

*“Certain critical skills are unique to the enterprise and, according to NNSA officials, can only be developed within its secure, classified environment. According to these officials, it generally takes a minimum of 3 years of on-the-job training to achieve the skills necessary to succeed in most critical skills positions...”*

*...M&O contractors have broadly similar retention initiatives. While M&O officials at all sites in the enterprise told us that compensation packages—that is, salary and benefits—are ultimately the most important factors in employee retention.”*  
—2012 GAO Report, *Modernizing the Nuclear Security Enterprise*.

## **The Effect of DOE Policy 350.1 on Representation and Morale On Union-Represented Contractor Personnel**

In 1998, the Procurement office of the Department of Energy (DOE) developed a “policy” regarding contractor reimbursement for employee fringe benefits.

Order 350.1, establishes a so-called “market-based” formula. The order directs that a Benefit Value Study (BenVal) must show that the per capita cost of a benefit plan is no more than five percent higher than the average value of the assessed benefits package of similar organizations in the same industry – also known as comparator organizations. It requires DOE contractors to survey the benefit packages of “comparator” companies in a region in order to establish cost parameters within which the contractor establishes the “value” of pension and health care benefits. The policy explicitly limits contractor reimbursements to 105 percent of the “value” that this survey establishes. If that cost is more than five percent of the other organization's plan then the contractor has to submit “a corrective action plan to achieve conformance” to a DOE contracting officer.

This policy was held in abeyance until 2005, when the then-DOE Secretary Sam Bodman attempted to implement it. That initial issuance was suspended for one

year when congressional sources pointed out that DOE had failed to submit the policy to the Federal Register to elicit public comment. In 2006, Congress explicitly rejected implementation citing the concerns by the Metal Trades Department affiliated unions, and others, that 350.1 directly undermines defined benefit pension plans—many of which have been in effect for DOE contractor personnel for 50 years or more.

DOE claims that this policy is necessary to restrain what they describe as the “out of control costs of defined benefit plans” and employee health care. However, DOE is ignoring several compelling facts that contradict the legitimacy of this policy.

First, as a one size fits all policy, 350.1 ignores the legal rights and responsibilities of unions and union members. When DOE explicitly instructs a contractor as to what can or cannot be negotiated, DOE becomes a party at the bargaining table.

It is noteworthy that DOE tried initially to impose this policy without prior public notice. When the notice was ultimately published in the Federal Register for public comment, those comments were overwhelmingly negative. Out of hundreds of public comments that were submitted in April and May of 2007, virtually none endorsed the policy. Dozens of comments from institutions—unions, coalitions of public interest groups, professional actuaries and benefit professionals—called the policy misguided, “outside the purview of DOE’s mandate,” imposing adverse effects on workers and retirees, and a “dangerous policy precedent.” Even the U.S. Chamber of Commerce sided with the negative comments submitted by unions, noting that the policy would be a “direct infringement upon employer benefit decisions.”

Yet, despite this evidence of overwhelming opposition and concern about the effects of this policy, DOE chose to put it into effect. Even the Government Accountability Office (GAO) took note of this incongruity, pointing out in its June 2008 report (GAO-08-642R):

*DOE officials acknowledged that there was no formal compiled record or summary analysis of the documentation and factors considered before notice 350.1 was issued. We found that the documentation provided to us contained only limited evidence that DOE had considered policy alternatives, the sensitivities of stakeholders to the policy choices reflected in Notice 350.1, or the near- and long-term financial and mission impacts of the changes made. Further, the decision document reflecting the Deputy Secretary's approval of Notice 350.1 did not include the basis on which approval was recommended.*

The policy also ignores the economics of collectively bargained fringe benefits packages. In every Metal Trades unit within DOE, defined benefit pension plans are the product of generations of negotiations—some with more than 50 years of history. Negotiated pension plans and other fringe benefits represent deferred wages that union members collectively elected to put into retirement and/or health care. Those pensions and health benefits belong to the workers and cannot be abrogated on the basis of some bureaucratic policy.

DOE is also ignoring another historic fact. Since the Manhattan Project in the middle of World War II, civilian contract personnel have provided the skills, dedication and expertise necessary for the nuclear program of the United States government. The current workforce is made up of second, and in some cases, third generation workers who perform dangerous and important work on behalf of the U.S. government. They are de facto employees of the Department of Energy, and the DOE has a responsibility to honor that relationship regardless of the administrative complexities that have evolved.

In 2009, the DOE argued that it is not engaged in or interfering with bargaining, but is merely “setting parameters within which contractors may negotiate.” At that time, they also maintained that companies could meet the limits established by 350.1 by instituting a “two-tier” benefit program, grandfathering current personnel and requiring new hires to join a defined contribution plan. DOE simply dismissed the argument that once the pipe line is closed off to new participants in a defined benefit plan, the plan quickly dies. Moreover, as GAO pointed out, any savings from substituting defined contribution plans in two-tier arrangements for defined benefit plans will not be realized for some 20 to 30 years when new hires are eligible for retirement.

**The Metal Trades Department and its Atomic Labor Councils maintain that implementing this policy puts DOE alongside every contractor at the bargaining table. It constitutes impermissible interference in free collective**

**bargaining by implementing a rule or regulation that takes away the DOE contractors discretion to bargain over a NLRB mandatory subject of bargaining.**

The unionized personnel at DOE worksites affected by 350.1 constitute no more than 10 percent of the entire contractor workforce. The other 90 percent are unrepresented scientific, professional and management personnel.

The Metal Trades Department and the Atomic Trades Councils maintain that the bulk of the “excessive costs” associated with defined benefits plans among DOE contractors are directly attributable to contractor decisions to extend coverage for high level managers in these plans by fiat, often without any financial contribution as in effect “golden parachutes” for selected individuals.

In his May 20, 2005, report, DOE Inspector General Gregory H. Friedman criticized DOE’s National Nuclear Security Administration after finding that NNSA had “incurred and will continue incurring costs that we consider to be unreasonable” because NNSA had approved the payment of 100 percent of the employer’s portion of post-retirement health benefits for Y-12 employees who transferred from the corporate offices of BWXT and Bechtel National, regardless of how long they worked in the department’s service. According to the IG, BWXT and Bechtel transferred some 200 corporate employees to Y-12 from 2000 to 2005. About 25 percent of these transferees had more than two years of corporate service and were, as a

result, eligible for post-retirement health benefits, paid for by the government, resulting in costs of nearly \$500,000 for currently retired contractor employees and a future liability of more than \$7 million for DOE, for employees currently working at Y-12. The report recommended that DOE adopt a policy that ensures post-retirement benefits “are based solely on work performed for Department of Energy contract efforts.”

This practice is still widespread among corporate management officials employed by major contractors, not only for health benefits, but for pensions as well.

### **Why BenVal Surveys Doesn't Work**

After performing a Ben-Val study, a call for a corrective action plan was issued for the Pantex and Y-12 Plants by the DOE after Consolidated Nuclear Security, LLC (CNS), was awarded a joint operating contract of the two facilities.

The contractor was required to perform a BenVal study to determine the average value of benefits packages at similar organizations. According to the Y-12 DOE run website, the BenVal study that was performed is proprietary and cannot be released. However, the NNSA did release the names of 27 organizations it says were used to assess the BenVal for Pantex and Y-12 employee benefits in 2013. Those organizations included Sprint Nextel, Goodyear Tire, Motorola Solutions, General Electric, DuPont and Boeing, just to name a few.

To use companies that are making mobile devices, tires, airplanes, and home appliances as “comparator” organizations is like comparing apples to grapefruit. Civilian employees at the Y-12 complex, fabricate and store weapons-grade uranium. These workers put their lives on the line and risk exposure to deadly chemicals in the name of national security. These employees have the highest risk of cancer of any profession and DOE wants to cut their health benefits. Why are they being forced to comply with Order 350.1 when Section 4-C of the Service Contract Act provides a waiver to accommodate good faith collective bargaining? The DOE can provide a reasonable remedy to this situation by incorporating the Section 4-C language within 350.1.

The Pantex Plant in Amarillo, Texas, and Y-12 National Security Complex in Oak Ridge, Tennessee, are key facilities in the U.S. Nuclear Security Enterprise, charged with maintaining the safety, security, and effectiveness of the U.S. nuclear weapons stockpile. Pantex is responsible for nuclear weapons life extension programs; weapons dismantlement; development, testing, and fabrication of high explosives components; and storage and surveillance of plutonium pits. Y-12 is responsible for safe and secure uranium storage, processing, and manufacturing operations; supplying fuel for the U.S. Navy; and global non-proliferation.

The DOE and the National Nuclear Security Administration (NNSA) are well aware of the dangers these employees face. In 2000, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was enacted. The Act compensates

current and former employees (or their survivors) of the DOE, its predecessor agencies, and certain of its vendor, contractors and subcontractors, who were diagnosed with a radiogenic cancer, chronic beryllium disease, beryllium sensitivity, or chronic silicosis, as a result of exposure to radiation, beryllium, or silica while employed at covered facilities.

Under the Special Exception Cohort (SEC) clause of the EEOICPA, claimants can be compensated without the completion of a NIOSH radiation dose reconstruction or determination of the probability of causation. To qualify, an employee must have at least one of the 22 specified cancers<sup>1</sup> and work for a specified period of time at one of the SEC worksites.<sup>2</sup>

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<sup>1</sup> These employees, or their survivors, from any of the above listed facilities, are eligible for benefits if, after beginning covered employment, they contracted one or more of the following **specified cancers**:; (1) Leukemia, if onset of the disease occurred at least two years after first exposure. (Chronic lymphocytic leukemia (CLL) is excluded.); (2) Primary or secondary lung cancer, including sarcoma of the lung (other than in situ lung cancer that is discovered during or after a post-mortem exam). ; (3) Primary or secondary bone cancer (including the bone form of solitary plasmacytoma, myelodysplastic syndrome, myelofibrosis with myeloid metaplasia, essential thrombocytosis or essential thrombocythemia, primary polycythemia vera [also called polycythemia rubra vera, P. vera, primary polycythemia, proliferative polycythemia, spent-phase polycythemia, or primary erythremia], and chondrosarcoma of the cricoid cartilage of the larynx). ; (4) Primary or secondary renal cancer; (5) The following diseases, provided onset was at least five years after the first exposure:; (i) Multiple myeloma;; (ii) Lymphomas (other than Hodgkin's disease); ; (iii) Primary cancer of the:; (A) thyroid; (B) male or female breast; (C) esophagus; (D) stomach; (E) pharynx (including the soft palate, back of the mouth, base of the tongue, tonsils, and larynx); (F) small intestine; (G) pancreas; (H) bile ducts; (I) gall bladder; (J) salivary gland; (K) urinary bladder (including ureter and urethra); (L) brain (malignancies only, not including intracranial endocrine glands and other parts of the central nervous system); (M) colon (including rectum) ; (N) ovary (including fallopian tubes); (O) liver (except if cirrhosis or hepatitis B is indicated);

<sup>2</sup> Allied Chemical Corporation; Ames Laboratory; Area IV of the Santa Susana Field Laboratory; Baker Brothers; Battelle Laboratories King Avenue; Bethlehem Steel Corporation; Blockson Chemical Company; Brookhaven National Laboratory; BWX Technologies, Inc.; Canoga Avenue; Clarksville Modification Center; Clinton Engineer Works; Combustion Engineering; Connecticut Aircraft Nuclear Engine Laboratory (CANEL); DeSoto Avenue; Dow Chemical Company; Downey Facility; Electro Metallurgical; Feed Material Production Center (Fernald); General Atomics; General Electric Co.; Grand Junction Operations Office; Hanford; Harshaw Harvard-Denison; Hood Building; Horizons, Inc.; Iowa Ordnance Plant (Iowa Army Ammunition Plant), Line 1; Joslyn Manufacturing and Supply Co.; Kellex/Pierpont; Lake Ontario Ordnance Works (LOOW); Lawrence Berkeley National Laboratory; Lawrence Livermore National Laboratory; Linde Ceramics; Los Alamos National Laboratory; Mallinckrodt Chemical Works; Medina Modification Center; Metallurgical Laboratory; Metals and Controls Corp.; Mound; Nevada Test Site; Norton Company; **Nuclear Materials and Equipment Corporation (NUMEC), Park Township**; Nuclear Materials and Equipment Corporation (NUMEC), Apollo; Nuclear Metals, Inc.; Oak Ridge Hospital; Oak Ridge Institute for Nuclear Studies Cancer Research Hospital (ORINS); Oak Ridge National Laboratory (X-10); Pacific Proving Grounds; Pantex; Piqua Organic Moderated Reactor Site; Revere Copper and Brass; Rocky Flats; S-50 Oak Ridge Thermal Diffusion Plant; SAM (Special Alloyed or Substitute Alloy Materials) Laboratories of Columbia University; Sandia National Laboratories; Sandia National Laboratories-Livermore; Savannah River; Simonds Saw and Steel Company; Spencer Chemical Company/Jayhawk Works; Standard Oil Development Company; St. Louis Airport Storage; Texas City Chemicals, Inc.; Tyson Valley Powder Farm; University of Rochester Atomic Energy Project; Ventron Corporation; Vitro Manufacturing; Wah Chang; Westinghouse Atomic Power Development Plant; Westinghouse Electric Corp.; Winchester Engineering and Analytical Center; W.R. Grace, Erwin, Tennessee; W.R. Grace, Curtis Bay, Maryland; Y-12



At Pantex, there have been 3,139 applications filed and \$161,327,659 total compensation paid to individuals or their survivors. At the Y-12 Plant there have been more than 28,000 cases filed and more than a billion dollars paid in compensation and medical bills.

The fact that the DOE is requiring these plants to follow Order 350.1 is penny wise and pound foolish. Failure to adequately cover these employees now could cost the DOE millions or even billions down the road.

A 2008 Government Accountability Office (GAO) study on the DOE costs and liabilities for contractors' pensions and postretirement benefit plans examined the DOE's use of 350.1 and pointed out that DOE "has not required several contractors to implement corrective action plans." DOE has the ability to waive the compliance in the case of nuclear workers at these highly dangerous facilities.

The Metal Trades Department and the Atomic Trades Councils that represent these workers have assured both the contractors and the DOE that we are willing to sit down and meet them half way, addressing their cost concerns while sustaining adequate benefit packages. It's time for the DOE to do the right thing and waive 350.1, they owe it to their employees who risk their lives everyday working with dangerous chemicals in the name of national security.