labor Organization Dues." Procedures for submitting requests for deductions, for withdrawing such requests, and for modifying dues deduction amounts will be negotiated with the labor organization and incorporated in term agreements (see Part III, Sample Contract Language).
- b. Where no union has been certified as exclusive representative, a union which submits to the Federal Labor Relations Authority a petition and showing of interest of 10% of the bargaining unit, may have dues deducted. Upon the Federal Labor Relations Authority's certification of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues from the pay of its members who make a voluntary allotment.
- c. When an employee ceases to be in a position covered by the bargaining unit through a specific personnel action, e.g., reassignment, promotion to a supervisory/managerial position, et. al., they become ineligible for union dues deductions. In such cases, the responsible payroll or personnel office will terminate the employee's dues allotment, effective the date of the personnel action. No voluntary revocation is required of the employee, and the employee may not elect to continue his dues allotment. The Standard Form-50, "Notification of Personnel Action," will include the statement: This action terminates eligibility for labor organization allotment.

- d. Dues allotments for labor organization dues must remain in effect for at least one year after the initial allotment, so long as the employee remains in the bargaining unit, i.e., the employee cannot voluntarily revoke his dues allotment during the first year. The employee must be allowed to revoke his dues allotment upon the first year anniversary date of his/her allotment, notwithstanding any negotiated time period during which employees can revoke. After the first year anniversary date, negotiated revocation periods shall be controlling so long as employees have at least a once per year opportunity to revoke their dues allotments.

4. Official Time.

- a. Representatives of exclusively recognized labor organizations are entitled to official time (paid duty time during the time the employee would otherwise be in a duty status), pursuant to 5 United States Code 7131, under the following conditions:
 - (1) Negotiating a collective bargaining (term or mid-term) agreement. The number of employees for whom official time is authorized under the Statute shall not exceed those designated to represent the agency. The number of bargaining team members is a negotiable subject (see 7131(a)).
 - (2) Participating in impasse proceedings (see 7131(a)).
 - (3) Participating in proceedings before the Federal Labor Relations Authority, e.g., unfair labor practice investigations, unfair labor practice hearings, representation hearings, representation elections. Travel and per diem is not required to be paid by the agency for these activities (see 7131(c)).
- b. The exclusive representative may negotiate for additional official time associated with administering a labor management agreement.
- c. Activities relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty/non-paid status.
- d. Field Offices/Headquarters should establish a means to record and monitor the use of official time for union activities. This information is valuable for administration of the contract with respect to any negotiated limits on the use of official time, and as historical data for renegotiation of contracts. To the extent that the process for recording official time use involves participation by the union officials, means of recording must be consistent with the negotiated agreement.

5. Bargaining Unit Status.

- a. The responsible Field Office/Headquarters management officials will monitor the composition of the recognized bargaining units to ensure that the employees in the unit meet the statutory criteria for inclusion (see 7103(a)(2), (10), (11), (13) and 7112(b)).
- b. Each numbered position in DOE will be assigned a bargaining unit status code. The codes, which are maintained in the DOE Payroll/Personnel System (PAYPERS), indicate whether the employee in the position is:
 - (1) Code 8888 - Not eligible for inclusion in a bargaining unit because the position is covered by the exclusions in 5 United States Code 7103(a)(2) or 7112(b).
 - (2) Code 7777 - Eligible for inclusion in a bargaining unit, but unrepresented.
 - (3) Code XXXX - Represented by an exclusive representative. The code assigned may be a combination of letters and numbers which cues system users to the identification of a specific single bargaining unit.
- c. Responsible activity personnel will monitor the assignment of bargaining unit status codes within their areas of responsibility. Changes in duties and position descriptions may alter bargaining unit status and require changes.

6. Unfair Labor Practice Charges.

- a. Regardless of the care with which the local labor-management relations program has been conducted, there may be occasions when a labor organization files unfair labor practice charges against Department of Energy activities. Responsible activity personnel will ascertain the facts surrounding the charge as soon as possible after the charge is received. Department of Energy activities will cooperate with Federal Labor Relations Authority investigators; they shall allow bargaining unit employees official time if they elect to participate in the investigation, and if requested by the Federal Labor Relations Authority. Participation by management officials and supervisors in interviews with the Federal Labor Relations Authority, including the decision as to whether to sign statements, will be determined on a case by case basis between the supervisor/management official and responsible labor relations staff. If the decision is made to be interviewed, managers and supervisors are entitled to be represented by a representative designated by the Field Office/Headquarters (normally a representative of the labor relations staff).

- b. When responsible Field Office/Headquarters personnel believe that the exclusive representative has committed a violation of the Statute, an unfair labor practice charge may be filed against the labor organization. Prior to filing Unfair Labor Practice charges it is recommended that the activity thoroughly investigate the facts and consult with the Department of Energy Employee/Labor Management Relations Policy Branch on the advisability of filing the charge and the likelihood of a desirable outcome.
- c. The parties are encouraged to negotiate prior notice to the charged party of any intent by the other party to file an unfair labor practice charge. During this period of advance notice the parties are encouraged to explore settlement through traditional means or through alternative dispute resolution process.

CHAPTER III

NEGOTIATION

1. **Bargaining Obligations.**

- a. **Full Term Contract Negotiations.** At the request of either management or the union, the parties are obligated to meet at reasonable times and convenient places for the purpose of negotiating a collective bargaining agreement. This may occur as a first agreement subsequent to recognition, or upon the expiration of a prior agreement. If agreement is reached, the parties are obligated, upon the request of either party, to execute a written contract, subject to agency head approval (see 5 United States Code 7114(b) and Chapter 6 on Contract Approval).
- b. **Mid-term Negotiations.**
 - (1) **Matters not covered by the contract.** When management anticipates that it will make more than a "de minimis" (minimal) change in the conditions of employment of bargaining unit employees or to a personnel policy, practice or matter affecting unit employee working conditions not covered by the negotiated agreement, the union must be afforded the opportunity to present proposals and to bargain on the substance of the change, (unless management rights are involved).
 - (2) **Exercise of management right - not covered by the contract.** When a change involves the exercise of a management right, and the matter is not covered by the negotiated agreement, the agency is obligated to negotiate over impact and implementation. (See 5 United States Code 7106(b)(2) and (3); and Chapter 2 for the scope of bargaining obligations on management rights.)
 - (a) The procedures management will use when implementing the change;
 - (b) Appropriate arrangements for adversely affected employees; and
 - (c) Procedures and arrangements are negotiable as long as they do not "excessively interfere" with the exercise of the management right.

- (3) Union initiated mid-term bargaining - not covered by the contract. The Federal Labor Relations Authority has held that a labor organization can initiate mid-term bargaining at any time during the life of a contract on any matter not covered by the contract. One Circuit Court of Appeals has reversed the Federal Labor Relations Authority on this issue. Other cases standing for this proposition are currently on appeal; therefore, research current case law when such a bargaining demand is received.
- (4) Notification to the union of personnel related and/or working condition changes should:
 - (a) provide clear and specific information about the proposed changes and state a specific proposed implementation date,
 - (b) provide the representative with a reasonable amount of time to evaluate and respond to the notice prior to the implementation date. The change may be implemented when planned if the representative does not submit any response to the notice.

Specific procedures for accomplishing this "impact and implementation" bargaining may be negotiated for inclusion in the negotiated agreement.

2. Scope of Bargaining.

- a. Management Rights Defined. Management Rights are those rights specifically reserved to agency management under 5 United States Code, Section 7106(a). Management has sole and exclusive rights (and may not legally give up the rights) to:
 - (1) Determine the mission, budget, organization, number of employees, and internal security practices; in accordance with laws, to hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, or take other disciplinary action against employees;
 - (2) Assign work to employees and decide whether to contract out work; or
 - (3) Select for appointments from among properly ranked and certified candidates or from any other appropriate source.

Contract proposals which interfere with the management rights provisions of the statute must not be agreed to. Interest-based bargaining approaches can be utilized to resolve the issue in a negotiable manner. However, if the union refuses to alter its position, the proposal should be declared nonnegotiable. Even if agreed to, nonnegotiable proposals are not enforceable.

- b. Bargaining obligations on the Exercise of Management Rights. With respect to the exercise of management rights, Field Offices/Headquarters shall bargain with labor organizations on:
 - (1) procedures which management officials of the agency will observe in exercising any authority under this section (5 United States Code 7106(b)(2)),
 - (2) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials (5 United States Code 7106(b)(3)), and
 - (3) procedures and arrangements are negotiable as long as they do not excessively interfere with the exercise of the management right, and are designed to mitigate the adverse affects on affected employees.
- c. 7106(b)(1) Bargaining Subjects.
 - (1) Executive Order 12871 of October 1, 1993, instructs agencies to "negotiate over the subjects set forth in 5 United States Code 7106(b)(1)." Those subjects are: the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.
 - (2) The Executive Order states that agencies must bargain over 7106(b)(1) matters; agencies are no longer permitted to elect not to. Therefore, they are no longer "permissive" subjects and that term may soon drop from Federal sector labor relations parlance. They are now mandatory subjects of bargaining by way of the Executive Order.

However, Section 3 of the Executive Order states in part that it "does not create any right to administrative or judicial review, or any other right." In this regard the requirement to bargain over 7106(b)(1) subjects does not override the management rights restrictions of Section 7106(a). The Order does not give unions (or eliminate the management proscriptions against) the right to negotiate proposals which interfere with management rights in sections 5 United States Code 7106(a).

d. Subjects Prohibited From Bargaining in Addition to Management Rights.

- (1) Laws. No provisions which are inconsistent with any law shall be negotiated. If the provisions of a law convey a right, the statutory language may be included in an agreement as a restatement of a legal requirement. Laws passed during the term of an agreement supersede any portion of an agreement in conflict with the law.
- (2) Executive Orders. Have the same effect on bargaining as laws.
- (3) Government wide regulations. Government wide regulations have the same effect as laws in that they prohibit bargaining on any proposals which are inconsistent with them. Examples include 5 Code of Federal Regulations, Comptroller General Decisions, Office of Management and Budget Regulations, and General Services Administration Regulations. They differ from laws in that, if issued during the life of an agreement, the agreement will prevail until it expires. At the expiration of the agreement, all new regulations will apply and subsequent agreements will be brought into conformance.
- (4) Non-Discretionary Department of Energy Orders. This category includes provisions of published Department of Energy Orders that afford local management no discretion. When union proposals appear to conflict with published Department wide policies and regulations, Field Office/Headquarters labor relations staff must obtain an exception to the policies or regulations or declare the proposals nonnegotiable. The DOE-wide Orders and regulations are controlling unless an exception is granted or the Federal Labor Relations Authority declares that there is no compelling need for that specific Order or regulation. The Federal Labor Relations Authority has the authority to determine whether a compelling

need for agency wide regulations exists which would bar negotiations. The Federal Labor Relations Authority's regulations in 5 Code of Federal Regulations 2424.11 establish the following criteria for compelling need:

- (a) Are the policies or regulations essential to the accomplishment of the agency's mission in a manner which is consistent with the requirements of an effective and efficient government?
- (b) Are they necessary for the maintenance of merit principles?
- (c) Do they implement, in a non-discretionary manner, a mandate under law or other outside authority?

If management's negotiators anticipate the need for exceptions to Department of Energy's policies or regulations, they shall forward a request for exceptions to the Office of Personnel. The Office of Personnel shall coordinate the request with the Department of Energy organization responsible for issuing the policies or regulations. The request must specify the policies or regulations in question, the contract proposal and how it conflicts, and how the aforementioned compelling need criteria apply.

3. Bargaining Styles.

a. Traditional Bargaining.

- (1) Based on bargaining positions,
- (2) Formal proposals are exchanged in contract language format,
- (3) May take on an adversarial posture,
- (4) Emphasis is only on the interests of one's own party, and

- (5) Desired outcome is to win, or win/win (as long as one's own party wins enough to balance or outweigh the other party's wins).

b. Interest Based Bargaining.

- (1) Parties receive joint training on interest based bargaining procedures and techniques.
- (2) Interests or issues are exchanged rather than proposals.
- (3) Criteria are jointly established for evaluating solutions to the interests/issues.
- (4) Options are developed and narrowed by consensus.
- (5) Problem solving approaches are utilized.
- (6) Desired outcome is to satisfy all interests.

- c. Summary. Both traditional and interest based bargaining are acceptable styles of bargaining. Interest based bargaining as a formal procedure is relatively new and requires a joint commitment from both parties to formally adopt the interest based procedures. Traditional bargaining practitioners have successfully utilized interest based bargaining techniques within the context of traditional bargaining procedures for years, and are encouraged to continue to do so. Training on interest based bargaining is available from the Department of Labor, the Federal Mediation and Conciliation Service, Office of Personnel Management, and independent providers.

4. Content of Agreement.

- a. Elements Required by Statute. 5 United States Code 7121 requires that any collective bargaining agreement shall provide procedures for the settlement of grievances including questions of arbitrability, additionally:
- (1) may exclude any matter from the application of the grievance procedure (by mutual agreement),
 - (2) be fair and simple,

- (3) provide for expeditious processing,
- (4) allow the union to file grievances on its own behalf or on behalf of bargaining unit employees,
- (5) allow management to file grievances on its own behalf,
- (6) assure an employee the right to present a grievance on his/her own behalf, and assure the union the right to be present, and
- (7) provide for binding arbitration to be invoked by a union or management.

b. Recommended Elements.

- (1) Management rights clauses are desirable, as they allow quick and easy reference to the rights by the union and employees. However, the absence of a management rights clause does not mean that management has waived them, since the Statute accords these rights to management.
- (2) Dues deduction procedures in contracts assure that the means by which management meets its obligation to deduct and remit dues has been agreed upon by the parties.
- (3) Procedures for mid-term bargaining can expedite the implementation of changes desired by management, when not already in the contract. Provisions are recommended stating how much advance notice of a change is given to the union, how much time the union has to respond, that the union submit written proposals within a specified number of days, and that failing receipt of timely proposals management will be free to implement the change. Since negotiation of separate ground rules for mid-term bargaining, each time a change is proposed, can substantially delay implementation, negotiating standard ground rules for mid-term bargaining into the contract can also expedite the process.
- (4) Procedures for approving, controlling, recording, and monitoring the use of official time by union officials for representational purposes is recommended.
- (5) A requirement for a certain period of advance notice to management of any unfair labor practice charge the union intends to file is recommended.

This allows the parties an opportunity to attempt resolution prior to the issue being submitted to the Federal Labor Relations Authority.

5. Dispute Resolution.

- a. Impasses. If the parties are unable to reach agreement during negotiations, the procedures outlined in the regulations of the Federal Mediation and Conciliation Service (FMCS), 29 Code of Federal Regulations, Parts 1404 and 1425, and the regulations of the Federal Service Impasses Panel (FSIP), 5 Code of Federal Regulations, Parts 2470 and 2471, will be followed.
- b. Negotiability Disputes. Guidelines and procedures for determining the negotiability of a union's proposals are in 5 United States Code 7106(a), 7117(a) and (b). Compelling need criteria and procedures are in Code of Federal Regulations 2424. Upon a written request by the union for a written allegation of nonnegotiability, the Field Office/Headquarters labor relations staff will provide to the union a written statement alleging the nonnegotiability of a proposal within ten (10) days of receipt of the union's written request. (Such statements of nonnegotiability are not operative unless and until requested.) A copy of the proposal will be sent to the Office of Personnel. The union may, within fifteen (15) days, file a petition for review of the nonnegotiability allegation with the Federal Labor Relations Authority. Upon receipt of a copy of the petition, the Field Office/Headquarters labor relations staff shall notify the Office of Personnel immediately, which will respond to the petition.

6. Contract Approval. The Director of Personnel shall review and approve or disapprove negotiated agreements, renegotiations, mid-term agreements, supplements, and side agreements for conformance with law, rule, or regulation under 5 United States Code 7114(c). An agreement shall be approved within 30 days of its execution if the agreement meets statutory requirements. The following procedures shall be used:

- a. The date considered by the parties to be the execution date of the contract should be clearly spelled out in the contract since it starts the statutory time limits for agency head review and approval. Execution date could be considered to be the date the bargaining team members sign the contract, the date the Field Office Head signs the contract, or the date the union advises the agency that its membership has ratified the contract, etc.

- b. Three (3) copies of each negotiated agreement shall be submitted to the Director of Personnel for review and approval immediately after execution. (Overnight mail is recommended.) Providing an advance copy prior to execution will further expedite the process.
- c. A negotiated agreement which meets the requirements in 5 United States Code 7114(c)(1), i.e., that is not inconsistent with any laws or governmentwide rules or regulations, and does not interfere with any rights reserved to management under the Labor Statute (5 United States Code, Chapter 71) will be approved within 30 days of its execution. Upon approval, the Director of Personnel will return two signed copies to the Field Office/Headquarters as notification of approval. One copy will be provided to the union.
- d. A negotiated agreement which, in whole or in part, does not meet the foregoing requirements will be returned within 30 days of execution with written identification of the part(s) disapproved and reasons for disapproval. Field Office/Headquarters labor relations staff will provide the disapproval to the union immediately upon receipt. Where disapproval notification cannot be given to an appropriate union official in person, facsimile, express mail, or courier service, should be utilized to accomplish delivery within the 30 days.

CHAPTER IV

CONTRACT ADMINISTRATION

1. Supervisors Training.

- a. The success of a labor management agreement largely depends on how the agreement is administered. Consistent and knowledgeable interpretation of the agreement will lessen confusion and the possibility of dissatisfaction and grievances.
- b. Consistent and knowledgeable interpretation can be accomplished by providing training to managers and supervisors on the contents and interpretation of any newly negotiated agreement as soon as possible after its implementation. Recommended topics are new contract provisions, the parties' interpretation and intent of the language, implementation procedures, statutory rights of the parties, and general guidance on handling grievances.

2. Grievances and Arbitrations.

a. Grievances.

- (1) Upon receipt of a formal grievance, a supervisor will consult with their Field Office/Headquarters labor relations staff for advice and assistance in responding to the grievance.
- (2) Each grievance will be reviewed for conformance to the negotiated grievance procedure, grievability/arbitrability, and timeliness. Although any procedural deficiencies to the grievance should be cited in the formal answer to the grievance to preserve these defenses for arbitration, the parties should nevertheless attempt to resolve the underlying issue to the grievance if possible. Resolving the issue is usually better than winning a grievance or arbitration.

- b. Union Right to Information to Process Grievances. The union has a right under 5 United States Code 7114(b)(4) to request and receive from the agency information which is relevant and necessary for it to carry out its representational functions. The Federal Labor Relations Authority has interpreted "necessary" to require the union to state the "particularized need" for the information. Although the Privacy Act and Freedom of Information Act do not bar the release of information to

unions, per se, their implications must be balanced with the union's need for information before release. Current case law must be researched as issues arise as it is rapidly changing in this area.

c. Arbitration.

- (1) Selection of the arbitrator. Labor relations staff members should request information from the Employee/Labor Relations Branch and/or through Office of Personnel Management on arbitrators prior to making a selection. Consideration should be given to track records, Federal sector experience, comments from other Federal sector practitioners who have appeared before the arbitrator, and experience with the type of issue being grieved.
- (2) Information to the arbitrator. Information should be provided to the arbitrator in a pre-hearing submission outlining the Statutory limits of arbitral authority in the Federal sector and the obligation to apply Federal sector precedents and disciplinary burdens of proof in making a decision.
- (3) Arbitrator's decision. If an arbitrator issues a decision that Field Office/Headquarters labor relations staff believes is contrary to law, rule, or regulation, the Office of Personnel shall be notified immediately. The Office of Personnel will file exceptions to the arbitrators decision with the Federal Labor Relations Authority if appropriate. Exceptions cannot be filed simply because the agency disagrees with the conclusions of the arbitrator. The Federal Labor Relations Authority is not authorized to review arbitrator's decisions related to performance based removal or demotions under 5 United States Code 4303, or adverse actions under 5 United States Code 7512. Only the Office of Personnel Management can seek review of such awards from the United States Court of Appeals for the Federal Circuit.
- (4) Attorney fees. If a union requests attorney fees in conjunction with an arbitration they feel they have won, the request and proposed response will be forwarded immediately to the Office of Personnel, which will direct the request to the Office of General Counsel for statutory and regulatory review. Attorney fees may also be awarded in an arbitrator's decision. An award of attorney fees by an arbitrator which is not in conformance with 5 United States Code 5596(b) or 5 United States Code 7701(g) will be the basis for the filing of exceptions to the Federal Labor Relations Authority.

3. Labor Relations and Equal Employment Opportunity Programs.

a. Choice of Procedures.

- (1) Pursuant to 5 United States Code 7121(d), the negotiated grievance procedure may extend to allegations of discrimination (unless excluded in the contract). However, employees must choose either the statutory discrimination complaint procedure (see 5 United States Code 2302(b)(1) and 29 Code of Federal Regulations, Part 1613) or the negotiated grievance procedure, but not both.
- (2) When an allegation of discrimination is raised during the negotiated grievance procedure, the grievant has a right of appeal to the Equal Employment Opportunity Commission (EEOC) either after arbitration, or if arbitration has not been invoked, at the end of the grievance procedure (see 29 Code of Federal Regulations 1613.231(b)).
- (3) When an employee chooses the statutory discrimination complaint procedure, the employee may choose his/her own personal representative. If the employee chooses a labor organization official as a personal representative, the representative's entitlement to time will be pursuant to Equal Employment Opportunity provisions, i.e., it will not count toward any negotiated maximums or caps for union official time.

b. Implementing a Discrimination Complaint Decision.

- (1) Corrective or remedial actions ordered by the Merit Systems Protection Board (MSPB) or as a result of a settlement of a Department of Energy Equal Employment Opportunity officer are binding on the Department of Energy. If application and implementation of a decision concerning a complaint of discrimination has an impact on personnel policies, practices, or working conditions, management must notify the exclusive representative of the settlement.
- (2) If the remedial action ordered includes meeting with an employee or employees regarding personnel policies, practices, or matters affecting working conditions, management will notify the exclusive representative and offer the representative an opportunity to attend the meeting.

- c. Affirmative Action Plans. Department of Energy management is required to maintain an affirmative action program to ensure equal employment opportunity. If the development of affirmative action plans involves changes in personnel policies, practices, or working conditions, management will notify the exclusive representative of the proposed changes and will afford the exclusive representative an opportunity to submit appropriate proposals on the plans prior to implementation.

CHAPTER V

PARTNERSHIP

1. Executive Order 12871. In September 1993, the National Performance Review (NPR) in its report, "Creating a Government that Works Better and Costs Less," recommended the formation of labor management partnerships for success. In October, 1993, President Clinton signed Executive Order 12871 which created the National Partnership Council (NPC), comprised of union, management, and neutral leaders.

- a. Preamble to Executive Order 12871. The Preamble to the Executive Order provides insight to its purpose and intent:

The involvement of Federal Government employees and their union representatives is essential to achieving the National Performance Review's government reform objectives. Only by changing the nature of Federal labor-management relations so that managers, employees and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform government. Labor management partnerships will champion change in Federal Government agencies to transform them into organizations capable of delivering the highest quality services to the American people.

The goal of labor management partnerships can be seen in the title of the National Performance Review's report "Creating a Government that Works Better and Costs Less." Similarly, it is clear from the preamble to the Executive Order that labor management partnerships are intended to be the vehicle for change, reform, and high quality service. These goals were subsequently echoed by the National Partnership Council in recommending the "Good Government Standard" as the criteria for decisions under partnership arrangements.

- b. Agency Requirements.
 - (1) Create labor-management partnerships by forming labor-management committees or councils at appropriate levels or adapting existing committees or councils.

- (2) Involve employees and their union representatives as full partners to identify problems and craft solutions to better serve the agency's customers and mission.
- (3) Provide systematic training of appropriate agency employees including line managers, first line supervisors, and union representatives in consensual methods of dispute resolution.
- (4) Negotiate and instruct subordinates to negotiate over the subjects set forth in 5 United States Code, Section 7106(b)(1).
- (5) Evaluate progress and improvements in organizational performance resulting from the labor-management partnerships.

2. Partnership Councils and Committees.

- a. Forming a Partnership Council or Committee. There is no single structure or process for labor management partnership councils which is appropriate for all labor management relationships. Cooperative efforts to form a council which meets the needs of the parties is the first exercise in cooperative decision making. Generally, partnership councils should be formed through a written agreement between the parties. However, such agreements do not have specific terms of duration, do not have the force and effect of contracts, and are not enforceable through third parties. Therefore, they are subject to change initiated by either party by giving notice to the other. Partnership agreements are working documents which embody the current consensus of the parties on the subject rather than a binding unchangeable contract. Partnership agreements normally embody the following basic elements:
 - (1) Structure. The agreement should address the number of members on the partnership council from each party. Is membership fixed or can it rotate, etc.?
 - (2) Leadership. Will the Council have a leader? How will leader be selected? How long will they serve?

- (3) Decision criteria. A commitment that the parties will apply the Good Government Standard to decision making.
- (4) Logistics:
 - (a) Frequency of meetings.
 - (b) Location of meetings.
 - (c) Are minutes kept?
 - (d) Are issues submitted for an agenda prior to the meeting?
- b. Decision Process (Predecisional Involvement, Consensus, Good Government Standard).
 - (1) Communication. The lines of communication must be kept open and sharing of information must take place for a partnership to succeed. Unions must be given pre-decisional involvement, i.e., involved in the decision making process prior to decisions becoming an accomplished fact. Information previously considered proprietary, sensitive, or irrelevant will now be shared with unions.
 - (2) Consensus. Consensus involves arriving at a solution or agreement satisfactory to all parties. Contrasted with traditional positional bargaining, consensus focuses on exploring alternatives approaches, rather than bargaining over positions. Suggestions for reaching consensus include:
 - (a) Listen intently and encourage participation.
 - (b) Share information.
 - (c) Do not bargain. Consensus building is an alternative approach to traditional bargaining techniques which should be applied in partnership council meetings. Therefore, avoid trade-offs, package deals, withholding agreement, and other "traditional bargaining strategies" in such meetings. Leave these strategies for traditional bargaining situations.

- (d) Explore solutions that satisfy each party's interests.
- (e) Do not argue blindly over a position, explore another alternative.

(3) The Good Government Standard.

- (a) Consistent with interest based bargaining techniques, all proposals should be evaluated against agreed upon criteria. The National Performance Review stated the primary criterion should be to make "Government capable of delivering the highest quality services to the American people." This covers such matters as achieving service to the public equal to the "best in business," improving productivity, streamlining operations, and reducing overcontrol and micromanagement.
- (b) The National Partnership Council defined elements of "the Good Government Standard" as "the promotion of increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and, in the case of the Department of Defense, military readiness."

Traditionally, management has developed solutions to problems, or approaches to issues, which then have been provided to the union for counterproposals and negotiation. Under partnership concepts, the union's involvement begins with identifying the problem, or in developing an approach to an issue, rather than merely responding to a proposed solution. The predecisional involvement of Federal Sector unions in decisions traditionally made by management, when alternative solutions are measured against a Good Government Standard, has the potential to be a valuable source of information and ideas to tap for government improvement. Ideas which do not meet these standards will not be adopted.

3. Alternative Dispute Resolution Training.

- a. General. Executive Order 12871 requires the Departmental organizations to provide training to appropriate agency employees (including line managers, first line supervisors, and union representatives who are Federal employees) in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches. Following this training, organizations are encouraged to use alternative dispute resolution techniques to facilitate the resolution of disagreements between labor and management. Alternative dispute resolution increases the parties' opportunities to resolve disputes prior to using the more traditional, formal administrative approaches such as win/lose bargaining, unfair labor practice filings, grievance arbitration, and litigation.

Moreover, alternative dispute resolution is often less costly and time-consuming, and can provide long term solutions to labor-management conflicts through stakeholders' participation and buy-in. In contrast, traditional dispute resolution often imposes a "solution" handed down by a third party, where neither party walks away satisfied, and the disputants' conflict continues or increases.

In labor relations, alternative dispute resolution most commonly takes the form of mediation and arbitration. However, organizations are encouraged to consider other lesser known methods to include interest-based problem solving and bargaining, fact finding, facilitation, conciliation, dispute panels, peer review, mini-trials, ombudsmen, and alternative discipline. Organizations wanting more information on any of these methods should contact the Office of Personnel Policy, Programs and Assistance at Headquarters.

- b. Training. Training opportunities and assistance are available from a wide variety of sources including Government agencies, colleges and universities, professional associations, and consulting organizations. Many organizations offer a combination of specific training courses, customized or tailored training, and other alternative dispute resolution assistance. Some organizations also offer training materials and/or videos that might be used for in-house training programs. The Office of Personnel Policy, Programs and Assistance at Headquarters maintains a comprehensive list of training sources.

4. Negotiation of 7106(b)(1) Subjects.

- a. Executive Order 12871 requires agencies to "negotiate over the subjects set forth in 5 United States Code 7106(b)(1), ..." Subjects included in 7106(b)(1) are the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, and the methods and means of performing work. The Executive Order mandate does not require agencies on their own initiative to immediately begin negotiations on each and every position or technology in the agency. It does mean, however, that when a bargaining obligation otherwise exists, (e.g., contract negotiations, management initiated reinvention initiatives), management can no longer refuse to bargain over union proposals which impact 7106(b)(1) subjects. Department of Energy's position is that the Good Government Standard applies to such negotiations.
- b. Agencies remain prohibited from negotiating on proposals which interfere with the management rights contained in 7106(a) of the Statute. At any time management rights are implicated, whether independently or as a result of bargaining on a 7106(b)(1) issue, the parties are encouraged to use interest based bargaining techniques to fashion agreements which do not affect these rights. Declarations of nonnegotiability should be employed only as a last resort.

5. Evaluation of Progress and Improvements in Organizational Performance. In order to monitor and improve the effectiveness of partnership initiatives, measures should be identified. Such measures could include:

- a. The numbers of complaints submitted to formal outside procedures, i.e., arbitration, Federal Labor Relations Authority, Equal Employment Opportunity Council, etc.
- b. The adoption of reinvention initiatives which enhance effectiveness.
- c. Dollar savings through reinvention initiatives.

- d. Customer surveys. True partnership is usually an evolutionary process, not an overnight change. Evaluation of progress by agreed upon measures is a tool for continuous finetuning of the relationship. Partnership approaches which do not achieve results can be discarded in favor of alternative partnership approaches.