

CHAPTER 1

INTRODUCTION

1-1. Federal Sector Labor-Management Relations Prior to 1978.

a. Historical developments.

Labor-management relations is not new to the federal service. The Department of Defense began dealing with labor organizations in the early 1800's at industrial type installations such as shipyards and arsenals. In 1836, Navy employees struck over work hours at both the Washington Naval Yard and the Philadelphia Naval Yard.¹ In 1893 Army employees struck at Watervliet Arsenal over work hours and pay rates.² One disruption, the 1899 Rock Island Arsenal strike, resulted in the War Department ordering arsenal commanders to deal with grievance committees and to refer unresolved matters to the Department.³ Needing a stable military-industrial environment, the various defense departments also recognized some union activity during World War I. The Department of the Navy, for example, urged employee organizations to facilitate coordination with management.⁴ Similarly, a number of Army arsenals negotiated salaries and promotions in exchange for employee agreements not to restrict output.⁵

It is noteworthy that although some federal agencies, such as the Defense Department, began dealing with unions in the early 1800's, the Executive Branch had not developed a government-wide labor-management relations program by the end of World War II. After 1951, provisions in the Civil Service Commission's Federal Personnel Manual encouraged federal managers to solicit their employees' views in formulating personnel policy. These expressions were not considered to apply to employee labor organizations as such until 1958.⁶

The legislative picture just after World War II was similar. Although Congress had encouraged and regulated private sector collective bargaining since its enactment of the

¹ D. Ziskind, *One Thousand Strikes of Government Employees*, at 24-25 (1970) (hereinafter cited as *One Thousand Strikes*).

² *One Thousand Strikes*, at 30. See generally Davies, *Grievance Arbitration Within Department of the Army Under Executive Order 10988*, 46 *Mil. L. Rev.* 1 (1969).

³ S. Spero, *Government as Employer*, at 94-95 (1948).

⁴ Office of Industrial Naval Relations, *Important Events in American Labor History*, at 9 (1963).

⁵ H. Aitkin, *Taylorism at Watertown Arsenal, Scientific Management in Action 1908-1915*, at 240 (1960).

⁶ President's Task Force on Employee-Management Relations, *a Policy for Employee-Management Cooperation in the Federal Service* pt. 1, at 2-3 (1961) [hereinafter cited as *Task Force Report*].

Norris-LaGuardia Act in 1932,⁷ Congress had not legislated a federal service labor-management program. The only legislation specifically recognizing the right of federal employees to join labor organizations was the Lloyd-LaFollette Act of 1912.⁸ That Act, in response to several executive orders prohibiting postal employees and their unions from petitioning Congress or lobbying, gave postal employees the right to join unions and grieve to Congress. The Act also assured all federal employees the right to give Congress information.

The lack of a government-wide labor-management relations program for the federal sector continued until President Kennedy's administration. Shortly after taking office, President Kennedy appointed a task force on employer-management relations in the federal sector. The task force recommended that he issue an executive order giving federal employees certain bargaining rights. Following his task force's advice, President Kennedy issued Executive Order 10988 on January 17, 1962.⁹

Executive Order 10988 was significant since it established the first government-wide labor-management relations policy. Although the Order expressly retained certain management rights, it recognized the right of employees to bargain with management through labor organizations. The Order also authorized federal agencies to negotiate grievance procedures culminating in advisory arbitration and made each agency head responsible for implementing the labor-management relations program within their particular agency. The unions had finally obtained formal recognition within the Federal Government.

Union recognition increased significantly under Executive Order 10988. From July 1964 until November 1969 unions increased the percentage of nonpostal federal employees they represented from twelve percent to forty-two percent.¹⁰

Shortly after assuming office in 1969, President Nixon appointed a new committee to consider changing the federal sector labor-management relations program.¹¹ A review of the program indicated that the policies of Executive Order 10988 had brought about more democratic management of the workforce and better employee-management cooperation; that negotiation and consultation had produced improvements in a number of personnel policies and working conditions; and that union representation of employees in exclusive bargaining units had expanded greatly. However, significant changes in the program were recommended to meet the conditions produced by the

⁷ 29 U.S.C. §§ 101-15.

⁸ 5 U.S.C. §§ 7101-02.

⁹ See Task Force Report.

¹⁰ 544 Gov't Empl. Rel. Rep. (BNA) at D-8 (1974) [hereinafter cited as GERR].

¹¹ U.S. Civil Service Commission, Office of Labor-Management Relations, the Role of the Civil Service Commission in Federal Labor Relations, at 46 (May 1971).

increased size and scope of labor-management relations. These recommendations led to the issuance in 1969 of Executive Order 11491, "Labor-Management Relations in the Federal Service," with the private sector as the model.

Accepting his committee's recommendations, President Nixon issued Executive Order 11491 on October 29, 1969. Although Executive Order 11491 retained the basic principles that the previous Order had established, it made some significant changes.

Executive Order 11491 retained the basic principles and objectives underlying Executive Order 10988, and added a number of fundamental changes in the overall labor-management relations structure. The Order established the Federal Labor Relations Council as the central authority to administer the program. Specifically, the Council was established to oversee the entire Federal service labor-management relations program; to make definitive interpretations and rulings on the provisions of the Order; to decide major policy issues; to entertain, at its discretion, appeals from decisions of the Assistant Secretary of Labor for Labor-Management Relations; to resolve appeals from negotiability decisions made by agency heads; to act upon exceptions to arbitration awards; and periodically to report to the President the state of the program and to make recommendations for its improvements. The Council was composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget.

Several other third-party processes were instituted at the same time to assist in the resolution of labor-management disputes. The Assistant Secretary of Labor for Labor-Management Relations was empowered to decide questions principally pertaining to representation cases and unfair labor practice complaints. The Federal Mediation and Conciliation Service was authorized to extend its mediation assistance services to parties in Federal labor-management negotiations. The Federal Service Impasses Panel was established as an agency within the Council to provide additional assistance when voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, failed to resolve a negotiation impasse. In addition, the Order authorized the use of binding arbitration of employees' grievances and of disputes over the interpretation or application of collective bargaining agreements.

Under Executive Order 11491, the Federal Service labor-management relations continued to expand. By 1977, 58 percent of nonpostal Federal employees were in units of exclusive recognition, and collective bargaining agreements had been negotiated covering 89 percent of those employees. As the program evolved, Executive Order 11491 was reviewed and amendments or clarifications of the Order were made on several occasions. Executive Order 11491 was amended by Executive Orders 11616, 11636, 11838, 11901, and 12027.

One of President Carter's campaign promises was the complete overhaul of the Civil Service. As the first step of that process, he appointed a task force to review the civil service system and make recommendations.

The 1977 Task Force of President Carter's Federal Personnel Management Project identified a variety of problems, particularly relating to structure and organization, which remained unresolved in the Federal Service labor-management relations program established by Executive Order. Recommendations developed by the task force formed a basis for both parts of the President's reform program--a reorganization plan and proposed substantive legislation that became the Civil Service Reform Act of 1978 (CSRA).

His promises for reform were fulfilled with the enactment of the Civil Service Reform Act of 1978, which had an effective date of 11 January 1979. Incorporating the provisions of the previous Executive Orders, with some significant revisions, the Act provided for a federal sector labor-management relations program which paralleled that of the National Labor Relations Act in the private sector.

The portion of the CSRA dealing with federal labor relations was codified at 5 U.S.C. § 7101-7135, as the Federal Service Labor-Management Relations Statute (FSLMRS). The Federal Labor Relations Authority refers to the FSLMRS as "The Statute".

b. The Civil Service Reform Act.

The CSRA cast into law all provisions of the Federal labor relations program that had operated under Executive Order since 1962. These provisions are intended to assure agencies the rights necessary to manage Government operations efficiently and effectively, while protecting the basic rights of employees and their union representatives.

The Preamble to the Statute states the policy towards labor unions representing Federal employees. It states at section 7101:

- (a) *The Congress finds that--*
- (1) *experience in both private and public employment indicates that statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--*
 - (A) *safeguards the public interest,*
 - (B) *contributes to the effective conduct of public business, and*
 - (C) *facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment; and*
 - 2) *the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.*

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

This provides the basic framework the labor counselor needs in resolving labor law problems. The above section is especially helpful when explaining to reluctant staff members why a certain course of action can or cannot be done, i.e., that "management is required by congressional mandate to cooperate with labor organizations."

1-2. Federal Labor-Management Relations in the Department of the Army.

Since 1962, many Federal employees have elected to have unions represent them. The Office of Personnel Management has reported that, as of January 1999, 60% (1,050,423) of all non-postal Federal employees were represented by labor organizations. This figure is especially impressive when you consider that many Federal employees, such as supervisors and management officials, are not eligible to be represented by labor organizations.

In the Department of the Army union gains have also been impressive. By January 1999, unions represented 121,302 Army civilian employees. DA is second only to the Department of Veterans Affairs as the Executive Branch agency with the highest number of employees represented by unions. These figures include non-appropriated fund employees, who may also be represented by an exclusive representative. See chapter 13, AR 215-3.

a. The Labor Counselor Program.

Recognizing that federal sector labor-management relations were becoming more complex and had a more significant impact upon management, the Army established the Labor Counselor Program in 1974.¹² Labor counselors play an important role in labor-management relations with duties which include: participating in contract negotiations with labor unions, particularly when union attorneys are involved; representing management in third party proceedings such as bargaining unit determinations, unfair labor practice complaint proceedings, and arbitration hearings; advising activity negotiating committees; and advising activities concerning interpretation and application of negotiated labor agreements.

To adequately represent their activities, Army labor counselors should take advantage of available professional training. Currently, such training is available through The Judge Advocate General's School, US Army; The Judge Advocate General's School, U.S. Air Force; the Army's Office of the Deputy Chief of Staff for Personnel; and the Office of Personnel Management. Other organizations, such as the Federal Bar Association and Cornell University, also conduct federal sector labor-management relations seminars periodically.

¹² The Army's Labor Counselor Program was inaugurated in July 1974. See Letter from The Judge Advocate General, DAJA-CP 1974/8342, July 15, 1974.

In addition to taking advantage of available professional training, labor counselors should maintain adequate library resources. Labor Counselor Bulletins issued by the Office of The Judge Advocate General and Labor Relations Bulletins issued by the Deputy Chief of Staff for Personnel provide pertinent guidance on current issues. Use of certain labor-management relations references is discussed in the following subsection.

While serving as labor counselors, Army lawyers should maintain informal contact with their major commands' labor law counterpart and with the Labor and Employment Law Office, Office of The Judge Advocate General. Such coordination is particularly critical in connection with third party proceedings.

b. Use of Reference Materials.

To better represent their activities concerning labor-management relations matters, labor counselors should be familiar with certain basic reference materials. This paragraph will identify these materials and describe their use.

Libraries should include copies of Title VII of the Civil Service Reform Act of 1978 and the Federal Labor Relations Authority's substantive and procedural implementing regulations of Title VII, which are found in the Code of Federal Regulations. The U.S. Government Printing Office publishes the full text decisions of the Federal Labor Relations Authority and the Federal Service Impasses Panel as a loose-leaf monthly service and then annually prints bound volumes of these decisions. These are also available on WESTLAW, LEXIS, and the GPO Web Site (www.access.gpo.gov). These are invaluable research materials.

Various private concerns also publish summaries of these decisions on a monthly or bi-weekly basis. Two widely used services are the Government Employee's Relations Report (GERR), which is published by the Bureau of National Affairs, and the Federal Labor Relations Reporter (FLRR), which is published by the Labor Relations Press. The GERR publishes a summary of the more significant decisions of program authorities and the courts for the entire public sector. The FLRR publishes a summary of all decisions by the program authorities and the courts for the federal sector. This latter service is especially useful as a research tool as it has a highly detailed index. Information Handling Services also publishes and indexes these decisions in a CD-ROM service. Many of the references listed above are located in the libraries of the installation civilian personnel offices.

The Office of Personnel Management publishes regular updates in the labor-management area on its web site, which is located at www.opm.gov. The Office of Personnel Management also operates a computerized data retrieval service called Labor Agreement Information Retrieval System (LAIRS). A variety of statistical and textual information is available for a "search" fee, with requests forwarded from local activities through major commands.

Another essential reference is the Department of Defense Directive 1400.25, "DoD Civilian Personnel Management System." Subchapter 711 of the DoD directive concerns labor-management relations (Appendix B).

In addition to the references already mentioned, labor counselors should have some general reference source for private sector labor law. Although private sector principles do not necessarily control federal sector practice, many are analogous to those in the federal service and the federal program authorities have adopted some of the private sector practices.

1-3. Federal Labor Relations Authority.¹³

The Federal Labor Relations Authority (FLRA or Authority) was established as an independent agency in the executive branch by Reorganization Plan No. 2 of 1978. The Authority administers Title VII, "Federal Service Labor-Management Relations," of the Civil Service Reform Act of 1978, which became effective 11 January 1979. As stated therein, the Authority provides leadership in establishing policies and guidance relating to Federal service labor-management relations and ensures compliance with the statutory rights and obligations of Federal employees, labor organizations which represent such employees, and Federal agencies under Title VII. It also acts as an appellate body for lower level administrative rulings.

The Authority is composed of three full-time members, not more than two of whom may be adherents of the same political party, appointed by the President, by and with the advice and consent of the Senate. Members may be removed by the President upon notice and hearing, only for inefficiency, neglect of duty, or malfeasance in office. One member is designated by the President to serve as Chairman of the Authority. Each member is appointed for a term of five years.

The Authority provides leadership in establishing policies and guidance relating to matters under Title VII of the Civil Service Reform Act and is responsible for carrying out its purpose. Specifically, the Authority is empowered to:

- (A) determine the appropriateness of units for labor organization representation;
- (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees voting in an appropriate unit and otherwise administer the provisions relating to according of exclusive recognition to labor organizations.
- (C) prescribe criteria and resolve issues relating to the granting of national consultation rights;

¹³ 5 U.S.C. § 7104.

- (D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations;
- (E) resolve issues relating to the duty to bargain in good faith;
- (F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment;
- (G) conduct hearings and resolve complaints of unfair labor practices;
- (H) resolve exceptions to arbitrators' awards; and
- (I) take such other actions as are necessary and appropriate to effectively administer the provisions of Title VII of the Civil Service Reform Act of 1978.¹⁴

To assist in the proper performance of its functions, the Authority has appointed Administrative Law Judges to hear unfair labor practice (ULP) cases prosecuted by the General Counsel. Decisions of Administrative Law Judges are transmitted to the Authority, which may affirm or reverse, in whole or in part, or make such other disposition as the Authority deems appropriate.¹⁵

1-4. The General Counsel of the Federal Labor Relations Authority.¹⁶

The General Counsel of the Authority is appointed by the President, by and with the advice and consent of the Senate, for a term of five years. The General Counsel is primarily responsible for supervision of the seven Regional Offices. In ULP cases the regional staffs serve as the General Counsel's field representatives. Each Regional Office is headed by a Regional Director, with a Regional Attorney who works closely with him or her as ULP cases develop. Each region also has a supervisory attorney or supervisory labor relations specialist who supervises the investigation of the ULPs and the processing of representation cases. After investigation, the Regional Office decides if these issues brought to it by a union or management have merit and will be pursued before the Authority. This decision of the Regional Office is appealable to the General Counsel. The remainder of the professional regional staff is roughly composed of half attorneys and half labor relations specialists. All staff members may function as ULP investigators but only the attorneys serve as prosecutors in ULP hearings.

¹⁴ 5 U.S.C. § 7105.

¹⁵ 5 U.S.C. § 7105(e)(2).

¹⁶ 5 U.S.C. § 7104(f).

1-5. Federal Mediation and Conciliation Service.

The Federal Mediation and Conciliation Service (FMCS) is an independent agency of the Federal government whose purpose is to resolve negotiation impasses. A negotiation impasse occurs when the parties agree that a matter is negotiable, but cannot agree to either side's proposal. Rather than using the coercive acts of a strike or a lockout (both of which are impermissible in the Federal sector), the services of the FMCS are used to try to resolve the dispute. The FMCS consists of a Director located in Washington, D.C., and commissioners located throughout the country. A mediator meets with the parties and attempts to resolve the deadlock by making recommendations and offering assistance to open communications. The mediator has no authority to impose a solution.

1-6. Federal Service Impasses Panel.

The Federal Service Impasses Panel (FSIP) is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives. The Panel is composed of a chairman and six other members, who are appointed by the President, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations. The Panel considers negotiation impasses after third-party mediation fails. The Panel will attempt to get the parties to resolve the dispute themselves by making recommendations or, as a last resort, will impose a solution. Resort to the Panel must be preceded by attempted resolution by the FMCS.

1-7. Jurisdiction.

a. Scope of the CSRA.

Section 7101(b) of the Civil Service Reform Act (CSRA) provides:

It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

Thus, the CSRA covers only "employees of the Federal Government." Employees are defined in section 7103(a)(2) as:

"employee" means an individual--

- (A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

(i) an alien or noncitizen of the United States who occupies a position outside the United States [except for agency operations in Republic of Panama - see 22 U.S.C.A. 3701(a)(1)];

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

Generally, an employee is an individual "employed in an agency." What is an agency? That is defined in section 7103(a)(3):

(3) 'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include-

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the Central Imagery Office; . . .

This section of the CSRA and 5 U.S.C. §§ 104 and 105 exclude the U.S. Postal Service from the jurisdiction of the Authority. It is governed by the National Labor

Relations Act. See United States Postal Service, Dallas, Texas and National Association of Letter Carriers, 8 FLRA 386 (1982).

In the following case, the union filed a petition asking the Regional Director of the FLRA to conduct a secret ballot election so that the cafeteria workers could vote for or against union representation. Fort Bragg opposed the election, arguing that the cafeteria workers were not Federal employees. The Authority held that the facility's Cafeteria Fund was a private organization rather than an agency within the meaning of 5 U.S.C. § 7103(a)(3). Although the Commanding General controlled appointments to the Fund Council through the School Board, he did not exercise control over day-to-day operations.

**FORT BRAGG SCHOOLS SYSTEM,
FORT BRAGG, NORTH CAROLINA**

3 FLRA 99 (1981)

(Extract)

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Authority finds:

The Petitioner filed an amended petition seeking exclusive recognition as the certified representative of all employees of Fort Bragg Schools Cafeteria Fund (Fund)... Petitioner argues that the Fort Bragg Schools System (System) is the Activity because the Fund is an instrumentality of the Army at Fort Bragg, and not a separate and distinct entity as contended by the Activity. The Activity asserts the Fund is not an "agency" within the meaning of section 7103(a)(3), the employees of the Fund are not "employees" within the meaning of section 7103(a)(2) of the Statute and, therefore, the Fund is not subject to the Authority's jurisdiction. The sole issue herein is whether the Fund is an "agency" within the meaning of the Statute, and therefore subject to the jurisdiction of the Authority.

The Fund is a private organization that provides noonday meals to students and faculty for the Fort Bragg Schools System. The Fund employs approximately 36 employees at seven schools. Approximately 98% of the students are either military dependents, children of civilian base residents, or non-military related dependents of military households.

Revenue is derived primarily from cash receipts for lunches and milk sold in the school cafeterias and is expended for salaries, supplies, and other expenses necessary for the cafeteria operation. The Fund also participates in the reimbursement plan of the U.S. Department of Agriculture surplus food commodities program via the State of North Carolina.

The Fund employees were nonappropriated fund (NAF) employees until 1976 when the cafeteria operation's status was changed to a "Type 3" private organization under Army Regulation 210-1, with the approval of the Commanding General. Although the Commanding General has the right to revoke his approval of the Fund as a private organization, he does not have control over its day-to-day operations. Such classification is defined in Army Regulation 210-1 as an independent private organization that is "controlled locally by a common interest group with no formal connection with outside organizations." The status was changed at the request of North Carolina State officials for the stated reason that it was inappropriate for the school system to be taking monies (lunch payments) from the cafeteria operation and paying it to the central post for support services. The State directed that the cafeteria operation be operated in a manner comparable to other systems in North Carolina. At the time of the change, employees had the option to resign and seek outside employment, be assigned to another NAF unit, or be hired by the new private organization, the Fund. None of the employees sought other NAF jobs. All of them sought positions with, and were hired by the Fund. As a result of the change, employees were refunded their "NAF" retirement benefits because the Fund does not have a retirement plan.

A representational certificate had been granted to the National Association of Government Employees (NAGE) in 1973 for all NAF employees at Fort Bragg. NAGE did not challenge the loss of the Fund employees at the time of the creation of the Fund, nor did it intervene in the instant proceeding.

The Fund's constitution and employee contracts are the only written documents governing the Fund's operations. Article II(f) of the constitution states that the "organization will be self-sustaining and receive no support assistance or facilities from the Army or from nonappropriated fund instrumentalities" Article V states that the Fort Bragg School Board will constitute the officers of the Fund and will serve as the Fund Council (Council). Presently, the School Board members are appointed by the Commanding General. Article V, section II requires that the Superintendent of Schools be appointed Custodian of the Fund. Membership in the Fund is voluntary and open to all parents of dependent children enrolled in the System and all school employees. The constitution also includes employee policies and regulations.

The School Food Services Supervisor is in charge of managing the food operations at the seven schools and reports to the Assistant Superintendent for Business, who reports directly to the Superintendent. Although the Superintendent, Assistant Superintendent, and Food Services Supervisor are appropriated fund employees and receive government checks, the employees receive nongovernment checks against the Fund's account, endorsed by the Superintendent. The Superintendent approves leave but employees have a right of appeal to the Council. There is no interchange of assignments between the employees of the System and those of the Fund, and no common first level supervision.

Based on the foregoing, it is concluded that the Fund is not an "agency" as defined in section 7103(a)(3) of the Statute. That is, the Fund is not an Executive agency, or a nonappropriated fund instrumentality of the U.S. Army. As to whether it continues to be an NAF instrumentality of the U.S. Army, as set forth above, the record reveals that the Fund was established and exists as a private organization in accordance with Army regulations and in response to a legitimate purpose. Further, the Fund's employees, in contrast to other NAF employees, do not have a retirement plan, and are now covered by social security. Although the Commanding General controls appointments to the Fund Council via the School Board, he does not exercise control over its day-to-day operations, or the wages, hours and working conditions of the Fund's employees.

Under these circumstances, it is concluded that the Fund is no longer a NAF instrumentality and therefore does not come within the definition of "agency" under section 7103(a)(3) of the Statute. Thus, the employees are not "employees" within the meaning of section 7103(a)(2). Accordingly, it shall be ordered that the petition herein be dismissed on jurisdictional grounds.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 4-RO-30 be, and it hereby is, dismissed.

b. President's Authority to Exclude and Suspend Employees from Coverage.

The statute, by its terms, has limited applicability. In addition, the President may exclude any agency or subdivision thereof from coverage under the statute for national security grounds (5 U.S.C. § 7103(b)). President Carter excluded certain organizations by Presidential Executive Order 12171 (44 Fed. Reg. 66565 (1979)). See Naval Telecommunications Center, 6 FLRA 498 (1981) for a discussion of this provision.

Various Presidents have amended Executive Order 12171 at least eight times. In A.F.G.E. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) the court upheld the authority of the President to issue the Executive Orders excluding certain agencies or subdivisions from coverage of the CSRA.

In Ward Circle Naval Telecommunications Center, 6 FLRA 498 (1981), the Authority held that it was without jurisdiction to process a representation petition for a four-person unit of employees engaged in the operation, maintenance and repair of "off line" and "on line" cryptographic equipment because the activity was excluded from the coverage of CSRA by EO 12171. In Criminal Enforcement Division, Bureau of Alcohol, Tobacco and Firearms, 3 FLRA 31 (1980), the Authority held that it had no jurisdiction over a Representational Petition (RO) case involving a proposed unit of all professional and nonprofessional employees of the activity because the activity was excluded from the coverage of CSRA by EO 12171. In Los Alamos Area Office, Department of Energy, 2 FLRA 916 (1980), the Authority dismissed a negotiability petition on the ground the subdivision of the agency was excluded from the coverage of CSRA by EO 11271.

In addition to his authority to exclude such organizations, the President may also suspend the application of CSRA to any "agency, installation, or activity located outside the 50 States and the District of Columbia," when such suspension is in the interest of national security.¹⁷

On November 4, 1982, President Reagan signed EO 12391. This EO gives the Secretary of Defense the authority to suspend collective bargaining within DOD overseas when union proposals would "substantially impair" the implementation of status of forces agreements (SOFA) overseas with host nations. The EO grew out of a dispute between NFFE and Eighth U.S. Army, Korea concerning union proposals to lift ration control purchase limits in the Army commissary store, and to waive certain registration requirements for employee's privately owned vehicles.¹⁸

The President's authority to exclude agencies or subdivisions is separate from the authority to exclude individuals or groups of employees from a bargaining unit based on the employee's involvement with national security.¹⁹

¹⁷ 5 U.S.C. § 7103(b)(2).

¹⁸ See NFFE and Eighth U.S. Army Korea, 4 FLRA 68 (1980), and Department of Defense v. FLRA and NFFE, 685 F.2d 641 (D.C. Cir. 1982).

¹⁹ 5 U.S.C. § 7112(b)(6). See Defense Mapping Agency and AFGE, 13 FLRA 128 (1983).

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