

# **NTEU**

**The National Treasury Employees Union**

December 6, 2006

**VIA E-MAIL (Kathleen.Benner@hq.doe.gov)**  
**AND FIRST CLASS MAIL**

Dr. Jeff T. H. Pon  
Chief Human Capital Officer  
HR-1/Forrestal Building  
U.S. Department of Energy  
1000 Independence Avenue, SW  
Washington, DC 20585

RE: National Grievance re: Deferral of Performance-Based Awards and Discretionary Pay Adjustments

Dear Dr. Pon:

On November 14, 2006, Michael C. Kane, Associate Administrator for Management and Administration, NNSA, and you issued a memorandum to "Heads of Departmental Elements," regarding the deferral of "performance-based awards and discretionary pay adjustments" ("Memorandum"). That same day and after providing the union only 15 minutes notice, the memorandum was circulated to employees. The memorandum explained that "performance-based awards and discretionary pay adjustments," including "all monetary performance awards and bonuses, time-off awards, quality step increases, and pay adjustments based on performance." Additionally, the memorandum stated that each departmental organization's management was provided the discretion to defer career ladder promotions. Interestingly, the memorandum did not address whether the Department of Energy ("DOE" or "Agency") deferred any payouts to the three Senior Executives receiving the 2006 Presidential Rank Award for Distinguished Senior Professional and 15 Senior Executives receiving the 2006 Presidential Rank Award for Meritorious Executive,<sup>1</sup> which were announced merely four weeks prior to the memorandum.

The DOE's deferral of "performance-based awards and discretionary pay adjustments," including "all monetary performance awards and bonuses, time-off awards, quality step increases, and pay adjustments based on performance" constitutes unmistakable violations of the parties' collective bargaining agreement ("CBA"), as well as unfair labor practices pursuant to the Federal Service Labor-Management Relations Statute ("FSLMRS"). Consequently, pursuant to Article 11, Sections 11.04, 11.07, and 11.10 of the CBA between the parties, NTEU hereby files this institutional grievance on behalf of itself and the bargaining unit employees that it

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<sup>1</sup> While the President of the United States has the final decision on the recipients of these awards, the awards are paid by the agency. See 5 C.F.R. §§ 451.201, 451.202.

represents in relation to the deferral of awards and discretionary deferral of career ladder promotions.

## **I. Contractual Violations**

### Article 29, Section 29.01(A)(5)

The CBA mandates that “[p]erformance-based cash awards will be paid to employees no later than 4 months after the end of the official rating year.” Article 29, § 29.01(A)(5). Accordingly, all such awards must be paid to employees no later than January 31, 2007. In an act which defies pronouncements of law from the Federal Labor Relations Authority (“FLRA”) and the very underpinnings of collective bargaining, DOE announced that it will defer the provision of performance-based cash awards. Recently, the FLRA held that a federal agency may not temporarily defer the payment of employee awards during a series of continuing resolutions, when the deferral violated the terms of a parties’ CBA. See NLRB and NLRBU, 61 FLRA 154, 163 (2005) (hereinafter NLRB I); NLRB and NLRBU, 61 FLRA 41, 46 (2005). Additionally, the concept of “collective bargaining” is rendered meaningless when an employer has the ability to unilaterally abrogate a collective bargaining agreement. See NTEU v. Chertoff, 452 F.3d 839, 860 (2006) (“no statutorily mandated collective bargaining system that we are aware of dispenses with the premise that negotiated agreements bind both parties”). Yet, in a bald-faced violation of FLRA precedent, the memorandum contemplates the possibility that DOE will not provide awards until after the parties’ agreed upon time frames, which for all intents and purposes is an assertion of a right to unilaterally abrogate the CBA. This assertion of a right to violate the CBA makes a mockery of the collective bargaining process and ignores elementary principles of the law of contracts. See NTEU, 452 F.3d at 854-56, 860 (“collective bargaining is a method of structuring the formation of labor contracts, and the notion of mutual obligation is inherent in contract law”).

### Article 19, Section 19.14

The memorandum also stated that DOE management has the unfettered discretion to determine whether to grant career ladder promotions. Such a claim is contrary to law and the CBA. Specifically, the FLRA has ruled that while management has the right to determine the numbers, types, and grades of employees, and, therefore, the right to establish career ladder positions, once it establishes a career ladder position, it must adhere to the terms of the CBA establishing criteria for such a position. See HHS and NTEU Chap. 229, 51 FLRA 747, 750-51 (1996). The DOE/NTEU CBA provides that:

Employees certified as capable of satisfactorily performing at the next higher grade level will be promoted effective the first pay period after having met the minimum time-in-grade requirements, if there is higher-graded work to be performed.

See Article 19, § 19.14. Accordingly, when an employee in a career ladder position has not achieved his/her full promotional potential and satisfies the three contractually required elements (time-in-grade requirement, capable of performing work at the higher grade level, and higher-

graded work exists) the agency *must* promote the employee. The memorandum violates and dismisses the parties' CBA by establishing a fourth element that must be met prior to a career ladder promotion — satisfaction of managerial discretion.

## **II. Failure to Provide NTEU Notice and an Opportunity to Bargain Prior to Implementing Changes to Conditions of Employment in Violation of the Statute (FSLMRS) and the CBA**

DOE implemented the deferral of “performance-based awards and discretionary pay adjustments” including “all monetary performance awards and bonuses, time-off awards, quality step increases, and pay adjustments based on performance” without ever providing sufficient notice to NTEU, the exclusive representative of all professional and nonprofessional employees of the United States DOE Headquarters employed in the Washington, D.C. metropolitan area.<sup>2</sup> A federal employer has an obligation to bargain with an exclusive representative *before* implementing changes in conditions of employment of unit employees. See U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990). The agency’s notice must be “sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining.” U.S. Department of Defense, Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colo. and American Federation of Government Employees, Local 1867, 61 FLRA 688 (2006). Further, the notice must “inform the exclusive representative of what will be ‘lost’ if [the exclusive representative] does not request bargaining.” Id. (citing American Distributing Co., Inc. v. NLRB, 715 F.2d 446, 451 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1983)). Similarly, the CBA forbids either party from making any changes to personnel policies, practices, or working conditions that conflict with the CBA without mutual agreement. See Article 13 § 13.01. When DOE wishes to make changes to personnel policies, practices, or conditions of employment not controlled by the CBA, it must provide NTEU with “reasonable advance notice” regarding a requested change that includes “sufficient information for NTEU to understand the need for the impact of the requested change.” Article 13 § 13.01.

As of the date of this grievance, the only notification that NTEU received regarding the deferral of “performance-based awards and discretionary pay adjustments” including “all monetary performance awards and bonuses, time-off awards, quality step increases, and pay adjustments based on performance” was a brief notification 15 minutes prior to the release of the memorandum. The memoranda is general in nature, devoid of any details concerning the agency’s decision regarding the awards, except for hanging a Sword of Damocles over the employees’ heads by stating that if these awards and discretionary pay adjustments were paid out now, the agency may be forced to conduct a reduction-in-force (RIF) or furlough federal employees. The memorandum also does not meet the requirement in the parties’ CBA which states that “[t]he Employer will notify NTEU throughout the year of any changes in budget administration that affect awards pools immediately upon a decision about the change.”

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<sup>2</sup> The relevant bargaining unit does not include employees of the Federal Energy Regulatory Commission, the Office of Inspector General, Office of the Assistant Secretary of Energy for Defense Programs, and all statutory exclusions.

Article 29, § 29.01. NTEU has requested to negotiate and also requested a briefing on the deferral decision, but these requests do not undo either the agency's obligation to provide proper notice or the harm caused to NTEU by DOE ignoring its statutory and contractual obligations prior to implementation.<sup>3</sup>

DOE's actions unlawfully undermine NTEU's presence and role, and this harm is not mitigated through post-implementation and/or announcement bargaining. NTEU has a right to be notified of changes to working conditions prior to any implementation or announcement to employees within the relevant bargaining unit, and the agency's obligation to notify NTEU may not be avoided by making such announcements "department-wide" or "headquarters-wide." Such an exception would swallow the rule and allow every federal agency the opportunity to evade the strictures of the FSLMRS and render notification superfluous — merely a *post hoc* ministerial act.

DOE's unilateral implementation of the deferral of awards and discretionary deferral of career ladder promotions substantively modifies matters that are already covered by this agreement. As a result of these actions, NTEU is charging DOE HQ with violations of Article 13, Article 19, Article 29, and the 2000 DOE Performance Management Program. Furthermore, NTEU believes that these violations constitute unfair labor practices and patent breach in violation of 5 U.S.C. §§ 7116(a)(1), (5), & (8).

### **III. Remedy**

The union requests that with respect to all employees represented by NTEU, DOE (1) immediately rescind the deferral of performance-based awards and discretionary pay adjustments; (2) immediately restore the *status quo ante*; (3) fulfill its bargaining obligations; (4) provide employees interest to the extent that any employees are denied awards and/or career ladder promotions within the time frames articulated in Articles 19 and 29 of the parties' CBA, employees; (5) reasonable attorneys'; (6) Headquarters-wide Posting signed by the Secretary of Energy; and (7) provide any other remedies that may be deemed reasonable or appropriate under law.

Although NTEU must file this grievance in order to preserve its rights under the contract, the union suggests that the parties meet immediately in an effort to rectify the matter in accordance with Article 11, Section 11.05 of the parties' collective bargaining agreement.<sup>4</sup>

### **IV. Information Request**

On a related note, in accordance with 5 U.S.C. § 7114(b)(4) of the FSLMRS, NTEU requests to be given the following information<sup>5</sup> with respect to DOE's deferral of performance-based awards and discretionary pay adjustments:

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<sup>3</sup> Moreover, the 15 minutes "heads up" notice to the presidents of NTEU Chapters 213 and 228 does not constitute legally sufficient notice either.

<sup>4</sup> This meeting will be separate from the scheduled bargaining session on December 7, 2006.

<sup>5</sup> Where possible, provide electronic data in Excel spreadsheet format.

1. For fiscal years 2005, 2006, and 2007, provide copies of DOE's budget (in electronic and hard copy format);
2. For fiscal years 2005 and 2006 (including awards determined under Article 29 of the parties' agreement but not yet distributed), provide a chart listing the performance appraisals and awards<sup>6</sup> for all DOE employees broken down by names, series, position titles, grade and step or other pay classification, location, organization, NTEU bargaining unit status, type/nature of award, and date of award (in electronic and hard copy format);
3. Copies of any studies, reports, matrices, or analyses concerning how the timely payment of awards could require DOE to conduct a RIF (in electronic and hard copy format);
4. For all nonbargaining unit employees nationwide that received any Presidential Rank Awards, Secretary's Awards, Meritorious Service Awards, Exceptional Service Awards based on FY2006 performance, provide a chart listing the names, series, position titles, grade and step or other pay classification including SES and schedule C, type/nature of award, date of award's announcement, and receipt of award (in electronic and hard copy format);
5. For all nonbargaining unit employees nationwide that received any monetary performance awards, bonuses, time-off awards, quality step increases, or pay adjustments based on FY2006 performance or received after October 1, 2006, provide a chart listing the names, series, position titles, grade and step or other pay classification including SES and schedule C, type/nature of award, date of award's announcement, and receipt of award (in electronic and hard copy format); and
6. For all headquarters bargaining unit employees that are/will meet the time-in-grade requirement for career ladder promotions in FY2007, provide a chart broken down by names, series, position titles, grade and step, and the date the employee meets his/her time-in-grade requirement (in electronic and hard copy format).

NTEU considers this information necessary and relevant to fulfill its representational duties in this matter. The information will allow NTEU to assess whether DOE had adhered to the appropriate articles and policies when it decided to defer performance-based awards and discretionary pay adjustments. Additionally, because DOE states that budgetary constraints prevent awards from being offered in a timely fashion, the information is needed to confirm DOE's assertion that payment will lead to RIFs. The union requests that this data be furnished no later than Friday, December 15, 2006. In the event that DOE cannot meet this deadline, please contact my designee immediately to discuss alternative arrangements.

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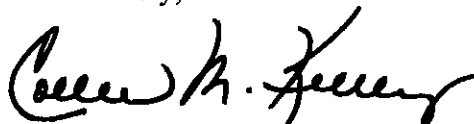
<sup>6</sup> The term "award" includes: monetary performance awards and bonuses, time-off awards, quality step increases, and pay adjustments based on performance.

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Moreover, if this request is denied, in whole or in part, please inform my designee, in writing, of the name, position, title, and grade of the official making the decision and the specific statutory, regulatory, or contractual citation(s) on which that decision is based.

Jared Gross of the D.C. Field Office will be my designated representative on this matter. Please contact him immediately at (202) 572-5500, ext. 7027, in order to respond to the aforementioned information request and/or to schedule any such meetings.

Sincerely,

A handwritten signature in black ink, appearing to read "Colleen M. Kelley". The signature is fluid and cursive, with a large initial "C" and "K".

Colleen M. Kelley  
National President

cc: Sent via e-mail to:  
Claudia A. Cross, DOE, Office of Human Capital Management  
Sarah J. Bonilla, DOE, Office of Human Capital Management Operational  
Implementation  
Lawrence H. Towne, DOE Headquarters, Human Resources Operations Division  
Kathleen J. Benner, DOE Headquarters, Employee and Labor Management Relations  
Team  
David Schoeberlien, President, NTEU Chapter 213  
Barry Clark, President, NTEU Chapter 228  
Sharon Quinn Harris, National Counsel  
Jared Gross, Assistant Counsel