GRIEVANCE ARBITRATION WITHIN DEPARTMENT OF THE ARMY UNDER EXECUTIVE ORDER 10988

A Thesis

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

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SCOPE

An analysis of those advisory arbitration decisions within Department of the Army rendered as the final step in grievance procedures negotiated since promulgation of Executive Order 10988 in January 1962. This analysis will include brief comparisons with the experiences of the other military services and a discussion of mechanics and techniques for counsel at arbitration hearings, together with an examination of the significance of Army experience to date.

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INTRODUCTION

On 17 January 1962, President Kennedy signed Executive Order 10988 and thereby formally established government-wide policy favoring employee-management cooperation in the federal service.[1] By November of 1967, over 1.2 million persons, or forty-five percent of all federal civilian employees, were represented by labor organizations with exclusive bargaining rights.[2] That figure has continued to increase sharply.[3]

Magnitude of coverage alone makes it abundantly clear that today public employee labor organizations are forces to be reckoned with in the federal service. The draft report of a task force established in late 1967 to

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[1] Employee-Management Cooperation in the Federal Service, Exec. Order No. 10988, 3 C.F.R. 521 (1962) [hereinafter cited as E.O. 10988].

[2] Office of Labor-Management Relations, U.S. Civil Serv. Comm'n, Union Recognition in the Federal Government, Statistical Report 2 (Nov. 1967).

[3] The Civil Service Commission is currently compiling data for a late-1968 tabulation similar to its Nov. 1967 tabulation. As of 7 Apr. 1969, Department of the Army personnel covered by exclusive agreements totaled 154,736 persons, an increase of 31,190 persons over Nov. 1967. Interview with W. J. Schrader, Chief, Labor Relations Division, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U.S. Army, 7 Apr. 1969.

recommend to the President changes in Executive Order 10988 has recently been submitted.[4] While the strikes and picketing by public employees which have become increasingly widespread in the state and local sector so far have left the federal sector virtually untouched, the possibility of even this type of activity cannot be ignored.

Section 8(b) of Executive Order 10988 authorizes the inclusion of grievance arbitration clauses in collective bargaining agreements. This thesis will examine those grievance arbitrations held to date within Department of the Army, briefly contrasting Department of the Navy and Department of the Air Force experience, with the objective of determining the present and potential significance of such arbitrations within the total Army labor relations framework. In addition, it will discuss arbitration mechanics, techniques, and preparation sources about which counsel at arbitration hearings should be aware.

A basic assumption underlying the following pages is that labor relations already has achieved and increasingly will achieve substantial importance, both to the Army as a whole and to the individual commander having civilian

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[4]The report was made public on 16 Jan. 1969. BNA 280 Gov't Empl. Rel. Rep. A-1 (20 Jan. 1969) [hereinafter cited as GERR].

employees within his command. There are many aspects of labor relations within Department of the Army well worth exploring in depth. Several, including the resolution of negotiation impasses and the determination of appropriate bargaining units and majority status, either currently or potentially involve the use of arbitration. The scope of this thesis, however, is confined to that arbitration authorized by Section 8(b) of Executive Order 10988 as the final step in negotiated grievance procedures.

CHAPTER II

HISTORICAL BACKGROUND

A. The Federal Employee Prior to Executive Order 10988

Until the promulgation of Executive Order 10988, no government-wide policy on labor relations within the federal sector existed although collective bargaining had been encouraged and regulated by the federal government within the private sector since the passage of the Norris-LaGuardia Act in 1932.[5] The National Labor Relations Act (Wagner Act)[6] and the Labor-Management Relations Act (Taft-Hartley Act)[7] expressly excluded government employees from coverage, while reaffirming the common law rule that such employees have no right to strike.

The only legislation specifically recognizing the right of federal employees to affiliate with labor organizations was the Lloyd-LaFollette Act in 1912.[8] Limited

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[5]Act of 23 Mar. 1932, ch. 90, 47 Stat. 70 (now found in 29 U.S.C. §§ 101-115).

[6]Act of 5 Jul. 1935, ch. 372, 49 Stat. 449 (now found in 29 U.S.C. §§ 151-168).

[7]Act of 23 Jun. 1947, ch. 120, 61 Stat. 136 (now found in 29 U.S.C. §§ 141-187).

[8]Act of 24 Aug. 1912, ch. 389, § 6, 37 Stat. 555 (now found in 5 U.S.C. §§ 7101-7102).

to postal employees and carefully forbidding strikes, it revoked Executive Orders of 1902, 1906, and 1908 which had prohibited such affiliation and had denied the right of individual petition to Congress.

Department of Defense experience with collective bargaining began as far back as the early 1800's at such industrial-type installations as shipyards and arsenals. In the year 1836, strikes occurred at both the Washington Navy Yard and the Philadelphia Navy Yard over the issue of hours of work.[9] In 1893, the Army encountered a similar experience at Watervliet Arsenal over the issues of hours of work and rates of pay.[10] In 1899, machinists at Rock Island Arsenal struck over the issues of discipline, discrimination against union members, and failure to consult and to hear grievances. This last incident resulted in a War Department order for arsenal commanders to deal with grievance committees and to refer unresolved matters to the Department.[11]

In the early 1900's, trade unionism increased rapidly as Frederick Taylor's principles of scientific management

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[9] D. Ziskind, One Thousand Strikes of Government Employees 24-25 (1940).

[10] Id. at 30.

[11] S. Spero, Government As Employer, 94-95 (1948).

were introduced into some Army industrial settings. Interestingly, while most employees appeared to oppose these principles,[12] some favored them.[13] In any event, employee activities resulted in various congressional resolutions and riders prohibiting the use of funds for such things as time studies and the payment of bonuses.[14]

World War I and the resultant need for a stable military-industrial environment brought about some specific recognition of union activity. In 1916, the Department of the Navy urged employees to organize in order to facilitate coordination with management,[15] while within Department of the Army a number of arsenals negotiated piece work rates and promotions in exchange for agreements by employees not to restrict output.[16]

While the shop committee system established by

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[12]At Rock Island Arsenal and at Watertown Arsenal, in 1911, employees strongly objected to the introduction of scientific management principles. The Encyclopedia of Management 875-876 (C. Heyel ed. 1963).

[13]Employees at Frankfort Arsenal during the same period petitioned for a continuance of the Taylor system. Id. at 876.

[14]Id.

[15]Office of Industrial Naval Relations, Important Events in American Labor History 9 (1963).

[16]Hugh G. J. Aitken, Taylorism at Watertown Arsenal; Scientific Management in Action, 1908-1915 240 (1960).

President Harding after World War I was not successful because of employee fear that it was a management trick, the onset of World War II gave the union movement sharp impetus.[17] By the end of the war, federal employee-management policy was a widespread topic of discussion.[18] The prevailing sentiment which gained momentum in the ensuing years was well expressed in the 1955 Report of the Committee on Labor Relations of Governmental Employees of the American Bar Association:

> A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis, modified, of course, to meet the exigencies of the public service. It should set the example for industry by being perhaps more considerate than the law requires of private enterprise.[19]

Beginning in 1949, Representative George M. Rhodes and Senator Olin D. Johnston introduced on a yearly basis a federal employee labor relations bill. In 1956, Senator John F. Kennedy went on record as supporting the bill.[20]

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[17] Spero, supra note 11, at 100-102.

[18] Id. at 104.

[19] 1955 Proceedings, American Bar Association Section of Labor Relations Law 90 (1955).

[20] Hearings on S. 3593 Before the Senate Comm. on Post Office and Civil Service, 84th Cong., 2d Sess. 36 (1956).

Unfortunately, the bill as it evolved contained some questionably extreme positions -- such as mandatory suspension, demotion, or removal for any administrative official violating certain parts of the law, regardless of knowledge, intent, or other circumstances.[21]

During the entire period of union growth in the federal sector prior to Executive Order 10988, the only formal government-wide policy, aside from the Lloyd-LaFollette Act in 1912, was inclusion of provisions in the Federal Personnel Manual from 1951 on encouraging the solicitation of the views of federal employees in the formulation of personnel policy. Not until 1958, however, were those provisions interpreted to apply to employee organizations as such.[22]

In spite of such limited encouragement, by 1961 some 33% of all federal employees, or 762,000 persons, belonged to some type of employee organization.[23] Relations between management and these organizations varied widely from

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[21] W. Hart, Collective Bargaining in the Federal Civil Service, 140-173 (1961).

[22] A Policy for Employee-Management Cooperation in the Federal Service, Report of the President's Task Force on Employee-Management Relations in the Federal Service, pt. I, at 2-3 (1961) [hereinafter cited as Task Force Report].

[23] Id. at 1.

department to department and agency to agency. Many departments and agencies had little or no significant relationship.[24]

B. Promulgation of Executive Order 10988

President Kennedy, early in his administration, recognized a valid need for a government-wide policy on employee-management relations in the federal sector. He further recognized that the mood of labor was such that, if the executive branch failed to act, Congress might well enact unduly restrictive legislation, such as the Rhodes-Johnston bill.

Consequently, on 22 June 1961, he appointed a Task Force on Employee-Management Relations in the Federal Service, headed by then Secretary of Labor, Arthur J. Goldberg. Its membership was composed of John W. Macy, Jr., Chairman of the United States Civil Service Commission; David E. Bell, Director of the Bureau of the Budget; J. Edward Day, Postmaster General; and Theodore Sorenson, Special Consultant to the President.[25] Its key staff

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[24]267 GERR F-2 (1968)(Address by Assistant Secretary of Labor Thomas R. Donahue, Governor's Conference on Public Employee Relations, New York, 14 Oct. 1968).

[25]Memorandum from President John F. Kennedy to the Heads of Departments and Agencies, 22 Jun. 1961.

members were drawn from the labor-management field in the private sector.[26]

The Task Force spent some five months hearing testimony from all available interested parties. On 30 November 1961, it reported its findings to the President. It recommended to him promulgation of an executive order which would give federal employees certain bargaining rights. Finding that no uniform system of employee-management relations had been followed in the federal service, it selected those approaches from both the public and the private sectors which appeared to be best suited to a workable relationship.[27]

Based upon the recommendations of the Task Force, President Kennedy issued Executive Order 10988 on 17 January 1962. The Order established the ground rules for employee-management cooperation in the federal service. In brief, it: (a) established a government-wide policy on employee-management relations, (b) included as the basis of that policy the recognition of employee organizations as bargaining representatives, (c) retained certain rights for management while limiting the rights

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[26]W. Hart, The U.S. Civil Service Learns to Live with Executive Order 10988: An Interim Appraisal, 17 Ind. & Lab. Rel. Rev. 203, 206-207 (1964).

[27]Task Force Report.

of employees to strike or discriminate, and (d) specifically authorized advisory arbitration as the final step in a negotiated grievance procedure.[28]

The issuance of Executive Order 10988 effectively stopped legislative efforts such as the Rhodes-Johnston bill. It gave to the unions the recognition which they said they wanted, although stopping short of the union shop type of arrangement for which many unions undoubtedly hoped.[29] It paved the way for a new era in federal personnel practice.

C. Growth of Federal Employee Unionism Under Executive Order 10988.

The impact of Executive Order 10988 has been particularly significant in terms of Union representation. As has already been noted, in 1961 33% of all federal employees, or 762,000 persons, were represented by employee organizations.[30] Many, of course, were postal workers whose union affiliation had first been given impetus by

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[28] E.O. 10988.

[29] Hart, supra note 26, at 205.

[30] See text accompanying note 23 supra. This figure includes members of employee organizations which may not later have gained exclusive representational status under Executive Order 10988.

the Lloyd-LaFollette Act of 1912. Within the military departments, the breakdown was: Navy - 96,528 persons (29%); Army - 39,331 persons (11%); and Air Force - 24,650 persons (9%).[31]

Under Executive Order 10988, recognition of exclusive representational status proceeded quickly. By August of 1966, 40% of all federal employees, or 1,054,417 persons, were represented by labor organizations having exclusive status.[32] By November of 1967, the figures had risen to 45% and 1,238,748 persons.[33] Within the military departments Department of the Army showed the greatest gain, going from 56,182 persons (15%) to 123,546 persons (31%) in that fifteen month period. At the same time, Department of the Air Force rose from 55,266 persons (19%) to 78,574 persons (28%), while Department of the Navy rose

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[31]President's Task Force on Employee-Management Relations in the Federal Service, Staff Report II, at 10-11 (1961).

[32]Office of Labor-Management Relations, U.S. Civil Serv. Comm'n, Statistical Report of Exclusive Recognition and Negotiated Agreements in the Federal Government Under Executive Order 10988 2 (Aug. 1966). Excluding the highly-organized postal workers drops this figure to 23%, or 434,890 persons. The reduced figure includes approximately 243,500 (40%) blue collar workers and 191,350 (15%) white collar workers.

[33]U.S. Civil Serv. Comm'n, supra note 2, at 2. Excluding postal workers drops this figure to 31%, or 629, 915 persons. The reduced figure includes 338,660 (54%) blue collar workers and 291,255 (21%) white collar workers.

from 151,331 persons (44%) to 187,468 persons (49%).[34]

Taking into account the provisions of Executive Order 10988 generally excluding from exclusive units managerial executives, employees engaged in non-clerical personnel work, rating supervisors of other members of the unit, and employees engaged in intelligence and investigative functions,[35] the percentage of eligible federal employees with exclusive representation is fast approaching the majority mark if it has not already exceeded that mark.

This significant growth factor, together with the experience gained over the initial years of the program established by Executive Order 10988, resulted in the appointment by President Johnson on 8 September 1967 of a Review Committee on Employee-Management Relations in the Federal Service. The Committee, chaired by Secretary of Labor Willard Wirtz, was composed of Secretary of Defense Robert S. McNamara, Postmaster General Lawrence F. O'Brien, Bureau of the Budget Director Charles L. Schultze, Civil Service Commission Chairman John W. Macy, Jr., and Joseph A. Califano, Jr., Special Assistant to the President. The Committee was charged with fully reviewing

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[34] Id. at 1; U.S. Civil Serv. Comm'n, supra note 32, at 1.

[35] E.O. 10988 §§ 6(a), 16.

experience under Executive Order 10988 and recommending any adjustments needed.[36]

The Committee's report, designated a "draft" and dated April 1968, was released on 16 January 1969 as an attachment to the 1968 Annual Report of the Department of Labor. Changes in composition of the Committee was the reason stated why submission of a final report to the President was not possible.[37]

The Committee's report noted substantial benefits resulting from Executive Order 10988 -- including improved communications between agencies and employees, increased participation by employees in the determination of working conditions, and a continuity of labor-management relationship through collective bargaining agreements. At the same time, the Committee recommended substantial changes in the existing program in order to bring it to the level of development indicated by the accumulated experience of both labor and management since 1961.[38]

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[36]Memorandum from President Lyndon B. Johnson to the Heads of Departments and Agencies, 8 Sep. 1967.

[37]280 GERR A-1 (1969).

[38]Report of the President's Review Committee on Employee-Management Relations in the Federal Service (1969) (found in 280 GERR, Special Supplement, 20 Jan. 1969) [hereinafter cited as Review Committee Report].

No attempt will be made here to detail all the Committee's recommendations. Two of the more significant are establishment of an interagency panel to oversee the program and placing in the Department of Labor the authority to decide unit, representation, unfair labor practice, and standard of conduct matters.

Regarding grievances and grievance arbitration, the Committee recommended, subject to existing law: (1) integrating all grievance and appeal procedures into a single system; (2) making the negotiated grievance and appeals procedures the only procedures available to employees in organized units; (3) ensuring that arbitration is available for the resolution of disputes over the interpretation and application of agreements, as opposed to only those disputes based upon individual grievances and appeals; and (4) limiting exceptions to arbitrators' decisions to those sustainable on grounds similar to grounds applied by the courts in private sector labor relations cases, with a limited right of appeal to the interagency panel.[39]

The Review Committee's recommendations, the rapid growth of employee unionism in the federal sector, and

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[39] Id. at 4-5.

the experience gained over the past seven years convincingly demonstrate the permanency of federal employee involvement in determining conditions of work. The Committee's recommendations concerning grievances and grievance arbitration procedures make it equally apparent that grievance arbitration will continue to play a significant role in that involvement. The ideal labor relations climate in which grievances are few and always resolved immediately is no more likely to be found in the federal government than in private industry. As noted by arbitrator Eli Rock at the 1967 Annual Meeting of the National Academy of Arbitrators:

> The need on both sides, not only to obtain an answer in arbitration for the irreconcilable but to delegate to a third party the blame at times for reconciling the reconcilable, will probably be as prevalent in the federal service as in private industry.[40]

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[40] 191 GERR D-3 (1967) (E. Rock, Role of the Neutral in Grievance Arbitration in Public Employment, a paper presented at the Twentieth Annual Meeting of the National Academy of Arbitrators, San Francisco, California, 3 Mar. 1967).

CHAPTER III

NEGOTIATED GRIEVANCE PROCEDURES UNDER EXECUTIVE ORDER 10988

A. Presenting the Grievance

As a general proposition, grievance procedures are designed to provide a series of steps, at increasingly higher levels of the management structure, through which employee complaints may be processed. Within Department of the Army, as is true generally in the federal service, there exist detailed regulations setting up a grievance system which considerably antedates Executive Order 10988. Appeals under this system never leave agency channels.[41]

With the advent of Executive Order 10988, authority for the establishment of alternative grievance systems was established. Section 8(a) of the Order states:

> Agreements entered into or negotiated in accordance with this order with an employee organization which is the exclusive representative of employees in an appropriate unit may contain provisions, applicable only to employees in the unit, concerning procedures for consideration of grievances. Such procedures (1) shall conform to standards issued by the Civil Service Commission, and (2) may

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[41] Dep't of the Army Civilian Personnel Regulation E-2 (22 Jun. 1962) [hereinafter cited as CPR].

not in any manner diminish or impair any rights which would otherwise be available to any employee in the absence of an agreement providing for such procedures.[42]

Fifty-two out of the first one hundred collective bargaining agreements negotiated within Department of the Army contained grievance porcedures,[43] and nearly all of the over one hundred agreements coming into effect since that time have also contained grievance procedures.[44] Where such negotiated grievance procedures have been available, they have been used to a much greater extent than the agency procedure.[45]

The scope of negotiated grievance provisions within

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[42]The standards established by the Civil Service Commission are contained in U.S. Civil Serv. Comm'n Federal Personnel Manual 771, Subch. 1-7 (21 Jul. 1967) [hereinafter cited as FPM].

[43]Interview with B.J. Moeller, Chief, Labor Relations Branch, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U.S. Army, 28 Feb. 1967.

[44]Interview with D.M. Atkinson, Employee-Management Relations Specialist, Labor Relations Division, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U.S. Army, 3 Feb. 1969.

[45]Id. An employee filing a grievance must choose initially which procedure he will follow and will be bound by that choice. CPR 711.A-XI, C. 4. a. (18 Aug. 1964).

Department of the Army has varied widely.[46] Most such provisions cover expressly at least the interpretation or application of the collective bargaining agreement itself.[47] Many others have included as well both any other dispute which might arise between the parties and the interpretation or application of policies and regulations of the local command or its higher headquarters.[48]

Nearly all agreements expressly exclude complaints or appeals arising from a number of types of actions, often in conformance with Department of the Army policy restricting such complaints or appeals to procedures set up by specific regulations.[49] Typically, these include

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[46]While a thorough analysis of possible grievance and grievance arbitration provisions is beyond the scope of this thesis, a description of the typical coverage of existing provisions within Department of the Army is necessary for effective examination of arbitration awards made to date.

[47]e.g., Memorandum of Agreement Between Granite City Army Depot and Local 149A, IUOE, Art. X, para. 47 (11 Mar. 1966).

[48]See, e.g., Agreement Between Rock Island Arsenal and Arsenal Lodge 81, IAM, AFL-CIO, Art. XXIV, § 1 (9 Dec. 1966) and Agreement Between U.S. Army Watervliet Arsenal and Lodge 2352, AFGE, Ch. VI, Art. 1, § C.a. (5 May 1967). Some of the variety of coverage of negotiated grievance procedures is indicated in a Bureau of National Affairs analysis of ninety agreements negotiated under E.O. 10988 at 92 GERR X-3 - X-5 (1965).

[49]e.g., CPR E-2.5 (22 Jun. 1962)(adverse action appeals) and CPR 713.D (30 Sep. 1966)(equal employment opportunity complaints).

such things as unfair labor practices; reductions in force; adverse actions; job evaluations; discrimination based upon race, creed, color, religion, or sex; non-selection for promotion where the grievant's sole allegation is that he is better qualified than the person selected; performance ratings; position classification; and wage determinations.[50]

It is important to both union and management to have an effective channel through which dissatisfied employees may air their feelings and secure appropriate relief regarding working conditions or management policies. To the unions, the grievance procedure is additionally important because employee dissatisfaction lies at the very core of unionism -- successful prosecution of grievances being a most effective recruiting technique. The establishment of negotiated grievance procedures under Executive Order 10988 thus properly can be considered of real benefit to unions, employees, and management alike.[51]

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[50] e.g., Granite City Army Depot, supra note 47, at Art. X, paras. 50, 52, and 53; Rock Island Arsenal, supra note 48, at Art. XXIV, § 1; Watervliet Arsenal, supra note 48, at Ch. VI, Art. 1, § C.b.; Agreement Between Red River Army Depot and Local 237, United Ass'n of Plumbers and Pipe Fitters, Art. XVIII, paras. 1-4 (14 Mar. 1966).

[51] This is true so long as the grievance procedure is in fact used by employees to keep genuine grievances from silently festering, regardless of whether distrust of the agency grievance system prevented such airing of differences before a negotiated system existed and regardless of whether prompting by union stewards is involved.

B. Pursuing the Grievance to Arbitration

The effectiveness of a grievance procedure which provides no opportunity for obtaining independent judgment from outside the agency in which a greivance arises, or even from outside the total governmental structure, is seriously suspect, at least from a morale standpoint. Recognizing this, the drafters of Executive Order 10988 expressly provided for advisory grievance arbitration in § 8(b), as follows:

> Procedures established by an agreement which are otherwise in conformity with this section may include provisions for the arbitration of grievances. Such arbitration (1) shall be advisory in nature with any decisions or recommendations subject to the approval of the agency head; (2) shall extend only to the interpretation or application of agreements or agency policy and not to changes in or proposed changes in agreements or agency policy; and (3) shall be invoked only with the approval of the individual employee or employees concerned.

Thirty-nine out of the first fifty-two collective bargaining agreements negotiated within Department of the Army which contained grievance procedures provided for advisory arbitration as the final step in those grievance procedures.[52] Nearly all of the over one hundred agreements coming into effect since that time have contained

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[52]Interview with B.J. Moeller, supra note 43.

provisions for advisory grievance arbitration.[53] To date, fourteen arbitration hearings have been held.[54]

Necessarily, the scope of grievance arbitration provisions has varied in accordance with the grievance provisions upon which each is based. In addition, the express limitations of § 8(b) of the Executive Order apply, regardless of whether or not specifically incorporated into the language of an agreement.[55]

Most agreements provide that arbitration may be invoked

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[53]Interview with D.M. Atkinson, supra note 44.

[54]This is considerably less than within Department of the Navy, which had sixty-four arbitration hearings completed through 7 Apr. 1969. Interview with T. Garnett, Employee-Management Cooperation Specialist, Contract Administration Analysis Branch, Labor and Employee Relations Division, Office of Civilian Manpower Management, Department of the Navy, 8 Apr. 1969. It is considerably more than within Department of the Air Force, which has had only one arbitration hearing to date. Interview with R. Lazarus, Union Relations Branch, Employee Programs Division, Directorate of Civilian Personnel, Department of the Air Force, 24 Jan. 1969. The sole Air Force hearing and twenty Navy hearings have involved discipline matters, which are not grievable under negotiated procedures within Department of the Army.

[55]Just how effective any but the most specific limitation would be if the question of arbitrability were taken to court, in light of the famour "Trilogy" decided by the United States Supreme Court on 20 June 1960, is doubtful. So long as grievance arbitration in the federal service remains advisory in nature, of course, chances of this issue being pursued in the courts are not great. For a recent discussion of the "Trilogy" see G. Torrence, Management's Right to Manage 7-26 (rev. ed. 1968).

by either party[56] or by the grievant alone[57] and call for selection of a single arbitrator. Typically, the arbitrator, unless mutually agreed upon by the parties, is to be selected by elimination from a list of five names submitted by the Federal Mediation and Conciliation Service.[58] Department of the Army regulations expressly provide for equal sharing of costs between union and management. A maximum of $150.00 fee per day, plus travel and per diem, is allowed.[59] Nearly all agreements provide for the arbitration award to be advisory to the installation or activity commander involved,[60] whose decision shall then be final.[61]

From the union viewpoint, the ability to invoke grievance arbitration is that which gives a grievance

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[56] e.g., Rock Island Arsenal, supra note 48, at Art. XXV, § 1.

[57] e.g., Watervliet Arsenal, supra note 48, at Ch. VI, Art. 1, § E.(2).a.; Granite City Army Depot, supra note 47, at Art. X, para. 47.f.

[58] e.g., Rock Island Arsenal, supra note 48, at Art. XXV, § 2; Red River Army Depot, supra note 50, at Art. XIX, § 1.

[59] CPR 711.A-XI.C.4 (18 Aug. 1964).

[60] Usually the same person who has rejected the grievance at the final pre-arbitration step of the grievance procedure.

[61] e.g., Granite City Army Depot, supra note 47, at Art. X, para. 47.f., Watervliet Arsenal, supra note 48, at Ch. VI., Art. 1, § E.2.d.

procedure, and perhaps an entire collective bargaining agreement, integrity. From management's viewpoint, grievance arbitration provides an impartial means of judging its administration of both grievance systems and entire agreements.

The advisory nature of the arbitration permitted by § 8(b) of Executive Order 10988 is a point which the unions in the federal sector have found particularly distressing.[62] Applied arbitrarily, the management discretion inherent in that nature could effectively negate the value of providing for arbitration in the first place. To regard arbitration awards as inviolable, on the other hand, flies in the face of the explicit language of the Executive Order. It also disregards whatever merit exists for the concept that a sovereign employer must not surrender its basic power to govern.[63] Equally, it ignores the very practical problem that an arbitrator not thoroughly schooled in the complex and changing system of federal rules and regulations is

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[62] Review Committee Report 4-5.

[63] J. Belenker, Binding Arbitration for Government Employees, 16 Lab. L.J. 234 (1965); H. Blaine, E. Hagburg, and F. Zeller, The Grievance Procedure and Its Application in the United States Postal Service, 15 Lab. L.J. 725 (1964); D. Shenton, Compulsory Arbitration in the Public Service, 17 Lab. L.J. 138 (1967); W. Vosloo, Collective Bargaining in the United States Federal Civil Service 17-20 (1966).

likely to recommend an award which violates those rules and regulations.[64]

In February 1966, the Civil Service Commission attempted to meet union objections partially by suggesting that any proposed modification or rejection of an advisory award be made at a higher administrative level than that of the agency official who made the original decision which forced the grievance to arbitration.[65] By removing a potential conflict of interest, the chances of arbitrary modification or rejection of an award would be reduced.[66]

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[64]This precise situation has resulted in rejected or modified awards in several Navy arbitrations, as well as in two Army arbitrations discussed in Ch. IV, infra. The Federal Mediation and Conciliation Service is in the process of establishing a separate list of arbitrators with experience in the public sector. 280 GERR B-4 (1969).

[65]U.S. Civil Serv. Comm'n, FPM Letter No. 711-3, 7 Feb. 1966.

[66]Department of the Navy substantially implemented that suggestion in April 1967 by requiring commanding officers proposing a rejection or modification of an advisory award to refer the matter to the Office of Civilian Manpower Management for advice prior to decision. Sec'y of the Navy Notice 12721, para. 3.b., 24 Apr. 1967. Adverse action appeals were expressly exempted from this requirement because of being further appealable to the Office of the Secretary of the Navy.

Department of the Army has not implemented that suggestion.[67] It is the author's experience, however, that unwritten Department policy strongly urges commanding officers to take a hard look at local implications and coordinate with higher headquarters for more widespread implications before modifying or rejecting an advisory award.

The recommendations of The President's Review Committee on Employee-Management Relations in the Federal Service, if adopted, should provide a reasonable solution to the problem. By severely restricting the grounds upon which an exception to an arbitrator's award could be sustained and by providing a limited right of appeal to an interagency panel overseeing the entire federal labor relations program,[68] a sufficient guarantee of integrity and certainty should exist which still allows minimal flexibility to both parites for the correction of

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[67]Interview with D.M. Atkinson, supra note 44. Two Army arbitrations have resulted in partial rejection of an award. As twelve of the Army total of fourteen awards have supported management on the basic issues, the question of rejection or modification has not arisen in any other instance.

[68]The limitation being a requirement that every attempt to resolve the matter be made at all union and agency levels before reference to the interagency panel. Review Committee Report 4-5.

substantial inequities or regulatory conflicts.[69]

It does not appear likely that collateral attacks in the federal courts upon the grievance system or upon an arbitration award would be successful. Recent cases dealing with such matters as dismissal from federal service[70] and promotions[71] carefully stress the very limited scope of review over the exercise of administrative discretion. One flatly stated that the courts may not interfere with the day-to-day internal administration of Government departments.[72] Those cases dealing directly with the validity of negotiated agreements,[73] representational election procedures,[74] withdrawal of recognition,[75]

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[69]The Review Committee's recommendations appear to contemplate that either party may challenge an arbitrator's decision. Id. at 4.

[70]e.g., Bishop v. McKee, 400 F.2d 87 (10th Cir. 1968); West v. Macy, 284 F. Supp. 105 (D.D.C. 1968); Menick v. U.S., 184 Ct. Cl. 756 (1968).

[71]Cominsky v. Rice, 233 F. Supp. 190 (E.D. Pa. 1964).

[72]Lodge 1858, AFGE v. Webb, 283 F. Supp. 155 (D.D.C. 1968).

[73]Morris v. Steele, 253 F. Supp. 769 (D. Mass. 1966).

[74]NAIRE v. Dillon, 356 F.2d 811 (D.C. Cir. 1966) (per curiam); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966).

[75]NAGE v. White, Civil No. 1617-68 (D.D.C., filed 28 Jun. 1968), appeal docketed, No. 22630, D.C. Cir., 8 Jan. 1969.

or wage regulations[76] have unequivocally declared that the federal courts have no jurisdiction to police the Executive Order, as has a very recent case where the relief sought was an order requiring Army officials to process complaints under the Executive Order as implemented rather than under agency grievance procedures.[77] Either the separation of powers, sovereign immunity, or both have been given as rationale.[78]

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[76]Canal Zone Central Labor Union v. Fleming, 246 F. Supp. 998 (D. Canal Zone 1965), rev'd on other grounds, 383 F.2d 110 (5th Cir. 1967).

[77]Lodge 1647 and Lodge 1904, AFGE v. McNamara, 291 F. Supp. 286 (N.C. Pa. 1968).

[78]The sole exception, Hicks v. Freeman, 273 F. Supp. 334 (D. N. Car. 1967), aff'd on other grounds, 397 F.2d 193 (4th Cir. 1968), involved a change of practice regarding which the plaintiff argued that there should have been at least prior consultation. The court cited favorably the Manhattan-Bronx Postal Union v. Gronouski case, supra note 74, holding that E. O. 10988 gives no judicially-enforcable rights, then decided the case on the merits by finding management's retained rights controlling.

CHAPTER IV

GRIEVANCE ARBITRATION EXPERIENCE WITHIN DEPARTMENT OF THE ARMY

A. The Initial Case

All of the fourteen grievance arbitrations held to date within Department of the Army have occurred at installations within the Army Materiel Command, which controls the Army's industrial facilities. The first grievance to go to arbitration arose early in 1966 at Granite City Army Depot, an installation involved primarily in the repair and maintenance of engineer equipment, located on the Illinois side of the Mississippi River just across from St. Louis, Missouri. For the author, newly-arrived Post Judge Advocate at that installation, it constituted an abrupt introduction to the problems of labor-management relations in the federal sector.

The grievance in question arose because management had assigned the task of fabricating web strapping for aviation repair vans to the mechanics assembling the vans. The union, in this case the International Union of Operating Engineers, contended that the fabrication should have been performed by a "wood body repairman" whose job description included upholstery duties and who had performed

some of that type of work before. Primary reliance was placed upon that paragraph of the collective bargaining agreement which stated that any deviation from existing practices would not occur until after consultation with the union. The relief sought was an award declaring management to have been in violation of the agreement and directing that such work be assigned exclusively to wood body repairmen in the future.

Management's position was that past practice had not in fact involved such fabrication being performed only by wood body repairmen. It asserted that the work was an incidental task falling under that part of the mechanics' job descriptions reading "and other duties as assigned," and that assignment of that work formed the essence of management's reserved rights to maintain efficiency of operations and to determine the methods, means, and personnel by which operations were to be conducted.[79] It pointed out also that the collective bargaining agreement placed a duty upon management only to consult, not to secure agreement, before deviating from existing practices. Consequently, even on the

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[79]These are two of the rights expressly reserved to management by § 7(2) of E.O. 10988 and repeated for emphasis in most collective bargaining agreements.

union's version of the facts, the future relief sought was inappropriate.

Recognizing the importance of the case, both as the first to be held within Department of the Army and as involving an issue basic to efficient and economical operation of any government maintenance activity,[80] management prepared for the arbitration with particular care. Close coordination was maintained with Army Material Command Headquarters and with the Office of the Deputy Chief of Staff for Personnel at Department of the Army Headquarters. The hearing was held on 14-15 July 1966. Post-hearing briefs were submitted on 3 September 1966.

On 3 October 1966, arbitrator Joseph M. Klamon rendered an award in favor of management. He concluded that management's actions were within its retained rights and in accordance with past practice and the terms of the collective bargaining agreement. He specifically noted that job descriptions give no proprietory interest in any particular tasks or duties. He also noted the special need of the military for efficiency through

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[80]The issue in the case could be variously described as involving assignment of work, job classification, or inherent craft jurisdiction.

flexibility in industrial functions, particularly in light of time and budgetary limitations during periods of international strife.[81] The award of the arbitrator was accepted by the Depot Commander on 12 October 1966.

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[81]Local 149A, IUOE v. Granite City Army Depot, 161 GERR Gr. Arb. 41-44 (1966)(Klamon, Arbitrator).

of the collective bargaining agreement. He specifically noted that job descriptions give no proprietory interest in any particular tasks or duties. He also noted the special need of the military for efficiency through flexibility in industrial functions, particularly in light of time and budgetary limitations during periods of international strife.[81] The award of the arbitrator was accepted by the Depot Commander on 12 October 1966.

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[81]Local 149A, IUOE v. Granite City Army Depot, 161 GERR Gr. Arb. 41-44 (1966)(Klamon, Arbitrator).

B. Subsequent Cases

1. Fort Detrick

The second grievance arbitration decision to be rendered within Department of the Army involved Fort Detrick, a research and development installation at Frederick, Maryland. The union, the International Association of Machinists and Aerospace Workers, objected to a 17 October 1966 change of the work week for caretakers at an experimental animal farm which eliminated Saturday and Sunday overtime work. In a brief opinion issued on 24 May 1967, arbitrator J. Harvey Daly did not reach questions such as management's motive for the change or the remedy for a failure to consult with the union. He simply found that the express language of the collective bargaining agreement exempted the change in work week for employees such as animal farm caretakers from any requirement of prior negotiation or consultation, past practice notwithstanding, and recommended that the grievance be denied.[82]

2. Rock Island Arsenal

Both the third and the thirteenth arbitration awards

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[82]Columbia Lodge 174, IAMAW v. Fort Detrick, 196 GERR Gr. Arb. 17-20 (1967)(Daly, Arbitrator).

within Department of the Army concerned Rock Island Arsenal at Rock Island, Illinois. The grievance giving rise to the first involved a number of issues, both real and apparent. The union, the International Association of Machinists, objected: (1) to management's adding to the job descriptions of W-11 electricians the requirement for rotating shifts, (2) to management's failure to meet the time limits for replies set up by the negotiated grievance procedure, and (3) to management's allegedly threatening manner of informing the electricians in question of the change in job description as an example of its general labor relations attitude.

In his award, issued on 5 July 1967, arbitrator Anthony V. Sinicropi took both parties to task for presenting the issues in a confusing and intertwined manner. With regard to the job descriptions, he found that management did not violate the collective bargaining agreement by formalizing an established practice of twenty-three years, one which the union readily admitted should be followed. With regard to the remaining charges, he found that management had violated the time limits for reply under the negotiated grievance procedure, but that there was no willful violation of the spirit and intent of Executive

Order 10988 in management's attitude.[83]

In an additional advisory opinion, the arbitrator further expressed disappointment in the labor relations atmosphere at the Arsenal. He criticized the union for letting emotions lead it to push to arbitration a grievance based upon an insignificant and not clearly defined issue. At the same time, he criticized management for being unwilling to make accomodations and work with the union. He specifically recommended that the parties affirmatively improve communications, adopt a flexible bargaining posture, center bargaining around issues rather than personalities, and demonstrate mutual respect and sincerity.[84]

The second arbitration at Rock Island Arsenal dealt with the obligation of management to replace employees who were absent from work because of sickness or leave with other employees at overtime rates. One instance of each such type of absence had occurred in April 1968. The contract clause in question, as it applied to the facts, stated that between 1 October and 14 May of each year "normally" two steamfitters would be scheduled for the second and third shifts. The union contended that

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[83]Arsenal Lodge 81, IAM v. Rock Island Arsenal, 202 GERR Gr. Arb. 31-35 (1967)(Sinicropi, Arbitrator).

[84]Id. at Gr. Arb. 36.

past practice and bargaining history established that the word "normally" in the contract clause allowed management flexibility only to increase the number of steamfitters assigned. Management contended that the word provided flexibility in both directions, the true issue being one of justifying overtime rather than of altering hours of work. In the two instances in question, mild weather had precluded such justification.

In an award submitted on 18 December 1968, arbitrator John F. Sembower recommended that the grievance be denied. He found past practice and bargaining history to be consistent with management's position, with no guarantee of overtime work opportunities contained in the contract provisions under consideration. He cautioned the parties not to interpret his award as recommending alteration of the regular scheduling of two steamfitters between the dates specified in the contract, however, in the absence of special circumstances other than prevailing weather conditions.[85]

3. Red River Army Depot

The fourth and fifth grievance arbitrations within

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[85]Arsenal Lodge 81, IAM v. Rock Island Arsenal, 283 GERR Gr. Arb. 5-10 (1968)(Sembower, Arbitrator).

Department of the Army occurred at Red River Army Depot, Texarkana, Texas, and involved the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

The first of these cases concerned the assignment to mobile equipment operators on an overtime basis of the job of installing bumper guard rails in a parking lot when the employees who regularly performed the welding and cutting work involved were available for overtime. The grievant, a welder then next on the rotational overtime chart within his section, sought to be paid for the lost opportunity at overtime rates. He relied upon provisions in the collective bargaining agreement specifying: (1) equal distribution of overtime by organizational element and skills required, and (2) that an employee not "normally" be scheduled to work overtime out of his regular assigned classification when employees regularly performing such duties are available for overtime.

In an opinion submitted on 7 August 1967, arbitrator Raymond L. Britton found that the first contract provision relied upon by the grievant did not apply. He concluded that the provision could not come into play until after management had chosen the employees to perform overtime under its reserved right to determine the methods, means,

and personnel by which its operations were to be conducted. He also commented that the fact of two different organizational elements being involved made the provision literally inapplicable. Concerning the second contract provision cited by the grievant, the arbitrator concluded that the word "normally" was intended to make the scheduling of overtime in the circumstances described by that provision a discretionary function of management under the same reserved rights.[86]

The second arbitration at Red River Army Depot involved an allegedly improper job description. The grievant, a W-10 steamfitter, contended that he spent more than 25% of his working time under environmental conditions requiring the wearing of protective clothing and equipment beyond that normally required of steamfitters. It was not disputed that, if his contention were accurate, that factor should be included in his job description.

In an award submitted in 20 September 1967, arbitrator Roy R. Ray found in favor of management. He noted initially that he was limited to deciding whether in fact the grievant's contention as to the time he spent in which

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[86]Local 237, United Ass'n of Plumbers and Pipefitters v. Red River Army Depot, 206 GERR Gr. Arb. 37-42 (1967) (Britton, Arbitrator).

extra protective clothing and equipment was required was accurate, rejecting the union's formulation of the issue as requiring him to decide a job evaluation appeal in violation of the grievance jurisdiction provisions of the collective bargaining agreement.[87] He then compared the rather indefinite testimonial evidence presented by the union with the time studies submitted by management[88] and concluded that the grievant's contentions could not possible be accurate.[89]

4. Watervliet Arsenal

The sixth, seventh, eighth, tenth, and fourteenth grievance arbitrations within Department of the Army all occurred at Watervliet Arsenal, just outside Albany, New York, and involved the American Federation of Government Employees. Additionally, the arbitration of one

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[87]The issue framed by the union was: "Whether Mr. Haggard worked 25% or more of his work cycle under environmental working conditions which would entitle him to 20 additional points as prescribed in CPR-P42, Section 5-2(f)?" Local 237, United Ass'n of Plumbers and Pipefitters v. Red River Army Depot, 216 GERR Gr. Arb. 61 (1967)(Ray, Arbitrator).

[88]Management used data processing equipment to compute from the employees' daily job description cards the total hours worked in the grievant's section in 1966 under pertinent environmental conditions.

[89]Local 237, supra note 87, at 61-63.

grievance which was closely related to an unfair labor practice charge was terminated at the outset of the hearing when the union insisted that the arbitrator decide the merits of the unfair labor practice charge and management refused to proceed upon that basis.[90] The matter has now been presented to the Federal District Court for the Northern District of New York and should be argued shortly.[91]

The first of the grievances at Watervliet Arsenal to reach the arbitration stage involved the question of whether the grievant had been passed over for promotion to a temporary welder-leader position improperly, in light of his past experience in the same and higher positions and his comparatively high qualifications. The union contended that management had abused its discretion -- first by not promoting the grievant noncompetitively because of both his qualifications and his supervisory experience[92]

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[90]Interview with Cpt. C. G. Chernoff, JAGC, counsel for management, 22 Apr. 1968.

[91]Interview with Cpt. A. K. Knorowski, JAGC, Post Judge Advocate, Watervliet Arsenal, 4 Apr. 1969.

[92]Applicable regulations allowed noncompetitive promotion to a given vacancy of employees who had satisfactorily held the same or higher positions before and who had been demoted through no fault of their own.

and, second, by not selecting the grievant under competitive promotion procedures. The basis for these alleged abuses of discretion was claimed to be a combination of personal dislike and failure to evaluate his qualifications objectively in accordance with applicable regulations.[93]

The opinion of arbitrator Benjamin H. Wolf, submitted on 6 June 1968, totally agreed with the union. Soundly castigating management for a serious abuse of official authority, the arbitrator noted that "Under the Army regulations the right of a supervisor to use his discretion is limited by cautions to be fair and equitable, without discrimination or favoritism."[94] He recommended that the grievant be promoted to the position which was the subject of the grievance and be granted pay retroactively.[95]

The second arbitration at Watervliet Arsenal also

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[93]His immediate supervisor was said to personally resent the grievant, and higher management officials passing on the vacancy in question were said to object to the grievant's attitude for trivial or improper reasons.

[94]Lodge 2352, AFGE v. Watervliet Arsenal, 252 GERR Gr. Arb. 69, 72 (1968)(Wolf, Arbitrator).

[95]Id. at Gr. Arb. 69-74. Management accepted the award and promoted the grievant as recommended. It was unable to grant retroactive pay under existing regulations, however, and to that extent subsequently rejected the award. Interview with J. E. Benson, Jr., Chief, Personnel and Training Office, Watervliet Arsenal, 28 Jan. 1968.

involved non-selection for promotion. In that case the grievant claimed that management had violated her rights by selecting candidates for the job of computer technician from outside the Arsenal. She cited alleged irregularities in the selection procedure and in the timing of interviews, as well as the friendship of another applicant's father with the selecting supervisor, as constituting a violation of her rights. Management denied any irregularity and asserted that it had properly exercised its discretion in filling the vacancies.

The award in this case, also rendered on 6 June 1968, fully supported management. Arbitrator Peter Seitz stated that "The question really is whether in relation to the job requirements and in comparing her qualifications with other candidates . . . the grievant was treated fairly."[96] He rejected a contention that a contract provision regarding preference to underutilized employees applied, noting that there was no evidence of underutilization of the grievant's skills in the technical field involved. He questioned the wisdom of the selecting supervisor in choosing the son of a man whom he knew to fill an

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[96]Lodge 2352, AFGE v. Watervliet Arsenal, 252 GERR Gr. Arb. 65, 66 (1968)(Seitz, Arbitrator).

opening, but stated that this fact alone did not constitute proof positive of a corrupt and discriminatory act.[97]

The third arbitration at Watervliet Arsenal was unique in that the issue presented was stipulated to be whether the negotiated grievance procedure excluded a grievance the subject matter of which had been a part of an adverse action expunged from the records on the basis of a substantial procedural defect. The grievant claimed that the accusation of insubordination, upon which suspension proceedings had been based and then negated by his adverse action appeal, was distinguishable from the adverse action. Management maintained that the grievance was merely a continuation of the controversy resolved by the adverse action appeal and, as such, barred from consideration by that provision of the negotiated grievance procedure specifically excluding adverse action appeals.

Arbitrator Daniel C. Williams, in an opinion submitted on 9 July 1968, answered the stipulated issue in the affirmative. He cited the need for the principles of res judicata to apply to arbitrations as well as to court actions, stating that in his opinion the gist of the grievance was the same adverse action of suspension already resolved upon appeal. He recognized that under

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[97] Id. at Gr. Arb. 65-67.

given conditions an adverse action might give rise to a distinct and proper grievance even though an appeal has been processed.[98] The burden of proof would be heavy, however, and upon the grievant. It was not met in this case.[99]

The fourth arbitration at Watervliet Arsenal involved the matter of training for promotional opportunity. The grievant had applied for the position of "electronic-mechanical communications equipment installer and repairer", but had been rejected as not having the necessary training. Thereafter, another applicant from outside the Arsenal with better but not full qualifications had been hired and given the necessary training to qualify him for the job. The union claimed that management had failed to make every reasonable effort to utilize existing employees when training was necessary for new positions, as required by the negotiated agreement. It sought to have the grievant trained and displace the selected applicant.

In a 10 September 1968 opinion, arbitrator Paul D.

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[98]For example a foreman could strike an employee in connection with suspending him for insubordination, or could deliberately publicize the suspension widely. Lodge 2352, AFGE v. Watervliet Arsenal, 256 GERR Gr. Arb. 79, 85 (1968)(Williams, Arbitrator).

[99]Id. at Gr. Arb. 79-85.

Hanlon found the grievance to be justified. Noting the lack of any improper motivation on management's part and the hardship on the selected applicant if abruptly displaced, however, he rejected the union remedy. Instead, he saw an apparent need for an additional back-up employee to work on the equipment in question and recommended that the grievant be trained, assigned such duties, and then "[B]e given available promotion or step-up in Grade, commensurate with his increased skills and responsibilities."[100]

The latest arbitration at Watervliet Arsenal again involved the subject of promotions. The grievant, a W-11 machine parts inspector, contended that he should be promoted to the grade of W-12, which required more complex and independent inspections with a minimum of supervision. He claimed already to be performing much the same work as a W-12 and to be fully qualified as such, but to have been denied promotion in spite of these facts.

In an opinion submitted on 17 December 1968, arbitrator James B. Wilson found the grievance to be without substance. Noting the frequent opportunities for proving his qualifications and the special training afforded the grievant,

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[100]Lodge 2352, AFGE v. Watervliet Arsenal, unpublished transcript of arbitrator's award, 1-8, 8 (10 Sep. 1968) (Hanlon, Arbitrator).

the arbitrator concluded that he had been given fair consideration for promotion but was not yet qualified.[101]

5. Army Aeronautical Depot Maintenance Center

The ninth, eleventh, and twelfth arbitrations within Department of the Army occurred at Army Aeronautical Depot Maintenance Center, Corpus Christi, Texas, and involved the International Association of Machinists and Aerospace Workers.

The first of these cases concerned overtime pay for attending off-the-job classes conducted pursuant to an apprenticeship program. Training under the program consisted of both on-the-job training and classroom instruction, some of which was provided on post during duty hours and some off post outside of duty hours. The grievants, who had voluntarily read and signed an agreement upon entering the program to attend such classes without pay, claimed that such training was a condition of employment and thereby qualified as compensable work under applicable regulations.

Arbitrator Byron R. Abernathy, in a 19 July 1968 opinion, found the grievant's contentions to be without

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[101]Lodge 2352, AFGE v. Watervliet Arsenal, unpublished transcript of arbitrator's award (17 Dec. 1968)(Wilson, Arbitrator).

merit. Noting that the collective bargaining agreement was silent on the matter, he looked to applicable civil service regulations, the language of the Government Employee's Training Act,[102] and decisions of the Comptroller General to find explicit authority that such training does not qualify as compensable work, particularly at overtime rates.[103]

The second arbitration at the Army Aeronautical Depot Maintenance Center involved the interpretation of contract language requiring a grievance at the second step of the grievance procedure to be "[R]educed to writing . . . stating the exact nature of the grievance, date incident occurred and remedy sought . . ."[104] In this case a meeting between management and union representatives had been held on 4 October 1967 concerning union objections to promotional procedures affecting aircraft welder-leaders. On 18 March 1968 the president of the local union filed a grievance stating merely "Amendment to protest

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[102]Government Employee's Training Act, 5 U.S.C. §§ 4101-4118 (1958).

[103]Aero. Lodge 2049, IAMAW v. ARADMAC, unpublished transcript of arbitrator's award (19 Jul. 1968)(Abernathy, Arbitrator).

[104]Aero Lodge 2049, IAMAW v. ARADMAC, 267 GERR Gr. Arb. 99, 100 (1968)(Ray, Arbitrator).

filed by L. L. 2049 on L-10 A/C Welder leaders"[105] and asking for corrective action which included removal and replacement of L-10s unable to perform their duties. Management refused to process the grievance without a more detailed statement of its basis. A separate grievance was then filed and processed through to arbitration protesting management's failure to process the first grievance.

The union contended that because management knew of the problem referred to in the grievance, a more specific statement was not required. Management contended that for lack of specificity the alleged grievance did not raise any question under the jurisdictional portion of the negotiated grievance procedure. It further contended that specificity was particularly necessary in this instance, since the grievance procedure specifically excluded consideration of promotion questions when the sole basis for complaint was an allegation of the grievant being better qualified than the person selected.

Arbitrator Roy R. Ray, in an award submitted on 7 October 1968, agreed with management. While noting the additional justification for demanding specificity present because of the exclusion of promotion grievances, he based

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[105] Id. at Gr. Arb. 99.

his decision upon the requirement of specificity in the grievance procedure itself, stating:

> Without a more specific statement of the basis of its complaint and a specification of the part of the Agreement allegedly violated by ARADMAC the Grievance cannot be considered as raising any question concerning the interpretation or application of the Agreement, policies or regulations. 106

The latest grievance arbitration award to be submitted at Army Aeronautical Depot Maintenance Center involved alleged harassment of the grievant by his supervisors, as well as refusal to let him discuss complaints with union officials and to let him select his own representative on a grievance. The corrective action requested was for a cessation of the harassment, a written apology, and appropriate disciplinary action against all supervisors and work leaders concerned.

In a 12 October 1968 award, arbitrator J. Earl Williams found the grievance to be unsupported by the evidence. Specifically commenting upon the apparent communication problem regarding the rights and responsibilities of union officers and other employees, to which both parties had contributed, he suggested guidelines for improving communication through the use of greater consideration and specificity on both sides.[107]

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[106] Id. at Gr. Arb. 99-101, 101.

[107] Aero. Lodge 2049, IAMAW v. ARADMAC, unpublished transcript of arbitrator's award (12 Oct. 1968)(Williams, Arbitrator).

CHAPTER V

ARMY COUNSEL AT GRIEVANCE ARBITRATIONS

It is axiomatic that counsel representing an installation or other command at a grievance arbitration hearing must be well prepared. As the body of arbitration awards in the federal sector grows and as arbitrators develop expertise in government regulations and practices, the precedential effect of any given award could be substantial. The more basic the issue involved is to economical and efficient operations, the more likely other commands or even other military services will be affected.[108]

Preparation should begin immediately upon receipt by the command of a request for arbitration. The primary consideration at this point is a thorough analysis of the grievance from its inception, with an eye toward formulating a precise definition of the issue.[109] A loosely-stated

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[108]Long before other grievances on the same issues reach the arbitration stage, unions at other installations will be able to increase the pressure on management by alluding to rendered awards.

[109]If counsel has been able to participate in management's discussions of the grievance at a prior stage, and thus help to define the issue during the course of the grievance, so much the better. The more complete and accurate a record is kept at each step of the grievance procedure, the more that record will assist the arbitrator and the easier it will be for counsel to focus the arbitrator's attention upon the actual issue.

issue invites confusion by opening the hearing up to the introduction of evidence not relevant to the incident giving rise to the grievance. The result might be an award more far-reaching than either party contemplates -- or wants.[110]

Unless agreement upon an arbitrator can be reached by the parties, most arbitration provisions call for jointly requesting a list of five arbitrators from the Federal Mediation and Conciliation Service.[111] Once the list of arbitrators is received, immediate investigation into the experience, integrity, and intelligence of each arbitrator should be conducted.[112] Additionally, a check of the reported cases should be made to see if decisions in similar cases have been rendered, particularly

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[110]Should there be a question of arbitrability involved, such as excuseability of a time lapse under the terms of the grievance procedure, it is preferable to state that question separately in order to avoid waiver or confusion.

[111]Care should be taken that, in that request and in later correspondence with the arbitrator selected, an "issue" is not stated which is not in fact intended by both parties to be the finally-defined issue in the case. Such an "issue" could be held to be binding, or at least could tend to obscure the actual issue.

[112]The experience sheet provided on an arbitrator by the Federal Mediation and Conciliation Service is helpful but not adequate to form the basis of a well-informed choice. A good source of additional information often is a local manufacturers' association or the personnel departments of local industries.

by any of the five listed arbitrators.[113] Generally, the more extensive an arbitrator's experience, the more likely he is to understand a case fully and decide it correctly.

As in thorough preparation for presenting a case in a court of law, all facts bearing upon the grievance must be gathered and analyzed from the viewpoint of both parties.[114] The entire collective bargaining agreement should be examined in order to ascertain what clauses are relevant, either directly or indirectly.[115] Custom and the past practice of the parties in analogous situations any be extremely important, even if the agreement does not contain the usual clause spelling out the agreed effect of past practice. Witnesses should be carefully interviewed and properly instructed.[116]

Exhibits, including background material as basic as

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[113]While most such awards probably would have been rendered in the private sector, they at least can provide insight into an arbitrator's reasoning.

[114]Much of this fact gathering and analysis, of course, will be accomplished in the process of defining the issue.

[115]In interpreting these clauses, their bargaining history is often a useful tool.

[116]It is usually sounder to plan on proving a case with one's own witnesses, rather than through the other party's witnesses.

a chronology sheet, can be most helpful and should be used freely so long as they will aid the arbitrator. A view of the scene should be considered. Above all, counsel should remember that the arbitrator can base his award upon the facts only if they are presented to him. It is the counsel's job to get those facts accurately before the arbitrator and persuasively to interpret them in accordance with his theory of the case.

Arbitration hearings are often quite informal, compared to a court of law. The degree of informality depends in each case, of course, upon the wishes of the arbitrator. Some may prefer to control the scope and relevancy of the questioning themselves; others will expect counsel to object to at least the more extreme departures from normal rules of evidence. Most procedural matters are often left for prehearing agreement between the parties.[117]

Generally, if either party requests permission to submit a post-hearing brief, the request will be granted. In the opinion of the author, submission of a post-hearing

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[117]Counsel may find it desirable to get written agreement on such matters as whether to have a transcript of testimony, the order and the availability of witnesses, the exact issue and the order of consideration if there is more than one issue, the swearing of witnesses, the order of presentation, rebuttal limitations, and whether to submit post-hearing briefs.

brief is usually desirable. Especially if a transcript of the testimony is not made, it is the most effective means of assuring that the arbitrator has both facts and argument before him when reaching his final conclusions.

A number of useful reference works are available to help potential counsel in preparing for arbitration hearings. The most comprehensive treatise known to the author is How Arbitration Works by Frank and Edna Elkouri.[118] Others include Arbitration of Labor Disputes by Clarence M. Updegraff,[119] The Labor Arbitration Process by R. W. Fleming,[120] and Anatomy of a Labor Arbitration by Sam Kagel.[121] More concise aids such as Boaz Seigel's Proving Your Arbitration Case,[122] a report on a speech by Robert A. Levitt of Western Electric Company contained in the 29 May 1967 issue of Government Employee Relations Report,[123] and

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[118] F. Elkouri and E. Elkouri, How Arbitration Works (Rev. ed. 1960).

[119] C. Updegraff, Arbitration of Labor Disputes (2d ed. 1961).

[120] R. Fleming, The Labor Arbitration Process (1967).

[121] S. Kagel, Anatomy of a Labor Arbitration (1961).

[122] B. Seigel, Proving Your Arbitration Case (1961).

[123] 194 GERR A-5 - A-7 (1967)(Address by Robert A. Levitt, labor counsel of Western Electric Company, at a labor law institute sponsored by the Creighton University School of Law in cooperation with the Nebraska State Bar Association, 1967).

an article by Samuel H. Jaffee in the Labor Law Journal[124] are also available.

[124] S. Jaffee, A Funny Thing Happened on the Way to the Forum, 14 Lab. L.J. 271 (1963).

CHAPTER VI

CONCLUSION

A. Significance of Experience to Date

Fourteen grievance arbitrations have taken place at six Army installations. While that experience has been limited, it has been sufficiently varied to be representative of labor relations conditions throughout Department of the Army.

Analysis of the fourteen arbitrations reveals a wide spread of issues, ranging from administration of the grievance procedure to assignment of work. The importance of some of the issues necessarily has been restricted by the local nature of the grievances in question. In at least four types of arbitrations, however, the awards have been significant on a much broader scale.

One of those four types involves the issue of work assignments. The ability of management to assign its personnel in accordance with the changing demands of its mission is vital to the maintenance of efficient and economical operations. Both awards dealing directly with this issue -- one at Granite City Army Depot and one at Red River Army Depot -- recognized this fact and stressed in

their rationale that the retained rights contained in § 7 of Executive Order 10988 also recognize it.[125] Even the right to assign personnel must be exercised reasonably, of course, as the one award in the related area of overtime assignments cautioned.[126]

A second of those four types involves the issue of promotions. All four arbitrations involving this issue arose at Watervliet Arsenal.[127] Two of the awards found merit in the grievance, with one severely castigating management for apparent bad faith. The standard which the arbitrators attempted to apply in all four cases was one of basic equity. The lesson for management would appear to be twofold: (1) regulatory procedures concerning promotions should be followed with particular care; and (2) both fairness and the appearance of fairness are vital to sound personnel actions.

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[125] Local 149A, IUOE v. Granite City Army Depot, supra note 81; Local 237, United Ass'n of Plumbers and Pipefitters v. Red River Army Depot, supra note 86.

[126] Arsenal Lodge 81, IAM v. Rock Island Arsenal, supra note 85.

[127] Lodge 2352, AFGE v. Watervliet Arsenal, supra note 94, at 69-74; Lodge 2352, AFGE v. Watervliet Arsenal, supra note 96, at 65-67; Lodge 2352, AFGE v. Watervliet Arsenal, supra note 100; Lodge 2352, AFGE v. Watervliet Arsenal, supra note 101.

A third type involves the issue of what constitutes a sufficient description of a grievance to qualify for processing under a negotiated grievance procedure. Any grievance procedure can operate effectively to resolve disputes only if the parties are communicating on at least the identification of the facts giving rise to the grievance and how those facts allegedly violate the negotiated agreement. For that reason, nearly every negotiated grievance procedure calls for reducing grievances to writing by the second step.[128] In the one award upon this issue, arbitrator Roy R. Ray strongly upheld the need for specificity.[129]

The last of the four types involves the issue of arbitrability of matters excluded from the grievance procedure because other avenues of appeal are provided for them. The one award upon this issue upheld management without hesitation, applying the reasoning that the principles of res judicata should logically apply to administrative grievances as well as to court judgments.[130]

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[128]Yet the author's experience has been that many stewards feel a distinct reluctance to fully identify a grievance in any true sense, particularly in writing.

[129]Aero. Lodge 2049, IAMAW v. ARADMAC, supra note 104, at 99-101.

[130]Lodge 2352, AFGE v. Watervliet Arsenal, supra note 98, at 79-85.

As was noted earlier, a similar question relating to the arbitrability of an unfair labor practice charge is now before the courts.[131]

There is no question but that labor relations at some installations is in a relatively early stage of development, although sophistication is rapidly being acquired by both management and labor. In three of the Army's fourteen arbitrations, the arbitrator has made note of immature attitudes and has felt constrained to offer guidelines for improving them. As is not surprising, communication has been the biggest hurdle involved.

Grievance arbitration within Department of the Army appears to be serving its purpose well. By providing a means of resolving disputes outside of agency channels, it has acted as an escape valve for pressures which otherwise would have impaired morale and worsened communication between labor and management. To be sure, political motivations and stubborn or overaggressive officials[132] have sometimes been behind carrying grievances to arbitration; and sometimes the true issues are never brought out for resolution until a grievance reaches arbitration. In such

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[131] See text accompanying note 91 supra.

[132] Both union and management officials.

cases the arbitrator is seldom fooled, however, and may be able to guide the parties toward improved relations.

B. Outlook for the Future

There is no reason to believe that grievance arbitration will not continue to serve the same functions in the future even more effectively than in the past. As union coverage grows and employees become accustomed to the grievance procedure's availability, undoubtedly more arbitrations will result.[133] Political motives inevitably will continue to play a role, too.[134] At the same time, as both labor and management become more experienced, hopefully attitudes and communication will improve sufficiently to hold arbitrations down to those cases where there is a meaningful

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[133]The rate of frequency to date has been 1966-1, 1967-4, 1968-9. This contrasts with the Navy's experience of 1964-1, 1965-13, 1966-10, 1967-27, 1968-21 and 1969-15 (through 4 Apr. 1969). The Navy's experience is in terms of arbitration requests received, however, and includes 9 cases settled prior to hearing and 15 awaiting hearings. It also includes 20 disciplinary appeals, which are not grievable within Department of the Army. Interview with T. Garnett, supra note 54. The Air Force experience of one case, also a disciplinary appeal, is too slight for significant comparison.

[134]This is not entirely unhealthy. For an excellent discussion of the role of grievance arbitration in the total labor relations context which specifically points out the many reasons why a grievance might be pursued to arbitration, see R. Fleming, supra note 120, at 20-21 and 203-206.

issue and a real need for an independent judgment.

Should the recommendations of the President's Review Committee On Employee-Management Relations in the Federal Service concerning grievance arbitration be adopted, the role of such arbitrations in labor relations would almost surely be strengthened. The system fostered by Executive Order 10988 seeks to have effective participation by federal employees in matters concerning their welfare. The more integrity the system has, the better the work force and the more meaningful the participation that will result.

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