

Labor-Management Relations Obligations Associated with Changing Performance Appraisal Programs (May 2004)

With the advent of Human Capital Performance Fund and standards set by the Office of Personnel Management (OPM) in meeting Human Capital goals for a “results-oriented performance culture”, many agencies are assessing whether they will need to modify their performance appraisal programs. This is of particular concern to those agencies with pass/fail appraisal programs where it is more difficult to meet the standard of making distinctions between levels of performance in order to document performance-related recognition.

For those agencies with employees who are represented by labor organizations, questions related to how the agency will meet its labor-management obligations in conjunction with changing its performance appraisal program need to be addressed. This paper is intended to provide managers a high level examination of this complex issue. Managers are advised to consult their agency’s labor relations officer for advice on dealing with labor-management obligations unique to their agency. Also available as a reference on this subject is a 1996 OPM-issued Guidance Bulletin containing labor relations case law on performance management at <http://www.opm.gov/lmr/html/labrmgmt.asp>.

A question and answer format is used to convey the information. Citations of case law supporting the answers provided are footnoted and listed at the end of the paper.

1. If an agency that has an article on performance appraisals in its collective bargaining agreement decides to change its performance appraisal program from a pass/fail to a multi-level rating system, does it have to wait until its collective bargaining agreement is re-negotiated to do so?

Answer: No. Establishing the number of performance levels is a reserved right of management to direct and assign work under its authority found in Section 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute (FSLMRS). ^{1/} As such, management can initiate such changes at any time during an agreement’s term.

2. In addition to changing from pass/fail to multi-level ratings, are there other changes management can make to the agency’s performance appraisal program during the term of its agreement?

Answer: Yes. Management can make changes to any aspect of its performance appraisal program that pertains to its reserved rights to direct and assign work. These include: the use and contents of generic performance elements and standards, contents of performance standards ^{2/}, the number of performance elements, the number of critical versus non-critical elements ^{3/}, and who specifically assigns ratings ^{4/}.

3. What if an agency's collective bargaining agreement currently addresses these reserved right provisions of its performance appraisal program, what are the possible consequences for attempting to change them?

Answer: Management is not bound to comply with contract provisions that are illegal or that conflict with Government-wide regulations that existed at the time the contract was approved. However, it is possible that the labor organization will disagree with a management-initiated attempt to change a contract provision and attempt to challenge it through the grievance, unfair labor practice, or negotiability dispute processes. Although management proceeds at its own peril, such challenges do not prevent management from effecting such changes provided it meets its other labor-management obligations (see Question 4).

4. If management decides to exercise its reserved rights and change its performance appraisal program, can it do so unilaterally?

Answer: No. Even though management can make changes to an agency's performance appraisal system that fall within its reserved rights, and such changes would **not** be negotiable as to their substance, management is bound by the FSLMRS to provide notice to labor organizations representing employees who would be affected by the changes. ^{5/} The only **rare** exception would be if the changes being made were determined to have *a de minimis* affect on conditions of employment. ^{6/}

In addition to providing notice, management is bound to bargain procedures and/or arrangements (aka. impact and implementation), presuming the labor organization respond to management's notice with bargainable proposals. Management must fulfill its collective bargaining obligation prior to implementing the planned changes.

5. Is management still bound to follow provisions of its collective bargaining agreement(s) pertaining to their performance appraisal program during the term of the agreement?

Answer: Yes. Although management is not bound to follow illegal or regulatory-conflicting language as indicated in Question 3, it is bound to follow other contract language pertaining to its performance appraisal program for the term of the agreement.

Most agreements have "reopener" provisions, whether by mutual agreement or limited discretion of either party, articles can be renegotiated during the contract's term. If an agency anticipates changing its performance appraisal program, it may be advisable to determine whether reopening the performance article is possible. In so doing, management and the union would have the opportunity to negotiate any bargainable provisions in the context of any substantive management right changes being planned.

6. If management is only considering changes to its performance appraisal program that will pertain to higher-grade supervisors and managers, does it incur any labor-management obligations?

Answer: Probably not. The threshold question to be addressed is whether the anticipated change will have more than a *de minimis* affect on the conditions of employment for bargaining unit employees. If it can be shown that program changes pertain only to non-bargaining unit employees, e.g. supervisors and managers, such changes could be made unilaterally.

7. Would a change to USDA policy that establishes requisites for all agency performance appraisal programs affect either the timing or limit the scope of issues subject collective bargaining?

Answer: No. Although such policy would ensure Departmentwide consistency for subjects falling within management's reserved rights, unless the Department received approval from the Federal Labor Relations Authority that there was a "compelling need" for policies that were otherwise bargainable, the policy would have no affect on management's bargaining obligation.

Footnotes:

1. Federal Service Labor-Management Statute is Chapter 71 of Title 5, U.S. Code. *AFGE Council of GSA Locals, Council 236 and General Services Administration*, 55 FLRA No. 73 (1999). A proposal that established performance levels was nonnegotiable.
2. *National Treasury Employees Union v. Federal Labor Relations Authority*, (D.C. Cir.); 691 F.2d 553 (1982). The substance of performance standards and critical job elements is nonnegotiable.
3. *National Federation of Federal Employees, Local 1028 and Department of the Army, Corps of Engineers, Norfolk District, VA*, 7 FLRA No. 17 (1981). Proposal that would limit the number of critical elements in a performance standard is nonnegotiable.
4. *POPA and Department of Commerce, Patent and Trademark Office*, Washington, DC. 47 FLRA No. 2. (1993) (Provisions 3 and 4). Proposals that prescribe that certain tasks to be performed by identified management officials directly interfere with management's right to assign work.
5. *U.S. Department of Housing and Urban Development and AFGE, Local 911*, 56 FLRA No. 93. (2000). The agency committed an unfair labor practice when it did not bargain with the union over the impact and implementation of a policy change that established new performance elements and standards.
6. *Social Security Administration Office of Hearings and Appeals Charleston, S.C. and Association of Administrative Law Judges International Federation of Professional and Technical Engineers, AFL-CIO*, AT-CA-01-0093, 59 FLRA No. 118 (2004). This decision contains the Authority's current *de minimis* standard.