

NEGOTIATING OVER A PERFORMANCE APPRAISAL AND AWARDS SYSTEM

Interagency Labor Relations Forum

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BACKGROUND

- Pay for Performance
- Reaction to Max HR and NSPS
- Employee Perception: 80% believe that they are in the top 20% of performers
- Pass-Fail and Deming Experience
- Relatively Widespread Lack of Trust Regarding Fairness of Performance Management Systems (Gov't Surveys)

SURVEY RESULTS

- Federal Human Capital Survey (OPM 2006)
 - 64% positive for “My performance appraisal is a fair reflection of my performance”
 - 56% positive for “Discussions with my supervisor about my performance are worthwhile”
 - 40% positive for “Awards depend on how well employees perform their jobs”
 - 30% positive for “Differences in performance are recognized in a meaningful way”
 - 29% positive for “Steps are taken to deal with poor performers who can’t or won’t improve”

SURVEY RESULTS

- MSPB Merit Principles Survey - 2005
 - 69% of employees believe they are above average performers compared to rest of group; 30% believe they are average; 1% believe they are below average
 - 62% believe they were rated fairly and accurately by their supervisor; only 49% fairly and accurately by upper level management
 - 42% trust management to refrain from favoritism
 - 39% are satisfied with the recognition and awards they received
 - 75% believe that there were others who either received undeserved awards/recognition or who did not receive deserved awards/recognition
 - 46% of non-supervisory employees believe that work unit ratings accurately reflect job performance; 40% believe awards do

BACKGROUND

- Is Your Organization Covered by Title V?
 - OCC/FDIC/Others have separate compensation and benefit authorities and may have different bargaining issues
 - Scope of bargaining differs regarding pay increases and relation to performance depending on language in enabling legislation (sole and exclusive discretion)

OUTLINE OF PRESENTATION

- We Will Cover:
 - What's negotiable and not negotiable regarding performance systems and awards
 - What are the issues that consistently arise in negotiating over performance system issues
 - How are these issues typically handled

WHAT'S NEGOTIABLE AND WHAT'S NOT NEGOTIABLE

- There are literally hundreds of FLRA decisions concerning performance systems
- Key distinction appears to be whether a proposal substantively impacts the performance system or whether it is primarily procedural in nature
- Remember that negotiability cases are very fact particular

MANAGEMENT RIGHTS

- The Management Rights to Assign Work and Direct Employees Includes the Right to Measure Performance
- This Includes the Right to:
 - Establish the Content of Performance Standards
 - Establish the Number of Rating Levels
 - Establish the Number of Performance Elements (Critical and Non-Critical)

EXAMPLES OF PROPOSALS FOUND NON-NEGOTIABLE

- Requiring a pass-fail rating system
- Requiring a three level or five level system
- Requiring a forced distribution of performance ratings
- Preventing the Agency from changing elements and standards during the rating year
- Requiring the number of performance levels within established elements and standards
- Limiting the number of critical elements that can be set
- Limiting employee accountability for meeting performance standards

EXAMPLES OF PROPOSALS FOUND NON-NEGOTIABLE

- Defining the rating levels or the level of performance that warrants a specific performance rating
- Requiring that all employees with the same position description working for the same supervisor have the same elements and standards
- Limiting or dictating the work that can be examined in connection with a performance rating (e.g. details)
- Limiting who can provide feedback on employee performance during the rating period
- Limiting the processes that can be used to measure performance (e.g. work sampling, computer monitoring, etc)
- Special performance rating tools for union officials
- Requiring that the union participate equally with management in the establishment of elements and standards

PROCEDURES AND APPROPRIATE ARRANGEMENTS

- Procedures associated with the performance management process are generally negotiable
- Appropriate arrangements may also be negotiable but not if they excessively interfere with the management right to measure employee performance
- A change in the performance system will normally engender a bargaining obligation

EXAMPLES OF NEGOTIABLE PROCEDURES

- Layout and content of performance appraisal forms
- Time frames associated with the rating year
- Time frames associated with the setting of elements and standards
- Time frames associated with providing ratings and performance feedback to employees
- Process for obtaining employee input into the setting of elements and standards
- Number and timing of interim performance feedback meetings
- Opportunity for employee's to review and provide feedback on performance rating
- Process and time frames for dealing with poor performance (PIP; Level 2)

EXAMPLES OF NEGOTIABLE PROCEDURES

- Non-quantitative requirements, e.g. performance standards will be reasonable; or will provide a meaningful opportunity to appraise employee performance
- Requirement to explain how elements and standards were determined
- Meeting with staff at the beginning of the performance year to answer any questions
- Process by which employees can suggest changes to elements and standards during the rating year
- Process for close out rating when the employee or the supervisor changes jobs during the rating year
- Process for obtaining feedback from other supervisors for whom the employee worked
- Timely discussion of work errors that might have an impact on rating

APPROPRIATE ARRANGEMENTS

- There are relatively few appropriate arrangement cases where proposals have been found negotiable; most have been found to excessively interfere with the broad management right to set performance plans and elements/standards
- Nevertheless, management do requisite appropriate arrangement analysis of union proposals

EXAMPLES OF NEGOTIABLE APPROPRIATE ARRANGEMENTS

- Elements and Standards will be applied in a fair and equitable manner
- Right to grieve performance system issues such as performance ratings
- Employees not adversely impacted by failing to meet a standard due to work factors beyond the employee's control
- Appraisal to consider all job functions as well as the time available to perform the work
- Limiting the use of performance feedback to the rating year in which the work was performed
- Requirement that details and other outside work be given proportional weight in performance rating
- Delays of evaluation when major new systems or programs are implemented (but presumptive rating of fully successful for the period of the delay is non negotiable)

PERFORMANCE AWARDS

- Proposals regarding the distribution of incentive awards, including performance awards, are generally negotiable
- Although FLRA at one time held that awards involved the same management rights as performance plans, they changed that view many years ago.
- However, proposals that would determine the amount of the Agency's budget to be set aside for awards are non-negotiable as interfering with the Agency's right to determine its budget.

EXAMPLES OF NEGOTIABLE AWARDS PROPOSALS

- Determining the level of awards by either percentage of salary (e.g. Level 5 ratings get 2% of salary. Level 4's get 1%; or Level) or by specific dollar figure (level 5 ratings get \$1,000, Level 4's get \$750, etc)
- Requiring that a proportional amount of the total awards pool be set aside for bargaining unit members
- Requiring that the awards pool for employees be split with one for 13's and above and another for 13's and below
- Setting time frames for the payment of awards (e.g. within 60 days from the end of the rating cycle)
- Establishing a process for peer nominations for awards

EXAMPLES OF NEGOTIABLE AWARDS PROPOSALS

- Union representation on an awards committee
- Right to grieve non-receipt or the amount of an award
- Publicizing or providing the union with the names of all employees who received awards (unless the information would have the direct effect of disclosing the rating level an employee received)

NON-NEGOTIABLE PERFORMANCE AWARDS

- Requiring that awards be proportional across grade levels
- Mandating a QSI for all employees receiving an outstanding rating

UNION REPRESENTATIVES

- Cannot have appraisals negatively impacted by official time usage
- Can note that the amount of time spent on representational activity made it difficult to provide an in-depth critique of the employee's work
- Negotiable to indicate that ratings will solely be based on agency assigned work
- Not negotiable to say that performance standards and expectations will be adjusted to reflect official time usage
- Presumptive performance rating levels are not negotiable (however, for certain purposes, e.g. WIGI, a presumptive level of performance can be presumed)
- Negotiable that union representatives will be rated if they spend a minimum of 120 hours performing agency assigned work

COMMON FEATURES IN CONTRACTS

- Almost all collective bargaining agreements contain sections covering:
 - Time frames for setting elements and standards and meetings/procedures associated with setting those standards
 - Time frames for establishing new elements and standards reflecting job changes during the rating year
 - Procedures concerning changes in elements and standards during the rating year
 - Provision for at least one interim review and other performance discussions as appropriate
 - Provisions for annual appraisal or other formal performance feedback as circumstances warrant (details, major work for other supervisors; change in supervisors)

COMMON FEATURES IN CONTRACTS

- Time frames for providing performance rating and holding performance discussion after the close of the rating period
- Linkage of performance evaluation with the elements and standards established for the rating period
- Procedures for the employee to submit an accomplishment report
- Procedures for the rating official to obtain feedback from other supervisors or customers
- Notice to employees of feedback received during the rating year that might have a significant impact on the employees appraisal, and an opportunity for the employee to rebut negative feedback

COMMON FEATURES IN CONTRACTS

- Role of the rating and reviewing officials
- Procedures for the employee to review the performance appraisal and prepare written comments to be associated with the appraisal
- Procedures for handling problem performance situations, including both unacceptable and marginally acceptable situations
 - **For marginally acceptable performance, provisions typically cover notice to the employee, identification of specific areas requiring performance improvement, actions to be taken to assist the employee, and steps the employee needs to take to demonstrate improvement**
 - **For unacceptable performance, provisions typically cover the content of formal performance improvement plans, identification of the specific elements and standards related unacceptable, the length of the PIP, the actions management will take to help the employee improve, and consequences for failure to demonstrate improvement**

COMMON FEATURES IN CONTRACTS

- Provisions covering performance awards, including the timing of awards
- Recognition that employees can grieve performance appraisal issues
- Reference to the agency policy on the performance system as well as government-wide regulations covering relevant issues within performance management

NEGOTIATING PERFORMANCE SYSTEMS – MANAGEMENT GOALS

- Time frames that provide rating officials with sufficient time to balance performance management responsibilities with day to day operational concerns
- No surprises/transparency (e.g. sufficient detailed feedback so that the end of the year rating isn't unexpected – especially in problem performance situations)
- Sharing performance feedback timely with employees during the rating year – not just an annual event
- Required submission of an accomplishment report
- No contractual expansion of Weingarten

NEGOTIATING PERFORMANCE SYSTEMS – MANAGEMENT GOALS

- Ability to address performance problems at the time they occur, including the end of the rating year
- Strong "covered by" defense
 - Agreement covers process of setting and modifying performance elements and standards
 - Agreement covers use of performance feedback and other issues
- Avoid over-documentation
- No mandatory awards or mechanical formula for determining awards
- Limited, if any, use of awards boards

FSIP TREATMENT OF AWARDS PROPOSALS

- FSIP has never ordered mandatory or automatic performance awards
- FSIP has often stated “it is our view that limitations on the discretion to distribute performance awards should not be unilaterally imposed upon management.” (See, e.g. 06 FSIP 68; 04 FSIP 5)

WHAT DO YOU WANT IN YOUR PERFORMANCE SYSTEM

- Number of rating levels (3, 4, 5, more?)
- Differentiation between critical and non-critical elements and the value of both
- Appropriate balance of individual and team performance
- Generic, uniform standards?
- Optimal performance cycle (fiscal year; calendar year?)
- Awards pool or pools? How many and where?
- Decoupling of awards and annual performance cycle?
- Use of SIs
- Use of non-monetary awards, including time off